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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

In re the Marriage of ANDREW and
PATRICIA KUBICHEK.

ANDREW KUBICHEK,
Respondent,

v.

PATRICIA KUBICHEK,
Appellant.

A144075

(Sonoma County
Super. Ct. No. SFL52715)

In this family law dissolution proceeding, Andrew Kubichek (Father) and Patricia Kubichek (Mother) have been engaged in an ongoing custody battle over their now 17-year-old daughter (Minor). Father currently has sole legal and physical custody. After a contested hearing, the trial court denied Mother’s motion to modify the existing custody order. The court also vacated a prior order requiring reunification therapy between Mother and the Minor, and limited Mother’s contact to that initiated by the Minor. Mother alleges that the court’s order resulted in a de facto termination of her parental rights. We affirm.

I. BACKGROUND

We are handicapped in our review of the relevant factual background by Mother’s highly selective references to a very limited trial court record, and by Father’s pro se response which references only two family court services (FCS) custody recommendations he improperly attached to his brief.

The parties filed for dissolution of their marriage on October 8, 2010. They initially shared custody of the Minor. The record evidences a number of custody disputes in the intervening years. On December 10, 2012, there was a trial on Father's request for full custody of the Minor, which the court denied.

We first observe that the operative *custody* order in this case is one issued by the family law court on June 21, 2013.¹ The court took testimony on June 20, and its findings and order after hearing recites that the order was based on oral testimony received, declarations submitted by the parties “as well as expert reports in the field of psychology and psychiatry previously filed with this court” While finding that “[b]oth parents tend to twist the facts to fit their own perspectives,” the court concluded “[o]n balance, the expert reports and Mother's noncompliance [with prior court orders] compel this court to grant [F]ather sole physical and legal custody of [the Minor]. I find that it is the best interest of [the Minor] to live exclusively with [Father], and to have time apart from [Mother] between now and October 1, 2013.” The court ordered reunification therapy for Mother and Minor, beginning after October 1, 2013, “but no later than November 1, 2013.”

On October 27, 2014, Mother moved for modification of the June 2013 order. She sought joint custody and asked the court to “Enforce Order filed 6/21/2013 regarding reunification therapy” Mother complained that the designated reunification therapist had refused to schedule joint therapy sessions with the Minor, and Mother requested appointment of a new reunification therapist. Father responded that Mother had violated the June 2013 order by appearing at the Minor's school, following her into a women's bathroom, and dropping a wallet containing what the Minor found to be a “disturbing” letter. He alleged that the Minor had met with the reunification therapist, asked not to go to mediation, and told the therapist that she did not want to reunify with Mother.

¹ Mother appears to acknowledge this in asking that the trial court be compelled to enforce that portion of its June 2013 order requiring “reunification.”

Hearing on Mother's motion was held on January 12, 2015. The court considered an FCS report and recommendation, which is not properly part of the record before this court.² On January 9, 2015, however, Mother filed a document entitled "Points and Authorities in Support of Petitioner's Request for Order Pursuant to California Rules of Court, Rule 5.94(d)." In that filing, she discusses the report and recommendation of an FCS mediator, challenging the recommendations as "one-sided" and biased. The parties discussed the mediator's recommendations at the hearing. The court ultimately adopted the FCS recommendation as an order of the court. The court's findings and order after hearing confirmed sole legal and physical custody to Father. The parenting plan for visitation provided that Minor would reside exclusively with Father "until the Court orders otherwise," and that "Mother shall have no contact with [Minor] until such time as [Minor] initiates and then only under such circumstances as [Minor] determines according to her discretion."

