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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION THREE

WENDI NORRIS,
Petitioner,
v.
ROBERT ICHO,
Respondent.

A131117
(San Francisco County
Super. Ct. No. FPT-05-375536)

In this family law case, Robert Icho (Robert),¹ father of two minor children ages eight and five, challenges a child support order of December 18, 2009, child custody order of November 19, 2010, and attorney fees order of November 23, 2010. He contends: (1) the trial court abused its discretion in imputing income to him of \$10,000 per month in awarding child support to Wendi Norris (Wendi), the mother of his children; (2) the trial court should have invoked a presumption against awarding custody to Wendi for committing an act of domestic violence; (3) the trial court failed to make a determination of Robert's ability to pay before excusing the child custody evaluator—who had not been paid—from testifying at trial; (4) the child custody evaluator was biased; and (5) the trial court erred in awarding attorney fees to Wendi. For the reasons set forth below, we shall dismiss the appeal as to the child support order and affirm the remaining orders.

¹ For clarity and ease of reference, we refer to the parties by their first names. (See *In re Marriage of Green* (1992) 6 Cal.App.4th 584, 588, fn. 1.)

FACTUAL AND PROCEDURAL BACKGROUND

Robert and Wendi met in 2003 and had a daughter in 2004 and a son in 2006. In March 2008, Wendi filed an amended petition to establish parental relationship, naming Robert as the father. She declared she and Robert were never married and had a “very tumultuous relationship.” She had “tried to make it work for [the] children’s sake” but “realized . . . that [a] house full of conflict is not a healthy environment for [the] children.” The children lived with her and she was the primary decision maker for all things related to the children. Robert had “no real schedule with the kids” although he did, “on occasion,” pick their daughter up from school. Wendi declared, “Due to the high conflict situation that Robert and I have been in off and on for four years now, I know it is best to spell out a very detailed parenting plan so that we can reduce opportunities for disagreement.” She proposed a visitation schedule whereby Robert would have custody of the children for two overnight visits per week, an additional overnight weekend on alternate weekends, and certain holidays. She declared that Robert had refused to agree to a set schedule.

Wendi further declared that Robert had “extreme temper issues” that made him an unreliable parent. He consistently made derogatory comments about her in front of the children and had “a very rigid view of how a woman should behave—he has criticized me frequently for working. . . . He criticizes me for drinking wine (I consume an average of two glasses a week, with dinner), for speaking to other men, and for not cooking enough and so on.” Robert had physically threatened Wendi’s business partner with bodily harm at least three times in the previous three months, and the business partner had called the police to assist him in controlling Robert’s anger. She further declared, “Robert recently called the police . . . after I accidentally scratched him (it was a small and minor scratch as demonstrated by a forensic doctor in the subsequent legal proceedings). . . . The DA dismissed the case after [Robert] changed his story three times and it was evident that he was trying to get me in trouble and make it difficult for me in custody proceedings.” Wendi and Robert went to anger

management counseling but the counselor refused to work with Robert after the third visit because he was not adhering to the agreements made in the sessions. Wendi continued to attend the sessions alone.

At a June 5, 2008 hearing, the trial court accepted Wendi's proposed visitation schedule and also ordered that "[e]ach parent shall have the right of first refusal if [the other] parent is unable to care for the minor children for a period of more than 4 hours." The court further ordered that Robert's declaration, which was "filed late," "shall be stricken." Robert then filed a responsive declaration on June 13, 2008, requesting to spend every Wednesday morning to Saturday morning with the children. He believed Wendi was working "more like 60 hours per week" rather than the 35 hours she stated she was working, and "obviously love[d] her work." He declared, "My objection remains that [Wendi] is working long hours and that our children are being raised by the nanny when they are allegedly with [Wendi]." He requested that the court appoint a child custody evaluator to assist the parties in developing a parenting plan. In an order filed August 25, 2008, the trial court appointed Dr. William Perry as the child custody evaluator. The court ordered the parties to split Dr. Perry's fees and expenses equally.

In late May 2009, Wendi filed a request for a restraining order against Robert. She declared, "Almost all of the transitions whereby father picks up the children from my care, or I drop them off with him, have been filled with negative, threatening comments from father." She declared, as examples, that Robert called her a " 'slut' " and a "bitch" in front of the children, said he "would 'take the children away from [her] and that [she] would never see them again,' " screamed at her while the kids were "in earshot," calling her a " 'liar' " and a " 'thief' " and saying, " 'you are going down, mark my words.' " On another occasion, after learning that Wendi had not brought a snack to share for a potluck Robert wanted to attend with the children, Robert "got up close to [Wendi's] face, screamed at [her], threatened [her], and stated 'I pray every day that god will destroy you,' and he refused to leave the premises."

Wendi was “shaky, agitated and upset by his constant threats” and feared for her safety. She further declared that Robert was stalking her. “Specifically, [Robert] has stated to [her] that he stalks [her] so as to insure that [she is] not leaving the children in someone else’s care for more than 4 hours.” Robert often stated such things as “ I know where you are,’ ” and “ ‘I know what time you left work.’ ” Wendi was also concerned that Robert wished to continue their relationship and was unwilling to accept her decision that the relationship was over. An emergency protective order was issued on May 22, 2009, and a temporary restraining order was issued on May 28, 2009.

