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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

CHRISTINA M.,

Plaintiff and Respondent,

v.

VICTOR C.,

Defendant and Appellant.

B277363

(Los Angeles County  
Super. Ct. No. KF014689)

APPEAL from a judgment of the Superior Court of Los Angeles County, Rocky L. Crabb, Judge. Affirmed.

Law Offices of Michael D. Williamson, Robert Brownlee for Defendant and Appellant.

Holstein, Taylor and Unitt, Brian C. Unitt for Plaintiff and Respondent.

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Victor C. appeals from a judgment of paternity granting Christina M. primary physical custody of their minor children and awarding Victor C. custody of the children for only two weekends per month plus two hours on Wednesday evenings. He contends the trial court denied him due process by refusing to admit certain audio and video recordings into evidence, by refusing to appoint a neutral evaluator, and by failing to articulate its reasoning supporting the judgment. We disagree with each contention, and therefore affirm.

### **BACKGROUND**

Victor C. and Christina M., who were never married, have three children. When they separated in 2015, they stipulated to temporary orders granting joint legal custody of the children, with Christina to have primary physical custody and Victor to have visitation with the children on Wednesday evenings and the first and third weekends of every month. The couple further agreed that each would pay one half of all child support costs.

However, in response to Christina M.'s petition to establish the parental relationship, Victor C. sought an equal timeshare with the children.

The issues were tried in June 2016. Christina M. testified she and the children lived in Hacienda Heights, and she had been employed full time at the same location for 16 years except for a two-year period during which she was laid off. The children had lived with her all their lives, and her mother (the children's grandmother) provided day care for them and transportation to and from school. Victor C., on the other hand, had been an inattentive parent who seldom took the children to school or their extracurricular activities and was mostly absent in later years due either to work or vacations. Christina M. testified that when

the children would stay over at Victor C.'s house, he often failed to ensure they bathed or did their homework.

Victor C. testified he had a three-bedroom home in Ontario, 18 miles away from Christina M., with enough room to house the children. He could easily get the children to and from school in Hacienda Heights, as he drove past there every day on his way to work. On days when work prevented his caring for the children, they could be transported by nieces to the homes of his mother or any his four sisters, the five of whom lived in Thermal, Fountain Valley, Victorville, Rialto and Huntington Beach.

Christina M. testified in rebuttal that the children had no meaningful relationship with Victor C.'s sisters.

The trial court granted Christina M. continuing primary physical custody of the children and denied Victor C.'s request for equal timesharing. The court ordered that the existing holiday and vacation schedule remain in effect and that Victor C. continue to have visitation rights on the first and third weekends of each month, any fifth weekend in even years, and a mid-week dinner visit.

Victor C. timely appealed.

### **DISCUSSION**

Victor C. contends the trial court's denial of equal timeshare was unfair. We disagree.

A court may, "during the pendency of a [custody] proceeding or at any time thereafter, make an order for the custody of a child during minority that seems necessary or proper." (Fam. Code, § 3022.) Any such order must be in the best interest of the child. (Fam. Code, §§ 3011, 3020.) We review custody and visitation orders for an abuse of discretion. (*Marriage of Fajota* (2014) 230 Cal.App.4th 1487, 1497.)

Here, the children had lived with Christina M. all their lives, near their schools. Christina M. was employed full time and arranged for daycare. She ensured that the children bathed, did their homework, and were transported to and from school and extracurricular activities. Victor C., in contrast had a history of neglecting the children's needs and lived 18 miles away from their schools, and would have to depend on far-away relatives for daycare when work prevented his picking the children up from school.<sup>1</sup> From these facts the trial court could reasonably conclude that visitation rather than equal timeshare would be in the children's best interests.

On appeal, Victor C. offers no substantive challenge to the trial court's decision. He does not argue, for example, that equal timeshare was in the children's best interests. Instead, he argues he was deprived of a fair hearing because the court refused to appoint a third party evaluator, refused to admit certain video recordings, and failed to provide a statement of decision. "We can never know," Victor C. asserts, "what the outcome might have been if the court had chosen to allow the video evidence in."

