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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

In re the Marriage of DONDREA MARIE
and VINCENT PAUL GARCIA.

DONDREA MARIE GARCIA,

Appellant,

v.

VINCENT PAUL GARCIA,

Respondent.

D058952

(Super. Ct. No. D483321)

APPEAL from orders of the Superior Court of San Diego County, Susan D.

Huguenor, Judge. Affirmed.

Dondrea Marie Garcia appears in propria persona to challenge orders pertaining to custody and visitation with her two minor children. Dondrea argues the trial court erred by: (1) modifying visitation without a showing of changed circumstances; (2) relying on a Family Court Services (FCS) report that was inaccurate; (3) relying on testimony and a report from a FCS mediator that did not have recent involvement in the case; (4) denying

her request for a custody evaluation; (5) granting legal custody of the children to their father, Vincent Paul Garcia, because that issue was not before the court and was not mediated; (6) denying her motion for a new trial; and (7) denying her peremptory challenge to disqualify the judge.

We find Dondrea's arguments unavailing and affirm the orders.

FACTUAL AND PROCEDURAL BACKGROUND

Our statement of the factual and procedural background is taken in part from this court's opinion in prior consolidated appeals in this case. (*In re Marriage of Garcia* (July 25, 2011, D057115, D057776) [nonpub. opn.].) We have taken judicial notice of the record in the prior appeals.

Dondrea and Vincent were married in 1997 and separated in 2004. They have two children together, Kyle and Jacob. In January 2010, the family court granted temporary physical custody of the children to Vincent, thereby permitting him to move them to Los Angeles where he resided. (All further date references are to the year 2010.) The court later made the physical custody arrangement permanent and granted the parents joint legal custody. The court gave Dondrea supervised visitation and daily scheduled telephone contact with the children.

In May, Vincent requested that the court reduce Dondrea's telephone contact with the children to twice per week. As ordered by the court, Vincent and Dondrea participated in a mediation conference with FCS on August 3. The FCS mediator, Kathy Lang, met with Vincent and Dondrea, made collateral contacts with various therapists who worked

with members of the family, reviewed information from Child Protective Services and the agency supervising Dondrea's visits with the children, and interviewed Kyle and Jacob.

On August 31, Dondrea made an ex parte request that the court return custody of the children to her. The court declined to grant a change in custody on an ex parte basis and instead set a hearing in October for both the custody and telephone contact issues.

Lang provided a postmediation report to the court in which she recommended that Dondrea have supervised telephone contact with the children twice per week. Lang also recommended giving legal custody of Kyle and Jacob to Vincent because of "the parents' inability to effectively communicate with each [other], much less collaboratively make decisions, the mother's inability to honor the Court regarding distributing the FCS report to the therapists, her reported resistance in consenting to the children's therapy, and concerns about her treatment of the children."

The court held an evidentiary hearing in October. During the hearing, the court heard testimony from Vincent, Dondrea, Lang, and Julie Taylor, an FCS mediator that met with Vincent and Dondrea in 2009. At the conclusion of the hearing, the court adopted Lang's FCS report, denied Dondrea's request for a custody evaluation, granted sole legal custody and primary physical custody to Vincent, and reduced Dondrea's telephone contact with the children to twice per week.

In November, Dondrea requested a new trial on the matters that were heard in October. At the hearing on her request, she argued that a new trial was necessary because the court treated the issues as a change of custody rather than a move away and Vincent

made multiple representations to the court that could be proven false. The court denied the request for a new trial, finding that there was no legal basis for it.

At the same time as her request for a new trial, Dondrea made a peremptory challenge to disqualify the judge on the basis of bias. The family court denied the request, finding that it was untimely.

DISCUSSION

I. *Modification of Visitation*

Relying on *In re Marriage of LaMusga* (2004) 32 Cal.4th 1072 (*LaMusga*), Dondrea argues the family court erred when it limited her telephone visits with her children without a showing of changed circumstances. We disagree.

