HERRING LAW GROUP

THROUGH AB 2044, THE LEGISLATURE ENHANCES CHILD CUSTODY PROTECTIONS IN CASES INVOLVING DOMESTIC VIOLENCE

Domestic violence ("DV") is a potential game-changer in child custody contests. In 2014's Assembly Bill ("AB") 2089, the Legislature expressly declared, among other findings, "[t]here is a positive correlation between [DV] and child abuse, and children, even when they are not physically assaulted, suffer deep and lasting emotional, health, and behavioral effects from exposure to [DV]." (Uncodified section I of AB 2089.)

Family Code sections 3020, 3011 and 3044 in pertinent part address DV in child custody cases. They are a part of the "hodgepodge" of confusing and sometimes contradictory provisions, as California Family Law guru, Garrett Dailey, has put it, enacted by the Legislature in its rush to enact one DV statute after another over the past twenty or so years.

AB 2044, signed by Governor Brown in September 2018, strengthens the anti-DV aspects of all three statutes.

Section 3020 broadly addresses competing policy concerns. One is the policy of protecting children's health, safety and welfare. Another is that children should have frequent and continuing contact with both parents. In adding new section 3020(c), AB 2044 clarifies that the former trumps the latter: "When [these] policies … are in conflict, a court's order regarding physical or legal custody or visitation shall be made in a manner that ensures the health, safety, and welfare of the child and the safety of all family members."

Section 3011 provides that, in making a custody order, the court "shall" consider any history of abuse by a parent seeking custody.

As a prerequisite to the consideration of allegations of abuse, the court **may** (not "must") require **"independent corroboration."** This can be, without limitation, through written reports by law enforcement agencies, child protective services or other social welfare agencies, courts, medical facilities, or other public agencies or private nonprofit organizations providing services to victims of sexual assault or DV. AB 2044 **de-emphasizes** the level of "independent corroboration" potentially required. The statute previously stated "substantial" amounts, but the adjective is now eliminated.

If DV allegations are made in a custody proceeding, 3011(e)(1) requires a court to "consider" them and to ultimately state its reasons in writing or on the record if it makes any orders allowing custody rights to the abuser.

Because 3011 (1) merely makes a finding of DV one of many potential factors to be considered in a custody award and (2) allows a trial court to potentially require "independent corroboration," **DV victim/parents -- especially those who might not have previously reported the DV -- would be better off if they could come within the purview of section 3044.**

Section 3044 provides a narrower universe than 3011 of people against whom the DV must have been committed: the other parent, a subject child or the child's siblings. It requires that the DV must have occurred within the previous five years, whereas 3011 provides no time limit.

In contrast to 3011's requirement for a court to merely "consider" DV allegations and then state its overall reasoning for its eventual order, 3044 requires a specific **"finding"** of whether or not DV was committed within the above parameters. AB 2044 requires a court to make that finding **prior** to making any custody orders at trial. In practice, this might call for **bifurcated proceedings** regarding the existence of prior DV before litigating custody. The court would have authority to proceed in this manner under Code of Civil Procedure section 128(a)(3) ("[e]very court shall have the power to do all of the following … provide for the orderly conduct of proceedings before it ….") and Evidence Code section 320 ("… the court, in its discretion, shall regulate the order of proof.").

A big plus to victim/parents who did not previously report DV is that **"independent corroboration" is *never* required** as it can be under 3011. Rather, 3044 broadly provides that the court "shall" consider any relevant, admissible evidence submitted.

If a victim/parent can overcome these barriers and establish DV, then 3044 provides a **rebuttable presumption** that an award of sole or joint physical or legal custody of a child to the perpetrator is detrimental to the children's best interests. **To victim/parents, this is 3044's main advantage over 3011.**

2016's *In re Marriage of Fajota* 230 Cal.App.4th 1487 sent a strong message upholding 3044's integrity. There, the trial court found that the father had previously engaged in DV under 3044, but nonetheless awarded him joint legal custody of the children. The Court of Appeal reversed, stating that 3044's principles must be applied, and that it did not matter if the mother had not previously obtained DV restraining orders. The rebuttable presumption must not be ignored. (*Accord, Celia S. v. Hugo H.* (2016) 3 Cal.App.5th 655.)

If the presumption against joint custody is achieved, 3044 provides that a court must consider seven specified factors in determining whether the abuser is able to rebut it. They include without limitation whether it is in the best interest of the children for the abuser to have custodial rights and whether the abuser has successfully completed a batterer's or substance abuser's treatment program. AB 2044 requires the trial court to make specific findings concerning each of the factors and also why the findings are consistent with the children's health, safety, and welfare, and also general "best interests," under 3020. Consistent with the holding of *Fajota*, the purpose is to give judicial officers cause for pause consistent with the Legislature's above 2014 findings.

As recently as November 21, 2018, the Fourth District issued its published Opinion in *S.Y. v. Sup'r Ct. (Omar)* Cal. App., November 21, 2018, D073450. In the underlying proceedings, the

trial court found that the father had previously committed DV under 3044, but also that he had successfully rebutted the statute's presumption. The father was thus awarded joint custody. In upholding the trial court, the Court of Appeal provided:

"The legal presumption [under 3044] is not … `that a parent who has committed an act of [DV] should not be awarded sole or joint legal or physical custody of a child.' [Father's] burden was only to persuade the court his custody would not be detrimental to [the child's] best interest. (Citations omitted.) The determination of custody is not to reward or punish the parents for their past conduct, but to determine what is currently in the best interests of the child." (Citations omitted.)

The Court further clarified that 3044 does not require a trial court to find that all the specified factors have been satisfied in order to hold that the presumption has been rebutted. It stated that, under the section's "clear language," a DV perpetrator might properly be awarded joint custody, even if he has not attended or completed such classes. It emphasized that, even where **prior** DV is found under 3044, a child's **present** safety and best interests are what ultimately matter. The Court upheld the trial court in part because the trial court had found that, with the parents now living separately, the child no longer lived in a household where DV occurred, and he was not a witness to continuing DV.

Conclusion:

The "positive correlation" between DV and child abuse is undeniable. Multiple statutes require serious consideration of it toward protecting children in custody proceedings. AB 2044 enhances them in various ways. In light of the ongoing legal "hodgepodge," victim/parents must give thoughtfully traverse them.