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Court of Appeal, Second District, Division 7, California.

Lisa A. POPOVICH, Petitioner and Appellant,

v.

Rick NEWTON, Respondent and Appellee.

No. B194324.

|
(Los Angeles County Super. Ct. No. BD403859).

|
Jan. 14, 2008.

APPEAL from a judgment of the Superior Court of Los Angeles County. Mitchell Beckloff, Temporary Judge. Affirmed.

Attorneys and Law Firms

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Opinion

[ZELON, J.](#)

*1 This appeal arises from a child custody dispute in which Appellant Lisa Popovich (“Popovich”) sought sole physical and legal custody of her two minor children with Respondent Rick Newton (“Newton”). Popovich’s request for sole custody was based primarily on her allegation that Newton had committed domestic violence against her during their marriage. After an extended trial, the trial court entered a judgment awarding the parties joint physical and legal custody of the children. In a 57-page Statement of Decision, the trial court concluded that Newton had rebutted the [Family Code section 3044](#) presumption against joint custody to a perpetrator of domestic violence and that a joint custody award was in the best interest of the children. ¹

On appeal, Popovich makes several arguments. First, she contends that the trial court erroneously concluded that Newton, who indisputably committed an act of domestic violence against her, overcame the statutory presumption against a joint custody award. Second, Popovich asserts that the trial court improperly precluded her from cross-examining the child custody evaluator about the deposition testimony of Newton’s former wife who had testified about his alleged abusive behavior toward her. Third, Popovich argues that the trial court erred in awarding attorney’s fees and costs to Newton by failing to apply a statutory presumption against an attorney’s fees award to a perpetrator of domestic violence.

We conclude that the trial court’s factual findings in this matter were supported by substantial evidence and that there was no abuse of discretion in the trial court’s award of joint custody. Accordingly, we affirm the judgment.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

I. Overview of Custody Proceedings

Popovich and Newton were married on March 19, 1994. After almost 10 years of marriage, they separated on March 15, 2004.² Popovich filed for divorce the following day. The couple has two children who are at the center of this custody dispute, 13-year-old E. and nine-year-old A.

On April 14, 2004, shortly after the parties separated, the family court entered an order granting Popovich sole physical and legal custody of the children pending a trial on issues of custody and child support. The order provided Newton with visitation with the children each Monday from 5:00 p.m. to 7:15 p.m., on the second and fourth Saturday of each month from 9:00 a.m. to 7:00 p.m., and on the second and fourth Sunday of each month from 9:00 a.m. to 5:00 p.m. Under this arrangement, Newton did not have any overnight visits with the children. In the ensuing litigation, Popovich sought to maintain this custody schedule. Newton, on the other hand, requested a 50/50 joint custody arrangement.

Prior to trial, the parties stipulated to the appointment of Mary Lund, Ph.D. (“Dr.Lund”), a clinical psychologist, as the child custody evaluator. During the course of her evaluation, Dr. Lund conducted in-person interviews with Popovich, Newton, E., A., and Popovich's significant other, John Porter, and telephone interviews with a number of collateral witnesses. Various psychological tests were performed on both the parents and the children, and the results were reviewed by Dr. Lund. Following her evaluation, Dr. Lund submitted a detailed written report to the court explaining her findings and custody recommendations. In her report, Dr. Lund recommended a joint physical and legal custody arrangement subject to various restrictions.

*2 The court tried the issues of child custody and support between January and March 2006.³ Although the matter originally was scheduled for a two-day trial, it took seven days to complete. Both parties presented an extensive amount of evidence. A significant amount of time was spent exploring the dynamics of the parents' relationships with the children and each other. The following statement of facts is based on the evidence presented at trial.

II. Newton's Relationship with the Children

In her custody evaluation, Dr. Lund found that E. and A. have “secure, positive attachments” to both parents. While E. appeared slightly more attached to her mother, A. appeared almost equally attached to both her mother and her father. According to Dr. Lund, “[t]here was virtually no difference in [E.'s] and [A.'s] behavior with their mother and their father. They showed physical affection to both parents, talked easily with both parents, and complied with both parents' requests of them.” Dr. Lund observed Newton to be “very calm and patient with the girls, good at playing with them, and able to talk easily with them about problems and how to solve them.”

Newton testified about the nature of his relationship with the children prior to the parties' separation. According to this evidence, he was very involved in his daughters' lives. He stated that he regularly took them to school in the mornings and picked them up in the afternoons, drove them to their various after-school activities, and attended their sports-related practices and games. He also stated that he often cooked dinner for the children, helped them with their homework, read them bedtime stories, and tucked them into bed at night. Newton further testified that he was responsible for caring for the children when Popovich was away on business for extended periods of time, including a two-month business trip to Guam in or about 2001. Dr. Lund's evaluation likewise reflected that Newton had been “very involved” in the care of the children prior to the parties' separation, and “may have been more physically present with the children during the workweek” due to Popovich's work schedule.⁴

There also was evidence, however, that Newton acted inappropriately toward the children at times prior to the separation. For instance, John Porter, whom the court found to be credible, testified that he heard Newton call the children names such as “idiot,” “crybaby,” “brat,” and “stupid.” Mr. Porter also testified that he once saw Newton chasing A. who appeared to be terrified, and

on another occasion, he observed Newton carry A. to her room as she was screaming and crying and heard him tell her to “be quiet or ‘I’ll make you be quiet.’” Popovich also testified that, prior to the separation, Newton would yell at the children, call them names such as “idiot” and “stupid,” and tell them to obey him and to call him “Sir.”

In her custody evaluation, Dr. Lund noted that there was some indication that E. had conflict in her relationship with Newton prior to the separation and that they would argue. However, Dr. Lund found E. to have “positive feelings and security with her father both before and after the separation.” Dr. Lund also indicated that E. saw her father “as having improved since the separation” and “now feels more comfortable with him.” According to Dr. Lund, neither E. nor A. described “their father as showing problems with anger now” or “showed any anxiety about being around their father.” Additionally, none of the children’s interview statements suggested to Dr. Lund that they were “encountering any problems with his parenting currently.”

*3 In her evaluation, Dr. Lund also asked the children various questions to elicit their feelings about the current custody arrangement and a possible change to the arrangement. In response to a question about whom she would like to spend more time with, E. stated, “I want to spend a little bit more with my Dad, not too much. I like how it is now, but not seeing him for a week is too long.” When E. was asked how she thought it would feel to spend the night with her father, she replied, “I don’t know. I have never done it.. I am just not used to spending the night anywhere else.” A. was asked if it ever seemed liked she went a long time without seeing her father. She stated, “No, but a little bit more I would like to see him ... [b]ecause I want to spend time with him a lot and Mom a lot.” When asked how she would feel if she spent the night at her father’s house, A. replied, “That would be fine with me.”

