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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

In re Marriage of AMANDA and
PATRICK MCGINTY.

B266408

(Los Angeles County
Super. Ct. No. MD044831)

PATRICK MCGINTY,

Respondent,

v.

AMANDA MCGINTY,

Appellant.

APPEAL from a judgment of the Superior Court of
Los Angeles County, Steff R. Padilla, Commissioner. Reversed
and remanded with instructions.

Amanda McGinty in propria persona.

No appearance for Respondent.

INTRODUCTION

Amanda McGinty, in propria persona, appeals from a child custody order entered in her dissolution proceeding. She contends the trial court abused its discretion in denying her request to move to Texas with her two children and awarding sole custody of the children to their father, respondent Patrick McGinty, in the event she moves out of state. We agree that the court erred in several respects and therefore reverse.

FACTUAL AND PROCEDURAL HISTORY

I. *Petition for Dissolution and Temporary Custody Orders*

Patrick¹ filed a petition for dissolution of marriage on October 4, 2013 after two and a half years of marriage. He requested joint legal and sole physical custody of the couple's two children, A.M. and L.M., then ages five and three, with visitation for Amanda. Amanda filed a response through counsel on November 8, 2013, seeking joint legal and sole physical custody of the children, with visitation to Patrick. In the accompanying declaration, Amanda stated that the children had lived with both parents until their separation on September 9, 2013. Since that date, they had been living with Amanda at an undisclosed address pursuant to Family Code section 3429,² which allows a party alleging domestic violence or child abuse to keep their current address confidential.

On November 15, 2013, Patrick filed a request for order (RFO), alleging that Amanda had taken the children to Texas in September 2013 "without my permission" and that Amanda was

¹ We refer to the parties by first name for clarity because they share a surname; no disrespect is intended.

² All further statutory references are to the Family Code unless stated otherwise.

“making false allegations” of spousal and child abuse. In his RFO, filed in propria persona, Patrick requested full legal and physical custody of the children, with visitation granted to Amanda “only when she is in the state of California,” and sought a court order “for the District Attorney to locate and return the children” to his custody. In his accompanying declaration, Patrick stated that he had previously found vials of drugs belonging to the hospital where Amanda worked in a closet in their home, had returned the vials to the hospital, and Amanda told him she was fired as a result. Patrick further stated that Amanda had taken the children to Texas “to be vindictive and to not let me see my children again.”

In her response, Amanda alleged that Patrick was sexually abusive to her and verbally and physically abusive to the children, including shaking A.M. after the child tripped and fractured his clavicle. She also alleged that Patrick was abusive toward his other son, “PJ,” who also lived with them and was then about 11 years old. Amanda stated that she had taken her children to her parents’ house in September 2013, but Patrick continued to “harass and threaten” her and attempted to have her fired from her job.

At the RFO hearing on November 15, 2013, the court ordered Amanda and the children to be in California for the next regularly-scheduled hearing, set for December 16, 2013, and for Amanda to appear in person. The court made no other orders regarding child custody.

At the December 16, 2013 hearing, Amanda appeared and represented that the children had returned to California as well. She again alleged abuse and requested monitored visitation for Patrick. She told the court that A.M. had broken his clavicle on

one side when he was about 15 months old, and then again on the other side several months later. While she acknowledged that both incidents were accidental, she stated Patrick shook the child afterward to get him to stop crying. The first break occurred when A.M. tripped and fell, the second when PJ “got mad and threw [A.M.] off the couch.” The court asked Amanda if she called the police or took A.M. to the doctor. Amanda responded she did the latter, but was too scared to call the police.

Patrick denied any abuse or violence, and stated that Amanda continued to tell him she was still in California after she had taken the children to Texas. At Patrick’s request, the court ordered the children to remain in California until the next hearing the following month. The court also noted concern about “broken bones” and Amanda’s other allegations, and therefore ordered monitored visitation for Patrick.

At the next hearing, on February 26, 2014, Amanda noted Patrick had been using about an hour out of four hours per week available for monitored visitation. Because Amanda wished to return to Texas with the children, where she was living with her current boyfriend, Joe, the court set an “evidentiary hearing on the move-away,” leaving in place the orders for monitored visitation and for the children to remain in California.

In June 2014, the court entered a status-only judgment of dissolution, reserving issues of custody, visitation, and support.

