

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION SIX

NICHOLAS DI NAPOLI, JR.,

Plaintiff and Appellant,

v.

PATARAWAN DI NAPOLI,

Defendant and Respondent.

2d Civil No. B235354
(Super. Ct. No. 1340405)
(Santa Barbara County)

Nicholas Di Napoli (Nicholas) was born in 2007. His father, Nicholas Jr. (Nick) is a U.S. citizen, his mother, Patarawand (Pat) is a dual citizen of Thailand and the United States.¹ They have ended their seven year marriage. Pat wishes to return to Thailand with Nicholas. Nick opposed the move contending that cultural differences, distance and the enforceability of court orders preclude granting Pat's request. In an excellent, thoughtful and thorough statement of decision the trial judge weighed the relevant factors and found, inter alia, the "best interests of [the Child] requires an award of joint legal custody . . . and an award of approximately 75% physical custody to Pat in Thailand and 25% physical custody to [Nick] in California"

Nick appeals and contends that the trial court abused its discretion by ignoring the requisite legal factors in its assessment of whether the move-away order was

¹ We refer to the parties by their first names for clarity, not out of disrespect.

in Nicholas' best interest. Our review of the record discloses that two loving parents could not agree upon the care and custody of their child. Their disagreement appears to have been grounded on irreconcilable notions of what would be best for Nicholas given their respective futures. It is equally clear that the trial court did anything but abuse its discretion in resolving this Solomonian dispute. We affirm.²

FACTUAL AND PROCEDURAL BACKGROUND

Nick and Pat married on January 30, 2003. They separated six years later on April 1, 2009. Their sole minor child, Nicholas, was born in May 2007.

Pat moved from Thailand to the United States before she met Nick. They married in California with a later ceremony in Thailand attended by Nick's mother, sister and a few family friends. Pat became a United States citizen after their marriage.

Pat and Nick chose to live in Santa Barbara in the last years of their marriage. Pat was the primary caregiver for Nicholas during the marriage. Pat worked for Citrix, a company based in Goleta, California, for over five years. She began as an accounts payable supervisor and ordinarily worked from her home. Her mother traveled from Thailand five or six times and stayed with Pat and Nick for several months and helped with Nicholas. Nick worked for several different employers during the marriage.

In 2008, Nick wrote a note promising Pat that they would move to Thailand within five years, and "live [there] forever." By April 2009, Pat and Nick were living in separate bedrooms of their family home. This started when Nicholas was very young and awoke frequently at night. Pat slept in a separate room while breastfeeding him. Later, their relationship "didn't go well" and they never shared a bedroom again.

Nick agreed that Pat could take Nicholas to Thailand for three months in the summer of 2009. Nicholas is a dual citizen of the United States and Thailand. He

² On April 13, 2011, Nick filed an in limine motion for judgment on the pleadings alleging that the Hague Convention precluded granting Pat's motion because Thailand is not a signatory thereto. The trial court denied the motion on multiple grounds, including Nick's failure not meet his evidentiary burden to support the motion, despite the evidence that Thailand is not a signatory to the Hague Convention.

also speaks English and Thai. While Nicholas and Pat were in Thailand, her mother was hospitalized. Pat called Nick to say she would need to extend the visit for an additional month. He did not object.

In November 2009, after returning from Thailand, Pat and Nicholas moved out of the family home. Pat filed a notice of motion for child custody and visitation and child support, but ultimately reached an agreement with Nick concerning custody in March 2010. On March 18, 2010, Nick filed a stipulation and order that provided for temporary joint legal and physical child custody, with a specific visitation schedule.

When Pat initially moved from the family home, Nick was working in Camarillo and had much less than 50 percent visitation with Nicholas. After he found employment in the Santa Barbara area, he and Pat shared visitation with Nick on alternating weeks. In 2011, before trial, while Pat was in California, she and Nick had a "week-on week-off visitation schedule, changing visitation every Monday." Nicholas attended the same Montessori school in Santa Barbara for more than two years.

On May 24, 2010, Pat's attorney sent a letter to Nick's attorney advising him that Pat planned to move to Thailand. Citrix was promoting her to become the financial operations manager of its Asian-Pacific region. In June 2010, Citrix increased Pat's salary to \$85,000 per year.

On July 2, 2010, Pat went to Thailand for about two months. When she left, she believed that she and Nick had reached a marital settlement agreement ("MSA") that would allow both parents regular physical contact with Nicholas, including travel on the 22-hour flight from California to Thailand. Although she and Nick had not signed the MSA before she went to Thailand that July, Pat anticipated that Nick would have primary physical custody of Nicholas in California and that Nicholas would visit her in Thailand during the summer and other school breaks.

