RESOLUTION 10-01-2020

TEXT OF RESOLUTION

RESOLVED that the Conference of California Bar Associations recommends that legislation be sponsored to amend Family Code section 3044, to read as follows:

§ 3044

(a) Upon a finding by the court that a party seeking custody of a child has perpetrated domestic violence within the previous five years against the other party seeking custody of the child, or against the child or the child's siblings, or against any person in subparagraph (C) of paragraph (1) of subdivision (b) of Section 3011 with whom the party has a 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. This presumption may only be rebutted by a preponderance of the evidence.

(b) To overcome the presumption set forth in subdivision (a), the court shall find that paragraph (1) is satisfied and shall find that the factors in paragraph (2), on balance, support the legislative findings in Section 3020.

(1) 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 pursuant to Sections 3011 and 3020, including but not limited to the following considerations: (i) There exists an agreement or order for sole or joint legal or physical custody in favor of the perpetrator, and it would serve the child's best interest for stability and continuity to maintain the existing custody arrangement, and (ii) The preference of a child of sufficient age and capacity pursuant to California Rules of Court, Rule 5.250 and Section 3042 of the Family Code, when considered with the other factors in this Paragraph (b), suggests that joint or sole custody to the perpetrator is in the child's best interest. 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, or with the noncustodial parent, as set forth in paragraph (1) of subdivision (a) of Section 3040, may not be used to rebut the presumption, in whole or in part.

(2) Additional factors:

(A) 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.

(B) The perpetrator has successfully completed a program of alcohol or drug abuse counseling, if the court determines that counseling is appropriate.

(C) The perpetrator has successfully completed a parenting class, if the court determines the class to be appropriate.

(D) The perpetrator is on probation or parole, and has or has not complied with the terms and conditions of probation or parole.

(E) The perpetrator is restrained by a protective order or restraining order, and has or has not complied with its terms and conditions.

(F) The perpetrator of domestic violence has committed further acts of domestic violence.

(c) For purposes of this section, a person has "perpetrated domestic violence" when the person 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 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 to protect the other party seeking custody of the child or to protect the child and the child's siblings.

(d) (1) For purposes of this section, the requirement of a finding by the court shall be satisfied by, among other things, and not limited to, evidence that a party seeking custody has been convicted within the previous five years, after a trial or a plea of guilty or no contest, of a crime against the other party that comes within the definition of domestic violence contained in Section 6211 and of abuse contained in Section 6203, including, but not limited to, a crime described in subdivision (e) of Section 243 of, or Section 261, 262, 273.5, 422, or 646.9 of, the Penal Code.

(2) The requirement of a finding by the court shall also be satisfied if a court, whether that court hears or has heard the child custody proceedings or not, has made a finding pursuant to subdivision (a) based on conduct occurring within the previous five years.

(e) When a court makes a finding that a party has perpetrated domestic violence, the court may not base its findings solely on conclusions reached by a child custody evaluator or on the recommendation of the Family Court Services staff, but shall consider any relevant, admissible evidence submitted by the parties.

(f) (1) It is the intent of the Legislature that this subdivision be interpreted consistently with the decision in Jaime G. v. H.L. (2018) 25 Cal.App.5th 794, which requires that the court, in determining that the presumption in subdivision (a) has been overcome, make specific findings on each of the factors in subdivision (b).

(2) If the court determines that the presumption in subdivision (a) has been overcome, the court shall state its reasons in writing or on the record as to why paragraph (1) of subdivision (b) is satisfied and why the factors in paragraph (2) of subdivision (b), on balance, support the legislative findings in Section 3020.

(g) In an evidentiary hearing or trial in which custody orders are sought and where there has been an allegation of domestic violence, the court shall make a determination as to whether this section applies prior to issuing a custody order, unless the court finds that a continuance is necessary to determine whether this section applies, in which case the court may issue a temporary custody order for a reasonable period of time, provided the order complies with Section 3011, including, but not limited to, subdivision (e), and Section 3020.

(h) In a custody or restraining order proceeding in which a party has alleged that the other party has perpetrated domestic violence in accordance with the terms of this section, the court shall inform the parties of the existence of this section and shall give them a copy of this section prior to custody mediation in the case.

(Proposed new language underlined; language to be deleted stricken)

PROPONENT: Bar Association of San Francisco

STATEMENT OF REASONS

The Problem: Current law has a sweeping effect on custody rights established by agreement or with the child's input. It doesn't address if 3044(a)'s presumption applies when the parties agree to joint or sole custody to the perpetrator after the alleged abuse. The law does not explicitly allow the child's preference to be considered. Although current law references 3011 and 3020, the practical application results in 3044(a)'s presumption being the overarching (or only) consideration when an allegation of abuse is presented. The best interest of the child should be the primary focus for any custody determination. All child-related and public policy considerations in 3011, 3020, 3040 should be examined through the lens of the best interest standard. This does not occur, however, because of cases like *Celia S. v. Hugo J.* (2016) 3 Cal.App.5th 655, where the court is prohibited from ordering a parenting schedule amounting to a de facto physical custody arrangement even if that order would confirm an arrangement by stipulation, requested by the child(ren), or recommended by the Court's Mediator. This undermines this state's public policy for stability and continuity in custody arrangements.

