Filed 4/9/12 Marriage of Rogers CA2/6

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

In re Marriage of WENDY and RONALD RAY ROGERS.	2d Civil No. B227305 (Super. Ct. No. FL098546) (San Luis Obispo County)
WENDY BEVAN, Appellant, v. RONALD RAY ROGERS, Respondent.	

Wendy Bevan appeals an order denying her request for a move away order and change of custody.[1] She asserts she was entitled to an evidentiary hearing before her request was denied. She also asserts the trial court erred in decreasing husband's child and spousal support obligation because he did not file an order to show cause seeking

[1] Respondent correctly points out that Wendy mischaracterized the order appealed from as "an Order after Judgment . . . authorized by the Code of Civil Procedure, section 904.1, subdivision (a)(2)." An order denying a move away request and change of custody is separately appealable. (See, e.g., *F.T. v. L.J.* (2011) 194 Cal.App.4th 1 [appeal from denial of move away order]; *In re Marriage of Skelley* (1976) 18 Cal.3d 365, 368 [temporary support orders and orders collateral to the main issue in a family law proceeding are directly appealable].)

such relief. She contends, in addition, that the trial court was biased and should have recused itself. We reverse that portion of the order denying the move away and change of custody requests and remand to the trial court to conduct an evidentiary hearing on this issue. In all other respects, we affirm the order.

STATEMENT OF FACTS AND PROCEDURAL BACKGROUND

Wendy Bevan and Ronald Rogers were married for more than 17 years. They have three minor children, ages 17, 13 and 9. On May 12, 2010, a status-only judgment of dissolution was entered. The judgment included a stipulation for joint legal and physical custody of the children drafted by the parties. It states in part: "Non-Removal of the Children: Neither party shall permanently move the children's residence from San Luis Obispo County without the prior written permission of the other parent or by binding arbitration . . . ." In addition, the judgment ordered Ronald to pay child support in the amount of $2,330 per month and spousal support of $706 per month for the months of February, March and April 2010. These amounts were reduced, commencing May 2, 2010, to $1,573 per month in child support and $615 per month in spousal support.

Wendy was self-employed during a portion of the marriage. Ronald finished college and received a B.A. degree in fine arts during the early part of the marriage. While he was in school, they lived in a 3,500 square foot basement apartment in the home of Wendy's parents in Utah. After Ronald's graduation, they moved to California and Ronald was self-employed as a studio artist. They opened an art gallery in Atascadero in 2008 through which Ronald's art was sold. The gallery was initially successful. However, the downturn in the economy and an arm injury Ronald sustained led to the gallery's closure in 2009.

The parties separated in 2009. Wendy obtained a loan from her parents to lease an apartment for six months. Ronald remained in the family home, but soon was unable to pay the mortgage, and the house went into foreclosure. Ronald continued to live in the residence during the foreclosure process. On May 27, 2010, Ronald filed for

Chapter 7 bankruptcy. As a result, the foreclosure proceedings were stayed. Ronald stopped making support payments to Wendy and arrears accrued in the amount of $9,108.

On May10, 2010, Wendy sought a change of custody and move away order on the ground that she could no longer afford to live in San Luis Obispo County. She requested that she and the children be permitted to move to Utah to live with her parents. She also requested that spousal and child support be increased to reflect the additional custodial time the move would entail, and that Ronald be ordered to pay support arrearages. Ronald filed a responsive declaration which opposed the move away order and change of custody. He requested that child and spousal support be reduced based on changed circumstances. Both parties filed lengthy supplemental declarations challenging the other's factual representations.

On June 15, 2010, the parties appeared before the trial court. Immediately upon calling the matter, the trial court said: "With respect to the petition to relocate, I'm going to deny that. There is simply no basis alleged in the petition, and no hearing is necessary to make that judgment." Wendy began to argue that she could not afford to live in Atascadero. The court stopped her, stating: "I'm not going to argue with you, ma'am. That's my order. . . . I don't think any kind of hearing is necessary. It seems to me that this whole case is spiraling out of control, and I'm certain there are financial pressures, but I think they need to be solved here, not from a distance. It may be appropriate to work that out, or try to negotiate something like that, and you work with Mr. Rogers to resolve all these problems, but I'm not going to rip the kids out of their school, take them away from their friends and plunk them in the middle of Utah, based on what I've read in the pleadings so far. I'm just not going to do that."

