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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF ORANGE

In re the Marriage of: Petitioner: ALEXANDER D. WILCOX and Respondent: MICHELLE C. WILCOX	Case No.: 04D006334 MEMORANDUM OF POINTS IN AUTHORITIES IN OPPOSITION TO PETITIONER'S ORDER TO SHOW CAUSE DATE: January 10, 2011 TIME: 8:30 a.m. DEPT: C-59

MEMORANDUM OF POINTS AND AUTHORITIES:

I. ANY COURT'S ORDER REGARDING CUSTODY SHALL BE MADE TO ENSURE THE HEALTH, SAFETY, AND WELFARE OF THE MINOR CHILD AND THE SAFETY OF ALL FAMILY MEMBERS

Pursuant to Family Code§3020:

> "(a) The Legislature finds and declares that it is the public policy of this state to assure that the health, safety, and welfare of children shall be the court's primary concern in determining the best interest of children when making any orders regarding the physical or legal custody or visitation of children. The Legislature further finds and declares that the perpetration of child abuse or domestic violence in a household where a child resides is detrimental to the child.
> (b) The Legislature finds and declares that it is the public policy of this state to assure that children have frequent and continuing contact with both parents after the parents have separated or dissolved their marriage, or ended their relationship, and to encourage parents to share the rights and responsibilities of child rearing in order to effect this policy, except where the contact would not be in the best interest of the child, as provided in Section 3011.

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(c) Where the policies set forth in subdivisions (a) and (b) of this section are in conflict, any court's order regarding physical or legal custody or visitation shall be made in a manner that ensures the health, safety, and welfare of the child and the safety of all family members."

Family Code §3011 states as follows:

> In making a determination of the best interest of the child in a proceeding described in Section 3021, the court shall, among any other factors it finds relevant, consider all of the following:
> (a) The health, safety, and welfare of the child.
> (b) Any history of abuse by one parent or any other person seeking custody against any of the following:
> (1) Any child to whom he or she is related by blood or affinity or with whom he or she has had a caretaking relationship, no matter how temporary.
> (2) The other parent.
> (3) A parent, current spouse, or cohabitant, of the parent or person seeking custody, or a person with whom the parent or person seeking custody has a dating or engagement relationship.
> As a prerequisite to the consideration of allegations of abuse, the court may require substantial independent corroboration, including, but not limited to, written reports by law enforcement agencies, child protective services or other social welfare agencies, courts, medical facilities, or other public agencies or private nonprofit organizations providing services to victims of sexual assault or domestic violence. As used in this subdivision, "abuse against a child" means "child abuse" as defined in Section 11165.6 of the Penal Code and abuse against any of the other persons described in paragraph (2) or (3) means "abuse" as defined in Section 6203 of this code.
> (c) The nature and amount of contact with both parents, except as provided in Section 3046.
> (d) The habitual or continual illegal use of controlled substances or habitual or continual abuse of alcohol by either parent. Before considering these allegations, the court may first require independent corroboration, including, but not limited to, written reports from law enforcement agencies, courts, probation departments, social welfare agencies, medical facilities, rehabilitation facilities, or other public agencies or nonprofit organizations providing drug and alcohol abuse services. As used in this subdivision, "controlled substances" has the same meaning as defined in the California Uniform Controlled Substances Act, Division 10 (commencing with Section 11000) of the Health and Safety Code.
> (e) (1) Where allegations about a parent pursuant to subdivision (b) or (d) have been brought to the attention of the court in the current proceeding, and the court makes an order for sole or joint custody to that parent, the court shall state its reasons in writing or on the record. In these circumstances, the court shall ensure that any order regarding custody or visitation is specific as to time, day, place, and manner of transfer of the child as set forth in subdivision (b) of Section 6323.
> (2) The provisions of this subdivision shall not apply if the parties stipulate in writing or on the record regarding custody or visitation.
> (Am Stats 1999, C980)

In the case at hand, this court made a finding on June 25, 2010, that Petitioner perpetrated an act of domestic violence pursuant to the code against Respondent and issued a permanent restraining order, which included an order that Petitioner shall attend a 52 week batter's prevention course. Since that time, the visitation time for Petitioner has been modified to increase his time, and a 730 evaluation was conducted, but Respondent maintains the role as the sole physical custodian of the minor child. Petitioner is seeking to have this court order the recommendations of the 730 evaluation conducted by Dr. David Mann and completed on November 12, 2010, wherein Dr. Mann recommends a joint physical custody plan. However, Respondent objects and contends that since there has been a finding that Petitioner has perpetrated domestic violence against Respondent in the presence of the minor child within the previous 5 years (actually within the last year), that there is a rebuttable presumption that an award of joint physical custody of the child to Petitioner is detrimental to the best interest of the child. Petitioner has not petitioned this court to rebut the presumption.

