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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

In re the Marriage of JOAN SOLARI and  
STEPHEN J. SOLARI.

JOAN SOLARI,  
Appellant,

v.

STEPHEN J. SOLARI,  
Respondent.

A139492

(San Mateo County  
Super. Ct. No. F0116103)

Joan Solari (Joan)<sup>1</sup> appeals from the trial court's judgment awarding her and her former husband Stephen Solari (Stephen) joint legal and physical custody of their now-13-year-old daughter and 11-year-old son.<sup>2</sup> She contends the custody order must be reversed because the trial court failed to make the requisite findings that Stephen had overcome the presumption against joint custody for perpetrators of domestic violence. We reject the contention and affirm the judgment.

<sup>1</sup>We refer to the parties, who share the same last name, by their first names for ease of reference; we intend no disrespect.

<sup>2</sup>The judgment also included an order denying Joan's request for a permanent civil restraining order against Stephen. Joan does not challenge that portion of the judgment.

## FACTUAL AND PROCEDURAL BACKGROUND

Joan and Stephen were married on February 14, 2000 and had a daughter in 2002 and a son in 2004. Their marriage was often characterized by conflict, and for several years before they separated in December 2011, they stayed in separate sleeping quarters, with Joan in the master bedroom and Stephen in the basement. According to Stephen, Joan regularly called him derogatory names and on one occasion, spit in his face. Joan denied this and testified that Stephen was unstable, having threatened suicide a number of times during their marriage—a claim Stephen disputed.

The parties' contentious relationship reached a breaking point at the end of 2011, when Stephen stabbed a \$4,000 mattress with a knife on December 9, 2011, and Joan reported the incident to the Atherton Police Department on December 13, 2011. The specifics of what occurred on December 9, 2011 were in dispute. The trial court found after trial:<sup>3</sup> "Stephen became angry over Joan's purchase of a new bedroom mattress. Prior to the incident, the parties had a highly conflicted relationship. Stephen, in his anger, obtained an eight inch knife from the residential basement. He walked with this knife through the residential dining room and living room where the parties' children were seated. He did not display the knife to the children and there was no evidence that they saw the knife."

"Stephen walked, with the knife, up the stairs and into the master bedroom. There was testimony that Stephen was upset with the barking dog that was then caged in the bedroom and that Stephen threatened to harm the dog with the knife. The court does not find that this portion of the incident, if true, played a significant part in the domestic violence. [¶] . . . With Joan standing at the bedroom entrance, Stephen pulled off a portion of the bed sheets and covers and plunged the knife into the mattress at least two times. He then proceeded to leave the bedroom. [¶] . . . Joan had, at this point, retreated to the stairwell where she attempted to block Stephen's exit, apparently afraid that his anger and the knife would be upsetting to the children. Stephen pushed her aside and in

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<sup>3</sup>The facts relating to the knife incident are taken from the trial court's Final Statement of Decision and Amended Order After Hearing of June 12, 2013.

doing so caused Joan's arm and back to be bruised. He never brandished the knife at Joan or threatened her with it. After getting by Joan, Stephen left the house without showing the knife to the children or involving them in the incident.”

The December 9, 2011 incident led to the issuance of a civil domestic violence temporary restraining order against Stephen as well as criminal charges with related restraining orders. The family court trial on the issue of whether a permanent civil restraining order should issue, and on the issue of custody and visitation, was continued several times pending the criminal case. The criminal case concluded on February 19, 2013, when Stephen entered a no contest plea to vandalism (Pen. Code, § 594, subd. (b)(1)). As part of the plea, the criminal court made no domestic violence conditions and stated that the conditions of probation and the criminal protective orders would follow the family court's orders.

After the December 9, 2011 incident, Stephen did not see the children until April 16, 2012. He testified at length about the continuous efforts he made to maintain contact with them, including trying to send them cards and asking that his emails be forwarded to them during the time the restraining order did not include the children. Once supervised visits began in April 2012, Joan directed that visits occur in the library, with Stephen supervising the children doing their homework. After Joan fired the first visitation supervisor, Stephen did not see the children during the two months it took to find another supervisor. A subsequent supervisor testified that Joan wanted to dictate what would happen with the visits and was inflexible with regard to visits. Stephen testified that he asked to speak to his daughter, and later, his son, on their birthdays, but that his requests were denied. He did not see the children on Father's Day. On one occasion, Joan called to tell him, “Don't try to crawl back into the children's lives. They don't want you. They don't want to be seen with you. Nobody in this town wants anything to do with you.” When Stephen asked why, Joan replied, “Because they know you are a violent psychopath.” “Your criminal record speaks for itself. No parents are going to trust their child at your house on a play date. Stop trying to invite them.”

