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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

In re the Marriage of TIFFANY L. and
JOSHUA J. CANTOR.

TIFFANY L. CANTOR,

Respondent,

v.

JOSHUA J. CANTOR,

Appellant.

D059643

(Super. Ct. No. ED68022)

APPEAL from an order of the Superior Court of San Diego County, Evan P.

Kirvan, Judge. Affirmed.

Joshua J. Cantor, representing himself in propria persona, appeals from the family court's modification of a previous order concerning child custody. As we will explain, we find that Joshua¹ has not established that the family court abused its discretion in

¹ As is customary in family law cases, for the sake of clarity we will refer to the parties by their first names and intend no disrespect by doing so.

modifying the custody order to provide that he and his ex-wife, Tiffany L. Cantor, would have joint legal custody of their two children. Accordingly, we affirm the family court's order.

I

FACTUAL AND PROCEDURAL BACKGROUND

At the outset, we note that Joshua has not provided us with an adequate record to fully understand the factual or procedural background of the relevant custody proceedings. However, it appears that Joshua and Tiffany were previously married and have two children, born in 2001 and 2003.

Certain statements in the record lead us to believe that the marriage ended in approximately 2006; that in May 2007, the family court held a trial on the issue of custody; and that in December 2007, the family court issued an order giving sole legal and physical custody of the children to Joshua.

None of the family court's previous custody orders appear in the appellate record. Joshua contends that the family court previously entered a custody order, which he describes as containing "a Montenegro provision." By this phrase, we understand Joshua to be referring to the case of *Montenegro v. Diaz* (2001) 26 Cal.4th 249, 258 (*Montenegro*), which established that "a stipulated custody order is a final judicial custody determination for purposes of the changed circumstance rule only if there is a clear, affirmative indication the parties intended such a result." Joshua provides conflicting information about whether the custody order he refers to was entered in May

2007 or May 2008, and he provides no information about the content of the order, or the reasons that it was entered, other than to describe it as a "permanent" order.

We also gather from the record that for approximately two years, Tiffany was allowed only supervised visitation with the children. The reason for the supervised visitation is not clear from the record. We also have pieced together from statements in the record that in June 2010, Tiffany's visitation with the children was changed to unsupervised visitation on alternate weekends. The reason for the change from supervised to unsupervised visitation is also not clear.

On September 30, 2010, Tiffany filed an order to show cause in which she sought a modification of the existing custody order, explaining that the unsupervised weekend visits with the children were very successful, with the children wanting to spend more time with her, and that "[i]t was the court's opinion at the May 25, 2010 hearing [presumably concerning the change to unsupervised visitation], I had made leaps and bounds in turning my life around" Among other things, Tiffany requested that she be given joint physical and legal custody, that the court allow her to spend time with the children on specific holidays, and that there no longer be any restriction on her presence at the children's school. Joshua responded by opposing Tiffany's order to show cause.

Prior to the hearing on the order to show cause, Joshua and Tiffany participated in a conference with a Family Court Services (FCS) mediator. The parties were unable to reach an agreement, but the FCS mediator made a recommendation that, among other things, (1) Joshua should continue to have sole legal custody; (2) primary physical custody should remain with Joshua, with Tiffany's visitation schedule continuing

substantially as before; (3) Tiffany should have access to regularly scheduled phone calls with the children; and (4) a specific schedule for visitation on holidays should be ordered.

Although the corresponding order is not in the record, the family court apparently ruled on December 28, 2010, that it would temporarily adopt the FCS mediator's recommendations as an order of the court pending a subsequent evidentiary hearing.

The family court held an evidentiary hearing on April 4, 2011, at which Tiffany and the FCS mediator testified. At the close of the hearing, the family court ordered that Tiffany and Joshua would have joint legal custody of the children, as a modification to the previous order awarding sole legal custody to Joshua. The family court explained its ruling by stating, "I think that there is a reason [Tiffany] had less contact with the children, and why there was supervised contact and a lot of orders. I think she made progress. . . . So far there is progress." In addition, among other things, the family court maintained primary physical custody with Joshua, but increased Tiffany's visitation by adding Sunday night to the visitation that was already occurring on alternate weekends. Joshua filed a notice of appeal.

