Filed 12/17/12 O.O. v. Dennis R. CA2/3

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

O.O., Plaintiff and Respondent, v. DENNIS R., Defendant and Appellant.	B233505 (Los Angeles County Super. Ct. No. LF004579)

APPEAL from an order of the Superior Court of Los Angeles County, Steff R. Padilla, Temporary Judge.* Affirmed. Remanded with directions.

Dennis R., in pro. per.; Robert F. Smith, for Defendant and Appellant.

Carl Etting for Plaintiff and Respondent.

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* Pursuant to Cal. Const., art. VI, § 21.

Dennis R. (father) appeals from the trial court's order granting O.O.'s (mother) request to be allowed to relocate with their children to Israel.

FACTS AND PROCEDURAL BACKGROUND[1]

Mother and father, who were never married, have three children together: O.R., born in December of 2001; L.R., born in October of 2003; and S.R., born in February of 2007. Mother is an Israeli citizen and the children speak both Hebrew and English.

Mother filed a request for a restraining order under the Domestic Violence Prevention Act (DVPA) on September 2, 2008. Both mother and father filed petitions to establish father as the father of the children and the petitions were consolidated shortly thereafter. A temporary restraining order and an order limiting father to monitored visitation with the children were put in place.

Mother filed a request to relocate with the children to Israel on June 23, 2009. The bases for her request included father's history of violence against her, his anger management issues, his failure to provide child support, mother's inability to support herself in the United States and being on welfare, her support system's being almost entirely in Israel, and a job at her sister's retail establishment waiting for her in Israel. The trial court ordered a child custody evaluation report pursuant to Evidence Code section 730 on August 3, 2009. The evidentiary hearing on the request for a DVPA

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[1] The factual and procedural background is drawn from the record, which includes a two-volume Clerk's Transcript, a four-volume Reporter's Transcript and a one-volume augmentation.

restraining order and mother's request to be allowed to relocate began on April 7, 2010 and continued for eight more days in court over the span of seven months.

On November 18, 2010, the trial court issued an Order of Protection[2] under the DVPA requiring father to stay at least 100 yards away from mother, her home, her vehicle and her workplace and to refrain from engaging in certain harassing behaviors enumerated in the order. The Order of Protection also granted mother the right to record communications with father and directed father to take a 52-week batterer intervention program. Finally, with respect to the children, the Order of Protection granted sole physical custody to mother and ordered supervised visitation with father with the paternal grandmother as the monitor. Father has not appealed from this order.

With respect to mother's request to relocate with the children to Israel, the trial court granted her request on March 30, 2011. Disagreeing with the decision, father filed a motion for a new trial and for reconsideration of the March 30, 2011 order on April 11, 2011, which was denied. On May 27, 2011, father filed a notice of appeal with respect to the order entered on March 30, 2011 and the trial court's denial of his motion.[3]

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[2] Family Code section 6323 allows a court to issue an ex parte order determining the temporary custody and visitation of minor children after determining whether the parent at issue has established a parent-child relationship. Family Code section 6340, by reference to section 6323, allows a court to issue a final custody and visitation order after notice and a hearing. (*Gonzalez v. Munoz* (2007) 156 Cal.App.4th 413, 421-422.)

[3] Although father's notice of appeal states that he is appealing the trial court's denial of his motion for a new trial and for reconsideration of the March 30, 2011 order, he provides no argument or discussion in support. As a result, this contention is deemed

CONTENTIONS

Father contends that the trial court erred in granting mother's request to relocate with the children to Israel. To support his contention, father argues that (1) the trial court applied the wrong test in deciding the issue; (2) the evidence did not support the order; and (3) the order did not sufficiently safeguard father's visitation rights.

DISCUSSION

1. *Standard of Review*

"We review for abuse of discretion relocation orders that permit a custodial parent to move away with a child. [Citations.]" (*In re Marriage of Abargil* (2003) 106 Cal.App.4th 1294, 1298.)

2. *The Trial Court's Application of the "Changed Circumstances" Standard*

Father argues that the trial court erred in applying the "changed circumstances" standard, which required father to show detriment, in ruling on mother's request to relocate with the children to Israel. He asserts that the DVPA Order of Protection was not a final judicial determination of custody and therefore the proper test was the "best interests" test.

