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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 THREE

ARACELY R., Appellant, v. RICHARD M., Respondent.	B272262 Los Angeles County Super. Ct. No. BF054873

APPEAL from an order of the Superior Court of Los Angeles County, Shelley L. Kaufman, Judge. Dismissed.

Los Angeles Center for Law & Justice, Carmen McDonald, Melissa L. Viramontes; Gibson, Dunn & Crutcher, Heather L. Richardson, Michael Holecek and Gregory S. Bok for Appellant.

Family Violence Appellate Project, Jennafer D. Wagner, Erin C. Smith, Nancy K. D. Lemon, and Shuray Ghorishi; Jenner & Block, Daniel A. Rozansky and AnnaMarie A. Van Hoesen as Amicus Curiae on behalf of Appellant.

Harris Family Law Group, Jeffrey L. Harris and James Q. Greaves for Respondent.

INTRODUCTION

Aracely R.[1] appeals from a December 2015 order awarding both parents joint legal and physical custody of their two daughters.[2] She contends the trial court misapplied Family Code section 3044 in awarding joint custody after finding that the children's father, Richard M., committed domestic violence against her. Aracely does not, however, appeal from the subsequent November 2016 judgment entered after a two-day trial concerning custody of and visitation with the parties' children. We conclude the 2015 custody order is not appealable and was superseded by the 2016 judgment. We therefore dismiss the appeal.

BACKGROUND

On October 19, 2015, Aracely filed a petition to establish parentage naming Richard as the respondent. The petition alleged that Aracely was the mother and Richard was the father of two girls, then ages four and six. Aracely sought sole legal and physical custody of the children with supervised visitation for Richard.

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[1] Because this appeal arises out of a parentage action, we refer to the parents by their first names to protect the children's privacy.

[2] "Joint legal custody" means that both parents share the right and the responsibility to make decisions related to the health, education, and welfare of the children. (Fam. Code, § 3003.) "Joint physical custody" means that each parent has significant periods of physical custody of the children. (Fam. Code, § 3004.)

On October 29, 2015, Richard filed a response to the petition admitting paternity. On the same day, Richard also filed a pretrial request for order (RFO) giving him "temporary sole legal [and] physical custody" of the parties' daughters. The RFO indicated a hearing would take place on November 24, 2015. Pending the hearing on the RFO, the court made emergency orders awarding Richard physical custody of the children based on his allegation that Aracely had threatened to take the children to Mexico and kill herself and the children. On October 30, 2015, Aracely responded to the RFO; she stated that she did not consent to the orders requested by Richard.

On November 4, 2015, Aracely applied for a domestic violence restraining order protecting her from Richard under the Domestic Violence Prevention Act (DVPA). (Fam. Code, § 6200 et seq.) Aracely expressly stated, however, that she was not seeking protection of other members of her family, including the parties' two daughters. Nor did Aracely seek a child custody or visitation order in connection with her request. Later that day, the court issued a temporary restraining order against Richard pending a hearing scheduled for November 24, 2015. The court's order only protected Aracely and did not address child custody or visitation. On November 20, 2015, Aracely sought custody of the children in a supplemental declaration filed in support of her request for a restraining order and in opposition to Richard's RFO.

The hearing on Aracely's request for a restraining order and Richard's RFO was continued from November 24, 2015 to December 15, 2015. After a contested evidentiary hearing on December 15, 2015, the court granted Aracely's request for a restraining order protecting her from Richard, with the restraining order set to expire a year later on December 15, 2016.

The court signed and served the parties with certified copies of the restraining order. There is no indication in the record either that the restraining order was extended beyond the December 2016 expiration date or that a new restraining order was issued in its place.

The restraining order stated that child custody and visitation were ordered as set forth in a separately attached DV-140 form. The custody and visitation order in the form provided that the parties would share legal and physical custody of the children. In addition, "[u]ntil the next court order," Richard would have visitation with the children on alternate weekends and certain days and times during the week. The court also attached a holiday visitation schedule for the month of December 2015 and the first week of January 2016 to the DV-140 form.

It appears, however, that the court did not intend to dispose of Richard's RFO through the DV-140 form. Notably, the court's unsigned minute order from the same date states that Richard's counsel shall "prepare and serve the Findings and Order After Hearing." In addition, at the conclusion of the hearing on Aracely's request for a restraining order and Richard's RFO, the court stated that it needed Richard's counsel "to do findings and order after hearing because it was [Richard's] RFO." Further, Aracely's counsel stated that Aracely and her counsel would "accept electronic service of the findings and order after hearing." If an order after hearing was ever prepared or signed, it was not included in the record on appeal.

On May 13, 2016, Aracely filed a notice of appeal[3] from the December 15, 2015 order awarding Richard joint legal and physical custody of the children.[4]

DISCUSSION

Before oral argument, we requested and received supplemental briefing from the parties on whether the December 15, 2015 custody order is final and appealable. Aracely argues that it is because the order was made after a contested hearing, and the parties could not anticipate that there would be future modification requests. In the alternative, Aracely argues we should "save" her defective appeal by treating it as an appeal from the judgment that was entered almost a year later, on November 22, 2016, or by construing the appeal as a petition for writ of mandate. As we will explain, the December 2015 custody order is not appealable, and the appeal should not be construed as either an appeal from the November 2016 judgment or as a writ petition challenging the December 2015 order. We therefore dismiss the appeal.

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[3] Since Aracely was not served with notice of entry of the December 2015 order, her appeal is timely under California Rules of Court, rule 8.104(a)(1).

[4] It is undisputed that the challenged custody order in this appeal was issued under the DVPA. While Richard also sought a custody order in his RFO, the court's unsigned December 15, 2015 minute order is not separately appealable because it directed Richard's attorney to prepare a formal order after hearing. (*In re Marriage of Wood* (1983) 141 Cal.App.3d 671, 677 [where a formal order is required, a minute order is not appealable].)

1. Interim custody orders are not appealable.

"Appellate jurisdiction is derived solely from the Constitution or statutes." (*Lopes v. Capital Co.* (1961) 192 Cal.App.2d 759, 763.) Accordingly, jurisdiction cannot be conferred upon the appellate court by estoppel, waiver, or the consent or stipulation of the parties. (See *Estate of Hanley* (1943) 23 Cal.2d 120, 123.) Our lack of jurisdiction in a direct appeal is not a technical or minor procedural defect.