III. Newton’s Relationship with Popovich

By all accounts, both parents had a volatile relationship during their marriage. Popovich testified that, prior to their separation, Newton was verbally and physically abusive toward her. She stated that he would scream at her and call her derogatory names like “stupid” and “idiot.” She also testified that, on one occasion in 2001, he tried to break down the front door and then pushed her. Newton admitted to yelling at Popovich and calling her names prior to their separation. He tried to characterize this conduct as “defensive behavior” and testified that he would only engage in yelling or name-calling when she provoked him. He denied engaging in any physically aggressive conduct prior to the events of April 12, 2004.

On that date, shortly after the parties separated, they had a violent physical altercation. According to Popovich, Newton pushed her to the floor and onto the bed, dragged her from the bedroom to the hallway, broke down a locked door to E.’s room where Popovich was dialing “911,” and forcibly prevented her from calling the police. Newton’s account of the altercation differed in many respects. However, he did admit to grabbing Popovich by the arms and shoving her. He also admitted to pulling her from the bedroom to the hallway while he searched for E. who was upset by her parents’ yelling and was crying. He further admitted to breaking through the locked door to E.’s room to try to prevent Popovich from calling the police. At trial, Newton acknowledged that his conduct on the night of April 12, 2004, constituted an act of domestic violence.

Following the April 12, 2004 altercation, Newton pled no contest to a misdemeanor charge of unlawfully interfering with a telephone call. The criminal court placed him on probation for three years and ordered him to complete a 52-week domestic violence treatment program. The court also issued a protective order prohibiting Newton from coming within 100 yards of Popovich. The criminal stay-away order later was reduced to 40 yards.

*4 On April 14, 2004, the family court also issued a restraining order against Newton, prohibiting him from coming within 40 yards of Popovich and from communicating with her except as necessary to facilitate visitation with the children. The court also ordered Newton to attend a parent counseling class.

IV. Newton’s Violations of the Restraining Orders

There was undisputed evidence presented at trial that Newton repeatedly violated the restraining orders issued against him by coming within 40 yards of Popovich. The violations generally fell within two categories: (1) school or sporting related activities in which the children participated, and (2) community related events that Popovich and the children attended.

The violations at the children's school and sporting related events occurred during functions that parents typically attend, but which Newton was restricted from attending to the extent that Popovich was also present. For instance, Popovich testified that Newton came within 40 yards of her at the children's back-to-school night and at their school's annual Christmas program. She also stated that he came within 40 yards of her when they were at the children's softball and soccer games. Popovich further testified that Newton unexpectedly showed up at community events that she attended with the children, such as concerts in the park and a 10K race, and that he violated the distance restrictions on those occasions as well. According to Popovich, during these community events, Newton would call to the children to come to him or would wave at them to try to get their attention. She testified that she never did anything to deliberately place Newton in violation of the court orders.

Newton's explanations for his attendance at these various events were similar in nature. He admitted that he attended the children's school and sporting related functions with an awareness that Popovich would be there, and that he violated the distance restrictions on those occasions. He tried to justify his violations by asserting that he left the school on back-to-school night as soon as he saw Popovich approach and that he stood outside the door of the school auditorium during the children's Christmas performance. He also testified that it was Popovich who came near him at the children's soccer and softball games and that he would move away from her when she did so to comply with the restraining orders. With respect to the community functions, Newton admitted that he attended these activities when Popovich was also present, but tried to emphasize that there were large numbers of people at these events and that he never approached her. He further testified that when he tried to initiate contact with the children at the 10K race, it was only to express how proud he was of their performance.

For each instance that Newton violated the restraining orders, he testified that he did not put himself in a position where Popovich would have no choice but to come near him. He also asserted that he never harmed or threatened to harm her on any of these occasions. There was no indication that Popovich reported any of these violations to the police. In any event, it is clear that Newton did violate the restrictions imposed by the restraining orders on multiple occasions while the custody proceedings were pending.

V. Newton's Participation in Counseling and Treatment

*5 Prior to the parties' separation, Newton participated in individual and joint counseling for a period of time. He first attended individual counseling with Dr. Dunbar to address his "defensive behavior." He stopped his therapy with Dr. Dunbar after six months because he felt that it "was not a good match" and that he had been given "few tools." Both parties then attended 18 months of family counseling with Dr. Baltizar so that they could work on their relationship and communication skills. In addition to these joint sessions, Newton saw Dr. Baltizar individually for a "few sessions" based on the doctor's recommendation. He stopped the therapy with Dr. Baltizar at the end of 2003 because he felt that Dr. Baltizar had provided "very few tools" and that the tools she did provide were not effective.

Following the April 12, 2004 altercation, Newton attended the court-ordered domestic violence treatment program, completing the 52-week program in September 2005. At trial, he testified that the program changed his life and that he learned anger management and communication tools that he uses today. He stated that the program helped him to be a calmer person and to recognize his behavior and how to change it. He further testified that he had learned that his conduct on April 12, 2004 was an act of domestic violence and that he now took "full responsibility for what [he] did." Newton stated that he had not engaged in any act of domestic violence since completing the program.

In her custody evaluation, Dr. Lund considered whether Newton had successfully completed the domestic violence treatment program. She found that he "showed acknowledgment that he had been inappropriate in how he expressed anger, took some responsibility and showed some remorse for the effects of his behavior on others the night of April 12, 2004." Dr. Lund also found that he "demonstrated an awareness of the use of anger management." During her evaluation, Dr. Lund also spoke with

the program's group leader who reported that Newton had taken responsibility for his behavior and "was in the higher end of people who successfully completed the 52 week group." Based on her interviews with Newton and the children and on the information provided by the program's group leader, Dr. Lund concluded that Newton had "made significant changes in anger management" and appeared "to have successfully completed a 52 week domestic violence treatment program."

Following his completion of the domestic violence treatment program in September 2005, Newton did not attend any further counseling until January 2006. He testified that he did not continue with therapy immediately because of his limited finances. He admitted, however, that he did not look for low-cost counselors. In January 2006, he began individual counseling with Dr. Schwartz, a therapist recommended by Dr. Lund. As of March 2006, he had attended three sessions with Dr. Schwartz over a six-week period. Newton testified at trial that he intended to continue his counseling with Dr. Schwartz on a weekly basis.

*6 In addition to his individual counseling and participation in the domestic violence treatment program, Newton attended two parenting classes offered through the family court. He attended the "Parents and Children Together" class, which was a three-hour education course about divorce and children. He also attended the "Parenting Without Conflict" class, which was a nine-hour course about parenting in high-conflict situations.

VI. Dr. Lund's Custody Evaluation and Recommendations

Dr. Lund performed her custody evaluation between June and October 2005. In November 2005, she submitted an 87-page report to the court which addressed, among other subjects, the children's adjustment and attachments to their parents, each parent's psychological issues including Newton's abusive behavior, and each parent's individual and co-parenting skills. Dr. Lund ultimately found that while each parent had specific shortcomings, both were "good parents" who "overall [] appear to have been loving, very involved, and competent in their care of the children." Dr. Lund also found that E. and A. were "almost equally attached" to both parents. With respect to Newton in particular, Dr. Lund found that her evaluation "suggested that [E.] and [A.] are very attached to their father, that he is competent as a parent, and that he has benefited from his 52 week group so that it is not likely that he would show inappropriate anger to them." Dr. Lund also reported that there was no indication that Newton had been inappropriate with the children during their custodial visits and "no indication that the girls currently have anxiety about being with their father."