From July 2, 2010, through September 24, 2010, while Pat was in Thailand, Nicholas lived with Nick 100 percent of the time. Pat and Nicholas were able to accommodate the 14-hour time difference and had daily contact via Skype.

While visiting Thailand in 2009, Pat saw many of her long-time friends, including a man named Chibuth Ananratnasook (Chibuth), whom she had known since high school. He was very kind to Nicholas, helped care for him, and took him places. Chibuth had attended graduate school in Ohio, spoke English, and started a growing information technology business in Thailand, with a presence in Japan. His goal was to make his business a worldwide operation. In August 2010, Chibuth proposed marriage to Pat.

On September, 24, 2010, Pat returned to the United States for training and remained for several weeks. For three weeks, Nick allowed her to have 100 percent visitation time with Nicholas.

Pat went to Thailand on October 24, 2010 and stayed there for several months. Nicholas resumed living with Nick full time. Nick's mother and a babysitter helped care for Nicholas when he lived with Nick.

On November 15, 2010, the trial court entered a judgment re status only dissolving the marriage. In December 2010, Pat married Chibuth. Pat did not disclose her remarriage before trial. She had planned to disclose it during a child custody evaluation, but the court declined her request for an evaluation.

Pat returned from Thailand on January 21, 2011. After her return, Nick told her that he objected to "any travel to Thailand by Nicholas." On February 1, 2011, Pat's lawyer wrote Nick's lawyer a letter stating that Pat decided to seek a court order awarding her custody of Nicholas and the right to relocate to Thailand with Nicholas. On February 22, 2011, the parties filed a stipulation that neither party would remove Nicholas from California without the prior written consent of the other or prior court order. On February 23, 2011, the court denied Pat's request for a child custody evaluation. On March 23, 2011, Nick filed his opposition to Pat's request for a move away and/or visitation in Thailand.

The trial court heard testimony on May 9, 10, and 12, 2011, to consider Pat's request for physical custody of Nicholas in Thailand, with liberal visitation to Nick, her request for child support, and Nick's requests for attorneys fees and sanctions. Nick,

Pat, and each of their mothers testified at trial. Pat presented a video of several sites in Bangkok, including her home, the private school that Nicholas would attend, the local hospital, and a park.

On June 16, 2011, the trial court issued its tentative decision. Both parties filed objections. On July 20, 2011, the court issued its statement of decision with findings, conclusions and orders concerning custody and related issues. On the same date, it entered judgment incorporating its orders.

The trial court found that Pat "appeared to be open and honest in her testimony," and that Nick's credibility was undermined by his inability to remember "facts that he reasonably would have been expected to remember" and by his giving "testimony inconsistent with his deposition testimony." It also found that Margaret Di Napoli, Nick's mother, "was seriously impeached by some deposition testimony strongly at variance with her testimony in court [which] seriously damaged her credibility."

The trial court concluded that Nick failed to present substantial evidence to support his claim that the political or social situation in Thailand presented an actual threat or detriment to the health, safety or welfare of Nicholas. It found that with the support of Nick, Nicholas had established a significant connection with Thailand, its culture and language, and his extended family there. It further found that Nicholas had a primary and dependent relationship with Pat and it was in his best interest to continue their relationship in Thailand, while "maintaining frequent communication and significant custodial time with his father in California."

The trial court awarded joint legal custody of Nicholas to Pat and Nick, and awarded approximately 75 percent physical custody to Pat, in Thailand, and 25 percent physical custody to Nick, in California. It ordered Pat to enroll Nicholas in the English language program of the private school depicted in the trial video exhibit, and to pay the entire cost of his tuition.

The trial court further found that Pat had developed and continued to maintain strong ties to California, including her dual citizenship and her employment with a United States-based employer, and that she demonstrated that she respects and will

continue to respect the court's jurisdiction. The court noted there was no evidence of Pat ever having threatened to abduct Nicholas, or to take him to Thailand, or keep him there, without the full knowledge and consent of Nick. It thus found that there was minimal risk that Pat would violate its orders.

The trial court ordered that Nick and Pat each obtain compatible computer equipment for Skype communication. In addition, it ordered the in-custody parent to initiate a daily Skype videoconference call each weekday at 6:30 a.m. in Santa Barbara and 8:30 p.m. in Thailand, for Nicholas to communicate with the out-of-custody parent for up to 30 minutes.

