


In re Marriage of Maria and Luis C., Not Reported in Cal.Rptr. (2018)

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Court of Appeal, Fifth District, California.

IN RE the MARRIAGE OF MARIA AND LUIS C.

Maria C., Appellant,

v.

Luis C., Respondent.

Consolidated Cases Nos. F076195 & F076261

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Filed 9/26/2018

APPEAL from a judgment of the Superior Court of Tulare County. [Nathan D. Ide](#), Judge. (Super. Ct. No. VFL258020)

Attorneys and Law Firms


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No appearance for Respondent.

OPINION

[DETJEN](#), Acting P.J.

*1 In this consolidated appeal, appellant Maria C. appeals the trial court's entry of a joint domestic violence restraining order as it relates to her and a later custody order involving the children of Maria and her ex-husband Luis C. Luis has not cross-appealed and did not file any briefing in opposition. With respect to the restraining order entered against her, Maria argues the trial court failed to enter detailed findings of fact in support of the restraining order as required by  [Family Code section 6305](#)¹ and otherwise abused its discretion in granting the order.² With respect to the custody order, Maria argues the court failed to consider or apply any of the required presumptions against joint or sole custody that are triggered by a domestic violence finding or otherwise properly factor the domestic violence findings into the determination of the best interests of the children. For the reasons set forth below, we reverse both the domestic violence restraining order against Maria and the most recent custody order and remand for further proceedings consistent with this opinion.

FACTUAL AND PROCEDURAL BACKGROUND

This case arises out of two incidents of domestic violence that occurred on April 14 and April 16, 2017. Both Maria and Luis filed requests for domestic violence restraining orders following the incident on April 16. The following facts were elicited at the hearing on these requests and, to the extent relevant, at a later hearing finally resolving custody issues raised during the restraining order hearing.

Background

Maria and Luis were married in 2011 and have two minor children. The first was born in 2014, the second in 2016. The parties had a difficult relationship, as further detailed below, with Maria first filing for divorce in September 2014. The parties reconciled at the time, but Maria again filed for divorce in December 2015. This resulted in an uncontested dissolution in June 2016 whereby Maria received sole physical and legal custody of the parties' first child.

In November 2016, Luis initiated a request to change the custody order. This resulted in a January 19, 2017, custody and visitation order that granted joint physical custody of both the children and gave visitation to Luis every Friday from

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11:30 a.m. until 9:30 p.m., and every weekend from 7:30 a.m. Saturday until 7:30 p.m. Sunday. Exchanges were ordered at the start of visitation curbside at Luis's home and at the end either at a babysitter's home or at Maria's home. This was an agreed upon schedule. It remained in place at the time of the incidents triggering this case.

History of Domestic Violence

*2 Maria testified to an extensive history of domestic violence in the relationship, perpetrated by Luis. According to Maria, the abuse began shortly after the birth of the parties' first child, in 2014. In that incident, Luis banged Maria's head against a wall and the floor, telling her she needed to listen to him and causing her to pass out. Maria woke up to Luis lying on top of her, crying and telling her to wake up. Maria did not call the police at that time because she was scared. She did, however, file for divorce, although she did not disclose the abuse.

Maria detailed a second incident of domestic violence, which occurred after the parties' reconciliation. In this incident, occurring in January 2015, Maria attempted to leave the parties' home because Luis was continuing to abuse her. Luis responded by physically moving Maria and locking her inside of a room for 10 hours, telling her she would not get their child if she fled through the window.

Maria detailed a third incident of domestic violence, which occurred later that year, in December 2015. At the time, Maria was pregnant with the parties' second child. The incident occurred at a time when the parties were exchanging their child. In the incident, Luis pushed and shoved Maria to remove her from his apartment. When that failed he threw her onto the couch and grabbed her head. Maria kicked Luis to escape and called the police. Maria testified the police told her that if she pressed charges, Luis would press counter charges and both parties would be arrested. After this incident, Maria filed for divorce but did not seek a restraining order because, she testified, she was told Luis would not see his child again if she did.

