Filed 6/28/18 Burgos v. Raad CA2/1

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

EVIS DESHA BURGOS, Plaintiff and Appellant, v. ELIAS GEORGE RAAD, Defendant and Respondent.	B271392 (Los Angeles County Super. Ct. No. BD588626)

APPEAL from a judgment of the Superior Court of Los Angeles County, Carl H. Moor, Judge. Affirmed.

Law Offices of Charles O. Agege and Charles O. Agege for Plaintiff and Appellant.

No appearance for Defendant and Respondent.

Evis Desha Burgos appeals a judgment awarding primary physical and joint legal custody of her daughter Sarah to her ex-husband, respondent Elias George Raad, entered after a bifurcated trial on custody and visitation during proceedings to dissolve the Burgos-Raad marriage. Ms. Burgos contends that substantial evidence does not support the judgment and the trial court abused its discretion in denying her requests for genetic testing and a continuance of trial.

We affirm the judgment. Although there was conflicting testimony, substantial evidence supported the trial court's core findings that Ms. Burgos had taken Sarah excessively to emergency room and urgent care visits, without meaningfully addressing any potential health issues, failed to ensure that Sarah regularly attended school on time, and fomented conflict between the parents in ways detrimental to Sarah. The trial court reasonably found that these factors, demonstrating that custody by Mr. Raad was in Sarah's best interest, rebutted the presumption under Family Code section 3044 that sole or joint custody by a domestic violence perpetrator is detrimental to a child. The trial court also reasonably concluded that granting a single parent custody during the school week would create a more stable environment for the child.

The trial court did not abuse its discretion in refusing Ms. Burgos's request for genetic testing because it would have delayed the trial and, as a matter of law, a finding that Mr. Raad was not Sarah's biological father would not have negated his presumed fatherhood. The trial court likewise did not abuse its discretion in denying Ms. Burgos's application for a continuance of trial because she made only conclusory assertions that

substitution of her counsel was required in the interest of justice and she failed to apply for the continuance as soon as practicable.

FACTUAL AND PROCEDURAL HISTORY

A. Pretrial History

Ms. Burgos and Mr. Raad were married in 2001. On March 10, 2007, Ms. Burgos gave birth to Sarah, who was eight years old at the time of the bifurcated trial on custody and visitation.

On September 3, 2013, Mr. Raad and Ms. Burgos had an altercation at the family home, which Ms. Burgos reported to the Lost Hills Sheriff's station that same evening. After interviewing both parties, the investigating deputy concluded that Ms. Burgos was "the most dominant aggressor during the incident." She was jailed overnight, and an emergency protective order was issued, requiring her to stay 100 yards from Mr. Raad and granting him temporary care and control of Sarah.

After her release from jail, Ms. Burgos sought and on September 11, 2013 obtained a temporary restraining order (TRO) against Mr. Raad, requiring him to move out of the home. Mr. Raad was denied both custody and visitation with Sarah at that time. Ms. Burgos also filed a petition for dissolution of the marriage on September 11, 2013.

By a stipulation entered by the trial court on October 29, 2013, Mr. Raad was permitted visitation with Sarah on Sundays from 1:00 to 5:00 p.m., while Ms. Burgos retained sole legal and physical custody. The stipulation also

provided that Mr. Raad would pay child support, spousal support, and attorney fees.[1]

Following a hearing on January 30, 2014, the trial court found Ms. Burgos had proved by a preponderance of the evidence that Mr. Raad had committed domestic abuse against her and granted a three-year domestic violence restraining order. Mr. Raad was ordered not to come within 100 yards of Ms. Burgos, except to go to Sarah's school, which was across the street from the family home.

On March 17, 2014, Mr. Raad filed a request for an order vacating the restraining order and temporarily transferring primary custody of Sarah to him or, if custody was not changed, expanding his visitation.[2] The request also sought, among other things, appointment of minor's counsel to represent Sarah, an immediate physical examination of Sarah by her pediatrician, removal of a man and woman (Michael Scott and Mrs. White) allegedly living in the family home, and a psychological evaluation of Ms. Burgos. Mr. Raad alleged numerous incidents of domestic violence against him by Ms. Burgos prior to the

---

[1] Mr. Raad subsequently sought to have the stipulated order set aside, contending that he had not agreed to certain provisions and certain pages of the purported stipulation did not contain his or his attorney's initials. Ms. Burgos's opposition included her declaration alleging that Mr. Raad had cut off her access to cash and credit cards, made late mortgage payments, and failed to pay for utilities at the family home.

[2] His filing was styled as both an ex parte application and a request for an order after hearing.

September 3, 2013 episode,[3] verbal abuse by Ms. Burgos in court and at exchanges of Sarah, and missed visitations on the pretext that Sarah was ill.

Mr. Raad further alleged that Ms. Burgos had hired Mr. Scott as a security guard and that he lived in the house, installed cameras around the property, "began a campaign of harassing and intimidating anyone Desha asked him to," "brandished a concealed handgun," and threatened Mavis McConnon, Ms. Burgos's next-door neighbor and Mr. Raad's lover. Mr. Raad alleged that Mr. Scott walked Sarah to school and had "bugged" the child with taping devices. According to Mr. Raad, Mr. Scott had been arrested for having a concealed firearm while driving in the neighborhood at 2:00 a.m. Mr. Raad noted that Sarah had missed 13 days of school and had been to the emergency room six times since her parents' separation—but not to her regular pediatrician.

Ms. Burgos responded with an opposition to Mr. Raad's request and an ex parte application of her own, asking that Mr. Raad be "restrained from seeking any relief from the court until such time as he is in full compliance with the stipulated court order entered on October 29, 2013." Ms. Burgos alleged that Mr. Raad filed his application simply to harass her and that he was using Ms. McConnon as a "proxy" to harass her at home—by spying on her, taking pictures of Sarah, and interrogating her visitors. Ms. Burgos denied ever threatening Ms. McConnon, and attributed her reliance on urgent care facilities, rather than Sarah's regular pediatrician, to her strained finances. A

---

[3] Mr. Raad did not include these allegations of abuse in his trial testimony.

declaration by her attorney alleged that Mr. Raad had not paid Ms. Burgos the $3,500 per month in child support ordered on October 29, 2013.