"When a final judicial custody determination is in place . . . , and a noncustodial parent seeks to modify custody in response to a proposed relocation, the trial court must apply the changed circumstance rule. Although the noncustodial parent is not required to show a custody modification is 'essential' to prevent detriment to the child from the

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waived and is properly disregarded. (*Huntington Landmark Adult Community Assn. v. Ross* (1989) 213 Cal.App.3d 1012, 1021.)

planned move, he or she bears the initial burden of showing that the proposed relocation of the child's residence will cause detriment to the child, requiring a reevaluation of the existing custody order. [Citations.]" (*In re Marriage of Brown & Yana* (2006) 37 Cal.4th 947, 959-960.) If the noncustodial parent fails to show such detriment, the trial court may deny any such request for modification without holding an evidentiary hearing.[4] (*Id*. at p. 962; *Elkins v. Superior Court* (2007) 41 Cal.4th 1337, 1360.) But, if detriment is shown, the trial court is obligated to apply the "best interests" test to determine whether a change in custody is needed. (*In re Marriage of Brown & Yana*, *supra*, 37 Cal.4th at pp. 960-961.) In cases where there is no prior judicial determination of custody, the initial showing of detriment is not required and the trial court proceeds directly to the "best interests" test. (*In re Marriage of Burgess* (1996) 13 Cal.4th 25, 34.)

Father correctly asserts that, under *Keith R. v. Superior Court* (2009) 174 Cal.App.4th 1047, 1054, he should not have been required to show detriment to the children as a result of the proposed move because custody orders issued as part of a DVPA Order of Protection are not generally considered the functional equivalent of

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[4] Family Code section 217, effective January 1, 2011, provides that "[a]t a hearing on any order to show cause or notice of motion brought pursuant to this code, absent a stipulation of the parties or a finding of good cause pursuant to subdivision (b) [of this section], the court shall receive any live, competent testimony that is relevant and within the scope of the hearing and the court may ask questions of the parties." (Fam. Code § 217, subd. (a).) It is not clear to what extent this section undermines a trial court's ability to deny a request for modification without holding an evidentiary hearing if detriment is not shown. Given that the trial court held a full hearing on the issue in this case, we leave to another day the question of whether a trial court may find that a party's failure to make a prima facie showing of detriment under these circumstances amounts to good cause for purposes of section 217.

a final judicial custody determination. He fails to argue, however, that he suffered any prejudice since the trial court found that he had made a prima facie case of detriment then ultimately actually applied the "best interests" test with respect to mother's request to relocate. "We are required to uphold the ruling if it is correct on any basis, regardless of whether such basis was actually invoked. [Citation.]" (*In re Marriage of Burgess*, *supra*, 13 Cal.4th at p. 32.) Although the trial court erroneously initially required a showing of detriment, it ultimately applied the correct legal test, the "best interests" test, in deciding mother's request to relocate with the children. We find no reason to reverse the order for an abuse of discretion on this basis.

3. *The Evidence in the Record Supports the Trial Court's Order*

Father next generally contends that the evidence was insufficient to support the trial court's order. He also specifically makes three similar arguments that we address herein, which are: (a) that the trial court improperly disregarded the evaluation report and the testimony of the expert evaluator; (b) that the trial court improperly relied on mother's representation that she would move to Israel with or without the children; and (c) that the trial court was biased because it believed mother's testimony over his.

"The precise measure is whether the trial court could have reasonably concluded that the order in question advanced the 'best interest' of the child." (*In re Marriage of Burgess*, *supra*, 13 Cal.4th at p. 32.) " ' "[E]valuating the factual basis for an exercise of discretion is similar to analyzing the sufficiency of the evidence for the ruling. . . . Broad deference must be shown to the trial judge. The reviewing court should interfere only ' "if [it] find[s] that under all the evidence, viewed most favorably

in support of the trial court's action, no judge could reasonably have made the order that he did." . . . ' " [Citations.]' [Citation.] ' "The burden is on the party complaining to establish an abuse of discretion, and unless a clear case of abuse is shown and unless there has been a miscarriage of justice a reviewing court will not substitute its opinion and thereby divest the trial court of its discretionary power." [Citations.]' [Citations.]" (*Rich v. Thatcher* (2011) 200 Cal.App.4th 1176, 1182.)

Prior to granting mother's relocation request, the trial court issued an Order of Protection based on its findings that father had engaged in domestic violence against mother and had physically abused, on at least one occasion, his daughter (K.R.) from a prior relationship. Neither that order nor the findings on which it is based are challenged in this appeal. Under Family Code section 3044, "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." Even without this presumption, the evidence presented to the trial court supports its conclusion that it was in the best interests of the children for them to remain in mother's custody despite her move to Israel.