II. DISCUSSION

In contentious and protracted battles between divorcing parents, children are often the first casualties of war. The impact of such high conflict cases on children can be significant and long-lasting. (See generally Johnston et al., *In the Name of the Child: A Developmental Approach to Understanding and Helping Children of Conflicted and Violent Divorce* (2d ed. 2009).) Even a cursory review of the register of actions in this case reflects a highly contentious relationship between Mother and Father, with the Minor caught in the middle of a seemingly intractable conflict. Each parent insists that the other seeks to alienate Minor from them and, as the trial court observed "twist the facts to fit their own perspectives." "[T]he children involved in a custody proceeding should not be made the pawns of the personal desires, either on the part of the contestants

² Father attaches to his brief copies of what appears to be portions of two FCS reports and recommendations. A party may only attach exhibits which are copies of documents in the appellate record. (Cal. Rules of Court, rule 8.204(d).) As Mother correctly notes, a party may only augment the record by timely noticed motion. (*Id.*, rules 8.416(d), 8.155(a).) Father has not. We therefore do not consider his improper attachments.

or the court, no matter how sincere such desires may be.’ ” (*In re Marriage of McLoren* (1988) 202 Cal.App.3d 108, 115 (*McLoren*).

The June 2013 order sought to mitigate the ongoing parental conflict’s impact on the Minor, finding it in Minor’s best interests to “have time apart from her mother.” While Mother devotes significant portions of her brief setting forth the history preceding this order, and criticizing the court’s ruling, the June 2013 order is not subject to review in this appeal. “Our jurisdiction on appeal is limited in scope to the notice of appeal and the judgment or order appealed from.” (*Polster, Inc. v. Swing* (1985) 164 Cal.App.3d 427, 436.) The June 2013 order awarding sole legal and physical custody to Father was an appealable order under Code of Civil Procedure section 904.1, subdivision (a)(10). No appeal was taken. “ ‘If a judgment or order is appealable, an aggrieved party must file a timely appeal or forever lose the opportunity to obtain appellate review.’ ” (*Norman I. Krug Real Estate Investments, Inc. v. Praszker* (1990) 220 Cal.App.3d 35, 46, italics omitted.) We will not consider belated attacks on the issues decided in the June 2013 order. (See *Chalmers v. Hirschkop* (2013) 213 Cal.App.4th 289, 304.) Mother’s challenge is properly directed only to the January 2015 order, which denied her motion for modification of the June 2013 order.

A. *Standard of Review*

“ ‘ “An application for modification of an award of custody is addressed to the sound legal discretion of the trial court, and its discretion will not be disturbed on appeal unless the record presents a clear case of an abuse of that discretion.” ’ ” (*McLoren, supra*, 202 Cal.App.3d at pp. 111–112; see *Montenegro v. Diaz* (2001) 26 Cal.4th 249, 255 [custody and visitation orders are subject to the “ ‘deferential abuse of discretion test’ ” and must be upheld if “ ‘correct on any basis, regardless of whether such basis was actually invoked’ ”].) Generally, a trial court abuses its discretion “only if there is no reasonable basis upon which the court could conclude that its decision advanced the best interests of the child.” (*In re Marriage of Melville* (2004) 122 Cal.App.4th 601, 610.)

“ ‘The burden is on the party complaining to establish an abuse of discretion, and unless a clear case of abuse is shown and unless there has been a miscarriage of justice a

reviewing court will not substitute its opinion and thereby divest the trial court of its discretionary power.’ ” (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 566; *Rich v. Thatcher* (2011) 200 Cal.App.4th 1176, 1182.) To establish an abuse of discretion, the appellant must demonstrate that the court exceeded the bounds of reason. It is not enough to argue that a different order would also have been within the range of reason. (*Denham*, at p. 566.) And it is a “settled rule of appellate review [that] a trial court’s order/judgment is presumed to be correct, error is never presumed, and the appealing party must affirmatively demonstrate error on the face of the record.” (*People v. Davis* (1996) 50 Cal.App.4th 168, 172.)

In evaluating the factual basis for an exercise of discretion, we also give broad deference to the trial judge. (*Rich v. Thatcher*, *supra*, 200 Cal.App.4th at p. 1182.) The trial court’s factual findings must be upheld if supported by substantial evidence. (See, e.g., *Osgood v. Landon* (2005) 127 Cal.App.4th 425, 435–436; *In re Marriage of Edlund & Hales* (1998) 66 Cal.App.4th 1454, 1473–1474.)