Based on her evaluation, Dr. Lund concluded that the children likely would "benefit from a high level of involvement by both parents" and that they would be able to adjust to expanded custody time with their father. In evaluating the current custody arrangement, Dr. Lund expressed concern that the current arrangement kept Newton in a "marginalized position" which created a risk that the children "would lose the possible benefit of a caring parent in their lives" and also resent Popovich for the loss of that relationship. Dr. Lund accordingly recommended a custody plan that would provide joint physical custody of the children, including overnight visits with Newton.⁵ Dr. Lund also recommended that the parents share joint legal custody of the children, but with specific orders about decision-making authority in education, healthcare, and extracurricular activities so as to minimize the conflict between them. Dr. Lund indicated that she believed the children would benefit from her proposed plan given the positive parenting skills of both parents and the children's equally strong attachment to both parents.

At trial, Dr. Lund was questioned at length by both parties about the contents of her report and the basis for her recommendations. One area of inquiry was Dr. Lund's conclusion that Newton had successfully completed the domestic violence treatment program. Dr. Lund testified that in determining whether he successfully completed the program, she did not merely consider his attendance in the program. She also considered whether he was able to articulate an understanding of the program's principles, whether he accepted responsibility for his actions and was remorseful, and whether he acknowledged that he had a problem. Much of Dr. Lund's testimony was accordingly focused on the extent to which Newton had accepted responsibility for the April 12, 2004 incident and apologized to Popovich for his actions that night.⁶

*7 Dr. Lund acknowledged that certain of Newton's statements suggested that he had not taken full responsibility for the April 12, 2004 incident. For instance, in a July 2005 written statement to Dr. Lund (which he later retracted), Newton stated that if he

had chosen to go to trial on the criminal charge, “it would have been [Popovich] who would have been ordered to go to the 52-week domestic violence program as well as myself for trying to prevent the 911 telephone call.” Additionally, at his deposition in January 2006, Newton testified that he believed the events of April 12, 2004, were part of a plan that Popovich “had consciously conjured up in order to engage in some sort of confrontation,” and that he did not believe he was “physically abusive” to her that night. Dr. Lund testified that she found these statements to reflect that Newton had not accepted full responsibility for his actions, but not that he had failed to take any responsibility. Dr. Lund explained that, based on other statements Newton made at his deposition and in their interviews, she believed that he had accepted some level of responsibility for his abusive behavior and had made substantial changes in his anger management. Dr. Lund also stated that while he still had more progress to make, she did not think he posed a danger to the children. She went on to explain, “I think that he might lose his temper again in the future. I don't think that ... anyone can go through life without showing anger. But I think that he has the ability to-and the motivation to manage his emotions with the children.”

Dr. Lund also was examined by both parties about the children's views on the current custody arrangement, and in particular, E.'s custody preferences as expressed in the evaluation. Dr. Lund testified that she had concluded that E. was comfortable with the current arrangement and was not necessarily seeking a change. Dr. Lund also stated, however, that E. did not voice any anxiety or hesitation about spending increased time with her father and that both E. and A. had expressed that they wanted more time with him. Dr. Lund further testified that although the children would need some time to adjust to a new custody arrangement, she did not believe that they would perceive overnight visits with their father as a substantial increase in custody time.

Dr. Lund also explained her concerns about the current custody arrangement and why she believed it created a “marginalized” relationship between Newton and the children. She testified that she believed the current arrangement “does not allow the girls to feel that they can have a secure home and a secure relationship with their father” and that the children “will lose strength of relationship with him” if that arrangement continues. Dr. Lund also testified that she believed her recommendation for a joint custody arrangement served the best interest of the children. As Dr. Lund explained, “the children are attached to both parents. And I believe that both of these parents have very positive qualities in their parenting, so they have a lot to offer the children.”

VII. Deposition Testimony of Newton's Former Wife

*8 During the course of the custody proceedings, Popovich contacted Newton's former wife, Laura Willig, who briefly was married to him for five months in 1989. At Popovich's request, Ms. Willig signed a declaration regarding that prior relationship, and she later was deposed in connection with these proceedings. At her videotaped deposition, Ms. Willig verified that the contents of her declaration were largely accurate. She testified that Newton was verbally abusive toward her during their relationship and that he would call her names and yell at her in a loud, angry voice. Ms. Willig also testified that at times he was physically abusive. She stated that he once pushed her up against a wall, and that on another occasion, he became angry while they were at work and threw a cup of hot coffee at her. Ms. Willig also testified that there were times when Newton was verbally and emotionally abusive toward her young son, and that he twice grabbed her son by his arm and dragged him to his room. At her deposition, Ms. Willig described Newton as “angry” and “short-tempered” during their relationship and described their relationship as “full of turmoil.” Ms. Willig had not spoken to Newton in 15 years and did not want him to know where she currently was residing.

During the first day of trial, the trial court ruled on Newton's motion in limine to exclude the deposition testimony of Ms. Willig. The court initially granted the motion on the grounds that the probative value of the testimony was outweighed by its prejudicial effect given the remoteness in time of the events alleged by Ms. Willig. The court stated, however, that if, after hearing from Dr. Lund, it decided that Ms. Willig's testimony was relevant to Newton's domestic violence against Popovich, it might reconsider its ruling and receive the deposition transcript into evidence.⁷ The court also stated that if it decided to admit Ms. Willig's deposition testimony, it would allow Newton to be cross-examined about such testimony.

Dr. Lund testified on the second day of trial. During her testimony, Popovich's counsel questioned Dr. Lund about the allegations of domestic abuse made by Ms. Willig. Dr. Lund testified that she had reviewed Ms. Willig's declaration in the course of her

custody evaluation, but was not able to interview her because Ms. Willig refused to speak to Dr. Lund directly.⁸ Dr. Lund also testified that she could not give the allegations in Ms. Willig's declaration "much weight because [she] wasn't able to speak to her directly," and that she "assumed that if they were going to be given weight, that the court would have to determine whether those allegations were credible or not." Dr. Lund noted, however, that if the allegations were true, "it would be consistent with [Popovich's] allegations that [Newton] was physically abusive in [their] relationship."

The court asked Dr. Lund if her recommendations in the case would have been impacted if she had interviewed Ms. Willig and found her to be credible. Dr. Lund responded, "I don't think it would have an impact, because I already believe that [Newton] had a problem with impulse control in his ... relationship with [Popovich] and behaved in the way that I think was physically aggressive. So I already made that conclusion." The court also asked Dr. Lund if her recommendations would be any different if she took the allegations in Ms. Willig's declaration as true. Dr. Lund responded, "Not necessarily."

