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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

NATHANIEL H., Plaintiff and Appellant, v. M.P., Defendant and Respondent.	B291493 (Los Angeles County Super. Ct. No. BF050055)

APPEAL from a judgment of the Superior Court of Los Angeles County, Lawrence P. Riff, Judge. Affirmed.

Nathaniel H., in pro. per., for Plaintiff and Appellant.

M.P., in pro. per., for Defendant and Respondent.

INTRODUCTION

Nathaniel H. appeals from a family law court judgment giving primary physical custody of his daughter Leyla to her mother, M.P. Nathaniel argues the family law court abused its discretion by failing to consider Nathaniel's equal if not superior "parenting and station in life" and the financial impact of his child support payments. Nathaniel also contends the trial court erred by considering hearsay evidence and by not continuing the trial even though Nathaniel said he had not received M.P.'s trial brief, witness list, or income and expense declaration. Because Nathaniel has not shown the family law court abused its discretion, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

A. *Nathaniel and M.P. Agree Leyla Will Live Primarily with M.P. in Riverside County*

Nathaniel and M.P. had a daughter, Leyla, in 2009. Leyla lived in Los Angeles with M.P. and M.P.'s two older daughters from a previous relationship, and Nathaniel lived with or near them. After Nathaniel and M.P. ended their relationship, Nathaniel learned M.P. planned to move with Leyla from Los Angeles to Riverside County, and he filed a petition to establish parental relationship. From April to October 2014, while Nathaniel and M.P. still lived five minutes apart, Nathaniel and M.P. had an informal visitation schedule that provided for Leyla to spend three days a week with Nathaniel and the rest of the week with M.P. During that time a child support order required

Nathaniel to make payments to M.P. based on their shared physical custody.

Following a hearing on Nathaniel's petition on October 16, 2014 the family law court ordered joint legal and physical custody and formalized the informal visitation schedule. The court prohibited Nathaniel and M.P. from moving out of Los Angeles County without prior written consent of the other or a prior court order.

A week later M.P. filed a request for an order allowing her to move to Riverside County and giving her sole physical custody of Leyla. M.P. explained that, before the court entered its October 16, 2014 order, she had already transferred her subsidized housing benefits to Riverside County, signed a lease, made a deposit on an apartment, resigned from her job and negotiated a new job opportunity in Riverside County, and enrolled Leyla and M.P.'s older daughters in new schools. M.P. told the court she lived in a high crime area in Los Angeles and wanted to move to provide "a better and safer environment for [her] children" and "better schools." Nathaniel opposed M.P.'s request and requested sole legal and physical custody of Leyla in light of M.P.'s "blatant violation" of the court's October 16, 2014 order.

At a hearing on December 3, 2014 the family law court acknowledged this was "a very hard case." After initially awarding Nathaniel sole physical custody, the court reversed course and granted M.P. primary physical custody because the court found living in Riverside County was in Leyla's best interest. On December 18, 2014 Nathaniel and M.P. entered into a Conciliation Court Agreement and Stipulated Order re Custody and Parenting Plan giving them joint legal custody and giving

M.P. primary physical custody of Leyla. Nathaniel later said he agreed to that arrangement because he could no longer afford to litigate.

B. *Nathaniel Requests Primary Physical Custody*

On November 29, 2017 Nathaniel filed a request to modify the stipulated order to give Nathaniel primary physical custody of Leyla. M.P. opposed the request, and the family law court set the matter for trial on April 16, 2018. The court asked Nathaniel and M.P. if they planned to call witnesses. Nathaniel said no, and M.P. said she might call her daughter but did not specify which one. The court asked Nathaniel and M.P. to file and serve witness lists by April 9, 2018 and said the court might not allow a witness to testify if the witness was not identified on a witness list.

In his trial brief Nathaniel explained that he had not been able to spend significant amounts of time with Leyla since she moved to Riverside County and that her residence there had been "financially damaging" for him. Nathaniel submitted evidence of his lease for a two-bedroom apartment where Leyla would have a bedroom, his work schedule, and the close proximity of his apartment to the school Leyla would attend if she lived with him. Nathaniel also served discovery on M.P. and requested information regarding her work schedule, tax returns, insurance, education, and Leyla's after school activities.

