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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

In re the Marriage of NICOLE E. and
DERREN L. GEIGER.

NICOLE E. GAYAN,

Appellant,

v.

DERREN L. GEIGER,

Respondent.

D061114

(Super. Ct. No. D497487)

APPEAL from an order of the Superior Court of San Diego County, Maureen F. Hallahan, Judge. Affirmed.

Nicole E. Gayan and her ex-husband Derren L. Geiger have lived in different states since 2006 when they entered into a marital settlement agreement (MSA). Under the MSA, they have joint legal and physical custody of their two children. The children originally lived with Gayan during the school year and with Geiger during school breaks.

Gayan appeals an order reversing the parenting schedule based on a substantial change of circumstances.

Gayan contends this is a so-called "move-away" case because the children are being removed from her primary custody, and thus the family court erred by applying a changed circumstances standard of proof rather than requiring a showing of detriment. We conclude this is not a move-away case, but even if it could be characterized as such, no showing of detriment is required when, as here, the parents have joint physical custody and the modification request is for a change in the parenting schedule. We also find no merit to Gayan's contentions reversal is required because the court abused its discretion by finding the modification was in the children's best interests, and by excluding evidence in rebuttal to the opinions of a court-appointed custody evaluator. We affirm the order.

FACTUAL AND PROCEDURAL BACKGROUND¹

The parties married in 2000, and they lived in Illinois. Their daughter Tanner was born in 2000 and their son Derren Jr. (Derren) was born in 2002. The family moved to California in early 2006 for Geiger's job, and shortly thereafter the parties separated.

A November 2006 judgment of dissolution incorporates the parties' MSA, under which they have joint legal and physical custody of the children. The parties agreed Gayan and the children would return to Illinois. The MSA includes a parenting schedule

¹ As the appellate record does not contain the judgment of dissolution and attached MSA and other relevant documents, we have taken judicial notice of the superior court file on our own motion. (Evid. Code, §§ 452, subd. (d), 459, subd. (a).)

under which the children lived with Gayan during the school year, and with Geiger during most of the summer break and other school holidays. The MSA gives the Superior Court of San Diego County continuing jurisdiction over custody and visitation.

In February 2011 Geiger filed an order to show cause (OSC) to reverse the parenting schedule. One of Geiger's chief complaints was Gayan's alleged lack of attention to Derren's medical needs. Geiger's declaration states as follows: Derren had amblyopia of the left eye and treatment included eye exercises, and daily prescription eye drops to and patching of the right eye, which made the left eye work harder. Twice, Gayan failed to pack the eye drops when Derren went to California. After the latest incident, Geiger tried to reach Gayan, but she did not return his messages for two days, which required him to locate Derren's doctor in Illinois to get the prescription transferred to California. Derren reported to Geiger that Gayan frequently forgot to administer the eye drops, and he had to remind her. Time was of the essence because Derren had turned eight years old in May 2010 and, according to his doctor, once a child reaches that age "it is less likely that the brain can be taught to strengthen the drifting eye, causing the eye to permanently drift."

Geiger's declaration also states Derren had a dermatological disorder that caused wart-like bumps on his body. The condition required regular visits to the dermatologist for removal of the bumps, and when Derren arrived in California for his summer 2010 visit, he had 14 large bumps on his arm that Gayan had left untreated. Geiger took Derren to the dermatologist twice that summer, and advised Gayan that follow-up care was required in Illinois. Instead of taking Derren to a dermatologist, Gayan took him to a

general practitioner after she "picked at one of his bumps and it wouldn't stop bleeding." During the Thanksgiving visit, Geiger took Derren to a dermatologist. Geiger told Gayan that Derren needed follow-up care in Illinois, but she did not arrange for the care, and at the winter visit Geiger again took Derren to a dermatologist.²

