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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

PENNELYS DROZ,

Plaintiff and Appellant,

v.

TRINIDAD GOODSHIELD,

Defendant and Respondent.

A140143

**(Humboldt County
Super. Ct. No. FL100100)**

Pennelys Droz appeals from a judgment of the trial court awarding joint physical and legal custody of her three children to her and their father, respondent Trinidad Goodshield. Droz contends the trial court erred by failing to require Goodshield to show a significant change of circumstances before modifying what she views as a prior permanent custody order. She argues the trial court committed further error by failing to apply the rebuttable presumption of Family Code section 3044¹ against awarding custody to Goodshield, whom she claims had been previously found to have committed domestic abuse.

Droz raised neither of these issues in the court below. Consequently, the well established doctrines implied waiver, invited error, and theory of trial prevent us from reaching them on appeal. Droz's failure to raise these matters in the trial court thus forecloses her challenges to the trial court's rulings. Accordingly, we will affirm the judgment.

¹ All statutory references are to the Family Code.

FACTUAL AND PROCEDURAL BACKGROUND

Droz and Goodshield began dating in 1999. They have three children.² The couple lived together with their children until 2009, when Droz and Goodshield separated. Thereafter, Droz moved with the children to Tucson, Arizona, where she pursued a Ph.D.

In February 2010, Droz filed a petition to establish parental relationship in Humboldt County Superior Court. Three months later, Goodshield filed a motion seeking shared custody of the children and a response to Droz's petition.

On June 18, 2010, Judge Christopher G. Wilson³ held a hearing on Goodshield's motion, and Droz informed the court the parties had reached an agreement. Their agreement was memorialized on a superior court form entitled "STIPULATION AND ORDER." A handwritten notation next to the title says "Permanent." The terms of the stipulation are also handwritten and were filled in by Goodshield. The terms state Droz "shall have full legal custody with . . . Goodshield having guaranteed visitation and extended sleepovers with prior notice; essentially, sharing parental duties." Droz agreed not to seek child support in return for Goodshield's agreeing to legal custody. The stipulation further provides Droz "shall have full physical custody as she temporarily relocates to Tucson, Arizona Full physical custody shall be open for renegotiation upon her guaranteed return to Humboldt County, California." Droz "verbally agreed to return home to Humboldt County in December of 2012 where they can both be active parents again for the well being" of the children.

Droz and Goodshield signed the June 18, 2010 stipulation, and Judge Wilson made it an order of the court (hereafter "the Stipulated Order"). At the hearing, Judge Wilson told the parties, "I have your agreement and you've labeled that as a permanent

² Droz was pregnant when the two met, and Goodshield is not the father of her oldest son. Nevertheless, Goodshield has treated the oldest son as his own child.

³ "Although it is not generally our custom to identify judges by name, in order to give proper context to the procedural history of this case we consider it helpful to identify the several different judges who made the various rulings." (*In re Marriage of Fajota* (2014) 230 Cal.App.4th 1487, 1491, fn. 2.)

agreement, so what that means is there would have to be some change in circumstances before you come back to court to request modification.” The court’s minute order states, “A permanent agreement was reached.”

On November 30, 2010, Droz filed a request for a domestic violence prevention order (Judicial Council Form DV-100) after a confrontation with Goodshield. Attached was a child custody, visitation, and support request (Judicial Council Form DV-105). On December 6, Goodshield filed his own request for a domestic violence prevention order based on the same incident. The court set a hearing on both requests for December 17, 2010.

At the hearing before Judge Timothy P. Cissna, Goodshield withdrew his request for a restraining order against Droz. The court asked Goodshield whether he agreed to the terms of the requested order stating that he not “harass, attack, strike, threaten, assault, hit . . .” Droz. While he did not agree with Droz’s accusations, Goodshield agreed to those terms, as well as to a stay away condition. After hearing testimony from both parties, the court agreed to issue the personal conduct and stay away orders to which Goodshield did not object. It denied Droz’s request that Goodshield be ordered to participate in a batterer’s intervention program, as it saw no legal basis for it. The court directed Droz to draft an order incorporating its rulings and to submit the order to the court for signature. No such order appears in the record.

