CALIFORNIA Family Law Monthly

S.Y. v. Superior Court

At first blush, this is a domestic violence case where the trial court found that husband had perpetrated domestic violence on his wife, but that husband had rebutted the presumption under Family Code section 3044, and that a grant of custody to the father would not be detrimental to the child's best interests. One of the reasons upon which the court ruled in father's favor was that he had greater fluency in English, and the court erroneously relied on that as a factor in rebutting the presumption of detriment to the domestic violence finding. An impressive coalition filed *amici curiae* briefs, including the American Civil Liberties Union of Southern California and Asian Americans Advancing Justice - LA, Bet Tzedek, California Women's Law Center, National Housing Law Project, Public Law Center, and San Diego Volunteer Lawyer Program, Inc. These groups raised larger conceptual issues attempting to overturn the trial court order, including that the custody order violated the equal protection clause, Title VI of the Civil Rights Act of 1964, and the First Amendment, because the trial court stated that Omar's greater fluency in English was one of the reasons it found that he had rebutted the presumption that custody to him would be detrimental to the child's best interest. More creatively, *amici curiae* Bet Tzedek argued that limited English proficiency was a proxy for discrimination based on national origin or immigration status and should not be considered as a factor in custody and guardianship decisions. *Amici curiae* California Women's Law Center, et al., contended that the Family Code section 3044 presumption of detriment could not be rebutted without completion of parenting classes and a batterer's treatment program.

In denying the writ petition filed by mother to overturn the trial court ruling, the Appellate Court concurred with mother's contention that the trial court erred in considering husband's greater fluency in English as a factor rebutting the presumption of detriment due to his domestic violence; however, it held that evidence *other* than language fluency substantially supported the trial court's ruling that father had rebutted the presumption of detriment and that the trial court did not abuse its discretion in granting joint legal and physical custody to both parents.

In stating its bases for rebuttal of the presumption, the trial court said that father was more fluent in English than mother and found his greater fluency to be an advantage for "navigation through the American medical and educational system." The appellate tribunal held it was error to use language fluency to rebut the presumption of detriment as it had no relation to the child's safety or the impact of prior domestic violence on him. But, held the court, that error did not require reversal or remand because there was sufficient other evidence supporting the court's finding that father had rebutted the presumption of detriment with respect to both legal and physical custody. Footnote 7 of the opinion set forth the court's view that English fluency was not a proxy for discrimination based on national origin here, because both father and mother were natives of Middle Eastern countries – husband from Jordan and mother from Iraq – who

had immigrated to the United States. The trial judge never mentioned immigration status, except to say that she came from an immigrant family herself. The court's comment on English was directed only to communication with education and health providers. Mother was not restricted from using her native language inside or outside her home.

Perhaps the worthwhile teaching point of this case is that, in our current highly sensitive societal environment, what may have been in times past domestic violence cases applying Family Code section 3044 standards to admittedly difficult, disputed and often violent factual scenarios, these underlying issues are now being conflated into overarching issues of constitutional equal protection and First Amendment arguments. This case puts us on notice that seemingly pedestrian domestic violence cases are no more, and that creative lawyering can inject nuanced and creative arguments into a case which heretofore may well have been overlooked. We are well advised to learn this lesson.

MARSHALL S. ZOLLA