The documents filed by the parties show that Mr. Raad had filed an order to show cause on February 6, 2014, alleging numerous missed visitations. Mavis McConnon had requested and received a civil harassment restraining order against Ms. Burgos on December 4, 2013. Ms. McConnon alleged that Ms. Burgos had been verbally belligerent, and aggressive, "obsessive and manic." Ms. McConnon stated she feared Ms. Burgos would become violent because Ms. McConnon was a witness for Mr. Raad in relation to the domestic violence restraining order.

Ms. McConnon had also received a temporary restraining order against Mr. Scott on March 13, 2014. Mr. Scott submitted declarations stating that he did not live at Ms. Burgos's home and had never threatened Mr. Raad or Ms. McConnon. He echoed Ms. Burgos's allegations that Ms. McConnon took photographs of people associated with Ms. Burgos and said that both Ms. McConnon and Mr. Raad engaged in verbal taunting and other conduct intended to provoke him and Ms. Burgos, especially at the exchanges of Sarah, which took place at the Lost Hills Sheriff's station. Mr. Scott explained that he walked Sarah to school to enable Ms. Burgos to avoid contact with Ms. McConnon, who allegedly made a habit of "stalking" Ms. Burgos and Sarah.

Mr. Scott alleged that Ms. McConnon repeatedly made false accusations, including to the Lost Hills Sheriff's station. He attached letters from law enforcement agencies thanking him for training sessions, but acknowledged that he had been arrested in

the very early morning on March 3, 2013, while leaving the family home, in what he characterized as a "guns-drawn, felony stop." The record shows that he was charged with carrying a dagger and a stun gun, in violation of Penal Code sections 21310 and 22610(A). He pleaded nolo contendre to violating section 21310.

Before the March 17 requests were heard, Mr. Raad filed an order to show cause re contempt on April 4, 2014, again alleging missed visitations.

On April 24, 2014, the trial court dismissed without prejudice Mr. Raad's order to show cause re contempt, and denied his request to set aside the October 29, 2013 stipulation and order. It denied his March 17, 2014 requests—except that Mr. Raad's visitation was increased to visitation from Friday to Monday on the first, third, and fifth weekends of the month. The trial court also denied Ms. Burgos's March 17, 2014 requests—except that it ordered that Ms. McConnon not be present at any exchanges of Sarah.

Mr. Raad again made an ex parte application for modification of visitation and custody on May 8, 2014. He repeated many of his previous allegations and specific requests, adding a request that Ms. Burgos be limited to professionally monitored day visits with Sarah. He claimed that Ms. Burgos had "perpetrated the crime of premeditated medical child abuse on Sarah."

In support of these allegations, Mr. Raad submitted records of Sarah's medical visits and an article on "Munchausen Syndrome by Proxy in False Allegations of Child Sexual Abuse." He also submitted a declaration from Sarah's pediatrician, Robert C. Hamilton, M.D., stating that Sarah was "a healthy, well

developed girl with no noted behavioral or physical health issues." Dr. Hamilton explained that on September 7, 2013—four days after the domestic violence incident—Ms. Burgos came in to his office with Sarah and recounted an incident in an Albertson's during which Mr. Raad allegedly touched Sarah's buttocks while pulling up her pants; Ms. Burgos "spoke about it as though it was a sexual abuse" and asked Dr. Hamilton to document it. He made a note in the file but felt the claim was "unlikely," given the public location. Mr. Raad also included a declaration from Boonclaire Siengthai Papale, M.D. Dr. Papale had written a letter on December 16, 2013, stating that she understood from Ms. Burgos that Sarah and Ms. Burgos had been victims of abuse by Sarah's father and recommending Sarah's visits with her father be monitored. Her declaration clarified that she had relied on Ms. Burgos's account and that Sarah had not confirmed any abuse.

The trial court denied Mr. Raad's request on May 8, 2014, finding that Mr. Raad had not made the "showing of immediate harm to the child or immediate risk that the child will be removed from the State of California," as required for modification of a custody order on an ex parte basis. (See Fam. Code, § 3064, subd. (a).) Mr. Raad filed still further requests for modification of custody and visitation on July 23, 2014 and October 31, 2014.[4] In a reply declaration filed on December 10, 2014, he alleged that Ms. Burgos had told Sarah, her physicians, her teachers, and neighbors that Mr. Raad

---

[4] A reply declaration by Mr. Raad filed on December 10, 2014 stated that the trial court had yet to hear any of his requests.

was not Sarah's biological father and that her natural father lived in Israel.

On December 17, 2014, the trial court ordered a bifurcated trial on custody and visitation, rather than spend time on an evidentiary hearing for only temporary custody and visitation. The matter was set for trial on February 18, 2015.

The trial apparently did not go forward on February 18, 2015, but was scheduled to begin on April 6, 2015. On March 20, 2015, Ms. Burgos's counsel filed a motion pursuant to *In re Marriage of Borson* (1974) 37 Cal.App.3d 632, stating that he had been informed that he would shortly be substituted out as Ms. Burgos's counsel and seeking payment of his attorney fees by Mr. Raad.

On April 3, 2015, Ms. Burgos, acting in propria persona, requested a continuance of the trial date, shortened time for service and hearing of motions for further discovery, shortened time for service and hearing of a motion to avoid an attorneys' lien on real property, and an order to show cause re contempt regarding Mr. Raad's affidavits about his income and failure to pay the mortgage on the family home. Ms. Burgos alleged that her counsel had been ineffective and she needed discovery to produce evidence that could "fully alter the course of this case." Mr. Raad opposed the request, and the trial court denied it for "no good cause."

B. The Bifurcated Trial on Custody and Visitation

The bifurcated trial on custody and visitation began on April 6, 2015 and included five or six days of testimony and argument. The trial court heard testimony from Karen Nakamatsu, who had conducted a Parenting Plan Assessment (PPA), Ms. Burgos, Mr. Raad, and Milli Bilareo,

who testified very briefly on behalf of Ms. Burgos. It appears that Ms. McConnon testified as well, but the reporter's transcript does not contain her testimony.[5]

1. The Parenting Plan Assessment Report and Recommendations

Ms. Nakamatsu explained that the Parenting Plan Assessment (PPA), including interviews and examination of documents, had occurred on February 17 and 18, 2015.