Droz failed to return to Humboldt County as promised in December 2012. As a consequence, in February 2013, Goodshield filed a request to modify custody. He asked for “equal legal and physical custody” of the three children. He explained he was seeking the change because Droz had not complied with the provision of the Stipulated Order guaranteeing her return to Humboldt County.

Droz filed a response, and in her attached declaration, she discussed the Stipulated Order and referred to a document dated December 17, 2010, which she “believed was the legally binding agreement.” That document, like the Stipulated Order, was a superior court “stipulation and order” form containing handwritten terms. It stated, “Pennelys Droz receives the personal restraining order as outlined. Pennelys also retains full legal

and physical custody. [¶] Trinidad Goodshield retains visitation as agreed previously, whenever he can pursuant to one day[']s notice, and does not have to pay child support.” Both Droz and Goodshield signed the document, but it was not signed by a judicial officer and bears no indication it was filed with the court.

The parties were referred to mediation on March 18, 2013. The mediator met with both Droz and Goodshield and interviewed all three children. The mediator noted Droz was seeking sole legal and physical custody of the children with only supervised visitation for Goodshield. Goodshield was seeking joint legal and joint physical custody and visitation during their summer and winter breaks without supervision. The mediator concluded it would not be in the children’s best interests to modify the custody order. In the mediator’s view, Goodshield needed to “show consistency of financial support for the children and to make some effort to visit [them] in Arizona.” Goodshield disagreed with the mediator’s report and recommendation, and the matter was set for a contested hearing.

On May 2, 2013, Goodshield, now represented by counsel, filed request for “Enforcement of Order Re: Residence of Minors.” He sought enforcement of the provision of the Stipulated Order requiring the return of the children to Humboldt County. In his attached declaration, Goodshield contended Droz was in violation of the stipulation’s requirement that she return with the children to Humboldt County in December 2012. In her response to Goodshield’s request, Droz, who now also had counsel, sought an order that the children remain with her, that she continue to retain sole physical and legal custody, and that she be permitted to determine the children’s residence. She further asked that “the June 2010 orders [*sic*] be modified to permit same.” In a statement attached to her response, Droz contended she had signed the Stipulated Order only because she had been uninformed about the process and about her “ability to have protection[.]”

Droz’s counsel filed a pretrial statement in advance of the contested hearing. It defined the issues to be decided as “determination of legal and physical custody, visitation, and residence of the minors.” Counsel reiterated Droz’s agreement with the

mediator's finding that modification of the custody order would not be in the children's best interest.

The contested hearing began on June 10, 2013, before Judge Joyce D. Hinrichs. Both Droz and Goodshield testified. The court ruled it would admit evidence concerning the enforceability of the Stipulated Order. During the hearing, the court repeatedly indicated it would issue specific orders regarding visitation and custody. After the close of the evidence, counsel for Goodshield argued Droz had violated the terms of the Stipulated Order and contended "this Court either has to order a full-blown change of custody from the mom to the dad, to enforce [the Stipulated Order], or modify it." Droz's counsel asked the court to decide whether the Stipulated Order "means that [Droz is] supposed to return to Humboldt County to change the residence of the children permanently back to Humboldt County."

The court issued a ruling on July 16, 2013. It filed its findings and order after hearing on August 20, 2013. It found the matter before it was "an initial custody determination[.]" It ordered Droz and Goodshield to share custody of the children, with Droz having physical custody during the school year so long as she resides in Tucson, and Goodshield having physical custody during summer break. If Droz moves from Pima County, Arizona, the children are to reside in Humboldt County. If Droz does not return to Humboldt County, then Goodshield is to have custody during the school year. If Droz returns, then the parents shall share physical custody equally. The court made further specific orders governing shared physical custody on long weekends and holidays.