Maria detailed a fourth incident of domestic violence that occurred in March 2016. In that incident, again occurring during an exchange of the parties' child while Maria was pregnant, the two parties got into a dispute about visitation. Luis called the police alleging Maria would not get out of his

car, a fact Maria testified was not true. As Maria attempted to leave the scene, Luis tried to stop her by taking her car keys from the car's ignition. Although this failed, Luis was able to gain control of the car. He pushed Maria out and attempted to drive the car away, with the child inside. Maria had to move her legs to avoid being run over, and Luis did not get very far, ultimately crashing the car into a tree with their child still in the car. The parties' child witnessed the violence and was screaming throughout the incident. The police arrived but did not arrest either party. Shortly after this incident, Maria received her uncontested divorce and sole custody.

Finally, Maria detailed a fifth incident that she claimed led to Luis seeking to modify custody in November 2016. In this incident, the parties were fighting over whether their children were safe at Luis's home. Luis responded to this argument by shoving Maria into a corner and choking her. Part of this incident happened in front of the children, and Luis only stopped when his sister, who also witnessed the incident, threatened to call the police. Although Maria did not report this incident or tell the court about the abuse during the custody considerations, she claimed she responded by opposing Luis's requested change of custody through a request that all exchanges take place at a safe location.

Following this last incident of domestic violence, Maria testified that Luis made attempts to reconcile and presented evidence that he left several notes on her car at odd hours of the night. Maria testified this conduct made her uneasy given Luis's past and that the April 2017 incidents arose in part because Luis became more aggressive in their interactions after these efforts were rejected.

Luis's Testimony Regarding the April 14, 2017, Incident

*3 As noted, the restraining orders requested in this case derived from two incidents occurring in April 2017. At the hearing on the joint requests, the court first heard from Luis, who detailed his version of the April 14, 2017, incident.

Luis testified that the parties had come to a separate agreement allowing him to have their children overnight on a Friday after he returned from a trip to Mexico. Despite this agreement, Maria arrived at Luis's house late Friday night demanding the children. Luis claimed Maria became enraged when she found out Luis's girlfriend was at the house—a fact she learned by seeing the girlfriend's car in the driveway—and attempted to

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barge into his house to attack the girlfriend. Luis testified he answered the door holding the parties' youngest child and had to physically restrain Maria while both holding the child and attempting to call the police. In doing so, Luis stated he grabbed Maria around the neck and that she bit him to get free. After getting free, Maria grabbed a lamp and used it to bash Luis's girlfriend's car. Maria then grabbed the parties' oldest child and attempted to leave with her. Luis concluded his testimony stating Maria attempted to drive off without one of their children being placed in a car seat and that he attempted to keep her from driving away to prevent that act.

On cross-examination, Luis confirmed that his girlfriend was not seeking a restraining order of her own. He also admitted that after this incident occurred he agreed to allow Maria to pick up the children from him early on April 16th. Finally, Luis offered pages of text messages to demonstrate that Maria did not consider him to be a danger to the children and often requested he care for them, even to the present day.

Maria's Testimony Regarding the April 14 and April 16, 2017, Incidents

Maria provided a different version of facts concerning the April 14 incident. According to Maria, her expectation was that she would be getting the children at 7:30 p.m. When Luis did not return the children at 7:30 p.m. or at the court-order exchange time of 9:30 p.m., Maria went to Luis's home, bringing her sister along for support, to get the children back. When she arrived, Maria knocked on the door for about 10 minutes before Luis answered and, during that time, Maria could see the children were left unattended. Maria testified she had no knowledge that Luis's girlfriend was present at the house and that the parties never talked about the girlfriend that day.

Rather, Maria testified that when Luis opened the door, holding the parties' youngest child, the two began arguing about why Luis had left the children unattended. Luis began to give the youngest child to Maria, but changed his mind and pushed her away instead, causing her to fall. Luis then pinned her down so she could not get back up. At this point, Maria's sister came up to the door and tried to get the youngest child from Luis. The sister succeeded and, upon seeing this, Maria attempted to flee.

