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THE 2023 CLAY Awards



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APPELLATE LITIGATION/FAMILY LAW

Judges now required to explain custody and visitation

CITY AND COUNTY OF SAN FRANCISCO V. HERSEL HALE, JR. (H.H.)

THOMAS SPRANKLING, MARK FLANAGAN, MELISSA MCCALL, WILMERHALE;
JENNAFER DORFMAN WAGNER, CORY D. HERNANDEZ, ERIN SMITH, FAMILY VIOLENCE APPELLATE PROJECT;
FAWN JADE KORR, SARAH JACOBVITZ, BAY AREA LEGAL AID

Attorneys for domestic violence victims say family law judges too frequently grant joint custody or significant visitation to an abusive parent. An appellate victory by a team from WilmerHale and the Family Violence Appellate Project should go a long way to fix the problem.

The decision early last year holds that when a judge awards joint custody or significant visitation of children to someone who has committed domestic violence, the judge must, if asked, explain why in detail. City and County of San Francisco v. H.H., 76 Cal.App. 5th 531 (C.A. 1st Dist., Feb. 17, 2022).

"It gives survivors of domestic violence a chance to make their

record below and ... present what happened to the Court of Appeal, which otherwise defers to what the trial court says, even if it said very little," said WilmerHale's Thomas G. Sprankling, who handled the appeal. "Previous to this, there was no right to that upon request."

California Family Code Section 3044 creates a rebuttable presumption that someone who has committed domestic violence against the other parent in the past five years should not be given custody of their children. To rule contrary to the presumption, the court should respond to a checklist of factors set out in the statute and "must state its reasons in writing or on the record," Justice J. Anthony Kline wrote.

But in this case, the trial court judge "just didn't provide any reasoning at all," Sprankling said. "It wasn't clear if he gave that thumb on the scale to the victim of domestic violence or what his thinking was precisely."

According to the opinion, the father was often violent. He kicked the mother in the stomach when he first learned she was pregnant. Other times he threatened her with a gun, slashed her tires and once grabbed her by her hair and "yanked so hard he tore out two big braids and left a bald spot on her scalp." He also sent their son home with many bruises and scratches.

The judge gave the mother full legal and physical custody, but he left in place a visitation order that put the

son with the father three days a week.

On appeal, Sprankling argued the generous visitation schedule amounted to joint custody, triggering Section 3044's presumption. And he argued that the judge should have granted the mother's request for a statement of decision explaining his reasoning per two other code sections.

Statements of decision generally aren't required for shorter proceedings. But they can be required in

special proceedings "where it's still important for policy reasons to have an explanation for the ruling," he said. Whether that public policy exception fit here was "the chief novel issue in the case."

The appellate court stated that the "importance of issues bearing on child custody and visitation orders are obvious." It voided the visitation order and told the trial to limit the father's visitation or explain why not.

"I think it makes a powerful point about the importance of having

an explanation for judicial rulings in cases like this one," Sprankling said. "We'll have to see how courts interpret it, but it could be read pretty broadly."

He also stressed that representing the mother was a big team effort. On remand, the mother's attorneys at Bay Area Legal won a ruling that gives the father only limited, supervised visitation.

– DON DEBENEDICTIS