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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

NATHALIE POLAKOFF, Plaintiff and Appellant, v. SACHA POLAKOFF, Defendant and Respondent.	B266928 (Los Angeles County Super. Ct. No. BD488361)

APPEAL from an order of the Superior Court of Los Angeles County, Christine Byrd, Judge. Affirmed.

Law Offices of Richard Ross and Richard Ross for Plaintiff and Appellant Nathalie Polakoff.

Sacha Polakoff, in pro per.

INTRODUCTION

The parties -- Nathalie Polakoff and Sacha Polakoff -- are before us a second time. In October 2013, we affirmed the trial court's order granting Sacha's motion for a restraining order against Nathalie, precluding her from harassing or contacting Sacha or his wife.[1] We concluded that substantial evidence supported issuance of the restraining order pursuant to the Domestic Violence Protective Act (DVPA), Family Code section 6200 et seq.[2] The restraining order did not prohibit Nathalie from having contact with the parties' minor children. (See *Polakoff v. Polakoff* (Oct. 2, 2013, B246029) [nonpub. opn.].) In July 2015, Nathalie filed form requests to, inter alia, dissolve the restraining order, modify the custody order to grant her joint custody of their minor son, Jeremy, and grant her immediate visitation with Jeremy. The trial court denied the requests, and Nathalie appealed only the denial of her requests for joint custody and visitation with Jeremy. For the reasons set forth below, we find the trial court did not abuse its discretion in denying Nathalie's requests for joint custody and immediate visitation. Accordingly, we affirm.

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[1] As the parties share the same last name, to avoid confusion, we refer to them by their first names.

[2] All further statutory citations are to the Family Code, unless otherwise stated.

FACTUAL BACKGROUND & PROCEDURAL HISTORY

A. *Prior Proceedings and Orders*

The parties were married for 15 years, had a daughter and two sons, and divorced in 2010. Initially, Nathalie had primary custody of Jeremy, but subsequently, the trial court (Hon. Amy M. Pellman) temporarily awarded Sacha primary custody. On February 16, 2011, the trial court (Hon. Christine Byrd) and the parties, represented by counsel, discussed a visitation order for Nathalie, who had moved to Sacramento. The court approved an agreement between the parties for Nathalie to contact Jeremy via Skype (a videoconferencing application) every Saturday, and it granted Nathalie physical visitation per the advice and recommendation of Jeremy's therapist. On May 10, 2011, following a hearing, the court ordered the Skype calls suspended temporarily, noting that it had "a letter from [Jeremy's] therapist saying that the stress of the calls had [a] very negative adverse impact on [Jeremy]." The court stated, "I'm not in favor of the children being cut off from both parents," but Jeremy "appears to be in [a] very fragile state."[3]

On August 23, 2011, another hearing was held on the issue of Nathalie's visitation with Jeremy. The court noted

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[3] Judge Byrd was the judicial officer at the hearing. She continued as the presiding judge for all subsequent proceedings, including those underlying this appeal.

that it had received a letter from Jeremy and his therapist, "saying [Jeremy] didn't want to have contact with his mother." Following a discussion with the parties' counsel, the court entered an order awarding Sacha sole legal custody of Jeremy and granting Nathalie monitored visits with Jeremy "as per the advice/recommendation of Dr. Adam Grindlinger" (Jeremy's therapist). The order provided that if Dr. Grindlinger did not provide his recommendation on visitation to Nathalie's counsel within three weeks, Dr. Cabrera, Jeremy's psychiatrist, "shall make the recommendations as to the visitation of Jeremy with his mother. Dr. Cabrera must respond to [counsel] on this issue."

On October 17, 2012, Nathalie filed a motion to modify the custody and visitation orders. Although Nathalie's counsel asserted that monitored visits had not occurred because Jeremy's therapist had been "relieved," counsel did not suggest that she had been unable to contact Jeremy's psychiatrist, Dr. Cabrera, to set up monitored visits. The court denied the request for modification of the orders, finding there was no change in circumstances, and that modification would not be in Jeremy's best interest.