The Code sets out that there are no preferences for custody, but for the Code containing one significant exception and that exception is the following: There is a rebuttable presumption against a sole or joint custody award to a contestant who has perpetrated domestic violence against the other party, the child or the child's siblings within the previous five years; and the statutory policy preference for "frequent and continuing contact" with both parents may not be used to rebut the presumption. The Code sets forth specific conditions for which to rebut that presumption and Petitioner has failed to show evidence of meeting any of them. Furthermore, as will be presented at time of any hearing, Petitioner has in fact violated on December 4, 2010, the Permanent Restraining Orders issued by this Court, and was in fact arrested by Costa Mesa Police Department for such contempt of the order.

Pursuant to Family Code § 3044:

> "(a) Upon a finding by the court that a party seeking custody of a child has perpetrated violence against the other party 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.
(b) In determining whether the presumption set forth in subdivision (a) has been overcome, the court shall consider ***all*** of the following factors (italics added):
(1) Whether the perpetrator of domestic violence has demonstrated that giving sole or joint physical or legal custody of a child to the perpetrator is in the best interest of the child. In determining the best interest of the child, ***the preference for frequent and continuing contact with both parents***, as set forth in subdivision (b) of Section 3020, or with the noncustodial parent, as set forth in paragraph (1) of subdivision (a) of Section 3040, ***may not be used*** to rebut the presumption, in whole or in part (italics added).
(2) Whether 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.
(3) Whether the perpetrator has successfully completed a program of alcohol or drug abuse counseling if the court determines that counseling is appropriate.
(4) Whether the perpetrator has successfully completed a parenting class if the court determines the class to be appropriate.
(5) Whether the perpetrator is on probation or parole, and whether he or she has complied with the terms and conditions of probation or parole.
(6) Whether the perpetrator is restrained by a protective order or restraining order, and whether he or she has complied with its terms and conditions.
(7) Whether the perpetrator of domestic violence has committed any further acts of domestic violence.
(c) For purposes of this section, a person has "perpetrated domestic violence" when he or she is found by the court to have intentionally or recklessly caused or attempted to cause bodily injury, or sexual assault, or to have placed a person in reasonable apprehension of imminent serious bodily injury to that person or to another, or to have engaged in any behavior involving, but not limited to, threatening, striking, harassing, destroying personal property or disturbing the peace of another, for which a court may issue an ex parte order pursuant to Section 6320 to protect the other party seeking custody of the child or to protect the child and the child's siblings.
(d) (1) For purposes of this section, the requirement of a finding by the court shall be satisfied by, among other things, and not limited to, evidence that a party seeking custody has been convicted within the previous five years, after a trial or a plea of guilty or no contest, of any crime against the other party that comes within the definition of domestic violence contained in Section 6211 and of abuse contained in Section 6203, including, but not limited to, a crime described in subdivision (e) of Section 243 of, or Section 261, 262, 273.5, 422, or 646.9 of, the Penal Code.
(2) The requirement of a finding by the court shall also be satisfied if any court, whether that court hears or has heard the child custody proceedings or not, has made a finding pursuant to subdivision (a) based on conduct occurring within the previous five years.
(e) When a court makes a finding that a party has perpetrated domestic violence, the court may not base its findings solely on conclusions reached by a child custody evaluator or on the

recommendation of the Family Court Services staff, but shall consider any relevant, admissible evidence submitted by the parties. (f) In any custody or restraining order proceeding in which a party has alleged that the other party has perpetrated domestic violence in accordance with the terms of this section, the court shall inform the parties of the existence of this section and shall give them a copy of this section prior to any custody mediation in the case."

