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123 Cal.App.5th 1
Court of Appeal, Fourth District, Division 1, California.

IN RE the MARRIAGE OF
JESSICA AND SAMMER Z.
Jessica L., Appellant,
v.
Sammer Z., Respondent.

D084336
|
Filed 08/18/2026

Synopsis

Background: Father sought orders modifying child custody arrangement so as to obtain joint legal and primary physical custody of child. Following hearing, the Superior Court, San Diego County, No. D562446, Terrie E. Roberts, J., determined that it was bound by the finding in a separate case that father had rebutted presumption that his custody of child was against child's best interest, due to domestic violence, and awarded father joint legal custody and primary physical custody. Mother appealed. Father moved to dismiss appeal from custody order on disentitlement grounds.

Holdings: The Court of Appeal, Buchanan, J., held that:

the Court of Appeal would decline to dismiss appeal under the disentitlement doctrine;

mother did not forfeit her claim of error asserting that presumption applied that father's custody was against child's best interest;

finding in separate proceeding that father had rebutted presumption against his custody did not preclude mother from litigating the issue;

it was not clear that issue of whether father overcame presumption against his custody had been litigated and decided;

error in failing to apply presumption against father's custody was prejudicial; and

assignment to a different judge on remand was not warranted.

Dismissed in part as moot, affirmed in part, reversed in part, and remanded with directions.

Procedural Posture(s): On Appeal; Motion to Dismiss; Motion for Primary Custody; Motion for Joint Custody.

APPEALS from three orders of the Superior Court of San Diego County, Margo Lewis Hoy, retired Temporary Judge (pursuant to Cal. Const., art. VI, § 21), Euketa Oliver, Judge, and Terrie E. Roberts, Judge. Dismissed in part as moot, affirmed in part, and reversed in part and remanded with directions. (Super. Ct. No. D562446)

Attorneys and Law Firms

Jessica L., in pro. per.; and Dennis Temko, San Diego, for Appellant.

Cage & Miles and John T. Sylvester, San Diego, for Respondent.

Opinion

BUCHANAN, J.

***523** This case involves a decade-long custody dispute between Jessica L. (Mother) and Sammer Z. (Father) over their only child, G., born April 2016 (Minor). In the most recent of four appeals filed by Mother,[1] ***524** she requests that we reverse in part the family court's December 23, 2024, findings and order after hearing, as amended (December 23 FOAH), awarding Father joint legal and primary physical custody of Minor.[2] She contends[3] that the family court committed reversible error by refusing to apply the section 3044 presumption that awarding custody to a parent who has perpetrated domestic violence within the prior five years is detrimental to the best interest of the child. Mother bases her argument on a February 2024 finding by the court in a separate family law case that Father had committed domestic violence against his new partner Raquel H. Mother contends the family court here erroneously concluded it was bound by the other court's subsequent finding that Father had overcome

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the presumption. She requests that we reverse the December 23 FOAH as to custody and visitation and remand the matter for a new trial before a different trial judge, due to what she claims was the court's bias against her and victims of domestic violence in general.

1 Mother filed four separate appeals, three of which are still pending and are resolved in this opinion. Her first appeal, filed on May 14, 2024, was from the trial court's visitation and conjoint counseling orders of April 8 and May 7, 2024. Father moved to dismiss the appeal on June 28, 2024. We requested supplemental briefing, deferred the issue to the merits panel, and now conclude that Mother's May 14, 2024, appeal, as well as Father's motion, are moot, as these two orders have been superseded by the current custody order. (See *Steiner v. Superior Court* (2013) 220 Cal.App.4th 1479, 1485, 164 Cal.Rptr.3d 155 [" 'A case is moot when the decision of the reviewing court "can have no practical impact or provide the parties effectual relief" ' "].) Mother's second appeal, filed on August 15, 2024, was from the court's July 17, 2024, minute order sanctioning her (1) $10,000 for publicly disclosing Father's confidential information; and (2) $5,000 under Family Code section 271, subdivision (a) based on his successful motion to quash her subpoena on his therapist. (Further undesignated statutory references are to the Family Code.) She, however, has not addressed sanctions in her opening brief; we therefore deem the issue forfeited. (See *Christoff v. Union Pacific Railroad Co.* (2005) 134 Cal.App.4th 118, 125, 36 Cal.Rptr.3d 6 (*Christoff*) ["an appellant's failure to discuss an issue in its opening brief forfeits the issue on appeal"].) Her third appeal, which we dismissed on March 20, 2025, was from a November 21, 2024, order holding her in contempt of court. (See Code Civ. Proc., § 904.1, subd. (a)(1) [contempt judgments are not appealable]; see also *In re M.R.* (2013) 220 Cal.App.4th 49, 65, 162 Cal.Rptr.3d 709 ["The proper method to challenge a contempt order is to seek extraordinary writ relief"].) Her fourth appeal is the one referred to in the text accompanying this footnote.

2 For clarity, Mother has *not* challenged the portion of the December 23 FOAH in which the trial court sanctioned her $74,824.80 under section 271, subdivision (a) for frustrating Father's visitation and conjoint therapy with Minor. Therefore, our partial reversal of the December 23 FOAH does not affect the sanctions award. (See *Christoff, supra*, 134 Cal.App.4th at p. 125, 36 Cal.Rptr.3d 6.)

3 On October 9, 2025, we conditionally granted Mother's motion to file sealed, unredacted versions of her opening brief and her motion to seal, along with publicly redacted versions. We now grant the motion to seal the unredacted opening brief unconditionally. We find this document contains private and confidential information pertaining to Father, there is an overriding interest in protecting the information, and there is an absence of any narrower means to prevent substantial prejudice to his privacy interests. We thus determine sealing of Mother's unredacted brief is appropriate. (Cal. Rules of Court, rule 2.550(d); *cf. NBC Subsidiary (KNBC-TV), Inc. v. Superior Court* (1999) 20 Cal.4th 1178, 1217–1218, 1222, fn. 46, 86 Cal.Rptr.2d 778, 980 P.2d 337.)

Father contends (1) Mother is disentitled from pursuing this appeal based on her violation of various court orders; (2) she forfeited her claim of error by allegedly failing to object to the trial court's ruling and/or conceding that Father had in fact overcome the section 3044 presumption; (3) any error by the court in failing to apply the presumption was harmless; and (4) to the extent the court erred, remand should be before the same trial judge who issued the December 23 FOAH.

As we explain, we conclude (1) the extreme remedy of disentitlement does not apply in this case, and we therefore deny Father's October 21, 2025, motion to dismiss; (2) Mother has not forfeited her claim of error; (3) the trial court's failure to apply the section 3044 presumption was prejudicial error; and (4) the trial judge was not biased against her. We therefore reverse the December 23 FOAH as to custody and visitation and remand with ***525** directions to the trial court to conduct limited proceedings to apply section 3044, make the required statutory findings under section 3044, subdivision (f) if it concludes that Father has rebutted the presumption, and issue a new custody order. The trial court may consider the evidence already presented and shall have the discretion to determine the scope and nature of any additional evidence necessary to make its determination. We offer no opinion on whether Father can rebut the section 3044 presumption, leaving that issue to be decided by the trial court in the first instance.

FACTUAL AND PROCEDURAL OVERVIEW

A. *Background*

Mother and Father met in law school and married in March 2015. They separated in July 2016, when Minor was three months old. The following month, Mother filed a petition for dissolution of marriage. In September 2016, Father filed the first of many requests for orders (RFO)[4] seeking custody of Minor, claiming that Mother was interfering with his ability to bond with the child. As part of the parties' December 2017 divorce decree, they agreed that Mother would have sole legal custody and primary physical custody of Minor, with Father having unsupervised visits three days a week.

4 At the time of trial, the parties had filed 577 documents in the superior court.

B. *Father's 2018 Conviction for Domestic Violence*

In May 2018, Father agreed to suspend visitation with Minor pending the parties' further agreement or by court order, following his May 5, 2018, arrest for domestic violence against his second wife, Eleanor C. Father subsequently pled guilty in September 2018 to two counts of misdemeanor domestic violence in San Diego County Superior Court, case No. M249309DV (9309DV).