Ms. Nakamatsu first reported that, in addition to the September 2013 detention, Ms. Burgos had been convicted of an infraction for disobeying the restraining order against her related to Ms. McConnon. There were three DCFS referrals related to Sarah. At the time of the domestic violence incident in September 2013, a referral of general neglect against Ms. Burgos and possible physical abuse, emotional abuse and sexual abuse against Mr. Raad was made, but deemed inconclusive. Referrals of general neglect against Ms. Burgos in February 2014 and against Mr. Raad in June 2014 were closed as unfounded.

Ms. Nakamatsu explained that the PPA was focused on three issues identified by the trial court: (1) possible sexual abuse, (2) domestic violence, and (3) Sarah's health and

---

[5] At the end of the day on April 6, 2015, the trial court stated that the trial would resume on April 13, 2015. The case summary does not indicate that trial was held on that day. It states that it was continued on the "Court's own motion" and the reporter's transcript does not include a transcript for April 13. However, beginning with the April 14 transcript, the parties refer to prior testimony by Ms. McConnon.

emotional issues. She also addressed concerns identified during the assessment itself.

a. Possible Sexual Abuse

Ms. Nakamatsu explained that in the September 2013 DCFS referral, the possible sexual abuse was reported as an incident in a grocery store when Sarah was three. Sarah's pants fell down and, as Mr. Raad pulled them up, his hand brushed her buttocks. Sarah denied any sexual abuse to a social worker, and DCFS did not suspect any wrongdoing. Later, when interviewed by Ms. Nakamatsu, Ms. Burgos claimed that Mr. Raad had inserted his fingers into Sarah's anus. As noted above, Sarah's pediatrician did not believe any sexual abuse had occurred. Ms. Nakamatsu noted that, even during her interview, Ms. Burgos's accounts of the incident repeatedly shifted from a hand brushing the buttocks to insertion of fingers.

b. Domestic Violence

In regard to the September 3, 2013 incident, Ms. Nakamatsu offered her own opinion, based on her review of law enforcement, DCFS and medical records, that Ms. Burgos was the aggressor, but provided no reasons for this opinion. She also noted her concern that on the day Ms. Burgos was released from jail, she went to the emergency room with Sarah and alleged that Mr. Raad had committed domestic violence against her and sexual abuse against Sarah—without informing medical personnel that law enforcement had been involved or that she had been jailed herself. Ms. Nakamatsu additionally noted that Ms. Burgos had told her that she became particularly upset during the incident because Mr. Raad had thrown an aerosol can at her breast while she was undergoing

mammograms and biopsies—but the emergency room records made no note of mammograms or biopsies.

c. Sarah's Health and Emotional Issues

According to Ms. Nakamatsu, Ms. Burgos contended that Sarah experienced "physical and emotional issues" resulting from her interactions with Mr. Raad, while Mr. Raad maintained that the child was developing normally and Ms. Burgos "fabricate[d] and embellishe[d] problems, such as medical issues." Both Sarah's pediatrician's office and school personnel described Sarah as generally healthy, although the pediatrician's office stated that she had not consistently had well child checkups.

Ms. Burgos expressed concerns about possible asthma and respiratory problems, produced many medical records related to urgent care and emergency room visits, and explained that she did not take Sarah to her regular pediatrician, Dr. Hamilton, because Mr. Raad had refused to provide health insurance and to pay bills. Ms. Nakamatsu confirmed with Dr. Hamilton's office, however, that Mr. Raad had advised the office that he would cover the cost of medical bills. Ms. Nakamatsu noted that the school reported that Sarah had not complained of any respiratory difficulties and that Ms. Burgos had not supplied the school with an Albuterol inhaler for use in an emergency.

Ms. Burgos repeatedly insisted to Ms. Nakamatsu that Mr. Raad was not Sarah's biological father and that Sarah's biological father lived in Israel. Ms. Burgos also claimed that she and her child were victims because, as Muslims, Mr. Raad and his family did not respect women and wanted her beaten.[6] Sarah

---

[6] Mr. Raad subsequently testified that he was Catholic.

confirmed that Ms. Burgos had told her Mr. Raad was not her father and stated she had spoken with her "real dad" and had good memories of him. Ms. Nakamatsu appeared to attribute these remarks to Sarah not being "a reliable historian," who even "lied" about a stuffed duck she brought to the interview.

Ms. Nakamatsu characterized Sarah's interactions with her mother as "over-the-top" in trying to prove she loved Ms. Burgos by sitting in her mother's lap, kissing her, and rubbing her face. While Sarah was initially reticent with her father in Ms. Nakamatsu's presence, she relaxed and engaged in conversation and laughter with him. She showed Ms. Nakamatsu videos of herself and friends made at her father's home in which she appeared to be enjoying herself. Sarah grew fearful, however, at the possibility that her mother might see the videos.

Ms. Nakamatsu expressed concern that Sarah's school records showed excessive absences and late arrivals—although she lived across the street from the school. Sarah had problems with her classmates; evidently, she was picked on, but sometimes instigated problems herself.

Ms. Nakamatsu characterized Ms. Burgos as rambling and unfocused; she stated that Ms. Burgos failed to provide direct answers and often changed her story. She stated that "[i]t is difficult to ascertain whether mother truly believes what she says or whether she just sort of begins to escalate as she tells a story." Ms. Nakamatsu recounted that at the end of a long day of a mediation when the parties were close to a stipulated agreement as to custody and visitation, Ms. Burgos was permitted to use a staff restroom at the back of the offices. She then became agitated and distressed and would not leave the restroom for ten

minutes. Ms. Nakamatsu cited this incident, as well as Ms. Burgos's contention that Mr. Raad was not Sarah's biological father, as reasons she was concerned Ms. Burgos would be unable to co-parent with Mr. Raad or support Sarah's relationship with him.