Although Ronald stated his belief he would be evicted from the residence in July when the bankruptcy proceeding concluded in July 2010, the court ordered the children to live in the residence full-time and Wendy and Ronald to rotate living in the residence on a weekly basis. With respect to child and spousal support, the court refused to consider Wendy's request to order Ronald to pay support arrearages. The court then considered and granted Ronald's request to reduce child and spousal support.

The court issued an "Addendum to Minute Order" denying Wendy's request to relocate the children to Utah, establishing a schedule for use of the family home, and reducing Ronald's support obligation commencing June 1, 2010, to $537 per month in child support and $92 per month in temporary spousal support.

On appeal, Wendy contends the trial court made several procedural errors, including denying her move away request without an evidentiary hearing and decreasing Ronald's child and spousal support obligation without an order to show cause containing such request. She also asserts the trial court was biased and erred in not recusing itself. We agree that the trial court erred in denying Wendy a hearing on her request for a move away order.

DISCUSSION

The Trial Court Erred in Denying Wendy's Move Away Request Without an Evidentiary Hearing

1. Standard of Review

We review orders granting or denying a move away request for abuse of discretion. (*Jacob A. v. C.H.* (2011) 196 Cal.App.4th 1591, 1598-1599.) "[A] trial court abuses its discretion if there is no reasonable basis on which the court could conclude its decision advanced the best interests of the child. [Citations.] 'A discretionary order that is based on the application of improper criteria or incorrect legal assumptions is not an exercise of informed discretion, and is subject to reversal even though there may be substantial evidence to support that order.' [Citation.]" (*Id.* at p. 1599.)

2. Evidentiary Hearing

In *Elkins v. Superior Court* (2007) 41 Cal.4th 1337 (*Elkins*), our Supreme Court held: "When parties have been unable (privately or through mediation) to agree on custody, 'the court shall set the matter for hearing on the unresolved issues.' (Fam. Code, § 3185, subd. (a).) It is undisputed that such a hearing is an ordinary adversarial proceeding leading to a 'final judicial custody determination.' ([*In re Marriage* of] *Brown & Yana* [2006] 37 Cal.4th [947], 959 . . . .) But once a judgment has been entered in the custody matter, a post-judgment motion or request for an order to show cause for a

change in custody, based upon an objection to the custodial parent's plan to move away, requires an evidentiary hearing only if necessary -- that is, only if the moving party is able to make a prima facie showing that the move will be detrimental to the child or has identified 'a material but contested factual issue that should be resolved through the taking of oral testimony.' (*Brown & Yana, supra,* 37 Cal.4th at p. 962 . . . .)

"Our decision in *Brown & Yana, supra*, 37 Cal.4th 947, did not suggest litigants must make a prima facie showing of some kind in order to be entitled to proceed to trial. Nothing we said undermines the requirement that at a contested marital dissolution trial, prior to entry of judgment, the court must hold an evidentiary hearing on the disputed issues, at which the usual rules of evidence apply. Indeed, we explained that a trial court had authority to deny a full evidentiary hearing in *Brown & Yana* in part because the custody issue already had been fully litigated and the resulting judgment therefore was entitled to substantial deference in the absence of a showing of a significant change of circumstances. [Citations.]" (*Elkins, supra*, 41 Cal.4th at pp. 1360-1361, italics omitted.) In the instant matter there was no such resolution.

A custody order based on a stipulation of the parties does not constitute a final, existing judicial custody determination unless "there is a clear, affirmative indication the parties intended such a result." (*Montenegro v. Diaz* (2001) 26 Cal.4th 249, 258; see also *F.T. v. L.J., supra*, 194 Cal.App.4th at p. 19 [where trial court adopted stipulation of the parties as to custody, neither the stipulation nor the order included any clear language affirmatively showing it was the intent of the parents that the order adopting their stipulation constituted a final judicial custody determination].)

Here, the initial custody order was incorporated into the status only judgment of dissolution. The stipulation contains language that the parties intended the children to remain living in San Luis Obispo County unless and until the parties agreed otherwise or arbitration occurred. The language in the stipulation does not indicate that the parties intended the stipulation to be a final custody determination. The status only judgment merely incorporated the parties' stipulation. The reporter's transcript of that proceeding indicates that no testimony was given or argument made concerning custody.