We review an order modifying child visitation for abuse of discretion. (*Montenegro v. Diaz* (2001) 26 Cal.4th 249, 255.) Under this deferential standard, we reverse only if no court reasonably could have concluded the challenged order advances the best interests of the children. (*In re Marriage of Burgess* (1996) 13 Cal.4th 25, 32 (*Burgess*).) To determine the best interests, the court is allowed the "widest discretion." (Fam. Code, § 3040; see also *Hue v. Pickford* (1950) 96 Cal.App.2d 766, 770.) (Undesignated statutory references are to the Family Code.) The court's determination will be disturbed only if its order exceeds the bounds of reason. (*In re Stephanie M.* (1994) 7 Cal.4th 295, 318-319.)

Dondrea's reliance on *LaMusga* is misplaced. In that case, the court examined the "changed circumstance rule" in the context of a move away and set forth factors that the family court should consider when deciding whether to modify a custody order based on the custodial parent's request to relocate the children's residence. (*LaMusga, supra*, 32

Cal.4th at pp. 1088-1089, 1101.) Here, Dondrea complains about a visitation issue, not a move away issue. Thus, we must apply the best interest test to determine whether the family court abused its discretion when it reduced Dondrea's telephone contact with the children.

Evidence in the record shows that Dondrea had a strained relationship with her children. Vincent reported that the children argued with Dondrea during their telephone calls and even Dondrea suggested that the calls should be supervised because one child used abusive language toward her. Relying on these factors, the FCS mediator recommended that Dondrea's telephone contact with the children should be limited to twice per week. Based on this evidence, we conclude the family court acted well within its discretion by adopting FCS's recommendation, which included an implicit finding that it was in the best interests of the children to limit their telephone contact with Dondrea.

II. *FCS Reports and Testimony*

A. Lang's Report

Dondrea argues the family court abused its discretion by adopting Lang's report because it contained statements that were contradicted by Lang's testimony and other evidence. We disagree.

"The report of a mediator in a custody case is 'evidence to be weighed with all other evidence' [Citations.]" (*In re Marriage of Slayton & Biggums-Slayton* (2001) 86 Cal.App.4th 653, 659.) We may not reevaluate or independently weigh the credibility of the evidence presented to the trial court. The trial court is the sole judge of the credibility of the witnesses and the weight of the evidence, and its decision with respect to the

evidence will not be disturbed on appeal. (*Primm v. Primm* (1956) 46 Cal.2d 690, 693, fn. 1; *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.)

In this case, the court had the benefit of determining the mediator's credibility based on seeing her testify in person at the hearing. During Lang's cross-examination, Dondrea's counsel extensively questioned her about her report and the alleged inaccuracies in it that Dondrea raises in this appeal. The trial court clearly determined that the mediator and her report provided credible evidence as to what course of action would be in the children's best interests in this situation. Based on this record, the trial court's conclusions do not exceed the bounds of reason. Therefore, the trial court's reliance on the mediator's report was not an abuse of discretion.

B. Taylor's Report and Testimony

Dondrea next argues the family court erred in considering Taylor's testimony and report. We conclude Dondrea forfeited the issue on appeal.

As we discussed in the prior appeal, in November 2009, Vincent and Dondrea participated in FCS mediation with Taylor, who subsequently provided a report to the court recommending that Vincent have primary physical custody of the children and that Dondrea have supervised visits with them. (*In re Marriage of Garcia, supra*, D057115, D057776.) Taylor did not testify at the hearing that was the subject of the prior appeal, but did testify about her report at the October hearing.

Dondrea's theory is that the court should not have considered Taylor's testimony and report because Taylor had no involvement in the case after her November 2009 report

and that report was already considered by the family court in a January hearing. Yet, Dondrea called Taylor to testify at the October hearing and questioned her extensively about her report. Setting aside possible application of the invited error doctrine for Dondrea having called Taylor as a witness and eliciting testimony regarding the report (see *Mesecher v. County of San Diego* (1992) 9 Cal.App.4th 1677, 1685-1686), we conclude Dondrea's failure to object or otherwise raise the alleged error below constitutes a forfeiture of the issue on appeal. (See *North Coast Business Park v. Nielsen Construction Co.* (1993) 17 Cal.App.4th 22, 28-29.)

III. *Request for Custody Evaluation*

Dondrea argues the trial court abused its discretion in denying her request for a custody evaluation. We disagree.

As we explained in our prior decision, although a court may order a custody evaluation, there is no authority requiring it to do so. (§ 3111 [stating "the court *may* appoint a child custody evaluator" (italics added)]; Evid. Code, § 730 [stating the court "*may* appoint one or more experts to investigate, to render a report as may be ordered by the court, and to testify as an expert" (italics added)].)