*9 Popovich's counsel later asked Dr. Lund hypothetical questions about the deposition testimony of Ms. Willig. In particular, counsel asked Dr. Lund to assume that Ms. Willig had testified at deposition that Newton was physically abusive toward her and that the court found her testimony to be credible. Counsel then asked Dr. Lund whether she thought the court should consider such testimony in making its custody determination. Dr. Lund responded, "If the court finds her statements credible and has some-well, I don't do the court's job for the court. [¶] But if the court finds that there is information that is supportive of those statements, then ... the court should probably take it into consideration, yes."

After Dr. Lund was excused as a witness, the court reconsidered its ruling on the motion in limine and received Ms. Willig's deposition testimony into evidence. On the third day of trial, the court also allowed Popovich's counsel to cross-examine Newton about Ms. Willig's deposition testimony and the extent to which he admitted to the conduct alleged by Ms. Willig at her deposition. However, prior to the close of trial, Popovich's counsel never requested that Dr. Lund be recalled as a witness to testify any further about Ms. Willig. The court later reviewed the transcript and DVD of Ms. Willig's deposition and found her to be credible.

VIII. The Statement of Decision

After seven days of testimony, the trial concluded on March 24, 2006. The court thereafter took the matter under submission. On June 21, 2006, the court issued a 50-page Intended Statement of Decision to which both parties filed objections. On August 1, 2006, the court issued a 57-page final Statement of Decision that discussed in detail the court's factual findings and legal conclusions.

In its Statement of Decision, the court discussed the specific concerns that it had about Newton's conduct, including his repeated violations of the requirements of the restraining orders and his out-of-court statements suggesting that he had not fully accepted responsibility for his abusive behavior. The court also found, however, that the children "have a strong, positive, and bonded relationship with their father," and that Newton "has shown his commitment to his daughters and his constant presence in their lives ." The court further found that the current custody arrangement "marginalizes" the children's relationship with Newton by denying them meaningful father/daughter experiences, and that the children would benefit from having two parents who are fully involved in their lives.

In making its custody determination, the court noted that it was undisputed that Newton had committed an act of domestic violence on April 12, 2004, and thus, that there was a rebuttable presumption against an award of joint custody. The court concluded, however, that Newton had rebutted the presumption and proved by a preponderance of the evidence that a joint custody arrangement was in the children's best interest. The court accordingly awarded the parties joint physical and legal custody of the children. The court also ordered the parents and the children to attend family counseling, and ordered Newton to attend 36 individual counseling sessions with the same therapist and to complete a parenting education course of at least 10 sessions. In addition, the court awarded Newton approximately \$55,000 in attorneys' fees and costs, which was one-third of the amount he sought. The court issued the attorneys' fees award based on Newton's financial need and Popovich's ability to pay,

but reduced the amount of the award, in part, because of his history of domestic violence. Following the trial court's judgment, Popovich filed a motion for a new trial on both custody and child support issues.⁹ The court denied the motion for a new trial on all issues related to custody. Popovich thereafter filed a timely appeal.

DISCUSSION

*10 In a child custody dispute, the trial court has “the widest discretion to choose a parenting plan that is in the best interest of the child.” (§ 3040, subd. (b).) The standard of review for custody orders is the deferential abuse of discretion test. (*In re Marriage of Burgess* (1996) 13 Cal.4th 25, 32.) “The precise measure is whether the trial court could have reasonably concluded that the order in question advanced the ‘best interest’ of the child.” (*Ibid.*) The appellate court is not allowed to retry the issue of custody nor to substitute its own judgment for that of the trial court. (*Catherine D. v. Dennis B.* (1990) 220 Cal.App.3d 922, 931.) Where reasonable minds may differ, “ ‘it is the trial judge's discretion and not that of the appellate court which must control.’ ” [Citations.]” (*Ibid.*)

We also “ ‘are bound by the established rules of appellate review that all factual matters will be viewed ... in support of the judgment....’ ” [Citation.]” (*Catherine D. v. Dennis B., supra*, 220 Cal.App.3d at p. 931.) Accordingly, “ ‘[w]e must accept as true all evidence ... tending to establish the correctness of the trial court's findings ..., resolving every conflict in favor of the judgment.’ ” [Citation.]” (*Sabbah v. Sabbah* (2007) 151 Cal.App.4th 818, 823.) “ ‘If appellate scrutiny reveals that substantial evidence supports the trial court's findings and conclusions, the judgment must be affirmed.’ ” [Citation.]” (*Catherine D. v. Dennis B., supra*, at p. 931.)

I. Section 3044 Rebuttable Presumption Against Joint Custody

In any custody proceeding, the court must make a custody award that is in “the best interest of the child.” (§ 3040, subd. (b); *Burchard v. Garay* (1986) 42 Cal.3d 531, 535.) There is no statutory definition of “best interest of the child.” It has been described as “ ‘an elusive guideline that belies rigid definition.’ ” (*Adoption of Matthew B.* (1991) 232 Cal.App.3d 1239, 1263.) Its purpose, however, is “ ‘to maximize a child's opportunity to develop into a stable, well-adjusted adult.’ ” [Citation.]” (*Ibid.*) Therefore, in determining custody, the trial court “must look to *all the circumstances* bearing on the best interest of the minor child” and make an award that best serves the child's (rather than the parents') interest. (*In re Marriage of Burgess, supra*, 13 Cal.4th at pp. 31-32; *In re Marriage of LaMusga* (2004) 32 Cal. 4th 1072, 1087.)

In considering the impact of domestic violence on the “best interest” of the child, the Legislature has declared that “the perpetration of child abuse or domestic violence in a household where a child resides is detrimental to the child.” (§ 3020, subd. (a).) This policy has been codified as a rebuttable presumption in section 3044, which provides, in relevant part, that “[u]pon 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 ..., 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.” (§ 3044, subd. (a).) This presumption against joint custody may only be overcome by a preponderance of the evidence. (*Ibid.*)

*11 Section 3044, subdivision (b), sets forth seven factors for the trial court to consider in determining whether the presumption against joint custody has been rebutted. (§ 3020, subd. (b).) The following six factors are relevant in this case:¹⁰

“(1) Whether the perpetrator of domestic violence has demonstrated that giving sole or joint physical or legal custody of a child to the perpetrator is in the best interest of the child. In determining the best interest of the child, the preference for frequent and continuing contact with both parents, as set forth in subdivision (b) of Section 3020, ... may not be used to rebut the presumption, in whole or in part.

“(2) Whether the perpetrator has successfully completed a batterer’s treatment program that meets the criteria outlined in subdivision (c) of Section 1203.097 of the Penal Code.

...

“(4) Whether the perpetrator has successfully completed a parenting class if the court determines the class to be appropriate.

“(5) Whether the perpetrator is on probation or parole, and whether he or she has complied with the terms and conditions of probation or parole.

“(6) Whether the perpetrator is restrained by a protective order or restraining order, and whether he or she has complied with its terms and conditions.

“(7) Whether the perpetrator of domestic violence has committed any further acts of domestic violence.”

(§ 3044, subd. (b).)

