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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

In re the Marriage of JOHAN and  
TIMOTHY LANE BURKES.

JOHAN BURKES,

Appellant,

v.

TIMOTHY LANE BURKES,

Respondent.

A134335

(Alameda County  
Super. Ct. No. VF08-408030)

Johan Burkes (Mother) appeals an order that denied her permission to relocate to Quebec City, Canada with her son before August 2014. She contends the order is premised on insufficient evidence, that the court abused its discretion when it denied her request for judicial notice of Father's convictions for driving under the influence, and that it erred when it allowed the court custody mediator to testify as an expert.

The order is supported by ample evidence. The trial court considered Father's history of alcohol abuse and did not abuse its discretion when it denied Mother's request for judicial notice. The challenge to the testimony of the court-appointed mediator was forfeited in the trial court. Thus, we affirm.

**BACKGROUND**

Mother was born and raised in Quebec, Canada. In 1999 she moved to the United States and began a long career as a software system engineer with Charles Schwab & Co., Inc. Father has two adult children from a previous marriage. His first wife abused

drugs and alcohol and he was granted sole custody of the children. At some point he moved in with his parents at their home in Pleasanton, where they helped him raise the children.

Mother and Father married in September 2005, and their son Max was born in January 2006. They separated around August 2008, although they lived in the same home until December.

Both parents sought primary physical custody of Max. In October 2008 Mother asked the court for temporary orders giving her primary custody and allowing Father visitation with Max from 4:00 to 6:00 p.m. on Tuesdays and Thursdays and all day most Saturdays. She also asked that Father be permitted to drive Max only in a car equipped with an alcohol interlock ignition device. According to her declaration, Father had several DUI's and has a restricted driver's license and an alcohol interlock device on his car. Mother described Father as an alcoholic given to monthly binge drinking and, since she filed for divorce, escalating rages at her in Max's presence.

Father requested joint physical custody with alternating weekend visits and two overnight visits with each parent per week. Father admitted past problems with alcohol. "I got two DUIs more than 7 years ago, in 2001. The first of these (.08), I believe, was expunged or vacated. I got a final DUI one and one-half years ago, in April of 2007. Since that time I have done all that I can to address this problem which is now under control. I attended all required DUI classes . . . and continue to go to AA voluntarily. Fourteen months ago, I enrolled in the Occupation Health Services Drinking Driver 18 month Program. To date I have timely and successfully completed all requirements which have included 6 Education Classes, 40 weekly group sessions and 25 Face-to-Face Counselor check-ins." Father's driving privileges were reinstated in October 2008.

Father said that Mother also drinks and has a history of alcohol and substance abuse. He says she was arrested for a DUI after an accident in 2005, while she was pregnant with Max. Father intended to move in with his parents a mile and a half from the family home, where Max would have his own room, a large back yard, his devoted grandparents, and visits with his adult half-siblings. Father felt Mother tried to alienate

Max from him and was overly possessive, but that both parents love Max and should be equally in his life.

The parties were ordered to attend custody mediation. They first met with mediator Dr. Alicia Howard on November 3, 2008, when Max was almost three years old. Mother proposed that Father have one daytime visit with Max each Saturday until he turned three, and then overnight visits on alternating weekends. Dr. Howard felt Father was in denial about the significance of his binge drinking, and she had concerns about his ability to remain sober. She also voiced concerns over Mother's controlling attitude toward Max and Father, and her negative attitude toward Father. Dr. Howard recommended that Max spend Wednesday evenings and every other weekend with Father for three to four months.

The first custody hearing was held December 2, 2008. The court awarded Mother and Father joint legal custody with primary physical custody to Mother. The court adopted Dr. Howard's custody recommendation and prohibited Father from driving with Max in the car, driving a vehicle not equipped with an alcohol interlock device or drinking alcohol within 48 hours of his custody weekends. Father was also ordered to attend Alcoholics Anonymous meetings and submit to alcohol tests after weekend visits. The case was continued for further mediation and a three-month review.

The next mediation session was in February 2009. Father was still requesting equal custody with each parent caring for Max two weeknights and alternate weekends, while Mother proposed that Father care for Max only on alternate weekends and two dinnertime visits each week. Dr. Howard felt Max would benefit from more time with Father, and recommended one overnight visit each week in addition to alternate weekends. The court adopted the recommendation, ordered the parties to continue in mediation, and scheduled the next review for three months later.