On May 29, 2009, Robert filed a motion for modification of child custody and visitation, for attorney fees and costs, and a motion to “expunge CLETS/Status on Custody Evaluation.” He declared he had never threatened to take the children from Wendi and had never threatened to destroy her or held her against her will. He did not believe Wendi was fearful of him, as she had spent time with him shortly before filing her request for a restraining order and felt comfortable leaving the children in his care while she traveled abroad. He declared that Wendi—not he—was the perpetrator of domestic violence. He attached to his motion a police report from the Hillsborough Police Department, which stated that on October 25, 2007, Robert called 911 and reported to the responding officer that Wendi “grabbed his throat and face area with her left hand” during an argument, yelled “ ‘I hate your guts,’ ” and “scratched his right cheek area with her fingernails,” then threw coffee at his shirt. The coffee was not hot and did not injure him. The officer then contacted Wendi, who said she grabbed Robert’s face and throat area and threw coffee on his shirt but did not intend to scratch his face. The officer arrested Wendi and obtained an emergency protective order for Robert. Robert declared that Wendi was “charged and prosecuted for domestic battery” and it was only after he “prevailed upon the San Mateo District Attorney to dismiss the charges” that the charges were dismissed. He attached a

criminal case docket showing that criminal charges against Wendi were dismissed in the “interest [of] justice.”

On June 4, 2009, Robert filed an application and declaration for an ex parte hearing requesting an order “quashing [the] domestic violence order filed 5/28/09 or advancing [his] motion [for modification of custody and visitation, among other things] . . . to June 10.” On June 5, 2009, an “Order to Modify Temporary Restraining Orders and Order” was filed, providing that Robert would have visits with the children beginning June 5, 2009, with exchanges at the children’s school or supervised by a mutually agreed third party. The right of first refusal was vacated. Robert filed an answer to the temporary restraining order on June 8, 2009, denying he had engaged in any threatening behavior and stating he had a stable home environment that was appropriate for the children.

Wendi opposed Robert’s motion in a responsive declaration filed June 9, 2009. She asked that the temporary restraining order be extended and that she be granted sole legal and physical custody of the children, with alternate weekend visits for Robert, with no right of first refusal. She sought attorney fees from Robert “as sanctions, or alternatively, each to pay their own fees and costs.” She stated that Robert “routinely shouts insults, physically intimidates and psychologically toys with the children’s loyalties,” and sends her controlling and angry phone calls, emails and text messages. He had sent up to 12 text messages or phone calls in a 45-minute period when he was angry. She stated she had worked to provide “greater structure and consistent parenting for her children . . . and had sought the advice of therapists and child therapists in particular in order to learn how to minimize the adverse impact” her separation from Robert was having on her children. She had spoken to the Executive Director at Kids Turn and had read “Good Parenting Through [Y]our Divorce.” She was the sole provider for the children and felt she was better equipped to make decisions regarding them. As an example, she stated that Robert was fully aware that Wendi had attended public school seminars, toured 14 public kindergartens, and

completed the application process for their daughter to attend public school in San Francisco where they lived, but that Robert was insisting on enrolling their daughter in private school in Burlingame even though neither party lived in Burlingame, the private school application process was closed, and he claimed he had no money to even help with health insurance costs for the children.

In an order dated June 10, 2009, the court reserved the issue of legal custody, granted physical custody to Wendi, and denied her request for a restraining order. The court ordered that the custody and visitation order of June 23, 2008, remain in place, “except as follows: (a) the 4 hour right of first refusal is terminated; and (b) pending receipt of Dr. Perry’s custody evaluation, [Robert] shall have visits with the children every other weekend”

On October 1, 2009, Wendi filed an order to show cause regarding child support, attorney fees and costs, and childcare and preschool. She attached an income and expense declaration signed September 29, 2009, in which she stated she earned \$4,350 per month as an art dealer. As to Robert’s income, she stated, “unknown however, 2007 tax return shows almost \$4,000,000 in stock values.” Her average monthly income for the year was \$8,932 and her 2008 tax return showed a total income of \$109,593, but she declared that her income had “dropped significantly this year as art is a luxury people cannot afford.” She stated she had assets of \$15,000 in cash and bank accounts. She had paid her attorney \$19,558 and owed \$11,713. She stated, “[Robert] does not pay any portion of child care, nanny or preschool notwithstanding his assertion in court that he can pay 100 percent of private school tuition.” She requested attorney fees based on need, or alternatively, as sanctions, based on Robert’s behavior, including his refusal to pay Dr. Perry’s fees, changing attorneys several times, and filing multiple frivolous motions.

Robert filed an opposition to Wendi’s request for attorney fees on October 23, 2009, and a responsive declaration on October 26, 2009. He filed an income and expense declaration stating he was earning \$1 per year as the “Chairman & Co-CEO”

of “Mia Water, Inc.” He estimated Wendi was earning \$9,083 per month. He stated he had \$2,000 in cash and bank accounts. He was living with his mother, whose gross monthly income was \$750, and his sister, whose gross monthly income was \$100,000. His monthly expenses were \$34,775 and he owed \$350,000 to his mother and over \$2,000,000 to other individuals. He had paid his attorney \$10,000 in addition to having paid \$52,000 to his previous three attorneys. In his declaration, Robert stated he was the “economically dominant party” during his relationship with Wendi. Since their separation, his “financial circumstances ha[d] changed greatly.” He was unable to maintain a steady income, lost his home, and incurred a sizeable amount of debt. He borrowed over \$2,000,000 from family and a close friend. He stated he “would be happy to pay the full cost” of private school and intended to “use the money [he had] attained in order to provide the best possible education for our children.” He stated he had done his best to cover all fees and costs for which he was responsible and had no intention of causing delays.

