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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

ANDREW KO, Plaintiff and Respondent, v. YU XIN MEI WANG, Defendant and Appellant.	B227765 (Los Angeles County Super. Ct. No. BF036096)

APPEAL from a judgment of the Superior Court of Los Angeles County, Scott Gordon, Judge. Affirmed.

Law Offices of Cynthia A. de Petris and Cynthia A. de Petris for Defendant and Appellant.

Lipton & Margolin, Hugh A. Lipton and Brian Magruder for Plaintiff and Respondent.

Law Offices of Deborah J. Manning and Deborah J. Manning for Minors.

INTRODUCTION

Yu Xin Mei Wang (Wang) appeals from the judgment of the trial court granting sole legal and physical custody of her twin sons to respondent Andrew Ko. (Fam. Code, § 7611.)[1] Wang did not appear at trial and her counsel observed the trial but did not make an appearance. Therefore, Wang forfeited all of her contentions on appeal. Accordingly, we affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

Wang and Ko met in 1998. In July 1999, Wang informed Ko that she was pregnant and that Ko was the father. The two were married in Santa Ana, California in November 1999. Wang gave birth to the twins four months into the marriage. The twins were born in Singapore but were United States citizens as they were registered with the United States Embassy in Singapore.

In March 2009, in the context of a dissolution action brought by Wang, the marriage of Wang and Ko was declared a nullity. (LASC case No. BD 419115, hereinafter the "dissolution action.") That same day, Ko filed the instant action to establish paternity and to obtain sole legal and physical custody of the twins (LASC case No. BF 036096). Meanwhile, Wang left town and took the twins with her, without informing Ko or her own attorney. It was later discovered that she had taken the boys to Singapore.

To retrieve the children, Ko filed an ex parte application for custody. At the hearing on Ko's application for custody, Wang's counsel announced her appearance "as former and prospective counsel" for Wang. The court sustained the objections to Wang's attorney's appearance raised by Ko and counsel for the children. Thereafter, at the request of the children's attorney, the court placed the boys in the temporary sole legal and physical custody of Ko to enable local, state, and federal law enforcement agencies to

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[1] All further statutory references are to the Family Code, unless otherwise noted.

retrieve the children (§ 3130).[2] Underpinning the order were the court's findings that Wang had violated or threatened to violate the standing visitation order by quitting her job, ending her lease, and removing the children from school at the end of August 2009. The court also found that Wang had a history of not cooperating with Ko in parenting and that she had ties to another country. The court ordered the district attorney's Child Abduction Unit to locate and retrieve the children.

The instant paternity action came on for trial a year later. Neither Wang nor her attorney made an appearance. Hence, the court ruled that Wang was "not represented" in the paternity action. The court further related that Wang had filed a declaration "regarding her Fifth Amendment rights," which demonstrated to the court that *Wang had knowledge of the trial*. Hearing no objections from Ko or the children's counsel, the court agreed to hear from Wang's attorney. In the middle of Ko's testimony, the court stated that Wang's attorney "has arrived in court. Here in no official capacity, just watching." A "female speaker" responded "Yes."

The children's attorney explained that her clients had not been in the United States in over a year. The district attorney from the Child Abduction Unit explained that it was actively investigating the case (Pen. Code, § 278)[3] and a warrant had been issued, but the

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[2] Section 3130 reads in relevant part, "If a petition to determine custody of a child has been filed in a court of competent jurisdiction, or if a temporary order pending determination of custody has been . . . and the whereabouts of a party in possession of the child are not known, or there is reason to believe that the party may not appear in the proceedings although ordered to appear personally with the child pursuant to Section 3430, *the district attorney shall take all actions necessary to locate the party and the child and to procure compliance with the order to appear with the child for purposes of adjudication of custody*. . . ." (Italics added.)

[3] Penal Code section 278 reads, "Every person, not having a right to custody, who maliciously takes, entices away, keeps, withholds, or conceals any child with the intent to detain or conceal that child from a lawful custodian shall be punished by imprisonment in a county jail not exceeding one year, a fine not exceeding one thousand dollars ($1,000), or both that fine and imprisonment, or by imprisonment pursuant to subdivision (h) of Section 1170 for two, three, or four years, a fine not exceeding ten thousand dollars ($10,000), or both that fine and imprisonment."

office had not determined whether it could have any effect in obtaining return of the children from Singapore.

