

No. xxxxxx

**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
SECOND APPELLATE DISTRICT, DIVISION 3**

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A.R.,  
*Petitioner and Appellant,*

v.

R.M.,  
*Defendant and Respondent.*

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Appeal from the Superior Court for Los Angeles County  
Hon. \_\_\_\_\_, Judge, Case No. xxxxx

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**APPLICATION FOR PERMISSION TO FILE AMICI  
CURIAE BRIEF; PROPOSED AMICI CURIAE  
BRIEF OF THE FAMILY VIOLENCE APPELLATE  
PROJECT, *ET AL.* IN SUPPORT OF APPELLANT  
A.R.**

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Pursuant to Rule 8.200(c) of the California Rules of Court, Family Violence Appellate Project and 10 other legal services and other organizations serving survivors of family violence respectfully submit this application and proposed *amici curiae* brief in support of Appellant A.R.

### **APPLICATION TO FILE *AMICI CURIAE* BRIEF**

The Family Violence Appellate Project (“FVAP”) and additional *amici* respectfully request permission to file an *amici curiae* brief in support of Appellant A.R. on the questions of why family courts repeatedly fail to properly apply California’s statutory presumption against awarding custody to a parent who has abused the other parent and why it is imperative that this Court provide guidance to prevent the known harms of such custody to children. Specifically, this brief addresses: (1) the statutory language of California Family Code section 3044’s rebuttable presumption against granting custody to domestic abusers and the purpose of each of its factors; (2) the legislative history of California Family Code section 3044; (3) the risks to survivors of domestic abuse when unwarranted joint custody is ordered; and (4) the potential harms to children when perpetrators

of domestic violence are awarded custody, which underscore the importance of properly effectuating California Family Code section 3044.

Proposed *amici* represent the interests of domestic violence survivors in California and offer a perspective on the issues presented in this case that has not been fully or adequately briefed by the parties. Given the nature of the *amici* organizations and the work they do, *amici* are uniquely situated to assist this Court in resolving the issues presented.

#### **INTERESTS OF *AMICI CURIAE***

*Amici* are California-based state and local nonprofit organizations who collectively work with thousands of domestic violence survivors each year, including survivors involved in custody litigation. *Amici* are committed to ensuring the safety and well-being of domestic violence survivors and their children. *Amici* have first-hand knowledge of the legal standards applied in custody cases involving domestic violence and the dynamics of domestic violence post-separation.

*Family Violence Appellate Project* is a nonprofit organization dedicated to ensuring, through the appellate legal system, the safety

and well-being of domestic violence survivors and their children. The founders of FVAP were spurred into action when they learned that perpetrators of domestic violence are awarded custody in an alarmingly high number of cases, which is the issue at the heart of this matter. Today, FVAP is dedicated to providing legal assistance to domestic violence survivors at the appellate level through direct representation, collaborating with pro bono attorneys, offering training to those who practice family law, and advocating for domestic violence survivors on important appellate issues. FVAP's work culminates with the goal of creating a body of case law that changes how family courts respond to domestic violence survivors and their children in order to protect families across California. FVAP monitors California family law litigation and has identified this case as one that has the potential to impact the interests of domestic violence victims and their children statewide.

*California Women's Law Center* ("CWLC") is a statewide, nonprofit law and policy center dedicated to advancing the civil rights of women and girls. Since its inception in 1989, CWLC has placed a particular emphasis on eradicating all forms of discrimination and violence against women.

For 50 years, *Central California Legal Services, Inc.* (“CCLS”) has acted as a vanguard of equity by fighting social injustice through education and representation of low-income residents. By maintaining a focus on its clients’ legal needs and the integrity of its services, an expert staff serves thousands of eligible clients in the counties of Fresno, Tulare, Kings, Merced, Tuolumne, Mariposa and senior citizens in Madera County. Today, CCLS employs a staff of over sixty individuals with offices in the cities of Fresno, Merced and Visalia.

*Domestic Abuse Center* is a San Fernando Valley-based nonprofit, non-shelter, domestic violence program whose mission is to support survivors of domestic violence and their children to live violence-free lives. It provides advocacy, court preparation, support, and accompaniment to clients in all court systems. The Domestic Abuse Center also works to train and inform in the police, criminal court personnel (both prosecution and defense), and institutions in Los Angeles in the field of domestic violence.

*Family Violence Law Center* is a 501(c)(3) nonprofit organization and works to end family violence in Alameda County

through violence prevention education as well as providing support and legal and counseling services for survivors of domestic violence.

*The Harriett Buhai Center for Family Law* is among the largest and few non-profit firms exclusively dedicated to providing comprehensive free family law assistance to very low-income victims of domestic violence in California.

*Laura's House* is a comprehensive domestic violence agency serving Orange County that provides residential shelter services, counseling, outreach, community education and legal services to thousands of domestic violence survivors each year.

*Rape Counseling Services of Fresno* is the only 24-hour response rape crisis center in Fresno County and serves primarily low-income and Latina survivors of sexual violence. Its mission is to end sexual violence and empower survivors while supporting safe, consensual relationships for all people.

*San Diego Volunteer Lawyer Program, Inc.* (“SDVLP”), was established in 1983 as a private, not for profit, charitable law firm which provides pro bono legal assistance to indigent residents of San Diego County. One of SDVLP’s priority areas of service is legal assistance to victims of domestic violence.

The mission of *WEAVE, Inc., Sacramento*, is to build a community that does not tolerate domestic violence and sexual assault and provides survivors with the support they need to be safe and thrive. A core component of WEAVE's services is access to legal assistance and support in obtaining legal interventions to ensure the short and long term safety of domestic violence victims and their children.

The *YWCA Glendale's Domestic Violence Program* has been helping abused men, women, and their children for over thirty-five years to live independent lives free from violence by providing emergency shelter, domestic violence education, individual counseling, legal advocacy, and support groups.

## **PROPOSED *AMICI CURIAE* BRIEF**

### **INTRODUCTION**

In recent years, the California Courts of Appeal have issued multiple published opinions reversing trial court custody orders for failure to apply, or properly apply, the Family Code section 3044 ("section 3044") rebuttable presumption *against* granting custody to a parent who has abused the other parent. (*Celia S. v. Hugo H.* (2016) 3 Cal.App.5th 655, 661; *Ellis v. Lyons* (2016) 2 Cal.App.5th 404, 416;

*In re Marriage of Fajota* (2014) 230 Cal.App.4th 1487, 1498;  
*Christina L. v. Chauncey B.* (2014) 229 Cal.App.4th 731, 736).

And yet, these errors continue, as demonstrated by this case. Why are trial courts failing in this crucial custody determination, despite guiding appellate law? We posit that while trial courts are well-versed with the general preference for frequent and continuing contact with both parents, they do not understand the reasoning behind section 3044's presumption and the rebuttal factors, and therefore have difficulty applying the legislative mandate that joint custody should not be ordered unless the rebuttal factors are met. FVAP's 2016 state-wide survey of domestic violence advocates found that trial courts in every region of California failed to properly consider domestic violence as it relates to custody: "Improper custody and visitation orders were overwhelmingly identified as problems in all areas of the state. This included failure to hear the requests, refusal to apply the correct standards, and a general misunderstanding of the dynamics of [domestic violence] and its ramifications for parenting."<sup>1</sup> Clearly, guidance is needed to help trial courts understand why

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<sup>1</sup> Family Violence Appellate Project, 2016 Survey of California Domestic Violence Service Providers (2016) p. 6, at <[http://www.fvaplaw.org/uploads/1/1/2/9/11292541/fvap\\_2016\\_ca\\_dv\\_service\\_providers\\_survey\\_report.pdf](http://www.fvaplaw.org/uploads/1/1/2/9/11292541/fvap_2016_ca_dv_service_providers_survey_report.pdf)> (as of Nov. 10, 2016).



section 3044 is critical to protecting children and survivors of abuse, and how the rebuttal factors should be weighed when considering a custody request made by an abusive parent.

