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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

MARIA R.,

Plaintiff and Appellant,

v.

EDDIE D.,

Defendant and
Respondent.

B281526

(Los Angeles County
Super. Ct. No. BQ055101)

APPEAL from an order of the Superior Court of Los Angeles County, Tamara Hall, Judge. Affirmed in part, reversed in part, and remanded with directions.

Sidley Austin, David R. Carpenter and Adriane Peralta; Los Angeles Center for Law and Justice and Sarah Reisman for Plaintiff and Appellant.

No appearance for Defendant and Respondent.

Maria R. appeals from the trial court's order granting her former husband, Eddie D., joint legal custody of their then 10-year-old daughter, to begin upon expiration of a one-year domestic violence restraining order protecting Maria from Eddie. Maria contends the court abused its discretion in failing to apply the rebuttable presumption under Family Code section 3044¹ that it is not in a child's best interest to award joint custody to a parent found to have committed domestic violence against the other parent. We agree with Maria's contention and therefore reverse the portion of the custody order awarding joint legal custody and remand the matter for the trial court to apply the mandatory presumption in determining legal custody.

BACKGROUND

Maria and Eddie's daughter, Tiffany, was born in 2006. Maria and Eddie dated on-and-off for the next several years. In 2013, the couple married and then separated in early 2016. Eddie filed for divorce in May 2016.

On September 19, 2016, the family law court heard and decided the parties' requests for custody of Tiffany. As stated in the court's September 19, 2016 minute order, the court denied Maria's "request for a continuance of the matter to hire counsel as the proceedings were already started when the request was made." The court further denied Maria's request for a restraining order against Eddie because "that issue [was] not before the Court this date." The court ordered joint legal custody and granted primary physical custody to Maria. The court

¹ Further statutory references are to the Family Code.

granted Eddie visitation every second and fourth weekend of each month and every other fifth weekend.²

On October 5, 2016, Maria filed a request for a domestic violence restraining order against Eddie, asking the court to protect her, her two adult sons from a previous relationship, and Tiffany (who was then nearly 10 years old). Maria attached a declaration, describing incidents that occurred in March and July 2016, after she and Eddie separated, during which Eddie committed domestic violence against her.³ Maria also submitted a request for sole legal and physical custody of Tiffany and no visitation for Eddie until the hearing.

The trial court issued a temporary restraining order against Eddie, protecting Maria and her two adult sons. The court declined to include Tiffany in the temporary restraining order because of the existing child custody order, which the court declined to modify. The court set a hearing on Maria's request for a permanent restraining order and modification of the child custody order.

On November 3, 2016, Maria, who was then represented by counsel, filed a supplemental declaration in support of her request for a permanent restraining order against Eddie and her request for a modification of the child custody order. Therein,

² This September 19, 2016 custody order is not the order from which Maria appeals. She appeals from a subsequent child custody order, dated January 19, 2017, as discussed below.

³ We need not set forth the details of the domestic violence incidents because the trial court later made a finding that Eddie committed domestic violence against Maria and the finding is not challenged on appeal.

Maria requested the trial court award sole legal and physical custody of Tiffany to her and order supervised visits between Eddie and Tiffany until Eddie “enroll[ed] in co-parenting and batterer’s intervention classes.”⁴ Maria also provided additional details about Eddie’s domestic violence against her and stated Eddie had “been violent towards [her] in the presence of [their] daughter and [her adult] sons.”

The hearing on Maria’s request for a permanent restraining order and modification of the child custody order was held on November 16, 2016 and January 18-19, 2017. Maria was represented by counsel; Eddie was not. The court heard testimony from Maria, her daughter-in-law, one of her adult sons, Eddie’s fiancé, and Eddie.

During argument, Maria’s counsel urged the trial court to make a finding that Eddie committed domestic violence and to issue a five-year restraining order against Eddie. Counsel also urged the court to award sole legal and physical custody of Tiffany to Maria, referencing section 3044 and the presumption that “the perpetrator of abuse should not share custody.” Counsel further requested the court order supervised visits between Eddie and Tiffany and order Eddie to attend a batterer’s intervention program.

Eddie denied all domestic violence and accused Maria of interfering with his visitation rights under the September 19, 2016 custody order.

⁴ In support of her request for supervised visitation between Eddie and Tiffany, Maria stated her belief that Eddie had substance abuse issues.

The trial court found Maria “met her burden of proving by a preponderance of the evidence that [Eddie] ha[d] committed a past act or acts of abuse within the meaning of Family Code section 6200 and 6300” and “a restraining order [was] needed to restrain [Eddie] for purposes of preventing reoccurrence of domestic violence and ensuring a period of separation of the persons involved.” The court issued a one-year restraining order, protecting Maria from Eddie during the period January 19, 2017-January 19, 2018. The court declined to include Tiffany in the restraining order, because it “heard no testimony that [Eddie was] a threat to the child.”⁵ The court also ordered Eddie “to attend 52 weeks of domestic violence restraining order batterers program.”

Regarding child custody and visitation, the trial court ruled “the orders made on September 19, 2016 will remain in full force and effect,” except that “[l]egal custody for this one year period only will be sole legal custody to [Maria].” Thus, Maria retained primary physical custody of Tiffany, and Eddie maintained unmonitored visitation every second and fourth weekend of each month and every other fifth weekend. During the one-year period of the restraining order, Maria had sole legal custody of Tiffany, but the order reverted to joint legal custody when the restraining order expired. The court ordered both Maria and Eddie to attend 10 sessions of “parenting counseling classes.”