II

DISCUSSION

On appeal, Joshua contends that the family court erred in modifying the existing custody order to award joint legal custody to him and Tiffany. We consider Joshua's arguments after setting forth the applicable standard of review.

A. *Standard of Review*

"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'" (*Montenegro, supra*, 26 Cal.4th at p. 255), and any factual findings are reviewed under a substantial evidence standard. (*In re Marriage of Burgess* (1996) 13 Cal.4th 25, 32 (*Burgess*)). To the extent Joshua raises an argument concerning the appropriate legal standard to apply in ruling on a request to modify a custody order, that issue of law is subject to our de novo review. (*Enrique M. v. Angelina V.* (2004) 121 Cal.App.4th 1371, 1378.)

B. *Joshua's Argument Regarding Changed Circumstances Lacks Merit*

Joshua's main argument is that the evidence presented to the family court did not establish the change in circumstances necessary to obtain modification of a final custody order.

As a first step to analyzing Joshua's argument, we turn to the relevant legal principles. When a final or permanent custody order is in place, a court may modify the custody order only upon finding changed circumstances. (*Burchard v. Garay* (1986) 42 Cal.3d 531, 535 (*Burchard*)). "Under the changed circumstance rule, custody modification is appropriate only if the parent seeking modification demonstrates 'a significant change of circumstances' indicating that a different custody arrangement would be in the child's best interest." (*In re Marriage of Brown & Yana* (2006) 37 Cal.4th 947, 956 (*Brown & Yana*)). The changed-circumstance rule "provides, in

essence, that once it has been established that a particular custodial arrangement is in the best interests of the child, the court need not reexamine that question. Instead, it should preserve the established mode of custody unless some significant change in circumstances indicates that a different arrangement would be in the child's best interest. The rule thus fosters the dual goals of judicial economy and protecting stable custody arrangements. [Citations.] [¶] "The change of circumstances standard is based on principles of res judicata.'" (*Burchard*, at p. 535.)

"[T]he changed circumstance rule applies 'whenever [final] custody has been established by judicial decree'" (*Montenegro, supra*, 26 Cal.4th at p. 256), or put another way, when there is a "final or permanent" custody order. (*Brown & Yana, supra*, 37 Cal.4th at p. 955.) Because Joshua has not provided us with an appellate record containing any of the previous custody orders, we cannot say whether the existing custody order, at the time of Tiffany's order to show cause, constituted a final or permanent custody order, which would require that any modification be subject to the changed circumstance rule. Joshua states that a previous custody order was "permanent" and contained a "Montenegro provision," but no such order appears in the appellate record. Therefore, Joshua has failed to provide an appellate record that establishes the fundamental predicate for his legal argument, namely that the changed circumstance rule applies here.

However, as we will discuss, assuming for the purposes of our analysis that a final or permanent custody order was in place at the time of Tiffany's order to show cause, and

that the changed circumstance rule applies, Joshua has not established that the family court abused its discretion in modifying the custody order.

Joshua acknowledges that the family court's statement that Tiffany "made progress" could be interpreted as a finding of changed circumstances concerning her improved fitness as a parent, but he argues that such a finding would not be legally sufficient to justify an application of the changed circumstances rule because Tiffany did not meet the purportedly additional requirement of establishing that it would be *detrimental* to the children if sole legal custody was maintained with Joshua. According to Joshua, when, as here, a sole custody order is in place, a showing of changed circumstances "require[s] a demonstration that the children are suffering detriment as a result of the sole custody order." Apparently quoting from materials he located on the Internet, Joshua argues that "[a] non-custodial parent who wishes to modify custody against a sole-custody order must make a showing of specific detriment to the child"

The problem with Joshua's argument is that it relies on case law that applies only when the custodial parent plans to *move away* with the child. "In a 'move-away' case, a change of custody [from the custodial parent to the noncustodial parent] 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.'" (*Burgess, supra*, 13 Cal.4th at p. 38, italics added; see also *Brown & Yana, supra*, 37 Cal.4th at pp. 957-958; *In re Marriage of LaMusga* (2004) 32 Cal.4th

