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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

KENT S., Plaintiff and Appellant, v. MICHELLE S., Defendant and Respondent.	B282435 (Los Angeles County Super. Ct. No. BD624774)

APPEAL from a judgment of the Superior Court of Los Angeles County. Tamara Hall, Judge. Affirmed.

Peter Gold for Plaintiff and Appellant.

Cuneo & Hoover and Sarah J. Hoover for Defendant and Respondent.

* * * * * *

A husband and wife in a dissolution action bifurcated the issue of child custody, and set that issue for trial. Nearly two months before the date set for trial, husband's attorney told him that she was filing an ex parte motion asking to be relieved as counsel. The trial court granted the motion 32 days before the trial date. On the Friday before the Monday trial date, husband moved to continue the trial. The trial court heard the motion on the morning of trial, and denied it. The matter proceeded to trial, and the trial court found that husband had committed domestic violence against wife in the form of emotional abuse, awarded wife sole legal custody of the couple's two children, and ordered father to complete a 52-week domestic violence class and attend preteen counseling. On appeal, husband argues that the trial court erred in (1) denying him a continuance, and (2) ordering him to complete a 52-week domestic violence class and attend counseling. We conclude that the trial court did not err and affirm.

FACTS AND PROCEDURAL BACKGROUND

I. Facts

Kent S. (husband) and Michelle S. (wife) married in August 2004. They had two children: Katharine (born 2004) and Conrad (born 2006).

As time went on, husband became more controlling toward wife. At some point prior to 2015, husband spanked wife and encouraged their two children to join in, and then locked her outside of the house in her bathrobe, all because she did not get up early enough on a Saturday morning to make him breakfast. Wife was forced to crawl through the doggy door to get back into the house. When husband lost his job and wife became the sole

breadwinner, husband took control of her earnings and required her to get his permission before spending any money.

They separated in June 2015.

II. Procedural Background

A. *Filing of dissolution proceeding and readiness for trial*

Husband filed for dissolution in July 2015.

A few months later, husband, who has an MBA from Stanford, applied for spousal support. In November 2015, the court ordered wife to pay nearly $2,500 per month in spousal support.

In September 2016, the parties agreed to bifurcate child custody matters from property-related matters, and set the child custody trial for December 12, 2016. At that time, both husband and wife informed the trial court that they had completed all discovery, exchanged their witness and exhibit lists, and were ready for trial. The court set a trial readiness conference for October 26, 2016.

B. *Withdrawal of husband's counsel*

On October 21, 2016, husband's attorney—his second attorney in this case—filed a motion asking to be relieved as counsel. The court set a hearing on her motion for December 19, 2016. On October 26, 2016—the day set for the readiness conference—husband's attorney filed an ex parte motion to advance the hearing date on her motion. In both motions, husband's attorney alleged that there had been "an irreconcilable breakdown of the attorney-client relationship" that rendered any "further representation" of husband "inappropriate and ineffectual." The attorney served husband with both motions on the dates they were filed. The court advanced the hearing to November 10, 2016.

At the November 10 hearing, husband's attorney explained that she was no longer "in a position to competently or effectively represent" husband. Although she could not divulge privileged attorney-client communications, the attorney explained that the breakdown stemmed from (1) husband's decision to photograph—and then disseminate to third parties—"portions of the confidential child custody evaluation" conducted on his children, including the results of psychological testing, and (2) husband's opinion that his attorney was over-preparing for trial. The attorney explained that "[t]he work" for the upcoming custody trial "has largely been done," such that it would not be "as difficult to have an attorney come in and get on board."

The attorney further stated that she had asked husband to sign a substitution of attorney "multiple times," but he refused to do so. She also relayed that when she personally served husband with the ex parte motion, he told her he would not attend the November 10 hearing because he "didn't think there was any need to be there."

The trial court granted counsel's motion to be relieved. The court found it "significant" that husband "did not bother" to attend the hearing in order to object to his attorney's request to withdraw. The court further noted that it is "better not to have the conflict" between husband and his counsel. The court went on to observe that husband was "an educated" and "sophisticated" person who could either retain counsel or choose to represent himself.

C. *Husband's eve of trial request to continue*

At approximately 3:00 p.m. on the Friday before the Monday trial date of December 12, 2016, husband served a motion to continue the custody trial. In an attached declaration,

husband stated that he had "discussed this matter with several attorneys" but had "to date found no attorney that is both willing and able to handle my lawsuit at this time especially with the impending trial date." Husband also explained that "a substantial amount of discovery" remained to be completed, including depositions. He estimated that it would take "at least several more months" for the matter to be "prepared for trial," and even that estimate was dependent "on how quickly [he is] able to find a replacement attorney, or else prepare to represent [him]self."