The trial court found that Newton had committed an act of domestic violence against Popovich on April 12, 2004, and thus, that there was a rebuttable presumption against an award of joint custody. Newton conceded this point at trial and stipulated that Popovich could assert the section 3044 presumption. Accordingly, the primary issue on appeal is whether the trial court abused its discretion in concluding that Newton had overcome the presumption against joint custody based on the factors set forth in section 3044, subdivision (b).

A. Best Interest of the Children

The first factor in the section 3044 analysis is whether the perpetrator of domestic violence has demonstrated that joint custody is in the “best interest of the child.” (§ 3044, subd. (b)(1).) While the court must look to all the circumstances bearing on the child’s best interest in cases of domestic violence, it may not consider the policy set forth in section 3020 which favors “frequent and continuing contact” with both parents.¹¹ (*Ibid.*) Popovich makes two arguments with respect to the “best interest” factor. First, she contends that the trial court impermissibly ignored the wishes of the children who did not want overnight visits with their father. Second, she asserts that the trial court improperly considered how the current custody arrangement created a “marginalized” relationship between Newton and the children. We consider each of these arguments in turn.

1. Children's Custody Preference

Popovich claims that the undisputed evidence at trial established that the children did not want overnight visits with their father and that the trial court ignored these wishes of the children in awarding joint custody. She also asserts that if the court had any doubts about E.’s custody preference, then it should have interviewed E. in chambers to ascertain her wishes. These arguments, however, are not supported by the evidence.

*12 Although it is true that a trial court must consider the wishes of children who are of sufficient age and capacity to reason, the court has no mandatory duty to follow a minor’s wishes in making its custody determination. (§ 3042, subd. (a); *In re Marriage of Mehlmauer* (1976) 60 Cal.App.3d 104, 110-111.) It simply must give the child’s custody wishes “due weight.” (§ 3042, subd. (a).) Moreover, “there is no absolute requirement that minors always be interviewed” “to ascertain their preferences as to custody.” (*In re Marriage of Slayton & Biggums-Slayton* (2001) 86 Cal.App.4th 653, 659.) Instead, the court is free to exercise its discretion to determine the most appropriate means to obtain a minor’s custody preference. (*In re Marriage of Brown & Yana* (2006) 37 Cal.4th 947, 964, fn. 11.) One alternative means of obtaining a child’s preference is through the custody evaluator’s report of interviews with the child. (*Niko v. Foreman* (2006) 144 Cal.App.4th 344, 366.) The trial court applied that method in this case and relied on the report and testimony of Dr. Lund in ascertaining the custody wishes of E. and A. The trial court acted well within its discretion in doing so.

In addition, Popovich is incorrect in her assertion that the only evidence presented at trial established that the children did not want overnight visits with Newton. In fact, the trial testimony and custody report of Dr. Lund are to the contrary. Dr. Lund testified that, during her evaluation, she asked the children a series of questions to elicit their feelings about the current custody arrangement and the possibility of increased time with their father, including overnight visits. Neither child ever told Dr. Lund that she did not want overnight visits with her father, and in Dr. Lund's opinion, neither child expressed concerns about the concept of overnight visits. A. told Dr. Lund that it "would be fine with [her]" if she spent the night at her father's home. E. stated that she did not know how she felt about spending the night with her father because she had "never done it" and was "just not used to spending the night anywhere else." But according to Dr. Lund, E. showed no anxiety or hesitation about spending increased time with her father during this discussion. Additionally, both children expressed to Dr. Lund that they wanted more time with their father than the current custody arrangement provided. Based on her interviews with the children, Dr. Lund formed the opinion that overnight visits would not be problematic for the children.¹² The trial court found Dr. Lund's opinion on the issue to be well-grounded.

Moreover, it is clear from the trial court's Statement of Decision that it did not wholly ignore the wishes of the children in making its custody determination. In its Statement of Decision, the court specifically described the children's various statements to Dr. Lund about their custody preferences and found that those statements supported Dr. Lund's opinion that the children would be comfortable with overnight visits. Based on Dr. Lund's testimony and evaluation report, the court also found that "the children are clear in their desire to have more time with their father." Accordingly, the court did give due weight and consideration to the children's custody wishes and its factual findings on this issue are supported by substantial evidence.

2. Children's "Marginalized" Relationship with Newton

*13 Popovich also asserts that the trial court improperly considered whether the current custody arrangement created a "marginalized" relationship between Newton and the children because "marginalization" is simply another way of expressing the concept of "frequent and continuing contact" which is a prohibited consideration under [section 3044](#). In particular, she contends that the term "marginalization" as used by both Dr. Lund and the trial court "means nothing more than a restriction on the amount of time [Newton] spends with the children."

We disagree with her characterization. Neither Dr. Lund nor the trial court described the children's "marginalized" relationship with Newton solely in terms of the quantity of time that they spent together. Rather, the discussion of "marginalization" was more about the quality of the children's time with their father and the extent to which they are being denied meaningful experiences with him under the current custody plan.

Dr. Lund testified that she believed the current custody arrangement created a "marginalized" relationship because it "does not allow the girls to feel that they can have a secure home and a secure relationship with their father," and thus, there was a risk that the children would "lose strength of relationship with him" if that arrangement continued. She identified the lack of any overnight visits, the limited contact that Newton had with the children's school, and the restrictions in place at the children's various activities as different forms of marginalization that could negatively impact the children's relationships with both parents. Dr. Lund was particularly concerned about how Newton's *de facto* physical distance from the children at their school and sporting events whenever their mother was also present contributed to this marginalized relationship and created an awkward situation for the children.

The trial court likewise focused on the quality of the children's relationship with their father under the current custody plan. The court found that the current plan created a "marginalized" relationship because "[i]t significantly impacts their father/daughter life experiences," and "prevents him from substantial parental and life activities with the couple's daughters ." In describing the kind of life activities that the court was concerned the children were losing, the court referred to the children never being tucked into bed at night by their father, never being comforted by their father at night if they were sick or scared, and never sitting down with their father in the morning for breakfast. To the extent that the court referred to the quantity of time that the

children spent with their father, it was to explain how the restricted custody time under the current plan deprived the children of this type of potential father/daughter experiences.

Furthermore, in its Statement of Decision, the trial court specifically addressed the same argument that Popovich makes here about marginalization. The court noted that Popovich was contending that the concept of marginalization was merely another way of considering the prohibited factor of “frequent and continuing contact.” The court expressly rejected that contention, stating that it “disagrees with [Popovich’s] characterization” of the concept. This evidences that the trial court was well aware of the prohibition against considering “frequent and continuing contact” in its [section 3044](#) analysis and concluded that the concept of marginalization as used in this case did not embody that prohibited factor.

*14 The discussion of “marginalization” accordingly was directed at the nature of the children’s relationship with their father, and not the total amount of custody time. Additionally, while Newton may have lost the right to rely on the legislative policy in favor of “frequent and continuing contact” with both parents as a result of his domestic violence, the children certainly did not lose their right to have a meaningful relationship with their father. Substantial evidence supported the trial court’s finding that the current custody plan created such a marginalized relationship for the children and that a joint custody arrangement would allow for a more meaningful relationship and be in the children’s best interest.