At the combined trial on the Order of Protection and the request to relocate, mother testified extensively regarding father's abusive and bullying behavior. She testified that he slapped her, choked her, pushed her to the ground and dragged her along the floor. She also testified that he threw things at her, attempted to force his way into her apartment and reached up her skirt in public in front of the children. Mother stated that father threatened to hurt her if she left him saying, "You're finished. I'm

going to hurt you. That's the end of you." She testified that he engaged in other offensive tactics, such as spitting in her face at Chuck E. Cheese's restaurant and calling her offensive names, all in front of the children. The court found such testimony credible.

Father denied these allegations and any responsibility for his actions generally and, in the opinion of Dr. Jill Schneider, the psychologist hired to write a custody evaluation report, father frequently took the position that *he* was being victimized. Dr. Schneider also testified that father had impulse control and anger problems.

When asked whether mother or father was more likely to facilitate a relationship with the other if mother left the country, Dr. Schneider testified that she believed mother would. She also testified that mother was a "fabulous mother" and that she had the proper parenting skills to take care of the children whereas father would need help. In her opinion, the animosity between the parents would "slow down" if mother moved to Israel. And finally, she testified that she did not believe father should have primary custody of the children. The trial court's conclusions in light of the evidence in the record were not unreasonable.

a. *The Trial Court Could Properly Disregard the Evaluation Report*[5]

Father argues that the trial court improperly disregarded the evaluation report prepared by Dr. Schneider. This argument is without merit. "The [trial] court merely and appropriately determined that [the contents of the report were] not dispositive." (*In re Marriage of Lasich* (2002) 99 Cal.App.4th 702, 718.) From Dr. Schneider's

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[5] The report at issue was not included in the record.

testimony, it was clear that in her evaluation report she did not properly analyze the issue of custody in the context of a move-away order. Instead, she only considered whether the best interests of the children were served if mother remained in California versus if mother moved to Israel with the children.

b. *The Trial Court Properly Assumed Mother Would Move Even if Custody Would be Given to Father*

Father argues that it was improper for the trial court to assume that mother would move to Israel even if father was granted custody of the children. We disagree.

With respect to move-away orders, the "issue is not whether the custodial parent will be permitted to move, since both the federal and California Constitutions preclude the court from prohibiting a move. [Citation.] The issue before the court is: *assuming the custodial parent moves, does the best interest of the child require changes be made in the existing custody or visitation arrangements?* To phrase the issue any other way would assume the unrealistic possibility that a court order could result in the custodial parent moving away, leaving the child behind (presumably in the care of third parties)." (*Brody v. Kroll* (1996) 45 Cal.App.4th 1732, 1736 [Italics added].) Unless the trial court found that mother's decision was in bad faith, and no such finding was made here, "the trial court must treat the plan as a serious one and must decide the custody issues based upon that premise. The question for the trial court is not whether the parent may be permitted to move; the question is what arrangement for custody should be made." (*Ruisi v. Thieriot* (1997) 53 Cal.App.4th 1197, 1206.) Father points to no authority that supports his contrary view.

The trial court's analysis of the best interests of the children, assuming that mother would move to Israel and father would remain in his current location, was the correct legal standard and, therefore, was not an abuse of discretion.

c. *The Trial Court Could Properly Find that Mother's Testimony Was More Credible Than Father's*

Although father's argument is under the heading "Abuse of Power and Judicial Bias," he attributes error to the trial court's decision to disregard mother's "repeated filing of false accusations and perjuring herself under oath." In his opening brief, he lists numerous alleged "lies" and "contradictions" in her testimony as well as includes a vague statement asserting that "Civil procedure codes [sic] were violated" in support of his argument. It is well established that a trial court in a bench trial is the finder of fact and that "[e]vidence from a single witness, even a party, can be sufficient to support the trial court's findings. [Citations.]" (*In re Alexis E.* (2009) 171 Cal.App.4th 438, 450-451.) Father fails to point to any authority to the contrary that supports his argument and we find that it is entirely without merit.

Based on the foregoing, we find that father failed to meet his burden of establishing that the evidence in the record did not support the trial court's conclusions.[6] After extensive testimony from both parents and a number of other individuals in

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[6] We are not required to undertake an independent examination of the record to determine whether the trial court abused its discretion on any grounds not mentioned by appellant. (*Rich v. Thatcher, supra,* 200 Cal.App.4th at p. 1181.) "A judgment or order of a lower court is presumed to be correct on appeal, and all intendments and presumptions are indulged in favor of its correctness." (*In re Marriage of Arceneaux* (1990) 51 Cal.3d 1130, 1133.)

a lengthy trial, the trial court could reasonably find that it was in the best interest of the children that mother retain sole physical custody, even if she moved to Israel.