Wife opposed the motion. She pointed out that this was husband's *second* motion to continue the proceedings, as his now-relieved counsel had sought and obtained a three-month continuance of the return date for the child custody evaluation. Wife attached an e-mail from her attorney to husband, dated just one week after the trial court relieved his former counsel, urging husband to "act promptly" if he "intend[ed] to engage a new attorney" and that wife would oppose any continuance request. Wife also attached a December 7 e-mail from husband to wife's attorney requesting her consent to a continuance on the ground that "every attorney [he] ha[s] spoken to is hesitant to take the case with a trial date that is only a few days away." Wife further explained that a continuance would prejudice her because she had already spent more than $2,500 in witness fees and because the child evaluator found that the pendency of this contentious case was harming the children.

On the morning of trial, the master calendar court heard the motion. It "denied" husband's "request for continuance." The matter was assigned out to a trial court later that day. Husband

renewed his motion to continue, but the trial court declined to revisit the master calendar court's ruling.

D. *Trial and ruling*

The matter proceeded to a six-day bench trial.

In mid-February 2016, the trial court issued an oral ruling. The court found that husband had engaged in "emotional abuse" of wife; that this abuse constituted domestic violence; that Family Code section 3044 erected a presumption against awarding joint legal custody to the perpetrator of domestic violence; and that husband had not rebutted that presumption. In the course of making these findings, the court rejected as not credible husband's testimony that *wife* was the abuser. Accordingly, the court awarded wife sole legal custody and primary physical custody of the children, but granted husband custody on many weekends and holidays. The court also ordered husband to attend a 52-week domestic violence course and a preteen counseling class.

E. *Judgment and appeal*

After the trial court entered judgment, husband filed a timely notice of appeal.

DISCUSSION

I. Denial of Continuance

Husband argues that the trial court erred in denying his request to continue the custody trial. Because trial courts enjoy "broad discretion in deciding whether to grant a request for a continuance" (*Freeman v. Sullivant* (2011) 192 Cal.App.4th 523, 527), we review the denial of a continuance solely for an abuse of that discretion (*In re Marriage of Falcone & Fyke* (2008) 164 Cal.App.4th 814, 823 (*Falcone*)).

Although, as a general rule, trial continuances are disfavored, "each request for a continuance must be considered on its own merits." (Cal. Rules of Court, rule 3.1332(c); *In re Marriage of Hoffmeister* (1984) 161 Cal.App.3d 1163, 1168-1169 [so noting].) At a minimum, the party seeking a continuance must make "an affirmative showing of good cause requiring the continuance." (Cal. Rules of Court, rule 3.1332(c); *Falcone*, *supra*, 164 Cal.App.4th at p. 823.) Once he does, the trial court may exercise its discretion to grant or deny the continuance, bearing in mind that it "'must exercise [that] discretion with due regard to all interests involved'" (*Cotton v. StarCare Medical Group, Inc.* (2010) 183 Cal.App.4th 437, 445), and that "'the refusal of a continuance which has the practical effect of denying the applicant a fair hearing is reversible error'" (*In re Marriage of Hoffmeister*, at p. 1169).

Good cause for a continuance includes, among other things, "[a] significant, unanticipated change in the status of the case as a result of which the case is not ready for trial." (Cal. Rules of Court, rule 3.1332(c)(7).) Factors relevant to the exercise of a trial court's discretion to grant a continuance include (1) "[t]he proximity of the trial date," (2) "[w]hether there was any previous continuance, extension of time, or delay of trial due to any party," (3) "[t]he length of the continuance requested," (4) "[t]he availability of alternate means to address the problem that gave rise to the motion or application for a continuance," (5) "[t]he prejudice that parties or witnesses will suffer as a result of the continuance," (6) "[i]f the case is entitled to a preferential trial setting, the reasons for that status and whether the need for a continuance outweighs the need to avoid delay," (7) "[t]he court's calendar and the impact of granting a continuance on other

pending trials," (8) "[w]hether trial counsel is engaged in another trial," (9) "[w]hether all parties have stipulated to a continuance," (10) "[w]hether the interests of justice are best served by a continuance, by the trial of the matter, or by imposing conditions on the continuance," and (11) "[a]ny other fact or circumstance relevant to the fair determination of the motion or application." (Cal. Rules of Court, rule 3.1332(d).)