This case typifies this repeated problem, and therefore presents this Court the opportunity to provide much-needed guidance. Appellant A.R. is the survivor of domestic violence inflicted by Respondent R.M. It is undisputed that R.M. physically and emotionally abused A.R., including violently grabbing her, repeatedly calling her derogatory names, and threatening to hurt her. In light of this egregious pattern of abuse, the trial court found that by a preponderance of the evidence, R.M. “intentionally or recklessly caused bodily injury” to A.R. and placed her “in reasonable apprehension of imminent serious bodily injury.” (RT at 83:16-18.) Appropriately, the trial court issued a domestic violence restraining order against R.M. “for the purposes of preventing a recurrence of domestic violence” and to avoid “jeopardiz[ing] the safety of [A.R.]” (RT at 82:1-8.)

Despite finding that R.M. is violent and abusive, however, the trial court—shockingly, and in stark contradiction of the law—awarded him joint custody of the parties’ two young daughters

without properly applying section 3044 and the rebuttal factors. As this brief sets forth, the section 3044 factors were specifically created to focus courts' analysis on whether an abuser can exercise joint custody without further harming his victim and/or his children.<sup>2</sup>

Children exposed to domestic violence are 6 times more likely to attempt suicide, 74 percent more likely to commit crimes against people, 24 times more likely to commit sexual assault, and 50 percent more likely to abuse drugs and alcohol than children not exposed.<sup>3</sup> They are also much more likely to abuse their own partners.<sup>4</sup> Supporting the children'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

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<sup>2</sup> Throughout this brief, perpetrators of domestic violence are generally referred to by he/him pronouns while survivors are generally referred to by she/her pronouns. FVAP recognizes that survivors and perpetrators of domestic violence can be male or female; our pronoun usage reflects the facts of this particular case, as well as the fact that four in five domestic violence survivors are female. (Bureau of Justice Statistics, U.S. Dept. of Justice, *Intimate Partner Violence 1993-2010* (revised 2015) p. 1.)

<sup>3</sup> *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.

<sup>4</sup> Bancroft, *The Batterer as Parent* (2002), 6(1) *Synergy* 6-8 <<http://lundybancroft.com/articles/the-batterer-as-parent/>> (as of Nov. 11, 2016).

domestic abuse.<sup>5</sup> However, joint custody arrangements risk undermining that relationship by jeopardizing both the non-abusive parent's safety and her ability to parent.<sup>6</sup> Specifically, batterers often exploit the legal system to further abuse their victims during child custody litigation, and joint custody provides the opportunity for further abuse.<sup>7</sup> Batterers also may cause lasting harm to children by exposing them to additional domestic violence and engaging in child abuse.<sup>8</sup>

If the trial court's custody order is upheld, family courts across California will continue to misapply section 3044, and batterers will continue to succeed in child custody litigation at the expense of the safety and well-being of domestic violence victims and their children. We urge this court to issue an opinion sharply focused on the section

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<sup>5</sup> Holden et al., *Children Exposed to Marital Violence: Theory, Research, and Applied Sciences* (1998) p. 384; Holt et al., *The Impact of Exposure to Domestic Violence on Children and Young People: A Review of the Literature* (2008) 32 *Child Abuse and Neglect* 797; Buckley et al., Children's Research Centre, Trinity College (Dublin), *Listen to me! Children's Experiences of Domestic Violence* (2006), p. 25.

<sup>6</sup> Hannah & Goldstein, *Domestic Violence, Abuse, and Child Custody* (2010) pp. 6-29.

<sup>7</sup> Liss & Stahly, *Domestic Violence and Child Custody, in Battering and Family Therapy* (1993) pp. 175, 182.

<sup>8</sup> See section IV, *infra*, discussing the overlap between domestic violence and child abuse, and the propensity of abusers to engage in domestic violence against future partners.

3044 rebuttal factors and how they should be weighed by trial courts so that future courts will understand and effectuate the legislative intent to protect children from the known harms associated with granting custody to domestic abusers.

## ARGUMENT

### **I. WHEN PROPERLY APPLIED, THE REBUTTABLE PRESUMPTION AGAINST GRANTING CUSTODY TO ABUSERS SAFEGUARDS CHILDREN FROM THE HARMFUL IMPACT OF VIOLENT PARENTS AND PROTECTS SURVIVORS FROM FURTHER DOMESTIC ABUSE.**

When a trial court finds that a party seeking custody of a child is a perpetrator of domestic violence against the other parent, it must apply a rebuttable presumption that awarding custody to the perpetrator is not in the child's best interest.<sup>9</sup> (Fam. Code, § 3044, subd. (a); *In re Marriage of Fajota* (2014) 230 Cal.App.4th 1487, 1498 [holding that a trial court is required to apply the presumption when there is a finding of domestic violence].) The burden then shifts to the perpetrator to prove by a preponderance of the evidence that custody is in the child's best interest. (Fam. Code, § 3044, subd. (a).) In determining whether it is in the child's best interest to grant any

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<sup>9</sup> All further statutory references are to the Family Code unless otherwise indicated.

custody to a parent who has abused the other parent, the trial court looks to section 3044, subdivision (b), which sets forth seven factors the court must consider to determine whether the presumption has been rebutted. Those seven factors are:

(1) Whether the perpetrator of domestic violence has demonstrated that giving sole or joint physical or legal custody of a child to the perpetrator is in the best interest of the child. In determining the best interest of the child, the preference for frequent and continuing contact with both parents, as set forth in subdivision (b) of Section 3020, or with the noncustodial parent, as set forth in paragraph (1) of subdivision (a) of Section 3040, may not be used to rebut the presumption, in whole or in part.

(2) Whether the perpetrator has successfully completed a batterer's treatment program that meets the criteria outlined in subdivision (c) of Section 1203.097 of the Penal Code.

(3) Whether the perpetrator has successfully completed a program of alcohol or drug abuse counseling if the court determines that counseling is appropriate.

(4) Whether the perpetrator has successfully completed a parenting class if the court determines the class to be appropriate.

(5) Whether the perpetrator is on probation or parole, and whether he or she has

complied with the terms and conditions of probation or parole.

(6) Whether the perpetrator is restrained by a protective order or restraining order, and whether he or she has complied with its terms and conditions.

(7) Whether the perpetrator of domestic violence has committed any further acts of domestic violence.

(Fam. Code, § 3044, subds. (b)(1)–(7) [emphasis added].)