"A reviewing court has jurisdiction over a direct appeal only when there is (1) an appealable order or (2) an appealable judgment. [Citations.]" (*Griset v. Fair Political Practices Com.* (2001) 25 Cal.4th 688, 696 (*Griset*).) Regardless of whether an appealability challenge is raised, "[t]he existence of an appealable judgment is a jurisdictional prerequisite to an appeal. A reviewing court must raise the issue on its own initiative whenever a doubt exists as to whether the trial court has entered a final judgment or other order or judgment made appealable by Code of Civil Procedure section 904.1. [Citations.]" (*Jennings v. Marralle* (1994) 8 Cal.4th 121, 126–127.) "It is settled that the right to appeal is strictly statutory, and a judgment or order is not appealable unless made so by statute. [Citation.] In civil matters, Code of Civil Procedure section 904.1 is the main statutory authorization for appeals. Code of Civil Procedure section 904.1, subdivision (a) provides in relevant part that an appeal may be taken from: a final judgment (subd. (a)(1)); an order made after an appealable judgment (subd. (a)(2)); or 'an order made appealable by the provisions of the Probate Code or the Family Code' (subd. (a)(10)). [¶] The Family Code contains no express provision governing appeals of child custody orders, except for those to enforce an order for the return of a child under

the Hague Convention on the Civil Aspects of International Child Abduction. [Citation.] Thus, the right to appeal a child custody determination is generally limited to final judgments and orders made after final judgments. [Citations.]" (*Enrique M. v. Angelina V.* (2004) 121 Cal.App.4th 1371, 1377 (*Enrique M.*).) "[T]he lack of any statute giving a litigant the right to appeal from a temporary custody order forecloses the claim that such orders are appealable." (*Lester v. Lennane* (2000) 84 Cal.App.4th 536, 558; see also *Smith v. Smith* (2012) 208 Cal.App.4th 1074, 1089 ["[I]t is well settled that temporary custody orders are nonappealable."].) "[T]he question whether an order is appealable goes to the jurisdiction of an appellate court, which is not a matter of shades of grey but rather of black or white." (*Farwell v. Sunset Mesa Property Owners Assn., Inc.* (2008) 163 Cal.App.4th 1545, 1550.)

A judgment is final " ' "when it terminates the litigation between the parties on the merits of the case and leaves nothing to be done but to enforce by execution what has been determined." ' [Citations.]" (*Sullivan v. Delta Air Lines, Inc.* (1997) 15 Cal.4th 288, 304.) As the California Supreme Court has further explained: " 'It is not the form of the decree but the substance and effect of the adjudication which is determinative. As a general test, which must be adapted to the particular circumstances of the individual case, it may be said that where no issue is left for future consideration except the fact of compliance or noncompliance with the terms of the first decree, that decree is final, but where anything further in the nature of judicial action on the part of the court is essential to a final determination of the rights of the parties, the decree is interlocutory.' [Citations.]" (*Griset*, *supra*, 25 Cal.4th at p. 698.)

2. The December 15, 2015 order is not a final custody order.

With these principles in mind, we turn to the challenged December 15, 2015 custody order[5] made by Judge Shelley Kaufman in conjunction with granting Aracely a one-year restraining order. The December 2015 order did not terminate litigation between the parties concerning the issue of custody and visitation, and further judicial action was necessary to resolve their dispute. Put another way, there was no *final* custody determination in the litigation as a result of the December 2015 order. (See *Montenegro v. Diaz* (2001) 26 Cal.4th 249, 259 ["Although these [custody] orders included detailed visitation schedules and did not provide for further hearings, they did not clearly state that they were final judgments as to custody."].) As reflected in the augmented record,[6] on April 22, 2016, Aracely sought to modify the "current [December 15, 2015] custody order" to award her sole legal and physical custody of the children. Further, Aracely's April 22, 2016 RFO was resolved by a stipulation and order dated June 15, 2016 (stipulation), where the parties *agreed* that the "current custody orders remain in full force and effect." In their stipulation, the parties expressly noted

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[5] During the pendency of a family court proceeding, the trial court may issue a variety of temporary or "pendente lite" orders—including custody and visitation orders—providing the parties with interim relief before the trial is completed and judgment is entered. (See *In re Marriage of Gruen* (2011) 191 Cal.App.4th 627, 637; Fam. Code, §§ 3021, 3022.) This is what occurred here.

[6] We grant Aracely's motion to augment the record to allow us to evaluate the procedural posture of this case.

that the agreed-upon orders were "temporary orders pending judgment or further court order (pendente lite)."

Most importantly for our purposes, the parties' requests for child custody and visitation orders, including their competing requests for legal and physical custody of the children, were finally resolved after a two-day *trial* held in August 2016 before a *different* judge, Judge Bruce Iwasaki. The court's post-trial rulings modified the December 2015 custody order by, among other things, giving Aracely "sole decision making authority" to select the children's school if the parties could not agree. (See Fam. Code, § 3003 [legal custody includes the right to make decisions related to the child's education].) The court's rulings also established an extensive vacation and holiday visitation schedule for the children, and set forth more than four pages of additional custody provisions. Those rulings were memorialized in the November 22, 2016 judgment that Aracely provided to this court after oral argument. In short, Aracely's attempt to cast the December 15, 2015 custody order—an order issued in conjunction with her request for a restraining order under the DVPA—as a final judgment lacks merit. (See *Keith R. v. Superior Court* (2009) 174 Cal.App.4th 1047, 1050 [child custody determinations under the DVPA are not permanent custody orders].)

Aracely relies on *Enrique M.*, *supra*, 121 Cal.App.4th 1371, to support her argument that the December 2015 order is a final appealable order. Her reliance on *Enrique M.* is misplaced. *Enrique M.* was a paternity action in which the trial court entered a custody order in June 1998 following an earlier hearing. (*Id.* at p. 1374.) When the father sought to appeal a later custody ruling in January 2003, the appellate court decided the later ruling was appealable as an order made after judgment

because the trial court's June 1998 order, "entered after a hearing and determining the issues raised in Enrique's complaint, constituted an appealable 'final judgment[] as to custody.' " (*Id.* at p. 1378.)

To the extent the appellate court in *Enrique M.* found the 1998 order was actually *the* final judgment in the paternity action—because that order "determin[ed] the issues raised in Enrique's complaint" (*Enrique M.*, *supra*, 121 Cal.App.4th at p. 1378)—the court's decision that the later 2003 custody order was an appealable *post*-judgment order is unremarkable. (See Code Civ. Proc., § 904.1, subd. (a)(2).) Of course, that is of no assistance to Aracely. Unlike in *Enrique M.,* the December 2015 custody ruling in this case *cannot* be characterized as the final judgment because a later judgment *was* entered in this case in November 2016. "[U]nder the 'one final judgment' rule, appeal lies only from final judgments in actions or proceedings, or from orders after judgment that affect the judgment or its enforcement; it does not lie from interlocutory judgments or orders unless specifically made appealable by statute." (*Lester v. Lennane*, *supra*, 84 Cal.App.4th at p. 560.)