Luis responded by grabbing Maria by the hood of her sweatshirt and dragging her into the house, slamming her into several objects, before pinning her down and telling her he was going to call the police and say she was trespassing. At this point, Luis had his fist on Maria's throat and his knee on her thigh. Maria bit Luis and attempted to flee. Luis again grabbed onto Maria's sweatshirt hood, and Maria responded by grabbing a lamp and swinging it at him. Luis released his grip and Maria fled, throwing the lamp at the first thing she saw as she exited—a car in the driveway.

*4 Maria tried to flee with the children, but Luis attempted to prevent her from doing so. Regardless, Maria drove off but did not call the police.

Consistent with the regular custody arrangement, Luis picked up the children the next day, Saturday. Maria testified the parties agreed she could pick the children up early, at 2:00 p.m. on Sunday, to spend additional time with them on Easter. Maria had a friend accompany her to this exchange. When she arrived, Luis's brother answered the door and refused to release the children to her. At some point, Maria's eldest heard her voice and ran to the door. In the commotion, Luis's brother slammed the front door on the child's head. This resulted in a further scuffle where Luis's brother pushed Maria from the doorway to the curb. Maria and her friend left and, the next day, Maria filed for a restraining order.

Maria's Witnesses

In support of her testimony, Maria brought her sister and her friend, who were present on the 14th and the 16th respectively, to testify. With respect to the incident on the 14th, Maria's sister testified Maria left the vehicle running while she went to the door to gather her children. Maria's sister watched Maria knock on the door for about 10 minutes before Luis answered. An argument immediately began and Luis, holding the youngest child, was pushing Maria down. The two were fighting about the baby and not about a girlfriend. Maria's sister intervened to get the children after she saw Luis grab Maria by the sweatshirt and drag her inside. The sister witnessed Luis swinging Maria around by the sweatshirt. With respect to the incident on the 16th, Maria's friend was present with Maria when a man answered the door and began yelling at them. She watched as this person, believed to be Luis's brother, started pushing Maria. The friend went with Maria to the police station after the incident.

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Closing Argument and the Trial Court's Ruling

After hearing from the witnesses, the trial court took closing arguments from each side. Maria's counsel argued Luis was the primary aggressor in the recent incidents and argued Maria should not receive a mutual restraining order. She noted that, should the court find Luis the primary aggressor, it should apply the presumption against joint custody found in section 3044.

Luis argued both parties were equally aggressive in their encounters. He stated, "I won't deny any altercations that was said, but the way they were described—I don't agree with the way they were described, because, obviously, I have the way I saw it, and they have the way they saw it." He further assured the court, "Coming from me, there will be no altercation that will ever harm my kids. I will not let that happen again. That's the only reason I filed this police report."

Following these arguments, the judge entered his ruling. He began by noting the relevant standard was proof by a preponderance of the evidence and that a restraining order was proper where one side showed injury, an intent to injure, or apprehension of serious bodily harm. With respect to the incidents of past domestic violence, the court stated Maria needed to show reasonable proof of past accounts of abuse and that, in the judge's view, she had met that requirement. The court also rejected issuing a restraining order based on the conduct on April 16 as the incident did not involve Luis. And, although recognizing that domestic abuse victims often did not report abuse based on fears related to losing their children or not being believed, the court expressed concern that Maria had not raised the various incidents in any prior proceedings.

*5 The judge then recounted what he considered to be the facts of this case. In the context of how the incident began and the parties generally interacted, the court stated, that the "fact of the matter is that [Maria], came to the home of a person where she claims she's afraid of and entered into an argument with that person over custody and visitation, and she did it the very next day as well. And I can see the text messages where after all these incidents they're still talking back and forth, like somehow this is normal behavior, and they're exchanging the kids, and it's not normal behavior."