The Solution: The amendment to 3044(b) explicitly allows courts to consider child-centered information to overcome the 3044(a) presumption. The change is necessary because the best interest of the child standard is often overlooked when abuse is alleged, even if the child was not the abuse victim or the child was not a percipient witness to the abuse. Some judicial officers find the presumption has been rebutted when the parties reach an agreement for sole or joint custody to the perpetrator, while others do not, creating confusion. If an agreement of the parties was made after the incident of abuse, such an agreement of the parents presupposes that both parents entered into a custody arrangement that is in their child's best interest, yet judges often disregard an agreement and strictly apply 3044, while other judges will consider the mutual agreement as rebutting the presumption and/or being in the child's best interest. Disturbing such an agreement of the parents would undermine the child's need for stability and continuity during an already tumultuous time, e.g. dividing their time between two households, coping with parents' separation, going to new school if one or both parents relocate after separating households. If a child is of sufficient age and capacity to weigh in on the custody determination, as permitted under the CRC and Family Code, the child's voice should be considered. The court can determine the weight given to the child's stated preference.

IMPACT STATEMENT
This resolution does not affect any other law, statute, or rule.

CURRENT OR PRIOR RELATED LEGISLATION
None.

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RESPONSIBLE FLOOR DELEGATE: Diana R. Passadori

RESOLUTION 10-02-2020

TEXT OF RESOLUTION

RESOLVED that the Conference of California Bar Associations recommends that legislation be sponsored to amend Family Code section 3044, to read as follows:

§ 3044

(a) Upon a finding by the court that a party seeking custody of a child has perpetrated domestic violence within the previous five years against the other party seeking custody of the child, or against the child or the child's siblings, or against any person in subparagraph (C) of paragraph (1) of subdivision (b) of Section 3011 with whom the party has a 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. This presumption may only be rebutted by a preponderance of the evidence.

(b) To overcome the presumption set forth in subdivision (a), the court shall find that paragraph (1) is satisfied and shall find that the factors in paragraph (2), on balance, support the legislative findings in Section 3020.

(1) 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 pursuant to Sections 3011 and 3020. 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, or with the noncustodial parent, as set forth in paragraph (1) of subdivision (a) of Section 3040, may not be used to rebut the presumption, in whole or in part.

(2) Additional factors:

(A) 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.

(B) The perpetrator has successfully completed a program of alcohol or drug abuse counseling, if the court determines that counseling is appropriate.

(C) The perpetrator has successfully completed a parenting class, if the court determines the class to be appropriate.

(D) The perpetrator is on probation or parole, and has or has not complied with the terms and conditions of probation or parole.

(E) The perpetrator is restrained by a protective order or restraining order, and has or has not complied with its terms and conditions.

(F) The perpetrator of domestic violence has committed further acts of domestic violence.

(c) For purposes of this section, a person has "perpetrated domestic violence" when the person 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 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 to protect the other party seeking custody of the child or to protect the child and the child's siblings.

(d) (1) For purposes of this section, the requirement of a finding by the court shall be

satisfied by, among other things, and not limited to, evidence that a party seeking custody has been convicted within the previous five years, after a trial or a plea of guilty or no contest, of a crime against the other party that comes within the definition of domestic violence contained in Section 6211 and of abuse contained in Section 6203, including, but not limited to, a crime described in subdivision (e) of Section 243 of, or Section 261, 262, 273.5, 422, or 646.9 of, the Penal Code.

(2) The requirement of a finding by the court shall also be satisfied if a court, whether that court hears or has heard the child custody proceedings or not, has made a finding pursuant to subdivision (a) based on conduct occurring within the previous five years.

(e) When a court makes a finding that a party has perpetrated domestic violence, the court may not base its findings solely on conclusions reached by a child custody evaluator or on the recommendation of the Family Court Services staff, but shall consider any relevant, admissible evidence submitted by the parties.

(f) (1) It is the intent of the Legislature that this subdivision be interpreted consistently with the decision in Jaime G. v. H.L. (2018) 25 Cal.App.5th 794, which requires that the court, in determining that the presumption in subdivision (a) has been overcome, make specific findings on each of the factors in subdivision (b), and interpreted consistently with the decision in S.Y. v. Superior Court (2018) 29 Cal.App.5th 324, which states that a parent is not required to [i] complete a parenting class or batterer's treatment program in every case or [ii] have all of the factors in subdivision (b) completed at the time of the custody determination in order to rebut the presumption in subdivision (a).

(2) If the court determines that the presumption in subdivision (a) has been overcome, the court shall state its reasons in writing or on the record as to why paragraph (1) of subdivision (b) is satisfied and why the factors in paragraph (2) of subdivision (b), on balance, support the legislative findings in Section 3020.

(g) In an evidentiary hearing or trial in which custody orders are sought and where there has been an allegation of domestic violence, the court shall make a determination as to whether this section applies prior to issuing a custody order, unless the court finds that a continuance is necessary to determine whether this section applies, in which case the court may issue a temporary custody order for a reasonable period of time, provided the order complies with Section 3011, including, but not limited to, subdivision (e), and Section 3020.