4. *The Order Insufficiently Safeguarded Father's Visitation Rights*

Father also contends that the trial court did not sufficiently safeguard his rights with respect to visitation. Father relies on *In re Marriage of Condon* (1998) 62 Cal.App.4th 533 and *In re Marriage of Abargil*, *supra*, 106 Cal.App.4th 1294 to support this contention.

The Court of Appeal in *In re Marriage of Condon* set forth three factors that must be considered by a trial court when "confronted with a parent's request to relocate a child to a foreign jurisdiction . . . in addition to those affecting a domestic move-away." (*Id.* at p. 547.) These are (1) whether the move will raise any significant cultural problems; (2) whether the distance, problems of expense, jet lag and the like resulting from the move is likely to result in a de facto termination of the nonmoving parent's rights to visitation and the child's rights to maintain a relationship with that parent; and (3) what steps must be taken in order to ensure the enforceability of the custody and visitation arrangements made for the nonmoving parent. (*Id*. at pp. 546-547.) Father does not challenge the trial court's findings with respect to whether the move will raise any significant cultural problems. Instead, he challenges only the second and third factors.

In taking the position that the distance, problems of expense, jet lag and the like resulting from the move is likely to result in a de facto termination of father's rights to visitation, he cites the following excerpt from *In re Marriage of Condon*: "except for

those of considerable means, any relocation to another continent is likely to represent a de facto termination of the nonmoving parent's rights to visitation." (*Id.* at p. 547.) However, father includes no analysis or argument as to how the trial court's order failed to take this into consideration. To the contrary, the record indicates that the trial court did.

In *In re Marriage of Condon*, the lower court provided that a portion of the support payments that father otherwise would have made could be used to cover the visitation expenses of travel between the United States and Australia. (*Id.* at p. 553.) The order also provided for specific additional visitation time. (*Id*. at p. 554.) The appellate court determined that, together, this method carefully balanced the factors and served the bests interests of the children and was thus reasonable. (*Ibid*.) The trial court here did the same thing.

In its Statement of Decision, the trial court here found, despite father's claims that he could not afford to travel to Israel, that visitation was not financially prohibitive as both parties had traveled back and forth between the United States and Israel several times before. The trial court found that father could use the child support payments he was required to make under an August 2010 order to fund the children's and his travel between Israel and the United States.

The trial court also ordered that father could travel to Israel for a ten-day unmonitored visit with the children in the summer of 2011. The trial court ordered the visit in the summer of 2012 to occur in California and be extended to 14 days. It also

ordered father to have electronic visitation contact with the children via Skype for at least 15 minutes every Monday, Wednesday, Thursday and Sunday.

Although neither parent was found to be "of considerable means," father fails to show that the relocation represents a de facto termination of his rights to visitation given the availability of court-ordered support payments to cover transportation costs, the unmonitored summer visits, and the required Internet communication via Skype.[7] "The trial court's orders on custody, visitation, and Internet communication [were] tailored to foster the minors' frequent and continuing contact with father [pursuant to Family Code section 3020[8]]. [While] [i]t is true that in-the-flesh visits will occur farther apart in

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[7] Father claims, in passing, that the trial court should have removed the restriction on his passport preventing him from leaving the United States. Father's assertion is based on section 51.60 (a)(2) of Title 22 of the Code of Federal Regulations, which provides that a parent who owes $2,500 or more in child support arrears is ineligible to receive a United States passport. In August of 2010, the trial court had previously found that the monthly incomes of father and mother were $2,000 and $700, respectively. Based on these numbers, the trial court ordered father to pay child support to mother in the amount of $622 per month, a lower amount than was initially ordered in 2009. Diane Brower testified on behalf of the Child Support Services Department that, as of August 5, 2010, father had failed to make any payments of child support since it was initially ordered in 2009. There is no evidence in the record that father made any payments after the amount was lowered either.

Father cites no authority for his assertion that the trial court should, or even could for that matter, lift his passport restriction. Further, as the restriction is due to father's own actions in violation of the court's child support order, we fail to see how such restriction should be taken into account in any analysis of whether his inability to travel as a result is a de facto termination of his right to visitation.

[8] Family Code section 3020, subdivision (b), states, "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."

time, . . . nothing in section 3020 precludes that change." (*In re Marriage of Lasich*, *supra*, 99 Cal.App.4th at p. 718.)

With respect to the question of enforceability, father asserts that the trial court erred in failing (1) to require mother to put forth an enforcement bond; and (2) to reduce his child support order as a method of enforcing the move-away order. He also asserts that the Hague Convention provides no safeguards with respect to enforcement of a California court order in Israel.

