



January 15, 2019

Chief Justice Tani G. Cantil-Sakauye
and Associate Justices
Supreme Court of California
350 McCallister Street, Room 1295
San Francisco, CA 94102-7303

Re: California Women's Law Center and Jacqueline Jacobs Caster's *Amici Curiae* Letter
in Support of Petition for Review, in *S.Y. v. Superior Court*, California Supreme Court
Case No. S253232

Dear Chief Justice Cantil-Sakauye and Associate Justices of the Court:

Pursuant to California Rule of Court, Rule 8.500, subdivision (g) of the
California Rules of Court, *amici curiae* California Women's Law Center ("CWLC") and
Jacqueline Jacobs Caster respectfully submit this letter in support of S.Y.'s Petition for
Review in the above-referenced action ("Petition").

I. Amici's Interest in this Case

The California Women's Law Center is a statewide, nonprofit law and policy center dedicated to advancing the civil rights of women and girls. CWLC works to break down barriers and advance the potential of women and girls through transformative litigation, policy advocacy, and education. Since its inception in 1989, CWLC has placed an emphasis on eradicating all forms of discrimination and violence against women. Part of CWLC's mission is to ensure that women and children have access to resources to protect against and overcome violence, including creating innovative programs to raise awareness, while bringing expanded services to victims of domestic violence.

CWLC has filed amicus briefs and letters before the California Court of Appeal and the California Supreme Court in several domestic violence appeals. The briefs and letters argue for clarity in the interpretation of the statutory scheme surrounding domestic violence restraining orders in family court and juvenile court as well as the interpretation and application of Family Code section 3044.¹ Two of these appeals resulted in published opinions. (*See Garcia v. Escobar*, (2017) 17 Cal.App.5th 267; *Priscila N. v. Leonardo G.* (2017) 17 Cal.App.5th 1208.)

Jacqueline Jacobs Caster, a member of the California Bar, is the Founder and President of the Everychild Foundation, a grant-making and advocacy organization dedicated to easing suffering of children in Los Angeles County. The group has made over \$17 million in targeted grants since 2000. Key among them are a major expansion of the Violence Intervention Program, Richstone Family Services, 1736 Family Crisis

¹ All further statutory references are to the Family Code unless otherwise indicated.

Board of Directors

Board Co-President
Mira El Sombaty
Fox Entertainment Group

Board Co-President
Diana Hughes Leiden
Winston & Strawn LLP

Board Treasurer
Chris Hollinger
O'Melveny & Myers LLP

Board Secretary
Pamela Palmer
Pepper Hamilton LLP

Members
Stacey Armato
Atlantic Investors

Tony Blain
Blain & Associates

Christa M. Demeke
The Wonderful Company

Theane Evangelis
Gibson, Dunn & Crutcher LLP

Kevin Feldman
Feldman Capital LLC

Kerry C. Fowler
Jones Day

Victor George
Law Offices of Victor L. George

Lisa Gilford
Skadden, Arps, Slate, Meagher & Flom

Genie Harrison
Genie Harrison Law Firm

Esra Hudson
Manatt, Phelps & Phillips LLP

Bethany Kristovich
Munger, Tolles & Olson LLP

Anna Menedjian
2020 Inc.

Edie Mermelstein, Esq.
FEM Law Group

Kim Nakamaru
Global Eagle Entertainment

Amy Quartarolo
Latham & Watkins LLP

Executive Director
Betsy Butler

Center, and the Children's Clinic in Long Beach, all of which share a focus servicing abused and traumatized women and children. Ms. Caster, a member the Los Angeles

County Probation Commission for the past three years, often speaks on issues relating to abused, traumatized and disenfranchised minors and is a longtime board member of the Campaign for Youth Justice, based in Washington, D.C.