Ms. Nakamatsu's only criticism of Mr. Raad was that he had taken Sarah for a spirometry (breathing) test, without informing Ms. Burgos, when he did not have legal custody.

d. Recommendation

Ms. Nakamatsu noted that she strongly considered recommending that Mr. Raad have sole legal custody and primary physical custody, but did not do so because of the restraining order and her concern that Sarah would have a difficult time making "such an extreme change." She recommended joint legal custody and joint physical custody in which Mr. Raad would have Sarah Monday through Wednesday, and Ms. Burgos would have Sarah Wednesday through Friday and they would alternate weekends.[7] Ms. Nakamatsu also recommended that Sarah continue to see Dr. Hamilton as her primary care physician and not visit multiple health care providers, unless Dr. Hamilton recommended the visits. She additionally recommended that if Sarah were frequently kept from school by alleged illnesses, Dr. Hamilton should provide a letter to the school and the other parent. Ms. Nakamatsu made a number of additional recommendations, including counseling for Sarah, Ms. Burgos, and Mr. Raad.

---

[7] Ms. Nakamatsu referred to this as a "2255 schedule."

2. The Trial Court's Findings and Order

Following the testimony and closing arguments, the trial court awarded joint legal custody to the parents, but gave Mr. Raad exclusive decision-making authority over medical and educational issues. It awarded primary physical custody to Mr. Raad, whose home was to be Sarah's principal residence. Ms. Burgos was to have visitation from Friday to Monday on the first, third, and fifth weekends of the month. The trial court accepted Ms. Nakamatsu's recommendation regarding Dr. Hamilton but did not prohibit Ms. Burgos from taking the child for treatment in emergencies. It ordered that Sarah participate in counseling and recommended, but did not order, that Ms. Burgos have "follow-up counseling" with a licensed therapist who could perform psychological testing. The trial court also made additional orders regarding holidays, school vacations, phone calls, and communication between the parents.

Due to technical mishaps, the entry of judgment on the issue of custody and visitation, and notice of the entry of judgment, were not filed until March 1, 2016. Ms. Burgos timely filed a notice of appeal on April 4, 2016 and filed her opening brief on December 6, 2017. Mr. Raad requested an extension of his briefing deadline on February 14, 2018, which was granted. He never filed a respondent's brief.

DISCUSSION

I. Substantial Evidence Supported the Trial Court's Custody and Visitation Judgment.

Ms. Burgos first argues that the findings leading to the trial court's custody and visitation judgment were not supported by substantial evidence. We disagree.

A. Legal Standards

We review custody and visitation orders for abuse of discretion, and apply the substantial evidence standard to the court's factual findings. (*In re Marriage of Burgess* (1996) 13 Cal.4th 25, 32.) 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 would serve the child's best interests. (*Ibid.*) We must uphold the trial court's ruling if it is correct on any basis, regardless of whether that basis was invoked below. (*Ibid.*)

Our review of the trial court's order is framed by four statutory directives. First, in determining a child's best interests, a court must consider four factors, in addition to any other factors the court finds relevant: (1) "[t]he health, safety, and welfare of the child"; (2) a history of abuse by a parent against any of the following: (a) a child related by blood or affinity or for whom the parent serves as a caretaker, (b) the other parent, (c) the parent's own parent, spouse, or cohabitant, *or* a person with whom the parent has a dating or engagement relationship; (3) the "nature and amount of contact with both parents"; and (4) a parent's habitual or continual illegal use of controlled substances, habitual alcohol abuse, or habitual abuse of prescribed controlled substances. (Fam. Code, § 3011.)

Second, where there has been a finding that a person seeking custody has perpetrated domestic violence against the other party seeking custody, there is a rebuttable presumption that granting sole or joint custody to the perpetrator "is detrimental to the best interest of the child." (Fam. Code, § 3044, subd. (a).) The section 3044 presumption applies here because, in granting the January 2014 restraining order, the trial court

found that Mr. Raad had committed acts of abuse as defined by Family Code section 6203. (See Fam. Code, § 6203.)

The presumption may be rebutted by a preponderance of the evidence. (Fam. Code, § 3044, subd. (a).) In deciding whether the presumption has been rebutted, a court again must consider all of the specified statutory factors: (1) whether the perpetrator of domestic violence has demonstrated that his or her sole or joint custody is in the child's best interest—without factoring in the preference for the frequent and continuing contact with both parents; (2) whether the perpetrator has successfully completed a batterer's treatment program meeting the criteria specified in Penal Code section 1203.097, subdivision (c); (3) whether the perpetrator has successfully completed alcohol or drug abuse counseling, if the court finds it appropriate; (4) whether the perpetrator has completed a parenting class, if the court finds it appropriate; (5) whether the perpetrator is on probation or parole and compliant with the conditions of such probation or parole; (6) whether the perpetrator is the subject of a protective or restraining order and has complied with the conditions of such order; and (7) whether the perpetrator has committed any further acts of domestic violence. (Fam. Code, § 3044, subd. (b).)

Third, California public policy requires that, in all cases, the "health, safety, and welfare" of the child must be the court's primary concern. (Fam. Code, § 3020, subd. (a).) A secondary consideration is the public policy of assuring that children have "frequent and continuing contact with both parents." (Fam. Code, § 3020, subd. (b).)

Fourth, "[i]f a child is of sufficient age and capacity to reason so as to form an intelligent preference as to custody or visitation," the court must give due weight to the child's wishes in

making custody or visitation orders. (Fam. Code, § 3042, subd. (a).)

We shall first address the evidence relating to the child's best interests, then address the domestic violence and additional statutory factors related to the section 3044 presumption, and finally consider issues related to promoting the child's frequent contact with both parents and the child's preference.

B. Substantial Evidence Supported the Finding that the Child's Best Interest Would Be Served by Awarding Primary Physical Custody and Exclusive Decision-Making Authority to Mr. Raad.

1. The Child's Health, Safety and Welfare

a. Medical Issues

Mr. Raad alleged that Ms. Burgos endangered Sarah's health by repeatedly informing health care providers that she had a history of asthma, although there had never been such a diagnosis, which led to Sarah being medicated for a nonexistent problem.

The record showed that during the period following the parents' separation, Ms. Burgos had taken Sarah to multiple medical providers at multiple locations, including emergency rooms and urgent care centers, but Ms. Burgos had not taken Sarah for her well child visits with Dr. Hamilton, the pediatrician who had treated her since birth. Prior to her parents' separation, Sarah had never been to an emergency room. Ms. Burgos attributed her use of multiple medical providers to a lack of health insurance following the separation and additional

financial problems. As noted, however, Ms. Nakamatsu confirmed that Mr. Raad had informed Dr. Hamilton's office to charge him for any medical care, and Mr. Raad testified that his attorney informed Ms. Burgos's attorney of that arrangement.