In an order filed December 18, 2009, the trial court found Wendi’s income was \$4,350 per month and Robert’s income was \$10,000 per month. Based on the parties’ incomes and other factors including their custodial timeshares of 86 percent to Wendi and 14 percent to Robert, the court ordered Robert to pay \$3,154 per month to Wendi in child support retroactively to October 1, 2009. The court denied Wendi’s request for sanctions and both parties’ requests for attorney fees.

After the completion of Dr. Perry’s evaluation, a trial was set and continued twice at Robert’s request. At a hearing on May 24, 2010, the trial court ordered Robert to pay fees to Dr. Perry no later than June 6, 2010, for the two granted continuances, in the amount of \$2,500 for the first continuance and \$1,000 for the second continuance. The court ordered, “If the fees are not paid timely, then Dr. Perry’s report and recommendation are admissible without foundation and [Robert’s] ability to cross exam Dr. Perry is waived. Dr. Perry’s appearance is then excused.” On June 6, 2010, Dr. Perry submitted a letter to the court in which he stated

Robert had “openly defied [the court’s order] to render payment to this office.” He stated, “I have spent and reserved considerable time on this case already for which I have not been compensated”

Prior to trial, on July 15, 2010, Robert filed a motion in limine requesting that the court invoke the presumption under Family Code section 3044 that an award of sole or joint physical or legal custody to a person who has perpetrated domestic violence is detrimental to the best interest of the child. He argued that Wendi had the burden of proving it was in the best interest of the children for her to have sole legal and primary physical custody because she had perpetrated domestic violence against him on October 25, 2007, as set forth in the Hillsborough Police Report. Wendi opposed the motion on the ground that no court had ever found she perpetrated domestic violence against Robert and that the “isolated matter” “was dismissed by the prosecution . . . in the interests of justice and with [Robert’s] approval”

On July 21, 2010, Robert filed an updated income and expense declaration in which he stated he was earning \$0 working 50 hours per week as “Chairman & CEO” of Mia Water, Inc. The income and expense declaration stated he had \$1,000 in cash and bank accounts and that his average monthly expenses were \$3,822 per month. He had paid his attorney \$1,900 and owed him \$6,000. He still owed his family and friends over \$2,000,000. Wendi filed an updated income and expense declaration on July 29, 2010, and submitted points and authorities and a declaration in support of a request for attorney fees and sanctions. Robert opposed the request for attorney fees and sanctions.

At the trial held July 23, 26 and 29, 2010, Robert, Wendi, Wendi’s business partner, the children’s nanny, a police officer, and a private investigator testified. Dr. Perry’s evaluation was entered into evidence. In his report dated July 6, 2009, Dr. Perry stated he interviewed Wendi for four hours and Robert for five hours in his office, visited them in their homes and observed them interact with the children, had telephone consultations and interviews with various individuals including the parties’

previous therapist, a Family Court Services mediator, and their daughter's preschool teacher. Dr. Perry had reviewed all of the records and pleadings in the matter, as well as numerous emails between the parties and from the parties to him. He described Wendi as appropriate during the interviews, "open, unguarded and undefensive at all times." Her range of emotion was within normal limits and her "[j]udgment and insight appeared good." She admitted to one incident of domestic violence with Robert and said her relationship with Robert was " 'always tumultuous.' " She " 'wanted to love him but never loved him' " and had a " 'fantasy' " of being a family but realized "they were not compatible . . . in almost every area." She had tried all she could but had concluded the relationship was irreconcilable.

Robert was "appropriately dressed and groomed and was on time for appointments and forthcoming with his concerns and feelings." He appeared unguarded and was generally cooperative but had a "high level of anxiety and perseverativeness" that "led him to make countless and repetitive phone calls and emails to [Dr. Perry's] office, even when asked on more than one occasion to cease." He was "prone to emotional outbursts, of anger and hurt. *He burst[] into tears at every interview. One interview had to be stopped because he was sobbing uncontrollably.*" (Emphasis in original.) "He was often evasive and did not answer questions directly[, and it] was difficult for him to focus and stay on track. Eye contact was minimal. Judgment and insight appeared poor." "He alternated between claiming poverty and stating that he had 'plenty of money' and could pay for the children to attend private school." He reported he did not understand why Wendi had left him and sobbed as he stated he still loved her and wanted her back. When asked what he wanted now, he responded, " 'Someone talk to this woman—to make her open her mind!' "

During home visits, Dr. Perry observed that the children got along well with and enjoyed the company of both parents. He was concerned that Robert "not-too-subtly" pressured his daughter to say negative things about her mother. He said,

“ ‘Tell the doctor where you like to be the most—with Daddy, right?’ ” and his daughter “responded in the affirmative but very haltingly.” Robert tried to coach his daughter to say she did not like her mother. Robert also took Dr. Perry aside and said he was “ ‘back on [his] feet financially, but keep it between you and me, ok?’ ” He said he might surprise Wendi by buying her a car, then said “he was not going to give [Wendi] or anyone else ‘one penny’ for [the] evaluation.” When Dr. Perry informed Robert’s attorney of this statement, Robert sent a letter to Dr. Perry stating Dr. Perry had misunderstood him.

