Filed 12/23/16 Francisco M. v. Monique M. CA2/3

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

FRANCISCO M. Plaintiff and Appellant, v. MONIQUE M., Defendant and Respondent.	B262614 (Los Angeles County Super. Ct. No. BD527049)

APPEAL from an order of the Superior Court of Los Angeles County, Colin Leis, Judge. Affirmed.

Farzad Family Law, B. Robert Farzad and Matthew J. Sundly for Plaintiff and Appellant.

Rallo Law Firm and Arthur J. Travieso for Defendant and Respondent.

INTRODUCTION

Francisco M. (father) appeals from a postjudgment order denying his request to modify the existing physical custody arrangement for his minor daughter, Isabel. The trial court determined Monique M. (mother) was Isabel's custodial parent, and that father failed to establish mother's change of residence constituted a detrimental changed circumstance justifying modification of the existing custody arrangement. We conclude the court applied the correct legal standard and its findings were supported by the evidence. We affirm.

FACTS[1] AND PROCEDURAL BACKGROUND

Mother and father were married for nearly six years, from August 2003 to July 2009. Their only child, Isabel, was born in March 2004. The judgment of dissolution awarded joint legal custody to the parents, with "primary physical custody" awarded to mother and "secondary physical custody" to father. Father was granted visitation with Isabel every other weekend from Saturday morning to Sunday evening and he had responsibility

---

[1] Consistent with our standard of review, we state the facts in the light most favorable to the trial court's ruling. Rulings on custody matters are consigned to the trial court's discretion. (*In re Marriage of Burgess* (1996) 13 Cal.4th 25, 32 (*Burgess*).) Insofar as an exercise of discretion rests on findings, we must accept those findings that are supported by substantial evidence. (*In re Marriage of Fajota* (2014) 230 Cal.App.4th 1487, 1497 (*Fajota*).) Thus, we draw all reasonable inferences from the evidence to support the findings; we review the record in the light most favorable to the court's determinations; and we adhere to the principle that issues of fact and credibility are the province of the trial court. (*In re Heather A.* (1996) 52 Cal.App.4th 183, 193 (*Heather A.*).)

Further, with respect to the record presented on appeal, we cannot overlook the fact that father designated for inclusion only his own declarations and written briefs, while omitting the responsive declarations mother filed in opposition to his request for order. As the appellant, father bears the burden of presenting an adequate record to overcome our presumption that the record contains evidence sufficient to sustain every finding made by the lower court. (See *Foreman & Clark Corp. v. Fallon* (1971) 3 Cal.3d 875, 881.) Father's failure to include mother's filings in his designation of record waives any challenge he might otherwise raise to the court's findings. (*Ibid.*)

for picking Isabel up from school on Tuesday, Wednesday and Thursday of each week.

From the time of their separation in July 2009 until early 2014, mother and father lived in the adjoining communities of Maywood and Paramount. During that period, father maintained visitation with Isabel as provided in the judgment, although Isabel spent most of her after-school visitation time with her paternal grandmother due to father's work schedule. Isabel attended the local Loma Vista Elementary School, where she had been enrolled since pre-kindergarten.

In February 2014, mother purchased a house in Pomona, some 30 miles away from her old home in Paramount. Before mother's move, she and father agreed that father would assume physical custody of Isabel during the school week until the school year ended in June 2014. The parents agreed upon this arrangement so Isabel would not be forced to transfer schools in the middle of the school year. When the new school year started, the parents agreed Isabel would attend a new school near mother's new home, and custody and visitation would remain as provided in the judgment of dissolution.

Contrary to the parents' agreement, on August 12, 2014, Isabel began her 5th grade year at Loma Vista Elementary School. On September 3, 2014, mother notified father that she had enrolled Isabel in Ruby Drive Elementary School, a short distance from mother's office and new home. On September 8, 2014, Isabel began attending Ruby Drive Elementary School.

On September 10, 2014, father filed a request for order (RFO) to modify custody and visitation. The RFO sought an order transferring legal and physical custody to father, with visitation for mother one weekend per month. The RFO also asked to have Isabel re-enrolled in Loma Vista Elementary School.

On October 23, 2014, the court held an initial hearing on father's RFO. With the parties' stipulation, the court continued the matter for 30 days to appoint counsel for Isabel. The resulting order stated Isabel's appointed counsel was to "[g]ather evidence that bears on the best interest of the child and present that admissible evidence to the court in any manner appropriate."

On December 10, 2014, the court held an evidentiary hearing on father's RFO. In addition to evidence submitted with the parents' declarations, the court heard testimony from father, the paternal grandmother and mother. At the end of the hearing the parties agreed to provide written closing arguments. Isabel's appointed counsel also agreed to provide a written report detailing her investigation of the child's best interests.