As a threshold matter, it is unclear whether husband carried his burden of making "an affirmative showing of good cause." The sole evidentiary support husband offered in support of his continuance request was his declaration, and it was notably bereft of any details regarding how many attorneys he contacted or, more importantly, *when* he contacted them. Husband knew his attorney was seeking to be relieved at least 52 days before the trial date and knew her request was granted 32 days before the trial date. Given that discovery was closed, the exhibit and witness lists were prepared, and that the trial was limited to the issue of custody, husband's failure to find an attorney may lie more with *his* delay in looking for counsel than with the "unanticipated" departure of his counsel nearly two months earlier.

But even if we assume that husband established good cause, the trial court did not abuse its discretion in determining that the totality of the circumstances warranted a denial of the continuance. Husband's continuance request came on the very eve of trial, and was not his first such request. He sought to continue the trial for "at least several more months," which is a substantial and open-ended period of time. The trial itself was limited to the issue of child custody, which means it was entitled to preference over other civil cases for obvious reasons (namely,

the need to provide stability to children). (Fam. Code, § 3023, subd. (b).) And wife detailed how continuing the trial would inflict further emotional damage on their children and would cost her additional witness fees. Wife also brought the court's attention to husband's general intelligence and educational achievements. In light of these factors, we cannot say that the trial court's denial of the husband's continuance request was """arbitrary, capricious, or patently absurd""" (*In re Stephanie M.* (1994) 7 Cal.4th 295, 318) or that it otherwise had the practical effect of denying him a fair hearing.

Husband raises three categories of arguments in response.

First, he contends that the trial court abused its discretion because it denied his request in a single sentence—"The request for continuance is denied"—and did not, on the record, (1) state that it had read the party's filings, or (2) articulate and balance the various considerations set forth in the California Rules of Court. We reject this contention because the Rules of Court do not in civil cases require a court to make findings on the record. (Cal. Rules of Court, rule 3.1332; cf. Pen. Code, § 1050, subd. (f) [requiring a court to "state on the record the facts proven" that justify a finding of "good cause" in support of a continuance in criminal cases].) Instead, we are to presume that the trial court read the parties' filings and impliedly weighed the necessary factors and concluded that those factors favored denial of a continuance until such time as the appealing party—here, husband—demonstrates to the contrary. (Evid. Code, § 669; *People ex rel. Reisig v. Acuna* (2017) 9 Cal.App.5th 1, 32 [noting "appellant['s] burden to demonstrate error"]; see *In re Marriage of Teegarden* (1986) 181 Cal.App.3d 401, 406-407 [applying these principles to the denial of a continuance].) Relatedly, husband

asserts that the trial judge's deference to the master calendar judge's denial of a continuance somehow creates error; it does not, and obligates us only to review the merits of the two courts' identical rulings for an abuse of discretion.

Second, husband argues that the trial court got its evaluations of the various considerations wrong. More specifically, he contends that (1) he never made any prior continuance requests, (2) only his retention of a new lawyer would suffice, (3) the sole prejudice to wife was "the prospect of having to face a lawyer on the other side of the case" because the documented harm to his children from the further delay of the proceedings could be ameliorated by keeping the children in therapy and because wife never showed that her witnesses could not be re-subpoenaed or that their fees would not carry over to a new trial date, and (4) the interests of justice were better served by allowing husband to continue the trial so he could hire a lawyer. Husband's first contention is factually incorrect, as noted above. And his remaining contentions invite us to give different weight to the various factors than the trial court. This is an invitation we must decline because abuse of discretion review does not empower us to """reweigh the evidence or substitute our notions of fairness for the trial court's."""" (*People v. Overstock.com, Inc.* (2017) 12 Cal.App.5th 1064, 1088.)

Lastly, husband likens this case to *Oliveros v. County of Los Angeles* (2004) 120 Cal.App.4th 1389. In *Oliveros*, the appellate court held that the trial court abused its discretion in denying a continuance because the trial court's "repeated comments suggest that the only factor he took into consideration, and which became the decisive factor in his ruling, was the impact of a continuance on the court's calendar." (*Id.* at p. 1399.)

There is nothing in the record to suggest that the trial court in this case relied solely upon concerns of court congestion in denying husband's continuance.

II. Domestic Violence Class and Counseling Order

Husband next asserts that the trial court lacked the authority to require him to attend a 52-week domestic violence course or to attend preteen counseling sessions. Whether the court had this authority is a question of law, which we review de novo. (*People ex rel. Kennedy v. Beaumont Investment, Ltd.* (2003) 111 Cal.App.4th 102, 120.)

