CALIFORNIA

Family Law Monthly

January 2018

Volume 2018 • Issue No. 1

HIGHLIGHTS

CHILD CUSTODY

- Court Erred in Applying Heightened "Best Interest of Child" Standard in Review of Temporary Custody Order Necessitated by Parent's Military Deployment (see Page 7)
- In this month's Point of View, Sandra L. Mayberry discusses realistic expectations and workable solutions for holiday visitation schedules. (see Page 5)

COMMUNITY PROPERTY

- Interest on Equalization Payment Accrued from Date Payment Was Due Under Terms of Stipulated Judgment, and Not from Date of Postjudgment Enforcement Order (see Page 10)

MILITARY SPOUSES

- Federal Law Preempted Stipulated Order Requiring Husband to Maintain Wife as Beneficiary of Life Insurance Policy (see Page 16)
- A complete table of contents appears on the next page.

LexisNexis™ Matthew Bender®

Domestic Violence Restraining Orders

Family Court Has Jurisdiction to Renew Domestic Violence Restraining Orders Issued by Juvenile Court

*By Carol Rothstein, Esq.**

Two recent Second District cases provide new protections to domestic violence victims by holding, for the first time, that the family court has jurisdiction to renew domestic violence restraining orders (DVROs) that were initially issued by the juvenile court.

The first of these cases, *Garcia v. Escobar* (No. B279530; Ct. App., 2d Dist., Div. 8. 11/15/17) 17 Cal. App. 5th 257, — Cal. Rptr. 3d —, 2017 Cal. App. LEXIS 1005), holds that the plain language of Family Code section 6345(a) permits the family court to renew restraining orders issued by the juvenile court. Two weeks later, in *Priscila N. v. Leonardo G.* (No. B279584; Ct. App., 2d Dist., Div. 4. 12/01/17) 17 Cal. App. 5th 1208, — Cal. Rptr. 3d —, 2017 Cal. App. LEXIS 1069, the court agreed with *Garcia* and further concluded that the Family Code and Welfare & Institutions Code should be read broadly to effectuate the Legislature's intent that juvenile and family courts work together to protect victims of domestic violence.

Garcia v. Escobar

Facts and Procedure. Maria and Gilbert dated for seven years and had one child together. After their relationship ended, the juvenile court issued a restraining order after hearing, protecting Maria and the child from Gilbert for three years, and subsequently terminated its jurisdiction.

Before the juvenile court DVRO expired, Maria filed a request for a DVRO in family court, attaching a copy of the juvenile court DVRO to her declaration. At the hearing, the trial court concluded

* Carol Rothstein is the principal author of the California Family Law Monthly. She is a research attorney in Lafayette, California.

Fifth, keep the schedule simple and have it in writing and on the calendar well ahead of time. Remember that having too many exchanges over a short period of time is confusing for everyone. When all of our law firms are closed around the holidays, the client's ability to contact you with a "what is the schedule again" email is difficult.

Sixth, and perhaps most challenging, don't let your clients' stressors ruin your own holiday. Your family will never remember the holiday "where you helped John Smith with his holiday schedule." They will remember the holiday where you stayed off your email or phone to enjoy being with them.

Happy Holidays to all my friends in the Family Law community!

CHILD CUSTODY

Modification

Court Erred in Applying Heightened "Best Interest of the Child" Standard in Review of Temporary Custody Order Necessitated by Parent's Military Deployment

In re Marriage of Vargas and Ross
(No. C082867; Ct. App., 3d Dist. 12/04/17)
17 Cal. App. 5th 1235, — Cal. Rptr. 3d —, 2017 Cal. App. LEXIS 1080
By Renner, J. (Blease, Acting P. J., Duarte, J., concurring)

A trial court erred when it held that the "best interest of the child" standard under Family Code section 3047, which governs changes in child custody necessitated by military deployment, is different from the best interest standard applied in other child custody cases.

Facts and Procedure. Mother and Father, both active service members, were married in 2009 and divorced in 2013. At the time of their divorce, they were both stationed in South Carolina and the initial custody order was for joint legal and physical custody. Father relocated to Washington, D.C. after the divorce, and the children remained in South Carolina with Mother.