Here, the trial court correctly acknowledged it needed to apply the rebuttable presumption that awarding custody to R.M. is not in the children’s best interest based on its finding that R.M. committed domestic violence against A.R. However, it misapplied the seven factors in section 3044, subdivision (b) when evaluating whether R.M. had rebutted the presumption. Critically, the court ignored the express mandate of section 3044, subdivision (b)(1) and improperly considered the preference for frequent and continuing contact with both parents. (*Ellis v. Lyons, supra*, 2 Cal.App.5th at pp. 414, 418-419 [“[W]hat a court may not do under the statute . . . is rely ‘in whole or in part’ on section 3040’s preference for frequent and continuing contact with the noncustodial parent.”]) Even in light of extensive factual findings a family court’s custody ruling is predicated on an

erroneous understanding of applicable law and “infected with legal error” if it relies in any part on the prohibited preference for frequent and continuing contact.] )

The court also failed to follow the statute when it improperly applied the six other factors set forth in section 3044, subdivisions (b)(2)–(7). Furthermore, the court improperly relied on two factors unrelated to domestic violence to rebut the presumption. Because its conclusion that R.M. had rebutted the presumption was based on an erroneous application of section 3044, subdivision (b), the court’s custody award was an abuse of discretion and should be reversed. (See *In re Marriage of Fajota*, *supra*, 230 Cal.App.4th at p. 1497 [“A court also abuses its discretion *if it applies improper criteria or makes incorrect legal assumptions.*”] [original italics].)

**A. The Rebuttal Factors 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 Perpetrator Parents Stop Their Abusive Behavior.**

The trial court in this case failed to properly apply the factors in section 3044, subdivision (b) regarding the rebuttable presumption against granting custody to a parent who has committed domestic violence. The statute is clear in its mandatory language that “the court

*shall* consider *all* of the following factors.” (Fam. Code § 3044, subd. (b) [emphasis added]; see *Ford Motor Credit Co. v. Price* (1985) 163 Cal.App.3d 745, 749 [“[T]he use of the word “shall” in a statute generally imports a mandatory construction....”] [citation omitted].)

The state legislature did not pick these factors from a hat when it wrote section 3044, and requiring trial courts to consider each of them is not a mechanical exercise. To the contrary, each of the seven factors is supported by ample social science research, and each plays an important role in protecting survivors of domestic violence and their children and encouraging courts to consider potential interventions for perpetrator parents that could help them to stop their abusive behavior.

**1. *The Trial Court’s Reliance on the Preference for Frequent and Continuing Contact to Rebut the Presumption Puts the Children at Risk.***

When trial courts consider whether or not a perpetrator of domestic violence has rebutted the presumption against custody, they determine whether sole or joint custody to the perpetrator would be in the best interests of the child. (Fam. Code, § 3044, subd. (b)(1).) The preference for frequent and continuing contact “may not be used to



rebut the presumption, in whole or in part.” (Fam. Code, § 3044, subd. (b)(1).)

There is good reason for this. Children often suffer adverse effects when they are in the custody of a parent who has perpetrated domestic violence.<sup>10</sup> There is a significant overlap between partner abuse and child abuse. Men who abuse their partners are likely to abuse their children; estimates are that between 30 and 60 percent of these children are abused, with one national study showing 50 percent of men who frequently assaulted their wives also abused their children.<sup>11</sup> Physical abuse of children by abusers actually *increases* after parents separate, since the protective parent is not there to monitor or intervene in the abusive parent’s behavior.<sup>12</sup> These men also often use the children to continue to control and abuse the mothers even after separation.<sup>13</sup> In light of these well-documented

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<sup>10</sup> See, e.g., Rita Webb, *The Adverse Childhood Experiences (ACE) Study: Implications for Mothers’ and Children’s Exposure to Domestic Violence* (2013) Practice Perspectives, Nat. Ass’n Soc. Workers, p. 2. For more on the effects on children in custody of perpetrators of domestic violence, see *infra* Part IV.

<sup>11</sup> Bragg, U.S. Dept. of Health and Human Services Office on Child Abuse and Neglect, *Child Protection in Families Experiencing Domestic Violence* (2003) p. 7.

<sup>12</sup> Bancroft, *et. al*, *The Batterer as Parent* (2002) p. 56.

<sup>13</sup> Bancroft, *The Batterer as Parent*, Synergy (Newsletter of the National

risks to children, section 3044 requires perpetrators of domestic violence to demonstrate that they should have custody *despite* the evidence of serious risks to children in the custody of batterers, and asks trial courts to exercise great care in determining whether such custody would be in the child's best interests. (Fam. Code, § 3044, subd. (b).)

Importantly, the statute unambiguously *prohibits* a court from considering the “preference for frequent and continuing contact with both parents, as set forth in subdivision (b) of Section 3020, . . . in whole or in part” to rebut the presumption against granting custody to a perpetrator of domestic violence. (Fam. Code, § 3044, subd. (b)(1); *Ellis v. Lyons, supra*, 2 Cal.App.5th at pp. 417-418.) This is because the legislature has determined that when there is a conflict between the health, safety, and welfare of children on one hand, and the preference for frequent and continuing contact with both parents on the other, the state's primary interest is the “health, safety, and welfare of the child and the safety of all family members.” (Fam. Code, § 3020, subd. (c).)

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Council of Juvenile and Family Court Judges) (2002) 6(1), 6-8, at <<http://lundybancroft.com/articles/the-batterer-as-parent/>> (as of Oct. 31, 2016) (“Many men who batter use children as a vehicle to harm or control the mother....”).

Nevertheless, in evaluating whether to award R.M. joint custody, the trial court in this case failed to follow the plain language of section 3044, subdivision (b)(1), by considering the preference for frequent and continuing contact. The trial court concluded that “it is in the [children’s] best interests” that R.M. should be “actively involved in their lives.” (RT 86:11-12.) In other words, the trial court relied upon a prohibited criterion in awarding R.M. joint custody. Thus, the trial court’s decision did not focus on the children’s best interest as intended by the statute, did not address the significant risk of harm to the children embodied in the joint custody order, and for this reason alone, was reversible error. (*Ellis v. Lyons, supra*, 2 Cal.App.5th at pp. 417-418.)

***2. Batterer’s Treatment Programs Are Designed to Break the Cycle of Violence and Enable Abusive Parents to Parent Without Harm. By Failing to Require Successful Completion of the Program Before Granting Joint Custody, the Trial Court Endangered the Children.***

Next, trial courts must consider whether the perpetrator of domestic violence has successfully completed a batterer’s treatment program. (Fam. Code, § 3044, subd. (b)(2).) Such batterer’s treatment programs, also called batterer intervention programs, help those who perpetrate abuse against their partners to accept

responsibility for the harm they cause and to work toward engaging in healthy relationships free from violence. In one review of several batterer programs, researchers found that 53-85 percent of domestic violence survivors reported successful outcomes for their violent partners who completed the programs.<sup>14</sup> In another study of a 52-week batterer intervention program, domestic violence perpetrators who successfully completed it showed positive changes “along a number of dimensions, including taking greater personal responsibility, understanding the effect of abuse on others, and anger management.”<sup>15</sup>

This factor reflects the legislature’s understanding that batterer’s treatment programs can help perpetrators of domestic abuse break their own cycle of abuse. Indeed, “[w]ithout intervention, children in these families continue to be at risk for further

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<sup>14</sup> Evans, *Can A Leopard Change His Spots?: Child Custody and Batterer’s Intervention* (2004) 11 Duke J. Gender L. & Pol’y 121, 131 [citing Tolman & Edleson, *Intervention for Men Who Batter: A Review of Research*, in *Understanding Partner Violence: Prevalence, Causes, Consequences and Solutions* (S.R. Stith & M.A. Straus eds., 1995) pp. 262, 266].

