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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

In re the Marriage of CHRISTINA MARIE  
FIELDS and LLOYD EUGENE COOK III.

CHRISTINA MARIE FIELDS,

Respondent,

v.

LLOYD EUGENE COOK III,

Appellant.

D063832

(Super. Ct. No. D509390)

APPEAL from an order of the Superior Court of San Diego County, Christine K. Goldsmith, Judge. Affirmed.

Lloyd E. Cook III, in pro. per., for Appellant.

Stephen Temko for Respondent.

This appeal arises from a family court order modifying an original child custody order. Appellant Lloyd Eugene Cook III contends the family court abused its discretion in temporarily preventing Cook's son Logan from traveling with him outside the country.

Cook, appearing in propria persona, also challenges a reduction in his visitation and alleges misrepresentations by opposing counsel, judicial bias, and ineffective assistance of counsel.

Because at the time the family court issued its order modifying custody Cook had been in Australia for almost two years and had had no direct contact with his son for at least that period of time, the family court acted well within its discretion in both preventing Cook's son from traveling with him back to Australia and temporarily reducing Cook's visitation. We conclude Cook's other contentions lack merit. We thus affirm the order modifying custody.

#### FACTUAL AND PROCEDURAL BACKGROUND

Appellant Cook and respondent Christina Marie Fields married in 2005. Their son Logan was born in 2006. Cook and Fields separated in April 2008, and their marriage was dissolved in December 2008. At the time of the dissolution of the marriage, both parents were awarded joint legal custody of Logan. Fields retained primary physical custody (60% of total time), while Cook had visitation rights (40% of total time).

According to Fields, in May 2010 Cook stopped having regular contact with Logan. From May 2010 until November 2012, Cook had no in-person contact with Logan. According to Cook, he was in Australia for a total of 21 months during this time.

While Cook was away, Logan's paternal grandfather maintained in-person contact with Logan, including having him over on many weekends. Cook's communication with Logan during his absence was limited to a few phone calls when Logan was with Fields and an unknown number of internet conversations when Logan was with his paternal grandfather.

In July 2012, Cook sought Fields's permission to include Logan in Cook's application for Australian residency, which required, among other things, a physical exam of Logan. When Fields refused to cooperate, Cook removed Logan from the residency application.

Logan's visits with his paternal grandfather ended in August 2012, when Fields and the paternal grandfather had a "falling out."

While in Australia, Cook moved residences multiple times. Cook explained that he did so in order to "get a feel of where he wanted to live permanently." The parties disagree with respect to whether Cook kept Fields updated as to his whereabouts.

In October 2012, Cook informed Fields that he intended to return to San Diego and resume his 40 percent share of physical custody of Logan. Believing that such a sudden return of Cook into Logan's life would be detrimental, Fields filed a request for order (RFO) and requested sole legal custody, sole physical custody and the right to claim Logan as a dependent on her income tax returns.

At an ex parte hearing in November 2012, the family court issued an order denying Fields's request for sole custody. However, the family court limited Cook's visitation to two hours of supervised visits twice a week. In mid-December 2012, the court allowed Cook to have Logan visit for one unsupervised night on Christmas day. Eventually, in late December, the parties agreed to unsupervised visits while Cook remained in San Diego.

Meanwhile, the parties met with the court's family court services (FCS) in December 2012. FCS prepared a recommended parenting plan. The plan provided for Logan to be in Cook's care on alternate weekends and alternate Wednesday nights. The

plan further permitted Logan to be in Cook's care for one month during the summer, on alternate spring breaks and on alternate Christmas breaks.

The FCS plan did not forbid Logan from visiting Cook in Australia. The plan would "allow[] for the child to travel to Australia to spend time with the father in the father's community during some school breaks *in the future, when the father obtain[ed] a more permanent residence* and provide[d] the mother with the address and contact information of such place of residence." (Italics added). When Cook was in Australia and Logan was in San Diego, the recommended plan provided for two hours of "virtual visitation" per week.

Fields's RFO was heard in early January 2013. Fields opposed allowing Logan to travel to Australia. She argued that Cook (i) did not have a job to go back to in Australia; (ii) had been "couch surfing" throughout his time in Australia; and (iii) had no in-person contact with Logan for the previous two years.