In May 2011 Geiger filed a supplemental declaration. It stated he had spoken with Derren's ophthalmologist in Illinois, Dr. Gregory Pacelli, who reported that while Gayan "seemed to show concern for Derren's treatment, it was clear that Derren had not received his eye drops regularly, and/or that his eye had not been patched" (italics omitted) as frequently as recommended. Dr. Pacelli had released Derren from treatment because he had "surpassed the age where improvements to his vision are likely." Geiger had scheduled an appointment in June 2011 for Derren at the Shiley Eye Clinic, at the University of California, San Diego, which Geiger claimed "is world-renowned for [its] pediatric eye expertise."³

Gayan's June 2011 responsive declaration states she consistently took Derren to appointments with Dr. Pacelli and she always made sure Derren's eye was patched, but because he had difficulty reading with the patch on in first and second grades, Dr. Pacelli okayed removal of the patch during reading. She conceded she forgot to pack the eye drops for the Thanksgiving visit, but she did pack them for the winter visit. She asked

² Additionally, Geiger claimed the children's school performances had declined. The evidence, however, did not support this claim and the family court impliedly rejected it.

³ Gayan does not raise any hearsay issue as to Geiger's statements.

Dr. Pacelli if missing an occasional dose of the eye drops would have caused Darren a problem, and he said no and despite consistent treatment Derren's eye condition had not improved over the years.

Gayan's declaration also states she took Derren to his general doctor about his skin condition before his scheduled trip to California. The doctor referred Derren to a dermatologist, but an appointment was not available before the visit. Gayan asked Geiger to take him to a dermatologist in California and "he did not seem to have a problem with that." Derren did have dermatology treatments in Illinois when he returned home, and the condition had cleared up. She denied picking at one of his bumps, and claimed Derren told her his father "popped" it.

Gayan's declaration also described the children's lives with her in Illinois. Derren played basketball and baseball. Tanner played basketball and softball, took riding lessons, and was a member of the band. Both children were members of a swim team and Gayan helped with coaching. The family routinely had dinner together, and went hiking and camping. The family regularly attended church and Sunday school, and Tanner belonged to a church youth group and she was an acolyte. When Gayan trained for runs, the children rode alongside her on their bikes and Tanner participated in a children's charity run. Gayan has a flexible work schedule so she can attend the children's school and extracurricular activities, and there were many family members near the children in Illinois.

Lynn Waldman, a mediator with Family Court Services, issued a report in June 2011. Waldman interviewed the parents, but not the children. She recommended the

continuation of Gayan as the primary custodial parent, because the children "most likely have developed a routine in her care and roots in the community where they live."

Waldman wrote, "[a]lthough the father has stated many concerns regarding the mother's care for [the] children there does not appear to be a reason for change in their primary residence at this time." Waldman noted that most of Geiger's complaints appeared to have occurred in 2008, but he allowed the children to remain with Gayan.⁴

Waldman also noted that insofar as Derren's eye condition was concerned, Geiger "has not presented any information regarding whether or not Derren's needs have been met." Gayan reported that Dr. Pacelli discontinued treatment. Geiger reported he was unsure of whether he agreed with the discontinuation of treatment, and he planned to take Derren to the Shiley Eye Center that summer. Waldman recommended that Derren have an ophthalmology assessment by a jointly chosen doctor, and that the parents follow his or her recommendations. Waldman was concerned about the parents' inability to communicate in the best interests of the children, and she recommended that the parents participate in counseling.

After Waldman issued her report, Geiger filed a reply declaration. It states that Dr. Shira Robbins had evaluated Derren at the Shiley Eye Center, and she was extremely concerned with diminished vision in his left eye. She wrote a new prescription for him

⁴ In 2008 Geiger petitioned for a change of primary physical custody based on an Illinois police report that showed Gayan lured an ex-boyfriend to her home so her brother and current husband could assault him. After receiving assurances from Gayan, Geiger took the matter off calendar without serving her. The children were with Geiger when the incident occurred, and he did not notify child protective services in Illinois. The record does not suggest the family court considered the incident in these proceedings.

and set up a treatment schedule, which he had begun. Geiger believed a change in primary custody was Derren's "last real chance to correct a very potentially disabling visual condition, which could affect him throughout the rest of his life." Further, Gayan had only recently begun taking Derren to a dermatologist.

