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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

In re Marriage of KARLA M. and AUGUSTINE B. GASCA.	B279579 (Los Angeles County Super. Ct. No. BD343997)
KARLA M. GASCA, Respondent, v. AUGUSTINE B. GASCA, Appellant.	

APPEAL from an order of the Superior Court of Los Angeles County, Rolf M. Treu, Judge. Affirmed with instructions.

Law Office of Noelle M. Halaby, Noelle M. Halaby and Maria D. Houser for Appellant.

No appearance for Respondent.

The procedural history of this case spans nearly 18 years and is recounted in detail below. In sum, although Karla M. and Augustine B. Gasca[1] officially divorced in 2004, they have battled over custody of their children ever since. In addition to spanning the children's entire childhood, this custody dispute has led to the intervention of several therapists as well as multiple evidentiary hearings regarding the efficacy of the current therapeutic model. On appeal, Augustine contends that the trial court erred in failing to change the current therapeutic model even though the court had reliable evidence that the therapy was not achieving the goal of reunification. Augustine also contends that the court violated his right to a fair hearing by failing to follow statutory guidelines and rules of court when interviewing the children during an evidentiary hearing, and by lifting, in only a limited fashion, the safe harbor rule regarding the family's therapy sessions. Augustine further contends that the court erred by refusing to allow him to testify in rebuttal during the evidentiary hearing. Lastly, Augustine contends that the court violated Family Code section 3190 by allowing the therapy to continue to continue beyond one year. We affirm with instructions that the trial court limit Augustine's required participation in counseling to a period of no more than one year.

BACKGROUND

On April 12, 2001, Karla filed for divorce from Augustine. Karla and Augustine have two children, Adam, born in 1999, and Alyssa, born in 2001. In February, March and May 2003, the Department of Children and Family Service (DCFS) determined

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[1] We refer to Mr. and Mrs. Gasca by their first names for the sake of clarity, intending no disrespect.

that an allegation of child abuse lodged with the agency was inconclusive or unfounded. On July 11, 2003, Karla sought a restraining order against Augustine. In her request, Karla alleged that Augustine, a deputy sheriff, had physically abused her in 2000 by placing her in a "police choke hold" and throwing her against a wall as she held their son in her arms. According to Karla, Augustine also threw objects, which put holes in the walls, and broke into a locked room where she had been hiding and violated her. "This was done several times that and the following year," Karla stated. "He said it was his marital right." In 2002, Karla said that Augustine constantly followed her, showing up at places where she was alone and then threatening her. According to Karla, "[Augustine] said I would never see our children again." Karla further stated that on July 9, 2003, Augustine sat approximately 300 yards away from her home and kept it under surveillance until her parents left. "As soon as they left and I was alone with our children (1 & 4 years) who were sick with a virus, he came to the door pounding about 500 times over 5 minutes." These actions terrorized Karla and the children. Augustine also rang the doorbell over 100 times while yelling and screaming at Karla through the door. Officers arrived quickly and told Augustine to leave.

On July 17, 2003, Karla and Augustine entered into a stipulation, which provided that Augustine would stay at least 750 yards away from Karla's home and workplace as well as the school or day care location of any minor child. Child exchanges were to take place inside the Palmdale sheriff's station. In March 2004, DCFS determined that an allegation of child abuse lodged with the agency was unsubstantiated and inconclusive. On December 10, 2004, the court entered a judgment of dissolution

and the marriage was terminated. The court made no orders concerning the custody or visitation of the children at this time but reserved jurisdiction to make such orders in the future. That same year, DCFS "substantiated that both parents were emotionally abusive of the [c]hildren due to exposing the [c]hildren to their conflict and to unnecessary or false reporting of allegations."

On March 17, 2008, the court set a temporary order regarding monitored visitation. On June 30, 2008, the court entered an order after hearing regarding visitation. The court eliminated the monitor requirement for Augustine's visits and set out a visitation schedule. The court also appointed psychologist Dr. Sheila Carter to evaluate the parties and their minor children. Each party was also restrained from discussing the issue of permanent custody with the children, discussing this case with the children or allowing the children to access any documents filed in this case other than to advise the children as to the current custody and visitation schedule. Augustine was restrained from making any comments regarding the health and wellbeing of Karla and was specifically restrained from making any comments to the children regarding the potential death of Karla. Dr. Carter submitted custody evaluations in September 2008 and June 2009. The custody evaluations recommended that Augustine have primary physical custody of the children. In March 2012, Karla and Augustine resolved the matter in a stipulated judgment that awarded the parties joint legal custody as well as joint physical custody.

On July 3, 2013, Karla filed a request for a temporary emergency court order as well as a custody and visitation modification order. Karla requested that Augustine receive no

visitation based upon a safety plan given to her by Child Protective Services (CPS) from Kern County, where she lived.[2] The safety plan stated: "Due to the minors' statements during a forensic interview, Mother agrees to obtain an Ex Parte hearing due to concerns of sexual abuse. CPS S.W. [social worker] requests that Father's visitation be modified to supervised visitation with no overnight visits." According to Karla, the sexual abuse was documented in a forensic interview recorded by Kern County Child Protective Services. In the forensic interview, Alyssa stated that she and Augustine have what Augustine called "daddy-daughter time." No one except Alyssa and Augustine is allowed in the room at that time. According to Alyssa, Augustine plays very explicit pornography while she is with him and puts his hands inside his pants. Augustine obtains what she described as an erection and then makes moaning and grunting sounds. When Alyssa tried to leave, Augustine threatened to kill her animals. Although Adam did not allege any sexual abuse, he complained of other conduct, including lack of sufficient food and toiletry products as well as verbal insults. As a result, Karla requested an emergency order to stop all visits by Augustine with the children.

