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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

In re the Marriage of THUAN D. NGO and
CHRISTINE P. NGUYEN.

THUAN D. NGO

Respondent

v.

CHRISTINE P. NGUYEN,

Appellant.

D063191

(Super. Ct. No. DS25486)

APPEAL from an order of the Superior Court of San Diego County, Katherine A.

Bacal, Judge. Affirmed.

Christine P. Nguyen, in pro. per., for Appellant.

Thuan D. Ngo, in pro. per., for Respondent.

Christine Nguyen (also referred to in the record as Loan Phuong Nguyen)

(Mother) appeals from an order denying her motion to modify an existing child custody order. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND¹

Mother and Thuan Ngo (Father) were married in 1997, and had two children. In March 2006, the court entered a judgment of dissolution. The judgment awarded the parties joint legal and physical custody of their children. Thereafter Mother had primary physical custody and Father had visitation rights.

Six years later, in June 2012, Father moved to modify the child custody orders, seeking primary physical and legal custody with limited visitation rights for Mother. At the time, the children were 12 and 13 years old. After an extensive evaluation of the family (including interviews with each parent and each child), the Family Court Services counselor prepared a lengthy report discussing the family situation and recommending that Father have primary custody. In reaching this conclusion, the counselor described Mother's history of mental illness and discussed concerns that Mother's behavior was detrimentally impacting the children.

After a hearing, on November 15, 2012, the court issued an order adopting most of the counselor's recommendations and granting Father's motion for a change of custody (the November 15 order). The court awarded Father sole legal custody and primary physical custody, and provided Mother with limited visitation that must be supervised by

¹ Mother designated a very limited appellate record, consisting only of a clerk's transcript containing many documents prepared after the challenged order and after Mother filed her notice of appeal. We have briefly reviewed the superior court file to obtain background information, and we take judicial notice of this background information. (See Evid. Code, §§ 452, subd. (d), 459, subd. (a).)

the maternal grandmother or a professional supervisor. Mother did not appeal from this November 15 order.

Mother then requested a modification of the November 15 order, and sought primary physical custody of the two children. On December 6, 2012, the court denied the motion. In a minute order, the court stated that it "finds that there is no change of circumstance to grant [Mother's] request for change of custody" (Capitalization omitted.) The court also stated that it "confirms the prior orders of November 15, 2012, granting [Father] custody of the children" and that Father "has the right to pick the children up at school, per the prior order." (Capitalization omitted.)

Mother appeals only from this December 6, 2012 order.

DISCUSSION

Mother contends the court erred in denying her motion to modify the custody arrangements and refusing to provide her with full or primary custody of the two children.

I. *General Appellate Law Principles*

Mother is not represented by an attorney in this appeal. However, unrepresented litigants are held to the same standards as attorneys. (*Rappleyea v. Campbell* (1994) 8 Cal.4th 975, 984-985; *Kobayshi v. Superior Court* (2009) 175 Cal.App.4th 536, 543.) We summarize those standards here.

It is a fundamental rule of appellate law that the lower court's order or judgment is presumed to be correct. We are required to make all reasonable inferences favoring the court's order, and affirm the judgment if any possible grounds exist for the trial court to

have reached its factual conclusions. (*Gee v. American Realty & Construction, Inc.* (2002) 99 Cal.App.4th 1412, 1416; *Vo v. Las Virgenes Municipal Water Dist.* (2000) 79 Cal.App.4th 440, 447-448.) As the party seeking reversal, the appellant has the burden to provide an adequate record to overcome the presumption of correctness and show prejudicial error. (See *Denham v. Superior Court* (1970) 2 Cal.3d 557, 564; *Aguilar v. Avis Rent A Car System, Inc.* (1999) 21 Cal.4th 121, 132.)

In this case, Mother did not provide a reporter's transcript of the relevant hearings. An appellant who challenges an order without supplying a reporter's transcript of the proceedings cannot prevail on a challenge to the sufficiency of the evidence. (*City of Chino v. Jackson* (2002) 97 Cal.App.4th 377, 385.) In the absence of a reporter's transcript of a hearing, we cannot evaluate issues requiring a factual analysis and must presume "the trial court acted duly and regularly and received substantial evidence to support its findings." (*Stevens v. Stevens* (1954) 129 Cal.App.2d 19, 20; see *Pringle v. La Chapelle* (1999) 73 Cal.App.4th 1000, 1003.)

Similarly, an appellant who challenges an order without including the underlying motions in the appellate record waives his or her right to argue that the court erred in denying the motion. Unless the error appears on the face of the record, we cannot evaluate error unless we know the evidence and arguments that were before the court at the time it issued its ruling. (See *Ballard v. Uribe* (1986) 41 Cal.3d 564, 574-575.)

Additionally, "[i]t is the duty of a party to support the arguments in its briefs by appropriate reference to the record, which includes providing exact page citations." (*Bernard v. Hartford Fire Ins. Co.* (1991) 226 Cal.App.3d 1203, 1205.) An appellant

challenging the factual basis of a court's conclusion must also set forth, discuss, and analyze all the evidence on that point, both favorable *and unfavorable*. (See *Schmidlin v. City of Palo Alto* (2007) 157 Cal.App.4th 728, 738.)