The third and final mediation session was held in June 2009. Mother wanted the court to replace Father's Wednesday overnights with two weekday dinner visits and shorten, or at least not lengthen, his weekend visits. She felt Max was consistently late to preschool on the mornings after his overnight visits with Father, and that his behavior

was more problematic on those days. Father wanted to add a second weeknight overnight and extend his weekend visits to Monday mornings. Dr. Howard had no concerns about either party's capacity to love and care for Max. She advised them that "as long as they were both competent enough and loving enough to care for their son, I did not have cause to suggest that they could not/would not eventually share custody on an equal basis." She recommended extending Father's weekends with Max to include the Sunday overnights he had requested.

On September 22, 2009, about three months later, Mother moved for permission to relocate to Quebec with Max. She said she wanted to move because Charles Schwab was downsizing its workforce in San Francisco and she had received a very good job offer from a company in Quebec City. Moreover, her family was in Quebec and housing would be much less expensive. Father opposed the move-away request and asked for primary physical custody of Max if Mother relocated from the Bay Area. The court vacated the trial date set for October and appointed Dr. Donald Fallin to conduct a child custody evaluation.

Dr. Fallin submitted his report on January 10, 2011. He concluded it was in Max's best interest to live primarily with Mother. Although he felt the move would be somewhat detrimental to Max in the short term because he'd have less interaction with Father and Father's family, Dr. Fallin believed it would not be at all detrimental in the long term. Accordingly, Dr. Fallin recommended that Mother be allowed to take Max to Quebec and that he spend extended vacations with Father.

Trial of the move-away and custody issues took place over five days between May and July 2011. The court found that a number of Dr. Fallin's findings and conclusions were unsupported by the record and that his recommendations were not in Max's best interests. In particular, the court disagreed with the emphasis Dr. Fallin placed on Father's history of unsafe behavior with guns when Max was a toddler and while drinking. Although Father had been reckless with his guns in the past, particularly while binge drinking, the court found that Father had been sober for some years and now stored

his gun collection in a safer and more appropriate way. Therefore, the court found, the likelihood of his repeating such behavior was “very remote.”

The court also criticized the evaluator’s report for omitting any reference to Mother’s 2005 arrest for driving under the influence. While the court observed that this could have been a simple oversight, the omission supported Father’s view that Dr. Fallin consistently omitted or discounted information that was unfavorable to Mother while emphasizing or exaggerating information critical of him. In the same vein, the court found Dr. Fallin had misinterpreted or exaggerated a conversation with Max’s preschool director in a way that was unfair to Father and placed unwarranted reliance on Mother’s version of events. The court also concluded that Dr. Fallin’s view that Father “ ‘defiantly refused to follow [Max’s] preschool curriculum’ ” and that his “ ‘attitude about the importance of academics likely would not change’ ” was unfounded.

The court had additional concerns about the evaluator’s opinions. One conflict between the parents concerned whether Max, who appeared to show signs that he is left-handed, should, as Father at one point believed, be encouraged to use his right hand. The court observed that Dr. Fallin implicitly ignored the possibility that Max might be ambidextrous and concluded Max is left-handed, despite conceding that he is not an expert in the subject. The court explained: “It is not important to the court whether the minor is left-handed or right-handed for some particular or for all purposes. What is more significant to the court is that the evaluator, despite acknowledging he was not an expert in the subject, opined on the subject in a way that was critical and challenging of the respondent.” Similarly, Dr. Fallin testified that it took six hours to fly from San Francisco to Quebec City, but did not consider the actual travel time between the two cities. This, the court found, was “illustrative of other instances in which, intentionally or not, [Dr. Fallin] presented information a way that is favorable to [Mother].” Considering the time necessary for ground transportation, check-in for an international flight, retrieval of luggage, and customs and immigration, the court noted that actual travel time was likely double the six hours Dr. Fallin reported.

The court found that Mother's desire to move with Max to Quebec was based in part on her wish to minimize both her own and Max's contact with Father, and that to that end she exaggerated the risk of losing her position with Schwab. It also found there was no "bright light" indicating which of the parties was Max's primary parent and that Father was more likely than Mother to facilitate Max's relationship with the other parent. The court concluded that, if Mother moves to Quebec, Max's interests in stability and continuity would best be served by remaining in California with Father through the second grade.

The court awarded joint legal custody and 50/50 shared physical custody provided Mother remains in the Bay Area. If she moves to Quebec before August 15, 2014, when Max will be eight years old, Father will assume primary physical custody and Mother will have extended visits over summers, weekends and holidays. If Mother relocates on or after August 15, 2014, Max will live primarily with her in Quebec and have extended visits with Father during the summers, weekends and holidays.