B. Successful Completion of a Domestic Violence Treatment Program

The second factor to consider in determining whether the [section 3044](#) presumption against joint custody has been rebutted is whether the perpetrator of domestic violence has successfully completed a domestic violence treatment program. (§ 3044, subd. (b)(2).) In this case, it is undisputed that Newton completed a 52-week domestic violence treatment program in accordance with the court order. Popovich asserts that the trial court erred in finding that the completion was “successful.”

First, Popovich asserts that “successful” completion as used in [section 3044](#) must mean that there is reasonable cause to believe that the perpetrator of domestic violence will not commit domestic violence in the future. In support of her argument, she cites [Penal Code section 1210.1](#) which requires a defendant convicted of a nonviolent drug offense to “successfully” complete a drug treatment program and specifically defines “successful” completion as the completion of the prescribed course of treatment with a “reasonable cause to believe that the defendant will not abuse controlled substances in the future.” ([Pen.Code, §§ 1210](#), subd. (c), [1210.1](#), subd. (e)) In contrast, however, [Family Code section 3044](#) contains no express definition of a “successful” completion. We will not read into a statute a requirement that the Legislature declined to impose. (*In re Khalid H.* (1992) 6 Cal.App.4th 733, 736 [“When a statute omits a provision which another statute embracing a similar subject includes, a different legislative intent for each statute is indicated.”]; *Hennigan v. United Pacific Ins. Co.* (1975) 53 Cal.App.3d 1, 8 [“The fact that a provision of a statute on a given subject is omitted from other statutes relating to a similar subject is indicative of a different legislative intent for each of the statutes.”].)

Second, Popovich contends that the trial court relied solely on Dr. Lund’s assessment of what it means to successfully complete a domestic violence treatment program rather than deciding on its own how the statute should be interpreted. She points to [section 3044](#), subdivision (e), which provides that “the court may not base its findings solely on conclusions reached by a child custody evaluator ..., but shall consider any relevant, admissible evidence submitted by the parties.” (§ 3044, subd. (e).) The record reflects, however, that the trial court did also consider the evidence presented by the parties in making its findings on this issue. In its Statement of Decision, the court specifically described how Newton’s trial testimony supported its finding that he had successfully completed the program. In particular, the court stated that it “believes [Newton’s] testimony that he learned tools to assist him with anger management” and that it found his testimony that “the treatment program changed his life” to be credible. The claim that the court solely relied on Dr. Lund’s opinion at the exclusion of all other testimony is not supported by the evidence.

*15 Third, Popovich argues that the trial court’s findings were inconsistent with Dr. Lund’s definition of successful completion. Dr. Lund testified that in determining whether Newton successfully completed the domestic violence treatment program, she considered such factors as whether he was able to intellectualize what he learned, whether he had accepted responsibility for

his actions and shown remorse, and whether he had acknowledged that he had a problem. Notably, Dr. Lund found that these factors supported her conclusion that Newton had successfully completed the program. She based her conclusion on statements obtained from various individuals, including Newton, the children and the program's group leader, which indicated that Newton had "made significant changes in anger management." In her interview with Newton, for instance, Dr. Lund found that he "showed acknowledgment that he had been inappropriate in how he expressed anger, took some responsibility and showed some remorse for the effects of his behavior on others." According to Dr. Lund, he also "demonstrated an awareness of the use of anger management." At trial, Dr. Lund acknowledged that certain of Newton's statements suggested that he had not accepted full responsibility for his actions on April 12, 2004, and that he was still deflecting blame to Popovich. Nevertheless, Dr. Lund believed that Newton had accepted some level of responsibility and made "substantial changes" in his behavior, and that this was sufficient to show his successful completion of the program.

The trial court found Dr. Lund's conclusions on this issue to be well-grounded. The court also found that Newton had not committed any acts of violence or threats of violence since the April 12, 2004 incident, that his testimony about his progress with anger management was "credible," and that his apology to Popovich on the witness stand was "sincere." While Popovich may doubt the truthfulness of Newton's testimony on this issue, it is not the role of the appellate court to reweigh evidence or determine credibility. (*Niko v. Foreman, supra*, 144 Cal.App.4th at p. 365.) "Credibility is a matter within the trial court's discretion, and the reviewing court must defer to the trial court's findings on credibility issues. [Citation.]" (*Ibid.*) In this case, substantial evidence supported the trial court's finding that Newton had successfully completed the domestic violence treatment program.¹³

C. Successful Completion of a Parenting Class

The third relevant factor in the [section 3044](#) analysis is whether the perpetrator of domestic violence has successfully completed a parenting class "if the court determines the class to be appropriate." (§ 3044, subd. (b)(4).) The trial court interpreted this factor as requiring participation in an extensive multi-session program and noted that it had "never ordered [Newton] to participate in [such] a parent education course." The court found, however, that Newton did complete two parenting classes provided by the family court with a focus on divorce and high-conflict custody disputes. The court also found that his completion of these classes was relevant to its determination as to whether he had rebutted the presumption against joint custody. As part of its joint custody award, the court ordered Newton to complete a more extensive parenting education course of at least 10 sessions.

*16 Popovich argues that because Newton had not yet attended a multi-session parenting course, this factor cannot be used to rebut the presumption against joint custody. We agree with the trial court, however, that Newton's completion of the two other parenting classes is at least relevant to the determination. It reflects his compliance with the court's prior order that required him to attend a parenting program. It also demonstrates that, following his act of domestic violence on April 12, 2004, Newton took steps to try to improve his parenting skills. Therefore, the court was allowed to consider the fact that Newton had completed at least 12 hours of parenting education in determining whether he had rebutted the presumption against joint custody.

D. Compliance with Probation and Restraining Orders

The only evidence before the trial court that Newton violated the terms of his probation was the evidence concerning his failure to comply with the restraining orders. We accordingly consider these two factors (i.e., compliance with probation and compliance with restraining orders) together. (§ 3044, subd. (b)(5), (b)(6).)

As the trial court recognized, Newton's refusal to comply with the restraining orders "is difficult and problematic." The court found that he had "failed to stay away from [Popovich] to the extent required by the orders on multiple occasions," and that he did not appear to "appreciate the serious nature of the orders." The court also noted that, although Newton had not committed any violence or threats of violence on those occasions, his violations nevertheless "affect[ed] [Popovich] in an emotionally negative manner" and led to her "feeling threatened." The court further expressed concern about Newton's failure to accept responsibility for his violations and found that his attempts to blame Popovich for causing the violations to be "patently unreasonable."

We find ample support for the trial court's finding that Newton repeatedly failed to comply with the restraining orders and that there was no excuse for his violations. Contrary to Newton's claims, his desire to remain involved in his children's lives cannot justify his actions in violating the court's orders. As the trial court stated, “[t]he order is what it is and compliance is required.” Newton therefore could not rely on these factors to rebut the [section 3044](#) presumption against joint custody and the trial court did not find otherwise.

