

**CALIFORNIA**

# Family Law Monthly

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## **HIGHLIGHTS**

### **CHILD CUSTODY**

- Court Was Required to Apply Rebuttable Presumption Against Rewarding Custody to Father, Despite Its Disagreement with Massachusetts Court's Finding that Father Had Perpetrated Domestic Violence (see Page 183)
- Change in Circumstances Warranted Family Court's Modification of Juvenile Court's Exit Order (see Page 186)

because the trial court erroneously relied on the section 3040 preference for frequent contact with the noncustodial parent in making its custody determination.

**Conclusion.** The appeals court reversed the family court's decision denying Mother's modification request on the grounds that it was "infected by legal error" and therefore was an abuse of discretion. On remand, the family court was to apply the section 3044 rebuttable presumption and expressly address whether Father rebutted the presumption by a preponderance of the evidence. Because the parties were fully apprised of the section 3044 issue throughout the proceedings, the trial court could decide the matter on the basis of the evidence presented, and was not limited to the evidence considered by the Massachusetts court.

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### Commentary

#### **Stacy D. Phillips and Erica Swenson**

The *Ellis* Court leaves practitioners with the lesson that, even if an order was based on questionable facts and improperly issued, a finding of domestic violence in another state will be considered "an order" for purposes of interpreting *Family Code* Section 3044.

Put another way, a finding of domestic violence by "any court" truly means "any court."

Matrimonial practitioners are in a unique position. A family law court may issue many, many orders over the course of the numerous years during which it retains jurisdiction over a case. To make matters more complicated, if the parties and the children move from state to state, fact patterns will develop in more than one jurisdiction.

In an attempt to provide guidance to parties and practitioners, the National Conference of Commissioners on Uniform State Laws enacted the Uniform Child Custody Jurisdiction and Enforcement Act ("UCCJEA"), which establishes preference and procedures for parties contending with the quicksand of moving parties, children and orders. A curious aside from this case is that Massachusetts is the only state that has not adopted the UCCJEA.

It is important that the practitioner never lose sight of the statutory framework. In all of Father's

wrangling about whether or not Mother was forum shopping, he overlooked the crucial point: the Massachusetts order, whether or not properly issued, gave rise to the presumption under Family Code section 3044 that an award of sole or joint physical or legal custody to the Father would be detrimental to his daughter. Father would have been better served by either working to overturn the Massachusetts order or focusing his efforts on overcoming the section 3044 presumption.

Practitioners should be cautioned to consider the interplay of different statutes in the Family Code and the shifting burdens that can result. Father's argument failed primarily because he did not address the plain language of the statute, *to wit*, that perpetration of "domestic abuse" under section 3044(c) has occurred if a person has been placed "in reasonable apprehension of imminent serious bodily injury *to that person to another*" [emphasis added].

The error was compounded when Father ignored the additional instruction of section 3044(d)(2): in determining the best interest of the child, the court may not use, in whole or in part, the Family Code section 3040 mandate that the preference for frequent and continuing contact with the non-custodial parent is in the child's best interest.

From a practical standpoint, success on appeal does not necessarily mean that the teenage daughter and Mother will get what they want – namely an end run around the process required to shorten Father's timeshare with the child. Instead, the case will go back to the California family court. Given that the California court did not appear to find Mother and daughter's testimony credible, the court may very well determine that Father has overcome the section 3044 presumption.

While the California court must heed the Massachusetts order, and apply the presumption under section 3044, the California court is still free to give its own credence to the testimony and impressions that it gleaned during the California hearing.

Parties seeking or defending against domestic violence orders must consider the far-reaching consequences of their decisions. Even when the orders expire, they leave a permanent stain on the restrained party. Shrewd, or simply accurate statutory interpretation could have made a difference here.