The parties’ previous therapist told Dr. Perry that he had seen Robert only twice and that the meetings were “ ‘fairly pointless’ ” because he was incapable of or unwilling to look at his own responsibilities for the problems he was having with Wendi, and said his goal was “ ‘just to get [Wendi] to not be such a whore,’ ” referring to her as a ‘high-priced prostitute.’ ” The therapist reported that Robert had “ ‘no insight, no sense of responsibility, no motivation, and no interest in looking at himself.’ ” The therapist continued to meet with Wendi on a weekly basis from December 2007 to February 2008 and worked with her on managing her own anger and responses to Robert’s anger, anxiety reduction and managing the children. A child custody evaluator who had previously provided mediation for the parties told Dr. Perry that he assisted the parties in coming up with a workable custodial timeshare plan. He stated he had not formed any individual impressions although “ ‘[i]t was clear that a lot was going on in their relationship.’ ”

Dr. Perry concluded it was clear both parents loved their children and wanted what was best for them. He believed Robert often allowed his personal animosity, resentment and attachment toward Wendi to cloud his views as to what was in the children’s best interest, which negatively impacted the children. Dr. Perry believed they were “very bad co-parents,” and “place[d] the onus of this problem on [Robert], who, by collateral report and my own experience, is almost completely incapable of insight, good judgment, and seeing his own responsibility for the current problems.

He is unable to look within himself and thus to contribute positive changes to the dynamic of the coparenting relationship.” The children clearly loved both parents and were well bonded to each of them, although they were negatively affected by their parents’ fighting, which was primarily instigated by Robert. Robert was emotionally unstable and “unable to control his affect and/or his behavior, which at times is malignantly compulsive ([h]is stalking of [Wendi], his repeated and repetitive e-mails to this office).” Dr. Perry stated, “If he is unable to control his emotions in my office then I must assume that he either is or will be unable to control them in dealing with the children. If he is incapable of ceasing to write repetitive emails to this office after being repeatedly asked then it is likely that he is unable to compromise in coparenting.”

Dr. Perry further reported that Robert demonstrated very poor judgment during the home visit and that his “reality testing” was impaired as evidenced by his “ongoing delusion that [Wendi] still loves him and will return to him, when she has made it quite clear that she does not love him and has no interest whatsoever in reuniting with him.” Robert insisted, and honestly believed, the children preferred to be with him. Dr. Perry stated he was “hard-pressed” “to come up with” concerns about Wendi, who was “a more stable and consistent influence on the children than is [Robert].” Dr. Perry made various recommendations, including legal custody to Wendi, “although [Robert] is to be informed of any and all pertinent decisions about their children and shall be invited to submit his opinions and input in writing.” He recommended that Wendi retain primary physical custody, with visitation to Robert on Wednesdays and alternate weekends, plus specified holidays.

At the end of trial, the trial court stated as to the Family Code section 3044 presumption, “based on the totality of the evidence presented I do not think this is an appropriate case to invoke the presumption that the party who has a domestic violence incident that there could be a presumption against custody of their children. [¶] In saying that I think [Robert’s] description of what happened at that time and place is

certainly more consistent with the police report. [¶] But the more important factor is that Doctor Perry knew about that. He considered it, he weighed it, he knew these people, he came and has seen them, he talked to them, he spent far more time with them. [¶] So in looking at Doctor Perry's description of both of the parents and in trying to assess what would be in the best interest of the children, I do agree with . . . Doctor Perry's observations." The court stated it had observed Robert's testimony and demeanor at trial and took note of Robert's comment that he "had no intention of following" a court order with which he "disagreed." The court also noted that Robert's act of hiring a private investigator to follow Wendi and the children "and all of the money spent on that" was "consistent with the observations of this court which found that [Robert] was obsessive, focused on [Wendi], and not focused on the best interests of the children."² The court adopted Dr. Perry's recommendation as to legal and physical custody and issued a visitation order for Robert to visit with the children on alternate weekends and certain specified holidays and vacations. The court reserved the issue of attorney fees and costs for further hearing. The court's findings and orders were memorialized in a Judgment filed November 19, 2010.

At an October 18, 2010 hearing on Wendi's request for attorney fees, Wendi's attorney argued "[t]his was a simple, garden variety custody case" but that her client had incurred over \$80,000 in fees due to Robert's behavior, including the filing of frivolous motions, his request for two continuances of the trial, his refusal to pay Dr. Perry's fees, and his "last-minute" attempt to introduce evidence at trial, which required additional briefing. She argued that Robert made inconsistent answers in his response to interrogatories and at trial, attacked Dr. Perry's credibility without basis, and refused to follow court orders for payment of child support, which was \$42,000 in

² The record shows Robert paid a private investigator approximately \$15,000 to follow and film Wendi and the children from July to November 2009 to determine whether the children were actually in her care during her custodial time.

arrears,³ as well as a prior court order for him to pay \$1,500 of Wendi's attorney fees, which he stated he had no intention of ever paying. Counsel pointed out that the trial court previously found when it issued its child support order that Robert had an income of \$10,000 per month and an ability to pay child support. Robert's attorney responded that Wendi's attorney had also engaged in acts that caused litigation costs to increase, including filing a request for a temporary restraining order and not responding to Robert's request for a stipulation to continue the trial. He also argued there was no evidence his client had the ability to pay attorney fees. As to Robert's ability to pay, Wendi's attorney pointed out that Robert had paid \$15,000 to the private investigator, \$62,000 in attorney fees as of October 2009, and had "borrowing capacity" of over \$2,000,000. She also noted that he had stated in declarations that he made "somewhere between \$5 and [\$]6,000 a month" as a day trader.⁴ The trial court took the matter under submission and issued an order regarding attorney fees on November 23, 2010.