C. *Father's Renewed Requests for Custody*

In October 2018, Father filed an RFO alleging Mother was preventing him from visiting with Minor. He filed another RFO in May 2019, arguing he had not seen Minor for 11 months and had missed the child's third birthday. The trial court ordered supervised visits for Father, but denied his request for custody, noting that, while he was on a "positive path," the section 3044 presumption then applied to him.

The parties in January 2020 stipulated that Father would have supervised visits with Minor during the week and an unsupervised visit for up to two hours on the weekend and that Father would continue drug and alcohol testing for the next three years through the state bar's Lawyer Assistance Program (LAP).

In August 2021, Father filed an RFO seeking joint legal custody of Minor, who was then five years old, and additional unsupervised visitation, including overnights. Father stated he (1) was regularly attending LAP and AA meetings, and undergoing therapy; (2) had completed a 52-week domestic violence rehabilitation program; (3) had undergone random LAP drug testing for the last two years with no positive results; (4) regularly saw his doctor for medication management; (5) had been having unsupervised visits with Minor since March 2020; and (6) had a daughter, C., with partner Raquel H. in May 2019. Father felt that with a change in custody, Minor would feel more "integrated" with his half-sister and respect ***526** him more, as Minor had recently stated that Mother was his "only boss."

Mother opposed Father's request, claiming it would be detrimental to Minor's "physical and mental health." She instead proposed twice-a-week visits after school until 6:00 p.m., and one day on the weekend for two hours; the visits could only be with Father and his immediate family; Father could not take the child "anywhere other than agreed upon activities" or his visits would be "paused"; and none of the visits could take place in Father's home. The parties eventually agreed that Father would pick up Minor after school two days a week and return him home by 6:45 p.m., and have Sunday visits between 10:00 a.m. and 3:30 p.m. supervised by Raquel H., which would become unsupervised in January 2022.

There was relative calm between the parties from November 2021 to March 2023. That changed, however, when Father sought joint legal and physical custody of Minor and sanctions against Mother in March 2023. Father claimed she had unilaterally canceled his visitation time, after Minor disclosed he sometimes felt "sad" at school.

The parties participated in a family court services (FCS) conference in April 2023. The FCS mediator's July 2023 report, which Mother included in the record, recommended (1) the parties share joint legal custody and Mother have physical custody of Minor; (2) Father follow an unsupervised, stepped-up parenting plan, leading to overnights; (3) Mother "facilitate and support the father's relationship with the child in an effort to assist in developing a parental bond"; (4) Minor participate in individual therapy, as he was "likely in the middle of the parental conflict"; and (5) the parties use a communication program and complete a coparenting class to reduce the conflict in their relationship. Mother, however, disagreed with the mediator's recommendations, claiming they did not promote Minor's best interest.

D. *Domestic Violence Involving Raquel H.*

In October 2023, Raquel H. sought a domestic violence restraining order against Father in San Diego County Superior Court, case No. 23FL012943N (2943N). She alleged Father's abuse involved constant calling, messaging, and blocking her movements; verbal abuse, including threats to kill her and throw their child into the ocean; and two incidents of physical abuse. The trial court granted Raquel H. custody of C. and a temporary restraining order against Father.

A month later, the trial court granted Father's request for a restraining order against Raquel H., after he alleged she had entered his home without permission, stolen cash and coins, tampered with his home's electrical box, and cut his phone power cords.

In February 2024 after a two-day evidentiary hearing, the trial court in case No. 2943N found that both parties had committed acts of abuse against the other based on conduct that included (1) recorded threats by Father against Raquel H. in September, November, and December 2022, and again in April 2023; and (2) Raquel H. twice entering Father's home without notice or permission in November 2023, damaging the interior and some of his belongings. The court found this conduct violated the Domestic Violence Prevention Act (DVPA) (§ 6200 et seq.) and granted each a permanent mutual restraining order against the other for a one-year period.

Significant to this appeal, on April 9, 2024, the court in the same case found in an "abundance of caution" that Father and ***527** Raquel H. had each rebutted the section 3044 presumption as to their daughter, C., based on a written stipulation of the parties, which the court signed and entered as an order the same day (April 9 Stipulation). The April 9 Stipulation provided that Raquel H. had "completed two coparenting classes and a domestic violence course"; and that Father had "completed a three hour co-parenting course, continued with individual therapy, complied with all terms and conditions of [the LAP], and has complied with all drug and alcohol testing required of him by the California State Bar." The court therefore dismissed their mutual restraining orders with prejudice based on the stipulation, without making any of the findings required under section 3044, subdivision (f).

E. *Mother Moves to Florida with Minor Without a Visitation Plan*

In mid-January 2024, the parties reached an agreement allowing Mother to move to Florida with Minor. The parties then attempted to agree on a new visitation plan, which included Minor returning to San Diego for parts of the year. Before that plan could be finalized, however, Mother left for Florida without notifying Father, preventing him from saying goodbye to the child.

In early March 2024, Father moved to set aside the parties' agreement, claiming that Mother had left without a visitation plan and had since refused to communicate with him. Father sought an order requiring her to return Minor to San Diego and pay $50,000 in sanctions. The following month, the trial court denied Father's set-aside request without prejudice; set a temporary visitation schedule; and ordered the parties to each select a therapist in their respective states, who together would participate in virtual, conjoint therapy sessions with Father and Minor.

F. *Contempt Proceedings and Sanctions Against Mother*

In early May 2024, Father requested that the trial court set firm deadlines for Mother to select a conjoint therapist, alleging she was frustrating the therapy process and his ability to have phone contact with Minor. The court ordered Mother to select a conjoint therapist in Florida by May 14, 2024, and make a conjoint therapy appointment by May 21, 2024. Mother, however, claimed the April and May 2024 orders were stayed due to her (first) appeal.[5] The trial court disagreed and issued another order requiring her to choose a therapist and enroll Minor in conjoint therapy by June 28, 2024. At the start of the parties' trial in November 2024, Mother had yet to choose a therapist for Minor to begin conjoint therapy with Father.

5 See footnote 1.

In July, Father filed an RFO seeking custody of Minor and sanctions against Mother for her alleged violation of multiple court orders, including for the child's conjoint therapy. He also filed a contempt action against her. The trial court subsequently dismissed all but two counts and set the matter for trial along with Father's RFOs seeking custody of Minor.[6]

6 The trial court subsequently found Mother guilty of both counts based on her willful failure to follow the trial court's conjoint counseling orders. The court sentenced

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her to 10 days in custody but stayed execution of sentence for one year "on the condition that she follow all court orders going forward."

Also in July 2024, the trial court sanctioned Mother (1) $10,000 for using Father's confidential information to oppose his motion to quash a subpoena she served on his therapist; and (2) $5,000 under ***528** section 271, subdivision (a)[7] to reimburse Father for the attorney fees he expended in quashing the subpoena.

7 Section 271, subdivision (a) provides in part that a court may award attorney fees and costs as a sanction when a party or his or her attorney "furthers or frustrates the policy of the law to promote settlement of litigation and, where possible, to reduce the cost of litigation by encouraging cooperation between the parties and attorneys."

G. *Bench Trial*

Both Father and Mother testified at the three-day hearing in November 2024.

1. Father's Testimony

According to Father, Mother has never agreed to overnights or allowed Father to travel with Minor. She has "cut off" Minor from Father's side of the family, including from Minor's half-sister, C.

Since 2018, Father has been subject to random drug testing and continues to voluntarily test. He also has been in counseling since 2018 and attends weekly therapy sessions. He admitted to having an issue with drugs and alcohol since he was a teenager. According to Father, he was a "mess," and had not yet become sober, when he agreed to suspend visitation with Minor within days of his May 2018 domestic violence arrest. But once it became clear that Mother wanted him out of Minor's life "forever," he moved to regain visitation after not seeing Minor for about 14 months.

Throughout this case, Mother has consistently alleged that Minor is scared of Father and does not like him. During one visit, Minor disclosed that Mother said he was a "bad parent."

In 2023, Minor began refusing visits. Mother claimed the child had "the right to say no" to Father's visitation. There were times when Mother would not answer the front door for a scheduled visit, even though he could hear the child inside. At other times, only Mother would answer the door, or Mother would answer and Minor would stand directly behind her, refusing to visit with Father.