II. *Evidentiary Hearing*

Due to the court’s crowded calendar and other scheduling issues, the evidentiary hearing in this matter took place in half-day increments between May 2014 and January 2015. During that period, the court gradually expanded Patrick’s visitation and ultimately set equal custody, alternating weeks. The following

evidence was presented by the parties, who were both represented by counsel during the hearing.

A. *Patrick's witnesses*

Patrick's two longtime friends, Roman De La Torre and Kathy Nieto, both testified that he was a loving father and that they never saw any indication of fear by the children or any abuse. They both also considered Amanda to be a good parent. De La Torre stated he had witnessed alcohol and marijuana use by both parties. He also countered Amanda's allegation that Patrick had injured her during frequent rough sex, testifying Amanda had told him that her injuries had been caused during childbirth.

Patrick called Amanda as a witness during his case-in-chief. She testified that A.M., who was 6 years old by the time of the hearing, broke his clavicle when he was 15 months old. A.M. had been running around with a blanket on his head when he tripped and fell. At the time, she and Patrick were both sitting on the couch nearby. After A.M. fell, Patrick told Amanda, "don't pick him up, I don't want him to be a titty baby." He got mad, grabbed A.M. and "started shaking him in the air and telling him, . . . If you don't stop crying, I'm going to put you in your crib." She took A.M. to the emergency room, but Patrick refused to go along. She did not mention Patrick's actions to the doctor, and did not call child protective services or the police because she was scared. A.M. then broke his other clavicle three months later, when PJ threw him off the couch. This time, Patrick was not home. Amanda was sitting on the couch next to A.M. and PJ, telling them to be careful. The court questioned whether "not properly supervising a child so the child has a second broken clavicle in three months might be considered abuse." The court

inquired why no report was made to the Department of Children and Family Services (DCFS). Amanda testified that after the second incident, the doctor told her he did not feel a report was necessary because PJ admitted to throwing A.M. off the couch.

Amanda testified that in September 2013 her doctor put her on a leave of absence from her job at the hospital as a surgical patient care technician. She stayed with her parents in California when she and Patrick first separated, then went to stay with her sister in Texas toward the end of September. She admitted that she did not initially tell Patrick they were in Texas, because he had threatened her, stated he would kill her and threatened her parents. She also admitted that when the sheriffs' department originally contacted her looking for the children, she told them she was still in California, which was not true. She resigned from her job in October because she was scared to return to California.

About a month after they left the state, Patrick started calling to talk to the children. Amanda allowed it, but often Patrick became upset and accused her of coaching the children, which upset the children. She would end the calls when Patrick "would get crazy." Upon questioning by the court, Amanda stated she met her new boyfriend, Joe, at a restaurant the week she arrived in Texas. They became intimate in mid-October and she was currently pregnant with his child. Amanda also told the court that if the children had to stay in California, she would remain as well. She believed the children enjoyed seeing their father during monitored visitation, but they were afraid of being

alone with him. She was told by DCFS that their investigation was inconclusive as to both parents.³

Patrick also testified on his own behalf. He denied any abuse. He said he was at work the first time A.M. broke his clavicle. The second time, he was outside. After the second fall, he told Amanda to take the child to the hospital, but she did not want to because she was worried child protective services would get involved. In response to the court's questioning, Patrick stated he did not think Amanda was responsible for either incident. A.M. was "always roughing around" with PJ and was "very rambunctious." Patrick testified that at times Amanda would spank the children excessively and that they had arguments about it.

Patrick claimed that after he found the drugs in his house, he texted a picture of the vials to Amanda. She responded by text that "until I get my stuff back, you'll have to wait until the court battle is over. And possession is 9/10th's of the law. It's in your possession. You'll go down. . . . And if you think blackmailing me is going to help you, you're wrong." He interpreted this to mean he would not get to see his children unless he gave the drugs back to her, and that she would try to claim they were his drugs. He returned the drugs to the hospital because he did not want to get in trouble. He was not trying to get her fired.

He learned Amanda had taken the children to Texas from her cousin. Before that, no one would tell him where they were.

³ It appears from the record that the DCFS investigation was triggered by the parties' accusations made in this custody dispute. No documentation from DCFS appears in the record, however it seems to be undisputed that no dependency case was filed.

From September to December he was only able to talk to the children once or twice. Patrick stated that he was upset by Amanda's allegations, but he would not try to keep the children from her and would let her see them as much as possible if he were awarded custody. Amanda and the children were currently staying with her mother and stepfather, and he was concerned that they smoked cigarettes around the children, and also kept guns and various medications in the house. According to Patrick, the children had lived in California their entire lives. They had grandparents on both sides in the state, as well as their half-brother, PJ.⁴ The only tie to Texas that he knew of was Amanda's sister and her family. Patrick testified he would accept 50/50 custody if Amanda stayed in California and moved out of her parents' house.