Neither the stipulation nor the order included any clear language affirmatively showing it was the parties' intent that the order adopting their stipulation constitutes a final judicial custody determination. (*Montenegro v. Diaz, supra*, 26 Cal.4th at pp. 257-258.) Nowhere in the stipulation or order do the words "final," "permanent," or "judgment," or words to that effect, appear. On the contrary, by containing language that the custody arrangement may be changed by consent of the parties or arbitration, the stipulation appeared to express the parties' intent that the stipulated order be only temporary and subject to change and *not* be deemed a final judicial custody determination. In these circumstances, an evidentiary hearing is necessary and remand is required.[2]

3. Considerations on Remand

In re Marriage of LaMusga (2004) 32 Cal.4th 1072, set forth the factors that a trial court should consider in deciding whether to grant or deny a custodial parent's request to relocate with a minor child: "Among the factors that the court ordinarily should consider when deciding whether to modify a custody order in light of the custodial parent's proposal to change the residence of the child are the following: the children's interest in stability and continuity in the custodial arrangement; the distance of the move; the age of the children; the children's relationship with both parents; the relationship between the parents including, but not limited to, their ability to communicate and cooperate effectively and their willingness to put the interests of the children above their individual interests; the wishes of the children if they are mature enough for such an inquiry to be appropriate; the reasons for the proposed move; and the extent to which the

[2] Family Code section 217, effective January 1, 2011, provides further support for our conclusion. That section provides that the court must permit oral testimony unless the parties stipulate otherwise or the court makes a finding of good cause to refuse to receive live testimony. In a declaration of purpose contained in the legislative history, the Legislature noted: "(b) Faced with crowded family law calendars and the rising numbers of self-represented litigants, as over 70 percent of litigants in family law are unrepresented, many courts have adopted local rules and procedures in an attempt to more efficiently process the high volume of family law cases. While some of these rules and procedures have been innovative, others have created barriers to litigants getting their day in court, particularly litigants who are unrepresented. These barriers include drastically reducing live testimony in family law, which the California Supreme Court found, in its landmark decision *Elkins v. Superior Court* (2007) 41 Cal.4th 1337, deprives family law litigants of due process protections. Access to justice requires that parties be able to appropriately address the court and present their cases."

parents currently are sharing custody." (*Id.* at p. 1101.) In addition, the trial court shall consider "the effects of relocation on the 'best interest[s]' of the minor children." (*In re Marriage of Burgess* (1996) 13 Cal.4th 25, 34.)

A custodial parent seeking to relocate with a child does not have any burden to show the proposed move is "necessary." (*In re Marriage of Burgess, supra,* 13 Cal.4th at pp. 28-29, 34; *In re Marriage of LaMusga, supra,* 32 Cal.4th at p. 1088.) Nevertheless, "[e]ven if the custodial parent has legitimate reasons for the proposed change in the child's residence and is not acting simply to frustrate the noncustodial parent's contact with the child, the court still may consider whether one reason for the move is to lessen the child's contact with the noncustodial parent and whether that indicates, when considered in light of all the relevant factors, that a change in custody would be in the child's best interests." (*LaMusga,* at p. 1100, fn. omitted.)

A recent case, *Mark T. v. Jamie Z.* (2011) 194 Cal.App.4th 1115, has facts similar to those here and illustrates another reason the trial court erred. In *Mark T.*, the parties agreed to a temporary joint custody arrangement but no permanent custody order was entered before wife submitted a request for a move away order and change of custody. The trial court denied the request. The Court of Appeal reversed the order, stating: "We conclude that the trial court abused its discretion by misapplying the pertinent legal standards in the context of a move away request. When a parent who shares joint physical custody of a minor requests authorization to relocate the minor, the court must proceed on the assumption that the parent will in fact be moving, and must fashion a custody order that is in the best interests of the minor accordingly. Here, the court failed to determine what custody arrangement would be in [the child's] best interests, assuming that [mother] would be relocating . . . ." (*Id.* at pp. 1119-1120; see also *Jacob A. v. C.H., supra,* 196 Cal.App.4th at p. 1599 ["'[W]hen the trial court is faced with a request to modify the existing custody arrangement on account of a parent's plan to move away (unless the trial court finds the decision to relocate is in bad faith), the trial court must treat the plan as a serious one and must decide the custody issues based upon that premise. The question for the trial court is not whether the parent may be

permitted to move; *the question is what arrangement for custody should be made* [*when the parent moves*]"'].)

