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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

NANCY R.,

Appellant,

v.

JUAN V.,

Respondent.

B280324

(Los Angeles County  
Super. Ct. No. BQ055131)

APPEAL from an order of the Superior Court of Los Angeles County, James E. Blancarte, Judge. Reversed with directions.

Los Angeles Center for Law & Justice, Carmen McDonald, Sarah Reisman and Erika J. Diaz; Gibson, Dunn & Crutcher, Timothy W. Loose, Michael Holecek and Gregory S. Bok for Appellant.

No appearance for Respondent.

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## I. INTRODUCTION

Nancy R. (Mother) appeals from an order granting her and Juan V. (Father) joint legal custody of their child, 18-month-old Jamie V. The trial court granted Mother a one-year domestic violence restraining order against Father. But the trial court granted the parents joint legal custody because it found Father rebutted the presumption in Family Code section 3044, subdivision (a)<sup>1</sup> that an award of legal custody to a parent who has committed domestic violence is detrimental to a child's best interest.

Mother contends the trial court abused its discretion by failing to consider the statutory factors in Family Code section 3044, subdivision (b) before awarding joint legal custody to Father. In addition, she asserts the trial court did not state its reasons in writing or on the record as required by section 3011, subdivision (e)(1) when it determined Father rebutted the section 3044 presumption. Furthermore, Mother argues the trial court erroneously awarded joint legal custody based on its policy that children should grow up knowing both parents.

We agree the trial court abused its discretion by failing to consider the relevant factors in section 3044, subdivision (b) and not stating its reasons for concluding Father rebutted the section 3044 presumption. To the extent the trial court found Father rebutted the section 3044 presumption because of the general preference for frequent and continuing contact with the

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<sup>1</sup> Further statutory references are to the Family Code unless otherwise noted.

noncustodial parent, this is impermissible under section 3044, subdivision (b)(1). We reverse the custody order. We remand the matter to the trial court to expressly consider the factors in section 3044, subdivision (b) to determine whether Father has rebutted the section 3044 presumption by a preponderance of the evidence.

## **II. FACTUAL BACKGROUND**

### *A. Parties' Relationship*

Mother and Father first met as coworkers in 2012. They began dating in 2013 and later moved in together. Mother gave birth to their daughter Jamie on December 29, 2014. Mother testified Father insulted her by calling her “crazy,” “stupid” and “old” during their relationship. According to Mother, in July 2016, she noticed a change in Father’s behavior. On some occasions, she observed he had “red eyes, slow speech, decreased appetite, and . . . his mouth sometimes twitched.” In addition, she found “a small plastic bag containing a white substance in the drawers underneath the bed . . . as well as a pipe in the locked storage shed behind [their mobile] home.” Father denied using drugs. He admitted he and Mother had smoked marijuana in the past but claimed that they stopped after the birth of their daughter.

### *B. August 19, 2016 Incident*

Mother testified that on August 19, 2016, she asked Father why he came home from work late and if he was seeing someone

else. According to Mother, Father admitted he had been unfaithful and said he regretted being with her. Father testified Mother accused him of cheating but he “denied everything because that never happened.” After their verbal exchange, the Father locked himself in a bedroom with their daughter. Mother decided to end her relationship with Father and began packing his belongings. She knocked on the door and asked Father to leave. He came out of the room with the child in his arms. When she went into the room to collect Father’s clothing, he grabbed her by the hair and then by her blouse. Father then grabbed her by the neck with one arm and choked her while holding their daughter in his other arm.<sup>2</sup> After Mother freed herself from his grasp, Father called the paternal grandmother and maternal aunt. The paternal grandmother arrived and Mother told the paternal grandmother that Father had hit her. The paternal grandmother told the Mother she was crazy. As Father started recording Mother with his cell phone, Mother took it away from him. The paternal grandmother grabbed Mother’s arms and started insulting her. Afterwards, Father left to look for the maternal aunt.