At the hearing, Cook's counsel asserted that Cook planned to return to his former Australian employer. Cook's counsel further stated that Cook would be moving back to his home in Tarneit, Victoria, Australia, where he lived in a three-bedroom house with his fiancée and a third roommate. According to the FCS Report, Cook was later planning to move to Perth. Cook did not dispute the fact that he had moved residences during his time in Australia.

In February 2013, the family court issued its order modifying custody, which for the most part incorporated the FCS recommendations but with some material changes. The family court's order removed the possibility of Logan going to Australia at least until June 2014, when the issue may be considered at a scheduled review hearing. The order

also removed Logan's month of summer visitation with Cook.

While Cook is in Australia, and until the review hearing in June 2014, the family court's order allows Cook two visits in San Diego of two weeks each. During these visits, visitation may consist of up to three hours per day when Logan's school is in session and up to eight hours per day when it is not.

However, if Cook is in San Diego for more than two weeks, he may have Logan on alternate weekends after the first two weeks. One-hour virtual visitations through the internet are available on Tuesdays and Fridays every week when Cook is in Australia.

Cook filed a timely notice of appeal.<sup>1</sup>

#### DISCUSSION

Although Cook's briefs do not clearly delineate the issues on appeal, we identify the following eight issues: (1) Cook's ability to take Logan to Australia for visitation; (2) cancellation of summer visitation and appropriateness of visitation during Cook's future trips to San Diego; (3) reasonableness of the "virtual visitation" schedule while Cook is in Australia; (4) implication of Fourteenth Amendment rights under the United States Constitution; (5) opposing counsel behavior and alleged misrepresentation during trial proceeding; (6) ineffective assistance of appellant's trial counsel; (7) alleged bias of the trial court judge; and (8) events following the modified order.

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<sup>1</sup> Cook's brief states that the modified order is appealable under Code of Civil Procedure section 904.1, subdivisions (a)(3) through (a)(13). We construe the notice of appeal broadly and find that the modified order is appealable under Code of Civil Procedure section 904.1, subdivision (a)(2) as an order subsequent to a final judgment. (*See In re Marriage of LaMusga* (2004) 32 Cal.4th 1072, 1088, fn. 2.)

## I

### Standard of Review

Under California's statutory scheme governing child custody and visitation determinations, our overarching concern is the best interest of the child. (*Montenegro v. Diaz* (2001) 26 Cal.4th 249, 255.) Trial courts and families are provided wide discretion in choosing a parenting plan without any presumptions or preferences for or against joint custody. (Fam. Code, § 3040, subd. (c).)

"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." (*In re Marriage of Burgess* (1996) 13 Cal.4th 25, 32.)<sup>2</sup> "Where minds may reasonably differ, it is the trial judge's discretion and not that of the appellate court which must control." (*In re Marriage of Lewin* (1986) 186 Cal.App.3d 1482, 1492.) A family court's order must be affirmed as long as it is within the bounds of reason and within the range of options allowed by relevant criteria, and is not an ""arbitrary, capricious, or patently absurd determination."" (*In re Stephanie M.* (1994) 7 Cal.4th 295, 318.) On review, evidence is viewed in the light most favorable to the order. (*In re Marriage of Drake* (1997) 53 Cal.App.4th 1139, 1151.)

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<sup>2</sup> Cook urges us to apply a de novo standard of review because he believes the abuse of discretion standard is "not adequate review of this case." We decline to do so. Although the interpretation of a statute is generally a matter of law for the reviewing court (see *County of Tulare v. Campbell* (1996) 50 Cal.App.4th 847, 853), none of the issues Cook raises on appeal involves the erroneous *interpretation* of statutes, as opposed to discretion in their application.

