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THE LEGISLATURE TIGHTENS DV/CUSTODY CROSSOVER PROCEDURES IN "RECOMMENDING" JURISDICTIONS LIKE VENTURA COUNTY
by Gregory W. Herring, CFLS

Domestic violence ("DV") is a potential game-changer in child custody contests. In 2014's Assembly Bill ("AB") 2089, the Legislature expressly declared, "There 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.) When a parent in custody proceedings asserts the other committed DV within the past five years, Family Code section 3044 requires a court to make findings on the DV issues *prior* to making custody orders. If DV is established, the abuser faces a presumption against joint or sole custody.

Family Code section 3170 requires pre-hearing mediations in custody cases. Most counties treat them as truly confidential, consistent with Evidence Code sections 1119 and 1121. Mediations are typically time-pressed, usually lasting only a few hours. Parties and children (different counties assert different minimum age limits) attend.

A minority of counties, including Ventura County, require mediators to issue written custody "recommendations" to the court and even testify as experts immediately following unsuccessful mediations. These types of mediations are effectively mini custody evaluations outside of the strict standards of Family Code sections 3111 and 3117 and the California Rules of Court. Because the "recommending" process defeats the confidentiality integral to true mediations, the sessions are called "Child Custody Recommending Counseling" ("CCRC"). CCRC Mediators are called "Child Custody Recommending Counselors" ("Counselors").

Historically, the CCRC system would sometimes undercut section 3044's policies and protections. The following could too often occur:

- An abused parent would file a Request for Orders based on DV allegations, with attendant requests for custody orders.
- The court would automatically schedule the case for the usual pre-hearing CCRC.
- The Counselor's job would *not* include making legal determinations of DV, as that would be an improper delegation of judicial duties. (E.g., *Settlemire v. Super. Ct.* (2003) 105

Cal.Ap.4th 666, 672.) They might suspect it and report their suspicions, but the focus would typically be the amorphous "children's best interests" concept. (Fam Code §3020, subd. (a).) (This is *not* criticism of these hard-working and committed professionals; they have most difficult jobs, and their scope is constrained.)

- If the parties could not agree on a custody plan, the Counselor would make written custody and parenting recommendations to the court based on their usual boilerplate template. They would make some minor customizations for the particular family. With the parties living separately, the Counselor's concerns about past abuse might not be acute. "Now that you are living apart, the alleged abuse is much less likely to reoccur and we want the children having both parents significantly involved."
- The parties would proceed to a hearing, where the time-pressed court would – as intended – typically approve the recommendations, perhaps with a few adjustments, through interim orders. "After all, the Counselor evaluated the children's best interests." Almost always the court would lack time for a formal hearing or trial on the DV issues prior to making these orders. (This is *not* criticism of our judicial officers, either; they also have most difficult tasks, their case loads are too high, and their resources are too limited.)
- The DV issues could be heard in a live hearing or trial some weeks, months, or years down the road. By then, though, the "interim" orders, possibly including joint custody, could have cemented a permanent *status quo*. It could be difficult to persuade a judicial officer to later reverse course absent some dramatic interim occurrence. The abuser would learn to mask their behavior; they might even, through ongoing intimidation and abuse, "set up" the victim so that *the victim* appears uncooperative, out of control, or otherwise unsuited for custody.

The Legislature addressed the above issues in making the following additions to section 3044, effective January 1, 2020:

- When a court makes a finding that a party has perpetrated DV, it may *not* base its findings solely on conclusions reached in CCRC. (Fam. Code §3044, subd. (e).)
- If a court provides custodial rights to an abuser because it finds that they overcame section 3044's presumption, it must do all the following in writing or on the record:
    - Make certain findings, as specified in section 3044 subd. (b). (*Id*., at subd. (f)(1).)
    - State its reasoning in specific terms. (*Id*., at subd. (f)(2).)
    - State why its findings, on balance, support the legislative findings that, among other things, "… children have the right to be safe and free from abuse, and that the perpetration of … [DV] in a household where a child resides is detrimental to [the child's] health, safety, and welfare …." (*Ibid*.)
- In a custody or restraining order proceeding involving DV allegations, the court shall inform the parties of the existence of section 3044 and give them a copy of the statute *prior* to any CCRC or mediation. (*Id*., at subd. (h).)

Even where DV is alleged, courts may still issue temporary orders as before. (*Id*., at subd. (g).) Under the new additions, though, such orders may only be "for a reasonable amount of time" prior to an evidentiary hearing or trial. (*Ibid*.) There, the court shall make a determination as to whether section 3044 applies prior to issuing a custody order. (*Ibid*.)

Counsel now have more tools for gaining a court's early attention to the Legislature's DV/custody crossover concerns and ensuring that DV allegations are given full weight. Best practices include pressing for a prompt evidentiary hearing before interim orders might effectively become the "*status quo*" before DV determinations. Counsel might also request expedited bifurcated DV proceedings *prior* to any regarding custody. In cases where simultaneous criminal DV charges might cause a stay of those considerations in the family court, litigators can point to the Legislature's new unambiguous language in advocating against any custodial rights for the accused prior to DV findings.

These changes can also benefit wrongfully accused parents. DV allegations can too often be manufactured or exaggerated for custody advantages. A wrongfully accused parent can point to the right to a prompt DV determination. Expediting this critical issue can help families move forward and begin healing.