Here, at the time Dondrea made an ex parte request that the court return custody of the children to her, she also withdrew her request for a custody evaluator. However, she later renewed the request for an evaluator at the October hearing. After hearing extensive testimony from the parents and FCS mediators, the family court denied Dondrea's request for a custody evaluation, stating that it "just [did not] see the need [to put] the children through more types of issues with professionals other than what they have already had to

deal with." Thus, the court found it was not in the best interests of the children to perform a custody evaluation. Dondrea has not cited to and we have found no basis or authority requiring the family court to appoint a custody evaluator. Based on our review of the record, we find no abuse of discretion in the court's ruling.

IV. *Change in Legal Custody*

Dondrea next argues the trial court erred by granting legal custody of the children to Vincent because that issue was not before the court and the parents were not afforded an opportunity to mediate it. We disagree.

"An order for joint custody 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." (§ 3087.) "If it appears on the face of a petition, application, or other pleading to obtain or modify a temporary or permanent custody or visitation order that custody, visitation, or both are contested, the court shall set the contested issues for mediation." (§ 3170.) The mediation must be set "before or concurrent with the setting of the matter for hearing." (§ 3175.) "[T]he failure to set the dispute for mediation in the conciliation court is a bar to a hearing on all custody or visitation disputes. [Citations.]" (*Hoversten v. Superior Court* (1999) 74 Cal.App.4th 636, 643.)

Here, Dondrea correctly points out that the parties did not raise the issue of legal custody. The record shows that Vincent requested that the court reduce Dondrea's telephone contact with the children. As a result, the court referred the parties to mediation, which occurred on August 3. For reasons not disclosed in the record, Lang evaluated legal

custody at the mediation and thereafter recommended to the court that Vincent have sole legal custody because of "the parents' inability to effectively communicate with each [other], much less collaboratively make decisions, the mother's inability to honor the Court regarding distributing the FCS report to the therapists, her reported resistance in consenting to the children's therapy, and concerns about her treatment of the children." There is nothing in the record to show that Dondrea objected at the mediation regarding Lang's consideration of legal custody.

After the mediation, Dondrea requested that the court return *physical custody* to her. The court set a hearing in October for both the custody and telephone contact issues. At that evidentiary hearing, Dondrea's counsel had the opportunity to and did question Lang about her recommendation concerning legal custody. It was only after the evidentiary hearing and reviewing Lang's report that the family court followed Lang's recommendation and granted Vincent sole legal custody. The family court found it was in the children's best interests to grant Vincent sole legal custody, concluding that it "just [did not] see how the[] parties can reach agreements in reasonable time frames for their children."

In this case, the mediator erred by evaluating legal custody when the parties and the court did not request it. The family court then compounded that error by proceeding to evaluate legal custody based on its mistaken belief that Dondrea raised the issue. Despite these errors, Dondrea must show prejudice to warrant reversal. In evaluating the effect of any errors, we are governed by article VI, section 13 of the California Constitution, which precludes reversal unless "the error complained of has resulted in a miscarriage of justice." (See *Cassim v. Allstate Ins. Co.* (2004) 33 Cal.4th 780, 800-802.) A "miscarriage of

justice" occurs when it appears there is a reasonable probability that the appealing party would have realized a more favorable result in the absence of error. (*Id.* at p. 800.) Under *Cassim*, we are required to examine "'each individual case to determine whether prejudice actually occurred in light of the entire record.'" (*Id.* at pp. 801-802.) Dondrea has the burden of showing that the error resulted in a miscarriage of justice. (*County of Los Angeles v. Nobel Ins. Co.* (2000) 84 Cal.App.4th 939, 945.)

The record in this case shows that there was no prejudice because legal custody was in fact mediated, the parties had an opportunity to question the mediator about her recommendation, and the court made its decision only after hearing extensive testimony and considering the mediators report. Reversal in this case would elevate form over substance because the correct procedure did occur, namely mediation followed by the court's consideration of the matter. The purpose of the rule requiring mediation is to allow the parties an opportunity to resolve issues prior to court intervention. The parties had that opportunity in this case. Dondrea has not pointed to and we have not found any reason why a further mediation would lead to a different result. Thus, we conclude Dondrea has failed to show any prejudice as a result of the court's alleged error.