Family Code §3040 states as follows:

(a) Custody should be granted in the following order of preference according to the best interest of the child as provided in Sections 3011 and 3020.
(1) To both parents jointly pursuant to Chapter 4 (commencing with Section 3080) or to either parent. In making an order granting custody to either parent, the court shall consider, among other factors, which parent is more likely to allow the child frequent and continuing contact with the noncustodial parent, consistent with Section 3011 and 3020, and shall not prefer a parent as custodian because of that parent's sex. The court, in its discretion, may require the parents to submit to the court a plan for the implementation of the custody order.
(2) If to neither parent, to the person or persons in whose home the child has been living in a wholesome and stable environment.
(3) To any other person or persons deemed by the court to be suitable and able to provide adequate and proper care and guidance for the child.
(b) This section establishes neither a preference nor a presumption for or against joint legal custody, joint physical custody, or sole custody, but allows the court and the family the widest discretion to choose a parenting plan that is in the best interest of the child.

The Family Code is very specific that the Court must consider all the factors of subsection (b) of Family Code §3044 as set forth above by preponderance of the evidence. In this case the following factors are relevant:

(b) (1) Petitioner has not set out an facts that support the contention that joint physical custody is in the minor child's best interest. The court's "primary concern" is to assure that child's health, safety and welfare. This codified policy is a companion to the Legislature's express finding and declaration that the "perpetration of child abuse or domestic violence in a household where a child resides is detrimental to the child" Fam. Code §3020(a). Where the policies of the code conflict (e.g., because domestic violence evidence shows contact with a parent could jeopardize the child's safety), a custody or visitation order "shall be made in a manner" that ensures the child's health, safety and welfare and the safety of all family members. Family Code

§3020(c). Consequently, where child and or/or family safety is a concern, the "frequent and continuing contact" policy is subservient to the paramount policy of protecting the child's health, safety and welfare. In the case at hand, Petitioner perpetrated the violence against Respondent in the presence of the minor child. Furthermore,

(b)(2) Petitioner violated the current restraining orders in the presence of the minor child on December 4, 2010.

The Code specifically states ***"the preference for frequent and continuing contact with both parents***, as set forth in subdivision (b) of Section 3020, or with the noncustodial parent, as set forth in paragraph (1) of subdivision (a) of Section 3040, ***may not be used*** to rebut the presumption, in whole or in part (italics added). See *Keith R. V. Super.Ct.* (2009) 174 CA4th 1047, 1056. Therefore, even when there is no concern with the child's health, safety and welfare, the "frequent and continuing contact with both parents" criterion does not necessarily "outrank all other factors in determining the custody matter. See *Marriage of LaMusga* (2004) 32 C4th 1072, 1095-1097; *Lester v. Lennane* (200) 84 CA4th 536, 594 - court acted within its discretion in awarding primary physical custody to mother despite finding father was more likely to allow frequent and continuing contact with noncustodial parent. Moreover, the court can deal with a custodial parent's reluctance to permit frequent and continuing contact with the child by ordering the custodial parent to undergo therapy to try to resolve the negative feelings toward the noncustodial parent. See *Lester v. Lennane*, supra at 594.

(b)(3)Petitioner was ordered to complete a 52 week batterer's prevention course and he has not done so. Prior to attending any classes for the batterer's program, Petitioner filed an *ex parte* OSC to request that this Court set aside its own ruling and terminate Petitioner's obligation to attend and learn from said course. Petitioner was denied the request to terminate his obligation to attend the Batter's Intervention Course on July 21, 2010. At best, Petitioner has only completed somewhere between 10 to 20

weeks of said course. He has not even finished one-half of said course to obtain any real necessary benefit. He cannot say to this court now that he is cured of his abusive ways after only this short period of time has followed. There has been no evidence presented in the custody evaluation or otherwise that the provider's of the batterer's treatment program have determined that Petitioner is cured and is no longer a danger to Respondent (and this is unlikely since he has violated the orders in December).

(b)(4) Petitioner was not ordered to complete a parenting class, but it would seem to be in this best interest if he wants to over come the burden of Family Code 3044.

(b)(5) Petitioner, who is restrained by a protective order or restraining order, has not complied with the terms and conditions of said order. Petitioner was arrested on December 4, 2010, for violating the terms of the court's order by video taping the exchange. Petitioner was arrested by Costa Mesa Police Department for the violation and missed part of his visitation time due to his flagrant violation of this court's order. Charges with the Orange County District Attorney's office are pending. Consequently, it would be Respondent's contention that since Petitioner has failed to comply with all the court's orders concerning the restraining order, that Petitioner continues to harass and annoy Respondent with his attempts to exert control and dominance over her which are all classic signs of a true perpetrator of domestic violence.