M.P. argued moving Leyla back to Los Angeles would be detrimental to Leyla's mental health and asked the court to maintain the existing visitation schedule. She said Riverside County provided Leyla "a better environment, better schools and great resources, so my family can ultimately have a better

lifestyle." M.P. admitted Nathaniel was "a great father," but said she did not think he had considered the "psychological emotional effect and trauma that [giving him custody] will cause to our daughter to be taken away from her sister[s] and [M.P.]." M.P. said Leyla sometimes slept with her sisters and bonded with them by sharing bedtime stories and painting each other's fingernails. M.P. said Leyla also had close bonds with friends at school and attended an after school program. M.P. agreed to have Leyla spend more time with Nathaniel during school breaks and recognized that driving to Riverside County to pick up Leyla for weekend visits was a hardship. M.P. did not respond to Nathaniel's discovery.

At trial Nathaniel argued that moving Leyla back to Los Angeles was in her best interest because she would have more contact with both sides of her extended family in Los Angeles, including her grandmothers, aunts, uncles, and cousins, none of whom lived in Riverside County. M.P. said she did not have contact with her siblings who lived in Los Angeles because she did not want to expose Leyla to their lifestyle. M.P. said she believed keeping Leyla in Riverside County with her was in Leyla's best interest because Leyla had a wonderful relationship with M.P. and Leyla's two sisters and had lived with them since she was born. M.P. said moving would devastate Leyla.

M.P. offered the testimony of a couple she had known for 20 years, whom she called "aunt and uncle," even though they are not biologically related to her. Nathaniel objected because he said M.P. had failed to notify him they were going to testify and she had not filed a witness list. Nathaniel also told the court M.P. had not responded to his discovery or served her trial brief with sufficient time for him to review it before trial. M.P. said

she filed and served a trial brief and a witness list identifying her "aunt" and "uncle" as witnesses. The court stated M.P. had complied with the court's order.

M.P.'s "uncle" said that he picked up Leyla after school and brought her to a day care owned by his wife and that M.P. picked up Leyla on her way home from work. He also said M.P. was a "fit mother," a "hard worker," and had given her children a "better place" to live than the "very dangerous" neighborhood where she had lived in Los Angeles. M.P.'s "aunt" said M.P. was a "phenomenal mother" and worked very hard to ensure her children had everything they needed. She also acknowledged Nathaniel was "a great man" and a good father, but she said he lived "in the jungle." She said M.P. "worked hard to pull [her] kids out of [there] and it would be devastating for them . . . to go back into that environment." Nathaniel cross-examined both witnesses.

The court asked Nathaniel if he felt excluded from making important decisions affecting Leyla, and he said, "For the most part, yes." But M.P. said that she always informed Nathaniel when Leyla was sick or away from school and that Nathaniel "always had access . . . to our daughter." The court asked M.P. if she would be open to the possibility that it might be in Leyla's best interest to live with Nathaniel when she went to middle school or high school, and M.P. said, "That's a discussion that me, Leyla and Nathaniel can sit down and have." Nathaniel said he was "very concerned" about the possibility of Leyla living with him as a teenager without him having a "foundation with her while she was a small child." The court stated that both Nathaniel and M.P. were "great parents," "very loving and

concerned for [their] daughter" and that Leyla "will do great living with either of [them]."

On April 19, 2018 the family law court issued a ruling maintaining the status quo.[1] The court, citing the close bond between Leyla and her siblings, found it was not in Leyla's best interest to live permanently with Nathaniel in Los Angeles. The court noted that "the analysis of [Leyla's] best interests may . . . change" as Leyla gets older, and the court encouraged Nathaniel and M.P. to discuss and agree on arrangements that would allow Leyla to spend more time with Nathaniel in Los Angeles or Riverside County. On May 22, 2018 the court entered a judgment including a child custody and visitation order that maintained the status quo as described in the December 2014 stipulated order. Nathaniel timely appealed.