V. *Denial of Motion for a New Trial*

Dondrea contends the family court abused its discretion in denying her request for a new trial. We disagree.

The trial court is accorded wide discretion in ruling on a motion for a new trial. However, "[i]n our review of [an] order *denying* a new trial, as distinguished from an order *granting* a new trial, we must fulfill our obligation of reviewing the entire record,

including the evidence, so as to make an independent determination as to whether the error was prejudicial." (*City of Los Angeles v. Decker* (1977) 18 Cal.3d 860, 872.) "Prejudice is required." (*Sherman v. Kinetic Concepts, Inc.* (1998) 67 Cal.App.4th 1152, 1161.)

Here, Dondrea claims a new trial should have been granted because the family court improperly referred to the case as a change in custody case, rather than a move away case. She refers to the family court's statement during the October hearing that although the court's prior January order had been referred to as a move away order, it was a custody order. At the hearing on Dondrea's request for a new trial, her counsel argued that the court's view of the case as a change in custody instead of a move away was problematic because if the case was a move away case, Dondrea should have been granted her request for a custody evaluation.

As an initial matter, we will not consider challenges regarding the family court's January order because, as we stated in the prior appeal, that order was a temporary custody order, which was not appealable. (*In re Marriage of Garcia, supra*, D057115, D057776.) Further, issues regarding the January order granting temporary custody of the children to Vincent and the February order making that arrangement permanent were raised in the prior appeal (*ibid.*) and at this point are untimely.

In regard to the October hearing, we find no prejudice as a result of the court's reference to the January order as a custody order. Whether the January order was a move away or custody order was irrelevant to the October proceedings. Further, as we explained above, Dondrea was not entitled to a custody evaluation and the court acted within its

discretion in denying her request. (*Ante*, Part III.) Accordingly, the court's denial of Dondrea's new trial motion was nonprejudicial.

VI. *Denial of Peremptory Challenge to Disqualify Judge*

Dondrea argues the court erred in denying her peremptory challenge to Judge Huguenor. We disagree.

Under Code of Civil Procedure section 170.6, "[a] judge . . . shall not try a civil or criminal action or special proceeding of any kind or character nor hear any matter therein that involves a contested issue of law or fact when it is established . . . that the judge . . . is prejudiced against a party or attorney or the interest of a party or attorney appearing in the action or proceeding." (Code Civ. Proc., § 170.6, subd. (a)(1).) Despite the generally liberal application of this section, courts strictly require motions be timely made. (See *Grant v. Superior Court* (2001) 90 Cal.App.4th 518, 527.)

As a general rule, challenges are permitted under Code of Civil Procedure section 170.6 any time before the commencement of a trial or hearing. (Code Civ. Proc., § 170.6, subd. (a)(2); *People v. Superior Court (Lavi)* (1993) 4 Cal.4th 1164, 1171.) However, nearly all cases fall under one of three exceptions to the general rule: (1) the master calendar rule; (2) the all-purpose assignment rule; and (3) the 10-day/5-day rule. A challenge can be made any time before trial only when none of the three exceptions apply. (*People v. Superior Court (Lavi)*, at p. 1185.)

An all-purpose assignment occurs when the assignment instantly pinpoints the judge likely to try the case and the judge is expected to process the case in its totality. (*People v. Superior Court (Lavi)*, *supra*, 4 Cal.4th at p. 1179.) "[I]f it is determined that

the assignment in this case is closely analogous to an all purpose assignment, then the all purpose assignment rule, which requires a litigant to file a disqualification motion 'within [15] days after notice of the all purpose assignment,' would apply." (*Id.* at p. 1178; § 170.6, subd. (a)(2).) Family law cases are "assigned randomly to a judicial officer for *all purposes.*" (Super. Ct. San Diego County, Local Rules, Family Law, rule 5.2.1 (italics added).)

The all-purpose assignment exception governed the timeliness of Dondrea's motion. Judge Huguenor has been managing this case since January, yet Dondrea did not file her challenge until November, which was well after the statutory deadline. Thus, the family court correctly denied the motion as untimely.

DISPOSITION

The orders are affirmed.

MCINTYRE, J.

WE CONCUR:

HUFFMAN, Acting P. J.

AARON, J.