Mother filed this timely appeal.

## **II. DISCUSSION**

### **I. Substantial Evidence Supports the Court's Findings and Order**

We review orders granting or denying move-away requests for abuse of discretion. "Generally, 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." (*Jacob A. v. C.H.* (2011) 196 Cal.App.4th 1591, 1599; *In re Marriage of Burgess* (1996) 13 Cal.4th 25, 32 (*Burgess*)). Here, Mother asserts the denial of her move-away request was an abuse of the court's discretion because a number of its factual findings are not supported by substantial evidence. "It is the province of the trial court to judge the effect and value of the evidence, determine the credibility of witnesses and resolve the conflicts in the evidence or in the reasonable inferences to be drawn from the evidence. When the evidence is conflicting, the "appellate court will indulge all intendments and reasonable inferences which favor sustaining the finding of the trier of fact and will not disturb that finding when there is substantial evidence in the record in support thereof [citation]." ' ' "

(*In re Robert D.* (1984) 151 Cal.App.3d 391, 396; see *Burgess, supra*, at p. 32 [no abuse of discretion where substantial evidence supported move-away order].)

In *In re Marriage of LaMusga* (2004) 32 Cal.4th 1072, 1101, the Supreme Court clarified factors the trial court should consider when determining the best interests of a child in a move-away case: the child's "interest in stability and continuity in the custodial arrangement; the distance of the move; the age of the [child]; the [child]'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 [child] above their individual interests; the wishes of the [child] if [he or she] is mature enough for such an inquiry to be appropriate; the reasons for the proposed move; and the extent to which the parents currently are sharing custody." (See also *Burgess, supra*, 13 Cal.4th 25, 32.) "Even 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." (*In re Marriage of LaMusga, supra*, 32 Cal.4th at p. 1100.)

There was no abuse of discretion here. Mother contests the finding that Father, an admitted alcoholic who is currently sober and has been for some years, is not at high risk of resuming drinking. But the finding is supported by Dr. Fallin's written evaluation and testimony. It is also supported by the opinion of Father's therapist (on which Dr. Fallin relied) that Father was not at a significant risk for relapse, Father's testimony about his participation in Alcoholics Anonymous and other efforts at maintaining sobriety, and the paternal grandfather's testimony that he had not seen Father drink since Max started visiting.

While Mother argues the court lacked discretion to deny her request for judicial notice of Father's four DUI's, the Family Code provisions she relies upon require only that the court consider the child's health, safety and welfare (Fam. Code, § 3020, subd.

(a)) and either parent's substance or alcohol abuse in determining the child's best interests. (Fam. Code, §§ 3011, subd. (d), 3020, subd. (a).) The court plainly did so and the code does not require judicial notice be taken of specific offenses.

Next, citing one footnote in the 44-page statement of decision, Mother argues the court abused its discretion because it erroneously found Father had been sober for 14 years. It did not. The footnote (with the sentence Mother relies on italicized below, but not in the original) reads: “[Father] testified that his last drink was December 31, 2008 when he took a sip of a friend’s drink so he could claim a sobriety date of January 1, 2009. He testified he had actually stopped drinking the previous September. [Citation.] *He had remained sober for 14 years from approximately 1988 to 2001.*” Fairly read, the court accurately paraphrased Father’s testimony. Elsewhere in the statement of decision, the court noted Father’s 2007 DUI and said specifically that he had been sober for “several,” not 14, years. Mother’s claim that the court made an unsupported finding that Father had been sober for 14 years misreads the statement of decision. While she also challenges the court’s more general finding that Father was not a high risk for a relapse, she does so by asking us to reweigh the evidence and reassess the credibility of the witnesses. As a reviewing court, we may not do so. (*In re Robert D.*, *supra*, 151 Cal.App.3d at p. 396–397.)

The court observed in the statement of decision that Dr. Fallin’s failure to address *Mother’s* 2005 DUI arrest in his evaluation supports Father’s contention that Dr. Fallin exaggerated information that was unfavorable to Father while discounting or ignoring negative information about Mother. Mother argues this observation is wrong because Dr. Fallin did not learn about Mother’s DUI until after he wrote the evaluation. She is mistaken. Dr. Fallin testified that he was given the information in a Family Services report, before he wrote the evaluation, but that “I obviously erred in accurately reporting her history in the report.” The court reasonably considered Dr. Fallin’s apparently selective use of facts in assessing the value of his evaluation and recommendation.