In this case, *amici* urge the grant of S.Y.’s Petition seeking review from this Court to clarify the application of Family Code section 3044, which sets forth a mandatory rebuttable presumption against awarding custody of a child to a domestic violence abuser, and specifically, asks this Court to make clear that the factor of a preference for “frequent and continuing contact” with both parents may not be considered in rebutting the presumption. Such clarity is essential because section 3044, and in particular the express direction that “the preference for frequent and continuing contact with both parents . . . may not be used to rebut the presumption, in whole or in part,” is frequently misapplied by courts as it was by the Court of Appeal here. It is particularly important that the Court provide this guidance because the consequences of joint custody for domestic violence victims and their children are serious and harmful. In addition, because the vast majority of domestic violence victims represent themselves in custody order hearings and appeals, clear guidance in applying the law is especially crucial for litigants lacking an attorney to cite to relevant legal authority.

II. The Court Should Grant the Petition for Review Because Courts Routinely Misapply Section 3044 and its Mandate Against Considering Frequent and Continuing Contact

The California legislature has recognized that “the perpetration of child abuse or domestic violence in a household where a child resides is detrimental to the child.” Fam. Code § 3020(a). In enacting section 3044, the legislature acknowledged this fact and the negative effects children face when placed into custody with an abusive parent. (Allison C. Morrill, et al., *Child Custody and Visitation Decisions When the Father Has Perpetrated Violence Against the Mother*, 11 VIOLENCE AGAINST WOMEN 1076, 1077 (2005) [noting children who live in households where there is domestic violence are at risk of being abused directly by their mothers’ abusers]; Allen M. Bailey, *Prioritizing Child Safety as the Primary Best-Interest Factor*, 47 FAMILY L.Q. 35, 49 (2013) [children of abusers are more likely to be abused directly, witness abuse of siblings, and be subject to emotional abuse than are children of non-abusive parents].) The legislature also recognized that a disproportionate percentage of child custody cases involve domestic violence. (Morrill, *supra*, at 1078 [studies have shown between 25% and 50% of disputed custody cases involve domestic violence].)

Section 3044 requires a court to determine whether a party seeking custody of a child has perpetrated domestic violence against the other parent. (Fam. Code § 3044(a).) If such determination is made, the statute requires the court to apply a rebuttable presumption that awarding custody to the perpetrator is not in the child’s best interest. (*Id.*) The statute’s mandate is clear: “[i]n determining whether the presumption . . . has been overcome, the court shall consider all of the following factors . . .” (Fam. Code § 3044(b).) Thus, the court must consider each of the seven factors outlined in subdivision (b) of section 3044 to make its determination whether it is in the best interest of the child to rebut the presumption and award the abuser custody.

The presumption against awarding custody to a perpetrator of domestic violence contained in Section 3044 was first established in 1999. (Assem. Bill No. 840 (1999-2000 Reg. Sess.)) Several years after section 3044 was originally enacted, it became apparent that courts were relying on the “preference for frequent and continuing contact” between children and parents set forth in Family Code section 3020 to overcome the presumption against awarding custody to a batterer—which defeated the purpose of section 3044. (Sen. Com. on Judiciary, Analysis of Sen. Bill No. 265 (2003-2004 Reg. Sess.) as amended May 5, 2003, p. 6.) In response, the legislature enacted Senate Bill 265, which contained

language expressly prohibiting courts from using this preference to rebut the section 3044 presumption. (Sen. Bill 265, 2003-2004, Reg. Sess. (Cal. 2003) (enacted).)

Evidence shows that courts consistently misapply Section 3044 in domestic violence cases, thereby allowing domestic violence perpetrators to abuse the system. (Zoe Garvin, *The Unintended Consequences of Rebuttable Presumptions to Determine Child Custody in Domestic Violence Cases*, 50 FAMILY L.Q. 173, 178-79 (2016) [the application of the presumption is inconsistent and often distorted by judges]; Nancy K. D. Lemon and Jennafer Dorfman Wagner, *Family Violence Appellate Project Finds Many Family Law Judicial Officers Fail to Respond Appropriately in Domestic Violence Cases*, 39 ST. B. OF CAL. FAM. L. NEWS 27, 28 (2017) [finding that 90% of California domestic violence service providers surveyed reported issues with custody and visitation, including a judge’s refusal to apply the correct standards mandated by law].)