Aside from the fact that Judge Kaufman's order was superseded by a judgment entered after a two-day court trial before Judge Iwasaki, there are other reasons why the challenged order, issued under the DVPA, should not be treated as the functional equivalent of a final judicial custody determination. Most notably, the December 2015 order was issued in a highly charged environment less than two months after the lawsuit was filed. Indeed, in their competing requests for custody, Richard accused Aracely of threatening to take the children to Mexico and kill them, and Aracely accused Richard of verbally, physically,

and emotionally abusing her in front of their daughters. In proceedings under the DVPA, "[t]he focus understandably is on protection and prevention, particularly where the evidence concerning prior domestic abuse centers on the relationship between current or former spouses. Treating domestic violence orders as de facto final custody determinations would unnecessarily escalate the issues at stake, ignore essential factors (such as the children's best interest) and impose added costs and delays. It also may heighten the temptation to misuse domestic violence orders for tactical reasons." (*Keith R. v. Superior Court*, *supra*, 174 Cal.App.4th at p. 1056.)

Nor is it appropriate to "save" Aracely's appeal by deeming it a premature appeal from the final judgment entered in November 2016. This is not a situation where the notice of appeal was filed after the trial court announced its intended ruling but before it rendered judgment. (Cf. *Village Nurseries v. Greenbaum* (2002) 101 Cal.App.4th 26, 36.) It is clear from her notice of appeal that Aracely was attempting to appeal from a different ruling entered by a different judge on a different day.

Even if we could liberally construe Aracely's notice of appeal as an appeal from the judgment entered almost a year *after* the challenged December 2015 order, however, she has failed to provide us with any exhibit, settled statement, or reporter's transcript for the trial conducted on August 16 and 17, 2016. Although Aracely contends that Judge Kaufman's December 15, 2015 order was never revisited at the trial before Judge Iwasaki, we cannot evaluate this argument without all of the evidence presented at trial. Without a reporter's transcript, "it is presumed that the unreported trial testimony would demonstrate the absence of error." (*Estate of Fain* (1999)

75 Cal.App.4th 973, 992.) In any event, based on the limited record before us, Aracely is incorrect—the 2015 custody order *was* revisited and *changed* as reflected in Judge Iwasaki's proposed statement of decision and judgment after trial. As the party challenging the court's presumably correct judgment, Aracely is required "to provide an adequate record to assess error." (*Maria P. v. Riles* (1987) 43 Cal.3d 1281, 1295.) She has not done so.

Finally, we are not persuaded by Aracely's contention that this court should treat the appeal from the December 2015 order as a petition for an extraordinary writ. Although we have power to treat her appeal as a petition for writ of mandate, "we should not exercise that power except under unusual circumstances." (*Olson v. Cory* (1983) 35 Cal.3d 390, 401.) This case does not present unusual circumstances. As we noted above, it is readily apparent from the trial court's December 2015 order and the subsequent proceedings reflected in the augmented record, that the parties and the trial court contemplated submitting or receiving further information before finally determining the issue of child custody and visitation. Indeed, reversing the December 2015 order would not afford Aracely any effective relief since the subsequent November 2016 judgment would remain undisturbed. Moreover, the very nature of pendente lite custody orders compels the swiftest possible review of any challenge, and the writ process, not the appeal process, is the way to get that review. (See *Lester v. Lennane*, *supra*, 84 Cal.App.4th at p. 565; see also *Alan S. v. Superior Court* (2009) 172 Cal.App.4th 238, 250 ["We need only point out that, of all issues, child custody is perhaps the most time-sensitive (and hence least amenable to an

adequate remedy by way of appeal) since time in a child's life can never be recovered."].)

For whatever reason, Aracely elected to appeal the December 2015 order rather than file a writ petition. As a result of Aracely's failure to avail herself of immediate review of the objectionable custody order, more than a year has gone by in the children's lives. Meanwhile, at least one child has changed schools, the court has made at least three subsequent rulings affecting custody or visitation, and ordered Richard to pay child support to Aracely based, in part, on their joint custody arrangement. Reversal of the December 2015 order will not undo bonds that were formed, or stability that was created, during the pendency of this appeal. Considerations of fairness and judicial economy also weigh against allowing Aracely to reverse a judgment entered after trial in the guise of correcting a prior interim custody order. In sum, we do not reach the merits of Aracely's contentions by deeming her appeal a petition for an extraordinary writ.

DISPOSITION

The appeal is dismissed. The parties shall bear their own costs.

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LAVIN, J.

I CONCUR:

ALDRICH, Acting P. J.

GOSWAMI, J., Dissenting

The majority seeks to dismiss this appeal due to what it considers a procedural defect. While I agree that the better practice would have been for Mother to have filed this appeal as a writ, I nonetheless find this case warrants a review on the merits. Here, after a contested hearing in December 2015, the trial court found that Father had engaged in unrefuted acts of physical and emotional violence against Mother in front of and involving their two young daughters, aged six and eight. When Mother sought sole legal custody of her daughters, Father called and threatened her. He then doubled his efforts to harass Mother by filing a temporary child removal order based on allegations against Mother that were later found by the trial court to be false. But these alleged falsehoods served Father well. At the ex parte hearing, Father obtained a removal order for the children. He then physically removed the two girls from Mother, and despite her repeated requests to see the girls for almost a month, Mother was afforded only one brief visit. Moreover, within 10 days of the issuance of the temporary restraining order against Father, Father violated the court's protective order by videotaping Mother's interactions with the girls and repeatedly harassing her with taunting phone calls.

This is a textbook domestic violence scenario where one parent physically abuses the other and then uses his superior financial position and exploits the legal system to further

intimidate and harass the vulnerable parent.[1] In December 2015, the trial court found for Mother, holding that Father had engaged in physical and emotional acts of abuse beginning in 2011 and culminating in October 2015. Then inexplicably, the court disregarded the mandatory provisions of Family Code, section 3044,[2] including the factor that the abusive parent *complete* a batter's treatment program. In addition, the court failed to consider that the father's abusive behavior was ongoing, resulting in a violation of the recent restraining order. This was a pyrrhic victory for the mother and her children. Moreover, the legal error by the first trial court in December 2015 was complicated by the second trial court's decision to treat the earlier order as final and to refuse to reconsider the section 3044 factors in its November 2016 ruling.

Normally in deciding custody matters, trial courts apply the general preference for frequent and continuing contacts with both parents. Section 3040 is akin to a fire alarm pull station. It recognizes that where there is a credible finding of domestic abuse, the family is in crisis and the statute prohibits courts from

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[1] Mother is a native Spanish speaker who was represented pro bono in the trial court by John Snow of Hueston Hennigan and Mario A. Rico for the Los Angeles Center for Law and Justice, and on appeal by counsel from the Los Angeles Center for Law and Justice and Gibson Dunn & Crutcher. The law firm of Jenner & Block and the Family Violence Appellate Projected submitted briefing on behalf of the Family Violence Appellate Project and other non-profit organizations that serve low-income victims of domestic violence.