B. *Forfeiture of Claims*

Mother has first forfeited any challenge to the sufficiency of the evidence by failing to set forth all relevant evidence in that regard. As we have already noted, Mother selectively cites only to evidence in support of her position, and she does not provide the custody and visitation recommendations from FCS (or earlier psychological and custody evaluations) that the court relied upon.³ When an appellant challenges the sufficiency of the evidence, “all material evidence on the point must be set forth and not merely [the appellant’s] own evidence. [Citation.] Failure to do so amounts to waiver of any alleged error, and we may presume the record contains evidence to sustain every finding of fact.” (*Jordan v. City of Santa Barbara* (1996) 46 Cal.App.4th 1245, 1255; see *Foreman & Clark Corp. v. Fallon* (1971) 3 Cal.3d 875, 881.) We would, in any event, resolve

³ The court stated that it was basing its decision “on the record in the file, the information provided to the court by [FCS].”

conflicts in evidence in favor of the prevailing party and draw all reasonable inferences to uphold the trial court's decision. (*In re Marriage of Mix* (1975) 14 Cal.3d 604, 614.)

We also note the irony in both Mother's objection that *Father* failed to seek augmentation of the record to include the custody evaluator's recommendations for the most recent hearing and her citation to *State Comp. Ins. Fund v. WallDesign Inc.* (2011) 199 Cal.App.4th 1525, 1528, footnote 1 (" [w]hen practicing appellate law, there are at least three immutable rules: first, take great care to prepare a complete record; second, if it is not in the record, it did not happen; and third, when in doubt, refer back to rules one and two' "). It was *Mother's* burden to prepare a complete record. An appellant's failure to provide an adequate record on an issue requires that the issue be resolved against the appellant. (*Maria P. v. Riles* (1987) 43 Cal.3d 1281, 1295.) Mother's complaint that the custody evaluator was biased against her does not excuse her failure to provide, and appropriately cite, the relevant reports.

C. *Mother's Claims Fail on the Merits*

Mother in any event fails to meet her burden to show that the court abused its discretion. "Under California's statutory scheme governing child custody and visitation determinations, the overarching concern is the best interest of the child. The court . . . ha[s] 'the widest discretion to choose a parenting plan that is in the best interest of the child.' (Fam. Code, § 3040, subd. [(c)].)"⁴ (*Montenegro v. Diaz, supra*, 26 Cal.4th at p. 255, fn. omitted.) The "best interest of the child" includes the child's "health, safety, and welfare." (§ 3020, subds. (a), (c).) We must uphold a court's custody order if it can be "reasonably concluded that the order . . . advance[s] the 'best interest' of the child." (*In re Marriage of Burgess* (1996) 13 Cal.4th 25, 32 (*Burgess*).)⁵

⁴ Undesignated statutory references are to the Family Code.

⁵ We will assume, based on the wording of the January 2015 order, that the June 2013 custody order was not intended by the court to be a "permanent" order, and that Mother was not therefore required to make a showing of a "change in circumstances" in order to obtain modification of it. (See *Burgess, supra*, 13 Cal.4th at pp. 37–38 [party seeking to modify a permanent custody order can do so only if he or she demonstrates a significant change of circumstances justifying a modification].)

Mother complains that the January 2015 order conflicts with the policies articulated in sections 3020, subdivision (b), and 3040, subdivision (a). Section 3020, subdivision (b) declares the public policy of assuring that children have frequent and continuing contact with both parents after parents end their relationship.⁶ Section 3040, subdivision (a)(1) states that in making a custody order to either parent, the court “shall consider, among other factors, which parent is more likely to allow the child frequent and continuing contact with the noncustodial parent”⁷

Mother’s argument is unavailing. “The policy of . . . section 3020 in favor of ‘frequent and continuous contact’ does not so constrain the trial court’s broad discretion to determine, in light of *all* the circumstances, what custody arrangement serves the ‘best interest’ of minor children. [¶] The Family Code specifically refrains from establishing a preference or presumption in favor of *any* arrangement for custody and visitation. Thus, . . . section 3040, subdivision [(c)], provides: ‘This section establishes neither a preference nor a presumption for or against joint legal custody, joint physical custody, or sole custody, but *allows the court and the family the widest discretion* to choose a parenting plan that is in the best interest of the child.’ (Italics added.) Similarly, although . . . section 3020 refers to ‘frequent and continuous contact,’ it does not purport

⁶ “The Legislature finds and declares that it is the public policy of this state to assure that children have frequent and continuing contact with both parents after the parents have separated or dissolved their marriage, or ended their relationship, and to encourage parents to share the rights and responsibilities of child rearing in order to effect this policy, *except where the contact would not be in the best interest of the child, as provided in Section 3011.*” (§ 3020, subd. (b), italics added.)

