No. F077615

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT

CRYSTAL VARGAS,

Appellant,

vs.

ROBERT GALAVIZ,

Respondent.

Appeal from an Order of the Tulare County Superior Court
Case No. PFL256462
Hon. Glade Roper

PROPOSED AMICUS CURIAE BRIEF OF CALIFORNIA WOMEN'S LAW CENTER IN SUPPORT OF APPELLANT

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I. INTRODUCTION AND SUMMARY OF ARGUMENT

California has a strong public interest in keeping its children safe from abusers, batterers, and other violent individuals, especially when the perpetrators of the violence are the children's parents or caretakers. The Legislature has specifically recognized that "the health, safety, and welfare of children shall be the court's primary concern in determining the best interests of children when making orders regarding the physical or legal custody or visitation of children." (Fam. Code, § 3020, subd. (a).) This fundamental legislative policy recognizes that "the perpetration of child abuse or domestic violence in a household where a child resides is detrimental to the child." (*Ibid.*)

In furtherance of these principles, in 1993 the Legislature enacted California Family Code Section 3044 ("Section 3044"). Section 3044 establishes that a survivor of domestic violence is entitled to the presumption that allowing a child to spend substantial time in the custody of an abuser is dangerous for the child. At bottom, the public policy underlying Section 3044 is about protecting children from the physical and emotional toll that witnessing—or being the direct target of—domestic violence takes. This toll is significant. As discussed in Section III.C, *infra*, studies show that there is significant overlap between perpetrators of domestic violence and perpetrators of child abuse, and that victims of or witnesses to abusive behavior experience severe long-term harm, including continuing the cycle of abuse. Said another way, those who witness

abusive behavior are more likely to later become the victim or the perpetrator.

Accordingly, Section 3044 provides that when a person seeking custody of a child "has perpetrated domestic violence within the previous five years against the other party seeking custody of the child, or against the child or the child's siblings," there is a mandatory rebuttable presumption "that an award of sole or joint physical or legal custody of a child to [that person] is detrimental to the best interests of the child." (Fam. Code, § 3044, subd. (a).) To overcome the presumption, a trial court must make specific findings on the record concerning each of the seven enumerated factors set forth in Section 3044. (*Jaime G. v. H.L.* (2018) 25 Cal.App.5th 794, 805-810; see also Fam. Code, § 3044, subd. (f)(1).)

The Legislature has amended Section 3044 twice, including as recently as last year, to address "how courts make child custody and visitation determinations in order to strengthen abuse protections for children." (Assem. Com. on Judiciary, Analysis of Assem. Bill 2044, 2017-2018 Reg. Sess., as amended Mar. 22, 2018, at p. 5.)

It is critical that courts apply Section 3044 properly to ensure maximum protection for children in custody disputes involving domestic abusers. Although California is "at the forefront in establishing laws to protect children from these abusers, . . . children involved in family court disputes still experience harm that could be prevented with more protective custody and visitation orders." (Assem. Com. on Judiciary, Analysis of

Assem. Bill 2044, 2017-2018 Reg. Sess., as amended Mar. 22, 2018, at p. 1.) In fact, notwithstanding children's inherent "right to be safe and free from abuse" (Fam. Code, § 3044, subd. (a)), trial courts continue to routinely misapply Section 3044 in various ways, including by (i) failing to apply the presumption when the court characterizes a joint custody order, or de facto joint custody order, as merely a "visitation" order; (ii) misapplying Section 3044's presumption factors; (iii) failing to consider all of the factors; or (iv) failing to make specific findings on the record concerning the factors.[1] Such errors, including a narrow application of Section 3044 that does not recognize de facto joint custody awards, place children at great risk for further exposure to violence, because of the increased opportunities for violence to occur during custodial or visitation

[1] See, e.g., *Celia S. v. Hugo H.* (2016) 3 Cal.App.5th 655, 661 (reversing and remanding custody order where trial court awarded 50/50 "timeshare arrangement" to parents without requiring abusive parent to present any evidence to rebut Section 3044's presumption); *Ellis v. Lyons* (2016) 2 Cal.App.5th 404, 416 (reversing custody order where trial court relied exclusively on Family Code Section 3040's "preference for frequent and continuing contact with the noncustodial parent," and failed to expressly consider Section 3044's statutory factors); *In re Marriage of Fajota* (2014) 230 Cal.App.4th 1487, 1498 (reversing and remanding custody order where trial court failed to apply Section 3044's mandatory presumption based on trial court's interpretation that Section 3044 only applies where there is an extant restraining order); *Christina L. v. Chauncey B.* (2014) 229 Cal.App.4th 731, 736 (reversing and remanding custody order where trial court "put the burden on Mother to show . . . that Father had committed domestic violence").

exchanges.[2] Accordingly, there is no question that routine misapplication or overly narrow application of Section 3044 harms children and domestic violence survivors by depriving them of an important judicial safeguard that the Legislature imposed to protect them from further exposure to violence and abuse, and instead injecting uncertainty and undue flexibility into disputes involving domestic abusers seeking custody of their children.