A court may order a parent "involved in a custody . . . dispute" to "participate in outpatient counseling with a licensed mental health professional, or through other community programs and services that provide appropriate counseling" for up to one year "if the court finds" that (1) "[t]he dispute between the parents . . . poses a substantial danger to the best interest of the child," and (2) "[t]he counseling is in the best interest of the child." (Fam. Code, § 3190, subd. (a).) In assessing whether a dispute "poses a substantial danger to the best interest of the child," a court is to consider whether there is any history of domestic violence in the last five years. (*Id.*, subd. (b).) The court must also "set forth reasons why" (1) "[t]he dispute poses a substantial danger to the best interest of the child and the counseling is in the best interest of the child," and (2) "[t]he financial burden created by the court order for counseling does not otherwise jeopardize a party's other financial obligations." (*Id.*, subd. (d).)

The trial court's order requiring husband to complete a 52-week domestic violence course and preteen counseling complies with most, though not all, of the statutory requirements. Each

program fits within the ambit of Family Code section 3190 because each involves "participat[ion] in outpatient counseling" or "through [a] community program[] . . . that provide[s] appropriate counseling." (Fam. Code, § 3190, subd. (a).) What is more, the court explicitly found that husband had inflicted emotional abuse upon wife in the last five years. Such abuse constitutes domestic violence. (Fam. Code, §§ 6211, subd. (a) [defining "[d]omestic violence" as "abuse perpetrated against" "[a] spouse"], 6203, subd. (a)(4) [defining "abuse" to include "any behavior that . . . could be enjoined pursuant to Section 6320"], 6320, subd. (a) [authorizing court to enjoin "disturbing the peace of the other party"]; *In re Marriage of Nadkarni* (2009) 173 Cal.App.4th 1483, 1497-1498 ["conduct that destroys the mental or emotional calm of the other party" constitutes "disturbing the peace of the other party"].) The court also explicitly found that this "domestic violence is detrimental to the best interests of the children" (and on that basis granted wife legal custody of both children).

Although the court did not make express findings that the domestic violence course and preteen counseling were in the best interest of the children and would not "jeopardize" husband's financial obligations, a trial court's failure to adhere to a statutory mandate calling for express findings is harmless "if the missing information is . . . otherwise discernible from the record." (*In re Marriage of Hubner* (2001) 94 Cal.App.4th 175, 183; see also *In re J.S.* (2011) 196 Cal.App.4th 1069, 1078-1079 [failure to make express findings is harmless if there is "no reasonable probability that had the trial court complied with the statutory requirement, it would have" made different findings].) Here, the trial court's other findings that husband perpetrated the domestic

violence in the presence of the children and that husband's current behavior was "wearing on" the children make it "discernable from the record" that the domestic violence course and preteen counseling would be in the children's best interest. Similarly, the uncontradicted evidence that husband has nearly $400,000 in a brokerage account makes it "discernable from the record" that these programs would not "jeopardize" his other financial obligations.

We reject wife's two alternative statutory bases for the court's order to attend domestic violence classes—Family Code sections 3044 and 6343.

Family Code section 3044, as noted above, erects a rebuttable presumption against awarding joint physical or legal custody of a child "to a person who has perpetrated domestic violence" in the last five years (Fam. Code, § 3044, subd. (a)), and goes on to set forth factors relevant to rebutting that presumption, including "[w]hether the perpetrator has successfully completed a batterer's treatment program" (*id.*, subd. (b)(2)). This statute necessarily looks to whether a parent has completed such a program prior to the time of the custody determination at issue; it does not provide a basis for ordering such a program *in the future*.

Family Code section 6343 is part of the Domestic Violence Prevention Act (the Act), and empowers a trial court to "issue an order requiring *the restrained party* to participate in a batterer's program." (Fam. Code, § 6343, italics added.) By its terms, it is limited to a person who is "restrained" under the Act, which means a person subject to an order dictating that he stay away from the victim of his domestic violence or move out of the residence. (*Id.*, §§ 6218 [defining "[p]rotective order"], 6320-6322

[defining the three types of restraining orders that a court may issue].) At no point does the Act empower a court to order a domestic violence class to a person who is not the subject of a restraining order. Here, husband is not currently the subject of a restraining order, so the Act cannot provide a basis for ordering the classes.

DISPOSITION

The judgment is affirmed. Respondent is entitled to her costs on appeal.

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_____, J.
HOFFSTADT

We concur:

_____, P. J.
LUI

_____, J.
CHAVEZ