The trial court also ordered that a parent accompany Nicholas during his trips between Thailand and the United States, on the plane, and in the airport, and that the parents maintain Nicholas's passports and make them available to the other parent. The court contemplated that Nicholas would make one trip each year, absent another agreement between his parents. It ordered Pat to "pay the cost of all air fare for Nicholas . . . and the parent accompanying him between the United States and Thailand."

The trial court also ordered Nick to pay Pat \$912 for child support per month. It ordered that Nick and Pat pay their own costs and fees, and denied Nick's request for sanctions and attorneys fees.

DISCUSSION

"In *In re Marriage of Burgess* (1996) 13 Cal.4th 25, our Supreme Court discussed the so-called 'move-away' orders. As in all cases where an initial custody determination is at issue, the trial court has ""the widest discretion to choose a parenting plan that is in the best interest of the child."" (*Id.* at p. 31.) This requires the court to consider all the circumstances. (*Id.* at pp. 31-32.)" (*In re Marriage of Bryant* (2001) 91 Cal.App.4th 789, 793 [disapproved on other grounds in *In re Marriage of LaMusga* (2004) 32 Cal.4th 1072, 1099-1100 (*LaMusga*).)Where, as here, the parties have a working joint legal and joint physical custody agreement, and one parent seeks to relocate, the family law court "must determine de novo what arrangement for primary

custody is in the best interest of the minor children." (*In re Marriage of Burgess*, at p. 40, fn. 12.)

"[T]he statutory policy promoting 'frequent and continuing contact with both parents' (Fam. Code, § 3020) does not limit 'the trial court's broad discretion to determine, in light of *all* the circumstances, what custody arrangement serves the "best interest" of minor children.' [Citation.] . . . Family Code section 3040, subdivision (b), expressly provides the court with "'the widest discretion to choose a parenting plan that is in the best interest of the child.'" [Citation.]" (*LaMusga, supra*, 32 Cal.4th at p. 1088.)

"The standard of appellate review of custody and visitation orders is the deferential abuse of discretion test. [Citation.] The precise measures whether the trial court could have reasonably concluded that the order in question advanced the 'best interest' of the child." (*In re Marriage of Burgess, supra*, 13 Cal.4th at p. 32.)

Nick contends that the trial court abused its discretion by ignoring all significant factors in assessing whether a move-away order is in the best interest of Nicholas. The record is to the contrary.

Condon Factors

In *In re Marriage of Condon* (1998) 62 Cal.App.4th 533 (*Condon*) the court reviewed the significant factors that a trial court must consider in assessing whether a parent's request to move a child to a foreign country is in the child's best interest. Those factors are (1) the enforceability of the order; (2) the cultural differences in the foreign country; and (3) the distance between the United States and the foreign country. (*Id.* at pp. 546-547.)

1. The Enforceability Factor

Nick argues that the trial court ignored the enforceability of the order when it granted Pat physical custody of Nicholas in Thailand despite the fact that Thailand is not a signatory to The Hague Convention. He asserts that "the court has no mechanism whatsoever to enforce the terms of the order, and it is therefore possible that [Nicholas] will never return to the United States to see his father, or any of his relatives in this country again." Neither the law nor the record supports his claim.

Family Code section 3048, subdivision (b)(1) addresses child custody order enforceability and specifies the factors the court should consider to determine the risk of abduction to the child. Those factors include whether a party has previously kept, withheld or concealed the child in violation of the right of another person's right of custody or visitation, or threatened to do so; whether a party lacks strong ties to California; and whether a party has strong ties to another state, including foreign citizenship. The trial court considered the section 3048, subdivision (b)(1) factors and found that Pat had developed and maintained ties to the United States, including her acquisition of United States citizenship and her career with a Goleta, California-based company. She moved to Thailand to accept a position with that company. It further found that Pat had demonstrated her respect for and obedience to the California trial court's orders and that there was minimal risk that she would violate its orders.

In addressing the problems inherent in enforcing an order where the child will live in a foreign country, the *Condon* court stated that "the trial court should take steps to ensure its orders [to maintain custody and visitation rights in the nonmoving parent] will remain enforceable throughout the minority of the affected [child]. Unless the law of the country where the children are to move guarantees enforceability of custody and visitation orders issued by American courts . . . the court will be required to use its ingenuity to ensure the moving parent adheres to its orders and does not seek to invalidate or modify them in a foreign court." (*Condon, supra*, 62 Cal.App.4th at pp. 547-548.)