That is precisely what has happened here. The trial court abused its discretion and committed reversible error when it awarded Galaviz substantial "visitation," but, because it did not use the words "joint custody," did not apply Section 3044's mandatory presumption. The court deprived Vargas and the parties' four-year-old child (the "Child") of the benefit of the mandatory presumption and did not make findings as to *any* of Section 3044's mandatory factors. The trial court's error not only is contrary to the clear directive of the Legislature, but it is detrimental to the health and safety of Vargas and the Child.

This Court should confirm that Section 3044 applies to de facto joint custody orders and that courts must consider the substance and effect of their orders even if called something other than "joint custody" by the judge. It is important to the statute's protective purpose that courts

[2] See Section III.C, *infra*; see also Shahan Ahmed & Rick Montanez, *Father Kills Mother of Their Child at Custody Exchange in Front of Hawthorne Police Station, Police Say*, NBC Los Angeles (Apr. 7, 2019) *available at* https://www.nbclosangeles.com/news/local/Shooting-Hawthrone-508246211.html (father allegedly killed mother of their child during custody exchange in front of police station).

understand that they must give consideration to whether and when the presumption applies and then, if it applies, make specific findings on each factor before issuing an order that grants a domestic abuser access to and time spent with a child.

Proper application of Section 3044 also is critical to the many domestic violence survivors who must represent themselves in custody hearings. While Vargas was represented by counsel at her custody hearing, most domestic violence survivors do not have representation, and they are entitled to the benefit of—and clarity regarding—Section 3044's presumption, which alleviates what traditionally was a survivor's burden of proof in the custody proceeding. It is imperative that the Court establish that Section 3044 applies in the circumstances here, to ensure that the presumption is properly utilized for the benefit and safety of domestic violence survivors and their children even if litigants are not themselves aware that the presumption exists.[3] Otherwise, the safety and well-being of domestic violence survivors and their children will continue to be in jeopardy.

II. THE LEGISLATURE ENACTED SECTION 3044 TO PROTECT CHILDREN AND SURVIVOR PARENTS

The California Legislature has long made it a priority to protect

[3] See also Fam. Code, § 3044, subd. (h) ("In a custody or restraining order proceeding in which a party has alleged that the other party has perpetrated domestic violence in accordance with the terms of this section, the court shall inform the parties of the existence of this section and shall give them a copy of this section prior to any custody mediation in the case.").

children from domestic violence and child abuse. In particular, it has noted that "even without being the direct targets of abusive behavior, if children are exposed to domestic violence in their households, they can suffer severe and lasting harm." (Assem. Com. on Judiciary, Analysis of Assem. Bill 2044, 2017-2018 Reg. Sess., as amended Mar. 22, 2018, at p. 1.) Social science studies demonstrate that "men who abuse their partners contest custody at least twice as often as non-batterer fathers."[4] Indeed, "[b]ecause of the history of the power dynamics between the couple, batterers 'tend to use the power of joint parenting to exert control over the other parent.'"[5] In order "to reduce the likelihood that a perpetrator of domestic violence [would] be awarded sole or joint custody of a child," the Legislature enacted Section 3044 in 1993. (Assem. Com. on Judiciary, Analysis of Assem. Bill 840, 1999-2000 Reg. Sess., as introduced Feb. 24, 1999, at p. 3.) Significantly, Section 3044 is rooted in a policy aimed at, among other things, stopping the cycle of abuse and "prevent[ing] batterers from using custody disputes to [continue to] exercise control over their victims." (Sen. Judiciary Com., Analysis of Sen. Bill 265, 2003-2004 Reg. Sess., as amended Apr. 21, 2003, at p. 10.)

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[4] Emmaline Campbell, *How Domestic Violence Batterers Use Custody Proceedings in Family Courts to Abuse Victims, and How Courts Can Put a Stop to It* (2017) 24 UCLA Women's L.J. 41, 58.

[5] *Id.* (citing Daniel G. Saunders, *Research Based Recommendations for Child Custody Evaluation Practices and Policies in Cases of Intimate Partner Violence* (2015) 12 J. of Child Custody 71, 82).

A. Courts must apply a rebuttable presumption against awarding custody to an abuser.

Accordingly, Section 3044 establishes a presumption against awarding an abuser sole or joint (including de facto joint) custody of his or her child. The statute requires that when a trial court makes a finding that a party seeking custody of a child has committed domestic violence within the previous five years, the court must apply a mandatory, but rebuttable, presumption that awarding custody to that parent is not in the child's best interest. (Fam. Code, § 3044, subd. (a).) Although "[t]he presumption is rebuttable, . . . the court *must* apply the presumption in any situation in which a finding of domestic violence has been made." (*In re Marriage of Fajota*, 230 Cal.App.4th at p. 1498 [emphasis in original]; see also *S.M. v. E.P.* (2010) 184 Cal.App.4th 1249, 1267 ["[S]ection 3044 does not authorize a court that is making a custody determination to ignore a prior finding that one parent has perpetrated domestic violence against the other parent."].) The mandatory presumption only can be rebutted if the perpetrator parent shows by a preponderance of the evidence that awarding custody to him/her is in the child's best interest, in light of and weighing all of the seven factors enumerated by Section 3044 and discussed in Section II.B., *infra*. (Fam. Code, § 3044, subd. (a).)