Later, Mother called 911 to report the incident. Because she did not speak English she could not communicate with the police when they arrived; however, the police officers spoke with Father and the paternal grandmother. Eventually, a Spanish speaking police officer spoke to Mother and told her that Father had a right to get his clothes. Mother did not tell the police officer about what happened because she was “very nervous, shaking, [and] crying.” Father left that night with their

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<sup>2</sup> At the time, Mother was pregnant with their second child.

daughter. The next day, Mother took pictures of the injuries to her neck on the advice of her coworker.

Father offered a different account of the August 19, 2016 incident. He testified that when he was in the room with their daughter, Mother banged on the door and yelled and cursed at him for about two hours. When she stopped he stepped out of the room to get some milk for their daughter. While he was preparing a bottle of milk, Mother came towards him with a bag full of his personal belongings. He testified she “started screaming at me, insulting me, pushing me around, telling me I had to leave.” He begged her to stop and calm down. Instead, Mother slapped him and scratched his arm. He called the maternal aunt for assistance.<sup>3</sup> The maternal aunt did not answer her cell phone so he called the paternal grandmother, who later came to the home. Mother told the paternal grandmother that Father had hit her. When Father attempted to record Mother with his cell phone, she snatched it away from him and put it in her underwear. Next, Father left the home and went to the maternal aunt’s house and left her a note asking her to talk to Mother. Afterwards, he walked over to the paternal grandmother’s house and called the police. The police arrived and escorted him back to Mother’s home so he could retrieve his personal belongings. He was not arrested, and he moved out of the home that day.

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<sup>3</sup> Father testified that the maternal aunt would sometimes help him calm Mother down.

### *C. August 29, 2016 Incident*

Mother testified that on August 29, 2016, Father came to her home and tried to take their sleeping child. (Father testified Mother had given him permission the day before to see their daughter.) When Father used his cell phone to record her, she admitted she took it from him and broke it. After Father left with their daughter, she called the police. A police officer accompanied Mother to Father's house so she could retrieve the child. The police officer advised Mother to seek a restraining order against Father.

### *D. Mother's Request for a Restraining Order*

Mother filed a request for a domestic violence restraining order on September 2, 2016. She requested an order requiring Father to stay away from her, her children, her home, her workplace and her vehicle. In support of the request, Mother submitted a declaration and pictures of the injuries she sustained to her neck. The trial court granted a temporary restraining order on September 8, 2016.

On October 27, 2016, Mother filed a supplemental declaration in support of her request for a permanent restraining order and for sole legal and physical custody of the child. In her supplemental declaration, she denied Father's assertion that she pushed, slapped and scratched him. Further, Mother expressed concern about physical injuries their daughter sustained while in the care of the paternal grandmother. In early 2016, the Mother noticed a welt on the child's leg after picking her up from the paternal grandmother's house. The paternal grandmother did

not take the child to the doctor after the child sustained a burn. Mother applied aloe vera and the injury healed, but the child was left with a permanent scar on her leg. Father admitted the scar on the child's leg was from a burn she sustained when the paternal grandmother spilled hot soup on the minor while holding her. More recently, Mother noticed a circular mark on the child's leg when the minor returned from Father's home on August 21, 2016.

*E. Photograph Sent to Coworkers*

Mother testified Father sent to her coworkers a photograph of her partially naked that he had taken when they first dated. She further testified that he was the only person who had access to the photograph and that she did not give him permission to share it with anyone. Mother felt sad and wanted to cry because her coworkers stared at her at work after he sent the photograph.

*F. Hearing on Custody and Restraining Orders*

On November 21, 2016, the trial court held a hearing on Mother's request for a permanent restraining order and sole legal and physical custody of the child. The parties testified and Mother submitted photographs showing the bruises on her neck.

Before ruling on the permanent restraining order, the trial court decided the custody issue. The trial court explained: "I'm going to go to the issue of child custody and visitation before ruling on the domestic violence petition. And the reason why I am going to go to child custody and visitation is because it will

have a direct impact on whatever ruling I make with regard to the petition for permanent domestic violence restraining order[].”