At the close of the paternity hearing, the court found that Ko was the father of the children pursuant to section 7611, and no evidence was offered to rebut the presumption in that statute. The court issued a judgment ordering, among other things, that Wang return the children to the court forthwith. To implement return, the court authorized Ko obtain United States passports for the children, to retrieve them, and accompany them on the flight to California. The court denied Wang visitation based on a finding, inter alia, that there was a risk that she would take the children out of California without Ko's permission. Wang filed her timely appeal.

CONTENTIONS

Wang contends the trial court erred in granting Ko sole legal and physical custody of the children (1) without making findings of the best interest of the children as required by sections 3020 and 3011, and (2) without the full participation of the children's attorney.

DISCUSSION

1. *Wang has forfeited her contentions.*

It is a general rule of appellate procedure that a party's failure to appear and register a proper and timely objection to a ruling or proceeding in the trial court forfeits the issue on appeal. (*Bell v. American Title Ins. Co*. (1991) 226 Cal.App.3d 1589, 1602; *Jordan v. County of Los Angeles* (1968) 267 Cal.App.2d 794, 798 [by failing to file briefs or appear for oral argument party forfeited right to challenge action by trial court].) Stated differently, "[c]ontentions or theories raised for the first time on appeal are not entitled to consideration." (*City of San Diego v. D.R. Horton San Diego Holding Co., Inc*. (2005) 126 Cal.App.4th 668, 685; *In re Marriage of Davenport* (2011) 194 Cal.App.4th 1507, 1528 [argument not raised below is forfeited on appeal]; *Amato v. Mercury Casualty Co*. (1993) 18 Cal.App.4th 1784, 1794 ["It must appear from the record that the issue argued on appeal was raised in the trial court. If not, the issue is waived."].)

Another general rule of appellate procedure is that 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. [Citations.]" (*In re Marriage of Arceneaux* (1990) 51 Cal.3d 1130, 1133.) "Under th[is] doctrine of 'implied findings,' when parties waive a statement of decision expressly or by not requesting one in a timely manner, appellate courts reviewing the appealed judgment must presume the trial court made all factual findings necessary to support the judgment for which there is substantial evidence." (*In re Marriage of Condon* (1998) 62 Cal.App.4th 533, 549-550, fn. 11, citing *In re Marriage of Arceneaux, supra*, at p. 1130.) "The clear implication of this provision, of course, is that if a party does not bring such deficiencies to the trial court's attention, that party *waives the right to claim on appeal that the statement was deficient in these regards*, and hence the appellate court will imply findings to support the judgment." (*In re Marriage of Arceneaux, supra*, at pp. 1133-1134, italics added.)

Yet another rule of appellate procedure is that "[t]his court cannot consider matters outside the record." (*Paulin v. Paulin* (1940) 39 Cal.App.2d 180, 185.) A "party who has failed to avail himself or herself of the privilege of incorporating into the record matters on which he or she relies as grounds for relief cannot base any effective argument on appeal on such matters." (5 Cal.Jur.3d (2007) Appellate Review, § 487, p. 22, citing *Paulin v. Paulin, supra*, at p. 185; cf. Cal. Rules of Court, rules 8.120(b), 8.124(b)(1)(B), (b)(6) & *Sahadi v. Scheaffer* (2007) 155 Cal.App.4th 704, 723 ["since the transcript excerpts—not having been filed or lodged in the superior court—were not proper matters for inclusion in the appendix . . . we will disregard them."]; *Canal Ins. Co. v. Tackett* (2004) 117 Cal.App.4th 239, 243 [appellate court will disregard matters not properly included in appendix].)