Droz then filed a notice of appeal.

DISCUSSION

Droz raises two issues on appeal. She first contends the trial court applied the wrong standard in making its order because it failed to require a showing of significant change in circumstances before modifying the Stipulated Order. Second, she argues the trial court erred by failing to apply the rebuttable presumption of section 3044 against awarding sole or joint custody to Goodshield, whom she claims perpetrated domestic violence against her.

In response, Goodshield first raises a number of procedural arguments. He argues Droz has forfeited the changed circumstances issue by failing to raise it in the trial court. He also contends that in reviewing the trial court's findings of fact, we should invoke the doctrine of implied findings because Droz failed to request a statement of decision. (See, e.g., *In re Marriage of Arceneaux* (1990) 51 Cal.3d 1130, 1133-1134.) Regarding the section 3044 presumption, Goodshield argues Droz failed to present evidence of any finding he had perpetrated domestic violence.

We agree with Goodshield that Droz may not raise these issues on appeal. Here, the doctrines of implied waiver, invited error, and theory of trial combine to preclude her from seeking reversal based on issues she failed to raise in the trial court.

I. *Droz Forfeited the Issue of the Change Circumstances Standard by Failing to Raise it Below.*

Droz contends the Stipulated Order was a final or permanent custody order. A consequence of this, she argues, is that the trial court was required to apply “the so-called changed circumstance rule, [under which] a party seeking to modify a permanent custody order can do so only if he or she demonstrates a significant change of circumstances justifying a modification.” (*Montenegro v. Diaz* (2001) 26 Cal.4th 249, 256.) Because the trial court failed to apply this standard, she contends it committed reversible error, and we must vacate its decision.

As Goodshield points out, however, Droz failed to raise the changed circumstances standard at any time before or during trial. He therefore argues we should disregard Droz's argument on this point. Droz, on the other hand, contends she has not forfeited the issue because she had no idea the trial court would apply the incorrect standard until it issued its findings and order after hearing. She tells us that “[p]rior to the June 10 and 11, 2013 hearings, [she] operated under the assumption that the [Stipulated] Order was permanent and that changed circumstances would be required before any modification would occur.”

We disagree with Droz because her contentions are simply not borne out by the record. To begin with, Droz does not disagree that she failed to raise the changed

circumstances standard either before or during trial. We ourselves have reviewed the entire record and found no evidence she ever argued either that the Stipulated Order was a permanent custody order or that the applicable standard for modifying it was changed circumstances. Her failure to bring the issue to the trial court's attention constitutes an implied waiver of her claim on appeal. (See, e.g., *In re Marriage of Falcone & Fyke* (2008) 164 Cal.App.4th 814, 826.) As our colleagues in Division Four have explained, "an appellant waives [her] right to attack error by expressly or implicitly agreeing or acquiescing at trial to the ruling or procedure objected to on appeal." (*In re Marriage of Broderick* (1989) 209 Cal.App.3d 489, 501; accord *In re Marriage of Hinman* (1997) 55 Cal.App.4th 988, 1002 ["Failure to object to the ruling or proceeding is the most obvious type of implied waiver."].)

Moreover, during the hearing, the trial court made clear more than once its intention to issue specific orders governing custody and visitation. This can hardly have come as a surprise to Droz, because in her declaration in response to Goodshield's request for enforcement of the Stipulated Order's terms, she acknowledged the parties were "scheduled for a hearing . . . to resolve the issue of custody and visitation." (Italics added.) In an apparent allusion to the applicable standard, she contended an order compelling her to return to Humboldt County with the children "would be absolutely contrary to their best interests." Similarly, her pretrial statement described the issues before the court as "determination of legal and physical custody, visitation, and residence of the minors." And in his closing argument at the hearing, Droz's counsel argued Goodshield should be given "visitation rights consistent with what is in the best interests of the kids." (See *Sumner Hill Homeowners' Assn., Inc. v. Rio Mesa Holdings, LLC* (2012) 205 Cal.App.4th 999, 1025 [defendants' "theory of the case was conspicuously evident in the closing argument of [their] attorney"].) Thus, not only did Droz fail to argue the changed circumstances standard applied, she and her counsel actually argued for the best interests of the child standard. "By such acquiescence in the allegedly erroneous standard, [Droz] is barred from raising for the first time here on appeal the

error stemming from adjudication pursuant to that procedure.” (*In re Marriage of Broderick, supra*, 209 Cal.App.3d at p. 502 [applying doctrine of invited error].)