In its November 23, 2010 order, the trial court found that an award of attorney fees against Robert under Family Code section 271—which allows for fees where a party frustrates the policy of the law to promote settlement—was warranted. The court found that Robert filed a contempt action against Wendi for inconsequential conduct, waited until the eve of trial to seek a continuance of the trial, and failed to pay Dr. Perry's fees or his own attorney's fees. The court stated, "[Robert's] response is

³ Robert testified he had not paid any court-ordered child support.

⁴ Robert testified at trial that he invests in the stock market and is "a day-trader." Wendi's attorney asked him, "the corrected interrogatory answer . . . [¶] . . . [¶] . . . [¶] stated you earn 5 to 6 thousand dollars a month in the sale of stocks and investments? [¶] Do you see that?" She asked whether he had a recollection of earning \$5,000 to \$6,000 in or about August 2009. Robert responded, "August of 2009? It's possible. [¶] Depends on the day. Trading, one day you make money, one day you lose money. . . . So let's say today I buy Google for \$10,000 or \$12,000. The next day it can go down to \$5,000, or next day it can go up to \$12,000. So it depends on the day if I make money or los[e] money. [¶] But in one month I'll make \$6,000, next month I'll lose \$10,000. So sometimes I'll be making money."

poverty. However, the record reflects [his] ability to go through huge sums of money, to pay a private investigator to track [Wendi], to file conflicting financial declarations and to fail to challenge a ruling attributing income to [him] of \$10,000 per month. Simply put, [Robert's] plea of poverty is not persuasive.” The court awarded \$10,040 in fees to Wendi for having to respond to the contempt action and to Robert's last minute request to continue the trial.

Robert filed a notice of appeal on January 14, 2011, stating he was appealing from the Judgment entered November 19, 2010.

DISCUSSION

1. December 18, 2009 child support order

Robert contends the December 18, 2009 child support order must be reversed because the trial court abused its discretion in imputing income to him of \$10,000 per month. However, as noted, Robert stated in his notice of appeal that he was appealing from the Judgment entered November 19, 2010. He made no mention of the child support order of December 18, 2009. A notice of appeal must specifically identify the order or judgment from which the appellant seeks review. (Cal. Rules of Court, rule 8.100(a).) When a notice of appeal omits any reference to the order from which the party purports to appeal, the reviewing court has no jurisdiction to review the propriety of that order. (*Norman I. Krug Real Estate Investments, Inc. v. Praszker* (1990) 220 Cal.App.3d 35, 46-47.) Moreover, a notice of appeal must be filed at most 180 days after entry of judgment, (Cal. Rules of Court, rule 8.104(a)), and it is settled that temporary child support orders are appealable orders (e.g., *In re Marriage of Skelley* (1976) 18 Cal.3d 365, 367; *In re Marriage of Guigne* (2002) 97 Cal.App.4th 1353, 1359; Fam. Code, § 3554; Code Civ. Proc., § 904.1, subd. (a)(10)). Because the child support order was an appealable order, yet Robert did not file a notice of appeal until January 14, 2011, over *a year* after the court issued the child support order, the appeal is also untimely, and we are without jurisdiction to consider it. (Code Civ. Proc., § 906; *In re Marriage of Padilla* (1995) 38 Cal.App.4th 1212, 1216, citing Code

Civ. Proc., § 906 and *Kinoshita v. Horio* (1986) 186 Cal.App.3d 959, 962.)⁵

Accordingly, the appeal from the December 18, 2009 child support order is hereby dismissed.

2. November 19, 2010 Child Custody Order

a. Family Code section 3044 presumption

“The standard of appellate review of custody and visitation orders is the deferential abuse of discretion test.” (*In re Marriage of Burgess* (1996) 13 Cal.4th 25, 32.) In an initial custody determination, a trial court, considering all of the circumstances, has the widest discretion to choose a parenting plan that is in the best interests of a child. (*Id.* at pp. 31-32; Fam. Code, § 3040, subd. (b).⁶) In making a determination of the best interests of a child, a trial court should consider various factors, including the health, safety, and welfare of the child (§ 3011, subd. (a)), the nature and amount of contact with both parents (§ 3011, subd. (c)), and which parent is more likely to allow the child frequent and continuing contact with the noncustodial parent (§ 3040, subd. (a)(1)). A trial court abuses its discretion if “there is no reasonable basis upon which the court could conclude that its decision advanced the best interests of the child.” (*In re Marriage of Melville* (2004) 122 Cal.App.4th 601,

⁵ In *In re Marriage of Padilla*, a father filed a notice of appeal on September 23, 1994, stating he was appealing from an August 22, 1994 order and “from any prior proceeding or ruling within the parameters of Code of Civil Procedure § 906.” (38 Cal.App.4th at pp. 1215-1216.) In his opening brief, he challenged the August 22, 1994 order as well as a January 26, 1994 order denying his motion for modification of child support. (*Id.* at p. 1216, fn. 1.) The Court of Appeal held it had no jurisdiction to review the January 26, 1994 order because the father had “waited too long to complain about [it].” (*Id.* at p. 1216.) The Court rejected the father’s argument that the January 26, 1994 order was interlocutory, holding, “[Father] misunderstands the nature of the January 26 order. He wanted the support order decreased; [Mother] wanted it increased. The court denied [Father’s] request. The resulting order was neither interlocutory nor intermediate but a final determination. As an injured party he could have appealed; having failed to do so, he cannot be heard to complain now.” (*Ibid.*)

⁶ All further statutory references are to the Family Code unless otherwise stated.