On December 16, 2014, Isabel's appointed counsel filed her report. The report noted that Isabel had her own room at mother's new home. When staying with father, Isabel shared a room with father in a converted garage at the paternal grandparents' home. In her most recent interview with appointed counsel, Isabel stated she was "comfortable" in her new school and in mother's new home. She said she enjoyed spending time at mother's home and liked seeing her father, grandmother and cousins on the weekends. The report also observed that

Isabel "felt pressured" to choose between her parents, and recommended that the parents attend co-parenting classes.

On January 9, 2015, the court issued its order denying father's RFO. The court credited mother's testimony, finding the parents agreed to a temporary custody arrangement that allowed Isabel to finish the school year at Loma Vista Elementary School before transferring to a school closer to mother's new home.[2] Notwithstanding that temporary arrangement, the court found mother was the custodial parent, citing evidence showing that "except for Isabel's alternate weekends visiting Father, Isabel spent most evenings until bedtime with Mother, slept most nights at Mother's home, and woke up most mornings in Mother's home."

In view of the custody finding, the trial court reasoned that father's RFO raised "what amounts to a 'move away' dispute." The court continued, "When a custodial parent such as Mother relocates a child's residence, the non-custodial parent must show by a preponderance of the evidence that the custodial parent relocated either in (1) bad faith (prototypical bad faith being the custodial parent's desire to frustrate the non-custodial parent's contact with the minor) or (2) that the relocation is detrimental to the minor." The court concluded father had "not carried that burden," explaining: "The record contains no substantial evidence that Mother moved to Pomona in order to frustrate Father's right to visitation of every other weekend under the April 2011 custody order. Additionally, the record contains no

---

[2] The court also expressly rejected father's claim that mother "virtually abandoned Isabel by supposedly relinquishing custody of Isabel to no more than one or two days a month."

substantial evidence that Mother's move to Pomona is detrimental to Isabel. Father testified he believes Isabel's former school in Maywood is better than her current school in Placentia, but that is a disputed fact which does not establish detriment. Father also testified he believes that it is in Isabel's best interest to live in his parents' home with him and near his and Isabel's extended family in the surrounding community . . . . But again such facts do not establish that it is detrimental to Isabel to live only about 30 miles away in Pomona." Based on these findings, the court denied father's request to modify custody and visitation.

DISCUSSION

Father contends the trial court applied the incorrect legal standard when it analyzed his RFO to modify custody and visitation as a " 'move away' case." Father maintains he was the "de facto custodial parent" when he filed the RFO and, therefore, the court should have applied a "best interest analysis" without considering whether changed circumstances justified modification of the preexisting custody arrangement. The argument misapprehends the applicable analysis for requests to modify custody.

"We review custody and visitation orders for an abuse of discretion, and apply the substantial evidence standard to the court's factual findings. [Citation.] 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. [Citation.] A court also abuses its discretion if it applies improper criteria or makes incorrect legal assumptions." (*Fajota, supra,* 230 Cal.App.4th at p. 1497, italics omitted; *Burgess, supra,* 13 Cal.4th at p. 32.)

Father's contention that the trial court applied the wrong legal standard rests on flawed factual premise. In arguing he was the "de facto custodial parent" for purposes of modifying custody and visitation, father fails to acknowledge the trial court found just the opposite—that "Mother is Isabel's custodial parent." The court's finding was supported by substantial evidence showing that, prior to mother's move, Isabel spent most evenings, nights and mornings during the school week in mother's care. Further, the court credited mother's testimony that the custody arrangement following her move was a "mutually-agreed temporary measure" to allow Isabel to finish the last four months of the school year at Loma Vista Elementary School. Consistent with the parents' agreement, the court found custody remained vested with mother when Isabel transferred to a school closer to mother's new home. Because the court's custody finding is supported by substantial evidence, and credibility determinations are the province of the trial court, we reject father's factual contention that he was the custodial parent. (See *Heather A., supra,* 52 Cal.App.4th at p. 193.)

Having found mother had sole physical custody of Isabel, the trial court applied the correct legal standard in assessing father's RFO to modify custody and visitation following mother's change of residence. As our Supreme Court explained in *Burgess*, "after a judicial custody determination, the noncustodial parent seeking to alter the order for legal and physical custody can do so only on a showing that there has been a substantial change of circumstances so affecting the minor child that modification is essential to the child's welfare." (*Burgess, supra,* 13 Cal.4th at p. 37.) "[T]he same allocation of the burden of persuasion applies in the case of a custodial parent's relocation as in any other

proceeding to alter existing custody arrangements: '[I]n view of the child's interest in stable custodial and emotional ties, custody lawfully acquired and maintained for a significant period will have the effect of compelling the noncustodial parent to assume the burden of persuading the trier of fact that a change [in custody] is in the child's best interests.' " (*Ibid.*; *In re Marriage of Biallas* (1998) 65 Cal.App.4th 755, 761 (*Biallas*) ["an existing custody order . . . reflects the best interests of the child until it is shown otherwise by changed circumstances"].) Further, in cases where the custodial parent seeks to or has relocated, the *Burgess* court cautioned that "the trial court must take into account the presumptive right of a custodial parent to change the residence of the minor children, so long as the removal would not be prejudicial to their rights or welfare."[3] (*Burgess,* at p. 32.)