In addition, Droz’s appellate claim that she viewed the Stipulated Order as permanent and final conflicts substantially with the position she took in the court below. Although she places great reliance on the Stipulated Order in this court, before the trial court she argued she had not agreed to it and had signed it only out of fear. Droz said she believed the December 17, 2010 stipulation and order, which was not signed by the court, “was the legally binding agreement.” Indeed, when questioned about the Stipulated Order in court, Droz testified, “I call into question that court order. I don’t – due to various circumstances, due to fear, not knowing my rights not – yeah. It was – I don’t know what the legal term for that would be, but I call into question the entire thing.”⁴ In closing argument, her counsel equivocated on the effect of the Stipulated Order. He seemed to argue the provision giving Droz physical and legal custody was valid but the provision stating Droz would return to Humboldt County in December 2012 was not. These inconsistencies aside, having taken the position in the trial court that the Stipulated Order was either completely or partially invalid, the theory of trial doctrine prevents Droz from reversing course and relying on its validity on appeal. (See *Sumner Hill Homeowners’ Assn., Inc. v. Rio Mesa Holdings, LLC, supra*, 205 Cal.App.4th at p. 1027 [where defendants took position in trial court that subdivision map failed to comply with statute, they could not change position on appeal and argue map was compliant].)

II. *Droz Did Not Raise the Section 3044 Presumption Below, and No Finding of Domestic Abuse Appears in the Record.*

Droz’s argument regarding the trial court’s failure to apply the section 3044 presumption suffers from the same infirmity as her argument on the issue of changed circumstances.⁵ While the issue of domestic violence was raised in the trial court, at no

⁴ The trial court admitted testimony concerning the negotiation and drafting of the Stipulated Order based on its understanding there would be “testimony that it wasn’t free and voluntary[.]”

⁵ Section 3044 provides in relevant part: “(a) Upon a finding by the court that a party seeking custody of a child has perpetrated domestic violence against the other party

time did Droz argue that Judge Cissna's December 17, 2010 order constituted a finding of domestic violence sufficient to trigger the presumption. Her failure to raise the issue below would ordinarily foreclose her from raising it on appeal. (*In re Marriage of Hinman, supra*, 55 Cal.App.4th at p. 1002.)

Droz contends the issue is not forfeited because, even if she did not raise it below, it was incumbent upon the trial court to apply the section 3044 presumption once it became aware of the existence of the December 17, 2010 restraining order. She argues issuance of a domestic violence restraining order (DVRO) necessarily entails a finding of domestic abuse sufficient to trigger the presumption. (See *S.M. v. E.P.* (2010) 184 Cal.App.4th 1249, 1267 ["Because a DVPA restraining order must be based on a finding that the party being restrained committed one or more acts of domestic abuse, a finding of domestic abuse sufficient to support a DVPA restraining order necessarily triggers the presumption in section 3044."].)

The difficulty with this argument is that the section 3044 presumption is triggered only by a specific finding that one parent committed an act of domestic abuse against the other parent. (See § 3044, subs. (a), (c), (d).) In this case, it is far from clear Judge Cissna made the required finding.⁶ The clerk's minutes of the hearing on December 17, 2010, state only that Goodshield agreed to "conduct restraint and 20 yard stay-away" and characterize the court's order as a "personal conduct restraining order[.]" There is no mention of domestic abuse. There is no written DVRO in the record before us, and a number of factors suggest no such order was intended. First, if Judge Cissna had

seeking custody of the child or against the child or the child's siblings 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. This presumption may only be rebutted by a preponderance of the evidence."