[2] All subsequent statutory references are to the Family Code unless indicated otherwise.

reverting to the general, default preference of joint custody. The statute provides the court with tools to address the underlying problems of domestic violence by limiting custody based on the court's evaluation of the abusive parent's efforts to complete batter's treatment and other programs that would assist the family in avoiding future violence and abuse. These programs are designed to help abusive parents accept responsibility, recognize the harm that violence toward a co-parent causes their children, and implement strategies for anger management and self-control. By failing to apply the seven factors of section 3044, the court ignored its own finding of abusive conduct, emboldened the abusive parent, and undermined the ability of the non-abusive parent and the children to recover from an environment of ongoing domestic violence.

FACTS AND PROCEDURAL BACKGROUND

Father and Mother dated and lived together on and off for eight years, from 2006 to 2014. Their two daughters were born in 2009 and 2011. Mother also has two older daughters from another relationship, who live with Mother.

1. Father's Domestic Violence

Beginning in 2011, Father began to verbally abuse Mother, telling her she was "no good," calling her names, and yelling expletives at her. At this time, Father also began threatening to hit Mother, making fists at her and violently punching walls and doors of their apartment. When Mother became fearful of Father and during particularly aggressive periods of behavior, Mother moved with her children into her parents' home, fearing for their safety. She resumed her relationship with Father and moved back in with him when he made promises to change and control

his anger. In 2013, Father bought a house in Whittier and Mother and the children moved there with him.

After a brief respite from the abuse, Father began physically abusing Mother about six months after they moved to Whittier. On one occasion, in response to Mother becoming upset because Father was dating another woman, Father head-butted Mother's forehead and broke a door in front of the children.

Father regularly smoked marijuana and abused alcohol. He became more violent and angry when he wanted to get high. In 2014, Father bought a bar and began abusing alcohol even more often. He frequently came home drunk and high. Father became increasingly abusive toward Mother because she refused to work at Father's bar.

In 2014, Mother decided to move the children and herself to her parent's house permanently. Following their separation, Mother was the primary caregiver for the children, and Father would sometimes care for them on the weekends. Although Father initially gave Mother $800 per month in child support, he reduced the amount to $600. Father then communicated to Mother that he no longer wanted to provide child support.

In March of 2015, Father went to Mother's home and told Mother he wanted to take their two daughters so that he did not have to make child support payments. Father pushed the door open and forced his way into the house, declaring that he was taking the daughters. Mother objected and stood her ground. To move her out of the way, Father grabbed the upper part of Mother's arm, bruising her. Father then grabbed the two girls, and dragged them out of the house and down the stairs that led from Mother's second floor unit. When Mother followed, Father threw a lawn chair at Mother, hitting her arm. Father then

placed the girls in the cab of his pickup truck. As Father drove away, Mother jumped in the bed of the pickup to stop Father because she feared for the children's safety. Mother screamed for Father to stop as he sped off. He eventually stopped the truck and Mother and the girls were able to leave the vehicle together. Throughout the ordeal, Father cursed at Mother and called her names. Mother photographed her injuries.

On October 15, 2015, Father again showed up at Mother's home, told Mother he wanted to take their daughters so that he would not have to provide Mother child support. Mother refused to let him into her home, and he grabbed her by both arms and pushed her. Father threatened to hit her, raising his arm in front of her. Father left when Mother informed him she was calling the police.

2. Mother's Parentage and Custody Action and Father's Emergency Custody Order

Mother filed this parentage petition to establish her custody of the daughters on October 19, 2015. After Father received the petition, he telephoned Mother, yelling at her, calling her names, and telling her that she "would be sorry for it later." Mother asked if he was indicating that he would hurt her, and he did not respond.

On October 28, 2015, Mother received a phone call from Father's attorney while she was driving. The attorney told Mother that Father would be appearing the next day in regard to the custody case and gave Mother the time and address of the court. Mother told the attorney that because she was driving, she could not write the information down. Mother called the attorney back later in the day so that she could write down the information, but the attorney refused to repeat the information

about the hearing, saying that he already gave it to her.[3] Father also refused to give her the information about the hearing.

On October 29, 2015, Father and his attorney appeared ex parte requesting a temporary emergency court order removing the children from Mother's care. Father attested that Mother threatened to take the children out of California and to Mexico and that she threatened to kill herself and the children. Father also stated that Mother used the children "as a paycheck" and that she withheld the children from him when she was upset. Father told the court that Mother shares a house with 18 people and the daughters were getting beaten up by other children in Mother's home. The court temporarily ordered the children into Father's custody, with Mother to receive monitored visitation.

That same day, Father, his mother, and his girlfriend showed up at Mother's home saying they were taking the daughters. When Mother refused to allow them to take the two girls, Father returned with police officers. When Father became hostile, the police officers did not allow him to leave with the girls. Later in the day, Father returned again with two different police officers. These officers explained to Mother that Father received a court order allowing him to take custody of the girls, and that they had confirmed this with the court. Mother complied with the officers' orders and Father took custody of their daughters.

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[3] Father's counsel, Jeffrey L. Harris of the Harris Family Law Group, declared to the trial court in writing that he had given notice of the ex parte application to Mother by telephone.

On November 4, 2015, Mother applied for a permanent restraining order against Father, and the trial court issued a temporary restraining order against Father. The temporary restraining order required Father to stay 100 yards away from Mother, and not harass, attack, strike, threaten, assault, hit, follow, stalk, molest, destroy personal property of, disturb the peace of, keep under surveillance, impersonate, or block movements of Mother.

On November 14, 2015, Father allowed Mother to visit the girls in a park for two hours. After the visit, Father called Mother from his girlfriend's phone and began laughing at her when she answered. He told Mother that he recorded Mother at the park while she was visiting the girls. During the time when Father had full custody, Father regularly called Mother from his girlfriend's phone to inform Mother that the girlfriend was spending time with their daughters.

3. Hearing on the Restraining Order and Custody

On December 15, 2015, Judge Shelley Kaufman heard both Mother's request for a domestic violence restraining order and her petition for legal and physical custody of the daughters. The trial court received into evidence the parties' declarations[4] as testimony and heard testimony from both parents. The declaration Mother submitted in support of her petition attested to Father's domestic violence and conduct described above.

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[4] Mother's declaration was made in support of her request for a restraining order and for custody of the children. Father's declaration was attached to his ex parte application for an emergency court order removing the children from Mother's custody. Father submitted no other declaration.

Mother also attested that all of the information Father provided to obtain an emergency court order removing the children from Mother's care, i.e. that Mother said she was going to take the children to Mexico, that Mother threatened to kill herself and her daughters, and that Mother lived in a house with 18 people where the children were subject to beatings, was false. At the hearing Mother mostly answered questions from Father's counsel, who pointed out she had not filed a police report about Father's behavior and that she had sent disgruntled text messages to Father. Mother admitted that she once texted she was going to move to Las Vegas with the girls because she found a job that paid more there and that in another text, she told Father he could not visit with the girls unless he paid child support.