DISCUSSION

A. *Applicable Law and Standard of Review*

Family Code section 3087 provides: "An order for joint custody may be modified or terminated upon the petition of one or both parents or on the court's own motion if it is shown that the best interest of the child requires modification or termination of the order."[2] "Under California's statutory scheme governing

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[1] We augment the record under California Rules of Court, rule 8.155(a)(1)(A), to include the family law court's April 19, 2018 ruling on submitted matter and the accompanying findings of fact and conclusions of law. (See *Hanna v. Mercedes-Benz USA, LLC* (2019) 36 Cal.App.5th 493, 505, fn. 9.)

[2] Undesignated statutory references are to the Family Code.

child custody and visitation determinations, the overarching concern is the best interest of the child. The court and the family have 'the widest discretion to choose a parenting plan that is in the best interest of the child.'" (*Montenegro v. Diaz* (2001) 26 Cal.4th 249, 255, fn. omitted; accord, *In re Marriage of Vargas & Ross* (2017) 17 Cal.App.5th 1235, 1243; see §§ 3011, 3040.) "When determining the best interest of the child, relevant factors include the health, safety and welfare of the child" (*Montenegro*, at p. 255; see §§ 3011, 3020, subd. (a)) and "the continuity and stability of relationships" (*In re Marriage of Vargas & Ross*, at p. 1243). When courts consider whether to modify a custody order in light of a parent's proposal to change the residence of the child, relevant factors may also include the distance of the move, the age of the children, the reasons for the proposed move, and the extent to which the parents currently are sharing custody. (See *In re Marriage of LaMusga* (2004) 32 Cal.4th 1072, 1101 [considering the request of a custodial parent].)

"We review a ruling on a request for modification of a custody order for abuse of discretion." (*Anne H. v. Michael B.* (2016) 1 Cal.App.5th 488, 501; see *Montenegro v. Diaz*, *supra*, 26 Cal.4th at p. 255 ["'The standard of appellate review of custody and visitation orders is the deferential abuse of discretion test.'"].) "'Generally, a trial court abuses its discretion if there is no reasonable basis on which the court could conclude its decision advanced the best interests of the child. [Citation.] "Under this test, we must uphold the trial court 'ruling if it is correct on any basis, regardless of whether such basis was actually invoked."'" (*Anne H. v. Michael B.*, at p. 501; see *Montenegro*, at p. 255.)

B. *The Trial Court's Custody Ruling Was Not an Abuse of Discretion*

Nathaniel argues the trial court abused its discretion by giving M.P. primary physical custody because he met his burden to show "his parenting and station in life" were "equal to if not superior to" M.P.'s. Nathaniel also argues the family law court failed to consider whether Nathaniel could continue paying child support if M.P. retained primary physical custody.

The family law court acknowledged that Nathaniel was a "great parent" and that Leyla would "do great living with either" parent. But parenting skills and social or professional standing are not dispositive factors in determining the best interests of a child. (See *In re Marriage of Vargas & Ross*, *supra*, 17 Cal.App.5th at p. 1243 ["[i]n evaluating the best interest of the child, courts consider many factors"].) The court properly considered Leyla's strong bonds with her family and extended family, her home environment, and parenting support in Riverside County in determining it was not in Leyla's best interest to move to Los Angeles to live primarily with Nathaniel. The court did not consider the impact of its ruling on Nathaniel's child support payments because Nathaniel did not make this argument in the family law court. Nathaniel's trial brief stated that previous court decisions were "financially damaging," but Nathaniel did not argue in his trial brief or at trial whether or how his child support payments impacted Leyla's best interests. Therefore, Nathaniel forfeited this argument. (See *In re Marriage of Binette* (2018) 24 Cal.App.5th 1119, 1120; *Thompson v. Ioane* (2017) 11 Cal.App.5th 1180, 1192.)

Nathaniel argues the family law court erred in considering hearsay evidence Leyla had a close bond with her older siblings.