The Legislature intentionally placed the burden of proof on the perpetrator, specifically acknowledging that the premise of Section 3044 is "that the perpetrator of the violence should have the burden" because, under

the former approach, the domestic violence survivor already had two burdens of proof to carry: (1) that he or she was a victim of domestic violence, and (2) that the past violence weighed against granting custody to the perpetrator. (Assem. Com. on Judiciary, Analysis of Assem. Bill 840, 1999-2000 Reg. Sess., as introduced Feb. 24, 1999, at p. 5.) Having the benefit of the rebuttable presumption would make it easier for a domestic violence survivor to defeat her abuser's attempts to obtain custody of their children.

The Legislature's amendment to Section 3044 that went into effect January 1, 2019 states, in pertinent part, that at a hearing "in which custody orders are sought and where there has been an allegation of domestic violence, the court shall make a determination as to whether this section applies *prior* to issuing a custody order." (Fam. Code, § 3044, subd. (g) [emphasis added].) The Legislature explained that if courts do not make this threshold determination, "the goal of [Section 3044]—to protect children from the known harm of exposure to domestic violence—would be substantially undermined." (Assem. Com. on Judiciary, Analysis of Assem. Bill 2044, 2017-2018 Reg. Sess., as amended Mar. 22, 2018, at p. 8.) Although this subsection had not yet been enacted when the trial court made its Order, it nevertheless reflects the same strong public policy considerations that resulted in Section 3044's passage nearly twenty years ago, and, therefore, is relevant to show the Legislature's public policy considerations. (See, e.g., *In re Marriage of Paddock* (1971) 18

Cal.App.3d 355, 360 ["Subsequent legislation clarifying a statute does not change its meaning but merely supplies an indication of legislative purpose."].) The Legislature made a policy decision against giving abusers custody of children, and the courts should apply that overriding policy choice in all situations where the underlying facts are appropriate.

Indeed, to hold otherwise would be to contravene the Legislature's overarching policy goal of keeping abusers away from children. The presumption has little meaning if a court does not consider its applicability in advance of making a custody determination involving an alleged domestic abuser, especially given California's public policy focused on protecting its children. As the Legislature explained, requiring courts to determine whether Section 3044 applies before issuing custody orders "does not make it any more likely that a court will find that the presumption exists; it simply requires that the court at least consider whether or not it might." (*Ibid.*)

B. Courts must consider seven factors in determining whether the presumption against custody has been rebutted.

In determining whether the perpetrator parent has carried his or her burden, the court must find that:

> "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 interests of the child, [acknowledging that] the preference for frequent and continuing contact with both

> parents . . . may not be used to rebut the presumption, in whole or in part.

(Fam. Code, § 3044, subd. (b)(1).) In addition, the court must find that the following factors, "on balance," support the Legislature's policy in favor of ensuring health, safety, and welfare of children:

> (2) Whether "[t]he perpetrator has successfully completed a batterer's treatment program";
>
> (3) Whether "[t]he perpetrator has successfully completed a program of alcohol or drug abuse counseling, if the court determines that counseling is appropriate";
>
> (4) Whether "[t]he perpetrator has successfully completed a parenting class, if the court determines the class to be appropriate";
>
> (5) Whether "[t]he perpetrator is on probation or parole, and he or she has or has not complied with the terms and conditions of probation or parole";
>
> (6) Whether "[t]he perpetrator is restrained by a protective order or restraining order, and he or she has or has not complied with its terms and conditions"; and
>
> (7) Whether "[t]he perpetrator . . . has committed any further acts of domestic violence."

(Fam. Code, § 3044, subd. (b).) No one factor is determinative, and *every one of the factors* must be considered and expressly addressed on the record. (*In re Marriage of Fajota*, 230 Cal.App.4th at pp. 1497-1498 [trial court required to apply each factor in determining whether presumption rebutted]; *Jaime G.*, 25 Cal.App.5th at p. 805 [referring to the factors as a

"mandatory checklist for family courts"].)

Similarly, factors unrelated to domestic violence or the safety of the child may not be considered when making custody decisions in these circumstances. (*In re Marriage of Fajota*, 230 Cal.App.4th at p. 1497 ["A court . . . abuses its discretion *if it applies improper criteria or makes incorrect legal assumptions*."] [emphasis in original].) In particular, courts may not rely exclusively on Section 3040's preference for frequent and continuing contact with both parents as a basis for finding Section 3044's presumption rebutted. (See *Ellis*, 2 Cal.App.5th at pp. 418-419; see also Fam. Code, § 3044(b)(1) ["[i]n determining the best interests of the child, the preference for frequent and continuing contact with both parents . . . may not be used to rebut the presumption, in whole or in part."].) The reason for this is simple—"[m]andatory checklists can improve professional decisionmaking (sic) for professionals," including judges. (*Jaime G.*, 25 Cal.App.5th at p. 805.) Although seemingly burdensome, "the Legislature's intent was to require family courts to give due weight to the issue of domestic violence," particularly in custody disputes, a context in which "courts have historically failed to take sufficiently seriously evidence of domestic abuse." (*Id.* at p. 806.) "Without such assumptions, it has been too easy for courts to ignore evidence of domestic abuse or to assume that it will not happen again." (*Ibid.*)