Ms. Nakamatsu testified that she did not see any actual diagnosis of asthma in Sarah's medical records, only notations that it was the presenting problem. Nor did the school ever notice breathing problems. Ms. Burgos pointed to diagnoses of bronchitis, sinusitis, and other problems, but admitted that Sarah had been treated for asthma for months without a specific diagnosis. Although Ms. Burgos repeatedly took Sarah in for treatment, noting asthma and respiratory problems, she did not follow through with the spirometry test and allergy testing ordered by Dr. Hamilton to determine whether Sarah did in fact have such problems.

By contrast, Mr. Raad had taken Sarah for a well child check-up and spirometer testing; he also purchased a spirometer to monitor Sarah's breathing when she was at his residence. Mr. Raad testified that he never observed Sarah experience any wheezing or breathing difficulties. Ms. Nakamatsu testified that Mr. Raad's comments about Sarah's health were "certainly more in line [than Ms. Burgos's comments] with what the school has observed and what her primary care physician has observed."

Ms. Burgos testified that Sarah had been prescribed the use of Albuterol and other medications. She alleged that a lack of insurance had caused her to ask for a free inhaler from the hospital and prevented her from purchasing more than one or two. She alleged that Sarah told her she did not receive her medicine while at Mr. Raad's residence and Mr. Raad had failed to return an inhaler sent with Sarah. Mr. Raad countered that

he gave the medication when Sarah requested it, he never saw any breathing problems, and the inhaler he allegedly failed to return had been at "zero." Both parents testified that they had attempted to inform Dr. Hamilton of Sarah's other medical visits.

Substantial evidence supported the trial court findings that Sarah's medical visits were excessive and disruptive to her schooling and Mr. Raad's visitation. Even more importantly, these medical visits did not serve Sarah's interest in determining whether she in fact suffered from health problems requiring treatment. Given Mr. Raad's primary reliance on Dr. Hamilton—Sarah's personal pediatrician since birth—and follow-through on his recommendations, the trial court reasonably concluded that giving Mr. Raad exclusive decision-making authority with regard to medical issues would best serve Sarah. Similarly, giving Mr. Raad primary physical custody would enable him to exercise this authority.

b. Educational Issues

Both Ms. Nakamatsu and Mr. Raad expressed concern that Sarah's school records showed excessive absences and tardy arrivals—although she lived across the street from the school. Ms. Nakamatsu testified that in the 2013-2014 school year, Sarah had been tardy 24 times and late (more than 31 minutes) twice. In the first two months of 2014, she had 15 absences, many of which occurred when Ms. Burgos brought Sarah to court when the child did not need to be there.

Mr. Raad testified that Sarah had never been late when he took her to school. Mr. Raad additionally testified that he helped Sarah with her homework, prompted her to use an on-line math tutorial, read with her, met with her teachers, and volunteered at her school until confrontations with Ms. Burgos prompted him to

cease doing so to avoid embarrassing Sarah. He stated that he repeatedly discovered that Ms. Burgos had removed him as a contact person at Sarah's school. After Mr. Raad spoke with Sarah's teachers to get outstanding homework assignments after Sarah had missed school, and then returned the completed homework to the school, Ms. Burgos admonished the teacher not to discuss Sarah's needs with Mr. Raad.

There was evidence that Ms. Burgos attended to some of Sarah's school needs as well. Ms. Nakamatsu admitted that Ms. Burgos had enrolled Sarah in school counseling to address her problems with classmates. Ms. Burgos sought an Individualized Education Program (IEP), although the school concluded in a session with both parents that it was unnecessary. Ms. Burgos did not inform Mr. Raad before requesting the IEP.

Even with this evidence of Ms. Burgos's arguably good intentions, substantial evidence supported the trial court's finding that Ms. Burgos had "failed to make sure that Sarah reliably attends school," and that Ms. Burgos had kept the child from school for reasons not in Sarah's best interest—including by bringing her to court. It reasonably concluded that Sarah's educational needs would be best served if Mr. Raad had decision-making authority for educational matters and custody during the school week.

c. Child Welfare Issues

The trial court found that Ms. Burgos had "created increasing conflict, which is not healthy for the child." It specifically cited Ms. Burgos's practice of bringing the child to court and hiring a security guard to carry a gun to the school and to the sheriff's station where the visitation transfers took place.

The record on appeal does not support the finding that a security guard carried a gun (as opposed to some other weapon), although there might have been testimony to that effect by Ms. McConnon.[8] However, the trial record *does* include substantial evidence that Ms. Burgos acted out the marital conflict in ways detrimental to Sarah. Immediately following the September 3, 2013 domestic violence episode, she took Sarah with her to the emergency room and reported the suspected sexual abuse from years earlier. Reporting this highly speculative suspicion subjected Sarah to inquiries by DCFS, which concluded no sexual abuse had occurred. In addition, Ms. Burgos informed Sarah that Mr. Raad was not her father, conduct that Ms. Nakamatsu regarded as harmful.

Ms. Burgos testified to conduct by Mr. Raad that likewise fostered conflict in a manner harmful to Sarah. She testified that he had stopped paying the mortgage on the family home, so the home was about to be foreclosed as the trial started. Ms. Burgos had also received warnings of the possible discontinuation of utilities.[9] Questioning of Mr. Raad on this topic was curtailed, however, by the fact that a contempt proceeding relating to child support was pending against Mr. Raad and he had invoked his Fifth Amendment rights. Ms. Burgos also testified that Mr. Raad had failed to pay for Sarah's extracurricular activities, including

---

[8] The clerk's transcript on appeal includes Mr. Raad's May 8, 2014 request for a modification to the existing custody order, attaching the arrest report of Ms. Burgos's security guard. He was charged with carrying a dagger and a stun gun, but not a firearm.

[9] Toward the close of the trial, Ms. Burgos reported that she had acquired a part-time job in the neighborhood.

ballet classes. She offered text messages to support her claim that Ms. McConnon had monitored her for Mr. Raad.

We conclude that both parents permitted their conflict to affect Sarah's welfare. In these circumstances, the trial court could have reasonably found that Ms. Burgos's acts were more harmful and/or that the medical and educational issues weighed more heavily in favor of Mr. Raad having custody.