Father provided limited testimony, mostly regarding statements he made in a prior deposition. Before the hearing, Mother's counsel deposed Father. In response to questions regarding Father's acts of domestic violence, Father asserted his Fifth Amendment rights against self incrimination. Father refused to respond to questions about whether he ever hit Mother, head-butted, grabbed, threw a chair at, pushed, or threatened Mother. Father reiterated this testimony at the hearing. Father further denied a prior conviction for misdemeanor telephone threats. Father also asserted his Fifth Amendment rights in response to questions about the temporary restraining order. In response to the court's questioning, Father stated that he wanted full custody, he has a better school district for the children, he would get the children to school on time (because mother had allegedly brought the children to school late twice), and he had control over the girls and Mother did not.

The trial court found that Mother met her burden of proof beyond a preponderance of the evidence in proving that Father committed past acts of abuse as defined under section 6300. The court found that a restraining order, protecting Mother but not the children, was needed to prevent recurrence of the violence. The court found that Mother's oral and written testimony was credible and unrebutted by Father. The court specifically found that domestic violence occurred in 2013 when Father head-butted Mother and in October 2015 when Father forced his way into Mother's home, grabbed her arms, threw a chair at her, bruised her, and tried to take the children without her agreement. The court also found other incidents of physical and verbal abuse, where he yelled profanities at Mother in front of the children, threatened to hurt her, raised a fist at her, and violently punched walls. The court thus issued a one-year restraining order against Father.

The trial court then recognized that section 3044 applied to the proceedings due to Father's history of domestic violence. Section 3044 creates a rebuttable presumption that the award of sole or joint custody to the perpetrator of domestic violence is not in the child's best interest. However, the trial court found that Father successfully rebutted the presumption under section 3044. The court reasoned:

> "[T]he court finds that [Father] has shown that it is in the best interests of the minor children to have joint physical and legal custody. And the reason[] the court states is that the petitioner has threatened to take the children away from the Father by moving to Las Vegas. There were text messages where she has wanted to withhold the children for visitation arguing over child support when her remedy for child support is to seek court intervention

> and have a proper child support order put in place rather than telling [Father] that he cannot see the children until he pays a certain sum. Child support can be received by a court order upon proper proof. And child support and custody are two different issues.
>
> "The fight between the parties, at least most recent fight on October 15th really related to not allowing Father to see the children or making it difficult for him to see the children.
>
> "The court finds that it is in the best interests that he be actively involved in their lives.
>
> "The court does not find that a batterers treatment program is necessary; that there is no need to order an alcohol or drug abuse counseling."

The court acknowledged that Father had not completed any parenting classes and ordered both parents to do so. The court also stated it "has no evidence that [Father] is on probation or parole. There was no evidence that he violated the temporary restraining orders." The court awarded joint custody and set a parenting schedule.

The court initially ordered Father to draft "findings and order after hearing" concerning the holiday visitation schedule because Father had made the request for such orders. The court then provided a proposed holiday schedule. The parties submitted an agreed upon visitation schedule, which the court signed and attached to the court's December 2015 custody order, which consisted of a DV-130 restraining order, a DV-140 custody order, the holiday schedule, and a minute order reiterating the terms of custody. Mother appealed from this order.

4. Motion to Modify Custody

In April 2016, Mother moved to modify the December 2015 custody order. Judge Bruce G. Iwasaki held a trial on the matter. On August 25, 2016, Judge Iwasaki issued a Statement of Decision After Trial, finding that he could not disturb Judge Kaufman's Family Code section 3044 ruling. The court maintained the custody arrangement from December 2015 and added that Mother had the sole discretion in selecting the children's school for a particular time period. The court also ordered Father to pay child support. Judge Iwasaki entered judgment on November 22, 2016, attaching the December 15, 2015 custody order as its terms remained in effect.

DISCUSSION

Questions have been raised regarding the finality of the trial court's December 2015 order.[5] The majority notes that Mother fails to appeal the November 2016 judgment and finds that it supersedes the December 2015 ruling. First, the December ruling appears to have been a final order and was certainly treated as such by Judge Iwasaki who issued the November 2016 order. However, the majority finds otherwise and holds that it cannot reach the merits until and unless Mother appeals the November 2016 judgment. Given that the issues are fully briefed and that the second trial judge refused to revisit the prior judge's ruling with regard to the section 3044 factors, I assert that this is precisely the type of case where we should construe the mother's appeal as a writ – to save judicial

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[5] We note that counsel for Father did not raise these questions on appeal. Neither party took issue with appealability prior to this Court's request for briefing on the issue.

resources, and more importantly to correct an error that has lingered and been unchanged by the subsequent proceedings. I do agree with the majority that "time in a child's life can never be recovered," and for that reason I contend that the best the interests of justice would be served by treating this appeal as a petition for an extraordinary writ.

Following my analysis regarding appealability and alternatively construing the appeal as a writ, I address the merits of Mother's appeal.

1. The December 2015 Order Was Final

First, the form custody order as well as the statutory scheme do not indicate that this order in particular is temporary or that DVPA custody orders more generally are always temporary. Nothing on the face of the DV-140 custody order indicated that it was a temporary order. It was issued after a contested hearing on custody and the restraining order. The order expressly stated: "If this form is attached to Form DV-130 . . . , the custody and visitation orders in this form remain in effect after the restraining orders on Form DV-130 end." The DV-140 order and the minute order do not indicate that there is any other pending trial or hearing dates. No other custody issues remained unresolved following the December 2015 hearing. Based on the plain language of the order, family law litigants, who are largely self-represented, would reasonably understand that the DV-140 order, under these circumstances, is a final order that remains in place after any restraining order expires.

If no further hearings are scheduled, as in this case, treating DV-140 orders as temporary would place an undue burden on self-represented litigants to return to court and set another, duplicative hearing to make the order "final" for

purposes of appeal. This would conflict with the well-established principle that " 'where no issue is left for future consideration except the fact of compliance or noncompliance with the terms of the first decree, that decree is final, but where anything further in the nature of judicial action on the part of the court is essential to a final determination of the rights of the parties, the decree is interlocutory.' " (*Kinoshita v. Horio* (1986) 186 Cal.App.3d 959, 963.) Where, as here, there is no indicia that the order was intended to be temporary, the court must treat it as a final order. (*Ibid.* ["It is not the form of the decree but the substance and effect of the adjudication which is determinative."]) The majority's stance that custody orders accompanying domestic violence restraining orders are always temporary frustrates judicial economy and makes the appeals process more convoluted.

To hold that custody and other such orders, when decided as part of a DVPA action, cannot be final appealable orders, would also defeat the statutory scheme. The DVPA differentiates between "temporary" custody orders (or interim orders as the majority calls them) that can be entered on an ex parte basis and custody orders that can been entered only after a noticed hearing. (Fam. Code, § 6323 [giving the court authority to issue ex parte *temporary* custody orders in cases involving domestic violence]; Fam. Code, § 6340 [custody orders issued after notice and hearing shall survive termination of any protective order].) If all DVPA custody orders were intended to be temporary, there would be no need to specify that the ex parte orders are temporary and only those orders issued pursuant to a hearing survive the expiration of the restraining order.