The trial court did not address section 3044, nor did Eddie rebut the presumption that it is not in a child’s best interest to award joint legal or physical custody to a parent found to have

⁵ Nor did the court include Maria’s adult sons in the restraining order.

committed domestic violence against the other parent. When Maria’s counsel attempted to address the portion of the ruling awarding joint custody, the court stated, “I’ll stop you right there. That’s the Court’s orders, Counsel. Okay?”

Maria appealed from the trial court’s January 19, 2017 child custody order. Eddie did not appear on appeal.

DISCUSSION

Maria challenges the January 19, 2017 child custody order on the ground the trial court abused its discretion in failing to apply the rebuttable presumption under section 3044 that it is not in a child’s best interest to award joint custody to a parent found to have committed domestic violence against the other parent.

We review a trial court’s custody order for abuse of discretion. A “court abuses its discretion if it applies improper criteria or makes incorrect legal assumptions.” (*Ellis v. Lyons* (2016) 2 Cal.App.5th 404, 415.)

Section 3044 provides, in pertinent part:

“(a) 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 . . . within the previous five years, there is a rebuttable presumption that an award of sole or joint physical or legal custody of a child to a person who has perpetrated domestic violence is detrimental to the best interest of the child, pursuant to Section 3011.”^[6] This

⁶ “The guiding principle for the court in making any custody or visitation order is that the order must be in the child’s best interest. (See §§ 3011, 3020, 3040.)” (*Celia S. v. Hugo H.* (2016) 3 Cal.App.5th 655, 661 (*Celia S.*)).

presumption may only be rebutted by a preponderance of the evidence.

“(b) In determining whether the presumption set forth in subdivision (a) has been overcome, the court shall consider all of the following factors:

“(1) Whether the perpetrator of domestic violence has demonstrated that giving sole or joint physical or legal custody of a child to the perpetrator is in the best interest of the child. In determining the best interest of the child, the preference for frequent and continuing contact with both parents, as set forth in subdivision (b) of Section 3020, or with the noncustodial parent, as set forth in paragraph (1) of subdivision (a) of Section 3040, may not be used to rebut the presumption, in whole or in part.

“(2) Whether the perpetrator has successfully completed a batterer’s treatment program that meets the criteria outlined in subdivision (c) of Section 1203.097 of the Penal Code.

“(3) Whether the perpetrator has successfully completed a program of alcohol or drug abuse counseling if the court determines that counseling is appropriate.

“(4) Whether the perpetrator has successfully completed a parenting class if the court determines the class to be appropriate.

“(5) Whether the perpetrator is on probation or parole, and whether he or she has complied with the terms and conditions of probation or parole.

“(6) Whether the perpetrator is restrained by a protective order or restraining order, and whether he or she has complied with its terms and conditions.

“(7) Whether the perpetrator of domestic violence has committed any further acts of domestic violence.”

“The legal effect of the presumption [in section 3044] is to shift the burden of persuasion on the best interest question to the parent who the court found committed domestic violence.” (*Celia S.*, *supra*, 3 Cal.App.5th at p. 662.) The presumption “must be rebutted by evidence.” (*Jason P. v. Danielle S.* (2017) 9 Cal.App.5th 1000, 1029.)

The “presumption is mandatory and the trial court has no discretion in deciding whether to apply it: ‘[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.” ’” (*Celia S.*, *supra*, 3 Cal.App.5th at p. 661, quoting *In re Marriage of Fajota* (2014) 230 Cal.App.4th 1487, 1498.)

“If the trial court determines a parent has overcome the section 3044 presumption and awards sole or joint custody to a parent who committed domestic violence, the court must state the reasons for its ruling in writing or on the record. (§ 3011, subd. (e)(1).)” (*Celia S.*, *supra*, 3 Cal.App.5th at p. 662.)

Here, the trial court failed to apply the mandatory presumption in ruling Maria and Eddie would share joint legal custody of Tiffany upon expiration of the one-year restraining order.⁷ The court did not reference section 3044 or state reasons for finding Eddie had overcome the presumption.

⁷ Maria also argues on appeal that the trial court erred in failing to apply the mandatory presumption in making its award of physical custody. She incorrectly characterizes the court’s January 19, 2017 custody order as one for joint physical custody. Where a court grants a father visitation on alternate weekends, as in this case, “‘this amounts to sole physical custody for the

“Because the family law court’s decision to deny [Maria]’s request for an order modifying the custody arrangement is infected by legal error, we hold the decision must be reversed as an abuse of the court’s discretion. [Citations.] On remand, the family law court should apply section 3044’s rebuttable presumption and expressly address whether [Eddie] has rebutted the presumption by a preponderance of the evidence.” (*Ellis v. Lyons, supra*, 2 Cal.App.5th at p. 418.)

DISPOSITION

The portion of the January 19, 2017 child custody order awarding Eddie joint legal custody of Tiffany upon expiration of the one-year restraining order is reversed, and the matter is remanded for the trial court to hold further proceedings consistent with this opinion and determine legal custody after applying the presumption set forth in section 3044. In all other respects, the January 19, 2017 custody order is affirmed. Each side is to bear its own costs on appeal.

NOT TO BE PUBLISHED.

CHANNEY, J.

We concur:

ROTHSCHILD, P. J.

CURREY, J.*

mother with “liberal visitation rights” for the father.’ ” (*Celia S., supra*, 3 Cal.App.5th at p. 664.) Thus, the presumption does not apply to the court’s award of physical custody. Maria does not challenge the visitation award on any other basis.

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