The trial court acknowledged, “[W]hen there is allegations of domestic violence, under certain circumstances and facts, there is a presumption that the biological father might not be eligible for visitation or legal custody . . . .” The trial court then found Father presented sufficient evidence to rebut the presumption that he is not entitled to visitation and legal custody. The trial court stated: “I am convinced that [Father] sincerely wants to be in [the child’s] life. His testimony is that he made multiple doctor visits with the child, it’s denied by the petitioner and I don’t know that between the two of you I am able to discern who is more truthful. [¶] Nonetheless, I do believe that [Father] is sincere about wanting to be in this child’s life and the court has a policy that minor children should grow up knowing that they have a mother and father. . . . [L]egal custody is awarded to the parent, or in cases to both parents, who are going to be responsible for the health, the education and general welfare of the minor child. [¶] I have no doubt that [Mother] is completely dedicated to the health and education of [the child]. The question is whether or not she should be solely responsible for those important factors in a minor’s life when there is a biological father, for whatever else I decide happened or didn’t happen in their lives, wants to be in [the child’s] life.” Mother was awarded physical custody with Mother and Father sharing joint legal custody.

Next, the trial court ruled on Mother’s request for a permanent domestic violence restraining order. The trial court stated; “Based on the testimony of the parties, I do not have what I would consider to be a preponderance of the evidence to grant the petitioner’s request for permanent domestic violence



restraining orders. [¶] So I go back to the evidence that I do have, above and beyond the testimony there has been no way for me to believe that photos of [Mother] in a compromising position would have made their way to her co[]workers other than through her testimony and belief that they came from [Father]. [¶] The photos [of] her neck seem to be consistent with testimony of a chokehold and the scratches on [Father's] arms allow me to draw an inference as to whether or not they came from [Mother] trying to break out of the chokehold where she said she grabbed his arm and pushed him away. [¶] I find that that's a mere preponderance of the evidence, an emphasis on the word 'mere.' It is a mere preponderance of the evidence, it is more than 51 percent, but not overwhelming amount of evidence."

The trial court granted Mother a one-year permanent domestic violence restraining order. Father was ordered to stay 100 yards away from Mother but was allowed to have "brief and peaceful contact" as required for visitation of the child. Father was prohibited from communicating about Mother with their supervisor and coworkers.

### III. DISCUSSION

#### A. *Standard of Review*

We review custody and visitation orders for an abuse of discretion. (*In re Marriage of Fajota* (2014) 230 Cal.App.4th 1487, 1497; *In re Marriage of Burgess* (1996) 13 Cal.4th 25, 32.) The trial court's factual findings are reviewed for substantial evidence. (*Celia S. v. Hugo H.* (2016) 3 Cal.App.5th 655, 662 (*Celia S.*); *In re Marriage of Fajota, supra*, 230 Cal.App.4th at p.

1497.) “A court abuses its discretion in making a child custody order if there is no reasonable basis on which it could conclude that its decision advanced the best interests of the child.” (*In re Marriage of Fajota, supra*, 230 Cal.App.4th at p. 1497.)

“A court also abuses its discretion *if it applies improper criteria or makes incorrect legal assumptions.*” (*In re Marriage of Fajota, supra*, 230 Cal.App.4th at p. 1497; accord, *Celia S., supra*, 3 Cal.App.5th at p. 662.) “If the court’s decision is influenced by an erroneous understanding of applicable law or reflects an unawareness of the full scope of its discretion, the court has not properly exercised its discretion under the law.” (*Farmers Ins. Exchange v. Superior Court* (2013) 218 Cal.App.4th 96, 106.) “The question of whether a trial court applied the correct legal standard to an issue in exercising its discretion is a question of law (citation) requiring de novo review.” (*Eneaji v. Ubboe* (2014) 229 Cal.App.4th 1457, 1463, citations omitted; accord, *Rodriguez v. Menjivar* (2015) 243 Cal.App.4th 816, 821.)