Stephen continued to see the children and began overnight visits with them in or about March 2013.

At a May 2013 trial on the issue of whether a permanent restraining order should issue, and on the issue of custody and visitation, several witnesses testified regarding the parties' character and parenting. A former babysitter who had known the family since 2005 testified that Joan was a good mother, and that she never saw Joan speak harshly to Stephen. One witness whose son went to school with the parties' son testified that Joan was "an extremely fit, involved and loving parent" who organized and facilitated all of the children's activities. She saw both Joan and Stephen pick up their son from school. Another parent testified that Joan was a very engaged and loving mother who helped the children with their homework and school activities. A third witness testified that Joan was involved in the parent teacher organization, volunteered in the classroom, and drove the children to sports events and school functions. Joan testified that she took the children to most of their school and outside activities, to almost all of their medical appointments, and to all dental appointments. In response to allegations that she drank regularly, she called several witnesses, all of whom testified that they never saw her drinking heavily in front of the children. She testified that at the time of trial, she was no longer drinking because she realized that the medication she took for her depression did not mix well with alcohol.

Several witnesses testified that Stephen was mellow, fun, caring, and loving and appropriate with the children. He worked from home and therefore spent significant time with the children on both weekdays and weekends. Almost every evening, he cooked the children's dinner and had dinner with them. He helped them with their homework, did projects with them, was a referee for the soccer team, and told them stories and put them to bed every night. The visitation supervisor testified the children were affectionate with their father during visits, engaged him freely in play, reading, and other activities, and never expressed or exhibited any fear of him. They never sought out the supervisor's help or expressed any concerns to her in or out of his presence. The supervisor had no concerns about Stephen being with the children. Joan told the children that their father

was mentally ill, and her attorney represented to the court that Stephen had a history of bipolar disorder, but there was nothing in the record indicating he had ever been diagnosed with bipolar disorder.<sup>4</sup>

Before the end of trial, Stephen requested a Statement of Decision. The trial court issued a preliminary Statement of Decision on May 8, 2013, to which Joan submitted objections and Stephen submitted a response to the objections. On June 12, 2013, the court issued a Final Statement of Decision and Amended Order After Hearing in which it found: “Regardless of Stephen’s intent in grabbing the knife and in ‘stabbing’ the mattress, the incident was inexcusable and was certainly justification for an emergency protective order and a temporary domestic violence restraining order.” “There was no history of physical violence prior to this incident or following the incident. There were mutual allegations of verbal abuse by each party against the other prior to the incident and these interactions surely [led] to the acceleration of the conflict resulting in the knife incident.”

The trial court further found: “Following the [December 9, 2011] incident there has been no further direct physical conflict between the parties. There have been emails and text messages between them that, at times, bordered on violation of the restraining orders but not to the extent that the criminal court or this court deemed significant enough for further orders. The police, at times, have been involved with the parties since the incident but no actions resulted against Stephen as a result of any of the police intervention.” “The court finds that the children have never been, and are not now, in danger because of the conduct of Stephen. The court finds that Stephen is not currently a danger to Joan and is not likely to be so in the future.”

In denying Joan’s request for a permanent civil restraining order, the trial court stated: “At a hearing for a permanent domestic restraining order, the court considers not

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<sup>4</sup>A psychiatrist Stephen had been seeing testified that Stephen suffered from depression but was not suicidal and did not pose a danger to Joan or to their children. He believed that while Stephen had “sort of a dramatic style at times,” that style of expression was reflective of “exasperation,” rather than an indication of any violent tendencies.

only the underlying actions of the parties but also the appropriate duration for a permanent restraining order. Because of the lengthy period that the temporary restraining orders ran, we are now almost 17 months post incident. There are no longer any significant grounds for a continuing restraining order to protect Joan.”

As to custody, the trial court found that the December 9, 2011 incident was “an act of domestic violence.” It found the “domestic violence action did not involve physical abuse against Joan and did not harm the minors in any way,” and stated: “After considering all of the factors contained in Family Code Section 3044(b), the court finds that Stephen has rebutted the presumption under Family Code Section 3044 that joint legal and physical custody would be detrimental to the best interest of the children.” The court awarded the parties joint legal and physical custody of the children and set forth in detail how the parties were to share custody.