<sup>15</sup> Macleod et al., Admin. Off. of the Cts., Off. of Ct. Research, *Batterer Intervention Systems in CA: An Evaluation* (2009) p. ii.

victimization.”<sup>16</sup> An abusive parent who successfully completes a batterer’s treatment program is more likely to understand the significance of his actions, to accept responsibility for them, and to have more motivation and strategies to stop his abusive behavior. On the other hand, an abusive parent who fails to take responsibility for his abuse is not as likely to cease his behavior, and may even use the custody of the children to continue perpetrating abuse (see *infra*, Part III).<sup>17</sup>

In the case at hand, the trial court “[did] not find that a batterer’s treatment program is necessary.” (RT at 85:13-14.) However, the plain language of the section 3044, subdivision (b)(2) mandates that courts *shall* consider whether a domestic abuser has *completed* a batterer’s treatment program; it does not instruct a court to determine if a treatment program is appropriate. Well-established

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<sup>16</sup> Scott & Crooks, *Preliminary Evaluation of an Intervention Program for Maltreating Fathers* (2007) 7 *Brief Treatment & Crisis Intervention* 224, 225.

<sup>17</sup> See Levin & Mills, *Fighting for Child Custody when Domestic Violence Is at Issue: Survey of State Laws* (2003) 48 *Social Work* 463, 468-69 [“The decision to grant joint custody may not be in the best interests of children who have been exposed to violence by one parent. Joint custody can allow the batterer to continue to exert control over the victimized parent and to expose children to abusive power dynamics and violence. Joint custody may be appropriate in those cases in which a batterer has reformed through treatment, and the battered parent believes that such an arrangement is appropriate.”].

rules of statutory construction support this interpretation. A statute must be “construed as a whole while avoiding an interpretation which renders any of its language surplusage.” (*City of Huntington Beach v. Bd. of Admin.* (1992) 4 Cal.4th 462, 468.)

The trial court’s misapplication of section 3044, subdivision (b)(2) becomes apparent when contrasted with the plain language of subdivisions (b)(3) and (b)(4). Specifically, factor three directs a court to consider whether a perpetrator has completed drug or alcohol counseling “*if the court determines that counseling is appropriate.*” (Fam. Code, § 3044, subd. (b)(3) [emphasis added].) Likewise, factor four directs a court to consider whether a perpetrator has completed a parenting class “*if the court determines the class to be appropriate.*” (Fam. Code, § 3044, subd. (b)(4) [emphasis added].) In stark contrast, factor two does not include any such discretion. (Fam. Code, § 3044, subd. (b)(2).)

The legislature did not intend for trial courts to determine whether a batterer’s treatment program is appropriate for domestic abusers when weighing the rebuttal factors. Otherwise, the language “if the court determines the [class or counseling] is appropriate” in section 3044, subdivisions (b)(3) and (b)(4), would be “render[ed] ...

surplusage.” (*Jurcoane v. Superior Court*, (2001) 93 Cal.App.4th 886, 893; see also *Ford Motor Credit Co.*, *supra*, 163 Cal.App.3d at p. 749 [“[W]hen the Legislature has used different language in several provisions, it is presumed that it did so advertently and intended a difference in meaning.”].) The trial court had no discretion to disregard the fact that R.M., a serial batterer, had not completed any program to treat his violent inclinations, and therefore, the court should have determined that factor two weighed against awarding R.M. custody. A clear statement from this court that not ordering batterer’s intervention necessarily means that this factor must weigh against rebuttal would not only effectuate the legislature’s intent, it also may guide trial courts to order batterer’s intervention treatment in more cases, which, in *amici’s* experience, is an underutilized tool in breaking the cycle of violence.

***3. By Failing to Order R.M. to Drug and Alcohol Counseling Despite Evidence That Respondent’s Violence Escalated While He Was Under the Influence of Drugs and Alcohol, the Trial Court Contravened the Clear Legislative Intent of Protecting Children From the Heightened Risk of Abuse.***

There is a powerful relationship between drugs, alcohol, and domestic violence. Section 3044(b)’s third factor explicitly asks courts to consider whether the perpetrator parent has successfully

completed alcohol or drug abuse counseling, if appropriate. (Fam. Code, § 3044, subd. (b)(3).) Researchers have found that drug and/or alcohol treatment “may be *essential* to help offenders end their abuse.”<sup>18</sup>

Perpetrators of domestic violence often abuse alcohol, which increases the frequency and the severity of the abuse. “IPV [intimate partner violence] is between two and eleven times more likely to occur under conditions of drinking.”<sup>19</sup> Alcohol increases expression of anger and aggressive verbalization, “with increases being more dramatic for maritally violent than maritally nonviolent men.”<sup>20</sup> Further, people who are “higher in hostility,” which includes perpetrators of domestic violence, “are more likely to use substances, leading them to engage in poorer parenting practices (e.g., spanking, yelling, ignoring the child) that may represent child maltreatment.”<sup>21</sup> Thus, alcohol abuse increases the perpetration and severity of child abuse as well as domestic violence.

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<sup>18</sup> Macleod et al., *supra*, at p. iii [emphasis added].

<sup>19</sup> Stover & Kiselica, *Hostility and Substance Use in Relation to Intimate Partner Violence and Parenting Among Fathers* (2015) 41 *Aggressive Behavior* 205, 206.

<sup>20</sup> *Id.*

<sup>21</sup> *Id.* at p. 210.



There is also a strong correlation between the use of drugs and alcohol and domestic homicide. In one study, “75.7% of [domestic homicide] perpetrators were problem drinkers, and 64.9% were problem drug users.”<sup>22</sup> Additionally, batterers who use alcohol or drugs are more likely to be re-arrested than those who do not use alcohol or drugs.<sup>23</sup> Section 3044(b)(3) is therefore present to alert trial courts to the significance of the relationship between domestic violence, child abuse, and drug and alcohol abuse and to direct courts to consider and order interventions for drug and alcohol abuse before risking harm to children by ordering joint custody.

In this case, the trial court determined “that there is no need to order an alcohol or drug abuse counseling.” (RT at 86:14-15.) Courts generally have discretion to determine whether drug or alcohol counseling is appropriate for a perpetrator. Here, however, the trial court abused its discretion by ordering joint custody while ignoring evidence that R.M.’s violence escalated when he was under the influence of drugs or alcohol (RT 86:14-15; AA075), that he smoked

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<sup>22</sup> Juodis et al., *What Can Be Done About High-Risk Perpetrators of Domestic Violence* (2014) 29 J. Fam. Violence 381, 383-84.

<sup>23</sup> Macleod et al., *Admin. Office of the Courts, Office of Court Research, Batterer Intervention Systems in CA: An Evaluation* (2009) p. ii.

marijuana and abused alcohol in front of the children, and that he frequently came home drunk and high. (AA075.)

