CASE ALERT

COURTS CANNOT CONSIDER WHO SPEAKS BETTER ENGLISH WHEN DECIDING BEST INTEREST FOR CUSTODY OR THAT THE PRESUMPTION AGAINST GRANTING ANY CUSTODY TO AN ABUSER HAS BEEN OVERCOME

S.Y. v. Superior Court (2018) 29 Cal.App.5th 324. This important appellate decision declares that trial courts **cannot consider English language proficiency when deciding a child's best interest in a custody case.** The appellate court explained that, like using the factors of race, religious belief, sexual orientation, single-parent status, and economic position, English language fluency is an improper factor to consider when deciding custody. The decision also **forbids trial courts from using English language fluency to overcome (rebut) the presumption against granting custody to a parent who has abused the other parent** in Family Code section 3044.

Our client, S.Y. was abused by her husband, she alleged this included preventing her learning English. After deciding she had been abused, the trial court granted the parties joint custody, finding it was in the child's best interest because the father spoke better English, and also relying on that factor to rebut the presumption against granting him any custody. In a published opinion, the Court of Appeal ruled that English language proficiency is not a proper basis for deciding best interest or deciding the presumption has been rebutted (overcome). Many thanks to our co-counsel Legal Aid Society of San Diego, Inc., and Horvitz & Levy, LLP.

We believe this case will help other survivors like S.Y. who are particularly vulnerable because of limited English proficiency. Questions? Contact Family Violence Appellate Project: info@fvaplaw.org or (510) 858-7358. Thank you!

PRACTICE TIPS

1. If the abusive parent tries to argue they should get custody because they speak better English, for instance by arguing that their better English will help the child with school, doctors, or other things, tell the court it cannot consider those arguments under this case, *SY v. Superior Court*. Also make sure to counter any argument that a survivor's lack of English fluency has resulted in any direct harm to the child. For example, if the abusive parent argues the non-abusive parent repeatedly mis-understood medical instructions, you can explain patients have a right to interpreters.

2. Ask the court to explain in writing or on the record why they are awarding any custody to a parent who has abused the other parent. For more information, see the tool kit on section 3044 and *Celia S.* at www.fvaplaw.org.

3. *Celia S. v. Hugo H.* establishes that 50/50 parenting time is "joint custody." **This case goes further by concluding that sharing a child 42% of the time is also "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 *S.Y.*

4. 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 and an example request form at www.fvaplaw.org.

5. The court in *S.Y. v. Superior Court* also said that trial courts do not have to go through each factor in section 3044 in order to rebut the presumption against granting any custody to a parent who has abused the other parent. Section 3044 has been updated by the legislature and now requires all trial courts to go through each factor. See the tool kit on section 3044 at www.fvaplaw.org.