"A judgment or order of the lower court is *presumed correct*. All intendments and presumptions are indulged to support it on matters as to which the record is silent, and error must be affirmatively shown. This is not only a general principle of appellate practice but an ingredient of the constitutional doctrine of reversible error.' [Citations.]" (*Denham v. Superior*

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<sup>1</sup> On our own motion we take judicial notice of the fact that the drive between Hacienda Heights and Fountain Valley, where Victor C.'s nearest sister lives, can take about an hour. (Evid. Code, § 452, subd. (h) [judicial notice may be taken of facts that are easily verified and not reasonably subject to dispute].)

*Court of Los Angeles County* (1970) 2 Cal.3d 557, 564.) Victor C.’s failure even to argue—much less support the argument—that equal timeshare was in the children’s best interests dooms his appeal.

Victor C. argues he was deprived of due process when the trial court failed to appoint a neutral evaluator, refused to admit certain audio and video evidence, and declined to issue a statement of decision. The argument must be rejected for two reasons. First, Victor C. failed to raise the argument below. A constitutional question not raised at the earliest opportunity is forfeited. (*Geflakys v. State Pers. Bd.* (1982) 138 Cal.App.3d 844, 864.) Second, as we discuss below, Victor C.’s argument fails because he was afforded due process.

**A. Failure to Appoint a Neutral Evaluator**

Victor C. argues the trial court “could” have appointed a neutral evaluator pursuant to Family Code section 3111 or Evidence Code section 730, but chose not to do so, which was “odd.”

A family law court may appoint a child custody evaluator to assess and report on the circumstances surrounding contested custody rights when to do so would be in the best interest of a child. (Fam. Code, § 3111.) In addition, if it appears to the court that expert evidence is required, the court on its own motion or on the motion of any party may appoint one or more experts to investigate, report, and testify at trial. (Evid. Code, § 730.)

Here, Victor C. never requested appointment of an independent evaluator or expert investigator. A trial court is not required to appoint an evaluator on its own motion.

## **B. Audio and Video Evidence**

At trial, Victor C.'s counsel sought to admit into evidence a series of audio and video recordings allegedly showing Christina M. abusing the children. The trial court ruled the recordings were inadmissible because Victor C.'s counsel had not transcribed the audio portions in advance pursuant to California Rules of Court, rule 2.1040. Victor C. argues the trial court's refusal to admit the videos prevented him from receiving a full and fair hearing. We disagree.

"Before a party may present or offer into evidence an electronic sound or sound-and-video recording . . . the party must provide to the court and to opposing parties a transcript of the . . . recording." (Cal. Rules of Court, rule 2.1040(b)(1).) A trial court may in its discretion waive this requirement upon a showing of good cause. (Cal. Rules of Court, rule 2.1040(b)(3)(C).) "Good cause" under rule 2.1040(b)(3)(C) might be that "the party presenting or offering the electronic recording into evidence lacks the capacity to prepare a transcript." (Advisory Com. com., 23 pt. 1A West's Ann. Codes, Rules (2013 supp.) foll. rule 2.1040, p. 61 [par. entitled "Subdivision (b)(3)(C)"].)

"A trial court's exercise of discretion in admitting or excluding evidence . . . will not be disturbed except on a showing the trial court exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice." (*San Lorenzo Valley Community Advocates for Responsible Educ. v. San Lorenzo Valley Unified School Dist.* (2006) 139 Cal.App.4th 1356, 1419.)

Here, Victor C.'s attorney never provided Christina M. with transcripts of the recordings he offered, and he made no attempt to establish good cause for failing to do so. For example, he made

no showing that Victor C. had no capacity to prepare the transcripts. Exclusion of the recordings was therefore mandated by the rules of court.

**C. Statement of Decision**

Victor C. argues he did not receive a fair hearing because the family law court failed to articulate the rationale for its order. We disagree.

“Upon the request of any party,” a family law court must state its reasons for granting or denying a request for joint custody. (Fam. Code, § 3082.) Here, Victor C. failed to request a statement of decision. The court was therefore not required to provide its reasons for denying his request for joint custody.

**DISPOSITION**

The judgment is affirmed. Respondent is to recover her costs on appeal.

NOT TO BE PUBLISHED.

CHANNEY, J.

We concur:

ROTHSCHILD, P. J.

LUI, J.