On July 3, 2013, the court entered an interim order granting Karla sole legal and physical custody of Adam and Alyssa. Augustine was to have no visitation or contact with the children. The matter was set for an evidentiary hearing on

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[2] According to Karla, because Augustine lived in Los Angeles, this matter was also investigated by DCFS in Los Angeles County, which determined that "Kern County should take the lead in helping [Karla] make sure that the children are safe."

October 3, 2013, but ultimately took place on March 19, 2014. The court appointed minors' counsel on behalf of the children that same day.

On July 1, 2014, the court issued its statement of decision regarding Karla's July 3, 2013 request. The court first vacated the July 3, 2013 interim order. The court then awarded the parties joint legal custody of Adam and Alyssa, although Karla was to have sole physical custody of the children until February 28, 2015, with March 1, 2015 as the target date to reinstate a visitation schedule. Beginning March 1, 2015, the court's March 2012 custody order would be reinstated without further order of the court.[3] The court also ordered that the entire family undergo conjoint therapy beginning no later than August 15, 2014, and lasting for 12 months. The therapy was to be safe harbor therapy and thus completely confidential. Dr. Patricia Emerson was subsequently appointed as the family therapist for the parties.

On July 21, 2014, the court issued its findings of fact regarding Karla's July 3, 2013 request. The court found that Karla's allegations about Augustine's care and actions regarding the children "are not shown to be true, even by a preponderance of evidence." In short, there was no credible evidence that the children were in physical danger at Augustine's home or that Augustine sexually abused Alyssa, and the allegations of sex

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[3] The March 2012 order had awarded the parties joint legal and joint physical custody. The only exception to the automatic reinstatement of the March 2012 order would be if minors' counsel filed a request for an order, to be heard prior to March 1, 2015, containing competent evidence that it was not in the children's best interest to reinstate the March 2012 order.

abuse were unfounded. The allegation that Augustine had pornography on his cell phone and/or computer was also found to have been made up or embellished by the children. The court further found that the allegation that the children were not provided with clothes, hygiene products or food while at Augustine's home was unsubstantiated.

The court also noted that DCFS had previously determined that both parents had emotionally abused the children by exposing them to their conflict as well as unnecessary or false reporting of allegations. "Neither parent seems to recognize the implications of that finding or to have incorporated it in any way in their parenting of their [c]hildren," the court stated. "Neither parent has taken ownership of what that DCFS finding meant, that they have abused their [c]hildren by their conduct in a very fundamental way." The court also listed the specific ways in which both Augustine and Karla had emotionally abused the children. Furthermore, the court noted that the children "have taken nuggets of truth, and embellished them or made up facts out of whole cloth as a way of dealing with this conflict." In short, the court found that the children "are aligned with [Karla]" and "are rejecting [Augustine] based on facts that are either untrue or embellished." Although the court found it was in the children's best interest to have a relationship with Augustine, it declined to change primary physical custody from Karla to Augustine at this time because doing so could be both physically and emotionally dangerous for the children.[4]

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[4] Under California's statutory scheme governing 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

On October 22, 2014, Augustine filed a request for order, asking that conjoint therapy with Dr. Emerson cease and that the court institute a different therapeutic model.[5] In his supporting declaration, Augustine noted that Karla had falsely informed the children's pediatrician that he did not see the children "due to abuse" and that "all [the] other therapists are in agreement that there was abuse." Karla's erroneous beliefs regarding abuse "continue to hurt our children," Augustine stated, as well as "any ability to have our children and my relationship repaired." Augustine also listed the ways in which the children had deteriorated while in Karla's custody, including continual physical illness, lack of school attendance, and emotional deterioration to the point where the children were now receiving psychotropic medication. Moreover, Augustine said, "with the inadvertent or planned assistance of the kids' respective therapists . . . and the kids' pediatrician . . . Karla has the kids medicated and now isolated in a home school environment, where the kids remain exclusively in her care." Augustine sought sole legal custody of the children as well as primary physical custody, with Karla having limited supervised visitation only.

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interest of the child." (Fam. Code, § 3040, subd. (c).) Relevant factors include the health, safety and welfare of the child, any history of abuse by one parent against the child or the other parent, and the nature and amount of contact with the parents. (Fam. Code, § 3011.)

[5] Augustine requested that the children receive treatment with new therapists. He also wanted the parties to engage in "intensive coparenting intervention" wherein Dr. Albert Gibbs would work with Karla and Dr. Alan Yellin would work with Augustine over the course of a weekend, with Dr. Yellin then reporting the results to the court.

On December 23, 2014, Karla responded to Augustine's request. She consented to joint legal custody of the children but requested sole physical custody. In her supporting declaration, Karla also noted, "It is not in their best interest to get rid of a therapist who now has a history and personal involvement with myself, Mr. Gasca, and our children." Furthermore, Augustine was requesting that the court replace the children's individual therapists—professionals who had been seeing the children for more than six and half years. "These are people who the children trust, confide in, and, in turn, provide comfort to our children," Karla noted.