Second, the parties understood this order to be final. Father conceded his understanding that the December 2015 order was appealable in his August 2016 motion to dismiss the appeal. There, Father strenuously argued that the appeal was belated, not premature. Father and his counsel submitted sworn declarations attesting to their understanding that "[t]he court signed the judgment that is being appealed on December 15, 2015." Mother brought this appeal; thus, she also construed this order as final.

Third, the subsequent family law trial court treated the December 2015 custody order as final. At oral argument and through briefing, it was revealed that while this appeal was pending, Mother moved to modify[6] child custody and visitation and requested the court to order Father to pay child support, which he ceased paying in 2015 around the time of the joint custody ruling. It appears that Mother sought modification on the basis of changed circumstances. The court denied the modification, evaluating custody based on changed circumstances standard. Specifically, in his statement of decision, Judge Iwasaki twice noted that he could not reevaluate Judge Kaufman's decision as to the application of section 3044. "[T]his court cannot alter the decisions made by another Superior Court Judge, that the presumption of Family Code section 3044 was rebutted." The trial then court stated: "Petitioner has failed to offer good reason to alter the existing equal parenting schedule.

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[6] Family law is unique in that perfecting an appeal does not stay proceedings in the trial court. (Code Civ. Proc., § 917.7.) Parties may continue to litigate custody while an order is on appeal.

The Court denies Petitioner's request on this topic; the parties' 2-2-5-5 parenting schedule will be retained."

The fact the trial court applied the changed circumstances standard to Mother's request for the custody order also indicates that the trial court interpreted the December 2015 order to be final. In deciding custody, "depending upon the posture of the case, the trial court will use either the 'best interest' analysis or the 'changed circumstances' analysis. The best interest analysis is used when making a permanent custody determination initially. . . . [¶] The changed circumstances test requires a threshold showing of detriment before a court may modify an existing final custody order that was previously based upon the child's best interest." (*Ragghanti v. Reyes* (2004) 123 Cal.App.4th 989, 996.) " 'The change of circumstances standard is based on principles of res judicata' " and "the importance of protecting prior custody determinations by forbidding the courts from reconsidering the circumstances which led to those determinations." (*Burchard v. Garay* (1986) 42 Cal.3d 531, 535, 537.) Given that the December 2015 order appeared final, Judge Iwasaki correctly applied the changed circumstances standard.

By applying the changed circumstances standard and refusing to reevaluate the section 3044 inquiry, the second trial court recognized the December 2015 order as a final custody order. (See *Montenegro v. Diaz* (2001) 26 Cal.4th 249, 258-259 [the changed circumstances rule applies to final judicial custody determinations]; *In re Marriage of LaMusga* (2004) 32 Cal.4th 1072, 1088-1089, fn. 2 ["The court's [order] granting joint legal custody to the parties and primary physical custody to the mother, constituted a final judicial custody determination that

the court need not reconsider in the absence of changed circumstances."].)

Finally, quoting *Keith R. v. Superior Court* (2009) 174 Cal.App.4th 1047, 1056 (*Keith R.*), the majority argues that "[t]reating domestic violence orders as de facto final custody determinations would unnecessarily escalate the issues at stake, ignore essential factors (such as the children's best interest) and impose added costs and delays."[7] Given that the best interests of the child is the main consideration when applying section 3044, such concerns regarding the failure to consider important factors is unfounded. The *Keith R.* court's interpretation of custody orders associated with domestic violence findings as only being temporary contradicts the purpose of section 3044. After extensively reviewing the legislative history and carefully examining the text of the statute, there appears nothing in the text or history of section 3044 which would indicate that the statute only applies to temporary custody orders. (Sen. Bill No. 265 (2003-2004 Reg. Sess.) Ch. 243.) To assume otherwise would read absent language into the statute, which is contrary to the canons of statutory construction. (See *Tyrone W. v. Superior Court* (2007) 151 Cal.App.4th 839, 850.) Section 3044 is intended to be considered in any custody determination, temporary or permanent, involving domestic violence. As such, a custody order involving a section 3044 inquiry would likely,

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[7] The majority characterizes the December 2015 proceedings as a "highly charged environment." Any custody hearing made in conjunction with a claim of domestic violence, which would almost always invoke section 3044, will likely be "charged" due to the claims of past or current violence.

although not always, accompany a domestic violence restraining order.

It is also important to note that contrary to *Keith R.'s* concerns, not treating the DVPA custody order as final in this case actually imposes costs and delays on the parties. Despite the fact that the second trial court treated the December 2016 order as final and that this Court has complete briefing on an issue that has been unchanged by subsequent litigation, the majority refuses to hear the merits and requires the parties to engage in further litigation.

The majority also asserts that treating domestic violence orders as final may heighten the temptation to misuse the orders to gain a tactical advantage. Again, this argument presupposes that section 3044 would not be considered when making a "final" custody determination as opposed to a custody determination accompanied by domestic violence findings and a restraining order. As I explained above, section 3044 is intended to be considered in any custody hearing involving domestic violence. Thus, regardless of whether this order or a later order is considered final and appealable, any gamesmanship in misusing the statute could be had at either juncture in a family law case. The trial court, as the finder of fact, is the appropriate venue to address misuse of the statute and false claims of domestic violence. Here, the court found Mother's testimony concerning Father's violence and abuse to be credible and expressed no concerns that her claims were exaggerated or unfounded. Mother should not be deprived an appeal based on speculative fears of gamesmanship not apparent in the record before this court.

My point here is that a DVPA order may be final, not that it always is. Like any custody order, the court must look for indicia that the order is temporary or final. "A temporary custody order is interlocutory by definition, since it is made pendente lite with the intent that it will be superseded by an award of custody after trial." (*Lester v. Lennane* (2000) 84 Cal.App.4th 536, 559.) There was no contemplation of a trial in this case to supersede the DV-140 order and there was no indicia that the order was intended to be temporary. To impose a blanket rule that all DV-140 orders are temporary, as the majority proposes, would unduly burden pro se litigants, who would be burdened with seeking further litigation on an issue that is already decided by a contested hearing. Such a principle is unfair and impracticable to litigants.