One of the most common misapplications by judges occurs when they evaluate factors beyond those delineated by section 3044(b), including improperly considering a policy preference for “frequent and continuing parental contact.” (*Keith R. v. Superior Court* (2009) 174 Cal.App.4th 1047, 1056.) This misapplication continues to occur, as it did here, despite clear language in the statute that this factor is expressly not to be considered in determining whether the presumption is rebutted. (*Ellis v. Lyons* (2016) 2 Cal.App.5th 404, 414 [“[W]hat a court may not do under [section 3044] . . . is rely ‘in whole or in part’ on section 3040’s preference for frequent and continuing contact with the noncustodial parent.”] [quoting Fam. Code § 3020]). Here, the Court of Appeal improperly considered frequent and continuing contact by holding that S.Y. keeping her abusive and estranged husband from seeing her son A. was relevant to determining if the presumption against awarding custody to her estranged husband was rebutted. (Typed Opn. 16-18.)²

This misapplication flies in the face of the essence of section 3044—that giving an abusive parent custody is presumptively detrimental to the best interest of a child. (Fam. Code § 3044(a); *see also* Fam. Code § 3020(a).) Yet, as the Court of Appeal did here, courts often find the presumption has been rebutted as a result of blatant misapplication. In this case Omar M. was found to have perpetrated a pattern of emotional and physical abuse against S.Y. for the duration of their marriage and as co-parents of A. (Petition at 12-13, Typed Opn. 4-5, exh. 14, pp. 494-495.) The Court of Appeal improperly considered frequent and continuing contact as a factor relevant to rebuttal of the presumption, and as a result, it affirmed the order awarding joint custody to Omar M. (Typed Opn. 16-18.)

Misapplication of the presumption hurts children by placing a child in the custody of a parent who has demonstrated their tendency towards violence and will likely use the grant of custody as a tool for further abuse against both the co-parent and the child. (Emmaline Campbell, *How Domestic Violence Batterers Use Custody Proceedings in Family Courts to Abuse Victims, and How Courts Can Put a Stop to It*, 24 UCLA WOMEN’S L.J. 41, 58-59 (2017).) The Petition should be granted because this Court must provide clarity that, courts have discretion in custody cases, when it comes to section 3044, a court may not under any circumstances consider frequent and continuing contact with an abusive parent in deciding whether the presumption has been rebutted.

III. The Court Should Grant the Petition Because Joint Custody Orders Issued When 3044 is Misapplied Are Harmful to Survivors and their Children

² We cite to both the typed opinion and the exhibits presented in support of S.Y.’s writ petition.

Abusive parents have a strong tendency to try to control their partner through violence and intimidation and thus are dangerous to the victim and children in co-parenting situations. (Margaret F. Brinig, *et al.*, *Perspectives on Joint Custody Presumptions as Applied to Domestic Violence Cases*, 52 FAM. CT. REV. 2, 274 (2014).) Abusive parents tend to undermine the victim parent's authority, use controlling and authoritarian parenting techniques, and elevate the abuser's needs above those of their children. (Lundy Bancroft & Jay G. Silverman, *The Batterer as Parent: Addressing the Impact of Domestic Violence on Family Dynamics*, SAGE SERIES ON VIOLENCE AGAINST WOMEN, at 94 (2002); Alytia Levendosky, Shannon Lynch & Sandra Graham-Bermann, *Mothers' perceptions of the impact of woman abuse on their parenting*, VIOLENCE AGAINST WOMEN, 6(3) (2000) 247-271.)