Wang made no appearance at the paternity trial. She was obviously aware of the paternity action as her attorney, who had attempted to make an appearance at the hearing on Ko's application for custody in this action, attended the paternity trial. Wang was also aware of the trial in the paternity suit because she submitted a declaration about her "Fifth Amendment rights." Still, rather than to arrange for counsel to represent her at the

trial or to make an appearance herself, Wang chose to monitor the proceeding through her attorney. In short, *Wang did not appear or contest Ko's paternity petition*. She did not request a statement of decision, file objections to a statement of decision, or adduce any evidence. Therefore, Wang forfeited her contentions on appeal. (*Bell v. American Title Ins. Co.*, *supra*, 226 Cal.App.3d at p. 1602; *Jordan v. County of Los Angeles*, *supra*, 267 Cal.App.2d at p. 798.) Accordingly, we presume the trial court made all the necessary findings to support the judgment.

Wang's forfeiture notwithstanding, we conclude her contentions are meritless.

2. *The best interests of the children – sections 3020 and 3011*

Section 3020[4] establishes California's policy that the health, safety, and welfare of its children are the court's primary concern in determining the best interests of the children when making custody and visitation orders and to assure that children have frequent and continuing contact with both parents. Section 3011[5] requires, in an action to

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[4] Section 3020 reads, "(a) The Legislature finds and declares that it is the public policy of this state to assure that the health, safety, and welfare of children shall be the court's primary concern in determining the best interest of children when making any orders regarding the physical or legal custody or visitation of children. The Legislature further finds and declares that the perpetration of child abuse or domestic violence in a household where a child resides is detrimental to the child. [¶] (b) The Legislature finds and declares that it is the public policy of this state to assure that children have frequent and continuing contact with both parents after the parents have separated or dissolved their marriage, or ended their relationship, and to encourage parents to share the rights and responsibilities of child rearing in order to effect this policy, except where the contact would not be in the best interest of the child, as provided in Section 3011. [¶] (c) Where the policies set forth in subdivisions (a) and (b) of this section are in conflict, any court's order regarding physical or legal custody or visitation shall be made in a manner that ensures the health, safety, and welfare of the child and the safety of all family members."

[5] Section 3011 reads in relevant part, "In making a determination of the best interest of the child in a proceeding described in Section 3021 [as relevant here, an action to determine legal or physical custody or visitation pursuant to section 7611], the court shall, among any other factors it finds relevant, consider all of the following: [¶] . . . [¶] (b) Any history of abuse by one parent or any other person seeking custody[.] [¶] . . . [¶] As a prerequisite to the consideration of allegations of abuse, the court may require substantial independent corroboration, including, but not limited to, written reports by law enforcement agencies, child protective services or other

determine legal or physical custody or visitation under section 7611, that a court making a determination of the best interest of the child must consider any history of abuse by the person seeking custody. If allegations about abuse by a parent "have been brought to the attention of the court in the current proceeding, and the court makes an order for sole or joint custody to that parent, the court *shall state its reasons in writing or on the record*." (§ 3011, subds. (b) & (e)(1), italics added.)

Wang contends that the trial court erred because it failed to consider the children's best interest in its paternity judgment as required by section 3020 or to make the requisite findings under section 3011. Wang asserts that the "history of domestic violence perpetrated by Ko on Wang is a major part of the file in the dissolution action and should have been considered by the court when it made its custody orders . . . ." in this paternity suit. (Capitalization omitted.) She argues that the court should have considered the allegations of domestic violence she made in *the dissolution action* when she asked for temporary restraining and stay away orders against Ko under the Domestic Violence Prevention Act. And, she argues, the court also should have considered the report of the child custody evaluator ordered in the dissolution action. The restraining order application and the custody evaluator's report in the dissolution action are evidence that Ko's custody was not in the best interest of the children, she contends.