Looking at Maria's conduct and how she ended up in Luis's home on the 14th, the court found, Maria "went to [Luis's] home and got into an argument with him on the front door—and there's a dispute how she ended up in his home—but she ended up in his home. And the fact of the matter—and I find that she went and broke the window of a car, whether she knew it was his car—she certainly knew it wasn't [Luis's] car, and she broke the window. ... One of the broad ranges of behavior to obtain a restraining order under the Family Code is when you break people's property. To make your point, you get angry and break property. And that is what [Maria] did."

The court continued, touching on the core factual disputes and the issue of who was the primary aggressor, "And so I'm finding that in going up to that door and entering into that argument, that at this point we have a 'he said-she said' situation. That these parties have ended up in arguments in the past, they were both aggressors on this matter, that they both asked in writing for restraining orders against each other. I'm making it a finding of fact that both acted primarily as aggressor. Specifically, that I believe [Maria] ended up in [Luis's] home, and I believe he reacted to that as an aggressor as well, because he acted completely inappropriately. And that thereafter this, [Maria] acts as the primary aggressor when she broke the windshield of his car with a lamp. So neither of them acted primarily in self defense, because the fact of the matter is, with all this going on, if you guys have a beef over custody and visitation, you continually get into an argument and it turns physical, when all you have to do is say, I'm sticking to the order. I'm calling the police to ask them to hand over my kids. That's going to be the order of the Court. I'm keeping the current orders in effect."

The court then ordered the parties to go to mediation to work on better exchange times so that future contact could be reduced. Following the mediation, the mediator presented a recommendation for week-to-week visitation. Maria objected. The court noted that the parties had previously agreed to an order the prior January and asked Luis what had changed since then. After hearing his explanation, the court explained why young children need a home base and stated: "And you guys don't get along. I get it. The purpose of sending you to mediation was to figure out how we could have less exchanges because you had this hiccup in your schedule where you're getting them early on Friday then having to return them. I'm thinking that doesn't work. You need to keep them." In line with this thinking, the court found

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no change in circumstance warranting a wholesale change to the entire schedule but decided to allow Luis to keep the children from his pick-up time on Friday until his drop-off time on Sunday—eliminating the exchange that previously existed in that weekend. The court ordered exchanges to occur at a babysitter's house, with neither parent present when the exchanges occurred. No discussion was had regarding the prior domestic abuse findings.

*6 This appeal timely followed.

DISCUSSION

Maria raises challenges to the domestic violence restraining order entered against her and the final custody order entered following mediation. Maria challenges the court's domestic violence restraining order on legal grounds, alleging the court failed to properly apply the legal standards required to enter a mutual restraining order, and on factual grounds, claiming substantial evidence does not support the trial court's order. Maria challenges the final custody order in alternative, but related, ways. First, assuming the trial court erred in issuing the domestic violence restraining order, Maria contends the court failed to apply the presumption Luis was not fit for joint custody and that placement with one shown to have committed domestic violence is not in the best interest of the parties' children. Second, assuming the trial court correctly issued mutual restraining orders, Maria argues the trial court still failed to properly apply the same presumptions in light of Luis's extensive proven history of domestic abuse. We conclude the trial court's factual findings do not provide substantial evidence to support the mutual restraining order issued against Maria and, therefore, reverse both contested orders.

Maria's Challenges to the Mutual Domestic Violence Restraining Order

Maria contends both that the trial court failed to make the detailed factual findings required under [section 6305](#) and that the facts of this case do not support a restraining order.

Standard of Review and Applicable Law


Section 6300 authorizes courts to issue orders “with or without notice, to restrain any person for the purpose specified


in Section 6220, if an affidavit or testimony and any additional information provided to the court pursuant to Section 6306, shows, to the satisfaction of the court, reasonable proof of a past act or acts of abuse.” Under section 6220, the purpose of the restraining order is “to prevent acts of domestic violence, abuse, and sexual abuse and to provide for a separation of the persons involved in the domestic violence for a period sufficient to enable these persons to seek a resolution of the causes of the violence.”