The hearing began in late June 2011. After the testimony of Waldman and the parties, the court appointed a custody evaluator, John C. Parker IV, Ph.D. (Fam. Code, § 3111.)⁵ The court instructed Dr. Parker to interview the children and the parties, and to assess the children's view of "their medical needs, school progress and tutoring," as well as "the atmosphere in mother's home and father's home, the care of them by mother and father, the children's attachments and connects [*sic*] to friends and family in Ottawa, Illinois, and the children's attachments and connects [*sic*] in San Diego."

Dr. Parker's report states, "both children enjoy a strong bond and attachment with both parents," and "the children are bright, verbal, well socialized, socially adept, and socially outgoing." It was evident, however, that they were "experiencing psychological distress and tension" because they sense the parents dislike each other and communicate poorly. The report explains that Tanner was "somewhat parentified," meaning she was cautious in sharing information with her parents. Dr. Parker agreed with Waldman that the principal problem was the parents' inability to communicate effectively for the children's sake.

⁵ Further statutory references are also to the Family Code unless otherwise specified.

Further, the report states "Derren . . . clearly is experiencing tension and distress with regard to his medical treatment and/or medical follow-up, particularly with regard to his vision therapy." Derren understood that Dr. Pacelli, whom he referred to as the "no" doctor, discontinued treatment because no benefit was likely to occur, and Dr. Robbins, whom he referred to as the "yes" doctor, believed there was an opportunity for further treatment and improvement. The report explains, "Derren . . . feels somewhat confused and distressed with regard to his perception that his mom sometimes forgets about vision treatment. Derren . . . indicates he sometimes needs to remind her with regard to his vision treatment. Derren . . . is particularly distressed with regard to his mother getting caught up in the flurry of the pressures of the routine of the moment, and simply not making time to prioritize his treatment, especially when he has reminded her of [the] same. Derren . . . clearly expressed . . . feeling more cared for and safer with his father. Derren . . . indicates his father never forgets. Derren . . . is adamantly expressing a preference to follow the direction of the yes doctor. He optimistically views the yes doctor as being able to assist him in improving his vision. Derren . . . reports currently observing improvement when he removes his patch."

In closing, Dr. Parker wrote that both parents "offer significant benefits and skill sets" to the children. It was evident from the children, however, that "the organizational capacity and capacity for sustained effort with regard to accommodating and supporting their academic, social and medical needs leads them to be comfortable and feel safe with father independent of the . . . greater activity resources available in urban San Diego. They do however enjoy and favor these benefits too. Likewise, mother's more laissez-

faire and relaxed parenting style may, particularly within the context of more rural Ott[a]wa, and fabulous access to family and extended family, lead the children to prefer her companionship during less structured time."

On the last day of the hearing, the court struck a declaration Gayan had filed in response to Dr. Parker's report. Further, the court did not allow Gayan to testify in rebuttal to the report. The court did allow the parties to examine Dr. Parker. He testified that Derren expressed frustration over his math grade. Because of his eye condition, he sometimes could not see whether there was a plus or a times symbol before a number. The court accepted Derren's records from the Shiley Eye Center, which showed improved vision in his left eye after recent patch treatment.

As to the parents, Dr. Parker testified that "mother tends to underreport for fear of criticism, and father appears to overreport for fear that the children will be harmed." Gayan tended to react to problems when they arose, and Geiger tended to be proactive. When Geiger proposed tutoring and psychological counseling for the children, Gayan initially opposed both measures. Dr. Parker testified that Gayan's refusal to agree to these measures until the OSC was pending demonstrated her tendency to be reactive rather than proactive. He characterized Geiger as more stable and reliable, and Gayan as "do[ing] less well." He also believed the children's scholastic performance would suffer in the future if they continued to be distressed and tense. He also believed that if the parenting schedule was reversed, the children would handle it well because they already spent substantial time in California.

The court found the OSC was for a change in primary custody, and thus a changed circumstances standard applied. It rejected Gayan's argument this was a move-away case, and thus it determined Geiger was not required to show detriment to the children absent a move to California.

