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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

VERONICA PETERSEN, **Plaintiff and Appellant,** **v.** **CHARLES E. BROOKS, III,** **Defendant and Respondent.**	**A147667** **(Solano County** **Super. Ct. No. FFL112780**)

In child custody proceedings following the dissolution of Veronica Petersen's marriage to Charles E. Brooks, III, the trial court awarded physical custody of the former couple's two children to Brooks. Petersen appeals, contending, among other things: (1) the court erred by awarding custody to Brooks; and (2) judicial bias violated her constitutional due process rights.

We affirm.[1]

[1] Brooks did not file a brief. We have decided the appeal on the record and Petersen's opening brief. (Cal. Rules of Court, rule 8.220(a)(2).) We deny Petersen's request for judicial notice of various documents postdating the order from which she appeals. Normally, "when reviewing the correctness of a trial court's judgment, an appellate court will consider only matters which were part of the record at the time the judgment was entered." (*Reserve Insurance Co. v. Pisciotta* (1982) 30 Cal.3d 800, 813; see also *In re Marriage of Lechowick* (1998) 65 Cal.App.4th 1406, 1414 & fn. 9 [denying request for judicial notice where documents "postdate the trial court order appealed from"].)

FACTUAL AND PROCEDURAL BACKGROUND

A court dissolved Petersen and Brooks's marriage in 2012; they shared custody of their two children, born in 2005 and 2007. A 2012 custody and visitation order (custody order) required the parties to, among other things, "deliver the minor children to their after school activities during their respective custodial time."

Motion to Modify Custody Order

In February 2015, Brooks moved ex parte to modify the custody order; he argued Petersen was not taking the children to after school activities such as Little League. Brooks requested the court order Petersen to take the children to after school activities, or to award him sole custody if she refused. The court issued an interim order stating the "children are allowed to participate in little league baseball" and set an August 2015 hearing date.

In late June 2015, Petersen moved from Fairfield to San Francisco to attend a graduate program at San Francisco State University. Petersen opposed Brooks's motion. Among other things, Petersen argued: (1) granting her custody during the school week was in the children's best interest; (2) Brooks could not put the children's best interest "above his own personal animosity" for her; and (3) she suspected Brooks abused the children. In a supporting declaration, Petersen described her involvement in her children's schooling and her belief that education should come before extracurricular activities. The declaration also described the alleged abuse of the children.

At the August 2015 hearing, the court issued a temporary visitation order and scheduled a hearing for the motion to modify the custody order.

Hearing on the Motion

The court held an evidentiary hearing on the motions in September and October 2015 (evidentiary hearing).[2] Brooks testified the children — then 10 and 7 — had lived

[2] Under well-established rules of appellate review, we summarize the evidentiary hearing in the light most "favorabl[e] to the prevailing party and in support of the judgment." (See *Catherine D. v. Dennis B.* (1990) 220 Cal.App.3d 922, 931.) In her opening brief, Petersen does not summarize the evidentiary hearing. Instead, she

in Solano County since their birth, near their extended family. The children's grandparents, aunts, and uncles were "very involved" in the children's lives. The children's school is approximately two miles from Brooks's house.

Brooks is a land surveyor. For the most part, Brooks's schedule is flexible, and his employer lets him "start work late[.]" Brooks takes the boys to school when he can. When Brooks must be at work early in the morning, his mother and his aunt come to the house and take the children to school after they wake. Brooks is typically done with work between 12:00 noon and 4:00 p.m.; if the children are done with school before Brooks is home from work, they spend time at a relative's home. On occasion, Brooks's neighbor babysits the children.

In the evenings, Brooks helps the children with their homework, and they make and eat dinner together. Brooks gardens and rides dirt bikes with the children, and goes fishing and hunting with them. He spends all of his free time with his children. The children want to play soccer, baseball, and flag football, and take karate. Brooks "want[ed] to offer them everything that I absolutely can as a father that they ask me to do. They want to play these things, I can get them there, I can enroll them . . . they want to participate in these things."