## II

### Appellant's Burden

As we have noted, an appellant has the burden of providing an adequate record and of showing that error occurred and that it was prejudicial. (*Maria P. v. Riles* (1987) 43 Cal.3d 1281, 1295-1296.) Being self-represented does not reduce these burdens. (*Wantuch v. Davis* (1995) 32 Cal.App.4th 786, 795.) In appeals challenging discretionary trial court rulings, an appellant has the burden of making a clear showing of abuse of discretion. (*Hernandez v. City of Encinitas* (1994) 28 Cal.App.4th 1048, 1077.) The appellate court is not obliged to search the record to find support for the appellant's contentions. (*Niko v. Foreman* (2006) 144 Cal.App.4th 344, 368 [noting one "cannot simply say the court erred, and leave it up to the appellate court to figure out why"].) Court rules also require that each point be stated "under a separate heading or subheading summarizing the point." (Cal. Rules of Court, rule 8.204(a)(1)(B).)

Cook does not state his arguments in separate headings nor does he identify specific instances of prejudicial error by the family court. In addition, at the RFO hearing in the family court, Cook's counsel did not raise many of the issues Cook raises in propria persona on appeal, including Cook's claim of judicial bias. As such, Cook has forfeited his right to appeal on a number of issues. (See *Telles Transport, Inc. v. Workers' Comp. Appeals Bd.* (2001) 92 Cal.App.4th 1159, 1167.) We nonetheless will exercise our discretion and reach the merits of the issues he raises, where appropriate.

### III

#### Analysis

##### *A. Cook's Ability to Take Logan to Australia for Visitation*

Cook argues the family court erred in not allowing him to take Logan to Australia.

We find no abuse of discretion.

##### *1. Additional Background*

At the hearing on the RFO, Fields's counsel opposed any travel to Australia at that point: "I would like to see and my client would like to see Dad put Logan as a priority, come here, see him as much as you can for the next year, consistently skype and communicate with your son, and one year from now, when he's seven, we can talk about sending him on a 16-hour plane flight to Australia. Even at that juncture, I don't believe it's appropriate and neither does my client to send him on a plane by himself. That's a hard flight for an adult, let alone a seven year-old.

"So, then we have to deal with how do we arrange this travel so that he can be accompanied. Because I believe he would have to be accompanied both going and coming. And then, we have the travel expense involved in that."

For her part, at the hearing on the RFO, Cook's counsel indicated that because of the requirements of his Australian employer, Cook would not be able to return to California for visitation during the following year. Counsel then made the following somewhat inconclusive statement with respect to arrangements for Logan to travel to Australia: "For the transportation of the child to Australia[,] there are a number of airlines that allow six year-olds to travel as an accompanied minor. These airlines include British Airways, Cathay Pacific, Quanta[']s. However, if the court is not inclined

to allow the child to travel in one these programs assisted by the flight attendant, my client is willing to transport the child one way, have the mother transport the child another way.

"Additionally, my client's both paternal grandmother and paternal grandfather would be willing to transport the child as well. The paternal grandmother would be able to stay for a length of time and pay for her own plane ticket to save money for the parties, perhaps."

In rejecting the FCS recommendation that Cook be permitted to have visitation with Logan in Australia during the summer, the family court stated:

"With regard to visitation. You know I'm sympathetic that Dad is so far away, but I do not see putting a six-year old on a 16-hour flight. And what I'm going to do is adopt in part what [Fields's counsel] has suggested; in the next 18 months, I would expect to see that Dad has made an effort to visit here twice and if he has not, then the court will consider making other orders."

## 2. Analysis

In support of his contention that Logan should be allowed to visit Australia, Cook points to case law addressing overseas and long-distance visitation. (See, e.g., *K.L.G. v. S.L.N.* (N.D. 2001) 622 N.W.2d 232 [holding that long travel should not be the reason for an overly restrictive visitation schedule]; *Alder v. Alder* (Conn. 2000) 760 A.2d 1263 [holding that the trial court did not abuse its discretion in allowing overseas visitation of minor child]; *Schiff v. Schiff* (N.D. 2000) 611 N.W.2d 191 [allowing overseas visitation]; and *Condon v. Cooper* (1998) 62 Cal.App.4th 533 [permitting custodial parent to move to Australia with her minor child and concluding that moving away is not a de facto

termination of rights].) None of the authorities cited by Cook prevent a family court from also delaying or prohibiting international travel. *Condon* refers to a situation where a *custodial* parent moves internationally. *Alder* and *Schiff* merely hold that international visitation may be appropriate under certain circumstances.