Because Thailand is not a signatory to the Hague Convention, it was necessary for the trial court to "use its ingenuity" (*Condon, supra*, 62 Cal.App.4th at p. 547) to issue orders to ensure Pat's compliance with the custody and visitation order as contemplated by the *Condon* court. In doing so, it followed the *Condon* guidelines, and the provisions of Family Code section 3048, subdivision (b)(2). For example, it ordered Pat to post a \$10,000 bond to provide Nick with the means to seek redress in Thailand if Pat should attempt or threaten to violate the court's orders. (Fam. Code, § 3048, subd. (b)(2)(B). It also ordered that she "agree in writing by declaration in proper form for

filing with any Thai court with jurisdiction over her and Nicholas . . . that she submits to the continuing exclusive personal jurisdiction of the Superior Court of the State of California in . . . Santa Barbara in all matters regarding her marriage to [Nick], and over the parental custody and visitation of Nicholas . . . in consideration of the court's order allowing her to have Nicholas . . . with her in Thailand and agrees . . . to return Nicholas . . . to the State of California when and as ordered by the court." (Fam. Code, § 3048, subd. (b)(2) The court further ordered that should Pat seek to frustrate the custody and visitation order or take steps to acquire jurisdiction in Thailand, Nick could apply to the court for an order to terminate or reduce his support obligations as an offset to the cost of recovery of Nick. Finally, it ordered that a violation of its order could subject the violating party to criminal or civil penalties or both.

In arguing that the order is unenforceable, Nick emphasizes that Nicholas will be in Thailand, which is not a signatory to the Hague Convention. The trial court recognized that fact but found that the risk that Pat would violate its orders was minimal and that the \$10,000 bond was sufficient to provide Nick the means to seek redress in Thailand if she attempted or threatened to do so. Moreover, as the *Condon* court observed, "[T]he Hague Convention protects a custodial parent from unlawful removal or retention of minor children for only one year. [Citation.] Only within the first year after the removal of the children from their habitual residence are courts of the country to which the children were removed obligated to order the return of the child forthwith." (*Condon, supra*, 62 Cal.App.4th at p. 556.) The trial court acted within its discretion and with care to include orders "to ensure the moving parent adheres to its orders and does not seek to invalidate or modify them in a foreign court." (*Id.* at pp. 547-548.)

2. The Cultural Factor

We reject Nick's claim that the trial court ignored the cultural differences in Thailand. He argues that Nicholas will be "deprived of many protections and advantages he was enjoying in the United States." He also asserts that "Thailand is currently at war with Cambodia and facing significant political unrest," and cites material, including a News.Com article and a United States Embassy notice. Nick further claims that the "trial

court did not even address the culturally-based risks or problems [he] raised." The record belies his claim. The court found that Nick had "offered little to no evidence of the political or social situation in Thailand or that it presents an actual threat or detriment to the health, safety or welfare of Nicholas." The evidence supports its finding.

The News.Com article states that "[a] border fight between Thailand and Cambodia appears to have cooled after Indonesia this week mediated an agreement to send observers to the disputed area. But their militaries remain on high alert.

[¶] [G]unfire along this border this month [February 2011] left several people dead"

[¶] An . . . analyst of Thai politics, . . . says the dispute appears aimed at raising nationalist sentiment ahead of elections this year." The Embassy notice "recommend[ed] . . . defer[ing] travel along the Thai-Cambodian border in the area of the Preah Temple because of a border dispute between Thailand and Cambodia. Soldiers from the two countries have been stationed along the border in this area since July 2008 and have exchanged gunfire on several occasions. Until the situation has been resolved, you should exercise extreme caution if you must travel to areas along the Thai-Cambodian border where troop activities are reported." The notice also discusses violent protests in Bangkok and cautioned travelers to remain "vigilant and cautious when transiting public areas," and to exercise caution, "especially in locations where Westerners congregate, such as clubs, discos, bars, restaurants, hotels, places of worship, schools, outdoor recreation venues, tourist areas, beach resorts, and other places frequented by foreigners." Unlike its warnings concerning the Thai-Cambodia border, the notice does not recommend that travelers "defer travel" to or in Bangkok, where Pat has her home. It also states that the "crime threat in Bangkok remains lower than that in many US cities."

In addition, the trial court found that Nick "led Pat to believe-in writing-that they would both permanently move to Thailand with Nicholas by 2013, and [Nick] has voluntarily allowed Nicholas to spend significant time with his mother in Thailand [in 2009], all of which is inconsistent with his claim that the political or social situation in Thailand is detrimental to the well being of Nicholas. Further, [Nick] has spent time in Thailand, has had positive experiences there, and he will have the right - and he has the

resources - to visit Nicholas in Thailand" The court also found that Nicholas already had established a significant connection with Thailand, its culture and language, and his extended family there, all with the support of Nick. It found that Pat would be maintaining the equivalent of a middle to upper middle class lifestyle in Thailand, and "produced substantial evidence that Nicholas's educational and health care opportunities in Thailand [would] be as good as or better than here in California," and that the "cultural differences between the U.S. and Thailand therefore do not weigh against allowing Nicholas to live in Thailand for 75% of the year."