Regarding the incident when Minor reported being "sad" in school, Mother paused Father's visits without informing him the child was seeing a school counselor. Father contacted the school and learned that Minor had not disclosed "the reasons for his sadness" to any school official. Father concluded that Mother had been untruthful when she attributed the child's sadness to visits with him. For the next few months, he "seldom" saw Minor.

Mother first mentioned she was considering a move to Florida in June 2023. That same month, she took Minor to Florida for two months, during which time Father had no visitation with the child and minimal telephone contact. On their return to San Diego, Mother did not give Father the opportunity to make up his visitation time with Minor.

Once Raquel H. filed for a restraining order in October 2023, Mother insisted that visitation take place at her home. Father agreed to this arrangement because he felt Minor was "slowly" "slipping away" from him and he "just want[ed] to be in [his] son's life" in "whatever" way he could.

In April 2024, the trial court set a temporary parenting plan, after Mother had moved to Florida with Minor. Under the plan, Father would visit Minor in Florida for four days during the summer, with only the first day being supervised. Mother agreed to split the cost of the visitation monitor and stated that she had found someone to supervise the first visit. On a Friday evening, two days before Father ***529** and his family were to leave for Florida, Mother informed him that he needed to find someone to supervise the visit. That weekend, he made at least 14 calls but was unable to find a supervision monitor on such short notice. At the time, he had not seen Minor for five months.

Once in Florida, Father messaged Mother. She, however, did not "open" the message for two days, then accused him of playing "games." While in Florida, he also spoke to Minor on the telephone, telling the child he wanted to see him. Minor responded, "Are you really in Florida[?]" then said, "I don't believe you." The day before he was to leave, Father asked Mother to drive by his hotel, which was 15 minutes away from

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her home, so he could "wave" to Minor. Father, however, left Florida without seeing Minor, which was "traumatic" for him. As he was leaving to return home, he messaged Mother that she was doing "permanent damage" to their son.

After Minor's move, Father's communication with the child was "virtually nonexistent," with most of their calls averaging "less than 15 seconds." Between March and August 2024, he estimated there were more than 250 "missed or unanswered calls" with Minor. These calls were "extremely important" to Father, as they were his "only form of contact" with the child.

Father visited with Minor in San Diego in September 2024. Overall, the visits went "[g]reat." During the first visit, Minor told him, "I missed you. I love you. I'm happy to see you." At Minor's request, they spent time at Father's home for some of the visits. During one of the visits, the supervision monitor found an "Airtag" Mother had placed inside Minor's backpack. Father felt "violated" because they were being "track[ed] ... in real[-]time around San Diego."

At trial, Father requested $200,000 in sanctions against Mother under section 271, subdivision (a), relying on her income and expense declaration from August 2024 that showed monthly earnings of about $30,000. He believed sanctions were appropriate because Mother had not supported his relationship with Minor for the child's "entire life"; she still had not signed the conjoint counseling contract to allow his therapy with the child to begin; she had failed to follow the court's orders regarding his visitation; and she had moved to Florida without a visitation plan. Father believed having sole legal custody of Minor was in the child's best interest because unlike Mother, he had no problem coparenting, and felt she could not be trusted to do what was best for Minor, including putting the child's interests above her own.

2. Mother's Testimony

According to Mother, Minor's resistance to Father began when the child was two years old, leading her to put the child in "play therapy" for about a year. After she and Minor returned from their "extended kind of trip" to Florida in summer 2023, Minor had more "conflicts" with Father, calling him a "bully" and "mean[ ]." She, however, tried to encourage Minor to visit with Father. After Raquel H. disclosed Father's domestic abuse, Mother required Father to visit Minor in her home to make the exchanges and visits less "intense."

After Mother and Minor relocated to Florida in February 2024, the trial court set a schedule for video conference visits between Father and Minor. The court subsequently ordered that Mother not be in the room during the visits, and she therefore did not know that Minor was hanging up on Father or ignoring him during calls.

Regarding the Airtag, she claimed that Father knew about it and that she had put ***530** it in Minor's backpack in 2022 for the child's "safe[ty]," before Father took him to Disneyland.

3. The Custody Order

Following the evidentiary hearing, the trial court issued a 43-page final statement of decision (SOD) to accompany its December 23 FOAH. The court awarded (1) the parties joint legal custody of Minor, while giving Father "final decision making authority as to conjoint therapy between the father and child"; (2) Father primary physical custody of Minor, requiring Mother to return the child to San Diego in January 2025; and (3) Mother supervised visitation in "the child's community only," which would become unsupervised upon a showing that she (i) engaged in at least 16 individual therapy sessions to obtain the "tools" for her to accept and support Father's relationship with Minor and (ii) took a 12-hour "high conflict co-parenting course." The court also sanctioned Mother $74,824.80 under section 271, subdivision (a), payable to Father in six monthly installments, for "her lack of cooperation and her intentional actions to disrupt, delay and frustrate visitation with the father and conjoint therapy between the father and child."

In making its custody determination, the trial court concluded it was bound by the court's finding in case No. 2943N that Father had overcome the section 3044 presumption in the litigation between Father and Raquel H. involving their daughter, C. For this reason alone, the court declined to apply the section 3044 presumption in this case. The court did, however, consider domestic violence as a relevant factor under section 3011, subdivision (a)(2)(A)(iii).[8] It found Father's actions against Raquel H. "concerning," as he had threatened to kill her, hit her knee with a baby bottle, and called her "derogatory names." The court noted this conduct occurred after Father already had completed a 52-week

domestic violence rehabilitation program in 2019, following his conviction for domestic violence against Eleanor C. The court also had "concerns" that Minor "could be subjected to domestic violence" if Father had custody because Father and Raquel H. had reconciled and were living together. As part of its December 23 FOAH, the court ordered Father to engage in "individualized treatment" for "anger management and domestic violence to reduce any chance that the domestic violence occurs in his home." The court explained, "It is in the child's best interest that [Father] engage in this therapy and the father has shown consistently that he will put the child's interest above his own."

8 Subdivision (a) of section 3011 provides in relevant part: "In making a determination of the best interests of the child ..., the court shall ... consider ... [¶] ... [¶] (2)(A) A history of abuse by one parent or any other person seeking custody against any of the following: [¶] ... [¶] (iii) A ... cohabitant, of the parent or person seeking custody, or a person with whom the parent or person seeking custody has a dating or engagement relationship."

The trial court nonetheless found a change in custody was necessary because Mother had never allowed Father "a chance to be a true parent to [Minor] because his ability to parent has always been dictated" by her. It also found that she "controlled" when, where, and who could be present for their visits; "unilaterally placed conditions upon father's ability to see the child by requiring supervised visits at her home, contrary to court orders"; refused to allow Father to visit or care for Minor in his own home, to travel with the child, or to have a single overnight; and wanted "father and child to ***531** have supervised visits all of the child's life."

In determining Minor's best interest, the trial court relied in part on section 3040, subdivision (a)(1). This statute requires that the court "consider, among other factors, which parent is more likely to allow the child frequent and continuing contact with the noncustodial parent." (*Ibid.*) The court found Mother's conduct showed "she has no regard for court orders and ... no regard for father's relationship with his son"; that throughout the years of litigation, it was Father "who has shown reasonableness" and "who has consistently placed the child's interest above his own"; that he was "the parent who is more likely to support and encourage the child's relationship with the mother"; and that if Minor was "allowed to stay with his mother, there is no hope in the father having a chance to salvage his relationship with his son."

The court found that when Minor and Father were together, they had a "great time," as confirmed by a visitation monitor who testified "the child ran to the father and hugged him each day" during their September 2024 visits in San Diego. In addition, in August 2024 while playing an online video game together, Minor messaged Father, "You are my father. I love you." Shortly thereafter, Father was "blocked" from communicating with Minor through this platform. The court found Mother not credible when she claimed not to have known that Father had been "blocked."[9]

9 The trial court modified its December 23 FOAH on January 15, 2025, nunc pro tunc to December 23, 2024. That modification has no bearing on the issues in this appeal.

