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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

ALEX GARCIA, Respondent, v. SARAH GARCIA, Appellant.	2d Civil No. B291948 (Super. Ct. No. D374132) (Ventura County)

THE COURT[*]:

Appellant Sarah Garcia (mother) appeals the superior court's order of July 27, 2018, granting respondent Alex Garcia's (father) request for a change in custody to allow the parties' two minor children to move from California to Missouri, to live with father. Mother contends the superior court abused its discretion in granting father's move-away request without requiring a

[*] Gilbert, P.J., Yegan, J., Tangeman, J.

showing of a material change of circumstances justifying a change of custody. We agree and reverse.

FACTS

Mother and father were married in June 2004, and separated in January 2016. They have two minor children, a daughter (age 13) and a son (age 7). Following a series of hearings and orders, mother and father stipulated to a final custody order which was entered on March 15, 2017. Pursuant to the custody order, mother and father shared joint legal and physical custody of the minor children. The children were living with mother and going to school in Ventura County, California. Father, who lived in Wisconsin at the time, had visitation on holidays and breaks from school, including fall, winter, and spring breaks.

On March 19, 2018, father, who had subsequently moved to Missouri, requested a change in custody based on daughter's stated desire to live with father. Mother opposed the motion, arguing the children were settled in California and doing very well. The parties attended a mediation and the mediator spoke with mother, father, and the children. The mediator recommended a change in custody so the children could move to Missouri and live with father.

The superior court held a hearing on July 27, 2018, and heard testimony from the mediator, mother, and father. The mediator testified that both mother and father "are appropriate parents and are caring for the children well." The mediator testified that both children mentioned concerns with mother's home and reported wanting to live with father. The children's concerns about mother's home were: (1) there are other people living in mother's home on a regular basis; (2) mother picks son's

nose in public and "picks his scabs off of him"; (3) mother encourages daughter to get what she wants from the opposite sex by smiling and dressing a certain way; (4) mother and daughter get into arguments and mother says unkind things; (5) daughter does not think mother provides appropriate boundaries for her and her brother (i.e., a bedtime) and thinks mother treats her "more as a friend"; and (6) mother discourages the children from talking to father on the phone and says bad things about father.

The superior court denied mother's request for a custody evaluation and ordered custody of the children changed from mother to father, so the children could move to Missouri to live with father. The superior court found: "[T]here is no bad faith in the request for the move. And therefore, [the court] is to consider the best interest of the children as it relates to whether or not there would be a detriment or no detriment to the children and determine whether or not a move-away is appropriate in this case. The Court finds that there is no detriment to the move, no substantial detriment. There's always . . . some disruption, but no detriment to the move that has been expressed that the Court finds credible in this particular case; [the court] [h]as considered all the factors enumerated in re the *La Musga* case and grants -- finds it's in children's best interest to grant the move-away . . . -- to Missouri; [and] authorizes them to move there and live primarily with father."

The superior court's order of July 27, 2018, was stayed for 30 days by operation of law, pursuant to Code of Civil Procedure section 917.7.[1] In the interim, the superior court ordered that the

[1] All statutory references are to the Code of Civil Procedure.

move-away order would become a temporary order pending the expiration of the 30-day stay.

Thereafter, in the middle of the night on August 10, 2018, father removed the children from mother's home. Mother immediately filed a request for a domestic violence restraining order (DVRO). On August 13, 2018, at the hearing on mother's request for a temporary DVRO, the superior court explained that the temporary move-away order was actually a temporary change in the visitation schedule, not a violation of the automatic stay prescribed in section 917.7. The children started school in Missouri on August 15, 2018.

Mother timely appealed the order of July 27, 2018, and filed a petition for a writ of supersedeas. After a hearing on the petition for a writ of supersedeas, we granted the petition and stayed the superior court's order of July 27, 2018, pending resolution of this appeal. We ordered father to return the children to mother's custody in Ventura County pending this appeal.

DISCUSSION

Mother contends the superior court abused its discretion by failing to make any finding regarding a change in circumstance justifying a change of custody. We agree.

The superior court has discretion to modify an existing custody order based on changed circumstances, or to grant or deny a move-away request. (*In re Marriage of Burgess* (1996) 13 Cal.4th 25, 32 (*Burgess*).) This discretion may be abused by applying improper criteria or by making incorrect legal assumptions. (*Mark T. v. Jamie Z.* (2011) 194 Cal.App.4th 1115, 1124–1125 [reversing postjudgment order regarding move-away request].) Move-away orders are "'one of the most serious

decisions a family law court is required to make,' and should not be made 'in haste.'" (*In re Marriage of Seagondollar* (2006) 139 Cal.App.4th 1116, 1119.)

This is not an initial custody determination, where the family court has the "widest discretion" to make a de novo determination of the parenting plan that is in the best interest of the children. (*Burgess*, *supra*, 13 Cal.4th at pp. 31–32.) Neither is this a situation where the parents, pursuant to a final custody order, have genuine shared physical and legal custody of the minor children. (*Niko v. Foreman* (2006) 144 Cal.App.4th 344, 362-363 [parents shared 50-50 division of physical custody time].)