Until 2015, Petersen complied with a court order requiring her to transport the children to after school activities. In 2015, however, Petersen refused to let the boys play Little League, forcing Brooks to obtain a court order allowing the children to play. After the court issued the interim order authorizing the children "to participate in little league baseball[,]" Brooks took the children to Little League practices and games when the children were with him. Petersen, however, did not take the children to Little League

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selectively quotes testimony favorable to her. This practice violates the California Rules of Court and has hampered our review. (See Cal. Rules of Court, rule 8.204(a)(2)(C) [requiring summary of "significant facts"]; *In re Marriage of Davenport* (2011) 194 Cal.App.4th 1507, 1530-1531 [wife's practice of reciting only "the evidence . . . favorable to her" is "not to be condoned"].)

when they were in her custody. This upset the children. Petersen did not tell Brooks where she was moving.

Petersen's San Francisco residence is approximately 50 miles from the children's school. When Petersen has custody of the children, they wake up at 6:00 a.m. to get to school, making them "exhausted [and] cranky." According to Brooks, it was better for the children to stay in Solano County because "[t]heir base of friends, their family, their everything that is familiar with them is here. They . . . love their school . . . . They have a lot of friends in school. . . . They're here, everything, every structure to them is here." Brooks's relationship with the children would suffer if they moved to San Francisco because "[t]hey're used to seeing [him] at least every two or three days" and because he does "so much" with them. If the children lived with Brooks during the school year, he would foster their relationship with Petersen. Brooks proposed a schedule with visitation for Petersen during the week and "alternating weekend time."

Petersen testified she is in a graduate program at San Francisco State University, where she also has a job assisting a professor. The children initially had a difficult time adjusting to San Francisco, but it's "[g]etting a lot better." Petersen believed Brooks abused the children, based in part on a bruise she saw on one of her son's ears. He said "his dad hit him." Petersen claimed Brooks was abusive to her, but she never sought a restraining order against him.

In December 2015, the court issued a written order (forms FL-340 and FL-341) granting Brooks sole physical custody and weekend visitation for Petersen twice a month. The order required the children to "remain in the schools in which they are currently enrolled" and Brooks and Petersen to "discuss the children's extracurricular activities, and the children shall participate as they agree. If they do not agree, [Brooks] shall make the decisions." The court noted Petersen and Brooks shared physical custody "on an equal or almost equal basis . . . for years. To accommodate her own change of residence to attend school, [Petersen] moved the children to San Francisco and attempted to change their school to one more convenient to her without discussing these changes with [Brooks] in any significant way. [¶] The court finds that [Brooks] is more likely than

[Petersen] to support the minors[’] frequent and continuing contact with the noncustodial parent. . . . [Petersen] has [a] persistent history of attempting to limit [Brooks]’s parenting and failing to cooperate with [Brooks] regarding his parenting the children and the children attending their activities. [Brooks] is more supportive of [Petersen’s] parenting the children than she is of his.”

The court considered that Petersen is “more available” than Brooks to care for the children because Brooks “works full-time and [Petersen] does not” but noted Petersen’s greater availability was not a factor in deciding custody. It also determined Petersen failed to prove Brooks’s use of family and friends to transport the children to school was harmful. Finally, the court considered the “Move-Away Factors” as set forth in *In re Marriage of LaMusga* (2004) 32 Cal.4th 1072, 1101 (*LaMusga*) and observed Brooks was more supportive of the children’s interests than Petersen: he “supports their remaining in their home community and school to a greater extent than [Petersen]. He was more willing to make efforts for them to attend important extracurricular activities than [Petersen].”

DISCUSSION

I.