1072, 1088-1089, 1094.) This standard follows from the fact that "[i]t has long been established that, under Family Code section 7501, the 'general rule [is that] a parent having child custody is entitled to change residence unless the move is *detrimental* to the child.'" (*Burgess, supra*, 13 Cal.4th at p. 35, italics added; see also *Brown & Yana*, at p. 957 [Fam. Code, § 7501 "unambiguously provides the right [of a custodial parent to relocate with a child] is not absolute and may be curtailed if the move would result in detriment to the child"].) Here, in contrast, where Tiffany did not seek a modification of custody based on a planned move-away, she was only required to establish "some significant change in circumstances indicat[ing] that a different arrangement would be in the child's best interest." (*Burchard, supra*, 42 Cal.3d at p. 535.)

Joshua also argues that even if improved parental fitness is sufficient to constitute changed circumstances, the evidence was not sufficient to support a finding that Tiffany's parental fitness had improved. As an initial matter, we note that Joshua focuses on whether Tiffany established changed circumstances between the June 2010 order allowing unsupervised visitation and the time of the family court's order modifying custody in April 2011. However, Joshua focuses on the wrong time frame. The proper inquiry in a changed circumstance analysis is whether there has been a change of circumstance between the date of the final or permanent custody order currently in force and the present date.

We are hampered in our ability to review whether substantial evidence supports a finding of improved parental fitness on the part of Tiffany sufficient to constitute changed circumstances because Joshua has not provided us with an appellate record that

includes the previous custody orders or other items that explain the circumstances under which Joshua was originally awarded sole legal custody. Without those facts, we cannot evaluate whether circumstances have changed.

"Where the appellant challenges the sufficiency of the evidence, the reviewing court must start with the presumption that the record contains evidence sufficient to support the judgment; it is the appellant's burden to demonstrate otherwise." (*Baxter Healthcare Corp. v. Denton* (2004) 120 Cal.App.4th 333, 368.) Appellant's burden includes providing the reviewing court with an adequate record to determine the sufficiency of the evidence. (*Aguilar v. Avis Rent A Car System, Inc.* (1999) 21 Cal.4th 121, 132; *Ballard v. Uribe* (1986) 41 Cal.3d 564, 574.) Joshua has not met his burden to provide us with an adequate record. Accordingly, we reject his contention that insufficient evidence supports a finding of changed of circumstances. (*Gee v. American Realty & Construction, Inc.* (2002) 99 Cal.App.4th 1412, 1416 ["if the record is inadequate for meaningful review, the appellant defaults and the decision of the trial court should be affirmed"]; *Hernandez v. California Hospital Medical Center* (2000) 78 Cal.App.4th 498, 502 ["Failure to provide an adequate record on an issue requires that the issue be resolved against plaintiff."].)

C. *The Family Court Did Not Abuse Its Discretion by Rejecting the Recommendation of the FCS Mediator*

Joshua contends that the family court abused its discretion because it did not follow the recommendation of the FCS mediator that sole legal custody should remain with Joshua. This argument lacks merit.

Regarding the issue of legal custody, the FCS mediator recommended that sole legal custody remain with Joshua, because "due to conflict and the lack of communication between the parents it does not appear they would be able to work together on making decisions." The recommendation of an FCS mediator is not something that the family court is bound to follow. Family Code section 3183, subdivision (a) states that the mediator may make a "recommendation" regarding custody and visitation. Such recommendations are to be considered, but "it is the court, not the mediator, that bears the responsibility to decide custody." (*In re Marriage of Rosson* (1986) 178 Cal.App.3d 1094, 1104.)

Here, the family court was well within its discretion, after considering the relevant evidence, to reject the FCS mediator's conclusion that the current level of conflict between the parties was a sufficient basis to continue sole legal custody with Joshua. The testimony in the family court showed that the parties were, to some extent, able to communicate and cooperate about matters related to the children. Further, the family court ordered the parties to attend coparenting classes, which would further their ability to effectively exercise joint legal custody. Accordingly, Joshua has not established an abuse of discretion.

DISPOSITION

The family court's order awarding joint legal custody to Joshua and Tiffany is affirmed.

IRION, J.

WE CONCUR:

MCDONALD, Acting P. J.

AARON, J.