DISCUSSION

A. *Disentitlement Doctrine*[10]

10 On October 21, 2025, Father moved to dismiss Mother's appeal after she filed her opening brief. Mother opposed the motion. Without seeking leave of court, Father attempted to file a reply, which we "received" but did not "accept," deferring the matter to the merits panel. We now accept Father's reply and direct the clerk to file it. On June 15, 2026, Father filed an opposed request for judicial notice in further support of his motion to dismiss for disentitlement. The request included an order showing Mother in arrears for child support payments, a screen shot from the state bar showing she has been suspended from practicing law due to her failure to pay child support, and a lengthy proposed statement of decision in which the trial court in late April 2026 proposed denying Father's request for a permanent DVRO against her but awarding him sanctions of $10,000. On June 25, 2026, Father filed an amended request for judicial notice to replace the proposed statement of decision with the final version, issued on June 18, 2026, which incorporated changes to address objections by Father but ultimately denied the DVRO and awarded sanctions. We grant Father's June 15 and June 25 requests for judicial notice and will consider these materials solely for their relevance to the disentitlement issue.

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As a threshold issue, Father has moved to dismiss Mother's appeal from the December 23 FOAH on disentitlement grounds. He contends she has not complied with court orders to pay (1) $15,000 in sanctions in connection with her subpoena on his treating therapist; and (2) the full $74,824.80 in sanctions for frustrating his visitation and conjoint therapy with Minor. He further contends Mother has been found guilty of two counts of contempt.

"The disentitlement doctrine, or appellate disentitlement, refers to a reviewing court's 'inherent power to dismiss an appeal by a party who has refused to comply with the orders of the trial court.' [Citation.] It 'is not a jurisdictional doctrine, but a discretionary tool that may be applied when the balance of the equitable ***532** concerns make it a proper sanction.' " (*In re E.E.* (2020) 49 Cal.App.5th 195, 206, 262 Cal.Rptr.3d 722 (*E.E.*).)

The inherent power to dismiss an appeal by a party who has refused to comply with the trial court's orders "has been exercised in a variety of circumstances" (*TMS, Inc. v. Aihara* (1999) 71 Cal.App.4th 377, 379, 83 Cal.Rptr.2d 834), including in civil cases (see, e.g., *id.* at p. 378, 83 Cal.Rptr.2d 834 [dismissing appeal due to the "willful failure" of judgment debtors to comply with an order to answer postjudgment discovery]); dependency proceedings (see, e.g., *In re C.C.* (2003) 111 Cal.App.4th 76, 85, 3 Cal.Rptr.3d 354 (*C.C.*) [dismissing appeal of the mother who refused to take a psychological evaluation, which made it "impossible" for the juvenile court to determine whether she was entitled to services and which also "interfere[d] with the legal rights of [m]inor"]); and, as relevant here, custody disputes (see, e.g., *MacPherson v. MacPherson* (1939) 13 Cal.2d 271, 89 P.2d 382 (*MacPherson*)).

In *MacPherson*, the father absconded with his two minor children to Mexico, in violation of a divorce decree. (*MacPherson, supra*, 13 Cal.2d at p. 277, 89 P.2d 382.) The trial court ordered the father to immediately deliver the children to the mother, reimburse her $17,500 for expenses she incurred in trying to locate them, and adjudged him guilty of contempt of court. (*Id.* at p. 276, 89 P.2d 382.) The father refused to return the children and appealed from that portion of the order requiring him to pay the mother's costs; she, in turn, moved to dismiss his appeal. (*Ibid.*)

In granting the mother's motion, the *MacPherson* court concluded that the father's "flagrant disobedience and contempt effectually bar[red] him from receiving the assistance of the appellate tribunal." (*MacPherson, supra*, 13 Cal.2d at p. 277, 89 P.2d 382.) The court explained, "A party to an action cannot, with right or reason, ask the aid and assistance of a court in hearing his [or her] demands while he [or she] stands in an attitude of contempt to legal orders and processes of the courts of this state." (*Ibid.*)

Here, we decline to invoke the " 'extreme measure' " of dismissing Mother's appeal from the December 23 FOAH. (See *E.E., supra*, 49 Cal.App.5th at p. 207, 262 Cal.Rptr.3d 722, quoting *MacPherson, supra*, 13 Cal.2d at p. 277, 89 P.2d 382.) We note the sanctions orders Mother allegedly violated are no longer at issue in this case, as she has abandoned her appeal from those orders, including, as we have noted, the requirement that she pay $74,824.80.[11] (See *Christoff, supra*, 134 Cal.App.4th at p. 125, 36 Cal.Rptr.3d 6; accord, *Reyes v. Kosha* (1998) 65 Cal.App.4th 451, 466, fn. 6, 76 Cal.Rptr.2d 457 ["[i]ssues not raised in an appellant's brief are deemed ... abandoned"].) Nor is the contempt order at issue, as we previously dismissed her appeal from that order; or the prior visitation orders, as they have been replaced by the December 23 FOAH. Thus, Mother is not in violation of any portion of the custody order she is *still* appealing. Specifically, Father makes no claim that Mother has violated the custody order at issue here. (See *Ironridge Global IV, Ltd. v. ScripsAmerica, Inc.* (2015) 238 Cal.App.4th 259, 265, 189 Cal.Rptr.3d 583 [the disentitlement doctrine " 'is particularly likely to be invoked where the appeal arises out of the very order (or orders) the party has disobeyed' "].)

11 See footnotes 1 and 2.

Most importantly, as we discuss later in this opinion, we agree with Mother that the trial court erred in refusing to ***533** apply section 3044 in determining whether to change Minor's custody, as she also argued in opposition to Father's motion to dismiss. "The purpose of the section 3044 presumption is to protect the health, safety, and welfare *of the child* ...." (*S.Y. v. Superior Court* (2018) 29 Cal.App.5th 324, 347, 240 Cal.Rptr.3d 137, italics added (*S.Y.*).) " 'In a noncriminal context, courts routinely decline to disentitle litigants on the basis of contempt, fugitive status, or noncompliance with court orders when the issues raised by the litigant entail interests beyond the personal of the individual petitioner, such

as the welfare of minor children ....' " (*In re L.J.* (2013) 216 Cal.App.4th 1125, 1136–1137, 157 Cal.Rptr.3d 197.)

For all these reasons, we conclude that it would be inequitable to dismiss Mother's appeal from the December 23 FOAH based on disentitlement. (See *Deyo v. Kilbourne* (1978) 84 Cal.App.3d 771, 787, 149 Cal.Rptr. 499 [disentitlement is the "ultimate sanction"].)

B. *Forfeiture*

Father contends Mother forfeited her claim of error by failing to object to the trial court's finding he overcame the presumption (as to Minor) and/or by conceding he had rebutted it. We are not persuaded.

In civil cases, a right of any sort may be forfeited by the party's failure to assert it in the trial court. (*In re Sheena K.* (2007) 40 Cal.4th 875, 880–881, 55 Cal.Rptr.3d 716, 153 P.3d 282 (*Sheena K.*).) "The purpose of this rule is to encourage parties to bring errors to the attention of the trial court, so that they may be corrected." (*In re S.B.* (2004) 32 Cal.4th 1287, 1293, 13 Cal.Rptr.3d 786, 90 P.3d 746 (*S.B.*).)

The record shows Mother repeatedly did just that. She argued in her trial brief that the presumption applied in this case due to Father's (1) September 2018 conviction for domestic violence in case No. 9309DV; and (2) abuse of Raquel H. in case No. 2943N, which led to the trial court's issuance in February 2024 of mutual restraining orders under the DVPA for a one-year period.

Mother also raised section 3044 in opposition to Father's motion in limine seeking to exclude any evidence of domestic violence before April 9, 2024. Mother argued the finding by the trial court in case No. 2943N that Father had rebutted the presumption as to C. was not binding in the current custody dispute involving Minor. She noted that Father and Raquel H. had *agreed* the presumption had been rebutted, and argued there was a "distinction between overcoming it by proof and a court not imposing the consequences of it in a case where there's mutual restraining orders."