In September 2013, in anticipation of Mother's relocation to Korea for one year, the parties agreed that the children would stay with Father, and the court issued an order granting father sole physical custody. In November 2014, just prior to Mother's return to the U.S., the parties agreed that the children would remain in father's physical custody but would spend their summer break in Wyoming, where Mother was being transferred. In January 2015, the court adopted the parties' agreement as an order of the court.

In July 2015, Mother filed a motion seeking custody of the children for the 2015-2016 school year. Before trial could take place, however, Father requested a change in physical custody as a result of his deployment, and the court granted Mother temporary physical custody of the children pursuant to Family Code section 3047.

Father returned from his deployment and the issue of the children's custody went to trial in July 2016. At the conclusion of the trial and in its written order, the court stated that if it were applying a "regular" or "straight" best interest analysis, it would award primary physical custody to Mother. It further stated that if it were applying a move-away standard, it would rule that Mother should have primary custody, because Mother was more likely to cooperate and facilitate Father's visitation. However, the court reasoned that under section 3047, "unless it's a clear case, [the court] should basically indicate that the parent who was deployed should resume custody." In its written order, the court stated that Mother did not overcome the section 3047(b)(2) presumption that custody should revert back to the order that was in place before the temporary custody order. Mother appealed.

Family Code Section 3047. Under Section 3047(b), when military orders require a parent to move a substantial distance or otherwise affect his or her ability to exercise custody or visitation rights, "any necessary modification of the existing custody order shall be deemed a temporary custody order made without prejudice, which shall be subject to review and reconsideration upon the return of the party from military deployment, mobilization, or temporary duty." Upon review of the temporary custody order, "there shall be a presumption that

the custody order shall revert to the order that was in place before the modification, unless the court determines that it is not in the best interest of the child. The court shall not, as part of its review of the temporary order upon the return of the deploying party, order a child custody evaluation. . .unless the party opposing reversion of the order makes a prima facie showing that reversion is not in the best interest of the child."

In enacting section 3047, the Legislature intended to "provide a fair, efficient, and expeditious process to resolve child custody and visitation issues when a party receives temporary duty, deployment, or mobilization orders from the military" or returns from service and seeks to revert back to the prior custody arrangement, and to "ensure that parties who serve in the military are not penalized for their service by a delay in appropriate access to their children" [Fam. Code § 3047(b)].

Plain Language of Section 3047 Does Not Create New Best Interest Standard. The appeals court agreed with Mother that the trial court had applied an incorrect legal standard. The appeals court turned to the plain language of section 3047, which it found to be unambiguous. Section 3047 states that custody "shall revert to the order that was in place before the modification, *unless the court determines that it is not in the best interest of the child"* (emphasis added by court). The meaning of the italicized phrase, wrote the appeals court, "is well known to the Legislature because '[u]nder California's statutory scheme governing child custody and visitation determinations, the overarching concern is the best interest of the child' [citations omitted]." In determining the best interest of the child, the courts consider many factors, including the continuity of relationships and each parent's ability to facilitate continued contact with the other parent.

The appeals court concluded that in enacting section 3047, the Legislature did not include language requiring courts to take a different approach to determining the best interests of the child, to consider different factors, or to somehow be more careful than they would in the ordinary case. The appeals court stated that it could not "insert language into the statute to add such requirements and change the standard for determining the best interest of the child." Therefore, when the court determined that under a "straight" best interest analysis it would be in the children's best interest to remain in Mother's custody because she was the parent most likely to facilitate contact, the section 3047 presumption that custody should revert to the previous arrangement was overcome. The court acknowledged a conflict with *Marriage of E.U. v. J.E.* (2012) 212 Cal. App. 4th 1377, to the extent that it suggests a heightened standard for evaluating the best interest of the child under section 3047.

Section 3047 Protects Deployed Service Members Without Imposing Heightened Standard. The appeals court stated that even though section 3047 does not create a heightened standard for determining the best interest of the child, it protects the interests of deployed service members by making deployment-related changes of custody temporary, which means that a service member need not show a significant change of circumstances to return to the pre-deployment status quo. In addition, section 3047 shifts the burden of proof from the returning parent to the parent opposing the change in custody. Finally, section 3047 makes the process of regaining access to children post-deployment more expeditious by requiring the party who opposes the return to the status quo to show that the prior order is no longer in the child's best interest before the court may order a child custody evaluation, and by directing the courts to prioritize the calendaring of these cases.