The court reversed the parenting schedule, relying principally on Dr. Parker's report. The court determined Derren "has a significant medical condition that needs to be addressed . . . in a consistent and appropriate manner," and Gayan "is not as good at follow-through with either the protocol set forth with the medical conditions of Darren and other issues." The court also found Tanner "is greatly influenced by her mother," and "is attempting to meet the emotional needs of the parents."

DISCUSSION

I

Applicable Legal Standard

Gayan contends the family court erred by applying a changed circumstances standard of proof. She asserts the proposed relocation of the children to California during the school year made this a move-away case because of the children's interest in stability in their living arrangements, and thus Geiger was required to show the status quo was *detrimental* to them. The appropriate legal standard is an issue of law we review independently. (*Enrique M. v. Angelina V.* (2004) 121 Cal.App.4th 1371, 1378.)

When the family court makes an initial permanent custody order, a best interest standard applies. The court "must look to *all the circumstances* bearing on the best interest of the minor child." (*In re Marriage of Burgess* (1996) 13 Cal.4th 25, 31-32

(*Burgess*.) When the court considers a request for modification of a permanent custody order, a "variation on the best interest standard, known as the changed circumstance rule," typically applies. (*In re Marriage of Brown and Yana* (2006) 37 Cal.4th 947, 956.) "Under the changed circumstances 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. [Citation.] Not only does this serve to protect the weighty interest in stable custody arrangements, but it also fosters judicial economy." (*Ibid.*)

There are two types of move-away cases, depending on the nature of the parents' physical custody of the children. A parent with *sole* physical custody "has a right to change the residence of the child, subject to the power of the court to restrain a removal that would prejudice the rights or welfare of the child." (§ 7501, subd. (a).) This rule codifies the holding in *Burgess, supra*, 13 Cal.4th 25, as the public policy in California. (§ 7501, subd. (b).) In *Burgess*, the court held that a parent with sole physical custody, who in good faith seeks to relocate, has no burden to prove the relocation is "necessary." (*Burgess*, at p. 37.) Rather, the noncustodial parent seeking a change of custody based on the children's proposed relocation has the burden of proving a substantial change in circumstances. (*Id.* at pp. 37-38.) In *In re Marriage of LaMusga* (2004) 32 Cal.4th 1072, 1078 (*LaMusga*), the court emphasized that the "noncustodial parent bears the initial burden of showing that the proposed relocation of the children's residence would cause *detriment* to the children, requiring a reevaluation of the children's custody." (Italics added.)

Gayan relies on *Burgess* and *LaMusga*. A different rule attains, however, in a move-away case when the parents have *joint* physical custody, and the requested modification alters the parenting schedule, but not the joint physical custody arrangement.⁶ In such a case, even changed circumstances are not required. The *Burgess* court cautioned that a "different analysis may be required when parents *share* joint physical custody of the minor children under an existing order and in fact, and one parent seeks to relocate with the minor children. In such cases, the custody order '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.' [Citation.] The trial court must determine de novo what arrangement for primary custody is in the *best interest* of the minor children." (*Burgess*, *supra*, 13 Cal.4th at p. 40, fn. 12, italics added; § 3087 ["An order for joint custody may be modified . . . 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."].)

Appellate courts have uniformly held detriment is not at issue in a joint custody move-away case. For instance, *Niko v. Foreman* (2006) 144 Cal.App.4th 344, 363-364, explains: "When the parents have joint physical custody, modification of the coparenting arrangements is not a change of custody requiring change of circumstances. Instead, the

⁶ "Equal division of a child's time between the parents is not the hallmark of joint custody." (*In re Marriage of Birnbaum* (1989) 211 Cal.App.3d 1508, 1515.) The "primary focus must be what is best for the child, not what is best for the parents." (*Ibid.*) " 'Joint physical custody' means that each of the parents shall have significant periods of physical custody. Joint physical custody shall be shared by the parents in such a way so as to assure a child of frequent and continuing contact with both parents." (§ 3004.)