2. This Court Should Exercise Its Discretion to Treat This Appeal as a Writ to the Extent There Are Doubts About Appealability

As the majority notes, this Court generally may not hear appeals from nonappealable orders. "However, (1) under unusual circumstances, and (2) where doing so would serve the interests of justice and judicial economy, an appellate court may use its discretion to construe an appeal as a petition for writ of mandate." (*Mon Chong Loong Trading Corp. v. Superior Court* (2013) 218 Cal.App.4th 87, 92.) These unusual circumstances exist "where requiring the parties to wait for a final judgment might lead to unnecessary trial proceedings, the briefs and record include[] in substance the necessary elements for a proceeding for a writ of mandate, there [i]s no indication the trial court would appear as a party in a writ proceeding, the appealability of the order [i]s not clear, and all the parties urge[] the court to decide

the issue rather than dismiss the appeal." (*H. D. Arnaiz, Ltd. v. County of San Joaquin* (2002) 96 Cal.App.4th 1357, 1367, citing *Olson v. Cory* (1983) 35 Cal.3d 390, 400-401.) Under such circumstances, it would be needlessly dilatory, inefficient, and circuitous to dismiss the appeal rather than construe it as a writ of mandate. (*Olson v. Cory*, at p. 401.)

The circumstances of this case behoove us to treat the appeal as a writ of mandate and address the issues on the merits. It is important to note that the custody order was not modified by the trial court's 2016 ruling on Mother's motion to modify. Rather, the 2016 statement of decision explicitly stated that it would not reevaluate the December 2015 order nor would it reevaluate the 2015 finding that Father rebutted section 3044's presumption against awarding him (a domestic violence perpetrator) custody. The 2016 order merely attached the order at issue in this case as part of its ruling. Thus, the issues raised by Mother on appeal have not been mooted. Judge Kaufman's section 3044 ruling is the same ruling that was incorporated into the November 2016 judgment, and there can be no prejudice to Father by reviewing Judge Kaufman's ruling at this juncture.

The majority also indicates that reversing the December 2015 order will not afford Mother relief because the 2016 order would remain undisturbed. Given that the 2016 order incorporates the December 2015 order because the court found no changed circumstances, and refused to reevaluate the applicability of section 3044, I disagree. The error at issue here has infected and continues to infect subsequent proceedings. (See *Haywood v. Superior Court* (2000) 77 Cal.App.4th 949, 953 [issue "not mooted by subsequent events when these events leave a material question affecting the parties unresolved"].) This court

should hear this case on the merits and order the trial court to reevaluate the division of custody and visitation in the context of section 3044 and issue a new custody order, "because dismissal of the appeal operates as an affirmance of the underlying judgment or order." (*In re C.C.* (2009) 172 Cal.App.4th 1481, 1489.)

The majority opines that too much time has passed and that three subsequent rulings on custody and visitation have been issued by the trial court. Yet, these orders have not modified the 50/50 custody arrangement made in violation of section 3044. The only real modifications appear to be giving Mother the sole discretion to choose the children's school and ordering Father to pay child support, as he failed to do so beginning in December 2015.[8] Fairness does not warrant dismissal of this appeal.

Moreover, the custody and safety of two small children are at stake. To require Mother to file another appeal and wait longer to assess issues that still exist today as they did in 2015 is nonsensical. In the interest of a just and speedy resolution of custody issues for this family and in the interest of judicial economy, I would address the merits of this case.

3. Standard of Review as to the Custody Order

At issue is whether the trial court properly applied section 3044. This Court "review[s] custody and visitation orders for an abuse of discretion, and appl[ies] the substantial evidence standard to the court's factual findings. [Citation.] A court abuses its discretion in making a child custody order if there is no

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[8] This is around the time the trial court issued its erroneous custody ruling and misapplied section 3044. The ruling appeared to embolden Father.

reasonable basis on which it could conclude that its decision advanced the best interests of the child. [Citation.] A court also abuses its discretion if it applies improper criteria or makes incorrect legal assumptions." (*In re Marriage of Fajota* (2014) 230 Cal.App.4th 1487, 1497, italics omitted (*Fajota*).)

4. Rebuttable Presumption Against Awarding Custody to Father

Generally, a trial court makes custody orders based on the best interests of the child standard. (*Ellis v. Lyons* (2016) 2 Cal.App.5th 404, 415 (*Ellis*); § 3020.) In assessing the best interest of the child standard, courts apply California's codified public policy that it is in the best interest of the child to have frequent and continuing contact with both parents after the parents have separated. (§ 3020.) However, when a parent commits domestic violence with the past five years, section 3044 "establishes a rebuttable presumption that joint or sole custody for a parent who has perpetrated domestic violence is not in a child's best interests." (*Ellis,* at p. 414.) "This presumption is mandatory and the trial court has no discretion in deciding whether to apply it." (*Celia S. v. Hugo H.* (2016) 3 Cal.App.5th 655, 661 (*Celia S.*).) "[T]he court *must* apply the presumption in any situation in which a finding of domestic violence has been made. A court may not ' "call . . . into play" the presumption contained in section 3044 only when the court believes it is appropriate.' " (*Fajota, supra,* 230 Cal.App.4th at p. 1498.) "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." (*Celia S.,* at p. 662.)

Under section 3044, subdivision (b), the trial court analyzes seven factors to determine whether the parent who perpetrated the domestic violence has rebutted the presumption against awarding him or her custody. The first factor the court considers is "[w]hether 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 . . . may not be used to rebut the presumption, in whole or in part*." (§ 3044, subd. (b)(1) (italics added).) The court also considers: "(2) Whether the perpetrator has successfully completed a batterer's treatment program . . . . [¶] (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." (§ 3044, subd. (b)(2)-(7).)

5. Application of Section 3044

The trial court properly found that section 3044 applied to this case as ample evidence supported the court's conclusion that Father engaged in domestic violence against Mother within the last five years.[9] Mother's testimony and declaration, documenting the multiple instances of physical abuse and threats beginning in 2011 and culminating in 2015, were never refuted since Father asserted the Fifth in response to all questions regarding the domestic violence. Nonetheless, as explained below, the trial court abused its discretion in finding that Father rebutted section 3044's presumption regarding the best interests of the child. None of the seven factors enumerated in section 3044 weigh in favor of awarding joint custody, particularly because Father did not produce evidence showing joint custody was in the children's best interests.

In regard to the first factor, the trial court found that Father proved that joint custody was in the children's best interest specifically because Mother threatened to move to Las Vegas with the children and withheld visitation when Father was not making agreed-upon child support payments. Yet, these items are irrelevant to the best interests inquiry. The statute expressly requires the court *not* to consider the preference for frequent and continuing contact with both parents when assessing the best interests of the child. (§ 3044, subd. (b);

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[9] The majority notes that Mother's domestic violence restraining order expired in December 2016 and that Mother did not include the children as those to be protected on her request for a restraining order. This is of *no consequence* to the section 3044 analysis.

Celia S., supra, 3 Cal.App.5th at p. 662.) The trial court's consideration of the preference for frequent and continuing contact with a noncustodial parent as a factor for overcoming section 3044's rebuttable presumption requires reversal as such a consideration infects the judgment with legal error. (See *Ellis, supra,* 2 Cal.App.5th 404, 418.)