In particular, Nathaniel argues the declarations of Leyla's sisters submitted in connection with M.P.'s trial brief were hearsay.[3] Nathaniel, however, did not object to the declarations at trial and therefore forfeited this argument as well. (See *Roe v. Halbig* (2018) 29 Cal.App.5th 286, 309-310 [plaintiff forfeited "any challenge to hearsay statements contained in the declaration . . . by failing to object on that basis below"]; *Duronslet v. Kamps* (2012) 203 Cal.App.4th 717, 726 [by failing to object to a declaration, the defendant "forfeited her claim that the court erred by admitting [the] evidence"]; see also Evid. Code, § 353.) Moreover, even if the declarations of Leyla's sisters were inadmissible hearsay, any error in their admission was harmless. M.P. testified Leyla had lived with her and Leyla's sisters all her life. M.P. also submitted a declaration, to which Nathaniel did not object, stating Leyla and her sisters sometimes slept together, shared bedtime stories, and painted each other's fingernails. (See *Muzquiz v. City of Emeryville* (2000) 79 Cal.App.4th 1106, 1122 ["Evidentiary rulings will be deemed harmless if the record demonstrates the judgment was supported by the rest of the evidence properly admitted."]; *Hall v. Bureau of Employment Agencies* (1976) 64 Cal.App.3d 482, 500 ["Where there is competent independent evidence in the record which supports the judgment without recourse to the testimony erroneously admitted, generally the error is not prejudicial as it will be presumed on appeal that the trial judge considered and relied upon the competent evidence in making his findings and rendering the judgment."]; *State Compensation Ins. Fund v. Lamb* (1929) 96 Cal.App. 236, 242 [any error in denying a motion

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[3] M.P.'s trial brief identifies letters from Leyla's sisters as exhibits, but the letters are not in the record on appeal.

to strike hearsay testimony was not prejudicial where "[t]wo different witnesses testified directly to the fact and confirmed the alleged hearsay statement"]; see also *People v. Bryant, Smith and Wheeler* (2014) 60 Cal.4th 335, 415 [any error in admitting a hearsay statement was harmless where another witness's "statements conveyed the same information"]; *People v. Thomas* (2007) 150 Cal.App.4th 461, 464 ["The trial court erred by admitting one hearsay statement, but the error was harmless because its content was the same as other properly admitted evidence."].)

C. *The Family Law Court Did Not Abuse Its Discretion by Not Continuing the Trial*

Nathaniel contends the trial court erred by proceeding with the trial after learning Nathaniel did not receive M.P.'s witness list or trial brief. Section 217, subdivision (c), provides: "If the witness list is not served prior to the hearing, the court may, on request, grant a brief continuance and may make appropriate temporary orders pending the continued hearing." At trial, however, the family law court determined M.P. filed and served a witness list and trial brief, and Nathaniel did not request a continuance. Therefore, the court did not err by failing to continue the trial.

Nathaniel also argues the trial court erred by allowing the trial to proceed even though M.P. failed to provide an income and expense declaration required by section 2104, subdivision (e). Again, Nathaniel did not request a continuance. Moreover, section 2104 applies only to parties to "a proceeding for dissolution of the marriage or legal separation of the parties"

(§ 2103), and Nathaniel and M.P. were never parties to (the same, at least) dissolution or separation proceeding.

California Rules of Court, rule 5.92(b) does require a party "seeking child support orders" or "orders for spousal or domestic partner support, attorney's fees and costs, or other orders relating to the parties' property or finances" to file an income and expense declaration. Rule 5.92(g)(3) requires the responsive party to file an income and expense declaration in the same circumstances. Rule 5.92(b) also provides: "The moving party *may be required* to complete, file, and have additional forms or attachments served along with a *Request for Order* (form FL-300) when seeking court orders for child custody and visitation (parenting time), attorney's fees and costs, support, and other financial matters." (Cal. Rules of Court, rule 5.92(b)(4), italics added.)

Nothing in the record on appeal indicates the family law court required Nathaniel or M.P. to file an income and expense declaration. Moreover, neither Nathaniel's initial request for an order nor his trial brief raised the issue of child support in connection with the issue of which parent could best serve Leyla's interests. Indeed, the only time the family law court addressed child support was to inform Nathaniel at the pretrial hearing on February 22, 2018 that changes in visitation could affect child support, but that a different department in a different courthouse handled such issues. Finally, nothing in the Family Code or the California Rules of Court required M.P. to provide an income and expense declaration merely because Nathaniel chose to provide that information.

DISPOSITION

The judgment is affirmed.

SEGAL, J.

We concur:

ZELON, Acting P. J.

FEUER, J.