E. Further Acts of Domestic Violence

The final factor in determining whether the presumption against joint custody has been rebutted is whether “the perpetrator of the domestic violence has committed any further acts of domestic violence.” ([§ 3044](#), subd. (b)(7).) Popovich contends that the trial court erred in finding that there had been no domestic violence since the April 12, 2004 incident by failing to consider Newton's violations of the restraining orders as a further act of domestic violence.

***17** In analyzing this factor, the trial court relied on [section 3044](#), subdivision (c), which provides in relevant part:

“For purposes of this section, a person has ‘perpetrated domestic violence’ when he or she is found by the court to have intentionally or recklessly caused or attempted to cause bodily injury, or sexual assault, or to have placed a person in reasonable apprehension of imminent serious bodily injury to that person or to another, or to have engaged in any behavior involving, but not limited to, threatening, striking, harassing, destroying personal property or disturbing the peace of another, for which a court may issue an ex parte order pursuant to Section 6320 ...”¹⁴

([§ 3044](#), subd. (c).) Applying this statutory provision, the court found that “[i]t is undisputed that the yardage violations of the restraining orders were not for intentionally or recklessly causing or attempting to cause serious bodily injury or sexual assault. [Newton] did not strike [Popovich], harass her, destroy her personal property, or disturb her peace. [Newton] did not speak to [Popovich] or otherwise communicate with her.” The court also found that “there has been no reoccurrence of any violence, threats of violence, or aggressive behavior by [Newton] against anyone” since the April 12, 2004 incident. While the court acknowledged that the violations affected Popovich “in an emotionally negative manner,” it found that the specific circumstances surrounding the violations “do not suggest that [Popovich] had a reasonable apprehension of imminent serious bodily injury on those occasions such that the yardage violations fall within the statutory definition of domestic violence.”

We agree with Popovich that Newton's repeated violations of the restraining orders were unreasonable. No matter how sincere his desire for meaningful contact with his children may be, there is simply no excuse for Newton's failure to comply with a court order. Nevertheless, we find that substantial evidence supported the trial court's finding that the particular violations at issue do not come within the prohibited conduct set forth in [section 3044](#), subdivision (c), and thus, do not constitute “further acts of domestic violence” under the circumstances of this case.

F. Trial Court's Balancing of the [Section 3044](#) Factors

Popovich's remaining argument regarding the rebuttable presumption is that the trial court abused its discretion in weighing the [section 3044](#) factors in favor of a joint custody award. We disagree. The trial court's Statement of Decision reflects that the court conducted a detailed review of the evidence presented at trial and carefully weighed all of the relevant factors required by [section 3044](#). The court made a number of findings in its Statement of Decision that support the conclusion that Newton rebutted the presumption. Among those findings were that a joint custody award would serve the best interest of the children by allowing for a more meaningful relationship with Newton, that Newton successfully completed a domestic violence treatment program, that he completed 12 hours of parent education classes, and that his violations of the restraining orders did not constitute a further act of domestic violence as defined by the statute. We conclude that substantial evidence supported the trial court's findings on these issues.

***18** We do note that the trial court was clearly and appropriately troubled by some of Newton's actions in this case. Newton's repeated violations of the restraining orders and out-of-court statements suggesting that he still has issues with anger

management are a cause for concern. However, the trial court has the authority to monitor the parties' joint custody arrangement and to modify its custody order as appropriate if there is a change in circumstances that warrants such modification. Based on the evidence presented at trial, we find that the trial court did not abuse its discretion in concluding that Newton had overcome the rebuttable presumption against joint custody and in determining that joint custody was in the best interest of the parties' children.

II. Dr. Lund's Testimony Regarding the Deposition of Laura Willig

Popovich also contends that the trial court committed prejudicial error by limiting the extent to which she was permitted to cross-examine Dr. Lund about the testimony of Newton's former wife, Laura Willig. Specifically, she argues that after the trial court reconsidered its ruling on the motion to exclude Ms. Willig's deposition testimony and received such testimony into evidence, the court did not allow her to recall Dr. Lund to the stand so that she could ask her how Ms. Willig's deposition testimony might impact Dr. Lund's opinions. Popovich also asserts that when she raised this error in her objections to the Intended Statement of Decision, the court rejected her objection based on a mistaken belief that it had reconsidered its ruling while Dr. Lund was still on the stand.

Popovich is correct that the trial court's Statement of Decision contains a factual error regarding the sequence of events. In its Statement of Decision, the court indicated that it reconsidered its position on the motion in limine "while Dr. Lund was on the stand" and that it "thereafter allowed Dr. Lund to be questioned by [Popovich] about Ms. Willig." That specific statement is incorrect. The reporter's transcript reflects that the court did not advise the parties that it was reconsidering its ruling on the motion in limine until after the court had already excused Dr. Lund as a witness. Ultimately, however, this one factual inaccuracy in the Statement of Decision does not demonstrate an abuse of discretion by the trial court.

First, it is undisputed that Popovich never requested that Dr. Lund be recalled as a witness before the end of trial even though she had an opportunity to do so. The trial court initially informed the parties that it was reconsidering its ruling on the motion in limine at the close of the second day of testimony. On the third day of testimony, Popovich's counsel asked the court if he could now cross-examine Newton about Ms. Willig's testimony and the court responded that he could. Yet Popovich made no similar request regarding Dr. Lund. It was not until after the trial ended and the court issued its Intended Statement of Decision that Popovich first argued that the court had improperly limited the extent to which she could examine Dr. Lund in light of the reconsidered ruling. Clearly, if Popovich believed that Dr. Lund had relevant testimony on this subject, then she should have renewed her request to further examine Dr. Lund before the close of trial.

*19 Second, even if Popovich had requested that Dr. Lund be recalled as a witness while the trial was in progress, it was within the trial court's discretion to deny such request based on Dr. Lund's prior testimony. Specifically, Dr. Lund testified that she could not form an opinion about Ms. Willig's allegations of domestic abuse because she never had the opportunity to interview Ms. Willig during her evaluation, and thus, she could not assess whether Ms. Willig was credible. It was also Dr. Lund's opinion that it was for the trial court to decide whether the statements made by Ms. Willig in her declaration and at her deposition were credible and entitled to weight. Dr. Lund further testified that even if she accepted Ms. Willig's allegations as true, she did not believe that it would impact her custody recommendations because she already had concluded that Newton "had a problem with impulse control in his ... relationship with [Popovich] and behaved in the way that ... was physically aggressive." According to Dr. Lund, Ms. Willig's testimony was simply something for the trial court to "take [] into consideration" in its custody determination. Dr. Lund's testimony accordingly reflects that she already had been asked to assume the truth of Ms. Willig's allegations of domestic abuse and had testified that, even if true, those allegations would not change her recommendations in this case. In light of this testimony, the trial court reasonably could have concluded that any further examination of Dr. Lund on this subject would not have assisted in its evaluation for the custody determination.

III. Attorney's Fees Award Under Section 2030

Popovich also appeals the trial court's award of attorney's fees and costs to Newton pursuant to section 2030. Although she does not dispute the amount of the award, she contends that the court erred in failing to apply a rebuttable presumption against an attorney's fees award to a perpetrator of domestic violence. This argument lacks merit.