The Court Did Not Abuse Its Discretion by Awarding Brooks Physical Custody of the Children

Petersen contends the court “committed reversible error” and abused its discretion by awarding physical custody of the children to Brooks. “Under California’s statutory scheme governing child custody and visitation determinations, the overarching concern is the best interest of the child. The court and the family have ‘the widest discretion to choose a parenting plan that is in the best interest of the child.’ (Fam. Code, § 3040, subd. (b).) When determining the best interest of the child, relevant factors include the health, safety and welfare of the child, any history of abuse by one parent against the child or the other parent, and the nature and amount of contact with the parents. ([Fam. Code,] § 3011.)” (*Montenegro v. Diaz* (2001) 26 Cal.4th 249, 255, fn. omitted.) “‘The standard of appellate review of custody and visitation orders is the deferential abuse of

discretion test.' [Citation.] Under this test, we must uphold the trial court 'ruling if it is correct on any basis, regardless of whether such basis was actually invoked.' [Citation.]" (*Id.* at p. 255.)

Petersen claims the court erred by awarding physical custody to Brooks because he "was an incredible witness" — that his testimony at the evidentiary hearing "wasn't true." Her attempt to portray Brooks as a liar is unpersuasive, and her disagreement with Brooks's testimony is not a basis for reversal. (*In re Marriage of Ackerman* (2006) 146 Cal.App.4th 191, 204.) "'[R]esolution of conflicts in the evidence, [and] assessment of the credibility of the witnesses . . . [are] all matters within the exclusive province of the trier of fact.' [Citation.]" (*Id.* at p. 204; see also *Izell v. Union Carbide Corp.* (2014) 231 Cal.App.4th 962, 974 [challenge to witness's memory and credibility did not establish a lack of evidence supporting jury's verdict].) Petersen's reliance on *In re Marriage of Ananeh-Firempong* (1990) 219 Cal.App.3d 272 is misplaced. In that case, the trial court disregarded husband's testimony and the appellate court deferred to that credibility determination. (*Id.* at p. 279.)

Next, Petersen argues the court abused its discretion by failing to consider Brooks's "history of abuse" toward her and the children. In opposition to the motion to modify the custody order, Petersen argued Brooks abused the children and described the alleged abuse; she also submitted a declaration detailing Brooks's threatening and abusive behavior toward her and the children. At the evidentiary hearing, counsel for Petersen argued Brooks was "highly aggressive" and that he "belittle[d]" her, and Petersen testified Brooks abused the children. That the court apparently did not give Petersen's evidence the weight she feels it deserved is not an indication the court ignored the evidence. "As the trier of fact, it is the trial court's role to examine the evidence, and we presume the court performed its duty." (*Christian Research Institute v. Alnor* (2008) 165 Cal.App.4th 1315, 1324, citing Evid. Code, § 664.)[3] *Burquet v. Brumbaugh* (2014)

[3] "As a prerequisite to considering allegations of abuse, the court may require substantial independent corroboration, including, but not limited to, written reports by law enforcement agencies, child protective services or other social welfare agencies,

223 Cal.App.4th 1140, 1145 where the court defined "abuse" under the Domestic Violence Protection Act, does not assist Petersen.

Petersen contends insufficient evidence supports the court's determination that: (1) Brooks was more likely to support the children's frequent and continuing contact with her, the noncustodial parent; and (2) Brooks was more supportive of the children's interests. Under the abuse of discretion standard, we do not substitute our judgment for that of the trial court; we determine only whether any judge reasonably could have made such an order. (*In re Marriage of Cryer* (2011) 198 Cal.App.4th 1039, 1046-1047.) The question before us is "'whether the court's factual determinations are supported by substantial evidence and whether the court acted reasonably in exercising its discretion.' [Citation.]" (*In re Marriage of Berger* (2009) 170 Cal.App.4th 1070, 1079.) The answer is yes. At the evidentiary hearing, Brooks testified he would foster the children's relationship with Petersen if the children lived with him during the school year. He also testified the children wanted to participate in extracurricular activities, and that he would do everything in his power to enroll them and transport them to those activities. Substantial evidence therefore supports the court's determination that Brooks was more likely to support the children's frequent and continuing contact with Petersen and that Brooks was more supportive of the children's interests. Petersen's attempt to "reargue the 'facts' as she would have them" is unavailing. (*In re Marriage of Davenport, supra,* 194 Cal.App.4th at p. 1531.)