In disagreeing with Mother, the trial court explained, "I don't ... have the ability to rationalize or figure out what [the court in case No. 2943N] may have been thinking .... But most importantly, I can't ignore that another judge made a finding that [Father] overcame the presumption." The court invited Mother to brief the issue, but reiterated, "I can't ignore a Court finding that ... he overcame the presumption. I cannot—I cannot ignore that. I can't change it. I can't ignore it ...." The court also commented that it did not intend on having "another domestic violence restraining order hearing" or "hear[ing] from [Raquel H.] on what [Father] did to her as far as domestic violence," because after the April 9 Stipulation, that evidence was "not relevant."

The record therefore shows that Mother raised the section 3044 presumption and argued for its application in the current ***534** case both before and during trial, and that the trial court simply disagreed with her position. We therefore conclude she has not forfeited this claim of error on appeal. (See *Sheena K., supra*, 40 Cal.4th at p. 881, 55 Cal.Rptr.3d 716, 153 P.3d 282; *S.B., supra*, 32 Cal.4th at p. 1293, 13 Cal.Rptr.3d 786, 90 P.3d 746.)

Father, however, contends Mother's failure to brief the issue, after her counsel indicated he would do so, resulted in a forfeiture of her claim of error. In support, he primarily relies on *In re Marriage of Broderick* (1989) 209 Cal.App.3d 489, 257 Cal.Rptr. 397. There, the husband argued that the trial court erred in calculating the community interest in a family residence. (*Id.* at p. 501, 257 Cal.Rptr. 397.) In rejecting the husband's argument, the *Broderick* court noted that he had raised a new legal theory on appeal that required new factual findings (*id.* at p. 502, 257 Cal.Rptr. 397) and, therefore, that he had "waive[d] his right to attack error by expressly or implicitly agreeing or acquiescing at trial to the ruling or procedure objected to on appeal" (*id.* at p. 501, 257 Cal.Rptr. 397).

Unlike the husband in *Broderick*, Mother has neither raised a new theory on appeal nor presented an issue not raised in the trial court. *Broderick* therefore is factually and legally inapposite to our case. In any event, we cannot fault Mother for not filing another brief while in the middle of trial, on what the court found was an "interesting" issue that it had not previously encountered, and which Father recognizes may be an issue of "first impression," particularly when Mother had already briefed the section 3044 presumption in her trial brief and the record shows the court was adamant in rejecting her position.

Father also contends that during closing, Mother allegedly conceded that he had rebutted the section 3044 presumption. The record shows that Mother, in explaining why she has had primary physical custody of Minor for most of the child's life, argued it was due to Father's domestic violence. She next argued that his domestic violence "is a factor notwithstanding the fact that there isn't the presumption against sole or physical custody to the father, but [is] a significant factor." Father contends this last statement was a concession by Mother that section 3044 did not apply to him. We disagree.

Instead, we interpret Mother's statement as merely an acknowledgement of the trial court's ruling that it was bound by the finding in case No. 2943N that Father had rebutted the presumption, but that, in determining Minor's best interest, it would still consider domestic violence which "led" to the presumption. " ' "An attorney who submits to the authority of an erroneous, adverse ruling after making appropriate objections or motions, does not waive [or forfeit] the error in the ruling by proceeding in accordance therewith and endeavoring to make the best of a bad situation for which he [or she] was not responsible." ' " (*Mary M. v. City of Los Angeles* (1991) 54 Cal.3d 202, 212–213, 285 Cal.Rptr. 99, 814 P.2d 1341 (*Mary M.*); accord, *Park City Services, Inc. v. Ford Motor Co., Inc.* (2006) 144 Cal.App.4th 295, 309–310, 50 Cal.Rptr.3d 373 (*Park City*) [defendant's general denial was sufficient to preserve its claim on appeal that California's warranty law did not apply to the plaintiff, after the trial court had ruled against the defendant on this issue].) In these situations, "[t]here is no element of waiver or of estoppel in such conduct of counsel." (*Leibman v. Curtis* (1955) 138 Cal.App.2d 222, 225–226, 291 P.2d 542.)

We thus conclude Mother's acquiescence in the trial court's ruling did not effect a ***535** forfeiture. Instead, the record shows she placed the presumption issue squarely before the court, it disagreed with her position, and she tried the case based on that ruling, arguing Father's domestic violence was detrimental to Minor's best interest. (See *Mary M., supra*, 54 Cal.3d at pp. 212–213, 285 Cal.Rptr. 99, 814 P.2d 1341; *Park City, supra*, 144 Cal.App.4th at pp. 309–310, 50 Cal.Rptr.3d 373.)

Finally, we note the forfeiture rule " 'is not automatic.' " (*In re D'Anthony D.* (2014) 230 Cal.App.4th 292, 298, fn. 2, 178 Cal.Rptr.3d 574.) Thus, when a party " 'raises a question of law, ... the appellate court can exercise its discretion to address the issue.' " (*Ibid.*) Whether the presumption applied to Father is a question of law based on undisputed facts that implicates an important public policy. Even assuming forfeiture, therefore, we would exercise our discretion to consider the issue on the merits, which we turn to next. (See *Adams v. Murakami* (1991) 54 Cal.3d 105, 115, fn. 5, 284 Cal.Rptr. 318, 813 P.2d 1348 ["a reviewing court has discretion to decide such an issue if it presents a pure question of law arising on undisputed facts, particularly when the issue is a matter of important public policy"].)

C. *Section 3044 and Issue Preclusion*

Mother contends the trial court committed legal error when it implicitly found that issue preclusion, also known as collateral estoppel,[12] prevented her from litigating the issue of whether Father had overcome the section 3044 presumption as to Minor. Before turning to issue preclusion, however, we first address the application of this statute.

12 We note that courts now use the term "issue preclusion" instead of "collateral estoppel." (*Samara v. Matar* (2018) 5 Cal.5th 322, 326, 234 Cal.Rptr.3d 446, 419 P.3d 924 (*Samara*).) Although the trial court did not explicitly refer to this doctrine by either of these names, we see no other possible legal basis for the court's ruling. Section 3044 itself contains no provision stating that one court's finding that the presumption has been overcome is binding in another case involving a different child with a different nonoffending parent.

1. Section 3044

In making child custody determinations, the trial court's " 'overarching concern is the best interest of the child.' " (*In re Marriage of Brown & Yana* (2006) 37 Cal.4th 947, 955, 38 Cal.Rptr.3d 610, 127 P.3d 28.) "In this context, the Legislature has found and declared that (1) 'it is the public policy of this state to assure that the health, safety, and welfare of children shall be the court's primary concern in determining the best interest of children when making any orders regarding the physical or legal custody or visitation of children'; (2) 'the perpetration of child abuse or domestic violence in a household where a child resides is detrimental to the child'; and (3) 'it is the public policy of this state to assure that children have frequent and continuing contact with both parents ... and to encourage parents to share the rights and responsibilities of child rearing in order to effect this policy,

except where the contact would not be in the best interest of the child.' (§ 3020, subds. (a) & (b).)" (*Celia S. v. Hugo H.* (2016) 3 Cal.App.5th 655, 661, 207 Cal.Rptr.3d 756.)

To effectuate this important public policy, the Legislature created section 3044. (*Noble v. Superior Court* (2021) 71 Cal.App.5th 567, 576, 286 Cal.Rptr.3d 522 (*Noble*).) Section 3044, subdivision (a) provides in pertinent part, "Upon a finding by the court that a party seeking custody of a child has perpetrated domestic violence within the previous five years against ... a person ... with whom the party has a ***536** relationship, 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 Sections 3011 and 3020."