(b)(6) Respondent contends that Petitioner's violation of the court's domestic violence order on December 4th is another incident of domestic violence in that it seeks to disturb her peace, was harassing and annoying in nature. Furthermore, in settlement negotiations, Petitioner made threats to pursue contempt charges against Respondent and file for a request for Temporary Restraining Orders against Respondent's mother, Debbie Castleton, if she did not agree to all the conditions set forth in the 730 evaluation and more. (Respondent requests that the court take judicial notice of Superior Court case number 10V002731.) Petitioner did in fact file

contempt charges against Respondent on December 1, 2010, set on January 14, 2011 and a request for TRO against Debbie Castleton on December 2, 2010, set on January 10, 2011.

(e) As set forth in this provision, "the court may not base its findings solely on conclusions reached by a child custody evaluator ...., but shall consider any relevant, admissible evidence submitted by the parties." Petitioner cannot rely on the recommendations of Dr. Mann as his only position in this matter. He has yet to even request that this Court consider rebutting the presumption. No evidence has been presented in any way by Petitioner and his request to adopt Dr. Mann's recommendations should be denied considering the argument above, that he has failed on every account to rebut the presumption by a preponderance of the evidence.

Additional relevant codes that this Court should consider:

Family Code § 3031.

> (a) Where the court considers the issue of custody or visitation the court is encouraged to make a reasonable effort to ascertain whether or not any emergency protective order, protective order, or other restraining order is in effect that concerns the parties or the minor. The court is encouraged not to make a custody or visitation order that is inconsistent with the emergency protective order, protective order, or other restraining order, unless the court makes both of the following findings
> (1) The custody or visitation order cannot be made consistent with the emergency protective order, protective order, or other restraining order.
> (2) The custody or visitation order is in the best interest of the minor.
> (b) Whenever custody or visitation is granted to a parent in a case in which domestic violence is alleged and an emergency protective order, protective order, or other restraining order has been issued, the custody or visitation order shall specify the time, day, place, and manner of transfer of the child for custody or visitation to limit the child's exposure to potential domestic conflict or violence and to ensure the safety of all family members.

Family Code § 6203.

> For purposes of this act, "abuse" means any of the following:
> (a) Intentionally or recklessly to cause or attempt to cause bodily injury.
> (b) Sexual assault.
> (c) To place a person in reasonable apprehension of imminent serious bodily injury to that person or to another.
> (d) To engage in any behavior that has been or could be enjoined pursuant to Section 6320

Dr. David Mann was appointed by this Court as the Court's Expert on June 4, 2010, to conduct a child custody evaluation pursuant to Evidence Code §730.

Evidence Code §730 states in pertinent part as follows:

> When it appears to the court, at any time before or during the trial of an action, that expert evidence is or may be required by the court or by any party to the action, the court on its own motion or on motion of any party may appoint one or more experts to investigate, to render a report as may be ordered by the court, and to testify as an expert at the trial of the action relative to the fact or matter as to which the expert evidence is or may be required.

Dr. Mann was charged with evaluating the parties and minor child and to provide information to the court. Unfortunately, the Court's Expert did not consider the Family Code in his evaluation when making his recommendations. As set forth above, the Court made a finding on June 25, 2010, after a hearing that lasted multiple days, that Petitioner is the perpetrator of domestic violence against Respondent. Once that findings is made, the Court's Expert is bound by that finding. The Court's Expert is required by the Code to be specially trained in the area of domestic violence. The evaluation should have taken into consideration the finding of domestic violence and the presumption that Petitioner should not have custody of the minor child.

California Rules of Court §5.225 states in pertinent part:

> (a) Purpose
>
> This rule provides the licensing, education and training, and experience requirements for child custody evaluators who are appointed to conduct full or partial child custody evaluations under Family Code sections 3111 and 3118, Evidence Code section 730, or chapter 15 (commencing with section 2032.010) of title 4 of part 4 of the Code of Civil Procedure This rule is adopted as mandated by Family Code section 3110.5.
> (Subd (a) amended and relettered effective January 1, 2007; adopted as subd (b).)
> (d) Education and training requirements
> Before appointment, a child custody evaluator must complete 40 hours of education and training, which must include all the following topics:
> (1).The psychological and developmental needs of children, especially as those needs relate to decisions about child custody and visitation;
> (2).Family dynamics, including, but not limited to, parent-child relationships, blended families, and extended family relationships;
> (3).The effects of separation, divorce, domestic violence, child sexual abuse, child physical or emotional abuse or neglect, substance abuse, and interparental conflict on the psychological and developmental needs of children and adults;
> (4).The assessment of child sexual abuse issues required by Family