In addition, the trial court received hardly any evidence from Father regarding the best interests of the children. Father made three statements during his testimony while being questioned by the judge, asserting in a conclusory fashion that he was in a better school district, that he would get the children to school on time, and that he could "control" the girls. Father's declaration in support of his petition for a temporary emergency court order removing the children from Mother's care likewise failed to address his relationship with the children and why it was in their best interests for him to maintain custody. Father provided no other testimony or evidence regarding his relationship with the daughters or how it is in their best interests for him to be part of their lives. Thus, the first factor of the analysis does not support the court's conclusion.

As to the second factor, the trial court erroneously found that the batterer's treatment program was unnecessary. Section 3044, subdivision (b)(2) explicitly instructs the court to assess "[w]hether the perpetrator has successfully completed a batterer's treatment program." The statute does not give the court discretion to decide whether a batterer's treatment program is necessary for the domestic violence perpetrator. As Father never completed the program, this factor also does not weigh in favor of joint custody.

The third factor required the court's assessment of whether Father should attend an alcohol or drug abuse program and if so, whether he attended such a program. Although Mother's declaration indicated that Father's abusive behavior increased with his consumption of alcohol and use of marijuana and such testimony was never rebutted, the court determined that a substance abuse program was unnecessary. Notably, Father testified that he no longer owned a bar (this is relevant as Mother attested Father's drinking and smoking increased when he was working at his bar), but no testimony was elicited to show he did not have a substance abuse problem.

In assessing the fourth factor, the trial court acknowledged that a parenting class was necessary and noted that Father had not completed one. The court did not appear to count this factor against Father in assessing the children's best interests. Rather, the court treated it as a prospective issue to be addressed by both parents, and ordered both parents to engage in parenting classes. Although the court has the discretion to assess the necessity for such classes, the inquiry is about whether the perpetrating parent has engaged in such classes when the classes are determined to be necessary. The need for classes is relevant because Father's parenting abilities and shortfalls are essential to assessing the children's safety and wellbeing in his care. This factor too appears to have weighed against finding joint custody in the children's best interests.

In regard to the sixth factor, the court concluded that there was no evidence Father violated the temporary restraining order. Yet, Mother attested in her declaration that following issuance of the temporary restraining order, Father repeatedly called Mother from his girlfriend's cell phone to taunt her. When he called

Mother on November 14, 2015, Father told Mother that he videotaped her visit with their daughters at the park. By making harassing phone calls and surveilling Mother, Father was in direct violation of the restraining order. Father produced no evidence to contradict Mother's statements.[10] In fact, Father asserted his Fifth Amendment right to silence in response to all questions regarding the restraining order. Thus, this factor weighs heavily against awarding joint custody.

Lastly, the trial court did not analyze the fifth and seventh factors. The court correctly noted that the fifth factor was not relevant because Father was not on probation or parole.

Nonetheless, the seventh factor, which evaluates whether Father committed any further acts of domestic violence, was relevant and should have been evaluated. Section 3044, subdivision (c) defines domestic violence, stating: "a person has 'perpetrated domestic violence' when he or she is found by the court to have intentionally or recklessly caused or attempted to cause bodily injury, or sexual assault, or to have placed a person in reasonable apprehension of imminent serious bodily injury to that person or to another, or to have engaged in any behavior

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[10] Realizing the import of these facts, in his brief, Father stated: "The issue that was alleged where Respondent was secretly recording Petitioner and calling her from another phone were found to untrue [*sic*] by the reviewing court." At oral argument, Father's counsel clarified that by "reviewing court," he meant Judge Bruce G. Iwasaki's court that issued the 2016 order (not Judge Shelley Kaufman's court that issued the 2015 order). However, Judge Iwasaki's statement of decision does not include a finding that Father's alleged violation of the restraining order was found to be untrue.

involving, but not limited to, threatening, striking, *harassing*, destroying personal property or disturbing the peace of another, for which a court may issue an ex parte order pursuant to Section 6320 to protect the other party seeking custody of the child or to protect the child and the child's siblings." (Italics added.) Domestic violence under the family code encompasses abuse like the harassing phone calls Father made to Mother after issuance of the temporary restraining order. (See *Rodriguez v. Menjivar* (2015) 243 Cal.App.4th 816, 821; *Phillips v. Campbell* (2016) 2 Cal.App.5th 844, 852-853; § 6211.) This factor also appears to weigh against giving Father custody.

In sum, Father produced no evidence that would support the court's conclusion that Father successfully rebutted the presumption against awarding him partial custody. Although the court recognized Section 3044's applicability and the existence of factors to consider, the court failed to apply the factors to this case.

This case resembles *Celia S.* There, the trial court recognized the applicability of section 3044 and purported to apply the factors to the facts of this case, but substantively sidestepped its application. (*Celia S.*, *supra,* 3 Cal.App.5th at p. 664.) The parents in that case separated due to domestic violence, and agreed to a 50/50 custody arrangement. (*Id*. at p. 658.) Father subsequently punched mother in the children's presence. (*Id*. at p. 659.) The trial court found that father committed domestic violence against mother, issued a one-year domestic violence restraining order against father, and ordered father to complete a batterer intervention program. (*Id*. at p. 660.) Acknowledging the applicability of section 3044 and the presumption against awarding father custody, the court awarded

mother full custody. (*Celia S.,* at p. 660.) Father did not even attempt to make a showing that it was in the children's best interest to award him custody. (*Id*. at p. 663.) The court nonetheless determined that visitation was in the best interest of the children and decided that the 50/50 timeshare was to remain in place. (*Id*. at p. 660.) The Court of Appeal reversed because the court's ruling "effectively awarded joint physical custody without requiring [father] to present evidence showing the arrangement is in the children's best interest." (*Id*. at p. 663.)

Likewise, here, the court awarded joint custody without requiring Father to rebut the section 3044 presumption. The court had no evidence before it to show joint custody was in the children's best interest. As stated above, the court made its decision entirely based on irrelevant information regarding Mother withholding visitation, and on one occasion, threatening to move to Nevada with the children.

Based on the foregoing, I conclude the trial court abused its discretion by failing to properly apply section 3044's rebuttable presumption and awarding Father joint custody without evidence showing joint custody was in the children's best interest.

The majority suggests that this is an issue of child custody and the December 2015 custody order has been superseded by the November 2016 ruling. I disagree. Section 3044 was enacted not to take custody away from abusive parents but to stop a cycle of physical and/or emotional violence by requiring abusive parents to enroll in and complete batter's treatment programs and affirmatively establish a change in their behavioral pattern. Here, despite a clear finding of repeated acts of domestic violence spanning several years, the core purpose of Section 3044 was not satisfied by the court. It matters not that time has passed. The

error persists and the welfare of two young girls who witnessed acts of domestic violence against their mother in 2011, 2013, and 2015 is at stake. These children see that such acts of physical and emotional abuse have no consequences for Father and that despite herculean efforts by Mother, our legal system affords her no relief. That is a message I am loath to send. I therefore respectfully dissent.

GOSWAMI, J.*

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* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.