We conclude that where, as here, there is no final judicial custody determination, an evidentiary hearing on a move away request and change of custody is required. Accordingly, we reverse the trial court's order denying Wendy's move-away motion and remand for the trial court to conduct the requisite hearing. (*Elkins, supra*, 41 Cal.4th 1337; see also *In re Marriage of McGinnis* (1992) 7 Cal.App.4th 473, 478 [trial court should exercise discretion to permit live witness testimony in move away case to provide parent a meaningful opportunity to be heard], overruled on another ground in *In re Marriage of Burgess, supra*, 13 Cal.4th at p. 38, fn. 10.)

The Trial Court Did Not Err in Reducing Spousal and Child Support

Wendy contends the trial court erred in reducing spousal and child support because Ronald failed to file an order to show cause requesting affirmative relief. We review an order reducing child and spousal support for abuse of discretion. (*In re Marriage of Wittgrove* (2004) 120 Cal.App.4th 1317, 1327.)

Family Code section 213 states: "In a hearing on an order to show cause, or on a modification thereof, or in a hearing on a motion, other than for contempt, the responding party may seek affirmative relief alternative to that requested by the moving party, . . . by filing a responsive declaration within the time set by statute or rules of court."

Ronald was not required to file an order to show cause to obtain a reduction in child and spousal support because Wendy's order to show cause put those issues in contention. Ronald filed a responsive declaration in which he requested that his support obligations be reduced. He filed a current income and expense declaration and copies of his bankruptcy petition showing that his income was substantially less than that on which the initial support award was based. The trial court did not err in reducing Ronald's support obligation. Of course, if changed circumstances warrant, the issue of support may be raised on remand.

No Evidence of Judicial Bias

Wendy asserts that the trial judge was biased because he treated her unfairly and issued orders against her interests. She requests that we assign the matter to a different judge in the event of remand.

A claim of judicial bias is reviewed for abuse of discretion. (*People v. Farley* (2009) 46 Cal.4th 1053, 1110.) The appellant bears the burden of establishing facts supporting a claim of judicial bias and showing prejudice. (*Betz v. Pankow* (1993) 16 Cal.App.4th 919, 926.)

Wendy has not met her burden of establishing judicial bias. The mere fact that the trial court ruled against her is insufficient to support such a claim. (See *People v. Guerra* (2006) 37 Cal.4th 1067, 1112 ["a trial court's numerous rulings against a party--even when erroneous--do not establish a charge of judicial bias, especially when they are subject to review"], overruled on another ground in *People v. Rundle* (2008) 43 Cal.4th 76, 151.) Wendy's assertion that the court should have recused itself because of a personal relationship with Ronald's counsel is similarly not supported by admissible evidence and, in any event, does not mandate recusal in every case. Moreover, Wendy did not preserve this issue for appeal because she failed to first raise it in the trial court. (*Moulton Niguel Water Dist. v. Colombo* (2003) 111 Cal.App.4th 1210, 1218.)[3]

We have considered the remaining issues raised in Wendy's briefs and find them to be without merit.

The order denying the request for a move away order is reversed and the issue remanded to the trial court to conduct an evidentiary hearing in accordance with this opinion. The order reducing spousal and child support is affirmed.

---

[3] Wendy also waived the issue of the trial court's failure to file written findings of fact and conclusions of law because she failed to request them before hearing on the matter was adjourned. (Code Civ. Proc., § 632; *In re Marriage of Hebbring* (1989) 207 Cal.App.3d 1260, 1274.)

No costs on appeal are awarded.

NOT TO BE PUBLISHED.

PERREN, J.

We concur:

YEGAN, Acting P.J.

COFFEE, J.*

* Retired Associate Justice of the Court of Appeal, Second Appellate District, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

E. Jeffrey Burke, Judge

Superior Court County of San Luis Obispo

_____

Wendy Bevan, in pro. per., for Appellant.

Ronald R. Rogers, in pro. per., for Respondent.