The following month, Sacha filed a request for a restraining order protecting himself, his new wife, and his two sons from Nathalie. He alleged that Nathalie had stalked and harassed him and his family. At the November 9, 2012 hearing on Sacha's request for a restraining order, he testified that Nathalie had threatened him on two

separate occasions, once stating she was going to kill him and take their sons, and on another stating she was going to "come after" his wife and the boys. Sacha also testified that Nathalie made numerous calls to his home, work, and personal cell phone, and that she had driven by his workplace and shown up at the gate of his residential community. (See *Polakoff v. Polakoff*, *supra*, B246029, at pp. 4-5.) Sacha testified that Jeremy was presently attending St. Catherine's Academy in Anaheim and seeing a therapist on a weekly basis.

Following the hearing, the trial court granted a restraining order against Nathalie in favor of Sacha and his current wife. It declined to include Jeremy as a protected person under the restraining order. The court expressed its belief that the current custody and visitations orders were appropriate, noting that Jeremy's situation had improved. Nathalie appealed, and we affirmed, finding substantial evidence supported the court's order granting a restraining order under the DVPA.

B. *Underlying Proceedings*

On June 9, 2015, Nathalie filed a request to dissolve the restraining order. She argued that Sacha had obtained the restraining order based on false and "manufactured" evidence. Nathalie also sought "reunification" and joint legal custody of Jeremy. She asserted that the restraining order was a "de facto order restraining [her] from having any contact whether it be face-to-face, telephonically, electronically, or by any other means, with her son Jeremy,

now age 15, for the past four years." (Italics omitted.) Nathalie sought to depose Sacha to obtain information about Jeremy's current location and status. Finally, she sought enforcement of allegedly delinquent spousal support (totaling $5,750 in arrears as of mid-June 2015), restoration of spousal support to $2,000 per month, and attorney fees for the pending motions.

At the July 17, 2015 hearing on Nathalie's various requests, her counsel stated he wanted to have "reunification starting at once" because Jeremy's brother would be returning from college the following week. "So I would like to have them get together before the expiration of next week so that you have that contact and then they can continue telephonically." He further stated that he wanted to have the relationship between Nathalie and Jeremy restored, "to have Nathalie have nonovernight visitation at least once a week for the next month or two months -- and she will be the best evaluator of how that's working. I expect it will work based on what the relationship has been -- and then proceed as any other visitation order in this building in a standard schedule." Counsel stated he understood that "to immediately have overnight visitation is going to be awkward," but asserted that "there is no conceivable reason of which I am aware . . . why this mother cannot be reunited with her son at this time on a gradual basis, weekly basis, and then proceed as one normally proceeds in this building with scheduled visitation."

Following the hearing, the trial court granted the request to enforce delinquent spousal support, but denied all other requests. Specifically, the court denied the request to dissolve the restraining order under Code of Civil Procedure section 533, determining that Nathalie had failed to meet her burden to show a change in facts, a change in the law, or that the ends of justice would be served. The court denied Nathalie's request for joint custody of Jeremy, determining that she had failed to rebut the presumption set forth in section 3044 against granting joint custody when there is a restraining order against one of the parties. It denied Nathalie's request to cross-examine Sacha about Jeremy's whereabouts due to the restraining order, finding "no legal basis requiring Mr. Polakoff to provide Jeremy's location to [Nathalie]." The court also denied the request for immediate visitation.

On September 17, 2015, Nathalie noticed an appeal from the trial court's order.

DISCUSSION

As an initial matter, we note that Nathalie appeals only from the trial court's rulings denying her requests for joint legal custody and immediate visitation. Accordingly, we focus on her challenges to those rulings.

"'The standard of appellate review of custody and visitation orders is the deferential abuse of discretion test.'" (*Montenegro v. Diaz* (2001) 26 Cal.4th 249, 255 (*Montenegro*), quoting *In re Marriage of Burgess* (1996) 13 Cal.4th 25, 32

(*Burgess*).) Generally, a trial court abuses its discretion if there is no reasonable basis to conclude the court's decision would advance the best interest of the child. (*In re Marriage of Melville* (2004) 122 Cal.App.4th 601, 610; see also § 3040, subd. (c) ["the court and the family [have] the widest discretion to choose a parenting plan that is in the best interest of the child"].) Factors that may be considered in determining the best interest of the child include "the child's health, safety, and welfare, any history of abuse by one parent against any child or the other parent, and the nature and amount of the child's contact with the parents." (*In re Marriage of Brown & Yana* (2006) 37 Cal.4th 947, 956; see also § 3011 [same].)