Under section 6211, domestic violence is abuse committed against a person having one of several specified relationships with the respondent, such as a spouse, former spouse, or person with whom the respondent has had a child. Under section 6203, abuse means “any of the following: [¶] (1) To intentionally or recklessly cause or attempt to cause bodily injury. [¶] (2) Sexual assault. [¶] (3) To place a person in reasonable apprehension of imminent serious bodily injury to that person or to another. [¶] (4) To engage in any behavior that has been or could be enjoined pursuant to Section 6320.” Relevant to number four, under section 6320: “The court may issue an ex parte order enjoining a party from molesting, attacking, striking, stalking, threatening, sexually assaulting, battering, credibly impersonating as described in [Section 528.5 of the Penal Code](#), falsely personating as described in [Section 529 of the Penal Code](#), harassing, telephoning, including, but not limited to, making annoying telephone calls as described in [Section 653m of the Penal Code](#), destroying personal property, contacting, either directly or indirectly, by mail or otherwise, coming within a specified distance of, or disturbing the peace of the other party, and, in the discretion of the court, on a showing of good cause, of other named family or household members.” (*Id.*, subd. (a).)




*7 Finally, under [section 6305](#), the court is precluded from issuing a mutual order enjoining the parties “from specific acts of abuse described in Section 6320 unless both of the following apply: [¶] (1) Both parties personally appear and each party presents written evidence of abuse or domestic violence in an application for relief [and] [¶] (2) The court makes detailed findings of fact indicating that both parties acted as a primary aggressor and that neither party acted primarily in self-defense.” In the required primary aggressor analysis, “the court shall consider the provisions concerning dominant aggressors set forth in [paragraph \(3\)](#)

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of subdivision (c) of Section 836 of the Penal Code.” (*Id.*, subd. (b).)  Penal Code section 836, subdivision (c)(3) provides guidelines for arrests in situations where mutual protective orders have been issued. It instructs officers to make a reasonable effort to identify the dominant aggressor involved in the incident by considering “(A) the intent of the law to protect victims of domestic violence from continuing abuse, (B) the threats creating fear of physical injury, (C) the history of domestic violence between the persons involved, and (D) whether either person involved acted in self-defense.”

“Generally, a trial court has broad discretion in determining whether to grant a petition for a restraining order under” the Domestic Violence Prevention Act (DVPA or the Act). (*In re Marriage of Fregoso & Hernandez* (2016) 5 Cal.App.5th 698, 702.) We therefore review the trial court's decision issuing a restraining order under the DVPA for an abuse of discretion. (*Isidora M. v. Silvino M.* (2015) 239 Cal.App.4th 11, 16 (*Isadora M.*)). “ ‘However, “[j]udicial discretion to grant or deny an application for a protective order is not unfettered. The scope of discretion always resides in the particular law being applied by the court, i.e., in the ‘ “legal principles governing the subject of [the] action” ’ ” ’ [Citation.] We review the court's factual findings supporting the mutual restraining order for substantial evidence.” (*J.J. v. M.F.* (2014) 223 Cal.App.4th 968, 975 (*J.J.*)). We thus ask whether a reasonable trier of fact could have found as the trial court did given the evidence. (See  *People v. Reilly* (1970) 3 Cal.3d 421, 425.)

The Trial Court Made Detailed Factual Findings

Maria argues the trial court failed to make the detailed factual findings required under  section 6305 because “it utterly failed to engage in the required dominant aggressor analysis set out in  Penal Code section 836[, subdivision](c)(3).” Recounting the trial court's factual findings, Maria contends the court was obligated to “address *which* party was the most significant and dominant” actor and that such a conclusion could only name one party. Maria argues the trial court neither considered the history of the parties' relationship, the intent of the law, nor which party issued threats creating fear of physical injury, and only facially considered whether either party acted primarily in self-defense. Maria posits that these failures demonstrate the court was misapplying  section


6305 and relying upon both improper criteria and incorrect legal assumptions. We do not agree.