2. The Nature and Amount of the Child's Contact with Each Parent.

Based on Ms. Nakamatsu's testimony, the trial court found Sarah was strongly bonded with each parent. The trial court found that Ms. Burgos had been Sarah's primary caretaker throughout her life, but that prior to the separation, Mr. Raad had "much more active and full participation in Sarah's life" than he had been allowed following the separation. Mr. Raad testified to details about Sarah's birthday parties, holidays and vacations in previous years. While these celebrations do not amount to daily caretaking, Mr. Raad also testified about his activities with Sarah during the weekend visitations, including making her breakfast, overseeing her schoolwork, swimming, hiking, and visiting the science museum.

Given the centrality of Ms. Burgos in Sarah's life, the trial court addressed what it characterized as the strongest factor weighing against the change of primary custody: stability and continuity for Sarah. The trial court reasonably concluded that one of Sarah's most pressing needs was to improve both academically and socially in school and, to do so, she needed a highly reliable parent and "a stable single place to stay during the week." A 2/2/5/5 schedule, recommended by Ms. Nakamatsu, would have required Sarah to move between her two parents'

homes during the school week, undermining stability.[10] We also note that Mr. Raad testified that he was aware of the potential disruption a change in custody would cause and intended to get Sarah immediate counseling to help with the transition. Ms. Burgos's future housing was uncertain, as she acknowledged, and Ms. Nakamatsu testified that Ms. Burgos failed to provide a clear answer about where she and Sarah would live if forced out of the family home by foreclosure.

The trial court did not abuse its discretion in finding that the potential disruption did not outweigh the benefits of granting primary custody to Mr. Raad. On appeal, Ms. Burgos argues that the trial court's concerns about Sarah having a single, stable home during the school week "could easily have been addressed by a 2255 schedule," but does not specify how this might have been accomplished.

3. The Parents' Possible Substance Abuse

The record confirms the trial court's finding of "no credible evidence of any issues of substance abuse that should [affect] the custody determination." The records related to the September 3, 2013 domestic violence incident report that both parents denied that alcohol played any role in the incident. Mr. Raad testified that although he had worked for employers who conduct drug testing, he had never failed a test. He also reported that Ms. Burgos once confided that she had been discharged from a position for failing a drug test, but this was not

---

[10] The trial court noted that Ms. Nakamatsu's recommendation of a 2/2/5/5 schedule appeared to have been driven by a belief that she had to take into account the domestic violence restraining order.

confirmed. Ms. Burgos only appears to have raised concerns about Ms. McConnon's use of alcohol.

4. The Child's Preferences

Ms. Nakamatsu reported that Sarah indicated she wished to remain with her mother because her father was not her biologic father. The trial court considered this information but ultimately did not give it much weight, given Sarah's age and Ms. Nakamatsu's observation that Sarah tries to appease the parent she is with. The trial court concluded that Sarah's remarks did not constitute a reasoned judgment by Sarah about her best interest.

We conclude the trial court acted reasonably. Given her age and Ms. Burgos's fixation on the question of biological paternity, Sarah may have simply articulated her mother's preference. She also expressed a belief that she would be "reunited with her real father" at age 13, so her expressed desires may also have reflected a child's fantasies of her future.

5. Appellant's Arguments

On appeal, Ms. Burgos argues that four issues demonstrate that substantial evidence does not support the trial court's finding that awarding primary custody to Mr. Raad serves Sarah's best interest.

First, Ms. Burgos points out that Mr. Raad ordered a spirometry test for Sarah even though he did not have legal custody and failed to inform Ms. Burgos. While Mr. Raad did not have the authority to order the test, he testified that Ms. Burgos had failed to do so, even though Dr. Hamilton had recommended it, as Ms. Nakamatsu confirmed, and Mr. Raad had offered to pay

for the test. Moreover, both parents, not only Mr. Raad, made medical decisions without consulting the other.

Second, Ms. Burgos argues that Ms. Raad failed to send back the Albuterol that Ms. Burgos sent with Sarah for the visitation and, although Mr. Raad testified the Albuterol was on zero, he did not so inform Ms. Burgos. The testimony on this issue was quite confused. Mr. Raad testified that he *did* inform Ms. Burgos that the device was on zero, then seemed to testify that this recollection actually pertained to a second medication, Qvar. He also insisted that he never saw Sarah in need of Albuterol.

These first two points relate to one of the most contested issues at trial: whether Sarah actually had respiratory problems in need of medication and frequent medical visits. As discussed above, substantial evidence supports the trial court's decision that Sarah would be better served by receiving treatment from one doctor—Sarah's longtime pediatrician—and that Mr. Raad would be more likely to follow this course.

Third, Ms. Burgos argues that "there was evidence that Sarah was showering in the sink while in [Mr. Raad's] care." This is true, but no context was ever provided as to why the child showered in the sink during her first visit,[11] and Mr. Raad testified that Sarah had her own bathroom at his apartment.

Fourth, Ms. Burgos points out that there was testimony that Mr. Raad failed to take Sarah to her extracurricular

---

[11] In an earlier filing, Mr. Raad alleged that Ms. Burgos had told Sarah not to shower at his home and that Mr. Raad might video her; she allegedly advised Sarah to wash her hair in the sink to convince her father she had showered. Such allegations were not made at trial.

activities. Here, again, the testimony on the topic was confused. For example, it was unclear whether Mr. Raad knew in advance that he could attend a Father's Day dance recital given the time restrictions on his usual visitation. Even if Ms. Burgos's allegations as to Mr. Raad's conduct are accurate, this does not alter the substantial evidence supporting the trial court's decision.

C. Substantial Evidence Supported the Finding That the Section 3044 Presumption Was Rebutted.

As discussed above, Family Code section 3044 creates a rebuttable presumption that granting sole or joint custody to a domestic violence perpetrator, such as Mr. Raad, will be detrimental to a child. In determining whether the presumption has been rebutted, the trial court must first consider whether the perpetrator 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." (Fam. Code, § 3044, subd. (b)(1).) The trial court found that Mr. Raad had demonstrated as much, as we have just discussed, and also reasonably concluded that this consideration outweighed the other section 3044 factors.