While social science demonstrates the danger to children from exposure to parental drug/alcohol abuse, courts have also consistently found that it is not in the best interest of a child to be in the custody of a parent who abuses drugs and alcohol in front of his or her child. (See, e.g., *In re William B.* (2008) 163 Cal.App.4th 1220, 1224-27 [finding that it is not in the child's best interest to reunite with parents who abused drugs and alcohol].) Because there is no reasonable basis to conclude that R.M.'s failure to complete drug and alcohol counseling advances the best interests of the children, to the extent that the trial court relied on factor three to rebut the presumption, that decision should be reversed. (See *In re Marriage of Fajota, supra*, 230 Cal.App.4th at p. 1497 ["A court abuses its discretion in making a child custody order if there is no reasonable basis on which it could conclude that its decision advanced the best interests of the child."].) Appellate guidance that helps trial courts understand the importance of ordering this vital intervention in appropriate cases will help to prevent further abuse and may enable children to have safe contact with a parent who has perpetrated domestic violence.

**4. *The Trial Court Ordered Respondent to Attend a Parenting Class but Then Erroneously Relied on that Order to Rebut the Presumption Instead of Considering Whether Respondent Had Already Successfully Completed a Parenting Class.***

The fourth factor trial courts consider in applying section 3044 is whether the abusive parent has successfully completed a parenting class. (Fam. Code, § 3044, subd. (b)(4).) Because extensive evidence demonstrates that it is detrimental to children to be in the custody of perpetrators of domestic violence.<sup>24</sup> It is critical that courts consider the parenting efforts and abilities of perpetrator parents.

Parents who perpetrate domestic violence may need parenting interventions in order to bolster their ability to parent safely and minimize risks to their children. In one study, fathers who had perpetrated domestic violence reported that they had difficulties in managing anger and aggression toward their children, interpreting

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<sup>24</sup> See Holden et al., *Partner-Abusers as Fathers: Testing Hypotheses about their Child Rearing and the Risk of Physical Child Abuse* (2010) 1 Partner Abuse 186-99 [men who abuse their partners tend to be harsher and more violent towards their children]; Holt et al., *supra*, at p. 799 [“The literature reviewed has unequivocally established the interconnectedness between men’s abuse of women and child abuse.”]; Bancroft & Silverman, *Assessing Risk to Children from Batterers* (2002) <<http://lundybancroft.com/articles/assessing-risk-to-children-from-batterers/>> [as of Nov. 11, 2016] [“[C]hildren’s continued contact with the batterer sometimes interferes with the creation of a healing context....”].

their children's behavior, and setting boundaries with their children.<sup>25</sup> Another study, which examined the potential consequences of allowing fathers who have abused their partners to have contact with their children, found that children who have witnessed domestic violence are likely to be traumatized.<sup>26</sup> As such, these children are at risk of being re-traumatized by further contact with their abusive parent, especially if that parent has had no interventions.<sup>27</sup> The authors therefore recommend parenting interventions: "Before establishing father-child visitation in families with [domestic violence], it is recommended that a thorough assessment of family violence take place [and] that the father receive necessary parenting and/or mental health interventions."<sup>28</sup>

This fourth factor, then, presents another important moment in the court's analysis of whether or not a parent who has committed domestic violence should have child custody. If the perpetrator of domestic violence does complete a parenting class, then the court

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<sup>25</sup> Strand et al., *Parenting Difficulties and Needs* (2015) 12 J. Child Custody 273, 277-79.

<sup>26</sup> Hunter & Graham-Bermann, *Intimate Partner Violence and Child Adjustment: Moderation by Father Contact?* (2013) 28 J. Fam. Violence 435, 443.

<sup>27</sup> *Id.*

<sup>28</sup> *Id.* at p. 440-41.

knows that the parent has at least been exposed to positive parenting models.<sup>29</sup> It also demonstrates to the court that the offending parent may be more serious about establishing a healthy relationship with his children, rather than just using custody to continue to exert control over the survivor of abuse, and may therefore be less likely to continue his abusive behavior.

Here, the trial court learned that R.M. had not completed a parenting class and ordered him to complete one. (RT at 85:16-24.) Thus, the court determined that a parenting class was appropriate. However, the plain language of the statute requires the court to consider whether the perpetrator has “successfully *completed*” such a program, not whether the perpetrator may complete one in the future. (Fam. Code, § 3044, subd. (b)(4).) By using the fact that R.M. *was ordered to participate* in a parenting class “as one of the factors in rebutting the presumption,” the trial court failed to follow the plain language of section 3044, subdivision (b)(4), in stark contrast to the purposes of that rebuttal factor. (RT at 87:2-3.) Appellate guidance that only *successful completion* of a parenting class weighs in favor of

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<sup>29</sup> Strand et al., *supra*, at pp. 273, 277-79.

rebuttal, not just an order to participate in one, will assist trial courts in protecting children and survivors of domestic abuse.

***5. Whether the Perpetrator Is on Probation or Parole and Has Complied with the Terms and Conditions of Probation or Parole Has a Direct Correlation to His Ability to Control His Behavior and Safely Parent.***

The fifth factor that courts considers in evaluating the section 3044 presumption is whether or not the perpetrator parent is on probation or parole, and if so, whether he or she has complied with his or her terms and conditions. (Fam. Code, § 3044, subd. (b)(5).) Active compliance with probation or parole conditions is an important part of domestic violence prevention and the safety of children: “[Domestic violence] prevention strategies are likely to be most effective when offered in communities that emphasize: (1) quick and judicious adjudication of cases; (2) careful monitoring of correctional outcomes via regular court reviews or specialized probation/parole programs; (3) continued safety planning for victims and risk management for perpetrators; and (4) vigilant supervision involving consequences for those who fail to complete mandated batterer intervention programs.”<sup>30</sup> Compliance with probation and parole

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<sup>30</sup> Juodis et al., *supra*, at pp. 381, 388.

conditions also demonstrates an overall respect for court orders, which is important in the context of creating custody orders.

R.M. was not on probation or parole, so this factor does not directly apply in this present case. However, this factor is worth mentioning as an integral part of the assessment of section 3044's rebuttable presumption.

***6. The Trial Court Ignored Evidence of Respondent's Restraining Order Violations, Which Are Indicative of His Inability to Control His Behavior and Parent Safely.***

Trial courts must also consider whether or not the perpetrator of domestic violence is restrained by a protective order, and if so, whether or not he has complied with the terms of the order. (Fam. Code, § 3044, subd. (b)(6).) This factor is significant for several reasons. *First*, if there is a restraining order, it highlights the underlying finding of abuse required to trigger the presumption at hand. (See Fam. Code, §§ 3044, 6320.) *Second*, the terms of the order may be instructive in helping the court to determine the logistical feasibility of a joint or sole custody order. For instance, a protective order that prevents the restrained party from coming within 100 feet of the protected parent, her home, her car, or other places, might make it impractical as well as dangerous to order joint legal or

physical custody. (See Fam. Code, § 6320, subd. (a) [authorizing courts to enjoin a restrained party from coming within a specified distance of the protected party].)

*Third*, it requires the court to determine whether the restrained parent is in compliance with this order, which again speaks to the batterer's respect for court orders and potential for reforming his behavior. For instance, while restraining orders are an effective tool for stopping abuse for many, significant numbers of survivors suffer abuse even after they have a protective order. In one study, 44 percent of survivors with a restraining order reported at least one violation over the course of 18 months.<sup>31</sup> Most of those violations involved "nonadherence to the order to stay 200 [feet] from the woman's home or workplace; stalking, threats of violence, and a combination of these infractions were other examples of violations."<sup>32</sup>

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<sup>31</sup> McFarlane et al., *Protection Orders and Intimate Partner Violence: An 18-Month Study of Black, Hispanic, and White Women* (2004) 94 Am. J. Pub. Health 613, 616.