Commentary

Stacy D. Phillips and Erica Swensson

Marriage of Vargas & Ross presents a snapshot of the dizzying life of parents in the military and how it can complicate custody disputes. In the span of fewer than three years, Ms. Vargas and Mr. Ross lived in two countries and four different states. (The parties will be referred to as Mother and Father for clarity.) Both parents were members of the United States Air Force.

In order to protect a deploying parent from losing custody, the California legislature enacted Family Code section 3047. The statute creates safeguards to preserve the pre-deployment status quo by, among other things, creating a presumption that that the custody order shall revert to the order that

was in place before the deployment ("pre-deployment order"). The deployed party's absence is classified as a "temporary absence" for purposes of custody determinations. The presumption that the pre-deployment order governs can be overcome by a finding that a return to the pre-deployment order is "not in the best interest of the child" [Fam. Code § 3047(b)(2)].

The facts in this case are convoluted. Both parents were deployed at different times during the case. Prior to the dissolution, the parties and children resided in South Carolina. At the time of dissolution, Mother was awarded primary physical custody of the children in South Carolina. Father relocated to Washington D.C. Mother was subsequently deployed to Korea and the children moved to Florida to live with Father. In anticipation of her return to the United States, Mother petitioned the court to have the children live with her in Wyoming. Pending a ruling on that request, Father was deployed and the children moved from Florida to Wyoming to live with Mother.

The trial court ultimately ruled that the children should be returned to Father's care in Florida because he had been the custodial parent during Mother's deployment to Korea. The court reasoned that section 3047 mandated a return to the pre-deployment custody arrangement notwithstanding its finding that Mother was the parent more likely to facilitate the relationship with the other parent.

The Court of Appeal reversed and remanded the case, finding that by ignoring the best interest standard, the trial court had attempted to create an alternate "best interest standard." The Court of Appeal pointed out that section 3047 created a *presumption* that children should be returned to the pre-deployment custody arrangement but that it did not create a higher standard for "best interest" in cases involving deployed military parents. In this case, the Court of Appeal determined that the section 3047 presumption was overcome when the trial court found that Mother was the parent most likely to facilitate the children's relationship with the other parent. The Court of Appeal ruled that despite the language of Section 3047, the "best interest" determination is the operative standard for evaluating custody in these situations.

This opinion is troubling for a number of reasons. First and foremost, while the parties had moved with the children to four different states, not one of those states was California. Other than the caption, there is not a single mention of California anywhere in the opinion. It is unclear why the case is being heard in California courts at all.

Second, since both of the parties were deployed at one time or another during the course of the case, which custody arrangement was the "original order" and which was the "temporary order?" Why wasn't the original order granting Mother custody in South Carolina considered to be the pre-deployment order? Why wasn't Mother's deployment to Korea from South Carolina a "temporary absence?" The opinion does not address these questions.

Finally, section 3047 provides that "there shall be a presumption that the custody order shall revert to the order that was in place before the modification *unless* the court determines that it is *not* in the best interest of the child." (Emphasis added.) The *Vargas* decision makes no distinction between a party showing what *is* in a child's best interest and what is *not* in the child's best interest, finding that the "best interest" standard is unaltered by Section 3047. From a practical standpoint, these two positions are not equal to the other. Building a case for a child's best interest would likely include evidence about a child's current education, performance in school, friends, medical professionals or other relationships. Conversely, an attorney showing detriment would focus on the negative aspects of the place to which the child would return and present evidence as to why the child's pre-deployment home is somehow deficient or detrimental.

Under a "best interest" analysis alone, when would it ever be in a child's best interest to move from the place to which they have been accustomed, with the parent who has been their sole custodial parent since the other parent was deployed? Provided that there was nothing detrimental about the children's new environment, when would it ever been appropriate to disrupt the child's life yet again? Since the "best interest" standard is utilized in initial custody determinations, applying the standard equally to section 3047 cases effectively makes every post-deployment custody review *de novo*, as if no prior custody orders had been made.

It will be interesting to follow the application of the *Vargas* holding in the future and learn whether subsequent decisions are able to refine the application of this ruling.