*B. The Trial Court Abused Its Discretion By Awarding Joint Legal Custody Without Requiring Father to Rebut Section 3044 Presumption*

“[A] finding of domestic abuse sufficient to support a [Domestic Violence Prevention Act] restraining order necessarily triggers the presumption in section 3044.” (*S.M. v. E.P.* (2010) 184 Cal.App.4th 1249, 1267; accord, *Christina L. v. Chauncey B.* (2014) 229 Cal.App.4th 731, 736 (*Christina L.*)). Section 3044, subdivision (a) establishes a rebuttable presumption that an award of sole or joint physical or legal custody to a parent who has committed domestic violence is detrimental to a child’s best interest. (*Celia S., supra*, 3 Cal.App.5th at p. 661; *Ellis v. Lyons*

(2016) 2 Cal.App.5th 404, 416-417 (*Ellis*).) Section 3044, subdivision (a) provides: “Upon a finding by the court that a party seeking custody of a child has perpetrated domestic violence against the other party seeking custody of the child or against the child or the child’s siblings within the previous five years, there is a rebuttable presumption that an award of sole or joint physical or legal custody of a child to a person who has perpetrated domestic violence is detrimental to the best interest of the child, pursuant to Section 3011. This presumption may only be rebutted by a preponderance of the evidence.” As explained in *Christina L.*, *supra*, 229 Cal.App.4th at page 736, “This presumption changes the burden of persuasion, but ‘may be overcome by a preponderance of the evidence showing that it is in the child’s best interest to grant joint or sole custody to the offending parent.’ [Citations.]”

Section 3044, subdivision (b) states: “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 trial court ruled Father rebutted the section 3044 presumption. But before doing so it failed to expressly consider the statutory factors set forth in section 3044, subdivision (b). (*Ellis, supra*, 2 Cal.App.5th at p. 417; *In re Marriage of Fajota, supra*, 230 Cal.App.4th at p. 1498 [court must apply presumption to parent who perpetrates act of domestic violence against other parent].) “Before reaching any final custody decision, the court should conduct a detailed review of the evidence presented at trial and carefully weigh *all* of the relevant factors required by section 3044.” (*Keith R. v. Superior Court* (2009) 174 Cal.App.4th 1047, 1057; accord, *F.T. v. L.J.* (2011) 194 Cal.App.4th 1, 28.) Here, the trial court abused its discretion by not applying the section 3044 presumption that it would be detrimental to the children’s best interest to award Father joint legal custody. (*In re Marriage of Fajota, supra*, 230 Cal.App.4th at pp. 1499-1500.)

Furthermore, “[i]f 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.)

Instead of reviewing the evidence and weighing the relevant factors in section 3044, subdivision (b), the trial court simply concluded Father “made a showing sufficient to rebut the presumption” that joint legal custody would be detrimental to the child’s best interest. The trial court erred by failing to state the reasons in writing or on the record for its ruling on the statutory factors in section 3044, subdivision (b). (§ 3011, subd. (e)(1); *Celia S.*, *supra*, 3 Cal.App.5th at p. 662.)

The trial court’s stated reason for awarding joint legal custody was its belief that Father was “sincere about wanting to be in this child’s life and the court has a policy that minor children should grow up knowing that they have a mother and a father.” To the extent the trial court found Father rebutted the section 3044 presumption because of its “policy that minor children should grow up knowing” both parents, this is impermissible under section 3044, subdivision (b)(1). Section 3044, subdivision (b)(1) states in relevant part: “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.” The trial court’s erroneous understanding of the applicable law is an abuse of discretion. (*Celia S.*, *supra*, 3 Cal.App.5th at p. 662 [section 3044 prohibits consideration of preference for frequent and continuing contact with noncustodial parent]; *Ellis*, *supra*, 2 Cal.App.5th at pp. 417-418.)

#### IV. DISPOSITION

The custody order is reversed. The matter is remanded to the trial court to expressly consider the factors in section 3044, subdivision (b) to determine whether Father has rebutted the section 3044 presumption by a preponderance of the evidence. Mother, Nancy R., shall recover her costs on appeal.

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LANDIN, J.\*

We concur:

KRIEGLER, Acting P.J.

BAKER, J.

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