<sup>32</sup> *Id.*



There is also a common misconception that domestic violence ends at separation.<sup>33</sup> However, violence often continues or even escalates after the parties separate.<sup>34</sup> In fact, over half of men who kill their wives do so after separation.<sup>35</sup> Further, children are often exposed to post-separation violence, particularly if there is contact between the parents for visitation.<sup>36</sup>

In this case, the trial court found that “[t]here was no evidence that [R.M.] violated the temporary restraining order.” (RT at 87:11-12.) On the contrary, the record includes undisputed evidence that R.M. acted in contempt of the temporary restraining order (“TRO”) when he repeatedly contacted, harassed, and surveilled A.R. *after* the TRO had enjoined R.M. from engaging in this behavior. (AA057.) The trial court thus failed to properly consider the sixth factor by ignoring this evidence of the restraining order violations. This Court should advise trial courts to take post-separation violence and any

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<sup>33</sup> Bancroft & Silverman, *supra*.

<sup>34</sup> Araji & Bosek, *Domestic Violence, Contested Child Custody, and the Courts: Findings from Five Studies*, in *Domestic Violence, Abuse, and Child Custody: Legal Strategies and Policy Issues* (Hannah & Goldstein eds. 2010) pp. 6-28.

<sup>35</sup> Bernard et al., *Till Death Do Us Part: A Study of Spouse Murder* (1982) 10 Bull. of The Am. Acad. of Psychiatry & The Law, 271, 274.

<sup>36</sup> Peled, *Parenting by Men Who Abuse Women: Issues and Dilemmas* (2000) 30 British J. Social Work 25, 28.

violations of restraining orders more seriously in custody decisions, in accordance with the statute and ample social science.

**7. *The Trial Court Failed to Consider Whether the Perpetrator Had Committed Any Further Abuse, Which Is Likewise Indicative of His Inability to Control His Behavior and Parent Safely.***

The final rebuttal factor is whether the perpetrator of domestic violence has committed any further acts of domestic violence.” (Fam. Code, § 3044, subd. (b)(7).) Both researchers and counselors of abusers have observed there is a strong likelihood that abusers will repeat their violent behavior in series of relationships, and courts should pay special attention to an individual’s past and current abusive behaviors.<sup>37</sup> Additionally, post-separation abuse often arises in the context of custody disputes, so it is particularly important for courts to consider any abusive behavior that occurs after the original finding of abuse that triggers section 3044.<sup>38</sup> Otherwise, courts put

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<sup>37</sup> Bancroft, *supra*.

<sup>38</sup> Hardesty & Ganong, *How Women Make Custody Decisions and Manage Co-Parenting with Abusive Former Husbands* (2006) 23 J. Soc. & Personal Relationships 543, 558 [“After divorce, men who were controlling during marriage were very involved with their children, and through this involvement continued to exert control over the mothers.”].

survivors and their children at risk of future abuse, which is contrary to the purpose of section 3044.<sup>39</sup>

In this case, the trial court misapplied the seventh factor by failing to address it at all. R.M. did not contest A.R.'s statements that he secretly recorded her at a park with her children, constantly called A.R., and sent her harassing messages after a TRO was issued and while trial was pending on the issues of a long-term restraining order and custody. (AA080.) The trial court, however, ignored all of this evidence. Despite concluding that R.M.'s violent behavior poses a threat to A.R.'s safety,<sup>40</sup> the trial court inexplicably failed to discuss the uncontroverted evidence that R.M. has continued to commit acts of domestic violence, a factor that section 3044, subdivision (b), requires trial courts to consider. Appellate authority clarifying that this failure was an error will provide necessary and important guidance to trial courts evaluating this final factor.

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<sup>39</sup> See, e.g., Araj & Bosek, *supra*, at pp. 6-28.

<sup>40</sup> The trial court determined by a preponderance of the evidence that a restraining order was necessary against R.M. in order to “prevent[] a recurrence of domestic violence” and avoid “jeopardiz[ing] the safety of the petitioner.” (RT at 82:1-8.)

**B. The Court Erred in Applying Nonstatutory Factors that Were Irrelevant to the Issue of Domestic Violence and to Respondent’s Burden to Rebut the Presumption.**

The trial court further failed to follow section 3044 when it relied on two extraneous factors to rebut the presumption against awarding R.M. custody. Specifically, the court partly based its custody award on its findings that A.R. threatened to move the children to Nevada and wished to withhold visitation in order to obtain child support.<sup>41</sup> (RT at 85:24-28; 86:1-6.) A court has no liberty to add factors that are not explicitly included in a statute because “[t]he expression of some things in a statute necessarily means the exclusion of other things not expressed.” (*Le Francois v. Goel* (2005) 35 Cal.4th 1094, 1105.) Furthermore, statutes must be construed as a whole. (*Jurcoane v. Superior Court, supra*, 93 Cal.App.4th at p. 893.)

Had the legislature intended the list of factors in section 3044, subdivision (b), to be non-exhaustive, it would have included language such as “the court shall consider, *among other things, and not limited to*, the following factors.” The fact that the legislature

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<sup>41</sup> A.R. testified that she was offered a higher paying job in Nevada and wished to move there so that she could better support her daughters given that R.M. was inconsistent in providing child support. (RT at 27:15-23; 31:18-20.)

included similar language in the next two subsections of section 3044 supports this interpretation.<sup>42</sup> (See *SJP Ltd. P'ship v. City of Los Angeles* (2006) 136 Cal.App.4th 511, 518 [“Where . . . the Legislature used different words or terminology in the same section of the law with regard to the same subject, we presume that it intended the words to be understood differently.”].) Because the trial court has impermissibly “insert[ed] what has been omitted” from the list of factors in section 3044, subdivision (b), its decision must be reversed. (*People v. Vasquez* (2016) 247 Cal.App.4th 513, 519.)

The rebuttal factors embodied in section 3044 directly address the potential harms associated with parenting by domestic abusers, and focus a trial court’s inquiry to whether the abuser has taken steps to demonstrate that he can safely parent. If trial courts are permitted

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<sup>42</sup> Family Code section 3044, subdivision (c) states: “For purposes of this section, a person has ‘perpetrated domestic violence’ when he or she is found by the court to have intentionally or recklessly caused or attempted to cause bodily injury, or sexual assault, or to have placed a person in reasonable apprehension of imminent serious bodily injury to that person or to another, or to have engaged in any behavior *involving, but not limited to*, threatening, striking, harassing, destroying personal property or disturbing the peace of another . . .” [emphasis added].

Section 3044, subdivision (d)(1) states: “For purposes of this section, the requirement of a finding by the court shall be satisfied by, *among other things, and not limited to*, evidence that a party seeking custody has been convicted within the previous five years, after a trial or a plea of guilty or no contest, of any crime against the other party that comes within the definition of domestic violence . . .” [emphasis added].

to identify and weigh additional factors when determining whether the presumption against custody has been rebutted, that focus is shifted and the purpose of the rebuttal factors is diluted. We urge this court to remedy this mistake and provide guidance to trial courts regarding the proper application of the rebuttal factors.