On August 12, 2013, Joan filed a notice of appeal from the June 12, 2013 Final Statement of Decision. Thereafter, on August 19, 2013, the trial court issued a Judgment memorializing its findings from the June 12, 2013 Final Statement of Decision. We hereby deem Joan’s notice of appeal to have been filed from the August 19, 2013 judgment. (Cal. Rules of Court, rule 8.104(d)(2) [reviewing court may treat a notice of appeal filed after the superior court has announced its intended ruling, but before it has rendered judgment, as filed immediately after entry of judgment].)<sup>5</sup>

### **DISCUSSION**

Joan contends the trial court’s order granting her and Stephen joint legal and physical custody of their children must be reversed because the court failed to make the

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<sup>5</sup>On December 5, 2014, Stephen moved to dismiss this appeal on the grounds that Joan’s appeal was premature, and that the “appeal has been rendered moot” by a request for modification of custody that she had subsequently filed. We deny the motion to dismiss. As noted, we deem Joan’s premature notice of appeal to have been filed from the August 19, 2013 judgment. Further, the fact that Joan initiated modification proceedings based on incidents that occurred post-judgment does not render the instant appeal moot. (See *In re I.A.* (2011) 201 Cal.App.4th 1484, 1490 [an appeal is moot only “when it is impossible for the appellate court to grant the appellant relief”].)

requisite findings that Stephen had overcome the presumption against joint custody for perpetrators of domestic violence. We reject the contention.

Family Code section 3044, subdivision (a),<sup>6</sup> provides in part: “Upon a finding by the court that a party seeking custody of a child has perpetrated domestic violence against the other party seeking custody of the child . . . 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, pursuant to Section 3011 [list of factors to consider in determining the best interest of the child]. This presumption may only be rebutted by a preponderance of the evidence.” “[A] person has ‘perpetrated domestic violence’ when he or she is found by the court . . . to have engaged in any behavior involving, but not limited to, threatening, striking, harassing, destroying personal property or disturbing the peace of another . . . .” (§ 3044, subd. (c).) There are seven factors to be considered when determining whether the presumption has been overcome: (1) the best interest of the child; (2) successful completion of a year-long batterer’s program; (3) successful completion of an alcohol or substance abuse class if appropriate; (4) successful completion of a parenting class if appropriate; (5) whether the perpetrator is on probation or parole and is complying with those terms and conditions; (6) whether the perpetrator is being restrained by court order and is complying with the terms of such an order; and (7) whether the perpetrator has committed further domestic violence. (§ 3044, subd. (b).)

“The section 3044 presumption . . . does not change the best interest test, nor supplant other Family Code provisions governing custody proceedings. This presumption may be overcome by a preponderance of the evidence showing that it is in the child’s best interest to grant joint or sole custody to the offending parent. (§ 3044, subd. (b)(1).) 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

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<sup>6</sup>All further statutory references are to the Family Code unless otherwise stated.

award of joint or sole custody to a parent who was the subject of the order.” (*Keith R. v. Superior Court* (2009) 174 Cal.App.4th 1047, 1055, fn. omitted.)

On appeal, custody and visitation orders are reviewed for an abuse of discretion, and the trial court’s factual findings are reviewed under the substantial evidence standard. (*In re Marriage of Fajota* (2014) 230 Cal.App.4th 1487, 1497.) An abuse of discretion may be shown if the court “applies improper criteria or makes incorrect legal assumptions.” (*Ibid.*, italics omitted.) “If the record affirmatively shows the trial court misunderstood the proper scope of its discretion, remand to the trial court is required to permit that court to exercise informed discretion with awareness of the full scope of its discretion and applicable law.” (*F.T. v. L.J.* (2011) 194 Cal.App.4th 1, 26, italics omitted.)

Here, Joan argues that the trial court’s “cursory determination that the presumption . . . had been rebutted” shows the court “misinterpreted and misapplied” section 3044. She cites no relevant authority supporting her position that the court was required to discuss all of the evidence that might bear on its determination under section 3044, including all of the statutory factors set forth in subdivision (b). In any event, it is apparent from the court’s written orders that it fully understood the section 3044 presumption, its applicability to the case, the factors to be considered, and the burden Stephen had to overcome the presumption against joint custody.