Code section 3118; local procedures for handling child sexual abuse cases; the effect that court procedures may have on the evaluation process when there are allegations of child sexual abuse; and the areas of training required by Family Code section 3110.5(b)(2)(A)-(F), as listed below:

(A).Children's patterns of hiding and disclosing sexual abuse in a family setting;

(B).The effects of sexual abuse on children;

(C).The nature and extent of sexual abuse;

(D).The social and family dynamics of child sexual abuse;

(E).Techniques for identifying and assisting families affected by child sexual abuse; and

(F).Legal rights, protections, and remedies available to victims of child sexual abuse;

(5).The significance of culture and religion in the lives of the parties;

(6).Safety issues that may arise during the evaluation process and their potential effects on all participants in the evaluation;

(7).When and how to interview or assess adults, infants, and children; gather information from collateral sources; collect and assess relevant data; and recognize the limits of data sources' reliability and validity;

(8).The importance of addressing issues such as general mental health, medication use, and learning or physical disabilities;

(9).The importance of staying current with relevant literature and research;

(10).How to apply comparable interview, assessment, and testing procedures that meet generally accepted clinical, forensic, scientific, diagnostic, or medical standards to all parties;

(11).When to consult with or involve additional experts or other appropriate persons;

(12).How to inform each adult party of the purpose, nature, and method of the evaluation;

(13).How to assess parenting capacity and construct effective parenting plans;

(14).Ethical requirements associated with the child custody evaluator's professional license and rule 5.220;

(15).The legal context within which child custody and visitation issues are decided and additional legal and ethical standards to consider when serving as a child custody evaluator;

(16).The importance of understanding relevant distinctions among the roles of evaluator, mediator, and therapist;

(17).How to write reports and recommendations, where appropriate;

(18).Mandatory reporting requirements and limitations on confidentiality;

(19).How to prepare for and give court testimony;

(20).How to maintain professional neutrality and objectivity when conducting child custody evaluations; and

(21).The importance of assessing the health, safety, welfare, and best interest of the child or children involved in the proceedings.

(Subd (d) amended and relettered effective January 1, 2007; adopted as subd (e); previously amended effective January 1, 2005.)

(e) Additional training requirements

In addition to the requirements described in this rule, before appointment, child custody evaluators must comply with the basic and advanced domestic violence training requirements described in rule 5.230.

California Rule of Court §5.230 states in pertinent part as follows:

> (b) Purpose
> Consistent with Family Code sections 3020 and 3111, the purposes of this rule are to require domestic violence training for all court-appointed persons who evaluate or investigate child custody matters and to ensure that this training reflects current research and consensus about best practices for conducting child custody evaluations by prescribing standards that training in domestic violence must meet. Effective January 1, 1998, no person may be a court-appointed investigator under Family Code section 3111(d) or Evidence Code section 730 unless the person has completed domestic violence training described here and in Family Code section.

The above codes clearly define that the Court's Expert must be cognizant of all codes relevant to domestic violence cases with all the required training. Given that the report fails to address the presumption placed on Petitioner for the finding of domestic violence, the report cannot be considered complete and the Court should not rely thereon.

II. CONCLUSION

As argued above and supported by the Family Code and cases set forth herein, Petitioner has not overcome his burden by a preponderance of the evidence to rebut the presumption that it is detrimental to the minor child for Petitioner to have joint physical custody of the parties' minor child. It is not in the best interest of the minor child that Petitioner should be awarded joint physical custody thereof. Petitioner has failed to articulate any facts concerning the minor child's best interest to be in his joint custodial care as required by the Code Petitioner has not completed his court ordered Batterer's Treatment and most importantly, Petitioner violated on December 4th this Court's Restraining Orders and was arrested by the Costa Mesa police. Therefore, Respondent respectfully requests that the Court maintain the current order of November 16, 2010 as the permanent custodial order for the minor child.

Respectfully submitted

LAW OFFICES OF WENDY L.C. FOUNTAIN, APC

Dated: January 6, 2011

Wendy L. Christensen Fountain