(h) In a custody or restraining order proceeding in which a party has alleged that the other party has perpetrated domestic violence in accordance with the terms of this section, the court shall inform the parties of the existence of this section and shall give them a copy of this section prior to custody mediation in the case.

(Proposed new language underlined; language to be deleted stricken)

PROPONENT: Bar Association of San Francisco

STATEMENT OF REASONS

The Problem: Although the current version of 3044 references Family Code §§ 3011, 3020, the practical application results in 3044(a)'s presumption being the overarching (or only) consideration when an allegation of abuse is presented. The best interest of the child should be the primary focus for any custody determination. All child-related and public policy

considerations in 3011, 3020, 3040 should be examined through the lens of the best interest standard. There is confusion in application given the case, *Jaime G. v. H.L.* (2018) 25 Cal.App.5th 794 referenced in subdivision (f), is a Second Appellate District case, and the case *S.Y. v. Superior Court* (2018) 29 Cal.App.5th 324 in the proposed language of subdivision (f), is a First Appellate District case. These cases each address the proper analysis of the subdivision (b) factors when determining if the presumption in subdivision (a) has been overcome or not by the perpetrator of abuse. Referencing only one of the District Court cases of 2018 in the current version of subdivision (f) has resulted in confusion in the various trial courts and even amongst the various judges in the trial departments of the same county.

The Solution:
To effectuate more consistent decisions from county to county and from judge to judge in the same county, the proposed revision gives the court explicit direction on how to correctly analyze the subdivision (b) factors in conjunction with determining if the presumption in subdivision (a) against joint or sole custody to a perpetrator of abuse has been overcome. The addition to 3044(f) explicitly references a second appellate case, *S.Y. v. Superior Court* (2018) 29 Cal.App.5th 324, that should be adopted as the policy of this state. The revision explicitly allows evidence to rebut the 3044(a) presumption if the perpetrator has partially or mostly completed the any of the factors in subdivision (b) at the time of the custody determination, e.g. batterer's intervention course or parenting class has nearly been completed. The revision also clarifies that not every factor in 3044(b) must be completed by the perpetrator, e.g. if substance abuse or parenting classes were never ordered or would not be appropriate given the facts of the case. The revision reflects the holding of *S.Y. v. Superior Court* (2018) 29 Cal.App.5th 324. Both 2018 appellate cases should be referenced in subdivision (f) to avoid confusion and inconsistent decisions.

IMPACT STATEMENT
This resolution does not affect any other law, statute, or rule.

CURRENT OR PRIOR RELATED LEGISLATION
None.

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RESPONSIBLE FLOOR DELEGATE: Diana R. Passadori

RESOLUTION 10-03-2020

TEXT OF RESOLUTION

RESOLVED that the Conference of California Bar Associations recommends that legislation be sponsored to amend Family Code section 2211, to read as follows:

§ 2211

(a) For causes mentioned in subdivision (a) of Section 2210, by any of the following:

(1) The party to the marriage who was married under the age of legal consent, within four years after arriving at the age of consent.

(2) A parent, guardian, conservator, or other person having charge of the minor, at any time before the married minor has arrived at the age of legal consent.

(b) For causes mentioned in subdivision (b) of Section 2210, by either of the following:

(1) Either party during the life of the other.

(2) The former spouse.

(c) For causes mentioned in subdivision (c) of Section 2210, by the party injured, or by a relative or conservator of the party of unsound mind, at any time before the death of either party, <u>within four years after the discovery of the facts constituting the unsound mind</u>.

(d) For causes mentioned in subdivision (d) of Section 2210, by the party whose consent was obtained by fraud, within four years after the discovery of the facts constituting the fraud.

(e) For causes mentioned in subdivision (e) of Section 2210, by the party whose consent was obtained by force, within four years after the marriage.

(f) For causes mentioned in subdivision (f) of Section 2210, by the injured party, within four years after the marriage.

(Proposed new language underlined; language to be deleted stricken)

PROPONENT: Probate Attorneys of San Diego

STATEMENT OF REASONS

<u>The Problem</u>: Family Code section 2211 requires that proceedings for annulment of marriage based on unsound mind commence at any time prior to the death of either party. This is a problem because incapacity to marry often immediately precedes death, and marriages based on unsound mind are only discovered after death. In addition, this is a problem because an annulment based on fraud may be commenced within four years after the discovery of facts constituting the fraud, which creates an ambiguity as to which statute of limitations is applicable in situations where the basis for annulment may be both fraud and unsound mind..

<u>The Solution</u>: The solution is to amend Family Code section 2211 to allow proceedings for annulment of marriage based on unsound mind to commence within four years within four years after the discovery of the facts constituting the unsound mind. This solution is consistent with the statutory period to commence annulments based on fraud.

IMPACT STATEMENT
This resolution does not affect any other law, statute, or rule.

CURRENT OR PRIOR RELATED LEGISLATION
None known.

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