On cross-examination, Patrick admitted calling A.M. a "little wussy" but said he was "just joking." He also stated that PJ had gotten into a "couple fights" at school but denied any behavioral problems.

B. *Amanda's witnesses*

Amanda testified again in her own case. She admitted that she occasionally smoked marijuana and drank, but never after she got pregnant. Patrick would "party and argue with me a lot. And he would get very aggressive." PJ had a lot of problems with "confrontations" at school, and she would deal with the school because Patrick did not "feel it was necessary." Patrick would tell PJ he did not have to listen to Amanda because she was not his mother and was "just like all the other bitches." He would tell

⁴ The record contains minimal information regarding Patrick's parents or siblings and it appears they were not close to him or to the children.

the children, “come here, you little S.O.B.’s” and would call them other names, and call Amanda an “old bitch.” Amanda stated that she tried to leave several times, but Patrick would say he was going to change and she would decide to try to “make things work.” Once, when they were fighting, he grabbed A.M. out of her arms; when she ran for the phone for help, Patrick grabbed it and pulled it out of the wall. He would use his pellet gun to shoot at her mother’s chickens. He also strangled one of their dogs because he did not want to spend the money to euthanize him.

Amanda stated she was placed on stress leave from her job in September 2013. She denied taking any drugs from the hospital, stating that she did not have access to them and ultimately was cleared of wrongdoing by the hospital. She did not know how Patrick got the drugs, but thought it could have been through a friend who worked at a veterinary clinic. The court then asked Amanda why she sent texts to Patrick telling him to give her stuff back and that, “you not threaten me with prison or my job ever again. I’m not f-ing with you.” She stated that she was not referring to the drugs, but to her computer that had all of her modeling photos on it, and some of her other things.

Patrick had started drinking and “partying” more in the few months before they separated. Amanda stated that she did not tell him that she and the children were in Texas because she was scared, especially because he had told her about things he had done for revenge in the past and she had seen the way he had treated his previous wife (PJ’s mother).

Amanda reiterated that she would not leave California if the court ordered the children to remain in the state. She and Joe, who worked as a police officer in Texas, were “still working things out” regarding their forthcoming child and hoping she

would be able to take all of the children back to Texas. When asked how she would ensure the children had contact with their father, Amanda responded she would allow phone calls, video calls, and visitation during summer and holidays. The court then asked, “For a person that you say abused you and abused your children?” Amanda responded that she knew she was required to provide such contact. The court later asked Amanda, “Will you also say anything that you need to say to keep your kids?”

Amanda denied Patrick’s allegations regarding the state of her mother’s home, saying it was clean and did not have mice. The only concern expressed by the DCFS social worker after his visit was her step-father’s gun case, which needed a new lock.

She recently took A.M. for a check-up and the doctor said his clavicles were healed, that there had been hairline fractures, and that he did not report any suspicion of abuse at the time because he did not see anything of concern (such as a twisting fracture, bruises, or scratch marks).

Amanda’s brother, Brandon Skinner, testified that he had used drugs, cocaine and ketamine, with Patrick. He had never seen Amanda do drugs. Amanda previously told Brandon that Patrick was forcing her to have sex every night, even though she was in pain. Brandon testified that Amanda was a “wonderful mom.” Although Brandon denied seeing physical abuse by Patrick, he did state that sometimes Patrick would “grab[]” the children in a way he thought was “a little too much.” Brandon called Patrick a “hard-ass” or a tough guy, and stated he was tough on his boys, especially PJ, “getting down on him . . . mentally and verbally,” and calling him names like “pansy.” Patrick would call A.M. a “titty baby” when he cried. He and Patrick would party together, sometimes every weekend, then

they would sleep most of the following day while Amanda took care of the kids.

Amanda's mother, Patty Skinner, testified that Patrick did not want Amanda to take A.M. to the hospital when he broke his clavicle. She noted that A.M. and PJ played roughly with each other and often wrestled around. Amanda first told her about two years ago that Patrick was being really rough in bed with her, and showed her bruises. Patty had advised Amanda "many times" to leave Patrick. He was "mentally abusive" and she was afraid he was going to become physically abusive. After Amanda left Patrick, Patty and Amanda's father decided to send her and the children to Texas to stay with Amanda's sister, because they were scared for Amanda and knew Patrick had abused his first wife. Patty testified that they "probably shouldn't have" sent them to Texas, and she felt "bad about that" decision.