610.) “[A]ll exercises of legal discretion must be grounded in reasoned judgment and guided by legal principles and policies appropriate to the particular matter at issue.” (*People v. Russel* (1968) 69 Cal.2d 187, 195, superseded by statute on another ground as noted in *People v. Anderson* (2001) 25 Cal.4th 543, 575.) Thus, a discretionary decision may be reversed if improper criteria were applied or incorrect legal assumptions were made. (*Linder v. Thrifty Oil Co.* (2000) 23 Cal.4th 429, 435-436.) The appellant bears the burden of showing a trial court abused its discretion. (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.)

Section 3044, subdivision (a), provides: “Upon a finding by the court that a party seeking custody of a child has perpetrated domestic violence against the other party . . . within the previous five years, 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 This presumption may only be rebutted by a preponderance of the evidence.” A person is determined to have “ ‘perpetrated domestic violence’ when he or she is found by the court to have intentionally or recklessly caused or attempted to cause bodily injury, or sexual assault, or to have placed a person in reasonable apprehension of imminent serious bodily injury to that person or to another, or to have engaged in any behavior involving, but not limited to, threatening, striking, harassing, destroying personal property or disturbing the peace of another, for which a court may issue an ex parte order pursuant to Section 6320 to protect the other party seeking custody of the child” (§ 3044, subd. (c).) “[T]he 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 any crime against the other party that comes within the definition of domestic violence contained in Section 6211 and of abuse contained in Section 6203” (§ 3044, subd. (d)(1).) “The requirement of a finding by the court

shall also be satisfied if any court . . . has made a finding pursuant to subdivision (a) based on conduct occurring within the previous five years.” (§ 3044, subd. (d)(2).)

Without much analysis or citation to authority, Robert asserts the trial court should have invoked the presumption under section 3044 because an emergency protective order and a protective order under Penal Code section 136.2⁷ were issued against Wendi in connection with the October 25, 2007, incident in which he suffered a scratch. It appears his argument is that the protective orders constituted a “finding,” as required by section 3044, that Wendi committed domestic violence against him. He acknowledges, however, that Wendi was never convicted of any crime and that the charges were dismissed and never adjudicated. Moreover, he cites no authority to support his position that the issuance of a protective order on an emergency basis or under Penal Code section 136.2—which requires only a “good cause belief” of harm—constituted a “finding” of domestic violence for purposes of section 3044.⁸ Thus, Robert has failed to show that the trial court erred in ruling the presumption did not apply. (See *Yield Dynamics, Inc. v. TEA Systems Corp.* (2007) 154 Cal.App.4th 547, 556-557 [an appellant has the burden of demonstrating reversible error based on adequate legal argument]; *Landry v. Berryessa Union School Dist.* (1995) 39 Cal.App.4th 691, 699-700 [when points are perfunctorily raised, without adequate analysis and authority, we pass them over and treat them as abandoned].)

⁷ The criminal case docket in the case arising from the October 25, 2007 incident shows a protective order was issued against Wendi on November 29, 2007, pursuant to Penal Code section 136.2 [court may issue order upon a “good cause belief” that harm or intimidation has occurred or is reasonably likely to occur], and that the order was lifted after the case was dismissed.

⁸ We note that Wendi also successfully obtained an emergency protective order against Robert, as well as a temporary restraining order, which similarly requires only a lowered burden of proof. (See *Keith R. v. Superior Court* (2009) 174 Cal.App.4th 1047, 1055 [“Domestic violence orders . . . are broader than civil harassment orders, and do not require as high a burden of proof. They may issue with or without notice. (§ 6300.)”])

In any event, even if the protective orders amounted to a finding of domestic violence such that the presumption would apply, there was substantial evidence to support the trial court’s implied finding that the presumption had been rebutted. (See *D’Amico v. Board of Medical Examiners* (1974) 11 Cal.3d 1, 19 [“ ‘If right upon any theory of the law applicable to the case, [a decision] must be sustained regardless of the considerations which may have moved the trial court to its conclusion’ ”].) In determining whether the section 3044 presumption has been overcome, “the court shall consider all of the following factors: [¶] (1) Whether the perpetrator of domestic violence has demonstrated that giving sole or joint physical or legal custody of a child to the perpetrator is in the best interest of the child. . . . [¶] (2) Whether the perpetrator has successfully completed a batterer’s treatment program that meets the criteria outlined in subdivision (c) of Section 1203.097 of the Penal Code. [¶] (3) Whether the perpetrator has successfully completed a program of alcohol or drug abuse counseling if the court determines that counseling is appropriate. [¶] (4) Whether the perpetrator has successfully completed a parenting class if the court determines the class to be appropriate. [¶] (5) Whether the perpetrator is on probation or parole, and whether he or she has complied with the terms and conditions of probation or parole. [¶] (6) Whether the perpetrator is restrained by a protective order or restraining order, and whether he or she has complied with its terms and conditions. [¶] (7) Whether the perpetrator of domestic violence has committed any further acts of domestic violence.” (§ 3044, subd. (b).)