A. *The Trial Court did not Abuse its Discretion in Denying Nathalie's Request to Modify the Existing Custody Order.*

With respect to custody orders, our Supreme Court has articulated "a variation on the best interest standard once a final judicial custody determination is in place. Under the so-called changed circumstance rule, a party seeking to modify a permanent custody order can do so only if he or she demonstrates a significant change of circumstances justifying a modification." (*Montenegro*, *supra*, 26 Cal.4th at p. 256.) As the court has explained: "The changed-circumstance rule is not a different test, devised to supplant the statutory test, but an adjunct to the best-interest test. It provides, in essence, that once it has been established that a particular custodial arrangement is in the best interests of

the child, the court need not reexamine that question. Instead, it should preserve the established mode of custody unless some significant change in circumstances indicates that a different arrangement would be in the child's best interest." (*Burchard v. Garay* (1986) 42 Cal.3d 531, 535; accord *Montenegro*, *supra*, 26 Cal.4th at p. 256.) Put simply, "a child should not be removed from prior custody of one parent and given to the other "'unless the material facts and circumstances occurring subsequently are of a kind to render it essential or expedient for the welfare of the child that there be a change.'"" (*Burgess*, *supra*, 13 Cal.4th at p. 38, quoting *In re Marriage of Carney* (1979) 24 Cal.3d 725, 730.)

In addition, "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." (§ 3044, subd. (a).) Under section 3044, "a person has 'perpetrated domestic violence' when he or she is found by the court . . . to have engaged in any behavior involving, but not limited to, threatening, . . . harassing, . . . 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 . . . ." (§ 3044, subd. (c).) In determining whether the presumption set forth in section 3044 has been overcome, the court shall consider, among other grounds, "[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, 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." (§ 3044, subd. (b)(1).) The court shall also consider "[w]hether the perpetrator is restrained by a protective order or restraining order, and whether he or she has complied with its terms and conditions." (§ 3044, subd. (b)(6).)[4]

Here, pursuant to an August 23, 2011 court order, Sacha was awarded sole custody of Jeremy. In November 2012, the trial court granted Sacha's motion for a restraining order against Nathalie under the DVPA. In granting the restraining order, the court found that Nathalie had engaged in conduct enjoined by section 6320. (See *Polakoff v. Polakoff*, *supra*, B246029, at pp. 6, 8-10; see also § 6320, subd. (a) ["The court may issue an ex parte order enjoining a party from . . . harassing, telephoning, including, but not limited to, making annoying telephone calls as described in Section 653m of the Penal Code, . . . or disturbing the peace of the other party, and, in the discretion of the court, on a showing of good cause, of other named family or household members."].) Thus, Nathalie "perpetrated domestic violence" against Sacha, as that phrase is defined under section 3044,

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[4] The other factors set forth in section 3044, subdivision (b) are not relevant.

subdivision (c). Accordingly, in order to modify the 2011 custody order and gain joint custody of Jeremy, Nathalie had the burden of (1) overcoming the presumption in section 3044 against a perpetrator of domestic violence; and (2) demonstrating a significant change in circumstances. The court found Nathalie failed to meet her burden on these two issues, and we conclude it did not abuse its discretion in making those determinations.

With respect to overcoming the presumption set forth in section 3044, Nathalie's moving papers challenged the trial court's order granting the restraining order. However, this court had previously upheld that order. The existence of a valid restraining order militates against the award of joint custody. (See § 3044, subd. (b)(6).) On appeal, she again challenges the propriety of the restraining order, but presents no arguments to rebut the presumption in section 3044. We agree with the trial court that Nathalie failed to rebut the presumption.