When Amanda, Patrick, and the children lived next door to Patty and her husband, Amanda was working a night shift at the hospital, and Patrick would "party" and drink at night. When Patty checked on the children in the morning, she often would find Patrick asleep, and would take the children back to her house. She often heard Patrick yell at the children and call them names. Patty confirmed that the social worker had told them to lock their guns up more securely, which they did. He had no other complaints about their house.

The director of the hospital where Amanda worked testified that Amanda did not have had access to drugs at work. The hospital did not discover any drugs missing during that time. She confirmed that Amanda had not been fired, she was a good employee and was be eligible to return to work.

C. *Custody evaluation*

In July 2014, during the presentation of Amanda’s case, her counsel requested a child custody evaluation by a court-appointed expert pursuant to Evidence Code section 730.⁵ Patrick’s counsel objected that the request was made too late. The court responded, “If it was a normal case, a normal move-away, I might even consider denying it. But there are such serious allegations going back and forth, and I have one child who has been injured twice. And I have children that I would like to hear how they view their family life. . . . [I]t causes me deep concern. This is a move-away . . . to Texas.” The court accordingly ordered the evaluation.

JoAnne Feigin, a licensed clinical social worker, issued a 47-page child custody evaluation report on November 21, 2014. In the report, Feigin detailed her interviews with Amanda, Patrick, both of their current partners, Amanda’s parents and step-father, the three children—PJ, A.M., L.M.—as well as teachers from current and former schools for all three children, Amanda’s ob-gyn, her therapist, her former supervisor at the hospital, and Patrick’s first wife, Carrie. Feigin also conducted a home visit to Amanda’s residence (her mother’s home), reviewed copious written information provided by both parties, and performed the Minnesota Multiphasic Personality Inventory-2 psychological test on Amanda, Patrick, their current partners, and Amanda’s mother and step-father.

⁵ “A ‘child custody evaluation’ is an expert investigation and analysis of the health, safety, welfare, and best interest of children with regard to disputed custody and visitation issues.” (Cal. Rules of Court, rule 5.220(c)(3).)

In their interviews, Patrick and Amanda largely repeated the allegations made about each other during the trial. A.M.'s current teacher reported that A.M. had very different behavior from week to week, and on alternate weeks he was "very disruptive, talking more and yelling out loud." This behavior appeared to correlate with the weeks A.M. was staying with Patrick. Additionally, the reports from A.M.'s school in Texas and his home schooling program (run by Amanda when she returned with the children to California in late 2013), were positive toward both A.M. and Amanda. Feigin noted that Amanda had complained of an occasion where Patrick took A.M. to school with a high fever. The school nurse confirmed A.M. had been sent to the school nurse less than half an hour after starting school with a fever of 100 degrees on October 27, 2014. Hospital records also confirmed Amanda's report that she had taken A.M. and L.M. to the emergency room with hand, foot, and mouth disease, which she claimed she had noticed upon picking them up from Patrick's home.

Reports from PJ's current and former schools noted he was often argumentative, disruptive, and aggressive, getting into fights and insulting classmates. PJ's teachers stated he did not turn in his homework and they had minimal contact with Patrick, who would "blam[e] others for his son's behavior."

Feigin reported that the children were attached to both of their half-siblings,⁶ but that their relationship with PJ was "more problematic" due to his history of fighting and dishonesty. She further noted that "various reports in this case show that

⁶ Amanda gave birth to her third child, fathered by Joe, in mid-2014.

[Patrick] glorifies physical fighting and has taught PJ, by his example and words, that physical aggression towards those around you is not only acceptable, but is manly.” Further, Patrick “blamed others for his son’s actions,” and was modeling and teaching domestic violence to the children. Patrick also failed to take steps to improve PJ’s poor academic performance and had conveyed “a lack of genuinely valuing education,” in “marked contrast” to Amanda and her fiancé, Joe. Feigin also found Patrick failed to enroll the children in sports, despite their expressed interest and the potential benefits, and that Amanda “is the parent more likely to follow through with involving the children in healthy extracurricular activities.” Feigin concluded that less contact between the children and PJ might “be of benefit,” because of PJ’s aggressiveness and “excessively rough play,” and because he “models unacceptable behavior to younger siblings.” Feigin also noted that Amanda’s descriptions of Patrick’s behavior with her and the children were very similar to those provided by Patrick’s first wife, Carrie.