Upon a determination that the perpetrator has rebutted the presumption, the court must "state the reasons for this decision," including

by making specific findings regarding *each* of these factors "in writing or on the record." (*Jaime G.*, 25 Cal.App.5th at p. 805.) Prior to the 2018 amendment, Section 3044 expressly required courts to make findings regarding rebuttal of the presumption in writing or on the record, and even without the subsequent amendment, that requirement was most reasonably read as requiring findings on each of the statutory factors. (*Jaime G.*, 25 Cal.App.5th at 805.) "The purpose of the rebuttable presumption statute is to move family courts, in making custody determinations, to consider properly and to give heavier weight to the existence of domestic violence." (*Ibid.* [citing Sen. Com. on Judiciary, Analysis of Assem. Bill 840 (1999-2000 Reg. Sess.) July 13, 1999].) Requiring individual findings in order to find the presumption against custody rebutted furthers the significant policy considerations aimed at keeping California's children safe.

By amending Section 3044 in 2018, the Legislature confirmed this. (See Fam. Code, § 3044, subds. (f)(1), (2) ["if the court determines that the presumption . . . has been overcome, the court shall state its reasons in writing or on the record as to why [the factors], on balance" warrant joint or sole custody to the perpetrator].) As discussed above, Section 3044's recent amendment was an express codification of both *Jaime G.* and the

Legislature's previously-expressed intent.[6] (See, e.g., *In re Marriage of Paddock*, 18 Cal.App.3d at p. 360; see also Fam. Code, § 3044, subd. (f)(1).) Given the significant dangers posed to children of perpetrators of domestic violence, the requirement that judges make specific findings in writing or on the record concerning Section 3044's rebuttal factors is necessary and justified, particularly in light of courts' historical failure to properly apply Section 3044.[7] Here, while the court below was required to consider each of the factors—and to make its determinations regarding them on the record—it failed to comply with either requirement because it started from the point that the presumption was irrelevant. (CT at p. 57.)

C. Courts routinely misapply the rebuttable presumption and the seven factors.

Unfortunately, courts apply Section 3044 inconsistently, and often not in accordance with the public policy forming Section 3044's foundation.[8] For that reason, the Legislature amended Section 3044, including as discussed above, "to better define a court's responsibility when

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[6] In amending Section 3044 in 2018, the Legislature confirmed that Section 3044 was to "be interpreted consistently with the decision in *Jaime G.* . . . which requires that the court, in determining the presumption . . . has been overcome, make specific findings on each of the factors." (Fam. Code, § 3044, subd. (f)(1).)

[7] Katharine T. Bartlett, *Preference, Presumption, Predisposition, and Common Sense: From Traditional Custody Doctrines to the American Law Institute's Family Dissolution Project* (2002) 36 Fam. L.Q. 11, 23 ("Written findings are required to support any allocation of custodial or decision-making responsibility to a parent, which justify allocation in light of the assumed dangers of these behaviors.").

[8] *See* n. 1, *supra*.

making a best interests of the child custody determination." (Assem. Com. on Judiciary, Analysis of Assem. Bill 2044, 2017-2018 Reg. Sess., as amended Mar. 22, 2018, at p. 1 [emphasis removed].) Specifically, amendment was needed concerning "how courts make child custody and visitation determinations in order to strengthen abuse protections for children." (*Id.* at p. 5.) In its analysis, the Legislature acknowledged that "[t]he presumption against custody to a batterer was established 20 years ago [by Section 3044] and has not recently been updated to better protect against the long-term harms to children exposed to domestic violence." (*Id.* at p. 6.) The Legislature further acknowledged that, although Section 3044 had been "updated slightly" in the early 2000s to "address . . . several of the substantial issues that had been found . . . to hinder the implementation of the presumption," further updating was needed to address "additional problems with implementation of the presumption that have put children in jeopardy." (*Ibid.*)

Given the critical role of Section 3044 in protecting children, this Court must ensure that trial courts apply the presumption appropriately. The trial court here failed to give Vargas the benefit of the presumption to which she was entitled and did not require Galaviz to make an evidentiary showing to overcome it.

III. FAILURE TO APPLY SECTION 3044 TO DE FACTO AWARDS OF JOINT CUSTODY LEADS TO FURTHER EXPOSURE OF CHILDREN TO DOMESTIC VIOLENCE

The trial court here appears to have concluded (wrongly) that Vargas

was not entitled to the Section 3044 presumption because the court's order granted Galaviz visitation, not joint custody. This narrow and formalistic limitation of Section 3044 is incorrect.

A. Section 3044 is designed to ensure that courts consider domestic violence before making a custody order.

As discussed above, trial courts are required to "determine if the Section 3044 presumption applies *before* issuing a custody or visitation order." (Assem. Com. on Judiciary, Analysis of Assem. Bill 2044, 2017-2018 Reg. Sess., as amended Mar. 22, 2018, at p. 7 [emphasis in original].) This requirement forces courts to give due consideration to the circumstances that might make a "visitation" order more like a "custody" order in practical effect, and ensures that courts at least pay attention to the issue. (*Id.*, at p. 8 [noting that the law "simply requires that the court at least consider whether or not [the presumption] might" exist].) As discussed above, this statutory requirement confirms how important it is for courts to consider whether the Section 3044 presumption applies before issuing custody or visitation orders, particularly where the noncustodial parent is awarded a substantial amount of time with the child.