On December 29, 2014, minors' counsel responded to Augustine's request. "The children's reported physical illness, their continued emotional turmoil, their poor school attendance and performance, and their overall welfare would be cause for concern for anyone," minors' counsel noted. "This is the net result of a parental conflict spanning thirteen years, and, if the past is any indication, the only end in sight for these children is through reaching the age of majority when they will be able to extricate themselves from the toxic childhood they have experienced in many ways, and put some distance between themselves and their parents."[6] Although Augustine's frustration in not seeing or speaking with his children for the past year and a half was "completely understandable," minors' counsel noted that the deterioration of Augustine's relationship with the children had begun long before. On the other hand, Karla's "knowing or subconscious contribution over the years to

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[6] Adam, born in June 1999, turned 18 in 2017. Alyssa, born in October 2001, will turn 18 in 2019.

the present dire relationship between the father and the children cannot be overlooked." Nevertheless, minors' counsel noted that a "parent's unclean hands is an improper ground to change custody, nor can custody be given to one parent as punishment of the other parent."[7] Therefore, minors' counsel stated, "the net effect of father's requests *on the children* should be closely assessed by the court." In this case, the children "continue to be adamantly opposed to *any* contact with their father at this time."

Minors' counsel argued that taking the children away from the environment they strongly want to be in and putting them in a home for which they have expressed, in no uncertain terms, dislike and fear was not in the children's best interest, minors' counsel noted. Nor was discontinuing the children's individual therapy with therapists they have been seeing regularly for years. Finally, minors' counsel observed that the family had undergone less than a dozen sessions with Dr. Emerson. "Considering the long list of past failures in this case, this process with Dr. Emerson should be given a fair chance before being tossed away as yet another ineffective remedy for this family." Minors' counsel also advised against having Dr. Emerson speak with the minors' attorney, noting that the parties themselves opted to have family therapy as safe harbor therapy so that, protected by the veil of confidentiality, they could discuss issues without fear of repercussion. With respect to hiring Dr. Gibbs and Dr. Yellin, minors' counsel noted the cost associated with such a decision and said it would be unreasonable to expect the doctors to conduct a full assessment of the parties in one

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[7] See *In re Marriage of Stoker* (1977) 65 Cal.App.3d 878, 881–882; *In re Marriage of Russo* (1971) 21 Cal.App.3d 72, 86.

weekend. In sum, minors' counsel concluded that it was not in the best interest of the children to revert back to the March 2012 joint custody arrangement; thus, counsel sought a stay of the court's self-executing July 2014 order. On April 24, 2015, minors' counsel submitted a status report which reiterated that the children were not ready to go back to the March 2012 joint custody arrangement.

On May 8, 2015, Augustine asked the court to appoint Dr. Jane Ellen Shatz as a Evidence Code section 730 custody expert to assess the efficacy of the reunification treatment.[8] That same day, the court issued a tentative ruling finding that although Dr. Emerson had conducted several sessions with the children, their parents and the children's stepmother, no conjoint sessions with Augustine had taken place.[9] Further, the children continued to suffer stress and Adam appeared to be in a deteriorating position. The court found that although it was in the best interest of the children to be reunified with Augustine, it could not conclude that Dr. Emerson had "failed in her mission." The court noted that, according to Dr. Emerson, therapy had not yet reached the point where it was in the children's interest to

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[8] Pursuant to Evidence Code section 730: "When it appears to the court, at any time before or during the trial of an action, that expert evidence is or may be required by the court or by any party to the action, the court on its own motion or on motion of any party may appoint one or more experts to investigate, to render a report as may be ordered by the court, and to testify as an expert at the trial of the action relative to the fact or matter as to which the expert evidence is or may be required."

[9] According to Dr. Emerson, the children had adamantly refused to meet with Augustine.

have conjoint meetings with Augustine. "There is no basis for this court to conclude that [Dr. Emerson] has refused to implement that part of therapy for reasons outside her professional judgment about the children's readiness for that step," the court held. Furthermore, the court stated that "[f[rom every bit of information the court has received, it concludes that Dr. Emerson knows of the court's orders and is working to achieve those ends."

The court further noted that although there might be some utility in getting Dr. Shatz's views on any alternative approach, the court would not allow Dr. Shatz to interview the children. Doing so would impose an additional intrusion in their lives, create additional uncertainty and might undermine Dr. Emerson's progress. Furthermore, because Dr. Emerson had been deemed a safe harbor, it was unclear whether Dr. Shatz could meaningfully communicate with Dr. Emerson without violating that order or the children's trust. The court said it would consider appointing Dr. Shatz if she were to only review the court's orders, interview the parents, and review the information in the court file.

On May 21, 2015, the court appointed Dr. Shatz in order to "provide the Court with (a) review of the current therapeutic model being used by the Court, along with its efficacy given the Goals of the Court, and (b) provide proposals for modification of therapeutic goals and mechanisms, as an alternative to the current therapeutic model, to meet the Goals of the Court." The " 'Goals of the Court' " were defined as: " 'It is in the best interest of the children to be reunified with their father.' " The court defined Dr. Shatz's scope in an attachment to the order. The

court ordered that Dr. Shatz not interview the children, the children's therapists or the reunification therapist (Dr. Emerson).

On April 5, 2016, the court held a hearing regarding Dr. Shatz's report and also heard testimony from Dr. Shatz. After Dr. Shatz testified, the court asked that Adam and Alyssa be brought to court the following day for an interview pursuant to Family Code section 3042, subdivision (c).[10] On April 6, 2016, the court heard further testimony from Dr. Shatz. The court also interviewed Adam and Alyssa in chambers.[11] The court found the children were "articulate, bright, knowledgeable about their interests and desires in life" and had a good relationship with Dr. Emerson. The court thus declined to "second guess the therapy plan currently in place instituted by Dr. Emerson." The children were 16 and 15, the court observed, and "are well

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[10] Pursuant to Family Code section 3042, subdivision (c): "If the child is 14 years of age or older and wishes to address the court regarding custody or visitation, the child shall be permitted to do so, unless the court determines that doing so is not in the child's best interests. In that case, the court shall state its reasons for that finding on the record."