Joint custody orders are particularly dangerous for victims and their children because they "allow assailants to have access to survivors, and therefore provide opportunities for continued abuse." (*Post-Separation Abuse of Women and Their Children: Boundary-Setting and Family Court Utilization Among Victimized Mothers*, 28 J. FAM. VIOLENCE 547, 547 (2013).) In particular, violent fathers are more likely to use negative parenting practices like spanking, shaming and exhibiting anger towards their children. (Holden & Ritchie, *Linking extreme marital discord, child rearing, and child behavior problems: Evidence from battered women*, 62 CHILD DEVELOPMENT 311-327 (1991); George Holden, Robert Geffner, & Ernest Jouriles, *Parenting behaviors and beliefs of battered women, Children exposed to marital violence: Theory, research and applied issues*, AMERICAN PSYCHOLOGICAL ASSOCIATION, 185-222 (1998).)

In addition, there are negative consequences for children who are exposed to domestic violence that follow them into adulthood: they are six times more likely to attempt suicide, 74 percent more likely to commit crimes, 24 times more likely to commit sexual assault, and 50 percent more likely to abuse drugs and alcohol than children not exposed. (Women and Violence, Dept. of Youth Services of Boston, Hearings Before the Sen. Com. on the Judiciary, Sen. Hearing 101-939, pr. 2 (Aug. 29 & Dec. 11, 1990) p. 131.) They are also much more likely to abuse their own partners. (*The Batterer as Parent, supra.*)

Supporting a child's relationship with the non-abusive parent is one of the most effective steps family courts can take to increase children's resiliency in recovering from living in a home with domestic abuse. (*Children exposed to marital violence, supra*, at p. 384; Holt et al., *The Impact of Exposure to Domestic Violence on Children and Young People: A Review of the Literature*, 32 CHILD ABUSE AND NEGLECT, at 797 (2008); Buckley et al., CHILDREN'S RESEARCH CENTRE, TRINITY COLLEGE (Dublin), *Listen to me! Children's Experiences of Domestic Violence* (2006), at p. 25.) However, joint custody arrangements risk undermining that relationship by jeopardizing both the non-abusive parent's safety and her ability to parent. (Mo Hannah & Barry Goldstein, *Domestic Violence, Abuse, and Child Custody*, CIVIL RESEARCH INSTITUTE (2010) pp. 6-29.)

Because of the well-known harm that results when children are exposed to domestic violence, Section 3044 and the rebuttable factors were created to focus courts' analysis on whether an abuser can exercise joint custody without further harming the victim and/or their children. (Ass. Bill No. 840 (1999-2000 Reg. Sess.) The rebuttal factors in Section 3044 are an essential component of the statutory scheme aimed at protecting survivors of domestic violence and their children from further abuse and encouraging interventions to help stop abusive parents from continuing their behavior. Specifically, the legislature has found that the consideration of "frequent and continuing contact" as a factor in domestic violence cases defeats the purpose of the presumption itself. (Sen. Com. on Judiciary, Analysis of Sen. Bill No. 265 (2003-2004 Reg. Sess.) as amended on Apr. 21, 2004, pp. 5-6.)

Thus, it is imperative that this Court clarify that consideration of frequent and continuing contact is improper in rebutting the presumption under Section 3044.

IV. The Court Should Grant the Petition for Review to Provide Guidance Because the Majority of Domestic Violence Victims Are Proceeding Without an Attorney