Wang's contentions are unavailing. First, under the doctrine of implied findings, we presume the trial court made all of the necessary factual findings concerning the best interests of the children pursuant to section 3020. (*In re Marriage of Condon, supra,* 62 Cal.App.4th at pp. 549-550, fn. 11.) Second, section 3011 only requires the court to

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social welfare agencies, courts, medical facilities, or other public agencies or private nonprofit organizations providing services to victims of sexual assault or domestic violence. . . . [¶] . . . (e)(1) Where allegations about a parent pursuant to subdivision (b) or (d) have been brought to the attention of the court in the current proceeding, and the court makes an order for sole or joint custody to that parent, the court *shall state its reasons in writing or on the record*. In these circumstances, the court shall ensure that any order regarding custody or visitation is specific as to time, day, place, and manner of transfer of the child as set forth in subdivision (b) of Section 6323." (Italics added.)

make findings on the record if allegations of abuse are "*brought to the attention of the court in the current proceeding*[.]" (§ 3011, subd. (e)(1), italics added.) Yet, no such allegations were brought to the attention of the court in this action because Wang did not appear to raise those issues. As Wang acknowledges, those allegations surfaced in the *dissolution action*, an entirely different case that had ended at least a year before this paternity action was tried. There is nothing in section 3011 that obligates the trial court in this paternity action to locate and adduce evidence sua sponte in aid of a party that opted not to participate in or to contest the proceeding. Where no allegations of abuse were "brought to the attention of the court *in the current proceeding*," i.e., the paternity action, the trial court's obligation to make findings on the record under section 3011, subdivision (e)(1) never arose. (Italics added.)

Third, we cannot consider the restraining order application or the custody evaluator's report because those documents are outside the record on appeal. (*Paulin v. Paulin, supra,* 39 Cal.App.2d at p. 185.) As Wang did not take the opportunity to appear by herself or by counsel and incorporate the application for restraining order and the child custody evaluator's report into the record in the paternity action, they are not properly part of the record or appendix in this appeal and so we disregard them. (Cal. Rules of Court, rules 8.120(b), 8.124(b)(1)(B), (b)(6); *Sahadi v. Scheaffer, supra,* 155 Cal.App.4th at p. 723; *Canal Ins. Co. v. Tackett, supra,* 117 Cal.App.4th at p. 243.)[6] There being no

[6] Even ignoring Wang's forfeiture, and even overlooking all of the procedural obstacles to Wang's argument under section 3011, we note that the allegations of abuse were entirely unsubstantiated. The record from the dissolution action shows that Wang *voluntarily agreed to vacate the temporary restraining order* and the allegations in that petition were never adjudicated. As for the child custody evaluator, the parties agreed in ordering appointment and payment of the evaluator that the results *could only be released under subpoena or court order.* They also agreed to delete the stipulation that the evaluator's report could be received into evidence without foundation or objection. As Wang did not attempt to introduce the evaluator's report into evidence at the paternity trial, the court had no reason to consider it.

evidence properly in the record to support Wang's contentions, a different result would not have obtained.[7]

Wang also contends that the trial court erred in granting sole custody of the twins to Ko in the absence of participation in the trial by the children's attorney. She cites section 3151[8] obligating appointed counsel for children to investigate and represent the children's best interests. However, Wang abducted the twins and sequestered them in Singapore for over a year. Where the boys were absent and inaccessible, counsel had no contact with them. Without reasonable access to her clients and others who had current knowledge of the twins, counsel had no evidence to present to the court. Effectively, Wang is arguing that the children's attorney should have presented Wang's evidence at trial, and where that did not occur, the judgment should be reversed for a new trial. As noted by counsel for the twins, it was not the duty of the children's attorney to introduce evidence on behalf of a parent.

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[7] For the above reasons, Wang's further contentions that the custody order was made to punish her for absconding with the children and failed to make orders that assure the children have contact with her are likewise unavailing.

[8] Section 3151, subdivision (a) reads, "The child's counsel appointed under this chapter is charged with the representation of the child's best interests. The role of the child's counsel is to gather evidence that bears on the best interests of the child, and present that admissible evidence to the court in any manner appropriate for the counsel of a party. If the child so desires, the child's counsel shall present the child's wishes to the court. The counsel's duties, unless under the circumstances it is inappropriate to exercise the duty, include interviewing the child, reviewing the court files and all accessible relevant records available to both parties, and making any further investigations as the counsel considers necessary to ascertain evidence relevant to the custody or visitation hearings."

DISPOSITION

The judgment is affirmed. Wang to bear costs of appeal.

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ALDRICH, J.

We concur:

KLEIN, P. J.

KITCHING, J.