Feigin found Patrick to be “highly manipulative of systems and people.” She noted that he had lied to her regarding sending A.M. to school with a fever and cited Patrick’s attempts to have Amanda fired from her job. She found Amanda “showed a lack of understanding of the law and of good judgment in taking off for Texas with the children,” but noted that since “the Court became involved, she returned with the children and has complied with all the Court’s orders.” Feigin believed Amanda would “continue to comply with orders going forward.” The children’s comments “show that they love and are attached to both parents, but describe a closer, less conflictual relationship with their mother,” and also “indicate their preferring to live in Texas, which they

have positive memories about, although they do not have the maturity to make this decision.” Feigin noted that comments by the children supported Amanda’s claim that Patrick “parties” and drinks alcohol, but did not confirm Patrick’s claims about Amanda abusing drugs. She also noted that Patrick had moved and changed PJ’s school many times, “contributing to his educational and behavioral instability,” and that A.M. and P.M. were likely to have greater stability in Texas with Amanda and Joe.

In conclusion, Feigin recommended that Amanda be granted sole legal and physical custody, with visitation for Patrick, and that Amanda be allowed to take the children to Texas.

D. *Closing arguments and ruling*

Both parties rested and closing arguments were held on January 16, 2015. Prior to argument, the court indicated that it had “reviewed the 730. . . . Pursuant to *In re LaMusga*, *In re Burgess*, and *In re Seagondollar*,⁷ the court . . . has seven criteria upon which it must look at in making a move-away” determination. The court then indicated that Amanda had the burden. Patrick’s counsel stated that he was the petitioner, to which the court responded, “I understand that, but it’s a move-away.” The court further stated, “[Amanda] is the petitioner on the underlying case.[⁸] This is a dissolution, but she is asking for

⁷ *In re Marriage of LaMusga* (2004) 32 Cal.4th 1072 (*LaMusga*), *In re Marriage of Burgess* (1996) 13 Cal.4th 25, 32 (*Burgess*), and *In re Marriage of Seagondollar* (2006) 139 Cal.App.4th 1116 (*Seagondollar*). We discuss these cases further *infra*.

⁸ As Patrick’s counsel correctly noted, he was the petitioner in the underlying dissolution proceeding, not Amanda.

the move-away. . . . [B]oth parents were sharing custodial arrangements prior to this time. There were actually no final orders made and so the court's belief . . . that the standard is in the best interests of the child, and [Amanda is] asking to take the child to Texas. I believe she has the burden."

In closing, Amanda's counsel largely submitted on the recommendations of the evaluation report. She noted the concern with PJ, including Patrick's apparent insensitivity to his ongoing difficulties in school; corroborating statements regarding Patrick's aggressive behavior; and the vocational and educational options available to Amanda and the children in Texas. Patrick's counsel argued there was no corroborating evidence to support Amanda's claims of abuse. He pointed to Amanda's admitted lies to the sheriff's department about her whereabouts after she had moved, and other claimed inconsistencies in her testimony. He also argued that Patrick was more likely to encourage contact with the other parent, while Amanda's plan "was and still is likely to cut dad out of the kids' lives."

The court issued a tentative statement of decision on April 6, 2015. Therein, the court noted that while the findings in the Evaluation Report were "quite detailed and thorough, the Court does not follow all the recommendations."⁹ The court then made a number of findings regarding "its determination of relocation as an initial determination under the Best Interest of the Child standards," including that the "children are not safe with mother." The court also noted concern with "father's teaching of

⁹ The court also noted that it "considered the evidence received during the direct and cross examination of the Evaluator." Contrary to this statement, the evaluator did not testify during trial.

[] unacceptable aggression,” his “lack of appreciation of education and [how] PJ has been raised,” but that “the court is more concerned with mother’s willingness to say or do anything to remove custody from the father.” The court found Amanda’s allegations of abuse by Patrick were not credible and were “an excuse to take the children out of state without the father’s knowledge or permission.” Next, the court considered multiple factors it found were “identified” and “mandat[ed]” by *LaMusga, supra*, 32 Cal.4th 1072, including a “significant change of circumstances indicating custody change in best interest of child.” Ultimately, the court ordered the children to remain in California, with shared custody if Amanda remained as well, but sole custody to Patrick if Amanda left the state.