Maria points us to no case, and we have found none, that defines exactly what findings are required from the trial court under the statutory phrase “detailed findings of fact” in  subdivision (a)(2) of section 6305. However, in various other contexts, the concept of detailed findings of fact or conclusions of law has been readily understood to require sufficient factual findings or analysis for the court of appeal to adequately review the factual or legal basis for the trial court's decision. (See *Maggart v. State Bar* (1946) 29 Cal.2d 439, 442 [“The petitioner's contention that the Board of Governors should have based its recommendation upon more detailed findings of fact is without merit. It is sufficient if such findings enable this court to make an intelligent and fair review of the decision of the board.”]; see also  *LeVesque v. Workmen's Comp. App. Bd.* (1970) 1 Cal.3d 627, 633-634 [under Labor Code statute that requires decisions to “state in detail the evidence relied upon and the reasons for its decision,” statement must provide adequate factual and legal guidance to allow appellate review]; cf.  *Nunes Turfgrass, Inc. v. Vaughan-Jacklin Seed Co.* (1988) 200 Cal.App.3d 1518, 1525 [“A trial court rendering a statement of decision under Code of Civil Procedure section 632 is required only to state ultimate rather than evidentiary facts. A trial court is not required to make findings with regard to detailed evidentiary facts or to make minute findings as to individual items of evidence.”].) We see no reason to depart from this general understanding here. The trial court's obligation under  section 6305 is to provide sufficient factual findings for an appellate court to review the factual support for its conclusions. Provided the trial court does not abdicate this duty, either by failing to make any findings or by relying on evidence that does not disclose the factual basis for its conclusions, it need not proceed according to the formulaic structure suggested by Maria whereby it identifies specific factors it must consider and specifically identifies the facts relevant to those factors. (See  *Monterroso v. Moran* (2006) 135 Cal.App.4th 732, 738 (*Monterroso*) [by relying on consent to restraining order the trial court failed to make any findings required by the statute]; *Isidora M., supra*, 239 Cal.App.4th at p. 23 [trial court's decision to rely on fact of conviction insufficient to satisfy requirement that it make detailed factual findings].)

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*8 Upon review of the trial court's oral statement of decision, we conclude it made factual findings sufficient for appellate review and, thus, satisfied the requirements of the statute. Specifically, the trial court accepted Maria's testimony regarding past abuse and found, in light of this evidence, that she had proven such past accounts of abuse. The court also made several specific factual findings regarding the April 14 incident. Specifically, the court found Maria went to Luis's home and that the two got into an argument at the front door. The court found, without deciding how, that, at some point Maria ended up in Luis's home, calling the facts surrounding how she entered the home a " 'he said-she said' " situation. The court further found that Maria got angry and broke the window of a car that she knew was not Luis's.

Continuing with these findings, the court made "a finding of fact that both acted primarily as aggressor." With respect to Luis, the court found that after Maria ended up in Luis's home, "he reacted to that as an aggressor as well, because he acted completely inappropriately." With respect to Maria, the court found that after Luis acted inappropriately, Maria "acts as the primary aggressor when she broke the windshield of his [*sic*] car with a lamp." The court then found neither party acted primarily in self-defense because the court believed two parties that "continually get into an argument and it turns physical" should have called the police rather than interact in the custody exchange.

Ultimately, these specific and detailed findings of fact set the framework for the trial court's rulings. They are sufficient to identify those factual disputes resolved by the trial court and, subsequently, the facts relied upon by the court to issue the mutual restraining orders. This satisfies the detailed factual finding requirements of  [section 6305](#).

The Facts Found by the Trial Court do not Support Restraining Maria

Maria next argues the trial court abused its discretion by finding the facts were sufficient to conclude that she committed an act of abuse, was a primary aggressor in the confrontation with Luis on the 14th, and did not act primarily in self-defense. We agree.