The court in *In re Marriage of Condon* stated that the "Hague Conference on Private International Law, Convention on the Civil Aspects of International Child Abduction (Oct. 25, 1980) 19 Intl. Legal Materials 1501 (Hague Convention), serves an analogous function to the UCCJA[**9**] in custody disputes involving countries that are signatories . . . . " (*In re Marriage of Condon, supra*, 62 Cal.App.4th at p. 556.) But any such protection is limited to only one year. (*Ibid*.) In reversing the lower court's order allowing the mother to move to Australia with the minor children, the appellate court directed the trial court to "obtain a concession of jurisdiction and furthermore to create sanctions calculated to enforce that concession. At a minimum, such sanctions should include the posting of an adequate monetary bond within [that mother's] means

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9 "The Uniform Child Custody Jurisdiction Act (UCCJA), codified in Family Code sections 3400 to 3425, provides the exclusive method for determining subject matter jurisdiction in child custody cases in California. [Citations.] . . . [It also] gives another state's court continuing jurisdiction over its child custody determinations by preventing a California court from modifying the decree as long as the first court does not concede jurisdiction. The other state's jurisdiction over the modification of custody orders is exclusive, and continues as long as at least one of the parties remains in that state." (*In re Marriage of Condon*, *supra*, 62 Cal.App.4th at p. 555.)

and the potential forfeiture of all or some support payments upon proof [the mother] is disregarding essential terms of the court order or has violated the concession of jurisdiction by pursuing modification of the California order in the courts of Australia or any other nation." (*Id.* at p. 562.)

In order to comply with *In re Marriage of Condon*, the court in *In re Marriage of Abargil* remanded the matter and ordered the trial court to modify its judgment, which allowed the mother in that case to move to Israel with her son, to ensure enforcement of the visitation orders by: (1) requiring the mother to post a substantial financial bond in an amount sufficient to ensure her compliance with the court's judgment and order; (2) prohibiting the mother, who had conceded to California's continuing jurisdiction, from attempting to modify the judgment except on application to a California state court with any attempt to do so in a non-California court absent a showing of good cause being deemed a violation and grounds for forfeiture of the bond and other sanctions as appropriate; and (3) requiring the mother to register the trial court's judgment with the proper Israeli authorities before traveling to Israel. (*In re Marriage of Abargil*, *supra*, 106 Cal.App.4th at pp. 1303-1304.)

In the case before us, the trial court made the following orders: (1) mother shall not file any action in the Israeli courts involving custody and visitation; (2) any requests for modification shall be made in California; and (3) child support payments shall not be paid to mother, but rather shall be used to fund visitation travel for father and the children thereby reducing the father's child support paid directly to mother. Mother filed a "stipulation and consent" in the form of a declaration stating that she agreed that

the United States is the "habitual home" of the children and that she consented to California's having jurisdiction over her, father and the children with regard to all child-custody issues. The trial court took judicial notice that Israel is a signatory to the Hague Convention without objection.

Mother was not required to post any bond and she was allowed to leave the United States with the children without registering the order with the proper Israeli authorities before doing so. As a result, the trial court's order failed to satisfy the requirements of both *In re Marriage of Condon* and *In re Marriage of Abargil*.

In *In re Marriage of Abargil*, a stay was issued and not lifted until that mother complied with that court's modifications upon remand. We do not have such a stay in place here and mother has already departed. Additionally, father's counsel stated that mother failed to allow the children to visit father during the summer of 2012 and that she had filed a legal proceeding in Israel to obtain an order preventing the children from leaving Israel and granting her 100-percent custody of them. Ordinarily, we would have remanded the case to the trial court with directions to modify the order to require mother to post an adequate bond or other surety that would be forfeited in the event she failed to comply with the order and to require mother to register the order with the proper Israeli authorities. But if the information provided by father's counsel is true, it is unlikely that mother would comply with any such modifications.

Because we find that the trial court did not abuse its discretion in granting the move-away order, we will affirm it. However, the interests of justice require that we remand the case in an attempt to mitigate the consequences suffered by father as a result

of mother's potential violation of the lower court's orders. In our remand, we will direct the trial court to hold a hearing for a factual determination of whether mother has violated its orders after which it is to consider suspending or otherwise modifying father's child support obligations as of a date that the trial court determines to be appropriate until mother submits herself and the children to California's jurisdiction with respect to child-custody issues.

DISPOSITION

The move-away order is affirmed. The matter is remanded to the trial court for reconsideration of the existing child support order in accordance with the views expressed in this opinion. The parties shall each bear his or her own costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

CROSKEY, Acting P. J.

WE CONCUR:

KITCHING, J.

ALDRICH, J.