Amanda objected to the proposed decision on the following grounds: (1) the court lacked substantial evidence to find the children were not safe with her; (2) the court gave insufficient weight to Patrick’s negative attitude toward education versus the strong evidence of her role attending to and encouraging the children’s schooling; (3) the court placed undue emphasis, without supporting evidence, on a finding that she would “say or do anything to keep the children from the father”; (4) there was insufficient evidence to support the finding that “father has been able to parent the children. Mother has not shown that stability”; (5) there was insufficient evidence to reject the feasibility of maintaining a relationship with Patrick if she and the children moved; (6) the court ignored statements of the children, who were admittedly young, but nevertheless expressed interest in returning to Texas; (7) the court ordered counseling based on a “history of domestic violence and the parents’ high conflict relationship,” which was inconsistent with other findings;

and (8) the court incorrectly stated that it considered the direct and cross-examination testimony of the evaluator, who had not testified, and unreasonably failed to follow any recommendations from that report.

The court issued its judgment on the reserved issues of custody and visitation on August 13, 2015, adopting many of the findings from the tentative decision. First, the court found that the custody evaluation report by Feigin, “while quite detailed and thorough, the Court does not follow all the recommendations [sic].” Next, the court made findings “regarding the best interests of the minor children and in consideration of [Amanda’s] request to relocate the minor children out of state.” The court adopted its tentative finding that the “children are not safe with” Amanda, citing A.M.’s two broken clavicles while “in the custody of” and “being supervised by” Amanda. The court again noted concern with Patrick’s “teaching of unacceptable aggression,” his “lack of appreciation of education and how [PJ] has been raised,” his “parenting, and his disparaging comments about” Amanda. However, the court also stated that it was “more concerned with [Amanda’s] willingness to say or do anything to remove custody from” Patrick. The court repeated this finding regarding Amanda three times in the final judgment.

The court further found that Amanda’s “allegations of abuse” by Patrick were “false” and “an excuse to take the children out of state without [Patrick’s] knowledge or permission,” and that Amanda had “previously intentionally interfered with” Patrick’s “custodial access” and visitation rights. However, the court also found that Amanda’s current request to move to Texas was made in good faith. Regarding their relationship with their children, the court found that Amanda and Patrick currently had

equal custody, that the children had a loving relationship with both parents, and that the children were too young “to make an intelligent choice and articulate their wishes.” The court noted that the children had family from both sides in California and had resided in California since birth. Moreover, it would not be possible to keep the children together with all of their siblings, as there were now half-siblings on both sides. The court also made two findings regarding “stability”: first, that Amanda “may have found stability but this has been recent”; and second, that Patrick “has been able to parent the children. [Amanda] has not shown that stability.” Finally, the court found that “[r]elocating the minor children would be detrimental.”

Based on these findings, the court ordered that the children are to remain in California, with the parties continuing to share joint legal and physical custody (alternating weeks) if Amanda stayed in California. If Amanda moved out of the state, the court awarded full legal and physical custody to Patrick, with visitation to Amanda. The court also ordered counseling for the children, “based on the history of domestic violence and the parties’ high-conflict relationship.”

Amanda timely appealed from the judgment.

DISCUSSION

Amanda presents two central arguments on appeal regarding the August 2015 judgment.¹⁰ First, she contends that the court used an incorrect standard in its determination of custody. Second, she asserts the trial court’s factual findings were not supported by substantial evidence.

¹⁰ Patrick has not appeared or filed any briefs in this appeal.

I. *Standard of Review*

“It is well settled that the standard of review for custody and visitation orders, including move-away orders, is whether the trial court abused its discretion.” (*In re Marriage of Lasich* (2002) 99 Cal.App.4th 702, 714.) “The precise measure is whether the trial court could have reasonably concluded that the order in question advanced the ‘best interest’ of the child.” (*Burgess, supra*, 13 Cal.4th at p. 32.) An abuse of discretion may also be found when the trial court applied improper criteria or made incorrect legal assumptions. (*F.T. v. L.J.* (2011) 194 Cal.App.4th 1, 15.) “When applying the deferential abuse of discretion standard, ‘the trial court’s findings of fact are reviewed for substantial evidence, its conclusions of law are reviewed de novo, and its application of the law to the facts is reversible only if arbitrary and capricious.’” (*In re C.B.* (2010) 190 Cal.App.4th 102, 123.) To the extent an appellant challenges the trial court’s factual findings, review is limited to whether there is any substantial evidence, contradicted or uncontradicted, that supports the trial court’s ruling. The reviewing court resolves conflicts in the evidence in favor of the prevailing party and draws all reasonable inferences to uphold the trial court’s decision. (*In re Marriage of Mix* (1975) 14 Cal.3d 604, 614; *Lammers v. Superior Court* (2000) 83 Cal.App.4th 1309, 1317.) “We may not reweigh the evidence or determine credibility. [Citation.]” (*In re Marriage of Friedman* (2002) 100 Cal.App.4th 65, 71.) “Credibility is a matter within the trial court’s discretion[,]” and the reviewing court must defer to the trial court’s findings on credibility issues. (*In re Marriage of Meegan* (1992) 11 Cal.App.4th 156, 162–163.)