Here, as the trial court stated, Dr. Perry was aware of and considered the October 25, 2007 incident, yet—after meeting with and speaking to the parties at length, observing them interact with their children, reviewing the history of their relationship and legal proceedings, and speaking to various individuals, including the parties’ previous therapist and child custody evaluator—he recommended that Wendi be awarded sole legal and primary physical custody of the children. After observing the parties at trial, the trial court agreed with Dr. Perry’s observations and

recommendations. Moreover, there was evidence that Wendi made various efforts to address the issues that led to the October 25, 2007, incident, including meeting with a therapist on a weekly basis from December 2007 until February 2008 to address anger and other issues, consulting with child therapists, seeking a set visitation schedule in order to minimize the conflict to which her children were exposed, speaking to the Executive Director at Kids Turn, and reading “Good Parenting Through [Y]our Divorce.” The evidence was sufficient to support a determination that Wendi had rebutted the presumption.

Furthermore, “[t]he section 3044 presumption . . . does not change the best interest test, nor supplant other Family Code provisions governing custody proceedings. . . . Nor does the statute establish a presumption for or against joint custody; again, the paramount factor is the child’s health, safety and welfare. [Citations.] And where the section 3044 presumption has been rebutted, there is no statutory bar against an award of joint or sole custody to a parent who was the subject of the order.” (*Keith R v. Superior Court, supra*, 174 Cal.App.4th at p. 1055, fn. omitted.) “The minor child’s best interests must remain at the forefront of the family court’s considerations on custody in determining whether the section 3044 presumption has been rebutted.” (*Id.* at p. 1056.) Here, it was clear the parties were unable to co-parent effectively and that Wendi was the more stable parent. Robert does not challenge that aspect of the court’s decision. Thus, regardless of whether section 3044 applied, there was substantial evidence to support the trial court’s finding that awarding sole legal custody and primary physical custody to Wendi was in the best interest of the children.

b. Excusal of Dr. Perry at Trial

Robert contends the child custody order must be reversed because the trial court failed to make a determination of his ability to pay before excusing Dr. Perry—who had not been paid—from testifying at trial. His argument is not entirely clear but it appears he believes the trial court should have considered his inability to pay and the

reasonableness of Dr. Perry's fees before ordering Robert to pay the fees. In support of his argument, he cites *In re Marriage of Laurenti* (2007) 154 Cal.App.4th 395, 403, in which the Court held, "a trial court must (1) decide whether an evaluator should receive any compensation for his or her services, (2) determine a reasonable amount of compensation and (3) state which party or parties will bear what portion of the fees and costs." He asserts, "At the time of appointment [of Dr. Perry as the evaluator], there was no financial information before the Court to appropriately determine the apportionment of Dr. Perry's fees and costs." As noted, however, the trial court issued its order appointing Dr. Perry on August 25, 2008, and ordered the parties to split Dr. Perry's fees and expenses equally. Robert also signed his name to a stipulation and order that provided he would pay half of Dr. Perry's fees, and never asked the court to review Dr. Perry's bills or determine whether, and how much, Dr. Perry should be compensated for his services. Because Robert did not challenge the reasonableness of Dr. Perry's fees or the order requiring him to pay half of the fees, he has forfeited the contention. (See *In re Marriage of Hinman* (1997) 55 Cal.App.4th 988, 1002.)⁹

c. Bias

Robert contends the child custody order must be reversed because Dr. Perry was biased. We disagree.

In performing an evaluation, the child custody evaluator must, among other things, "[m]aintain objectivity, provide and gather balanced information for both parties, and control for bias," "[n]ot offer recommendations about a party unless that party has been evaluated directly or in consultation with another qualified neutral professional," "[n]ot disclose any recommendations to the parties, their attorneys, or the attorney for the child before having gathered the information necessary to support

⁹ In any event, even assuming a finding of ability to pay was required, we would conclude such a finding would have been supported by substantial evidence, as discussed below in the attorney fees section of this opinion.

the conclusion,” and “[d]isclose to the court, parties, attorney for a party, and attorney for the child conflicts of interest or dual relationships” (Cal. Rules of Court, rule 5.220(h)(1), (3), (9), (10).) Robert asserts Dr. Perry violated all of the above ethical rules. First, he claims Dr. Perry “was prepared to author his evaluation report without any input from [Robert]” when Robert failed to pay his portion of the retainer fee. Second, he states Dr. Perry had the obligation to “elaborate on either actual or possible conflicts of interest” after learning of a potential conflict of interest that arose when Robert hired an attorney who was also representing Dr. Perry in an unrelated matter. Third, he asserts that Dr. Perry “t[ook] sides with [Wendi]” and stated, “ ‘I am under no obligation, legally or ethically, to continue providing free services’ ” Fourth, he asserts Dr. Perry failed to disclose a possible conflict arising from the fact that Dr. Perry’s co-defendant in the unrelated matter was represented by an attorney who shared office space with Wendi’s attorney.