Mother makes a similar argument about the court’s criticism of Dr. Fallin’s conclusion that Max’s is left-handed, which she maintains is speculative and unsupported

by the record. This argument, too, is unpersuasive. The court's primary concern was that Dr. Fallin unnecessarily opined on the subject in a way that supported Mother and was critical of Father, despite his admitted lack of expertise. The court was also troubled that Dr. Fallin declared Max should be presumed to be left-handed without considering that the child might be neither entirely left nor right-handed. These are valid inferences from Dr. Fallin's report, particularly in light of his admitted lack of expertise and Father's testimony that Max uses both hands. Likewise, the court's finding that Dr. Fallin significantly understated the burden of travel between San Francisco and Quebec by taking into account only the six-hour flight time is supported by Father's testimony that the door-to-door trip takes a minimum of 14 hours, as well as by common experience that international air travel requires time for ground transportation, luggage, security and immigration.

Mother's challenge to the finding that Father was not likely to repeat his prior unsafe behavior with guns fares no better. Although it is undisputed that Father had behaved recklessly with his guns, his longtime therapist assured Dr. Fallin that she was not concerned about his gun hobby. Moreover, Father's father, also a gun owner, testified that he taught his son about gun safety as a child. There was ample evidence that Father was no longer drinking. The trial court reasonably credited this evidence to reject Mother's suggestion that Father's past behavior with guns and alcohol made him an unsafe parent.

Sufficient evidence also supports the court's finding that Mother's move-away request was motivated in part by her desire to curtail her own and Max's contact with Father. The court rendered a particularly thoughtful and nuanced analysis of the evidence to reach this conclusion. It is supported, as the court expressly found, by Mother's history in mediation of seeking to reduce Father's time with Max and evidence that she sought the move-away order after it appeared the mediator was going to recommend a 50/50 time share. The court reasonably found that Mother overstated her job insecurity as a reason for the move to Quebec based on evidence that she was still employed at Charles Schwab some two years later and had not been asked to transfer from California

or told that her job was at risk. While Mother testified that Schwab was reducing staff in her area and shifting to a new technology that was incompatible with her skills, it was the trial court's job to assess credibility and resolve conflicts in the evidence and reasonable inferences. The fact the court could have also drawn a different conclusion from this record does not undermine the determination it made.

The same holds true for the finding that "there is no bright light indicating for the court which of the parties is the primary parent for the minor at this point in his development." Dr. Fallin testified that Max was "bonded to both of his parents and he is familiar and loves both of his parents and he's at an age where he knows that. So, you know, significant, lengthy absences are likely especially [in] the first year or so to generate some worry, anxiety or confusion from either parent. I think that [Mother] in some ways has been a primary parenting figure already for Maxime, not in every way but in some ways. So in that sense that kind of separation I think would be more significant for Maxime but there's also the argument that . . . Maxime's a boy and looks to his dad a little more at this age for modeling than he does to his mom. So I guess in conclusion I would say that really either way he would be likely to experience some distress initially with the lengthy separation." The court observed that Max was familiar with both parents' homes and accustomed to having frequent contact with his paternal relatives. Mother asserts the court should have credited contrary information in Dr. Fallin's report, but, as we have explained, we cannot disturb the trial court's findings on appeal if, as here, they are supported by substantial evidence.

#### **B. Mother Waived Her Argument About Dr. Howard's Testimony**

Mother contends the court erred in allowing Dr. Howard to testify as an expert in child custody matters because Father failed to disclose her as an expert witness within the time allowed by statute. She is wrong on the law and, in any event, the alleged error was forfeited for appeal.

The relevant discovery statute does not, as Mother maintains, mandate exclusion of experts who are not timely disclosed to the opposing party. To the contrary, Code of Civil Procedure section 2034.300 provides for the exclusion of expert testimony only if

the offering party “unreasonably” failed to properly disclose the proposed expert in response to a demand. (Code Civ. Proc., §§ 2034.300, 2034.260.) The determination of reasonableness, and, thus, whether to grant relief from late disclosure, is addressed to the trial court’s discretion. (*Boston v. Penny Lane Centers, Inc.* (2009) 170 Cal.App.4th 936, 950; *Stanchfield v. Hamer Toyota, Inc.* (1995) 37 Cal.App.4th 1495, 1504; *Dickison v. Howen* (1990) 220 Cal.App.3d 1471, 1476.) Mother has not made any attempt to show the court abused its discretion here, and none is apparent from the record.

**DISPOSITION**

The custody order is affirmed.

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Siggins, J.

We concur:

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Pollak, Acting P.J.

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Jenkins, J.