For example, the trial court cited section 3044 in its orders, found it was applicable, expressly stated it had “consider[ed] all of the factors contained in [the section],” and found that Stephen had overcome the presumption. It heard extensive testimony regarding the best interest of the children—the first factor set forth in section 3044, subdivision (b)—including the frequency and nature of the parties’ relationship to them and the parties’ substance abuse or mental health issues. It made specific findings relating to best interest, including whether the children were affected by the knife incident, and how they “have never been, and are not now in danger because of the conduct of Stephen.” The court also considered the fifth factor of whether Stephen was complying with any probation conditions when it noted the criminal court’s ruling

that “the conditions of probation and the criminal protective orders would follow the Family Law Court . . . custody and visitation orders.” It also considered the sixth and seventh factors—compliance with restraining orders, and further domestic violence incidents—when it found there had been no restraining order violation “significant enough for further orders” and no physical contact between the parties during the lengthy period of time—almost 17 months—the temporary restraining order had been in effect.<sup>7</sup> In light of the court’s awareness of the applicability of section 3044 and its statements relating to why the presumption was overcome, we are not persuaded by Joan’s contention that the “cursory” nature in which the court discussed the presumption shows it “misinterpreted and misapplied” the law.

We also understand Joan to argue that the trial court was required to state its reasons for granting joint custody under three additional statutes—section 3011, subdivision (e)(1), section 3082, and Code of Civil Procedure section 632—all of which provide support for the position that a court is required to state its reasons for granting joint custody.<sup>8</sup> We reject this argument in light of our conclusion above that the court in this case provided sufficient analysis and reasoning as to why joint custody was appropriate in this case. In any event, even if we were to accept that the court’s

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<sup>7</sup>As to the remaining three factors—completion of a year-long batterer’s program, completion of an alcohol or substance abuse class, if appropriate, and completion of a parenting class, if appropriate—there is nothing in the record indicating that Stephen was required to take these programs or classes as part of his no contest plea to vandalism, or that these issues required discussion or analysis in the court’s determination of whether the presumption had been overcome.

<sup>8</sup>Section 3011, subdivision (e)(1), which applies to situations in which there are allegations of abuse made against one parent, provides that the trial court “shall state its reasons in writing or on the record” when finding that that parent is entitled to sole or joint custody. Section 3082 provides that “[w]hen a request for joint custody is granted or denied, the court, upon the request of any party, shall state in its decision the reasons for granting or denying the request.” Code of Civil Procedure section 632 provides requires the court, upon the request of any party appearing at the trial, to “issue a statement of decision explaining the factual and legal basis for its decision as to each of the principal controverted issues at trial.”

statements were inadequate under any of the Family Code sections, we would reject her contention on the ground that she has failed to show prejudice.

In conducting our appellate review, we presume that a judgment or order of a lower court is correct. “ ‘All intendments and presumptions are indulged to support [the judgment] on matters as to which the record is silent, and error must be affirmatively shown.’ ” (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 564; *Conservatorship of Rand* (1996) 49 Cal.App.4th 835, 841.) Therefore, the appellant “has the burden of showing reversible error,” (*Ballard v. Uribe* (1986) 41 Cal.3d 564, 574), i.e., that the error complained of resulted in a “miscarriage of justice” in that “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).

Here, Joan does not explain how it is reasonably probable she would have achieved a more favorable result if the trial court had conducted a more thorough analysis, or had discussed in greater detail its reasoning for awarding joint custody to the parties.<sup>9</sup> In fact, she acknowledges she is not challenging “whether substantial evidence supports the trial court’s Order,” and does not discuss the evidence. She refers, for example, to the court’s failure to discuss the section 3044 factors more thoroughly, but does not explain how any of the factors would have weighed in favor of a finding that Stephen had not overcome the presumption. She does not assert there were any probation conditions, or any evidence that Stephen had violated those conditions. She does not argue that the record contains substantial evidence of a violation of restraining orders, and does not assert there were any further acts of domestic violence. She does not attempt to make any showing that the joint custody order was not in the best interest of the children. In sum, she has failed to show any likelihood that the result would have been more favorable to her in the absence of error.

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<sup>9</sup>She asserts, in a conclusory manner: “Here, there is certainly a ‘reasonable chance’ that, upon a proper application of Family Code section 3044 and the other governing statutes, the trial court may, upon a more thorough review, have denied Stephen’s request for joint custody.”

**DISPOSITION**

The judgment is affirmed. Respondent Stephen Solari shall recover his costs on appeal.

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McGuiness, P.J.

We concur:

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Pollak, J.

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Jenkins, J.

*In re Marriage of Solari*, A139492