## **II. THE TRIAL COURT'S AWARD OF JOINT CUSTODY TO A BATTERER UNDERMINES THE PURPOSE OF FAMILY CODE SECTION 3044 AND IS CONTRARY TO CALIFORNIA PUBLIC POLICY.**

Awarding custody to R.M. completely undermines the purpose of Family Code section 3044. The California legislature enacted the law to “reduce the likelihood that a perpetrator of domestic violence will be awarded sole or joint custody of a child” in response to research on the impact of domestic violence on child custody proceedings. (Assem. Com. on Judiciary, Analysis of Assem. Bill No. 840 (1999-2000 Reg. Sess.) as amended Apr. 20, 1999, p. 3.) In particular, the legislature relied on studies establishing that victims of domestic violence had a significant disadvantage compared to their batterers during child custody litigation. (*Id.* at 6.) Additionally, research demonstrated that family law courts consistently ignored or undervalued evidence of domestic violence in making custody

determinations.<sup>43</sup> (*Id.* at 7.) As a result, batterers were extraordinarily successful at winning custody. (*Id.* at 4.)

To address the serious dangers posed to survivors and especially their children as a result of these custody awards, the legislature created a statutory presumption that awarding custody to a perpetrator of domestic violence is *not* in the best interest of the child. (Assem. Bill 840, 1999-2000 Reg. Sess. (Cal. 1999) (enacted).) The law also made it more difficult for batterers to gain custody by shifting the burden of proof to the batterer and requiring him to overcome the presumption by presenting evidence related to a number of statutory factors. (*Id.*; Assem. Com. on Judiciary, Analysis of Assem. Bill No. 840 (1998-1999 Reg. Sess.) as amended Apr. 20, 1999, p. 4.)

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

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<sup>43</sup> See Katherine T. Bartlett, *Preference, Presumption, Predisposition, and Common Sense: From Traditional Custody Doctrines to the American Law Institute's Family Dissolution Project* (2001) 36 Fam. L.Q. 11, 23 [“Presumptions are used in [the context of domestic violence and custody] because courts have historically failed to take sufficiently serious evidence of domestic abuse. 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.”].

forth in Family Code section 3020, to overcome the presumption against awarding custody to a batterer which, in effect, 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).)

While drafting the legislation, lawmakers proposed an amendment to the bill that would permit courts to use the preference *in part* to rebut the statutory presumption. (Sen. Com. on Judiciary, Analysis of Sen. Bill No. 265 (2003-2004 Reg. Sess.) May 5, 2003, p. 12.) Critically, the legislature rejected this proposal in favor of a more stringently enforced rebuttable presumption in order to discourage harmful behaviors such as batterers seeking custody and exploiting the legal system to further control and abuse their victims. (Sen. Rules Com., Off. of Sen. Floor Analyses, Analysis of Sen. Bill No. 265 (2003-2004 Reg. Sess.) as amended May 13, 2003, p. 4.) As a result, the legislature made it clear that the safety of children and other family members takes precedence over continuing contact with an



abusive parent, and recognized that giving perpetrators custody of children can physically and emotionally endanger both children and survivors. (Assem. Com. on Judiciary, Analysis of Sen. Bill No. 265 (2003-2004 Reg. Sess.) as amended June 12, 2003, p. 6.)

By awarding custody to R.M., the trial court acted contrary to the language and intent of section 3044. Section 3044 is in place to ensure that courts place greater importance on domestic violence during child custody deliberations and consider the potentially detrimental effects on children in the custody of a perpetrator parent. Here, however, the trial court placed little to no weight on its finding that R.M. was a perpetrator of domestic violence and undermined the express purpose of section 3044.

First, by allowing the preference for frequent and continuing contact to rebut the statutory presumption against awarding custody to a domestic abuser, the trial court prioritized contact between parent and child over the safety of the domestic violence victim and child, which conflicts with the statute's express language and legislative intent to bring the issue of domestic violence to the forefront of child custody litigation. (Fam. Code, § 3044, subd. (b)(1).)

Second, the trial court's cursory analysis of the statutory factors in section 3044, subdivision (b) is inconsistent with the legislature's intent for trial judges to carefully consider the serious impact of domestic violence before awarding custody to a batterer. Here, the trial court summarily concluded that R.M. does not need a batterer treatment program or drug and alcohol counseling despite extensive and undisputed evidence of the nexus between R.M.'s violent behavior and his drug and alcohol use. That the trial court believed R.M. was enough of a threat to the safety of A.R. to issue a restraining order, but did not believe R.M. needed treatment for his violent behavior or drug and alcohol abuse before granting him custody of their children, is a puzzling conclusion that flies in the face of the language and intent of section 3044.

The trial court also did not carefully consider evidence that R.M. had recently recorded A.R. without her consent and regularly contacted her when it concluded that "there was no evidence" that R.M. violated the TRO. (RT at 87:11-12.) Additionally, the fact that the trial court completely ignored the existence of factor seven—whether R.M. had committed further acts of domestic violence—is indicative of the court's disregard of the factors in section 3044,

subdivision (b). Trial courts are to “conduct a detailed review of the evidence presented at trial and carefully weigh *all* of the relevant factors required by section 3044,” and this trial court’s order shows a disregard of the legislature’s intent for courts to treat domestic violence with seriousness and careful consideration. (*Keith R. v. Superior Court* (2009) 174 Cal.App.4th 1047, 1057.)

Finally, the trial court acted contrary to the legislature’s intent when it relied heavily on two factors that are not included in section 3044, subdivision (b)—that A.R. allegedly threatened to move the children to Nevada and that she allegedly wanted to withhold visitation in order to obtain child support. Neither of these factors bear any relation to domestic violence or to R.M.’s burden to the court. To use these factors to rebut a presumption that R.M. is unfit to have custody because of his violent history is both illogical and incompatible with the legislature’s purpose in drafting the presumption. Considering these two allegations does little to remedy concerns that R.M. may continue to abuse A.R. through the current custody arrangement and may cause direct or indirect harm to the children. By giving these two factors precedence in awarding R.M. joint custody, the trial court minimized the importance of domestic

violence in its decision, which is antithetical to the purpose of section 3044.