Nathalie contends that she could have produced evidence to rebut the presumption, but that the trial court abused its discretion in precluding her from cross-examining Sacha about Jeremy's whereabouts and condition and presenting testimony from Jeremy's adult siblings that they had not had contact with their brother for many years. However, frequent contact with adult siblings is not a factor the court must consider in determining whether the presumption has been rebutted. (See § 3044, subd. (b).) As to Jeremy's whereabouts and condition, those factors have

little, if any, relevance to whether joint custody would be in his best interest. As stated above, under section 3044, subdivision (b)(1), the preference for frequent and continuing contact with both parents may not be used to rebut the presumption, in whole or in part. In short, the trial court did not abuse its discretion in denying Nathalie's requests to cross-examine Sacha and to call Jeremy's adult siblings to testify.

As to demonstrating a significant change in circumstances warranting a modification of the custody order, Nathalie's sole argument is that the restraining order effectively barred her from any contact with her son, as the order prevented her from questioning Sacha about Jeremy's whereabouts. Although not stated clearly, Nathalie appears to be arguing that the continuing frustration of her "constitutional right to have access to her son" constitutes a significant change in circumstances. (Cf. *Mark T. v. Jamie Z.* (2011) 194 Cal.App.4th 1115, 1131, italics omitted ["'"Conduct by a custodial parent designed to frustrate visitation and communication may be grounds for changing custody"'"].) As noted, this court previously rejected Nathalie's challenges to the restraining order. Moreover, as explained in greater detail below, the operative visitation order contemplated that Nathalie would have monitored visits with Jeremy, scheduled in accordance with the advice and recommendation of Jeremy's therapist (or psychiatrist) to Nathalie's counsel. The restraining order prohibiting Nathalie from contacting Sacha did not deny her access to

her son. In short, the trial court did not err in finding that Nathalie had failed to demonstrate a significant change in circumstances warranting modification of the August 23, 2011 custody order.

B. *The Trial Court did not Abuse its Discretion in Denying Nathalie's Request to Modify the Existing Visitation Order.*

Nathalie contends the trial court abused its discretion in denying her request for immediate, unmonitored, nonovernight visits with Jeremy. We disagree. The appellate record shows that after considering Jeremy's best interest, the trial court granted monitored visitation to Nathalie per the advice and recommendation of his therapist or psychiatrist. Nathalie did not demonstrate that a modification of the visitation order would be in Jeremy's best interest.

The appellate record shows the following. In February 2011, the trial court approved an agreement between the parties for Nathalie to contact Jeremy via Skype every Saturday, and it granted Nathalie physical visitation per the advice and recommendation of Jeremy's therapist. In May 2011, the court ordered the Skype calls suspended temporarily, based on a letter from Jeremy's therapist that the calls were having an adverse impact on the boy. In its August 23, 2011 order, the court granted Nathalie monitored visits with Jeremy per the recommendation of Jeremy's therapist or psychiatrist. The court noted it had received a letter from Jeremy and his therapist stating that Jeremy did

not want to see Nathalie. There is no record of a notice of an appeal of the August 23, 2011 visitation order. Nor is there anything in the record demonstrating that Jeremy's therapist or psychiatrist refused to provide Nathalie's counsel with their advice and recommendation on monitored visits. Indeed, in the underlying proceedings, Nathalie did not mention Jeremy's therapist or psychiatrist when she sought immediate and unmonitored visits.

As the foregoing shows, the trial court found that it was in Jeremy's best interest for Nathalie to have monitored visits in accordance with the advice and recommendation of his therapist or psychiatrist. The court's visitation order, now final, was based on substantial evidence that contact between Nathalie and Jeremy was having an adverse impact on Jeremy's condition and therapy. Nathalie did not demonstrate that modification of the August 23, 2011 visitation order was in Jeremy's best interest. She did not show that the visitation order frustrated her "constitutional right to have access to her son." More important, she did not show that her visits would not have an adverse impact on Jeremy, let alone that such visits should begin immediately or be unmonitored. On this record, we find no abuse of discretion in the trial court's denial of Nathalie's request for immediate, unmonitored visits with Jeremy.

DISPOSITION

The order is affirmed. Respondent is awarded his costs on appeal.

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MANELLA, J.

We concur:

WILLHITE, Acting P.J.

COLLINS, J.