In this case, a final custody order was entered, pursuant to the stipulation of the parties, on March 15, 2017. Mother and father shared joint legal and physical custody, but mother had the children for the school year and father had visitation on major holidays and breaks from school. The vast majority of the children's time was spent with mother and mother was the primary caretaker. This "is a case where one parent had, in substance, primary physical custody of the child[ren] and the other generous visitation rights." (*In re Marriage of Whealon* (1997) 53 Cal.App.4th 132, 142.)

As the noncustodial parent seeking a change of the existing custody order, father had the initial burden to make a substantial showing of changed circumstances affecting the children to change the final custody determination. (*In re Marriage of La Musga* (2004) 32 Cal.4th 1072, 1088–1089 (*La Musga*); *Burgess*, *supra*, 13 Cal.4th at pp. 37-38.)

"The changed circumstances test requires a threshold showing of detriment before a court may modify an existing final custody order that was previously based upon the child's best

interest." (*Ragghanti v. Reyes* (2004) 123 Cal.App.4th 989, 996; see *In re Marriage of Brown & Yana* (2006) 37 Cal.4th 947, 959–960.) A "substantial showing" must be made to modify a final custody determination. (*Brown & Yana*, at p. 960.)

"'[A] child will not be removed from the prior custody of one parent and given to the other "unless the material facts and circumstances occurring subsequently are of a kind to render it essential or expedient for the welfare of the child that there be a change." [Citation.] The reasons for the rule are clear: "It is well established that the courts are reluctant to order a change of custody and will not do so except for imperative reasons; that it is desirable that there be an end of litigation and undesirable to change the child's established mode of living." [Citation.]'" (*Speelman v. Superior Court* (1983) 152 Cal.App.3d 124, 129.)

The superior court should preserve the established custodial arrangement unless some significant change in circumstances indicates that a different arrangement would be in the child's best interest. Some of the factors the superior court should consider in evaluating a noncustodial parent's move-away request include the children's ages, community ties, health and educational needs, the attachment and relationship of the children with each parent, the anticipated impact of the move upon the children's social, educational, and familial relationships, and each parent's willingness to facilitate continuing contact with the other parent. (*La Musga*, *supra*, 32 Cal.4th at p. 1101.)

There is nothing in the record showing the superior court found a change of circumstance that would render it essential or expedient for the welfare of the children that there be a change in custody. The court's bare reference to the factors enumerated in *La Musga* is insufficient to show the court considered and found

changed circumstances. The court abused its discretion when it ordered a change in custody to the noncustodial parent, and allowed the children to move out of state, without considering the relevant standard. The court's error requires reversal and remand for reconsideration of father's move-away request and application of the correct legal standard.[2]

The superior court compounded its error by refusing to recognize the mandatory automatic 30-day stay provided by section 917.7.

The automatic 30-day stay expired on August 27, 2018. The children were permanently moved to Missouri on August 10, 2018. The children were enrolled in school in Missouri and began attending classes there on August 15, 2018. No matter how the superior court chose to characterize its order of July 27, 2018, this was a permanent move of the children effectuated during the period of the automatic stay under section 917.7.

The automatic stay provided for in section 917.7 operates as a procedural safeguard. It allows the appellate court time to review a custody order prior to the removal of a child from the state and the opportunity to issue a stay to preserve appellate jurisdiction. This ensures stability and continuity for the children, and prevents repeated changes in custody that disrupt children's lives. The superior court's order in this case undermines that purpose. There is no exemption in section 917.7 for "interim" or temporary move-away orders. (*Andrew V. v. Superior Court* (2015) 234 Cal.App.4th 103, 109.)

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[2] Mother also argues the superior court erred in refusing her request for a custody evaluation. Given this court's conclusion, we do not reach this issue. Mother may renew her request for a custody evaluation in the superior court.

The superior court's actions created the subsequent emergency request for a writ of supersedeas in this court and required the children to bounce back and forth between mother's and father's residences. It also resulted in father's actions in taking the children from mother's house in the middle of the night on August 10, 2018. This court cannot condone father's decision to remove the children from mother's residence in the middle of the night. Nor can we ignore the superior court's failure to observe the automatic stay under section 917.7, which is in place to prevent the repeated changes in custody that occurred here.

Had the superior court observed the automatic stay, this court could have reviewed mother's request for a temporary stay and petition for a writ of supersedeas during the 30-day period set forth in section 917.7. The children would not have had to start school in Missouri prior to appellate review, and then be returned to Ventura County where they had missed the first day of school.

DISPOSITION

We reverse the superior court's order of July 27, 2018, and remand for further proceedings as outlined in this opinion. Mother is awarded costs on appeal.

NOT TO BE PUBLISHED.

GILBERT, P.J. YEGAN, J. TANGEMAN, J.

Roger L. Lund, Judge

Superior Court County of Ventura

Vanessa Kirker Wright for Appellant.

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