trial court has wide discretion to choose a parenting plan that is in the *best interest* of the child. [Citation.] The joint custody moving parent does not have the presumptive right to change the child's residence, and bears no burden of proving the move is essential or imperative. [Citation.] Nor does the opposing nonmovant parent bear the burden of showing substantial changed circumstances require a change in custody or that the move will be detrimental to the child. [¶] The value in preserving an established custodial arrangement and maintaining stability in a child's life is obvious. But when the status quo is no longer viable and parents have joint custody, a court must review de novo the best interest of the child. It can fashion a new time-share arrangement for the parents." (See also *Jacob A. v. C.H.* (2011) 196 Cal.App.4th 1591, 1599-1600 (*Jacob A.*); *Enrique M. v. Angelina V.* (2004) 121 Cal.App.4th 1371, 1381-1382; *In re Marriage of Birnbaum, supra*, 211 Cal.App.3d at p. 1510.)⁷

We agree with the family court that this is not a move-away case. In the typical move-away case, a parent with joint custody intends to relocate and the relocation would make it impossible or imprudent to maintain the original parenting schedule. Here, the parents were living in different states when the MSA was entered into and there was no *inherent* reason the original parenting schedule could not be maintained. Rather, Geiger sought a reversal of the schedule on the ground Derren's medical conditions and Gayan's alleged lack of attention to them constituted a substantial change in circumstances.

⁷ Gayan's opening brief ignores joint custody move-away cases. Her reply brief erroneously states that in *Nico v. Foreman, supra*, 144 Cal.App.4th 344, "the issue of 'move away' was not discussed."

Moreover, even if the court had classified this as a move-away case, no showing of detriment was required. In that instance, the court presumably would have applied the best interest standard rather than the more stringent changed circumstance rule, arguably a worse result for Gayan. A best interest standard applies in joint custody move-away cases, even when a significant change in the parenting schedule is required because of the distance between the parents' homes. (See, e.g., *Niko v. Foreman*, *supra*, 144 Cal.App.4th at pp. 348-349 [equal time-sharing substantially modified after child's relocation out-of-state]; *Jacob A.*, *supra*, 196 Cal.App.4th at pp. 1599-1600 [same].)

In arguing the court erred by not applying a detriment standard, Gayan relies on secondary sources, and even poetry, on the importance of stability in children's living arrangements. Indeed, the "decision to move a child away from one of his or her parents is one of the most difficult decisions a judge will ever have to make." (*Jacob A.*, *supra*, 196 Cal.App.4th at p. 1603.) Here, the family court described this as "one of the most difficult cases that I have confronted on the bench." It remains, however, that in addressing Gayan's argument the court was required to follow established legal precedent. We find no error in the court's application of a changed circumstances standard.⁸

⁸ Given our holding, we are not required to consider Geiger's contention the evidence supports a finding of detriment.

II

Exercise of Discretion

Gayan also contends that under any standard, the family court's ruling constitutes abuse of discretion. "The standard of appellate review of custody and visitation orders is the deferential abuse of discretion test. [Citation.] The precise measure is whether the trial court could have reasonably concluded that the order in question advanced the 'best interest' of the child." (*Burgess, supra*, 13 Cal.4th at p. 32.) "Although precise definition is difficult, it is generally accepted that the appropriate test of abuse of discretion is whether or not the trial court exceeded the bounds of reason, all of the circumstances before it being considered." (*In re Marriage of Connolly* (1979) 23 Cal.3d 590, 598.)

Gayan focuses solely on the children's interest in stability. Her attorney violates basic principles of appellate practice by citing only the evidence favorable to her, and ignoring the evidence in support of the court's ruling. Gayan's briefing ignores Derren's medical conditions and Dr. Parker's findings. An appellant's opening brief shall "[p]rovide a summary of the significant facts" (Cal. Rules of Court, rule 8.204(a)(2)(C).) "[A]n attack on the evidence without a fair statement of the evidence is entitled to no consideration when it is apparent that a substantial amount of evidence was received on behalf of the respondent. [Citation.] Thus, appellants who challenge the decision of the trial court based upon the absence of substantial evidence to support it 'are required to set forth in their brief *all* the material evidence on the point and *not merely their own evidence*. Unless this is done the error is deemed waived." "

(*Nwosu v. Uba* (2004) 122 Cal.App.4th 1229, 1246; *In re Marriage of Davenport* (2011) 194 Cal.App.4th 1507, 1531.)