[11] Although the court's minute order states that minors' counsel and a court reporter were present during the interview, it does not appear that minors' counsel was actually present. The court initially stated it wanted to speak with the children with no one else present except the clerk and court reporter. No party objected to this procedure. When minors' counsel later asked to be present during the entirety of the interview, the court said it "would like to hear from the children first as to their wishes on that matter, and will do that initially, and then see where we go." Minors' counsel was then instructed to wait in the courtroom at that time. The court later stated that it had interviewed the children outside the presence of counsel and the parties.

enough knowledgeable about their current situation and their past situation." With all due respect to Dr. Shatz, the court continued, the type of "extremely abrupt transition" advocated by Dr. Shatz would not be useful, especially without the recommendation of the therapist who had been seeing the children for years.[12]

On May 19, 2016, the court issued the following findings and orders: (1) the court denied, without prejudice, Augustine's request to have the children placed in an intensive therapeutic facility with Augustine and refused to order the therapeutic model recommended by Dr. Shatz at this time;[13] (2) the court found disturbing the length of time that had gone by without Augustine having seen the children given the court's July 1, 2014 findings; (3) the court did not adopt Karla's view that Dr. Shatz was biased against Karla, instead finding that Dr. Shatz was a highly experienced professional in the custody field as well as credible and unbiased; and (4) moving the children from Karla to an intensive therapeutic facility would be psychologically traumatic for the children.

The court also lifted the safe harbor restriction of Dr. Emerson's conjoint therapy and ordered that the parties, particularly Karla, comply with Dr. Emerson. Based on what it had heard from the children, the court found that some progress was being made with Dr. Emerson and therefore ordered that the

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[12] The court also noted there was no evidence that the parties could remotely afford the therapeutic model recommended by Dr. Shatz.

[13] The therapeutic model recommended by Dr. Shatz would have placed the children with Augustine in an around the clock intensive therapeutic facility for a period of three to four days.

therapy schedule be maintained. The court also found it would be beneficial to receive testimony from Dr. Emerson. The court also extended Dr. Shatz's appointment as a Evidence Code section 730 custody evaluator and allowed Dr. Shatz to speak with Dr. Emerson. The court also stated it was dedicated to the proposition that it is in the children's best interest to have a relationship with Augustine and there is a legislative mandate that the children have regular, continuing, frequent contact with both parents.

The court set a hearing for July 18, 2016, to receive Dr. Emerson's testimony. The hearing was continued to August 9, 2016, and then to August 29, 2016.

On August 29, 2016, at Augustine's request, the court clarified its previous safe harbor ruling: "The court's intention would be with respect to safe harbor, it should not make it retroactive but prospective only with respect to what [Dr. Emerson's] current plan is and what prospects she sees with respect to the future." In other words, "Dr. Emerson is free to testify about her current opinions and conclusions, how she anticipates the matter going forward with respect to the therapy and eventual reunification, and will not be examined with respect to past revelations by the children to her." Augustine's counsel responded: "Without being able to look out retroactively, I would submit that there's no foundation for a statement by Dr. Emerson as to what prospects there would be. If we are not able to go behind a certain period of time, that would lack foundation." The court noted that Augustine had already executed a waiver allowing such testimony and was not precluded from cross-examining Dr. Emerson.

Dr. Emerson then testified before the court.[14] After Dr. Emerson testified, the court said it would allow Dr. Shatz to comment on Dr. Emerson's therapeutic model. However, the court would not allow further testimony by Dr. Shatz on any alternative models since Dr. Shatz had already testified on that subject extensively. The court also allowed Augustine to submit a proposed witness list for the next hearing and directed Augustine to outline his specific offer of proof. The court would then rule on Augustine's request to rebut Dr. Emerson's testimony through additional witness testimony.

On September 8, 2016, Augustine submitted a proposed witness list for the hearing scheduled for October 12, 2016. Augustine listed himself, Dr. Shatz, his individual therapist, and a transporter of minor children as his witnesses. Karla submitted a witness list identifying herself and Augustine as witnesses. On September 23, 2016, the court issued a minute order stating that, in accordance with its August 29, 2016 order, it would permit only Dr. Shatz to opine as to Dr. Emerson's therapy regimen. The remaining proposed witnesses were not to be called because their testimony was unnecessary given that material facts were not in controversy, assessment of credibility was not a factor, and the proposed testimony would have addressed issues the court had already ruled on.

The hearing took place on October 12, 2016.[15] On October 13, 2016, the court issued its ruling regarding the

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[14] Augustine filed a transcript of Dr. Emerson's August 29, 2016 testimony with this court when filing a motion to correct or augment the record on appeal.

[15] Augustine filed a transcript of Dr. Shatz's October 12, 2016 testimony with this court when filing a motion to correct or

continued viability of the current reunification modality used by Dr. Emerson. After careful review of the record, as well as Dr. Shatz's and Dr. Emerson's testimony, the court concluded that it was in the children's best interest to continue with the current modality, with some modifications. The modifications were as follows: (1) Dr. Emerson was to confer every 60 days with Augustine's therapist with an eye toward adjusting Augustine's perceived negative attitude; (2) Dr. Emerson was to provide the court and counsel with 60-day progress reports on the reunification progress; and (3) Karla was ordered to strictly maintain the previously-ordered schedule of sessions with Dr. Emerson, and any proposed deviations were to be discussed among counsel and brought to the court's attention if appropriate.