The factual findings made by the court provide two potential arguments for finding Maria committed an act of abuse as a primary aggressor, not in self-defense. In the first, Maria approached Luis's home to discuss custody issues without calling the police for help. In the second, Maria fled Luis's abuse and, in anger, damaged a car not belonging to Luis. As the court failed to resolve any factual disputes regarding how Maria entered Luis's home, and found Luis's responsive conduct was inappropriate and thus not in self-defense, we note that a restraining order cannot be predicted on Maria's entry into Luis's home under the facts found by the trial court.³

The first argument, that Maria approached Luis's home without calling the police for help, is readily rejected. The court made no findings that Maria was prohibited from approaching Luis's home or had a history of harassing or otherwise causing problems for Luis by approaching his home. While it noted an argument ensued, it made no findings that the argument caused Luis to feel any fear of harm, that the argument related to Luis's girlfriend as he contended, or that Maria was harassing Luis. Merely approaching a home to engage in a discussion satisfies none of the factors identified as abuse under the relevant statutes. Notably, although the trial court mentioned Maria's conduct of approaching the house in its discussion of the facts, the court did not make a specific finding Maria committed an act of abuse by doing so or that she was a primary aggressor in the parties' interactions by approaching the home. Accordingly, no evidence supports the conclusion Maria could be restrained based on this conduct.

*9 The second argument, that Maria was a primary aggressor and not acting in self-defense because she damaged personal property in anger after leaving Luis's home, is also flawed. The court found no fault in Maria's conduct while inside of Luis's home. Rather, the court specifically found, on testimony that Luis attacked Maria once she was inside his home, that Luis was the one that acted inappropriately at that time. Further, the court specifically found that Maria had proven a history of domestic abuse at the hands of Luis. Given these findings, we see no evidence that could support the trial court's conclusion Maria was a primary aggressor when she threw a lamp into a car after she fled the proven abuse from Luis inside of his home. The facts demonstrate Maria's conduct was a direct response to abuse at the hands of Luis and occurred not because she was continuing the

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confrontation but rather occurred while fleeing the location where that abuse occurred. (See *J.J.*, *supra*, 223 Cal.App.4th at pp. 975-976 [single act in self-defense does not support finding one was primary aggressor].)

Further, the court specifically found the car damaged belonged to Luis's girlfriend. Under section 6203 the relevant definitions of abuse require causing or attempting to cause bodily injury, placing a person in reasonable apprehension of imminent serious bodily injury, or engaging in conduct that could be enjoined under section 6320. Section 6320 allows enjoining several types of conduct, including the destruction of the personal property of the other party or, upon a showing of good cause, other named family or household members. The court's findings do not demonstrate any non-defensive conduct by Maria that would cause Luis harm, apprehension of harm, or that demonstrate destruction of Luis's property. Further, the court made no factual findings that Luis's girlfriend was a protected family or household member and, certainly, did not identify good cause for enjoining acts against the girlfriend. Indeed, Luis's girlfriend was not included in the final restraining order issued. Thus, in the same way the court dismissed the claims of abuse by Luis on the 16th because he was not part of the dispute, its findings could not support concluding Maria abused Luis on the 14th because the act it considered abuse was not directed toward the party seeking the restraining order and no other basis for restraining Maria was found.

For these reasons, we conclude the trial court abused its discretion in issuing a restraining order against Maria in this instance. The court's detailed factual findings and the record supporting those findings do not demonstrate Maria committed an act of abuse permitting the court to enter a restraining order against her.

Maria's Challenges to the Custody Order

Maria contends the trial court failed to apply the rebuttable presumption under section 3044 that it is not in the best interest of the children to award sole or joint physical or legal custody to a party that has perpetrated domestic violence against the other party. Given the record in this case, and having concluded that Maria did not commit an act of abuse under the facts found by the trial court, we find the trial court erred in failing to apply the presumption set forth in section 3044.

Standard of Review and Applicable Law

“The standard of appellate review of custody and visitation orders is the deferential abuse of discretion test. [Citation.] The precise measure is whether the trial court could have reasonably concluded that the order in question advanced the ‘best interest’ of the child. We are required to uphold the ruling if it is correct on any basis, regardless of whether such basis was actually invoked.” (*In re Marriage of Burgess* (1996) 13 Cal.4th 25, 32.)