### **III. PERPETRATORS OF DOMESTIC VIOLENCE USE CHILD CUSTODY AS AN EXTENSION OF INTIMATE PARTNER ABUSE.**

The protections provided by section 3044 are profoundly important given the dangers to domestic violence survivors post-separation and during custody disputes. Copious social science research confirms the risks that abuse victims face during custody determinations. For example, the Duluth Model's Power and Control Wheel<sup>44</sup> for post-separation abuse describes the various ways in which abusers commonly use separation and the children to abuse their former partners. This may include physical and sexual violence against the survivor parent and children, harassment and intimidation, undermining the survivor's ability to parent, withholding financial

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<sup>44</sup> In the 1980's, the Domestic Abuse Intervention Project created the Duluth Model, a visual representation of how batterers use power and control to abuse their partners. (The Wheel Gallery, Domestic Abuse Intervention Program: Home of The Duluth Model, <<http://www.theduluthmodel.org/training/wheels.html>> [as of Nov. 11, 2016].) Today, the Duluth Model can be found in books, manuals, and articles, and on the walls of organizations that seek to prevent domestic violence. (*Ibid.*)

support, endangering children, disregarding children, and disrupting the survivor parent's relationships with children.<sup>45</sup>

Separation and custody disputes can actually put domestic violence survivors at greater risk of abuse. A high rate of serious assaults by batterers occur post-separation, and children are likely to witness those incidents.<sup>46</sup> It has been estimated that among victims of violence committed by an intimate partner, “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.”<sup>47</sup>

Moreover, numerous studies show that when non-abusive parents (primarily women) asserted the need to protect their children from the custody of domestic abusers, “there were consistent findings that violence often continued or even escalated” after custody or visitation orders were issued. (See, *supra*, I.A.6.) According to one review, “child homicide in the context of domestic violence usually

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<sup>45</sup> Post-Separation Power and Control Wheel, Domestic Abuse Intervention Program: Home of The Duluth Model (2013) <<http://www.theduluthmodel.org/cms/files/Using%20Children%20Wheel.pdf>> (as of Nov. 11, 2016).

<sup>46</sup> Bancroft & Silverman, *supra*.

<sup>47</sup> Bachman & Saltzman, Bureau of Justice Statistics, *Violence Against Women: Estimates from the Redesigned Survey* (1995) p. 4.

involves the termination of the parents' relationship as the precipitating factor.”<sup>48</sup> Other studies have concluded that separation and custody disputes can threaten the beliefs of a homicide-suicide perpetrator, causing the perpetrator to resort to homicide in an effort to sustain control and prevent the breakup of the family.<sup>49</sup>

An order of joint custody necessarily requires a survivor of abuse to interact with her abuser, providing increased opportunities for further abuse. Specifically, “[t]hese court-mandated arrangements allow assailants to have access to survivors, and therefore provide opportunities for continued abuse.”<sup>50</sup> It is axiomatic that placing a batterer, such as R.M., and his victim in a joint custody situation without properly applying section 3044 puts survivors of domestic violence at unwarranted risk of further abuse.

To the extent that the rebuttal factors also demonstrate that the risk to survivors has been mitigated—for instance, the abuser has shown the ability and willingness to comply with a restraining order

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<sup>48</sup> Jaffe & Juodis, *Children as Victims and Witnesses of Domestic Homicide: Lessons Learned from Domestic Violence Death Review Committees* (2006) 57 *Juvenile & Fam. Court J.* 13, 15.

<sup>49</sup> *Id.*

<sup>50</sup> Zeoli et al., *Post-Separation Abuse of Women and their Children: Boundary-Setting and Family Court Utilization among Victimized Mothers* (2013) 28 *J. Family Violence* 547, 547.

or probation and parole terms, has undergone treatment for drug and alcohol abuse, or has successfully completed a batterer's intervention program—the risk of future abuse may be lessened. But those are not the facts here. We urge this court to provide guidance on this crucial aspect of the rebuttal presumption, so that trial courts may effectively carry out the legislative intent of protecting survivors of abuse when joint custody is ordered.

#### **IV. AWARDING CUSTODY TO BATTERERS IS DETRIMENTAL TO THE WELL-BEING OF THE CHILDREN INVOLVED.**

As explained *ante*, research has patently demonstrated a strong link between the perpetration of adult domestic violence and child abuse. (See Section I.A., *ante*.) In 30-60 percent of families in which either child maltreatment or partner abuse occurs, the other form of violence is also being perpetuated.<sup>51</sup> Findings from a national survey show that 50 percent of the men who abused their spouses also abused a child more than twice a year, a rate about seven times that of non-violent fathers.<sup>52</sup>

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<sup>51</sup> Edleson, *The Overlap Between Child Maltreatment and Woman Abuse* (1999) Applied Research Forum: National Electronic Network on Violence Against Women, p. 2.

<sup>52</sup> Peled, *supra*, at p. 28.

One study based on surveys of fathers found that men who abused their partners were more likely to engage in physical abuse of their children.<sup>53</sup> The surveys also indicated that men who abuse their partners “tend to be less involved and less likely to show affection to their children but more likely to be angry and use harsh discipline than other fathers.”<sup>54</sup> Additionally, when compared to their non-violent counterparts, abusive fathers are less likely to be involved with their children and more likely to use negative child rearing practices, such as slapping.<sup>55</sup> They are also more controlling and authoritarian, more often angry with their children, and less likely to allow freedom of expression, creativity, and structure in their children’s lives.<sup>56</sup> Abusive fathers are also poor role models with regard to relationships and conflict resolution.<sup>57</sup>

As a result, children of abusive parents may carry harmful beliefs and behaviors with them through adulthood. In particular, “[b]oys who are exposed to domestic violence show dramatically

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<sup>53</sup> Holden et al., *Partner-Abusers as Fathers: Testing Hypotheses about their Child Rearing and the Risk of Physical Child Abuse*, *supra*, at p. 196.

<sup>54</sup> *Id.* at p. 187.

<sup>55</sup> Holt et al., *supra*, at p. 801.

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*



elevated rates of battering their own partners as adolescents or adults.”<sup>58</sup> Conversely, “[d]aughters of battered women show increased difficulty in escaping partner abuse in their adult relationships.”<sup>59</sup> Furthermore, research on children who witness domestic violence found that they face an increased risk for mental health issues related to juvenile delinquency, antisocial behavior, and escalated rates of depression, anxiety, and PTSD. The impact of chronic domestic violence exposure in childhood was found to have long-term effects throughout the life span.”<sup>60</sup>

As this research demonstrates, awarding custody to perpetrators of domestic violence can have lasting and detrimental effects on the children involved. Accordingly, it is crucial that California courts carefully consider the factors outlined in Family Code section 3044 when considering the best interests of the children and before awarding custody to batterers.

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<sup>58</sup> Bancroft, *supra*.

<sup>59</sup> *Id.*

<sup>60</sup> Webb, *supra*, at p. 2.

## CONCLUSION

The trial court abused its discretion when it awarded R.M. joint custody of his children. Not only did the court fail to follow the plain language instructions of Family Code section 3044, but its order is at odds with the purpose of section 3044 and California public policy. As voluminous social science literature explains, decisions such as this put A.R. and other victims of domestic violence at risk of further harm by their abusers and negatively impact the health and well-being of the children involved.

Unfortunately, this is not an isolated case. Domestic violence advocates throughout the state report that trial courts frequently make custody and visitation orders that fail to properly consider domestic abuse. (See, Introduction, *supra*.) This observation is supported by the recent decisions in *Celia S. v. Hugo H.*, *supra*, 3 Cal.App.5th 655 and *Ellis v. Lyons*, *supra*, 2 Cal.App.5th 404. For these reasons, *amici* respectfully ask that this court reverse the trial court's ruling and issue an opinion that will provide guidance for trial courts as to how and why the section 3044 rebuttal factors are to be properly applied.

Respectfully submitted,

By: \_\_\_\_\_

**CERTIFICATE OF COMPLIANCE**

Counsel of Record hereby certifies pursuant to Rule 8.204(c)(1) of the California Rules of Court that the enclosed brief is produced using 14-point Roman type and, including footnotes, contains 10,068 words. Counsel used Microsoft Word in preparing the brief, and relies on that program's computer word count.