Section 2030 authorizes the trial court in a custody proceeding to order one party to pay another party's attorney's fees and costs based on their respective financial need and ability to pay. (§ 2030.) The court may award attorney's fees and costs under section 2030 "where the making of the award, and the amount of the award, are just and reasonable under the relative circumstances of the respective parties." (§ 2032, subd. (a).) In determining whether an attorney's fees award is "just and reasonable," the court must take into consideration "the circumstances of the respective parties described in section 4320." (§ 2032, subd. (b).) Section 4320 in turn sets forth the circumstances to be considered by the court in making an award of spousal support. (§ 4320.) Among those circumstances are "[d]ocumented evidence of any history of domestic violence" and the "criminal conviction of an abusive spouse." (§ 4320, subd. (i), (m).)

In this case, the trial court did take into account Newton's history of domestic violence, along with other factors, in making its attorney's fees award. As the court indicated in its Statement of Decision, "[i]t is clear that domestic violence is a consideration for this court with regard to attorney's fees and costs." In considering this factor, the court found that the "litigation is directly related to domestic violence and [Popovich] should not be further victimized." The court also found that a "reasonable (instead of a complete) award of attorney's fees and costs ... recognizes the economic disparity between the parties and makes [Newton] accountable financially at the same time for his conduct." On that basis, the court awarded Newton approximately one-third of the attorney's fees and costs that he sought to recover in this case.

***20** Although Popovich acknowledges that the trial court did give consideration to Newton's history of domestic violence in making its attorney's fees award, she asserts that the court failed to give this factor the proper weight, insisting there is a rebuttable presumption against awarding attorney's fees to a perpetrator of domestic violence and relying on section 4325 which creates a rebuttable presumption against awards of spousal support to persons criminally convicted of domestic abuse. She contends that since the attorney's fee statute (section 2032) refers to the spousal support statute (section 4320) and since the spousal support statute (section 4320) refers to this rebuttable presumption statute (section 4325), it must mean that there is also a rebuttable presumption against awards of attorney's fees to perpetrators of domestic violence.

The central flaw in this argument is that the specific statutes governing attorney's fees awards in dissolution proceedings contain no such rebuttable presumption for cases involving domestic violence. It is a well-settled rule of statutory construction that the "Legislature is presumed to have meant what it said, and the plain meaning of the language will govern the interpretation of the statute. [Citation.]" (*In re Khalid H.*, *supra*, 6 Cal.App.4th at p. 736.) Furthermore, when a statute omits a provision which another statute on a similar subject includes, it indicates a different legislative intent for each statute. (*In re Khalid H.*, *supra*, at p. 736; *Hennigan v. United Pacific Ins. Co.*, *supra*, 53 Cal.App.3d at p. 8.) Section 4325, which governs spousal support in dissolution proceedings, expressly sets forth a rebuttable presumption against spousal support awards to perpetrators of domestic violence. On the other hand, sections 2030 and 2032, which govern attorney's fees in dissolution proceedings, omit any similar language regarding a rebuttable presumption. This indicates that the Legislature did not intend for sections 2030 and 2032 to apply a rebuttable presumption against attorney's fees awards in cases of domestic violence.

Popovich's argument also fails because the trial court found that, even assuming there was a rebuttable presumption against awarding attorney's fees to a perpetrator of domestic violence, Newton overcame that presumption for the same reasons that he overcame the presumption against joint custody. As discussed above, we conclude that the trial court did not abuse its discretion in deciding that Newton had rebutted the presumption against an award of joint custody. That same conclusion applies to the court's determination regarding attorney's fees.

DISPOSITION

The judgment is affirmed. Newton shall recover his costs on appeal.

We concur: [PERLUSS, P.J.](#), and [WOODS, J.](#)

All Citations

Not Reported in Cal.Rptr.3d, 2008 WL 116261

Footnotes

- 1 Unless otherwise indicated, all further statutory references are to the Family Code.
- 2 The parties had separated on two occasions prior to 2004 with each separation lasting less than a year.
- 3 The child support issues are not before this court on appeal.
- 4 Popovich is an attorney at a private law firm and Newton is a self-employed architect and energy consultant.
- 5 Dr. Lund's proposed plan gave Newton less custody time during the school year and equal custody time during the summer. During the school year, he would have the children every Monday afternoon to Tuesday morning and every other weekend from Friday afternoon to Monday morning. During the summer, he would have the children every Monday afternoon to Wednesday morning and every other weekend from Friday afternoon to Monday morning.
- 6 Dr. Lund noted that while an apology may indicate that a perpetrator of domestic violence was accepting responsibility for his or her actions, it was nevertheless possible to accept responsibility without verbally apologizing to the victim.
- 7 Ms. Willig was outside the subpoena process and could not be called to testify at trial.
- 8 Because Ms. Willig was deposed after Dr. Lund had completed her evaluation and submitted her written report to the court, Dr. Lund did not review Ms. Willig's deposition testimony in the course of her evaluation.
- 9 In her motion for a new trial, Popovich included a declaration from E. which stated, among other things, that E. "did not want a change and did not want to spend overnights with [her] dad," that her father "still gets very mad at times," and that E. was "afraid to tell him when things he does upsets [her]."
- 10 The remaining factor is "[w]hether the perpetrator has successfully completed a program of alcohol or drug abuse counseling if the court determines that counseling is appropriate." (§ 3044, subd. (b)(3).) There was no allegation that Newton had an alcohol or drug abuse problem.
- 11 Section 3020 states, in pertinent part, that "[t]he Legislature finds and declares that it is the public policy of this state to assure that children have frequent and continuing contact with both parents after the parents have separated or dissolved their marriage, or ended their relationship." (§ 3020, subd. (b).)
- 12 While the children's statements to Dr. Lund are hearsay and not admissible for the truth of the matter asserted, Dr. Lund was entitled to rely on the statements of the children in forming her opinions concerning custody and was allowed to testify as to the basis for those opinions. (See [Evid.Code, § 801](#), subd. (b) [expert generally may base his or her opinion on any matter known to the expert, including hearsay, which "reasonably may be relied upon by an expert in forming an opinion"]; [People v. Campos \(1995\) 32 Cal.App.4th 304, 307-308](#) [expert witnesses "are entitled to rely upon reliable hearsay ... in forming their opinion"].)
- 13 Popovich's argument that Newton could not have successfully completed the treatment program since he was ordered to attend more counseling is also without merit. Neither Dr. Lund nor any other witness testified that a person cannot be considered to have successfully completed a domestic violence treatment program until he or she no longer needs any further counseling. Furthermore, the court did not order Newton to repeat the program that he had attended or to attend any other treatment program on domestic violence. Rather, the court ordered him to participate in individual counseling with his therapist, as recommended by Dr. Lund.
- 14 Section 6320 states that "[t]he court may issue an ex parte order enjoining a party from molesting, attacking, striking, stalking, threatening, sexually assaulting, battering, harassing, telephoning, ... 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.” (§ 6320.)

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