II. *Standards for Determining Child Custody*

“In an initial custody determination, the trial court has ‘the widest discretion to choose a parenting plan that is in the best interest of the child.’ (Fam. Code, § 3040, subd. (b).) It must look to *all the circumstances* bearing on the best interest of the minor child. [Citation.]” (*Burgess, supra*, 13 Cal.4th at pp. 31-32.) Section 3011 lists specific factors, “among others,” that the trial court must consider in determining the “best interest” of the child: the health, safety, and welfare of the child; any history of abuse by either parent; the nature and amount of contact with both parents; and either parent’s habitual or continual illegal use of controlled substances or alcohol. (§ 3011, subds. (a)–(d).) “[I]t 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.” (§ 3020, subd. (a).)

On the other hand, where a parent seeks to modify an existing custody order, that parent has a substantial burden to show that “‘some significant change in circumstances indicates that a different arrangement would be in the child’s best interest.’ [Citation.]” (*Burgess, supra*, 13 Cal.4th at p. 38.) “In a ‘move-away’ case, a change of custody is not justified simply because the custodial parent has chosen, for any sound good faith reason, to reside in a different location, but only if, as a result of relocation with that parent, the child will suffer detriment rendering it “‘essential or expedient for the welfare of the child that there be a change.’” [Citation.]” (*Ibid.*)

Here, it is undisputed that the matter before the trial court was an initial determination of custody. As such, the best interest standard applied. Amanda contends that the court improperly applied the changed circumstances standard in

denying her request to relocate with the children. The court's discussion of the applicable standard was somewhat muddled. During the hearing and in the tentative statement of decision, the court referred to both standards, including extensive discussion of the factors to be considered under *LaMusga, supra*, 32 Cal.4th 1072, and *Seagondollar, supra*, 139 Cal.App.4th 1116. Both of those cases involved analysis of the changed circumstances standard, and therefore are inapplicable here. The court also incorrectly stated during the hearing that Amanda bore the burden of proof as the parent seeking to move with the children. (*Burgess, supra*, 13 Cal.4th at pp. 36-37 and fn.10 [parent seeking to relocate "bears no burden of demonstrating that the move is 'necessary'"].) Thus, to the extent the court imposed such a burden on Amanda or applied any aspect of the changed circumstances standard, it erred in doing so.

However, Amanda has not affirmatively demonstrated that such an error occurred. (See, e.g., *State Farm Fire & Cas. Co. v. Pietak* (2001) 90 Cal.App.4th 600, 610.) The final judgment expressly referred to the court's findings "regarding the best interest of the minor children" and did not reference either the changed circumstances standard or the burden of proof. The court's inconsistent statements in its tentative decision are not binding and may be modified or changed. (See *Khan v. Superior Court* (1988) 204 Cal.App.3d 1168, 1173, fn. 4; see also *People ex rel. State Air Resources Bd. v. Wilmshurst* (1999) 68 Cal.App.4th 1332, 1341.) At most, whether the court applied an incorrect standard is unclear, and as a general rule "[a] judgment or order of the lower court is presumed correct" (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 564) with "ambiguities . . . resolved in favor of affirmance" (*Winograd v. American Broadcasting Co.*

(1998) 68 Cal.App.4th 624, 631). Accordingly, we must presume that the court properly applied the best interest standard in making its child custody order.

III. *Factual Findings*

Amanda also contends that the trial court lacked substantial evidence in making several key factual findings supporting the judgment. We agree.