Ms. Burgos's primary contention regarding the section 3044 presumption is that Mr. Raad failed to demonstrate that he had completed a batterer's treatment program satisfying the criteria set forth in Penal Code section 1203.097, subdivision (c)—the second section 3044 consideration. (Fam. Code, § 3044, subd. (b)(2).) As the trial court noted, Mr. Raad testified that immediately after meeting with DCFS, even before the TRO issued, he began family counseling. Ms. Burgos argues that no evidence established that this counseling amounted to a

batterer's treatment program. We agree, but also conclude that the statute does not make completion of a batterer's class a dispositive criterion. Mr. Raad's counseling does constitute favorable evidence relevant to the fourth consideration: whether the perpetrator has completed a parenting class if the court determined such a class to be appropriate. (Fam. Code, § 3044, subd. (b)(4).) Again, the fit is not perfect—family counseling is not a parenting class—but the trial court rightly considered the counseling as relevant evidence of Mr. Raad's productive response to the September 3, 2013 incident.

As discussed above, the trial court reasonably found there was no credible evidence of substance abuse; hence, there was no reason for Mr. Raad to receive alcohol or drug abuse counseling—the third section 3044 consideration. (Fam. Code, § 3044, subd. (b)(3).) Mr. Raad was not on probation or parole, the fifth consideration, but he was subject to a restraining order, the sixth consideration. (Fam. Code, § 3044, subd. (b)(5), (6).) Ms. Burgos alleged that he had violated the order by his appearances at Sarah's school, but the order permitted Mr. Raad on the school grounds, as the trial court noted.[12] Finally, the trial evidence did not show that Mr. Raad had committed further

---

[12] Ms. Burgos also alleged that Mr. Raad had violated the order by using Ms. McConnon as a "proxy" to harass her. Because Ms. McConnon's testimony is not in the reporter's transcript, we cannot assess what evidence was before the trial court on this issue. Although Ms. Burgos made specific allegations about Ms. McConnon in certain documents previously filed with the trial court, at trial she only offered text messages between Ms. McConnon and Mr. Raad as evidence that Mr. Raad was monitoring her.

acts of domestic violence after September 3, 2013—the seventh factor. (Fam. Code, § 3044, subd. (b)(7).)

In sum, the only factors that did not favor a finding that the section 3044 presumption had been rebutted were Mr. Raad's failure to complete a batterer's treatment program and the existing restraining order. Because there had been no recurrences of violence in the year and a half after issuance of the order, the trial court reasonably found these factors were outweighed and the presumption rebutted.

D. Frequent contact with both parents

Consistent with section 3044, the trial court emphasized that it did not consider the policy of promoting frequent contact with both parents when determining whether the section 3044 presumption was rebutted. It did find, however, that Mr. Raad was "far more likely to permit frequent contact between the child and the other parent." Substantial evidence supports this finding because Mr. Raad testified that prior to the April 24, 2014 order granting him full weekend visitations, Sarah had missed 13 visits since October 2013. He also testified that although the trial court ordered in December 2014 that he was to received phone calls from Sarah, originated by Ms. Burgos, again and again he did not receive the calls. In contrast, Ms. Burgos had informed Sarah that Mr. Raad was not her biological father, arguably to distance Sarah from Mr. Raad.

For all of the above reasons, we conclude that substantial evidence supported the trial court's custody and visitation order.

II. The Trial Court Did Not Abuse Its Discretion in Declining to Order Genetic Testing to Determine if Mr. Raad Was the Child's Biological Father.

Ms. Burgos additionally argues that the trial court abused its discretion in declining to order genetic testing pursuant to Family Code section 7551 to determine if Mr. Raad was Sarah's biological father. Section 7551 provides in relevant part: "In a civil action or proceeding in which paternity is a relevant fact, the court may upon its own initiative or upon suggestion made by or on behalf of any person who is involved, and shall upon motion of any party to the action or proceeding made at a time so as not to delay the proceedings unduly, order the mother, child, and alleged father to submit to genetic tests." (Fam. Code, § 7551.)

The trial court did not abuse its discretion in denying Ms. Burgos's request for two reasons. First, as the trial court explained, to make the requested genetic testing part of the bifurcated trial would have significantly delayed and disrupted it. The dissolution action was filed in 2013, the trial began on April 6, 2015, the motion was filed only on April 21, 2015, and even then it was not filed in the department where the trial was occurring, and Ms. Burgos did not request a temporary emergency order. We observe that the trial court had already issued numerous custody and visitation orders predicated on Mr. Raad's assumed fatherhood.

Second, Mr. Raad's biological fatherhood was not a relevant issue in the matter because as a matter of law Mr. Raad was presumed to be the natural father of Sarah. Family Code section 7611 provides that "[a] person is presumed to be the natural parent of a child if the person meets the conditions" set forth in various sections of the Code, including section 7540, or

any of the provisions set forth in section 7611 itself. (Fam. Code, § 7611.) Section 7540 provides that "[e]xcept as provided in Section 7541, the child of a wife cohabiting with her husband, who is not impotent or sterile, is conclusively presumed to be a child of the marriage." (Fam. Code, § 7540.) Section 7541 permits a mother to move for the use of blood tests to determine paternity, even where section 7540 applies, where "the child's biological father has filed an affidavit with the court acknowledging paternity" and the mother's motion is filed no later than two years after the child's birth. (Fam. Code, § 7541, subd. (c).) Ms. Burgos does not allege on appeal that an affidavit by a biological father had been filed, and her request for an order regarding DNA testing was made long after the two-year deadline passed. Hence the section 7540 conclusive presumption must stand. Moreover, as our Supreme Court has observed, the section 7540 presumption "is not really a presumption at all but is instead . . . 'a rule of substantive law.' " (*In re Jesusa V.* (2004) 32 Cal.4th 588, 614.)

Even if section 7540 somehow did not apply, Mr. Raad was also presumed to be Sarah's father under Family Code section 7611, subdivisions (a) and (d), because (1) he was married to the child's natural mother and Sarah was born during the marriage, and (2) he received Sarah into his home and held her out as his natural child. (Fam. Code, § 7611, subds. (a), (d).) Section 7612 provides that a section 7611 presumption is rebuttable, but "may be rebutted in an appropriate action only by clear and convincing evidence." (Fam. Code, § 7612, subd. (a).) However, as the Supreme Court has made clear, the proceeding here was *not* such an "appropriate action": "When it used the limiting phrase *an appropriate action*, the Legislature was

unlikely to have had in mind an action like this—an action in which no other man claims parental rights to the child, an action in which rebuttal of the section 7611(d) presumption will render the child fatherless." (*In re Nicholas H.* (2002) 28 Cal.4th 56, 70.)