Augustine now appeals the court's October 13, 2016 order. Karla has not responded to the appeal.[16]

STANDARD OF REVIEW

"The standard of appellate review of custody and visitation orders is the deferential abuse of discretion test." (*In re Marriage of Burgess* (1996) 13 Cal.4th 25, 32.) Under this test, we must

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augment the record on appeal. In her October 12, 2016 testimony, Dr. Shatz opined on Dr. Emerson's therapy regimen after having reviewed Dr. Emerson's August 29, 2016 testimony.

[16] We do not consider this to be a concession and reach the merits of the appeal. (See *In re Marriage of Riddle* (2005) 125 Cal.App.4th 1075, 1078, fn. 1; *In re Bryce C.* (1995) 12 Cal.4th 226, 232–233.) We determine the appeal based on the record provided and the opening brief. (Cal. Rules of Court, rule 8.220(a)(2).) As appellant, Augustine retains the burden of demonstrating prejudicial error. (See, e.g., *Red Mountain, LLC v. Fallbrook Public Utility Dist.* (2006) 143 Cal.App.4th 333, 347.)

uphold the trial court's ruling "if it is correct on any basis, regardless of whether such basis was actually invoked." (*Ibid*.) Given that child custody and visitation orders are subject to a trial court's broad discretion, an abuse of discretion will be found only if the court exceeded the bounds of reason or contravened the uncontradicted evidence. (*In re Estate of Parker* (1921) 186 Cal. 668, 670.) "A trial court's exercise of discretion in admitting or excluding evidence is [also] reviewable for abuse." (*People v. Coddington* (2000) 23 Cal.4th 529, 587, overruled on another point in *Price v. Superior Court* (2001) 25 Cal.4th 1046, 1069, fn. 13.) To the extent Augustine is challenging the trial court's factual findings, our review is limited to whether any substantial evidence, contradicted or uncontradicted, supports the court's ruling. We resolve conflicts in evidence in favor of the prevailing party and draw all reasonable inferences to uphold the court's decision. (*In re Marriage of Mix* (1975) 14 Cal.3d 604, 614.)

DISCUSSION

On appeal, Augustine contends that the trial court's October 13, 2016 order was made without a proper basis. Augustine reiterates the procedural history of this case, then states that he has "essentially had his parental rights terminated by a process that has found Karla's allegations against him to be untrue yet has done nothing to assist him in reuniting with his children." Augustine also contends that the trial court's orders have prevented him from having a fair opportunity to be heard. Additionally, Augustine argues that, since July 2014, the trial court has kept a failed therapeutic model in place that has proven to be ineffective in achieving the stated goals of the court.

Augustine specifically cites the following alleged trial court errors: (1) although the court was provided with reliable

evidence that the current therapy with Dr. Emerson was not achieving the goal of reunification, including testimony from Dr. Shatz, the court did not change the therapeutic plan, instead maintaining therapy with Dr. Emerson; (2) the court violated Augustine's right to a fair hearing by failing to follow statutory guidelines and rules of court when interviewing the children; (3) there was no factual basis for the court to maintain the extant therapeutic plan because it had reliable evidence that Dr. Emerson's therapy was not effective and was not serving to reunify Augustine with the children; (4) the court's order lifting the safe harbor rule only prospectively regarding Dr. Emerson's therapy sessions violated his right to a fair hearing; (5) the court erred by refusing to allow Augustine to testify in order to rebut Dr. Emerson; and (6) the court's October 13, 2016 order violated Family Code section 3190, which thus resulted in a miscarriage of justice. We discuss each claim in turn.

A. Augustine's first claim

With respect to Augustine's first claim, Augustine acknowledges that the trial court granted his request that an evaluator be appointed to opine on the proper therapeutic model. On May 21, 2015, the court appointed Dr. Shatz to review the therapeutic model currently being used by the court, along with its efficacy given the court's goals; namely, to reunify the children with their father. The court also asked Dr. Shatz to provide proposals regarding the modification of therapeutic goals and mechanisms, as an alternative to the current therapeutic model, in order to meet the court's goals. Dr. Shatz provided a report to the court and testified before the court on April 5 and April 6, 2016.

Dr. Shatz testified that, "[t]here is nothing we can do therapeutically unless it's intensive intervention." "[I]t doesn't look good for these kids the way things are now," Dr. Shatz noted. "The other thing that I know from my work with severely alienated children, which I believe these children to be, is that therapy is never going to help because what the child is going to tell the therapist is what the mother or the alienator tells the children." The therapeutic model recommended by Dr. Shatz would have placed the children with Augustine in an around the clock intensive therapeutic facility for a period of three to four days. According to Dr. Shatz, without this level of intervention, the children would have problems throughout their lives.