Indeed, it has long been the rule that courts "must consider the legal effect" of custody or visitation orders, "not the label" attached to them. (*Celia S.*, 3 Cal.App.5th at p. 664; see also *id.* at p. 657 ["[T]he trial court may not circumvent [S]ection 3044" based on its characterization; holding that what the trial court called "visitation" was in fact custody].) As set

forth above, allowing trial courts to sidestep Section 3044's presumption based on the name given to a custody order (*i.e.*, custody or visitation) is contrary to the public policy considerations of Section 3044 and the clear directive of *Celia S.* (See Assem. Com. on Judiciary, Analysis of Assem. Bill 2044, 2017-2018 Reg. Sess., as amended Mar. 22, 2018, at p. 7; see also *Celia S.*, 3 Cal.App.5th at pp. 664, 657.) In fact, although the *Celia S.* decision, which required courts to consider the legal effect of custody or visitation orders, was issued in 2016—two years before the trial court issued its de facto joint custody award here—the trial court failed to consider whether the Section 3044 presumption applied *before* issuing the order. Here, the trial court had already determined that Galaviz committed domestic violence against Vargas, and he was requesting a change to the custody order to obtain extensive periods of visitation. (RT 9.) Therefore, the trial court was required to determine whether Section 3044 applied before issuing any order. Unfortunately, there was no discussion by the trial court whatsoever regarding Section 3044, either at the custody hearing or in the Order. It appears, then, that the trial court failed to make the threshold determination whether Section 3044 applied (and it did apply); certainly it made no such determination on the record.

B. Failure to apply the Section 3044 presumption with equal force to joint custody orders and substantial visitation orders that are the functional equivalent to a de facto joint custody order exposes children to violence.

As discussed in Vargas's Opening Brief (pp. 34-41), "joint physical

custody" arises where each parent "has significant periods of physical custody," and the child has "frequent and continuing contact with both parents." (Fam. Code, § 3004.) Case law demonstrates that joint physical custody arises in circumstances in which (1) the parent with whom the child does not reside sees the child four or five times a week;[9] or (2) parents have the child for "roughly" equal time.[10] Against this backdrop, a "visitation" order that allows the domestic abuser to spend substantial amounts of time with a child is no different from a joint physical custody order. Here, the trial court's "visitation" order allows Galaviz to see the Child at least four days out of the week, and requires the Child to be shuttled back and forth between Galaviz and Vargas on each of those four days. (CT at p. 57.) When considering vacations and holidays, the Order allows Galaviz to see the Child for up to 44 percent of the year in some years. (CT at pp. 57-58.) Thus, the practical effect of this "visitation" order is to award Galaviz joint physical custody.

An order that nominally grants substantial visitation rights can expose a child to the exact same risks as an order awarding joint physical custody—if not more, because of the frequency of exchanges of the child

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[9] *In re Marriage of Biallas* (1998) 65 Cal.App.4th 755, 760 ("Joint physical custody exists where the child spends significant time with both parents"); *Brody v. Kroll* (1996) 45 Cal.App.4th 1732, 1735-1736 (joint physical custody where child saw parent three days a week, and more extensively during the summer).

[10] *Celia S.*, 3 Cal.App.5th at p. 658 (visitation that amounted to children splitting their time 50 percent between parents amounted to de facto joint custody order).

between the parents. The Legislature has recognized that exposure to domestic violence inside the home is not limited to situations in which a child is the subject of a joint custody order. The Legislature specifically noted that a domestic violence perpetrator's "unsupervised visitation" with children can lead to "significant harm," and that "it may well not be safe to give that parent unsupervised visitation with the child." (Assem. Com. on Judiciary, Analysis of Assem. Bill 2044, 2017-2018 Reg. Sess., as amended Mar. 22, 2018, at p. 6.) In particular, in such a circumstance, "the child will likely be exposed to the transfers between the parents, which can create unique opportunities for witnessing abusive behavior." (*Ibid.*)

Although Section 3044 ultimately was not amended to apply its presumption to simple visitation orders, the public policy principles underlying the aforementioned legislative history apply with equal force to de facto joint custody arrangements, and confirm the Legislature's focus on guarding against the risk to which children are exposed when they are in the care of abusive parents. When children are shuttled back and forth to and from an abusive parent under broad "visitation" orders, as Child will be shuttled between Vargas and Galaviz four times per week here, abusive parents are granted more opportunities to perpetrate violence or abuse in interactions between the parents. This is directly contrary to the policy considerations underlying Section 3044. (See Fam. Code, § 3020, subd. (a) ["the health, safety, and welfare of children shall be the court's primary concern in determining the best interests of children when making orders

regarding the physical or legal custody or visitation of children."].) "Frequent contact between the batterer and his child, child exchanges, and visitation provide an ideal opportunity for continued abuse and manipulation." (Allen M. Bailey, *Prioritizing Child Safety as the Prime Best-Interest Factor* (2013) 47 Fam. L.Q. 35, 57.)[11]

C. Failure to apply the Section 3044 presumption and factors in joint custody and de facto joint custody awards risks immediate and long-lasting damage to the child.