In making this observation, the *In re Nicholas H.* court examined a number of Court of Appeal cases holding that a presumption arising under section 7611, subdivision (d) is not necessarily rebutted by clear and convincing evidence that the presumed father is not the child's biological child. (See *In re Nicholas H.*, *supra*, 28 Cal.4th at pp. 64-70.) In one such case, the court questioned whether section 7551—the provision relied upon by Ms. Burgos—actually authorized a trial court to order genetic testing in the circumstances presented here at all. The court noted that section 7551 refers to testing of an "alleged" father but not a *presumed* father. (*In re Raphael P.* (2002) 97 Cal.App.4th 716, 734.) "[W]here there is a man claiming presumed father status and no indication of another man asserting paternity, we question whether paternity can rightly be considered a 'relevant fact.' " (*Id.* at p. 735; see *In re Nicholas H.*, *supra*, 28 Cal.4th at pp. 68-70.) The court further observed: "We can discern no policy that would support a requirement of failing to legally recognize a man who has acted as a child's only father, regardless of his relationship with the child and desire to accept paternal responsibility, solely because he is determined not to be the biological father." (*In re Raphael P.*, at pp. 735-736.)

Although Ms. Burgos argued that Sarah had had contact with her biological father, he had not come forward to assert paternity and as the foregoing discussion shows, Mr. Raad had developed a paternal relationship with Sarah from her birth.

For all these reasons, the trial court did not abuse its discretion in denying the request for genetic testing.

III. The Trial Court Did Not Abuse Its Discretion in Denying Ms. Burgos's Motion for a Continuance of Trial.

Finally, Ms. Burgos contends that the trial court abused its discretion by denying her request to continue the trial. Her request for a 180-day continuance was initially filed on April 3, 2015 as an ex parte application and was denied in the trial-setting court with a notation "no good cause." Ms. Burgos reiterated her request when trial commenced on April 6, on the grounds that she was unrepresented and thus had an "uneven playing field," had only recently received her case file from her attorney, did not yet know which witnesses she would call, and needed to get counsel because "there were things that I felt that were not presented to the [Parenting Plan Assessment]." The trial court—a different court—ascertained on April 6 that Ms. Burgos's attorney was relieved before her application was heard in the trial-setting court and Ms. Burgos had raised the issue of her lack of representation in that court. The trial court thus stated that it would not revisit the issue.

We review the ruling for abuse of discretion and will uphold the decision if it is " 'based on a reasoned judgment and complies with legal principles and policies appropriate to the case before the court.' " (*Thurman v. Bayshore Transit Management, Inc.* (2012) 203 Cal.App.4th 1112, 1126, quoting *Forthmann v. Boyer* (2002) 97 Cal.App.4th 977, 984.)

California Rules of Court, rule 3.1332 provides that a party seeking a trial continuance "must make the motion or application as soon as reasonably practical once the necessity for the

continuance is discovered" and must make "an affirmative showing of good cause requiring the continuance." (Cal. Rules of Court, rule 3.1332(b), (c).) The rule lists "[c]ircumstances that may indicate good cause," including substitution of trial counsel, "but only where there is an affirmative showing that the substitution is required in the interests of justice." (Cal. Rules of Court, rule 3.1332(c)(4).) The listed circumstances also include "[a] party's excused inability to obtain essential testimony, documents, or other material evidence." (Cal. Rules of Court, rule 3.1332(c)(6).)

Although Ms. Burgos attempted to bring her request for a continuance within the scope of these provisions, she failed to make the necessary showing. She alleged that she had been "forced" to substitute her previous counsel due to his ineffectiveness and "an unacceptable level of negligence or failure to act." But her filing provided no specifics and did not indicate that she had taken steps to acquire substitute counsel. Nor did Ms. Burgos attempt to show that she had requested the continuance as soon as practicable. Her former counsel had filed a *Borson* motion[13] on March 20, 2015, attaching a declaration stating at that time that he would be substituted out. Ms. Burgos's request for continuance was not filed until two weeks later.

---

[13] Under *In re Marriage of Borson*, *supra*, 37 Cal.App.3d 632, a discharged attorney may file a motion asking the court to set a fee amount and determine how it is to be paid. (See *id.* at pp. 637-638; Hogoboom and King, California Practice Guide: Family Law (The Rutter Group 2017) ¶ 14:308, pp. 14-105 to 14-106.)

Ms. Burgos alleged "a highly deficient discovery process" and argued that "additional discovery" was needed, but she made these allegations in regard to Mr. Raad's alleged withholding of child and spousal support—issues that were not before the trial court in the bifurcated custody and visitation proceeding. As Mr. Raad pointed out in opposing the motion, in the trial setting conference and pretrial orders entered on December 17, 2014, the trial court deemed that "petitioner is ready for trial on the bifurcated issue of child custody and visitation because they had more than adequate time to prepare and have not shown due diligence to justify any further delay." The orders additionally stated: "The court has advised the parties that their failure to complete discovery in this case may not be good cause for a continuance of the trial in this matter."

Rule 3.1332 also requires a trial court to consider "all the facts and circumstances that are relevant" to a request for trial continuance, including the proximity of the trial date, the length of the requested continuance, and prejudice that will be suffered by parties due to a continuance. (Cal. Rules of Court, rule 3.1332(d)(1), (3), (5).) Ms. Burgos made her request on the eve of trial and requested a half-year continuance. Mr. Raad argued that such a delay would prejudice him if the existing custody and visitation orders continued for that period. In

addition, the trial court's volunteer child custody evaluator had already been scheduled to testify on April 6.

For all of these reasons, the trial court did not abuse its discretion in denying Ms. Burgos's request for a continuance.

DISPOSITION

The trial court's judgment is affirmed. Each party shall bear its own costs on appeal.

NOT TO BE PUBLISHED.

BENDIX, J.

We concur:

CHANEY, Acting P. J.

JOHNSON, J.