Furthermore, Dr. Shatz testified that the critical aspect of this program was the after care. "The goal really would be to reunify the family. . . . [¶] I don't know if that's possible in this case because of that long history of reports, and anger, and you know, all of that. But what happens is there's an after care professional that—I mean, there are a number of ways to go about it. But, first of all, mother is [to have] no contact with the children at all for 90 days." If Karla did have contact with the children within that 90-day time period or if the children tried to contact her, then, Dr. Shatz said, "I think there needs to be consequences, behavioral consequences, or this is not going to be effective. I think because there's been so many lines that have been crossed in this case for so many years, I think that if there are not very strong consequences for mom, she's going to find a way to contact the kids." The consequences "could be all the way from as severe as mom being detained or the 90-day starting over again, or maybe a permanent change of custody, maybe a permanent change of custody has to happen here." Dr. Shatz

recommended that this change in therapy take place immediately. Dr. Schatz admitted that this form of therapy was both new and extreme, noting "it's a little, maybe overwhelming to think of something this drastic because of the fears of what the children might do."[17]

On May 19, 2016, the court denied, without prejudice, Augustine's request to have the children placed in an intensive therapeutic facility with him and refused to order the therapeutic model recommended by Dr. Shatz at that time. Further testimony from Dr. Emerson on August 29, 2016, and from Dr. Shatz on October 12, 2016, did not change this result, although Dr. Emerson now had to provide 60-day progress reports on the reunification progress.

The trial court did not abuse its discretion in declining to change the current therapeutic model, while allowing Augustine to re-raise the issue at a future date. Once a trial court has entered a custody order reflecting that a particular custodial arrangement is in the best interest of the child, "the paramount need for continuity and stability in custody arrangements—and the harm that may result from disruption of established patterns of care and emotional bonds with the primary caretaker—weigh heavily in favor of maintaining" that custody arrangement. (*In re Marriage of Burgess*, *supra*, 13 Cal.4th at pp. 32–33.)

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[17] Despite her recommendation that the children undergo a three- to four-day intensive therapeutic facility with their father followed by a 90-day after care program where they would have no contact with their mother, Dr. Shatz stated that "there should be a change of custody based on the history of this case, no matter what."

Here, it was undisputed that therapy with Dr. Emerson had not yet achieved the goal of reunification. As a result, the trial court spoke with the children directly and heard extensive testimony regarding both the current therapeutic model as well as its proposed replacement. Where, as here, a trial court diligently inquires into the matter in a formal court hearing, and duly considers the noncustodial parent's claims, evidence, and offers of proof, but properly finds them insufficient to impose a new therapeutic model at the present time, the court does not err or abuse its discretion. Indeed, the preferable procedure is that which the trial court utilized here. (See *In re Marriage of Brown and Yana* (2006) 37 Cal.4th 947, 965; *In re Marriage of Stevenot* (1984) 154 Cal.App.3d 1051, 1059, fn. 3.) That Augustine does not agree with the result does not mean that the court exceeded the bounds of reason. (See *In re Estate of Parker*, *supra*, 186 Cal. at p. 670.) "[A] trial court does not abuse its discretion unless its decision is so irrational or arbitrary that no reasonable person could agree with it." (*People v. Carmony* (2004) 33 Cal.4th 367, 377.) As discussed above, the record provides us with ample grounds for concluding that the trial court's decision was within the bounds of reason. (See *In re Estate of Parker,* at p. 670.)

B. Augustine's second claim

Augustine next contends that the trial court violated his right to a fair hearing by failing to follow statutory guidelines and rules of court when interviewing the children. Under Family Code section 3042, subdivision (c): "If the child is 14 years of age or older and wishes to address the court regarding custody or visitation, the child shall be permitted to do so."

California Rules of Court, rule 5.250, which implements Family Code section 3042, provides: "No statutory mandate,

rule, or practice requires children to participate in court or prohibits them from doing so. When a child wishes to participate, the court should find a balance between protecting the child, the statutory duty to consider the wishes of and input from the child, and the probative value of the child's input while ensuring all parties' due process rights to challenge evidence relied upon by the court in making custody decisions." (Cal. Rules of Court, rule 5.250(a).)

To that end, courts should consider: "(A) Where the testimony will be taken, including the possibility of . . . hearing from the child on the record in chambers; [¶] (B) Who should be present when the testimony is taken, such as: both parents and their attorneys, only attorneys in the case in which both parents are represented, the child's attorney and parents, or only a court reporter with the judicial officer; [¶] (C) How the child will be questioned, such as whether only the judicial officer will pose questions that the parties have submitted, whether attorneys or parties will be permitted to cross-examine the child, or whether a child advocate or expert in child development will ask the questions in the presence of the judicial officer and parties or a court reporter; and [¶] (D) Whether a court reporter is available in all instances, but especially when testimony may be taken outside the presence of the parties and their attorneys and, if not, whether it will be possible to provide a listening device so that testimony taken in chambers may be heard simultaneously by the parents and their attorneys in the courtroom or to otherwise make a record of the testimony." (Cal. Rules of Court, rule 5.250(d)(3)(A)-(D).) However, "[n]o testimony of a child may be received without such testimony being heard on the record or

in the presence of the parties. This requirement may not be waived by stipulation." (Cal. Rules of Court, rule 5.250(d)(6).)

We first note that the trial court was allowed to interview the children outside the presence of their parents and minors' counsel. Thus, although Augustine criticizes the trial court's decision to interview the children without counsel, the trial court was permitted to do so. Augustine does correctly note that, in the past, the children were found to have provided embellished or unfounded statements. Augustine also correctly notes that the trial court summarized its impressions of its Family Code section 3042 discussion with the children rather than providing a transcript of the interview, which would have allowed counsel to better analyze the veracity of the children's statements. However, the applicable statutes and rules in this case do not impose such a requirement. Furthermore, it is clear from the record that the children's custody preference, although taken into account, did not serve as the sole basis for the court's decision. The court also had at its disposal Dr. Shatz's report, Dr. Shatz's April 5 and April 6, 2016 testimony, Dr. Emerson's August 29, 2016 testimony, and Dr. Shatz October 12, 2016 testimony, which she provided reviewing Dr. Emerson's testimony. Once again, that Augustine does not agree with the result does not mean that the court exceeded the bounds of reason. (See *In re Estate of Parker*, *supra*, 186 Cal. at p. 670.)