“Upon a finding by the court that a party seeking custody of a child has perpetrated domestic violence against the other party seeking custody of the child or against the child or the child's siblings within the previous five years, there is a rebuttable presumption that an award of sole or joint physical or legal custody of a child to a person who has perpetrated domestic violence is detrimental to the best interest of the child, pursuant to Section 3011.” (§ 3044, subd. (a).) “The presumption is rebuttable, but the court *must* apply the presumption in any situation in which a finding of domestic violence has been made.” (*In re Marriage of Fajota* (2014) 230 Cal.App.4th 1487, 1498.) “The legal effect of the presumption is to shift the burden of persuasion on the best interest question to the parent who the court found committed domestic violence.” (*Celia S. v. Hugo H.* (2016) 3 Cal.App.5th 655, 662.)

The Trial Court Failed to Apply Section 3044

*10 Following its decision to grant mutual restraining orders, the court resolved the parties' competing requests for a custody modification by saying “I'm keeping the current orders in effect. And if I have to make a safe exchange place, someone's going to have to work to change their work schedule.” The court later sent the parties to mediation for additional discussions “because we need less exchanges.” Following that mediation, the trial court found no change in circumstance warranting a wholesale change to the entire schedule but still decided to eliminate the mid-weekend exchange. No discussion was had regarding the prior domestic abuse findings.

It is apparent from this record that the trial court did not consider the presumption in section 3044 against joint

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custody when granting custody. The court was apprised of the presumption at the initial hearing on the restraining orders but, after granting mutual restraining orders, only stated it was keeping the current orders in effect. At the later hearing following mediation, the court expressly found no change in circumstance that would warrant a major change to the order—a point contrary to the presumption set forth in section 3044 following a domestic violence finding—and, despite implicitly recognizing the domestic violence issues present through its comments about the parties not getting along and its order keeping the parents apart at exchange, maintained a joint custody order while increasing Luis's time with the children. Such conduct provides no indication that the court was aware of the presumption under section 3044 or readily applied it. (See *In re Marriage of Fajota, supra*, 230 Cal.App.4th at p. 1500 [having found instances of domestic violence there “is no reasonable basis for the trial court's failure to apply the section 3044 presumption at either of the two hearings at which the court addressed custody in this case”].)

The court's failure to apply the presumption set forth in section 3044 is further compounded in this instance by our conclusion that the finding Maria committed an act of abuse was unsupported by the evidence. Even if we presume the trial court considered the mutual findings of domestic violence and adjusted the custody and visitation order to account

for those findings, that balancing would no longer stand given our findings the evidence did not support a finding Maria committed an act of abuse. Accordingly, we reverse the trial court's order and remand for the court to apply the presumption set forth in section 3044 due to the proven acts and history of abuse committed by Luis. (See *Ellis v. Lyons* (2016) 2 Cal.App.5th 404, 418-419.)

DISPOSITION

The domestic violence restraining order against Maria C. and the court's custody order are reversed and the matter remanded for the court to apply the presumption set forth in *Family Code section 3044*. Maria C. shall recover her costs on appeal.

WE CONCUR:

FRANSON, J.

SMITH, J.

All Citations

Not Reported in Cal.Rptr., 2018 WL 4611331

Footnotes

- 1 All future statutory references are to the Family Code, unless otherwise noted.
- 2 On this issue, we have received the amicus briefing filed by (1) the ACLU of Southern California, ACLU of Northern California, Lambda Legal Defense and Education Fund, and The LGBTQ Center Long Beach and (2) Bay Area Legal Aid, both in support of Maria. We thank amici for their input and have considered their positions.
- 3 It appears from the court's findings that it was unable or unwilling to determine who caused Maria to enter Luis's home. As this fact was a critical component to determining who was properly subject to a restraining order in this case the court's failure to make findings of fact on this issue and its decision to, instead, issue mutual restraining orders suggests the court was incorrectly entering the orders out of convenience rather than upon specific factual findings supported by the record. (See *Monterroso, supra*, 135 Cal.App.4th at p. 738 [rejecting decision where inference was that the trial court decided that a mutual restraining order was an expedient way to resolve the matter without reaching the merits].)