---

[3] The analysis is different when the parent seeking to relocate shares *joint* physical custody with the other parent. "In such cases, the custody order 'may be modified or terminated upon the petition of one or both parents or on the court's own motion if it is shown that the best interest of the child requires modification or termination of the order.' (Fam. Code, § 3087.) The trial court must determine de novo what arrangement for primary custody is in the best interest of the minor children." (*Burgess, supra,* 13 Cal.4th at p. 40, fn. 12.) Father contends this de novo standard should apply because (1) the dissolution judgment did not constitute a final custody determination and (2) the evidence established the parents shared joint physical custody. The first contention is belied by the dissolution judgment, which plainly states child custody and visitation "are ordered" as set forth in the attached settlement agreement. The second contention, as we have discussed, does not present a ground for reversal, because there was substantial evidence to support the trial court's finding that mother was the de facto

In view of the foregoing principles, the *Burgess* court held that, "[i]n a 'move-away' case, a change of custody is not justified simply because the custodial parent has chosen, for any sound good faith reason, to reside in a different location, but only if, as a result of relocation with that parent, the child will suffer detriment rendering it ' "essential or expedient for the welfare of the child that there be a change." ' [Citation.]" (*Burgess, supra,* 13 Cal.4th at p. 38; *Biallas, supra,* 65 Cal.App.4th at p. 762.) The court added that "bright line rules in this area are inappropriate: each case must be evaluated on its own unique facts. Although the interests of a minor child in the continuity and permanency of custodial placement with the primary caretaker will most often prevail, the trial court, in assessing 'prejudice' to the child's welfare as a result of relocating even a distance of 40 or 50 miles, may take into consideration the nature of the child's existing contact with both parents . . . and the child's age, community ties, and health and educational needs. Where appropriate, it must also take into account the preferences of the child." (*Burgess,* at p. 39.)

---

custodial parent. (See *Biallas, supra,* 65 Cal.App.4th at p. 760 ["cases in which the fathers had alternate weekends and one weeknight every week" with minor child were not joint custody arrangements; mothers had what was "effectively sole physical custody," while fathers had "liberal visitation rights"].)

Father's RFO identified only two changed circumstances: mother's 30-mile move to Pomona and Isabel's transfer to a new school closer to mother's office.[4] Accordingly, as the noncustodial parent, father bore the initial burden of showing the change of residence and school transfer would cause a detriment to Isabel, requiring a reevaluation of the custody arrangement. (*Burgess, supra,* 13 Cal.4th at p. 38; *In re Marriage of LaMusga* (2004) 32 Cal.4th 1072, 1104.) Father offered evidence to show Isabel flourished at her former school and enjoyed the company of her grandparents and cousins in the Maywood community. However, mother introduced competing evidence showing Isabel had adjusted to her new school, enjoyed the additional time she could spend with mother as a result of the new living arrangement, and continued to maintain significant contact with father, her grandparents and other extended family under the existing visitation schedule. Further, Isabel's appointed counsel corroborated the benefits of the existing custody arrangement,

---

[4] Father contends mother could not unilaterally transfer Isabel to a new school because the dissolution judgment vested both parents with shared joint legal custody over educational decisions. This argument is contrary to the trial court's factual finding. As we have repeatedly observed, the trial court rejected father's contention that mother acted unilaterally, while crediting mother's testimony that the parents agreed Isabel would complete the school year at Loma Vista Elementary School and transfer to a new school closer to mother's home at the beginning of the next school year. Because the court found the parents mutually agreed to the school transfer, it correctly determined father had the burden of showing a detrimental changed circumstance justifying modification of the existing custody arrangement. (*Biallas, supra,* 65 Cal.App.4th at p. 762.)

noting in her report that Isabel had made friends at her new school and liked having her own room in mother's new home.[5] All told, we conclude there was sufficient evidence to support the trial court's finding that father failed to establish mother's change in residence resulted in a detriment to Isabel justifying reevaluation of the existing custody arrangement.

---

[5] Father contends the trial court erred by failing to rule on his objection to appointed counsel's report. Father's objection argued the report should be stricken because it "represented facts and circumstances contrary to the evidence received by the court during the evidentiary hearing." This is not a proper basis for an evidentiary objection and the trial court did not err by impliedly overruling it as such. The order appointing Isabel's counsel expressly authorized her to "[g]ather evidence that bears on the best interest of the child and present that admissible evidence to the court in any manner appropriate." At the evidentiary hearing's conclusion, appointed counsel stated she would present her evidence in a written report. Father's counsel did not object. As the trier of fact, the trial court had ultimate discretion to resolve any conflicts in the evidence bearing on its factual findings. (See *Heather A., supra,* 52 Cal.App.4th at p. 193.)

DISPOSITION

The order is affirmed. Mother is entitled to her costs.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

STRATTON, J.*

We concur:

EDMON, P. J.

LAVIN, J.

---

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.