Family law litigants are overwhelmingly unrepresented at the trial level. (Elkins Family Law Task Force, *Final Report and Recommendations, Administrative Office of the Courts*, CENTER FOR FAMILIES, CHILD. & THE CTS., JUD. COUNCIL OF CAL., at 10 (2010) available at <http://www.courts.ca.gov/documents/elkins-finalreport.pdf> [noting that “more than 75 percent of family law cases . . . have at least one self-represented party”].) This is particularly true of family violence litigants. (*Ross v. Figueroa* (2006) 139 Cal.App.4th 856, 861 [litigants in domestic violence restraining order cases are *pro se* 90% of the time].) This presents challenges for litigants who are experiencing one of the most traumatic moments of their lives. They are often in crisis dealing with the abuse and are forced to be in the same courtroom with their abuser while sometimes additionally facing language barriers. (Bailey, *supra*, at 44.) Batterers are given an unfair advantage when courts fail to understand the full future consequences of the abuser’s behavior. (Mike Brigner, *Why Do Judges Do That?*, DOMESTIC VIOLENCE, ABUSE AND CHILD CUSTODY, 13-6, 13-7 (2010) [citing studies showing that batterers have been able to convince authorities that the victim is unfit or undeserving of sole custody in approximately 70% of challenged cases].) And batterer fathers are twice as likely to seek custody of their children than non-batterer fathers. (Campbell, *supra*, at 58 [citing Joan S. Meier, *Rates at Which Accused and Adjudicated Batteries Receive Sole or Joint Custody*, DOMESTIC VIOLENCE LEGAL EMPOWERMENT AND APPEALS PROJECT, at 2 (2013), available at <https://irp-cdn.multiscreensite.com/0dab915e/files/uploaded/DV%20Leap%20Aug%202013%20rates-batterers-receive-custody.pdf>].) Without an attorney, victims may have trouble navigating the court system and understanding court rules, procedures, and substantive standards. (Campbell, *supra*, at 55.)

Without clarity from this Court on the correct application of section 3044, a *pro se* domestic violence victim who is already facing a traumatic situation will be left without effective guidance in how to advocate on her own behalf to prevent her abuser from gaining custody of her child. Victims are already facing an uphill battle that is compounded by the fact that courts consistently misapply the law. See Section II, *supra*. Research shows that domestic violence victims who represent themselves in litigation proceedings against their abusers are at greater risk for violence and intimidation from their abusers. (Beverly Balos, *Domestic Violence Matters: The Case for Appointed Counsel in Protective Order Proceedings*, 15 TEMP. POL. & CIV. RTS L. REV. 557, 568-69 (2006).) Parties who are able to obtain legal representation are significantly more likely to receive comprehensive relief than their *pro se* counterparts. (*Id.* at 569.)

If a victim receives an adverse decision from the trial court judge, their chances of winning at the appellate level dwindle even further. (Garvin, *supra*, at 190-191.) Overwhelmingly, successful appeals of custody decisions involving domestic violence come when parties are represented by counsel. (*Id.*) Low-income victims fare worst when attempting to bring an appeal *pro se*. (See, e.g., *Foust v. San Jose Constr. Co.* (2011) 198 Cal.App.4th 181, 185-186 [noting that appellate courts in numerous situations have refused to reach the merits of an appellant’s claims because the appellant was not able to pay for and procure a reporter’s transcript]; *In re Marriage of Obrecht* (2016) 245 Cal.App.4th 1, 9 [noting the importance of having a clear and complete record on appeal and emphasizing that a trial court decision cannot be overturned unless an appellant can demonstrate an error on the record before the court].) Clarity in the application of the section 3044(b) and specifically that a court may not consider frequent and continuing contact in rebutting the presumption, is essential for litigants who must represent

themselves at the trial court level to ensure they have the best opportunity to preserve their legal challenges and win on appeal. (Garvin, *supra*, at 177.)

The Petition presents the Court with an opportunity to provide authoritative guidance and clarity to courts on how to apply section 3044's mandate against consideration of frequent and continuing contact in rebutting the presumption, and to clarify that courts must consider all factors and not create their own factors beyond the seven that the legislature has mandated.

For all these reasons, the Court should grant the Petition for Review.

Sincerely,

A handwritten signature in black ink, appearing to read 'Amy Poyer'. The signature is stylized with a large 'A' and a cursive 'P'.

Amy Poyer
Senior Staff Attorney