Indeed, it is well established that children are harmed physically and emotionally when they are in the care of a parent who perpetrates domestic

[11] See also Campbell, *supra* n. 4, 24 UCLA Women's L.J. at p. 58 ("When batterers are granted custody, they can use the children as a mechanism to stay involved in the life of their victims"); Peter G. Jaffe, Claire V. Crooks & Frances Q.F. Wong, *Parenting Arrangements After Domestic Violence* (2005) 6 J. of the Ctr. for Fams., Children & the Cts. 95, 104 (child exchanges between parents may lead to conflict and opportunities for abuse); April M. Zeoli, Echo A. Rivera, Cris M. Sullivan & Sheryl Kubiak, *Post-Separation Abuse of Women and their Children: Boundary-Setting and Family Court Utilization among Victimized Mothers* (2013) 28 J. Fam. Violence 547, *available at* https://www.researchgate.net/profile/Echo_Rivera/publication/255976296_Post-Separation_Abuse_of_Women_and_their_Children_Boundary-Setting_and_Family_Court_Utilization_among_Victimized_Mothers/links/573a304e08ae9f741b2ca44e/Post-Separation-Abuse-of-Women-and-their-Children-Boundary-Setting-and-Family-Court-Utilization-among-Victimized-Mothers.pdf?origin=publication_detail (accessed March 12, 2019), at p. 547 ("These court-mandated arrangements allow assailants to have access to survivors, and therefore provide opportunities for continued abuse.").

violence.[12] "Both common sense and expert opinion indicate spousal abuse is detrimental to children." (*In re Benjamin D.* (1991) 227 Cal.App.3d 1464, 1471, fn.5.) As a result, "even if they are not physically harmed, children suffer enormously from simply witnessing the violence between their parents."[13] (See *In re Sylvia R.* (1997) 55 Cal.App.4th 559, 562 [children are damaged by witnessing domestic violence, even if not subject to it].) Given the power dynamics between a perpetrator of domestic violence and the victim, it is unsurprising that ongoing custody exchanges present an opportunity for continued abuse that can be witnessed by children.[14] In fact, "the victimization rate of women separated from their husbands was about 3 times higher than that of divorced women and about 25 times higher than that of married women."[15] Further, perpetrators of

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[12] There are an "abundance of social science studies showing a direct correlation between abuse against a parent and abuse against the children of that parent." (*Perez v. Torres-Hernandez* (2016) 1 Cal.App.5th 389, 402; Hart & Klein, *Practical Implications of Current Intimate Partner Violence Research for Victim Advocates and Service Providers* (2013) National Criminal Justice Reference Service, *available at* https://www.ncjrs.gov/pdffiles1/nij/grants/244348.pdf [accessed March 12, 2019], at p. 64 [children exposed to intimate partner violence increased "risk for children's difficulties with 'impulsive emotionality and aggressive personality styles'"].)

[13] Naomi R. Cahn, *Civil Images of Battered Women: The Impact of Domestic Violence on Child Custody Decisions* (1991) 44 Vand. L. Rev. 1041, 1055.

[14] Lundy Bancroft & Jay G. Silverman, *Assessing Risk to Children from Batterers* (2002), *available at* http://lundybancroft.com/articles/assessing-risk-to-children-from-batterers/ (accessed March 12, 2009).

[15] Ronet Bachman & Linda E. Saltzman, Bureau of Justice Statistics, *Violence against Women: Estimates from the Redesigned Survey* (1995), *available at* https://www.bjs.gov/content/pub/pdf/FEMVIED.PDF (accessed March 12, 2019), at p. 4.

domestic violence often parent or co-parent in ways that are dangerous or detrimental to both the domestic violence victim and his or her children.[16]

The legislative history of Section 3044 demonstrates that the Legislature intended for Section 3044 to embody California's strong public policy goals of protecting children from the adverse effects of witnessing domestic abuse of and by their parents. As one hearing transcript explained:

> "In 14 out of 16 studies, witnessing violence between one's parents or caretakers is a more consistent predictor of future violence than being the victim of child abuse." . . . Researchers Lewis, et al, found that 79% of violent children in institutions reported that they had witnessed extreme violence by the parents, whereas only 20% of the nonviolent offenders did so.

(Assem. Com. on Judiciary, Analysis of Assem. Bill 840, 1999-2000 Reg. Sess., as introduced Feb. 24, 1999, at p. 7 [citations omitted].)[17] The effects of children witnessing one parent committing violence against the other are profound:

> Perhaps the most shocking finding of all was by the Department of Youth Services of Boston which reported that

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[16] Margaret F. Brinig, Loretta M. Frederick, Leslie M. Drozd, *Perspectives on Joint Custody Presumptions as Applied to Domestic Violence Cases* (2014) 52 Fam. Ct. Rev. 271, 273 ("Parenting problems commonly . . . associated with coercive controlling abuse include systematic interference with and undermining of the victim parent's authority, the use of inflexible, controlling and authoritarian parenting, and the elevation of the abuser's needs above those of their children").