None of the above facts supports a finding that Dr. Perry was biased. First, although Dr. Perry stated he was prepared to author a report without Robert’s input, he did not decline to “consult[] with another qualified neutral professional” (Cal. Rules of Court, rule 5.220(h)(3)) or “gather balanced information,” (*id.*, rule 5.220(h)(1)) as required. He ultimately met with both parties at length, spoke to other professionals who had met with the parties, and conducted home visits before issuing a report that thoroughly addressed the disputed issues of child custody and visitation. Second, the record shows that Dr. Perry contacted the parties promptly upon learning of a possible conflict arising from Robert’s hiring of Dr. Perry’s personal attorney. Robert apparently retained a new attorney immediately after learning of the possible conflict of interest, and he cites no authority supporting his position that Dr. Perry was required to do anything more to address this issue. Third, the fact that Dr. Perry demanded payment of fees legitimately owed does not show he was biased against Robert. Fourth, the connection between Dr. Perry and the attorney who shared office space with Wendi’s attorney is so attenuated that we fail to see how it would have risen to

the level of even a “possible conflict” such that Dr. Perry would be required to report the matter to the parties and the court.

3. November 23, 2010 order regarding attorney fees

Robert contends the trial court erred in awarding attorney fees to Wendi because there was no evidence he had the ability to pay. We reject the contention.¹⁰

Section 271 provides that a court may award attorney fees and costs “on the extent to which the conduct of each party or 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. An award of attorney’s fees and costs pursuant to this section is in the nature of a sanction. In making an award pursuant to this section, the court shall take into consideration all evidence concerning the parties’ incomes, assets, and liabilities. The court shall not impose a sanction pursuant to this section that imposes an unreasonable financial burden on the party against whom the sanction is imposed. In order to obtain an award under this section, the party requesting an award of attorney’s fees and costs is not required to demonstrate any financial need for the award.” Sanctions under section 271 are committed to the discretion of the trial court, and will be reversed on appeal only on a showing of abuse of that discretion; that is, “only if, considering all of the evidence viewed most favorably in its support, and indulging all reasonable inferences

¹⁰ Robert failed to list the November 23, 2010 attorney fees order in his notice of appeal. As noted, a notice of appeal must specifically identify the order from which the appellant seeks appellate review (Cal. Rules of Court, rule 8.100(a)), and when there is no reference to the order from which the party purports to appeal, we have no jurisdiction to review the propriety of that order (*Norman I. Krug Real Estate Investments, Inc. v. Praszker, supra*, 220 Cal.App.3d at pp. 46-47). However, the rules require, and the Supreme Court has instructed, that a “ “notice of appeal shall be liberally construed in favor of its sufficiency.” ’ ’ ” (*Walker v. Los Angeles County Metropolitan Transportation Authority* (2005) 35 Cal.4th 15, 20; Cal. Rules of Court, rule 8.100(a)(2).) Thus, because the trial court specifically reserved the issue of attorney fees in its Judgment and Robert listed the November 23, 2010 order in his Civil Case Information Statement as an order from which he was appealing, we decline to dismiss the appeal and shall address the contention on its merits.

in its favor, no judge could reasonably make the order.” (*In re Marriage of Corona* (2009) 172 Cal.App.4th 1205, 1225-1226.)

Robert does not challenge the basis upon which the trial court awarded attorney fees as sanctions, i.e., that he “frustrate[d] the policy of the law to promote settlement of litigation and . . . reduce the cost of litigation” Rather, his only complaint with respect to the order is that the trial court improperly “focus[ed] on [his financial status and] completely ignore[d] the factual issues surrounding [Wendi’s] concealment and misrepresentation of her financial status” However, the trial court had before it financial information from both parties in the form of income and expense declarations and tax returns, and we presume the court considered them in reaching its decision. (See Evid. Code, § 664 [presumption that judicial duty is properly performed].) Moreover, because Wendi was not required to demonstrate a financial need for an award of sanctions under section 271, but the trial court was required to find the award would not “impose[] an unreasonable financial burden” on Robert (§ 271, subd. (a)) , it was reasonable for the court to focus on Robert’s financial status.

As to the sufficiency of the evidence to support the court’s finding that an award of sanctions would not be an unreasonable burden, Robert challenges the finding by asserting he “is no longer able to borrow funds from the sources identified [in his prior income and expense declaration], nor has he been able to borrow funds from any other source.” The trial court found, however, that Robert’s claims of poverty were not credible based on the fact that he had the “ability to go through huge sums of money, to pay a private investigator to track [Wendi], to file conflicting financial declarations and to fail to challenge a ruling attributing income to [him] of \$10,000 per month.” In addition, Dr. Perry stated in his report that Robert told him he was “ ‘back on [his] feet financially’ and might surprise Wendi by buying her a car. There was also evidence that Robert had the funds to pay for private school for the

children. Robert has not shown that the trial court abused its discretion in awarding attorney fees to Wendi in the amount of \$10,000.¹¹

DISPOSITION

The appeal from the December 18, 2009 child support order is hereby dismissed. The child custody judgment of November 19, 2010, and the attorney fees order of November 23, 2010, are affirmed. Petitioner Wendi Norris shall recover her costs on appeal.

McGuiness, P.J.

We concur:

Pollak, J.

Jenkins, J.

¹¹ Wendi requests sanctions against Robert on the ground the appeal is frivolous. The request is procedurally improper. A party seeking sanctions on appeal must file a separate motion for sanctions. (Cal. Rules of Court, rule 8.276.) Wendi did not file a separate motion and is therefore not entitled to be heard on the subject. The request for sanctions is denied.