First, we find no support in the record for the court's conclusion that the children were "not safe" with Amanda. This conclusion appears to be entirely based on the court's determination that A.M. was in Amanda's custody and under her supervision when he broke his clavicle twice as a toddler, several years prior to custody dispute. As an initial matter, the undisputed evidence established that A.M. was in the custody of both Amanda and Patrick at the time and that Amanda sought medical attention for A.M. following both incidents. Whether Patrick was present and/or involved in child supervision for either incident and whether he encouraged or discouraged the visits to the hospital were disputed by the parties, and we therefore resolve those issues in Patrick's favor and in conformance with the judgment. However, the record reflects an unusual degree of agreement between the parties as to the accidental circumstances of both injuries, and neither Amanda nor Patrick blamed the other parent (apart from Amanda's suggestion that PJ's rough manner of playing was a result of Patrick's influence). Indeed, upon questioning by the court, Patrick expressly stated he never thought Amanda was responsible for A.M. breaking his clavicles and that she was a good mother. Moreover, Amanda presented evidence that the doctor who examined A.M. did not find the injuries significant

enough to report them to DCFS and had told her that this type of injury was “very common” in children around A.M.’s age. In light of this evidence, particularly coupled with the court’s noted concern regarding Patrick’s “teaching of unacceptable aggression” to his children, the court lacked substantial evidence to conclude that the children were safe with Patrick and not with Amanda.

The court’s findings regarding stability were similarly unsupported. The court concluded, without further explanation, that Amanda had only recently “found stability” and that Patrick “has been able to parent the children [but Amanda] has not shown that stability.” It is unclear why the court reached this conclusion and we find no evidence in the record to support it. At the time of the hearing, Patrick had moved in with his girlfriend, and Amanda, who was staying with her parents pending the court’s decision, planned to live with Joe in Texas. She also presented evidence that she would be eligible for rehire at her hospital job if she remained in California, and that she planned to pursue additional education to become a registered nurse (tuition-free as a benefit of Joe’s employment at a university) if she returned to Texas. Further, while Patrick’s involvement with the children’s educational and medical needs was disputed, the evidence uniformly suggested that Amanda was attentive and proactive in these areas. Moreover, the court echoed the concerns detailed in the custody evaluation report regarding Patrick’s “lack of appreciation of education,” how he had raised PJ, and “his parenting.” These findings are incompatible with the court’s stated conclusion that Amanda lacked stability and an ability to “parent” the children.

The court also found Amanda’s allegations of abuse by Patrick were unfounded and that Amanda initially took the

children to Texas for the purpose of interfering with Patrick's access to them. These findings are supported by evidence in the record. Based on these findings, the court then relied heavily on its conclusion that Amanda would "do or say anything" to keep the children from Patrick. The court was entitled to make a negative credibility finding as to Amanda, and we cannot reweigh the evidence or reevaluate credibility on appeal. Nevertheless, we cannot conclude that such a finding allowed the trial court to reasonably conclude that its order advanced the best interests of the children under all of the circumstances. We note that, contrary to the above findings, the trial court also found the parties had a "history of domestic violence" and found that Amanda's *current* request to relocate with the children was made in good faith, rather than to prevent Patrick from custody or visitation. In addition, the evidence suggested that Amanda had complied with all of the court's orders from November 2013, when she was ordered to return to California with the children and allow visitation by Patrick, through the entry of judgment in August 2015, including over a year of shared custody on an alternating weekly schedule.¹¹

Nor do we find any basis in the record for the court's complete rejection of the recommendations in the child custody evaluation, particularly in light of the court's agreement with Feigin's concerns regarding Patrick's aggressive behavior and

¹¹ The court's comments during the hearing suggest it faulted Amanda for attempting to keep the children from Patrick while simultaneously expressing incredulity that Amanda would allow Patrick access to the children in view of her testimony regarding Patrick's abuse.

attitude toward parenting, and PJ's serious social, emotional, and educational difficulties.

In sum, although the trial court recognized the difficulty in making a custody determination in this type of case, we conclude it failed to properly consider all of the relevant circumstances in evaluating the best interest of the children here. (See *Burgess*, *supra*, 13 Cal.4th at pp. 31–32.) By relying on several key factual findings that lacked supporting evidence, and by making several other findings inconsistent with its own conclusions or with other undisputed evidence, the trial court's custody order was an abuse of discretion.

DISPOSITION

The judgment on the reserved issues of child custody and visitation is reversed. The matter is remanded for further proceedings consistent with this opinion.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

COLLINS, J.

We concur:

EPSTEIN, P. J.

WILLHITE, J.