We have concluded the "section 3044 'presumption is mandatory and the trial court has no discretion in deciding whether to apply it: "[T]he court *must* apply the presumption in any situation in which a finding of domestic violence has been made." ' " (*Abdelqader v. Abraham* (2022) 76 Cal.App.5th 186, 196, 291 Cal.Rptr.3d 269 (*Abdelqader*).) " 'Because a DVPA restraining order must be based on a finding that the party being restrained committed one or more acts of domestic abuse, a finding of domestic abuse sufficient to support a DVPA restraining order necessarily triggers the presumption in section 3044.' " (*Christina L. v. Chauncey B.* (2014) 229 Cal.App.4th 731, 736, 177 Cal.Rptr.3d 178 (*Christina L.*).) The section 3044 presumption applies even if the finding of domestic violence was made by a court other than the one hearing the custody matter. (*Noble, supra*, 71 Cal.App.5th at p. 577, 286 Cal.Rptr.3d 522.) Moreover, a court does not have the authority to nullify the presumption in section 3044 once a restraining order has issued. (*S.M. v. E.P.* (2010) 184 Cal.App.4th 1249, 1268, 109 Cal.Rptr.3d 792.)

To rebut the presumption, an offending parent must show by a "preponderance of the evidence" (§ 3044, subd. (a)) that it is in the best interest of the child to give the parent sole or shared custody (*id.*, subd. (b)(1)). In making this determination, the trial court may not rely on "the preference for frequent and continuing contact with both parents, as set forth in subdivision (b) of Section 3020, or with the noncustodial parent, as set forth in paragraph (1) of subdivision (a) of Section 3040." (§ 3044, subd. (b)(1).)

If the offending parent satisfies this first step, the court in step two must consider each enumerated factor contained in section 3044, subdivision (b)(2), find that they, "on balance," weigh in favor of granting some amount of custody to the offending parent (*id.*, subd. (b)); and "make specific findings on each of the factors in subdivision (b)" in accordance with the decision in *Jaime G. v. H.L.* (2018) 25 Cal.App.5th 794, 236 Cal.Rptr.3d 209 (*Jaime G.*) (§ 3044, subd. (f)(1)), either on the record or in writing (*id.*, subd. (f)(2); accord, *Abdelqader, supra*, 76 Cal.App.5th at p. 196, 291 Cal.Rptr.3d 269 [holding "[t]he statement of reasons must address all of the factors outlined in section 3044, subdivision (b)"]).

The legal effect of the presumption is to shift the burden of persuasion on the best interest question to the parent who committed domestic violence. (*Christina L., supra*, 229 Cal.App.4th at p. 736, 177 Cal.Rptr.3d 178.) A court must consider whether section 3044 applies *before* entering a custody order. (§ 3044, subd. (g).)

The parties do not dispute that the finding of Father's domestic abuse against Raquel H. triggered the presumption. (See § 3044, subd. (a).) The trial court itself noted that absent preclusion law, the presumption applied to Father, and it would have to "hear evidence of abuse" before it made a custody finding, as required under section 3044, subdivision (g). We thus turn to issue preclusion and whether this doctrine barred Mother from litigating the rebuttal issue.

2. Issue Preclusion

"Issue preclusion ... prevents 'relitigation of previously decided issues,' ***537** rather than causes of action as a whole. [Citation.] It applies only '(1) after final adjudication (2) of an identical issue (3) actually litigated and necessarily decided in the first suit and (4) asserted against one who was a party in the first suit or one in privity with that party.' " (*Samara, supra*, 5 Cal.5th at p. 327, 234 Cal.Rptr.3d 446, 419 P.3d 924.) "Under issue preclusion, the prior judgment [or order] conclusively resolves an issue actually litigated and determined in the first action." (*DKN Holdings LLC v. Faerber* (2015) 61 Cal.4th 813, 824, 189 Cal.Rptr.3d 809, 352 P.3d 378 (*DKN Holdings*).) "The party asserting issue preclusion has the burden of establishing the above elements." (*Williams v. Doctors Medical Center of Modesto, Inc.* (2024) 100 Cal.App.5th 1117, 1132, 319 Cal.Rptr.3d 741

(*Williams*).) A trial court's application of issue preclusion is reviewed de novo. (*Ibid.*)

Turning to the identical issue requirement, it addresses whether identical factual allegations are at stake in the two proceedings, not whether the ultimate issues or dispositions are the same. (*Williams, supra*, 100 Cal.App.5th at p. 1132, 319 Cal.Rptr.3d 741.) In analyzing this element, "courts look carefully at the entire record from the prior proceeding, including the pleadings, the evidence, the jury instructions, and any special jury findings or verdicts." (*Hernandez v. City of Pomona* (2009) 46 Cal.4th 501, 511, 94 Cal.Rptr.3d 1, 207 P.3d 506 (*Hernandez*).)

Here, because the instant case and case No. 2943N involved different children, different relationships, and different factual allegations, we conclude Father cannot establish the "identical issue" requirement for purposes of issue preclusion. (See *DKN Holdings, supra*, 61 Cal.4th at p. 825, 189 Cal.Rptr.3d 809, 352 P.3d 378; *Williams, supra*, 100 Cal.App.5th at p. 1132, 319 Cal.Rptr.3d 741.) The question whether Father rebutted the section 3044 presumption in the separate case involving his child with Raquel H. is not identical to the question whether he rebutted the presumption as to his older child with a different mother in this case. Whether the presumption has been rebutted depends on the best interest of the particular child (§ 3044, subd. (b)(1)), which may vary depending on the child's age, relationship with the perpetrator, exposure to domestic violence, and other factors. (*Guardianship of A.L.* (2014) 228 Cal.App.4th 257, 268, 175 Cal.Rptr.3d 79 ["What constitutes the best interest of a child presents an inherently factual issue"].) Thus, the issues are not identical.

It is also questionable whether the rebuttal issue was actually litigated and decided in the prior proceeding. For issue preclusion purposes, "an issue was actually litigated in a prior proceeding if it was properly raised, submitted for determination, and determined in that proceeding." (*Hernandez, supra*, 46 Cal.4th at p. 511, 94 Cal.Rptr.3d 1, 207 P.3d 506.) Here, the court in the prior proceeding found that the section 3044 presumption had been rebutted only out of an "abundance of caution" based on the parties' stipulation, which the court adopted as its order *without* making the mandatory findings required by subdivision (b) of section 3044. (§ 3044, subd. (f).) An issue is not " 'actually litigated if it is the subject of a stipulation between the parties.' " (*People v. Bratton* (2023) 95 Cal.App.5th 1100, 1118, 314 Cal.Rptr.3d 106, quoting Rest.2d Judgments, § 27, com. e, p. 256.)

Finally, Mother was not a party to the prior proceeding and was not in privity with Raquel H. Under issue preclusion, only parties to the former judgment or order or their privies may take advantage of or be bound by it. A party in this ***538** context is one who is directly interested in the subject matter, and had a right to make defense, or to control the proceeding, and to appeal from the judgment or order. (*Bernhard v. Bank of America* (1942) 19 Cal.2d 807, 811, 122 P.2d 892; *Cal Sierra Development, Inc. v. George Reed, Inc.* (2017) 14 Cal.App.5th 663, 672, 223 Cal.Rptr.3d 506 (*Cal Sierra*).) " 'A nonparty alleged to be in privity must have an interest so similar to the party's interest that the party acted as the nonparty's " ' "virtual representative" ' " in the first action.' " (*Cal Sierra*, at pp. 672–673, 223 Cal.Rptr.3d 506, quoting *DKN Holdings, supra*, 61 Cal.4th at p. 826, 189 Cal.Rptr.3d 809, 352 P.3d 378; accord, *Victa v. Merle Norman Cosmetics, Inc.* (1993) 19 Cal.App.4th 454, 464, 24 Cal.Rptr.2d 117 ["Due process requires that the nonparty have had an identity or community of interest with, and adequate representation by, the losing party in the first action"].)

Although Mother testified as a witness against Father in case No. 2943N, there is no evidence in the record that she had the right to defend or control that proceeding. (See *Cal Sierra, supra*, 14 Cal.App.5th at p. 672, 223 Cal.Rptr.3d 506.) Nor is there any evidence Mother acquired an interest in the subject matter of that case through Raquel H., or that Raquel H. acted as Mother's virtual representative in that action. (See *ibid.*) To the contrary, to the extent Mother had any interest in the outcome of case No. 2943N, it likely would have been to *oppose* the finding that Father had rebutted the section 3044 presumption, which was contrary to the position taken by Raquel H.