[17] The transcript cited Hotaling & Sugarman, *An Analysis of Risk Markers in Husband to Wife Violence: The Current State of Knowledge*, Violence and Victims 1, 101-124, and *Fact Sheet on Children of Men Who Batter*, compiled by the National Organization for Men Against Sexism, 1993, p. 3.

> children of abused mothers are 6 times more likely to attempt suicide, and 74% more likely to commit crimes against the person. They were also 24 times more likely to have committed sexual assault crimes, and 50% more likely to abuse drugs and/or alcohol.

(*Ibid.* [citing Women and Violence, Hearings before the U.S. Senate and Judiciary Committee, August 29 and December 11, 1990, Senate Hearing 101-939, pt. 2, p. 131].)

Beyond the significant risks associated with witnessing domestic abuse, these exchanges also increase the opportunity for a child to be abused directly.[18] As the Legislature acknowledged, "another reason to protect children from a parent who commits domestic violence is because there is a significant overlap between those who commit domestic violence and those who commit child abuse." (Assem. Com. on Judiciary, Analysis of Assem. Bill 2044, 2017-2018 Reg. Sess., as amended Mar. 22, 2018, at p. 4.) Case law reinforces the significance that must be placed on children's safety in these circumstances. (See, e.g., *Perez*, 1 Cal.App.5th at p. 402 ["The overlap between children witnessing domestic violence and being abused themselves has been widely documented"]; see also *ibid.*

[18] Bailey, *supra* p. 25, 47 Fam. L.Q. at p. 57 ("Visitation exchanges provide opportunities that may result in the children witnessing homicidal violence or being victimized directly"); Margaret F. Brinig, et al., *supra* n. 16, at p. 275 ("custody exchanges may be occasions for violence . . . [and c]hildren may thus be harmed as primary victims (victims harmed directly) or as secondary victims when they are exposed to or witness the violence." [internal citations omitted]); *Perez v. Torres-Hernandez* (2016) 1 Cal. App. 5th 389, 402 ("[w]ithin this body of social science literature, most of the studies show that in 30–60 percent of families where either child abuse or spousal abuse exists, both forms of the abuse exist.").

[some perpetrators of domestic violence "abuse children as a way to inflict pain on the abused spouse"].)

Given the foregoing, it is unsurprising that experiencing and witnessing domestic violence results in a "pattern of learned helplessness and dependence" that has long-lasting effects. (*In re Heather A.* (1996) 52 Cal.App.4th 183, 195-196.) In working to amend Section 3044 in 2018, the Legislature highlighted recent research conducted by the Centers for Disease Control, which "confirms that even without being the direct targets of abusive behavior, if children are exposed to domestic violence in their households, they can suffer severe and lasting harm." (Assem. Com. on Judiciary, Analysis of Assem. Bill 2044, 2017-2018 Reg. Sess., as amended Mar. 22, 2018, at p. 1.) That research revealed that "exposure to domestic violence can increase risk for physical, mental health, and substance abuse conditions" in children.[19] One study also showed that witnessing intimate partner violence as a child furthers the cycle of abuse by "doubl[ing] the risk of adult victimization in females and doubl[ing] the risk of adult perpetration in males."[20] As the Legislature concluded, "[s]imply put, it is

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[19] Nat'l Ass'n of Social Workers, Spring Practice Perspectives, *The Adverse Childhood Experiences (ACE) Study: Implications for Mothers' & Children's Exposure to Domestic Violence* (May 2013) *available at* https://www.socialworkers.org/assets/secured/documents/practice/children/acestudy.pdf (accessed March 12, 2019) ("research on children who witness domestic violence found that they have an increased risk for mental health issues related to juvenile delinquency, antisocial behavior, and escalated rates of depression, anxiety, and PTSD.").

[20] Hart & Klein, *supra* n. 12, at p. 64.

harmful to children, both immediately and through their lives, to be exposed to domestic violence." (Assem. Com. on Judiciary, Analysis of Assem. Bill 2044, 2017-2018 Reg. Sess., as amended Mar. 22, 2018, at p. 4.)

As this research indicates, awarding explicit custody, or de facto custody in the form of substantial visitation, to perpetrators of domestic violence can result in immediate, lasting, and permanent damage to the children involved in these disputes. These concerns necessitate that trial courts consider Section 3044 whenever a custody or visitation order is made and apply it when the effect of an order would be to grant an abuser substantial physical access to a child. It is axiomatic that the risks associated with failing to do so run afoul of California's public policy of protecting "the health, safety, and welfare of children . . . in determining the best interests of children when making orders regarding the physical or legal custody or visitation of children." (Fam. Code, § 3020, subd. (a).)