C. Augustine's third claim

Augustine next contends that there was no factual basis for the court not to change the therapeutic plan because it had reliable evidence Dr. Emerson's therapy was not effective and was not serving to reunify Augustine with the children. In addition to overlapping with the first claim, this third claim

overstates the deficiencies present in the current therapeutic model—deficiencies already examined and acknowledged by the trial court. As the court noted, progress achieving the stated goal of reunification has been slow. However, as the court noted on May 8, 2015, Dr. Emerson's therapy had not yet reached the point where it was in the children's interest to have conjoint meetings with Augustine; thus, there was no basis for to conclude that Dr. Emerson had refused to implement conjoint therapy for reasons other than the children's readiness for that step.

Furthermore, on May 21, 2015, the court appointed Dr. Shatz to review and propose alternatives to the current therapeutic model. Rather than simply accept Dr. Emerson's slow progress, the court took action to determine if a different form of therapy would serve the court's reunification goals. Although, on May 19, 2016, the court tentatively declined to adopt the therapeutic model advocated by Dr. Shatz, the court continued to hear additional testimony to determine if its initial decision was in fact correct. On October 13, 2016, the court concluded that it remained in the children's best interest to continue with the current therapeutic model. However, the court did modify the treatment plan, including ordering that Dr. Emerson provide court and counsel with 60-day reports on the reunification progress.

Therefore, the court is both monitoring progress under the current model and moving the process forward, as sought by Augustine. In so doing, the court has struck a balance between the vicissitudes of ongoing therapy, the changing needs and desires of growing children, and the court's express goal of reunification. At every step in this difficult proceeding, the court has repeatedly heard from all the parties as well as their counsel

and recommended therapists. Once again, the court's decision to continue with the current therapeutic model at this time did not exceed the bounds of reason. (See *In re Estate of Parker*, *supra*, 186 Cal. at p. 670.)

Augustine argues that the current model has effectively deprived him of visitation rights with the children, thus requiring a clear showing that any contact would adversely affect the children. However, the case cited by Augustine for this proposition, *Devine v. Devine* (1963) 213 Cal.App.2d 549, also provides that this parental right, although very important, remains subservient to the best interest of the child, which must be given paramount consideration. (*Id.* at p. 552.) Furthermore, a "court abuses its discretion in making a child custody order if there is no reasonable basis on which it could conclude that its decision advanced the best interests of the child." (*Marriage of Fajota* (2014) 230 Cal.App.4th 1487, 1497.) Given the trial court's thorough and deliberate work when determining whether it was in the children's best interest to remain with the current therapeutic model, we cannot say the court's finding had no reasonable basis.

D. Augustine's fourth and fifth claims

At the outset, the parties opted for safe harbor therapy so that, protected by the veil of confidentiality, they could discuss issues without fear of repercussion. On May 19, 2016, the court lifted the safe harbor restriction regarding Dr. Emerson's conjoint therapy for its upcoming evidentiary hearing, wherein the court was tasked with deciding whether to continue with the current therapeutic model. On August 29, 2016, the court clarified its ruling: "The court's intention would be with respect to safe harbor, it should not make it retroactive but prospective only

with respect to what [Dr. Emerson's] current plan is and what prospects she sees with respect to the future." In other words, "Dr. Emerson is free to testify about her current opinions and conclusions, how she anticipates the matter going forward with respect to the therapy and eventual reunification, and will not be examined with respect to past revelations by the children to her."

Augustine contends that lifting the safe harbor rule regarding Dr. Emerson's therapy sessions—mid-hearing and only prospectively—violated his right to a fair hearing. According to Augustine, the trial court was required to lift the safe harbor rule entirely. We disagree. A trial court may permit disclosure by a child's therapist of matters that would reasonably assist the court in evaluating whether further orders are necessary for the child's benefit, and preserves the confidentiality of the details of the child's therapy. (See *In re Kristine W. (*2001) 94 Cal.App.4th 521, 529; *In re Mark L.* (2001) 94 Cal.App.4th 573, 584.) Indeed, "[w]ithout the testimony of psychologists, in many juvenile dependency and child custody cases superior courts and juvenile courts would have little or no evidence, and would be reduced to arbitrary decisions based upon the emotional response of the court." (*In re Jasmon O.* (1994) 8 Cal.4th 398, 430.) However, Augustine cites no authority that compels a court to utterly remove the protection afforded by the veil of confidentiality, especially when, as here, the court faced only a limited, future-directed, task. Nor do we find such a case.

After Dr. Emerson testified, Augustine submitted a proposed list of rebuttal witnesses. Augustine listed himself, Dr. Shatz, his individual therapist, and a transporter of minor children as his witnesses. Karla submitted a witness list identifying herself and Augustine as witnesses. However, the

court allowed only Dr. Shatz to opine on rebuttal as to Dr. Emerson's therapy regimen. The court did not permit the remaining proposed rebuttal witnesses to be called because their testimony was unnecessary given that material facts were not in controversy, assessment of credibility was not a factor, and the proposed testimony would have addressed issues the court had already ruled on.