Petersen's claim that the court erred by considering Brooks's support of the children remaining in their "'home community and school'" fares no better. A trial court

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courts, medical facilities, or other public agencies or private nonprofit organizations providing services to victims of sexual assault or domestic violence." (Fam. Code, § 3011, subd. (b)(3).) Here, the court was within its discretion to reject Petersen's claims of abuse, based on the lack of *any* independent corroboration. That the court's written order does not mention the abuse allegations "does not indicate that the court failed to properly discharge its duties. [Citation.] 'A judgment or order of a lower court is presumed to be correct on appeal, and all intendments and presumptions are indulged in favor of its correctness.'" (*LaMusga, supra,* 32 Cal.4th at p. 1093, internal brackets omitted.)

may consider a "child's age, community ties, and health and educational needs" in determining custody arrangements when one party relocates. (*In re Marriage of Burgess* (1996) 13 Cal.4th 25, 39.) "[T]he superior court has '"'the widest discretion to choose a parenting plan that is in the best interest of the child.'" [Citation.] This requires the court to consider all the circumstances.' [Citation.]" (*LaMusga, supra,* 32 Cal.4th at p. 1091.) Here, the children's ties to their community — where they had lived their entire lives, near their extended family and support network — was an appropriate factor in the court's determination of the children's best interests. Petersen cites no authority establishing otherwise.

The court did not, as Petersen's claims, abuse its discretion by failing to grant her "reasonable visitation."[4] Petersen concedes "the public policy in favor of visitation that provides 'frequent and continuing contact with both parents' [citation] may be served in a variety of ways" and that "'frequent and continuous' is not defined and the code does not specify any particular form of contact. [Citation.]" (*In re Marriage of Biallas* (1998) 65 Cal.App.4th 755, 763.) She has not demonstrated the amount of visitation was unreasonable.

II.

Petersen's Judicial Bias Claim Fails

Petersen claims judicial bias violated her constitutional right to due process. This claim is forfeited. As Petersen acknowledges, a party's failure to object to the alleged judicial bias in the trial court forfeits the claim on appeal. (*People v. Seumanu* (2015) 61 Cal.4th 1293, 1320 ["[a]s a general rule, a specific and timely objection to judicial misconduct is required to preserve the claim for appellate review"].) Her claim also fails on the merits. In an attempt to demonstrate bias, Petersen relies on comments made by

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[4] We have considered — and rejected — Petersen's contention that the court erred by "delegat[ing] its authority" to determine the conditions of her custodial time to Brooks, as well as her claim that the delegation of authority violates constitutional prohibitions on involuntary servitude. (*Southern California Edison Co. v. Public Utilities Com.* (2014) 227 Cal.App.4th 172, 203, fn. 23; *Moss v. Superior Court* (1998) 17 Cal.4th 396 [rejecting involuntary servitude claim].)

the judge at the evidentiary hearing. We have carefully reviewed the judge's comments and reject Petersen's claim of judicial bias. The court's comments may indicate mild frustration with Petersen's failure to give a direct answer to a straightforward question, and the court's desire to move the hearing forward. The comments do not indicate bias. (See *People v. Brown* (1993) 6 Cal.4th 322, 337 [judge's "understandable frustration with counsel's conduct did not reasonably suggest he would be biased against counsel or defendant"]; *Hernandez v. Superior Court* (2003) 112 Cal.App.4th 285, 303 [trial court's orders "do not suggest bias . . . only frustration and a desire to manage a complex case"]; *Crisci v. Sorce* (1957) 150 Cal.App.2d 96, 99 [none of the judge's remarks indicated "anything other than the proper exercise of reasonable control over a judicial proceeding, to keep it within the issues and to keep it moving"].)

DISPOSITION

The court's December 30, 2015 order is affirmed. No costs are awarded because Brooks has not made an appearance.

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Jones, P. J.

We concur:

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Simons, J.

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Needham, J.