II. *Legal Principles Regarding Custody Modification Requests*

The legal rules for modifications to custody orders depend on whether the existing custody order is permanent or temporary. Custody arrangements under an existing permanent order may be changed only upon a showing of a substantial change in circumstances. (*Montenegro v. Diaz* (2001) 26 Cal.4th 249, 256 (*Montenegro*)). Under this rule, the moving party must establish that the circumstances have changed and the custody modification is in the child's best interests. (*Ibid.*) By contrast, to modify a temporary custody order, the moving party must show only that the proposed modification is in the child's best interests, and need not show changed circumstances. (*Id.* at pp. 255-259.)

Under both rules, we review a court order denying a modification under an abuse of discretion standard. (*Montenegro, supra*, 26 Cal.4th at p. 255; *In re Marriage of Burgess* (1996) 13 Cal.4th 25, 32.) Trial courts have broad discretion to determine the appropriate custody arrangement. "The test is not whether this court would have made the same order or whether the trial court could have reasonably made some other order, but 'whether the trial court could reasonably have concluded that the order in question advanced the "best interest" of the child.' [Citation.]" (*Lester v. Lennane* (2000) 84 Cal.App.4th 536, 595.)

III. *Analysis*

It is not entirely clear on the record before us whether the prior November 15 order was a permanent or a temporary order. However, under either standard, Mother has not met her burden to show the court abused its discretion in denying her modification motion.

In her appellate brief, Mother challenges the Family Court Services report recommending that primary custody be given to Father. She states that the Family Court Services counselor did not properly evaluate the situation, would not permit Mother to fully discuss her version of the events, misinterpreted Mother's previous mental and physical challenges, and "did not understand what the children need."

However, the Family Court Services report was the basis for the court's *prior* November 15 order. Mother did not appeal from this order. Thus, any challenges to that order are waived. "If a party fails to appeal an appealable order within the prescribed time, [the reviewing] court is without jurisdiction to review that order on a subsequent appeal." (*In re Marriage of Lloyd* (1997) 55 Cal.App.4th 216, 219; accord, *Mauro B. v. Superior Court* (1991) 230 Cal.App.3d 949, 953.)

Further, we have reviewed the Family Court Services report and on its face the counselor's conclusions are well-reasoned and supported. Under established appellate rules, we are required to presume that the court considered Mother's challenges to the report, but rejected those arguments and found the conclusions in the report to be credible and reliable. Without a transcript of the hearing, we presume substantial evidence supported the court's determinations.

In her appellate brief, Mother also discusses her allegations that Father had previously engaged in emotional and physical abuse against her (in 1998 and 2003). However, Mother does not cite to any evidence showing that these claims were before the family court when it denied her modification motion. Thus, these assertions are not properly before us. Moreover, if Mother did present these claims to the court, on the limited record before us we are required to presume the court considered these arguments and properly declined to credit them as a reason for changing the November 15 custody order.

Mother also devotes portions of her brief to arguing why she is the better parent to have custody of the children. In so doing, she is essentially requesting that we reweigh the facts and reach different conclusions than did the trial court. For example, she argues she should have primary custody because she lives closer to the children's school; she loves her children more than Father does; Father lacks parental skills; and it is important for a mother to guide teenagers.

However, an appeal is not a second trial. Instead, the role of an appellate court is limited to determining whether the evidence supports the court's findings and/or whether the court made any legal errors. In performing this review, we cannot reweigh the evidence or judge the credibility of the witnesses. (*Schild v. Rubin* (1991) 232 Cal.App.3d 755, 762.) When considering a claim that the evidence does not support the court's ruling, "[w]e resolve all factual conflicts and questions of credibility in favor of the prevailing party and indulge in all legitimate and reasonable inferences to uphold the

finding of the trial court if it is supported by substantial evidence which is reasonable, credible and of solid value." (*Ibid.*)

Under these rules, there was substantial evidence for the family court to find there were no changed circumstances and that a modification of the prior order was not in the children's best interests. The fact that Mother submitted evidence that could support a contrary conclusion does not show error. Even if there is conflicting evidence, we are bound by the court's resolution of those conflicts and are bound by the court's factual conclusion that a particular custody arrangement is in the child's best interests. (See *Howard v. Owens Corning* (1999) 72 Cal.App.4th 621, 630-631.)

In the remainder of her brief, Mother discusses events occurring after the December 6, 2012 order and she attaches documents that concern post-order events. Those facts are not properly before us because matters occurring after entry of the appealed order are not reviewable.² (*Truong v. Nguyen* (2007) 156 Cal.App.4th 865, 882; *In re Marriage of Folb* (1975) 53 Cal.App.3d 862, 877, disapproved on other grounds in *In re Marriage of Fonstein* (1976) 17 Cal.3d 738, 749, fn. 5.) Our review of an order is generally limited to the record before the court at the time the order was entered. (*Vons Companies, Inc. v. Seabest Foods, Inc.* (1996) 14 Cal.4th 434, 444, fn. 3; see 9 Witkin, Cal. Procedure (5th ed. 2008) Appeal § 337, p. 387.) The family court remains the appropriate forum in which to litigate any subsequent developments. "This

² Although there are exceptions to this rule, there are no applicable exceptions here. (See Eisenberg et al., Cal. Practice Guide: Civil Appeals and Writs (The Rutter Group 2012) ¶¶ 8:180 to 8:188, pp. 8-136 to 8-141.)

rule preserves an orderly system of appellate procedure by preventing litigants from circumventing the normal sequence of litigation." (*Reserve Insurance Co. v. Pisciotta* (1982) 30 Cal.3d 800, 813.)

DISPOSITION

Order affirmed. Appellant to bear respondent's costs on appeal.

HALLER, J.

WE CONCUR:

HUFFMAN, Acting P. J.

NARES, J.