⁷ Mother adamantly insists the evidence shows Father has consistently attempted to keep and alienate the Minor from her. The trial court, while far from exonerating Father from responsibility, earlier found Mother’s testimony regarding her encouragement of the father-daughter relationship “not credible.” In reviewing a custody order, the trial court’s credibility determinations are binding on an appellate court. (*In re Marriage of Roe* (1993) 18 Cal.App.4th 1483, 1488, disapproved on other grounds in *Burgess, supra*, 13 Cal.4th at p. 38, fn. 10.) “Where there is conflicting evidence, the evidence that supports the order is accepted as true, and that evidence which is unfavorable is discarded. . . . We may neither reweigh the evidence nor reevaluate the credibility of witnesses.” (*Roe*, at p. 1488.)

to define the phrase ‘frequent and continuous’ or to specify a preference for any particular form of ‘contact.’ Nor does it include any specific means of effecting the policy, apart from ‘encourag[ing] parents to share the rights and responsibilities of child rearing.’ ” (*Burgess, supra*, 13 Cal.4th at pp. 34–35.) “Thus, in exercising its discretion, the trial court must duly evaluate all the important policy considerations at issue in any change of custody and make its ultimate ruling based upon a determination of the best interests of the child.” (*McLoren, supra*, 202 Cal.App.3d at p. 113.) We see no evidence that the court failed to do so here.

Mother also faults the court for failing to consider the Minor’s expressed wishes to remain with Mother when originally awarding full custody to Father in June 2013, but deferring to the wishes of the Minor when denying her contact in the January 2015 order. She argues that this demonstrates the court’s orders are arbitrary and capricious. We disagree.

The record shows that the Minor was interviewed in chambers by the court (Hon. Nancy Shaffer) at an earlier custody hearing on December 10, 2012. The Minor was at that time 14 years old and in eighth grade. She expressed her desire to maintain the then existing joint custody arrangement. The court denied Father’s request for sole custody, but voiced its concern about the continuing level of conflict between Mother and Father, and its effects on the Minor. At an April 29, 2013 custody hearing, the court (Hon. Bradford DeMeo) again interviewed the Minor in chambers, and she advised the court of her conflicts with Father and her reluctance to visit with him. The court again ordered continued joint custody pending the June 20, 2013 trial, noting that its order was contrary to the FCS recommendation. The court also found that Mother was not in compliance with prior court orders on reconciliation therapy, and cautioned Mother that it would consider granting exclusive custody to Father if she was not in compliance with “100 percent of the conditions” of the orders by the next hearing. The Minor did not testify at the June 2013 hearing but apparently submitted a declaration (which is not part of the record), reflecting her desire to remain with Mother. As we have repeatedly observed, we do not have all of the evidence considered by the court at the January 2015

hearing. Father's declaration avers that the Minor then opposed Mother's request to modify the order, and that the reunification therapist agreed that Minor should not have contact with Mother at that time. Father submitted e-mails from the reunification therapist to Mother's counsel discussing Minor's distress at Mother's attempted contact at her school, and declining to schedule joint therapy sessions given the level of Minor's distress. The court (Hon. Bradford DeMeo) noted its prior conversation with Minor, its invitation to her to write to the court if she wished make her wishes known, and her "pretty clear indication that [she] does not want to speak to the mediator or the court" at the time of the 2015 hearing.