We therefore conclude the trial court erred when it barred Mother from litigating whether Father could rebut the domestic violence presumption. (See *Samara, supra*, 5 Cal.5th at p. 327, 234 Cal.Rptr.3d 446, 419 P.3d 924; *Williams, supra*, 100 Cal.App.5th at p. 1132, 319 Cal.Rptr.3d 741; accord, *Vinson v. Kinsey* (2023) 93 Cal.App.5th 1166, 1179, 311 Cal.Rptr.3d 628 [de novo standard of review applies when determining whether trial court applied the correct legal standard to an issue in exercising its discretion];

In re Marriage of Fajota (2014) 230 Cal.App.4th 1487, 1497, 179 Cal.Rptr.3d 569 (*Fajota*) [court abuses its discretion in making a custody order "if it applies improper criteria or makes incorrect legal assumptions" (italics omitted)].) We turn next to the issue of whether the error was harmless.

D. *Prejudice*

Father contends that, even if the trial court erred in failing to properly apply section 3044, that error was harmless because Mother cannot show it was reasonably probable that, absent the error, a result more favorable to her would have been reached. He contends that the record (1) shows the court extensively considered domestic violence and still granted him custody; and (2) contains "uncontroverted evidence" that each section 3044, subdivision (b) factor "was met and satisfied, even if not expressly enumerated by the court." We are not persuaded.

As noted, the effect of the section 3044 presumption is to shift the burden of persuasion on the best interest question to the parent who committed domestic violence. (*Noble, supra*, 71 Cal.App.5th at p. 577, 286 Cal.Rptr.3d 522.) "[A] misallocation of the burden of proof is not 'reversible error per se' " and must be prejudicial to constitute reversible error. (*Perez v. VAS S.p.A.* (2010) 188 Cal.App.4th 658, 679, 115 Cal.Rptr.3d 590.) We therefore apply the "miscarriage of justice" standard in determining prejudice from the trial court's failure to apply the section 3044 presumption. (Cal. Const., art. VI, § 13.) Under this standard, the error is ***539** reversible if it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error. (*Cassim v. Allstate Ins. Co.* (2004) 33 Cal.4th 780, 800, 16 Cal.Rptr.3d 374, 94 P.3d 513.) In this context, a reasonable probability "does not mean more likely than not, but merely a reasonable chance, more than an abstract possibility." (*Ibid.*, italics omitted.)

For several reasons, we conclude that the error here is prejudicial. First, the trial court failed to make the express findings required to overcome the presumption. Section 3044, subdivision (f)(1) requires the trial court to make "specific findings on each of the factors in subdivision (b)" in determining whether the presumption has been overcome. Through the passage of Assembly Bill No. 2044 (2017–2018 Reg. Sess.) (Assembly Bill 2044), the Legislature added subdivision (f)(1) to section 3044, effective January 1, 2019 (Stats. 2018, ch. 941, § 3), "in an effort to further protect children from parents who have perpetrated domestic violence or child abuse and further ensure that the health, safety, and welfare of children are paramount in the determination of what custody or visitation orders are in the best interest of children." (Off. of Sen. Floor Analyses, 3d reading analysis of Assem. Bill 2044, as amended May 31, 2018, p. 1.) The Legislature cited to *Jaime G., supra*, 25 Cal.App.5th 794, 236 Cal.Rptr.3d 209, which concluded as a matter of statutory interpretation that, in enacting the section 3044, subdivision (b) factors, "the Legislature created a mandatory checklist for family courts" (*Jaime G.*, at p. 805, 236 Cal.Rptr.3d 209); that "[m]andatory checklists can seem bothersome to experienced professionals but the Legislature's intent was to require family courts to give due weight to the issue of domestic violence" (*id.* at p. 806, 236 Cal.Rptr.3d 209); and that the "requirement that courts make specific findings 'in writing or on the record' furthers this legislative goal" (*ibid.*).[13]

13 Before Assembly Bill 2044 became effective on January 1, 2019, we disagreed with *Jaime G.* "to the extent it state[d] that each factor [in section 3044, subdivision (b)] must be specifically stated in the statement of reasons" when the trial court finds an offending parent has overcome the presumption. (*S.Y., supra*, 29 Cal.App.5th at p. 335, 240 Cal.Rptr.3d 137, citing *Jaime G., supra*, 25 Cal.App.5th at pp. 805–807, 809, 236 Cal.Rptr.3d 209.) Instead, we concluded that the trial court "need only provide sufficient reasons to permit meaningful appellate review." (*S.Y.*, at p. 335, 240 Cal.Rptr.3d 137.) Given section 3044, subdivision (f)(1)'s mandate requiring a court to make findings on each of the statutory factors in section 3044, subdivision (b), we doubt the continued validity of *S.Y.* on this issue.

Here, in determining whether a change in Minor's custody was warranted, the trial court did not make "specific findings on each of the factors" in section 3044, subdivision (b) (§ 3044, subd. (f)(1)), or address whether, "on balance," those factors "support[ed] the legislative findings in Section 3020."[14] (*Id.*, subd. (b).) Given Father's domestic violence against Raquel H.,[15] it is ***540** possible that the court may have approached Minor's custody differently, had it complied with section 3044 as intended by the Legislature. Without those required findings, we are left to guess whether the court would have made the same custody determination in

this case. (See, e.g., *C.C., supra*, 105 Cal.App.5th at p. 112, 325 Cal.Rptr.3d 661 [refusing to "imply findings" in rejecting the father's harmless error argument, "[g]iven section 3044's command that a court state its reasons on the record when it determines a perpetrator of domestic violence has rebutted the presumption"]; *Abdelqader, supra*, 76 Cal.App.5th at p. 198, 291 Cal.Rptr.3d 269 [rejecting harmless error argument and holding the "doctrine of implied findings does not relieve the court" of the statutory mandate to "make specific findings on each of the applicable factors [citation] and state its reasons in writing or on the record why, as to each factor, the court has found the presumption rebutted"].)

14 Section 3020, subdivision (a) provides: "The Legislature finds and declares that it is the public policy of this state to ensure that the health, safety, and welfare of children shall be the court's primary concern in determining the best interests of children when making any orders regarding the physical or legal custody or visitation of children. The Legislature further finds and declares that children have the right to be safe and free from abuse, and that the perpetration of child abuse or domestic violence in a household where a child resides is detrimental to the health, safety, and welfare of the child."

15 The section 3044 presumption does not apply to the domestic violence Father committed against Eleanor C., as his September 2018 conviction is outside the five-year period of Minor's November 2024 custody trial. (See § 3044, subd. (d)(1) [the statute is triggered by "evidence that a party seeking custody has been convicted within the previous five years, after a trial or plea of guilty or no contest, of a crime ... that comes within the definition of domestic violence"]; *In re Marriage of Destiny & Justin C.* (2023) 87 Cal.App.5th 763, 768, 303 Cal.Rptr.3d 830 [we recognized the "five-year look back provision" in section 3044, subdivision (a) "was designed to limit the section 3044 presumption to evidence of domestic violence that is not remote in time from the custody decision the court is currently making"].) Nonetheless, the domestic violence involving Eleanor C. is relevant in determining Minor's best interest, as the trial court also recognized. (See § 3011, subd. (a)(2)(A)(iii).)

Second, the record shows the trial court, in determining Minor's best interest, relied on factors it could not legally have relied on in assessing whether the section 3044 presumption had been overcome. As noted, the statute does not allow the trial court to rely on "the preference for frequent and continuing contact with both parents, as set forth in subdivision (b) of Section 3020, or with the noncustodial parent, as set forth in paragraph (1) of subdivision (a) of Section 3040" in determining whether the presumption has been rebutted. (§ 3044, subd. (b)(1).) However, the court here relied extensively on the "*LaMusga* factors," based on *In re Marriage of LaMusga* (2004) 32 Cal.4th 1072, 12 Cal.Rptr.3d 356, 88 P.3d 81 (*LaMusga*).[16] One such factor indicated in the SOD was the "[l]evel of parental animosity and past conduct as indicator of best future arrangement." (Bolding omitted.) The court found this factor "weigh[ed] heavily" (bolding and italics omitted) against Minor remaining in Mother's physical custody, as Father had been the parent who had "consistently placed the child's interest above his own"; and was "the parent who is more likely to support and encourage the child's relationship with the mother pursuant to Fam. Code [section] 3040(a)(1)[, and t]he mother has clearly shown that she is not." The court therefore relied on a provision of the Family Code (§ 3040, subd. (a)(1)) that section 3044, subdivision (b)(1) would ***541** have placed off limits in determining whether the presumption had been rebutted.