IV. THIS COURT SHOULD PROVIDE CLARITY REGARDING SECTION 3044'S APPLICATION BECAUSE DOMESTIC VIOLENCE VICTIMS ARE OFTEN NOT REPRESENTED BY COUNSEL IN CUSTODY HEARINGS

Compounding the serious safety issues discussed above is the fact that domestic violence victims are overwhelmingly unrepresented by attorneys at the trial level, and are tasked with navigating complex custody

issues without assistance or clear guidance on the law.[21] Indeed, given trial courts' systematic misapplication of Section 3044, how are *pro per* victims expected to adequately advocate for their own or their children's safety in court? As it stands now, Section 3044's application is inconsistent at best, with many courts failing to apply the rebuttable presumption or factors in custody disputes when they should do so.[22]

The result is that unrepresented domestic violence victims are tasked with carrying a burden to prove not only that they are victims, but that the trial court should not grant sole or joint custody to their abuser. This is directly contrary to the public policy furthered by Section 3044, which intentionally vested the burden of overcoming the presumption against joint custody with the perpetrator. (Assem. Com. on Judiciary, Analysis of Assem. Bill 840, 1999-2000 Reg. Sess., as introduced Feb. 24, 1999, at p. 3 ["the perpetrator of the violence should have the burden" of rebutting a presumption against joint custody].) This fundamental issue regarding the lack of clarity concerning Section 3044 is particularly problematic in light of the fact that, without representation, domestic abuse victims are put at risk for still more abuse by their aggressors. (Campbell, *supra* n. 4, at p. 55

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[21] Bonnie Hough, *Self-Represented Litigants in Family Law: The Response of California's Courts* (Jan. 2010) 1 Cal. L. Rev. Circuit 15, 16 (70-80% of California family court litigants are unrepresented); *Ross v. Figueroa* (2006) 139 Cal.App.4th 856, 861(litigants in domestic violence restraining order hearings are *pro per* 90 percent of the time).

[22] *See* Section II.C, *supra*.

["the batterer can use the power differential between himself and the victim to his advantage in court"].)

Given the foregoing, the courts must act to protect these victims and their children by ensuring that Section 3044's safeguards are applied when a court considers issuing an order that de facto awards joint custody.

V. CONCLUSION

Amicus Curiae respectfully requests that the Court reverse the decision of the trial court for the reasons discussed herein and in Vargas's briefing, and issue an opinion that will provide guidance to trial courts concerning when, how, and why to apply Section 3044's rebuttable presumption and factors.

Dated: May 14, 2019

Respectfully submitted,

MANATT, PHELPS & PHILLIPS, LLP

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California Women's Law Center

WORD COUNT CERTIFICATION

Pursuant to California Rules of Court, rule 8.204(c)(1), I certify that this Proposed Brief of Amicus Curiae contains 6,586 words, not including the application, table of contents, table of authorities, the caption page or this certification page.

Dated: May 14, 2019 MANATT, PHELPS & PHILLIPS, LLP

By: s/ Joanna S. McCallum
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PROOF OF SERVICE

I, Brigette Scoggins, declare as follows:

I am employed in Los Angeles County, Los Angeles, California. I am over the age of eighteen years and not a party to this action. My business address is Manatt, Phelps & Phillips, LLP, 11355 West Olympic Boulevard, Los Angeles, California 90064-1614. On **May 14, 2019**, I served the within **PROPOSED AMICUS CURIAE BRIEF OF CALIFORNIA WOMEN'S LAW CENTER IN SUPPORT OF APPELLANT** on the interested parties in this action addressed as follows:

(*Via TrueFiling*) Mary-Christine Sungaila Marco A. Pulido HAYNES AND BOONE, LLP 600 Anton Blvd., Suite 700 Costa Mesa, CA 92626 Jennafer Dorfman Wagner Shuray Ghorishi Cassandra Allison Erin C. Smith FAMILY VIOLENCE APPELLATE PROGRAM 449 15th St., Suite 104 Oakland, CA 94612 Jenee Barnes CENTRAL CALIFORNIA LEGAL SERVICES, INC. 2025 West Feemster Ave. Visalia, CA 93277	*Attorneys for Plaintiff & Appellant* *CRYSTAL VARGAS*
(*Via U.S. Mail*) Robert Galaviz 2079 Bella Oaks Dr. Tulare, CA 93274	*Respondent*
(*Via U.S. Mail*) Clerk, Tulare County Superior Court 300 E. Olive Porterville, CA 93257	*For Delivery to the Honorable* *Glade Roper*

Clerk, Supreme Court of California 350 McAllister Street San Francisco, CA 94102-7303	(*Electronically served pursuant to CRC 8.212(c)*)

☒ **(BY U.S. MAIL)** By placing such document(s) in a sealed envelope, with postage thereon fully prepaid for first class mail, for collection and mailing at Manatt, Phelps & Phillips, LLP, Los Angeles, California following ordinary business practice. I am readily familiar with the practice at Manatt, Phelps & Phillips, LLP for collection and processing of correspondence for mailing with the United States Postal Service, said practice being that in the ordinary course of business, correspondence is deposited in the United States Postal Service the same day as it is placed for collection.

☒ **(BY TRUEFILING)** Based on a court order or an agreement of the parties to accept service by e-mail or electronic transmission via the Court's Electronic Filing System (EFS) operated by TrueFiling.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this declaration was executed on **May 13, 2019**.

Brigette Scoggins

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