In any event, we find no abuse of discretion. "[W]e are bound by the established rules of appellate review that all factual matters will be viewed most favorably to the prevailing party [citations] and in support of the judgment [citation]. All issues of credibility are likewise within the province of the trier of fact." (*Catherine D. v. Dennis B.* (1990) 220 Cal.App.3d 922, 931.) "'The trial judge, having heard the evidence, observed the witnesses, their demeanor, attitude, candor or lack of candor, is best qualified to pass upon and determine the factual issues presented by their testimony. This is especially true where the custody of minor children is involved.'" (*Ibid.*)

We conclude the evidence permitted the family court to reasonably find changed circumstances based on Derren's medical conditions, particularly his amblyopia, the effect of the amblyopia on him, the potential that further treatment may succeed or at least improve the condition, and the greater likelihood that Geiger would follow through with ensuring treatment. The amblyopia threatened Derren's vision and his emotional well-being, and given his age there was limited time within which additional treatment might be effective. Dr. Robbins of the Shiley Eye Institute was concerned about Derren's loss of vision, she offered further treatment, and there was some early indication of improvement. After interviewing Derren, Dr. Parker wrote in his report that Derren was "somewhat confused and distressed" because his mother sometimes forgot his treatments. Derren felt "more cared for and safer" with his father, who never forgot treatments, and

Dr. Parker found Geiger to be more stable and reliable than Gayan. In the past, Gayan had not consistently provided Derren the treatment Dr. Pacelli prescribed.

As to Tanner, Dr. Parker determined she had become "somewhat parentified" and tried to protect her mother. While this is a weak ground for reversal of the parenting schedule as to Tanner, Gayan does not suggest the children should have been separated.

III

Evidentiary Rulings

Lastly, Gayan contends the family court violated her constitutional rights of due process by striking her declaration and excluding her testimony in rebuttal to Dr. Parker's report. Geiger counters that she waived appellate review of the constitutional issue by raising it for the first time on appeal. " 'Typically, constitutional issues not raised in earlier civil proceedings are waived on appeal.' " (*Neil S. v. Mary L.* (2011) 199 Cal.App.4th 240, 254.)

Gayan argues the forfeiture rule is inapplicable because a due process challenge would have been futile. She cites the court's comment before Dr. Parker's testimony that "no other testimony of either parent is going to be admissible today as they submitted their cases at the last hearing." " 'Reviewing courts have traditionally excused parties for failing to raise an issue at trial where an objection would have been futile or wholly unsupported by substantive law then in existence.' " (*K.C. Multimedia, Inc. v. Bank of America Technology & Operations, Inc.* (2009) 171 Cal.App.4th 939, 949.)

Assuming futility, we nonetheless find against Gayan. " 'No judgment shall be set aside . . . in any cause, on the ground of . . . the improper admission or rejection of

evidence . . . unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice.' (Cal. Const., art. VI, § 13.) Under this standard, the appellant bears the burden to show it is reasonably probable he or she would have received a more favorable result at trial had the error not occurred." (*Citizens for Open Government v. City of Lodi* (2012) 205 Cal.App.4th 296, 308.)

Gayan ignores her burden of showing prejudice, and thus her position lacks merit. She does not discuss the contents of her declaration or proposed testimony, or explain why it is likely she would have prevailed had her evidence been admitted. We decline Gayan's tacit request that we comb through the record in search of reversible error. "As a general rule, 'The reviewing court is not required to make an independent, unassisted study of the record in search of error or grounds to support the judgment.' [Citations.] It is the duty of counsel to refer the reviewing court to the portion of the record which supports appellant's contentions on appeal. [Citation.] If no citation 'is furnished on a particular point, the court may treat it as waived.' " (*Guthrey v. State of California* (1998) 63 Cal.App.4th 1108, 1115.)

DISPOSITION

The order is affirmed. Geiger is entitled to costs on appeal.

McCONNELL, P. J.

WE CONCUR:

BENKE, J.

IRION, J.