3. The Distance Factor

We also reject Nick's claim that the trial court ignored the distance between Thailand and the United States. Several provisions of the order, which are set forth below, expressly recognize and address the distance factor. Nick acknowledges that the court granted him visitation privileges in Thailand while Nicholas is there. He nonetheless argues that it is unlikely that he will be able to have the money or time away from his job to travel there for weeks at a time every year. Nick asserts that "he is a person of average means and has a negative cash flow on a monthly basis." The record indicates otherwise.

The trial court found that Nick had earned income of \$3,701, plus \$1,000 from his roommate, and also received about \$4,500 in gift income from his mother each month to cover his "negative cash flow . . . including his mortgage payment of \$3,546 and property taxes of \$584," which Margaret Di Napoli "testified she would continue to do." The court further found that Nick lives "in a three-bedroom, two bath . . . residence that he purchased about three years [before trial and that] his mother provided about \$120,000 for the down payment" which was a loan and that Nick "thinks he signed a promissory note but has not made any repayment of the loan." In addition, it found that "[w]hen Pat stipulated to the current order to pay [Nick] \$255 in child support [Nick] had not disclosed the amount of regular gift income he received from his mother" on his income and expense declaration.

The statement of decision reflects that the trial court considered the distance and took steps to facilitate the policy of Family Code section 3020 which favors "frequent and continuing contact" between parent and child. For example, it states: "Although the distance between California and Thailand, and the air travel time, is significant, it does not pose a significant detriment to the safety and welfare of Nicholas or to the ability of [Nick] to maintain his parental relationship with his son. One, or another parent will accompany Nicholas on all flights between Thailand and the U.S., and the court's order contemplates there shall be only one roundtrip per year unless otherwise agreed by the parties. Pat is ordered to pay for all travel by Nicholas between Thailand and California. . . . [Nick] shall have visitation rights in Thailand . . . as well as daily visual and voice communication with Nicholas via Skype." It further ordered Pat to pay the cost of all air fare for the parent accompanying him on his annual trip between the United States and Thailand.

Moreover, the trial court found that "[a]ny detriment to [Nick's] relationship with Nicholas is outweighed by the benefits to Nicholas of allowing him to reside with his mother in Thailand for three quarters of the year." The record supports that finding. Pat has been his primary caregiver for most of his life. Her employer allows her to conduct much of work at home, which provides Nicholas with tremendous access to her. In Bangkok, he can attend a school that is equal to or better than California schools and participate in an English program.

CONCLUSION

In the twenty-seven page statement of decision, Judge Brown offered a detailed summary and analysis of the facts of the case giving this court the benefit of his assessment of the credibility of the witnesses as well as a thorough discussion of the applicable law. Our duty is to determine if, in reaching his conclusions, Judge Brown "abused his discretion." He did not. To the contrary, this case evidences the meticulous application of judicial discretion necessary to resolve this thorniest of problems. (*Condon, supra*, 62 Cal.App.4th at 549 [Justice Johnson's characterization of a trial court's "Herculean effort" is particularly apt.]) Here, the trial court "reasonably

concluded that the order in question advanced the 'best interest' of the child." (*In re Marriage of Burgess*, *supra*, 13 Cal.4th at p.32; *Condon*, *supra*, 62 Cal.App.4th at 549.) We give the trial court's conclusion the "great deference" our standard of review requires of us. (*LaMusga*, *supra*, 32 Cal.4th at p. 1090.) "[W]e must permit our superior court judges --guided by statute and the principles we announced in *Burgess*--to exercise their own discretion to fashion orders that best serve the interests of the children in the cases before them." (*Id.* at p. 1101.)

DISPOSITION

The judgment is affirmed. Each party shall bear their own costs on appeal.³

NOT TO BE PUBLISHED.

PERREN, J.

We concur:

GILBERT, P.J.

YEGAN, J.

³ Pat filed a motion contending that the appeal is frivolous and requesting sanctions. (Code Civ. Proc., § 907; Cal. Rules of Court, rule 26(a).) The appeal is not frivolous and we deny her request. (See *In re Marriage of Flaherty* (1982) 31 Cal.3d 637, 650-651.)

James W. Brown, Judge
Superior Court County of Santa Barbara

Matthew E. Palmer for Plaintiff and Appellant.

Christopher K. Brown for Defendant and Respondent.