16 The *LaMusga* court listed factors that a trial court should consider in deciding whether to modify custody when a custodial parent seeks to change the residence of the child. (*LaMusga, supra*, 32 Cal.4th at p. 1101, 12 Cal.Rptr.3d 356, 88 P.3d 81.) These nonexclusive factors include "the children's interest in stability and continuity in the custodial arrangement; the distance of the move; the age of the children; the children's relationship with both parents; the relationship between the parents, including, but not limited to, their ability to communicate and cooperate effectively and their willingness to put the interests of the children above their individual interests; the wishes of the children if they are mature enough for such an inquiry to be appropriate; the reasons for the proposed move; and the extent to which the parents currently are sharing custody." (*Ibid.*)

From the trial court's SOD, it appears that allowing Minor to have continuing contact with both parents was by far the most important factor the court relied on in determining the child's best interest. The court even concluded: "Any order otherwise would be against [Minor's] best interest because it would result in this father's relationship with this child being completely nonexistent." This statement suggests a reasonable probability that, had the court applied the section 3044 presumption, it would *not* have found Father

rebutted it without considering the preference for frequent and continuing contact with both parents, in contravention of section 3044, subdivision (b)(1). (See *Ellis v. Lyons* (2016) 2 Cal.App.5th 404, 415–418, 206 Cal.Rptr.3d 687 (*Ellis*) [trial court's explicit reliance on section 3040's preference for frequent and continuing contact with both parents in violation of section 3044, subdivision (b)(1) required reversal].)

Third, in applying the other *LaMusga* factors, the trial court found that two favored Mother. Regarding Minor's stability and continuity of custody arrangement, the court found this factor "weigh[ed] heavily" (bolding and italics omitted) in favor of the child remaining in Mother's primary care in Florida, as Minor had lived with Mother "his entire life." Similarly, the court, in applying section 3011, subdivision (a)(2)(A)(iii), found Father's domestic violence and the risk it created to Minor "weigh[ed] in favor" of Mother retaining custody. (Bolding and italics omitted.) These findings provide additional support that, had the court applied the section 3044 presumption, there is a reasonable probability it would have made a different custody determination.

Fourth, the trial court itself suggested that if it had applied the section 3044 presumption, it would have permitted additional evidence about Father's domestic violence against Raquel H., which it excluded on relevance grounds solely because of its conclusion that it was bound by the other court's finding that the presumption had been overcome.

Finally, California courts have consistently found similar errors in failing to apply the section 3044 presumption or failing to make the required statutory findings to be reversible. (See, e.g., *C.C., supra*, 105 Cal.App.5th at pp. 111–112, 325 Cal.Rptr.3d 661; *Abdelqader, supra*, 76 Cal.App.5th at pp. 197–198, 291 Cal.Rptr.3d 269; *Jaime G., supra*, 25 Cal.App.5th at pp. 809–810, 236 Cal.Rptr.3d 209; *Ellis, supra*, 2 Cal.App.5th at p. 417, 206 Cal.Rptr.3d 687; *Fajota, supra*, 230 Cal.App.4th at pp. 1500–1501, 179 Cal.Rptr.3d 569; *Christina L., supra*, 229 Cal.App.4th at p. 737, 177 Cal.Rptr.3d 178.) We thus conclude the trial court's error was prejudicial.

E. *Request for Assignment of Different Judge on Remand*

Mother argues that we should order the case reassigned to a different judge on remand "in the interests of justice." (Code Civ. Proc., § 170.1, subd. (c).) She claims the trial court approached this case with "entrenched and stereotypical views" about domestic violence, as evidenced by its decision regarding section 3044, leading the court to exclude the testimony of Raquel H. and award Father custody of Minor. Mother further claims "[n]o judge in this state would have made the order the court here did"; that the "atmosphere" in the courtroom was such that she felt "scared" (italics omitted); and that the court "*wanted* [her] to fear it," not unlike a ***542** victim of domestic violence who is subject to an abuser's "power and control."

Father argues that if remand is necessary, it should be before the same trial judge who issued the December 23 FOAH order.

We see no grounds to order assignment of a new judge on remand. Code of Civil Procedure section 170.1, subdivision (c), provides: "At the request of a party or on its own motion an appellate court shall consider whether in the interests of justice it should direct that further proceedings be heard before a trial judge other than the judge whose judgment or order was reviewed by the appellate court."

We disagree that the record shows the trial court was biased against Mother.

First, legal error " 'normally is not a proper ground for disqualification' " under Code of Civil Procedure section 170.1. (*In re Tuilaepa* (2025) 108 Cal.App.5th 1262, 1283, 330 Cal.Rptr.3d 185; *In re Marriage of Walker* (2012) 203 Cal.App.4th 137, 153, 137 Cal.Rptr.3d 611 [trial court's legal error in characterizing the husband's disability allowance did not establish bias]; *Blakemore v. Superior Court* (2005) 129 Cal.App.4th 36, 59–60, 27 Cal.Rptr.3d 877 ["erroneous rulings, without more," do not "justify the removal of a trial judge from further proceedings in a case"]; *People v. Gulbrandsen* (1989) 209 Cal.App.3d 1547, 1562, 258 Cal.Rptr. 75 [mere sentencing error by the original judge, "given the complexity of the determinate sentencing scheme, does not justify removing the trial judge"].)

Second, the record shows that the trial court, in considering whether a change in custody was in Minor's best interest, carefully weighed the parties' credibility and the evidence, and analyzed various factors including under *LaMusga* in determining Minor's best interest. As we have noted, the

court found some of the *LaMusga* factors *favored* Mother, undermining her claim the court was biased against her.

Third, nothing in the record supports Mother's allegations that the trial court allegedly "mock[ed] her" and created an "atmosphere" in which it "*wanted* [her] to fear it." (See Cal. Rules of Court, rule 8.204(a)(1)(C) [briefs must "[s]upport any reference to a matter in the record by a citation to the volume and page number of the record where the matter appears"]; *Nwosu v. Uba* (2004) 122 Cal.App.4th 1229, 1246, 19 Cal.Rptr.3d 416 [if a party fails to support an argument with the necessary citations to the record, the argument will be deemed to have been forfeited on appeal].) The record instead shows the court performed "the delicate and difficult task" of determining whether a change in custody was in Minor's best interest (see *LaMusga, supra*, 32 Cal.4th at p. 1078, 12 Cal.Rptr.3d 356, 88 P.3d 81), in what has undoubtedly been an emotional and protracted custody dispute between the parties.

Recognizing our authority under Code of Civil Procedure section 170.1, subdivision (c) should be used "sparingly," we conclude the "interests of justice" do not require disqualification of the trial judge who issued the December 23 FOAH. (*Hernandez v. Superior Court* (2003) 112 Cal.App.4th 285, 303, 4 Cal.Rptr.3d 883.)

DISPOSITION

Mother's appeal from the trial court's orders of April 8 and May 7, 2024, is dismissed as moot. In her appeal from the order of July 17, 2024, the order is affirmed. In her appeal from the December 23 FOAH, the order is reversed as to custody and visitation (but not sanctions), with directions to the trial court to conduct ***543** limited proceedings to apply section 3044, make the required statutory findings if it finds that Father has rebutted the presumption, and enter a new custody order. The trial court may consider the evidence already presented and shall have the discretion to determine the scope and nature of any additional evidence necessary to make that determination. We offer no opinion on whether Father can rebut the section 3044 presumption, leaving that issue to be decided by the trial court in the first instance. On remand, the court should also consider appointment of counsel for the minor under Family Code section 3150 et seq. and rules 5.240, 5.241, and 5.242 of the California Rules of Court. The parties are to bear their own costs on appeal. (Cal. Rules of Court, rule 8.278(a)(5).)

WE CONCUR:

MCCONNELL, P. J.

KELETY, J.

All Citations

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