CASE ALERT

WHEN GRANTING JOINT OR SOLE CUSTODY TO A DOMESTIC ABUSER, TRIAL COURTS MUST ADDRESS ALL 7 REBUTTAL FACTORS IN WRITING OR ON THE RECORD.

Los Angeles Center for Law and Justice, and co-counsel Gibson, Dunn & Crutcher LLP obtained a published appellate opinion in *Jaime G. v. H.L.* **This case may help if your client is in a custody case and the other parent committed domestic abuse.**

Summary of the Case

1. **Family Code section 3044 creates a rebuttable presumption against granting custody to a parent who has abused the other parent. That presumption cannot be overcome merely by showing the abusive parent is "more suitable."**

Under California law there is a presumption against awarding *any* custody to a domestic abuser. This means the court must give the survivor sole legal and physical custody, unless the abuser shows the presumption has been overcome, or "rebutted." When deciding whether the presumption has been rebutted, the court must consider 7-factors which are designed to help the trial court consider the effects of domestic violence and whether it will reoccur. The presumption and rebuttal factors are found in California Family Code section 3044. The 7 rebuttal factors are: best interest of the child(ren), successful completion of a batterer's intervention program, successful completion of alcohol or drug counseling – if appropriate, successful completion of a parenting class – if appropriate, whether the perpetrator is on probation or parole and complying with the terms and conditions, whether the perpetrator is under a restraining order and has complied with the terms and conditions, and whether the perpetrator has committed any further acts of domestic violence.

Jaime G. v. H.L. (2018) ___ Cal.App.5th ___ (Case No.B280569) reversed a trial court order rebutting the presumption and granting joint legal custody and majority physical custody to a domestic abuser. At trial, H.L. proved that she suffered years of physical and emotional abuse at the hands of her ex-husband, Jaime G. The trial court granted H.L. a two-year restraining order. But with respect to custody over the couple's seven-year-old son, the trial court found Jaime G. to be the "more suitable parent" and awarded him joint custody and nearly 90% of the parenting time. To rebut the presumption, the court relied on the fact that the child went to school regularly when living with father who paid rent and worked full-time. On the other hand, the child had "a high absence rate" when living with mother who was unemployed, did not know who owned the home she lived in with her boyfriend, moved around a lot, and had no transportation. The trial court found it was in the child's best interest to be with father the majority of the time.

This case is like many where the trial court looks only at the first of the seven rebuttal factors, "best interest of the child," to rebut the presumption against granting custody to abusers. **This case makes clear that the trial court cannot stop there – it must look at all 7 factors.**

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2. **Before awarding any custody to a domestic abuser, a trial court must first make findings about each of the 7 rebuttal factors. The court's findings must be expressly made in writing or on the record (orally).**

The opinion in *Jaime G.* establishes that **a trial court cannot award any type of custody to a domestic abuser without first making findings in writing or on the record (orally) about each of the seven-factors.** In coming to this decision, the Court of Appeal relied on the fact that the Legislature enacted the 7-factor test because too many trial courts were awarding custody to domestic abusers, and failing to take into account the effects of domestic violence and whether it would reoccur. Thus, § 3044 serves as a "mandatory checklist" that "require[s] family courts to give due weight to the issue of domestic violence." The Court of Appeal held that a trial court must complete the § 3044 checklist on the record, even if misconduct by counsel requires the trial court to prematurely terminate a hearing.

This is a significant victory for domestic abuse survivors because it helps ensure that trial courts will fully consider past and future domestic abuse when making custody determinations.

PRACTICE TIPS

1. If you are requesting sole custody, provide evidence about any of the 7 "rebuttal factors" that apply in your case. If appropriate, ask the Judge to send your abuser to a batterer's intervention program, a drug or alcohol abuse program, and/or parenting classes, and explain why they are needed. Let the Judge know if your abuser is on probation or parole, or is subject to a restraining order, and tell the judge if your abuser is not following those orders. Tell the Judge about any continuing abuse including harassment.

2. *Celia S. v. Hugh H.* establishes that 50/50 parenting time is "joint custody." If a court tries to avoid the section 3044 presumption by ordering "sole custody" to the survivor parent, but significant parenting time to the abusive parent, tell the court that is not allowed under *Celia S.*, and ask the court to explain in writing or on the record why the section 3044 presumption is being rebutted. For more information, see the tool kit on section 3044 and *Celia S.* at www.fvaplaw.org.

3. Findings can only be made on the record, or orally, if there is a court reporter present. All litigants who qualify for a fee waiver can request a free court reporter – see FVAP Case Alert "*Jameson v. Desta*" for tips at www.fvaplaw.org.

For questions or clarifications, contact Family Violence Appellate Project: info@fvaplaw.org or (510) 858-7358. Thank you!