Section 3042 requires the court to permit a child 14 years of age or older to address the court regarding custody or visitation if he or she wishes to do so, unless the court determines that doing so is not in the child's best interests. (§ 3042, subd. (c).) "If the child is of sufficient age and capacity to reason so as to form an intelligent preference . . . , the court shall consider, and give due weight to, the wishes of the child" (§ 3042, subd. (a).) The court heard and considered the Minor's wishes on several occasions—that it did not in every instance follow those wishes does not establish an abuse of discretion. (*In re Marriage of Winternitz* (2015) 235 Cal.App.4th 644, 655.) And it appears from the limited record provided that the January 2015 order is consistent with the expressed wishes of the now 17-year-old Minor.

Generally a child's best interests are served by joint custody to permit the child to have a full and involved relationship with both parents. But where there is acrimony "the reality of their parents' conflicts unavoidably hampers the realization of that goal." (*McLoren, supra*, 202 Cal.App.3d at p. 116.) Here the court noted its personal familiarity with the case over a period of a year and a half, and "some irrational behavior, and also somewhat contrary to prior court orders" by Mother. The register of actions reflects multiple contested hearings over an even longer period on custody and visitation issues, and the need for the court to designate therapeutic assistance for the Minor. The court could more than reasonably conclude that the high level of continuing conflict between the parents was detrimental to the Minor and would be reduced by granting legal and

physical custody rights to one parent and not both. The court could further reasonably conclude that compelled visitation with Mother would be detrimental to the Minor, given her history of embroilment in the parental conflict and Minor's current level of emotional distress over Mother's actions, until the Minor was ready to initiate contact with Mother. "In making its order, the family court applied the proper criteria and a reasonable basis existed on which the court could conclude its decision advanced [Minor's] best interests." (*In re Marriage of Winternitz, supra*, 235 Cal.App.4th at p. 656.)

“ “An appellate tribunal is not authorized to retry the issue of custody, nor to substitute its judgment for that of the trier of facts. Only upon a clear and convincing showing of abuse of discretion will the order of the trial court in such matters be disturbed on appeal. Where minds may reasonably differ, it is the trial judge's discretion and not that of the appellate court which must control.” ’ ’ ” (*Catherine D. v. Dennis B.* (1990) 220 Cal.App.3d 922, 931.)

D. *Due Process*

Mother insists that denying her visitation with the Minor was equivalent to termination of her parental rights and a denial of due process in the absence of any evidence or finding that she was an unfit parent. We again disagree.

Mother emphasizes the fundamental liberty interest, protected by the due process clause of the Fourteenth Amendment, of parents in the care, custody, and control of their children. (See *Troxel v. Granville* (2000) 530 U.S. 57, 65–66 (plur. opn. of O'Connor, J.); *Guardianship of Ann S.* (2009) 45 Cal.4th 1110, 1135.) She asserts that the January 2015 order consequently required a finding, by clear and convincing evidence, that she is “unfit” as a parent. In the first instance, we find her premise unconvincing. Her parental rights have not been “terminated.” (*In re Marriage of Brown & Yana* (2006) 37 Cal.4th 947, 958 [“an award of sole legal and sole physical custody of a child to one parent does not serve to ‘terminate’ the other's parental rights or due process interest in parenting”].) While Father has sole legal and physical custody, Mother may see her nearly adult daughter at any time the Minor is emotionally ready to initiate contact. Further, no California court has held that a court must find that one

parent is “unfit” as a prerequisite to an award of sole legal and physical custody to the other parent. To the contrary, both our courts and the Legislature have repeatedly recognized a family court’s broad discretion in protecting the rights of children in dissolution proceedings, and that “the overarching concern is the best interest of the child.” (*Montenegro v. Diaz, supra*, 26 Cal.4th at p. 255; §§ 3022 [“[t]he court may, during the pendency of a [marital dissolution] proceeding or at any time thereafter, make an order for the custody of a child during minority that seems necessary or proper”] and 3040, subd. (c) [court has “the widest discretion to choose a parenting plan that is in the best interest of the child”].) To the extent Mother asserts a parental right to custody or to visitation that would subordinate the Minor’s best interests, she is simply wrong.

III. DISPOSITION

The court’s January 2015 order is affirmed.

BRUINIERS, J.

WE CONCUR:

JONES, P. J.

NEEDHAM, J.

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