On appeal, Augustine contends that the trial court erred by refusing to allow him to testify against Dr. Emerson on rebuttal. We again note the limited purview of the court during this specific hearing; namely, Dr. Emerson's current therapeutic plan and what future prospects she anticipated. We also note that Augustine was neither precluded from cross-examining Dr. Emerson, within the boundaries of the court's safe harbor ruling, nor prevented from calling his own expert witness.[18] Indeed, it was Dr. Shatz who had been allowed to interview Dr. Emerson about her therapeutic model, interview the parents, review the court's orders, review the information in the court's file, and examine Dr. Emerson's August 29, 2016 hearing testimony. Thus, it was Dr. Shatz who had conducted the work most relevant to this hearing's purpose. Although oral testimony of witnesses may supply valuable evidence relevant to credibility (*Elkins v. Superior Court* (2007) 41 Cal.4th 1337, 1356), Augustine has not identified how his rebuttal testimony, as opposed to Dr. Shatz's, could have aided the court in its credibility determination.

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[18] Trial courts may limit the number of expert witnesses. (Evid. Code, §§ 352, 723; *Horn v. General Motors Corp.* (1976) 17 Cal.3d 359, 371; *Scalere v. Stenson* (1989) 211 Cal.App.3d 1446, 1454 [trial court properly limited plaintiff to one expert witness].)

Describing a party's fundamental right to present evidence at trial in a civil case, Witkin observed: "One of the elements of a fair trial is the right to offer relevant and competent evidence on a material issue." (3 Witkin, Cal. Evidence (5th ed. 2012) Presentation at Trial, § 3, p. 29.) However, this right is subject to "obvious qualifications" such as the court's power to restrict cumulative and rebuttal evidence, and to exclude unduly prejudicial matter. (*Ibid.*) Indeed, trial courts are granted broad discretion over the scope of rebuttal (*Johnston v. Brewer* (1940) 40 Cal.App.2d 583, 588) and may exclude such evidence if appropriate. (*Kahn v. Revett* (1918) 39 Cal.App. 312, 315–316.) Thus, the court did not abuse its discretion when it precluded Augustine's rebuttal testimony.

E. Augustine's sixth claim

Lastly, Augustine contends that the court's October 13, 2016 order violated Family Code section 3190, thus resulting in a miscarriage of justice. Family Code section 3190, subdivision (a), provides, in relevant part, that "[t]he court may require parents . . . involved in a custody or visitation dispute, and the minor child, to participate in outpatient counseling with a licensed mental health professional . . . for not more than one year, provided that the program selected has counseling available for the designated period of time."[19] Once counseling has been completed, any party may file a new order to show cause or

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[19] In order to do so, the court must find, in relevant part, that the dispute between the parents "poses a substantial danger to the best interest of the child" and that "[t]he counseling is in the best interest of the child." (Fam. Code, § 3190, subd. (a)(1)–(2).)

motion and "the court may again order counseling consistent with this chapter." (Fam. Code, § 3190, subd. (e).)

On July 1, 2014, the court ordered that the entire family undergo conjoint therapy together beginning no later than August 15, 2014, and lasting for 12 months. On October 22, 2014, just two months after the therapy began, Augustine filed a request for order, asking that conjoint therapy with Dr. Emerson cease and that the court institute a different therapeutic model. Although the court has allowed Dr. Emerson's therapy to continue while determining whether a different model is in fact warranted, it is unclear if Dr. Emerson's therapy would have continued until now had Augustine not sought so quickly to end the therapy and replace it with an admittedly drastic alternative. Furthermore, given that the desired conjoint therapy has yet to take place, and reunification remains an unreached goal, it appears likely that Augustine would have sought continued counseling after the one-year time period expired, albeit under a drastically different therapeutic model. Thus, Augustine's *real* claim here—just like his first and third claims—is that the court should have changed the therapeutic plan, not that it should have ended therapy altogether at the end of 12 months. As discussed above, however, the trial court did not abuse its discretion in continuing Dr. Emerson's therapy while assessing whether a different model was appropriate.[20] Furthermore, the

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[20] Nor can the trial court's continuation of Dr. Emerson's therapy be deemed a miscarriage of justice. A miscarriage of justice should be declared only if we examine the entire cause, including the evidence, and find it reasonably probable that a result more favorable to the appealing party would have been reached absent the error. (*People v. Watson* (1956) 46 Cal.2d 818,

court, in recognition of the slow pace of this therapy, as well as Augustine's mounting frustration, has now mandated 60-day progress reports on the reunification process.

Nevertheless, Augustine is correct that the one-year time period mandated by Family Code section 3190 has long since expired. However, Augustine has appealed the court's October 13, 2016 order, not its July 1, 2014 order. The October 13, 2016, which continues Dr. Emerson's therapeutic model, could not exist without the July 1, 2014 order requiring that the parties engage in therapy with Dr. Emerson in the first instance. Accordingly, we will allow a limited remand so that the trial court may clarify its July 1, 2014 order to limit Augustine's required participation in counseling to a period of no more than one year.

836.) A probability in this context "does not mean more likely than not, but merely a *reasonable chance*, more than an *abstract possibility.*" (*College Hospital Inc. v. Superior Court* (1994) 8 Cal.4th 704, 715.) Here, even if the trial court erred in continuing Dr. Emerson's therapy past the 12-month mark, in violation of Family Code section 3190, there is little to no evidence that the court would have switched to the drastic therapeutic model advocated by Dr. Shatz absent this error.

DISPOSITION

The trial court's October 13, 2016 order is affirmed with instructions that the trial court clarify its July 1, 2014 order to limit Augustine B. Gasca's required participation in counseling to a period of no more than one year. The parties are to bear their own costs on appeal.

NOT TO BE PUBLISHED.

JOHNSON, J.

We concur:

ROTHSCHILD, P. J.

BENDIX, J.