⁶ This suffices to distinguish this case from *In re Marriage of Fajota, supra*, 230 Cal.App.4th 1487, on which Droz relies. In that case, although the trial court had *not* issued a DVRO, it *had* made the required finding of domestic abuse. (*Id.* at p. 1498.) The court went on to explain that the section 3044 presumption is triggered by the finding of domestic abuse, regardless of whether a DVRO is issued. (*Id.* at p. 1499.)

intended to issue a DVRO, he almost certainly would have used form DV-130 (Restraining Order After Hearing (Order of Protection)) as prescribed by the Judicial Council. (§ 6221, subd. (c) [*“Any order issued by a court to which this division applies shall be issued on forms adopted by the Judicial Council of California”*], italics added; see also § 6226.) We presume the trial court was aware of its statutory obligation to use the Judicial Council form. (See *Ross v. Superior Court* (1977) 19 Cal.3d 899, 913 [*“in the absence of any contrary evidence, we are entitled to presume that the trial court . . . properly followed established law”*].)

Second, “[a] person subject to a protective order, as defined in Section 6218, shall not own, possess, purchase, or receive a firearm or ammunition while that protective order is in effect.” (§ 6389, subd. (a).) Thus, when the trial court imposes a DVRO, it has no authority to refuse to impose this restriction. (*Ritchie v. Konrad* (2004) 115 Cal.App.4th 1275, 1294-1295 [*“Nothing in 6389, subdivision (a) or elsewhere suggests the court is empowered to disable or modify the firearm prohibition section 6389, subdivision (a) automatically activates when a court imposes . . . any of the enumerated forms of protective orders.”*], fn. omitted.) Not only do we lack a written order incorporating a firearm restriction, but the trial court did not even inquire into the issue of firearms at the hearing. It is difficult to imagine Judge Cissna would not have done so had he intended to issue a DVRO.

Third, Judge Cissna expressly refused to order Goodshield to participate in a batterer’s intervention program because he saw no legal basis for it. But participation in such a program is a very common feature of any DVRO. (See § 3044, subd. (b)(2) [in determining whether § 3044 presumption has been overcome, court “shall consider” “[w]hether 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.”].) Thus, Judge Cissna’s refusal to order Goodshield into any such program suggests he declined to issue a DVRO.

Droz had ample opportunity in the trial court to clarify the precise nature of the order. She was directed to draft an order embodying the court’s rulings, but there is

nothing in the record showing she did so. As Droz herself notes, “[t]here is no information in the [r]ecord to explain why the restraining order was drafted as a stipulation, nor why it was neither signed nor filed.”⁷ Had Droz raised this issue in the trial court, it would have been able to articulate its reasoning. But she did not. In addition, if Droz had raised the section 3044 presumption at the hearing before Judge Hinrichs, the court and the parties might have been able to resolve this issue at that time. Perhaps equally important, if Droz had raised the section 3044 presumption at that hearing, Goodshield would have had the opportunity to present evidence rebutting it. Again, however, Droz said nothing, thus forgoing yet another chance to clarify the record.

Given the importance of the protections afforded by a DVRO—not to mention the serious consequences such orders entail for the party restrained—we are unwilling, on the record before us, to infer that the order Judge Cissna orally pronounced was a DVRO and that he made the crucial finding of domestic abuse. Droz has not met her burden on appeal of establishing error.

DISPOSITION

The judgment is affirmed. Respondent shall recover his costs on appeal. (Cal. Rules of Court, rule 8.278(a)(1), (2).)

⁷ Of course, the fact that the restraining order was drafted as a stipulation suggests that it was *not* intended to be a domestic violence restraining order. As explained above, by statute, such orders are to be issued on forms adopted by the Judicial Council.

Jones, P.J.

We concur:

Simons, J.

Bruiniers, J.

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