Here, the record shows that in preventing Logan from traveling to Australia, the family court did not abuse its discretion. As we read the family court's statement—especially in the context of the arguments made by counsel—it is clear that, in delaying any travel to Australia, the family court was primarily concerned about Cook's extended absence as a parent in Logan's life, although the court also had legitimate concerns about the logistics of travel to Australia. Given Cook's lengthy physical absence as well as the difficulty of extended travel for a young child, the family court could reasonably conclude that, at the time of its order, it was not in Logan's best interest to permit visitation with Cook in Australia.<sup>3</sup>

Our determination that the family court properly exercised its discretion does not prevent Cook from renewing his request for travel to Australia at the upcoming review hearing set for June 2014, or thereafter. The family court may, on consideration of then existing circumstances, reach a different conclusion with respect to whether travel to Australia is in Logan's best interest.

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<sup>3</sup> We note Cook disagrees with the family court's statement that flight time to Australia is 16 hours; Cook contends that the flight is 14.5 hours. Cook also believes that Logan is old enough to endure such a long journey. We must, of course, resolve these factual issues in favor of the trial court's order. We hasten to add that, because in rejecting Cook's request for travel to Australia it appears the family court relied primarily on Cook's lengthy absence from his son's life, Cook's disagreement with the family court as to the precise burdens of travel is not a matter of substantial significance.

B. *Summer Visitation and the Appropriateness of Visitation in San Diego*

As we have noted, the FCS Report recommended that Logan be in Cook's care every summer. The family court did not grant Cook any summer visitation with Logan. If Cook returns to Australia, and until the review hearing in June 2014, the family court's order allows Cook two visits in San Diego of two weeks each. During these visits, visitation hours consist of up to three hours per day when Logan's school is in session and up to eight hours per day when it is not.

Cook argues that the family court erred in eliminating the time FCS recommended he have with Logan during summer vacations. He points to Family Code sections 3004, 3020, subdivision (b) and 3100, subdivision (a) and contends that the visitation order was overly restrictive. In addition, Cook argues that his time with Logan during his future visits to San Diego (three hours per day on school days and eight hours per day on non-school days) "is not any rational person's idea of a reasonable and significant amount of time to spend with [his or her] child."

Again, we conclude the court properly exercised its discretion in limiting Cook's visitation.

As a preliminary matter, we note the trial court is under no obligation to adopt FCS recommendations. (See *In re Marriage of deRoque* (1999) 74 Cal.App.4th 1090, 1096; *In re Marriage of Battenburg* (1994) 28 Cal.App.4th 1338, 1345.) Moreover, the family court adopted the FCS recommended plan for the most part, which, according to Cook, is what he seeks. The trial court's rejection of a portion of the FCS recommendation was not arbitrary and was well within reason.

As we have discussed, the family court reasonably determined that it was not in

Logan's best interest to travel outside the country. As a practical matter, given Cook's plan to return to Australia, this determination prevents Cook from having custody during the summer months.

The allegedly "draconian" visitation schedule that Cook challenges in the modified order applies when Cook visits San Diego for two weeks or less. If Cook makes trips to San Diego of longer than two weeks, under the family court's order, Cook may continue to have Logan on alternate weekends. This schedule not only allows for significant periods of physical custody to Cook in accordance with Family Code sections 3004, 3020 and 3100, but it is perfectly reasonable given the best interest of the child.

*C. Reasonableness of "Virtual Visitation" Schedule when Cook Is in Australia*

Cook next argues that "[l]iving in Australia and only being allotted [two] hours of [internet] contact [per week] is not enough contact to parent a child." In light of the time difference between San Diego and Australia, and the inherent limitations of internet visitation, we conclude the court properly exercised its discretion when it allowed Cook two, one-hour visitations per week with Logan. The parenting challenge Cook faces at this point has less to do with contact available through the internet and more to do with the physical distance between him and his son. We note Cook may seek an increase in his virtual visitation time at the upcoming review hearing.

*D. Fourteenth Amendment Violation*

In one paragraph, Cook argues that his rights under the Fourteenth Amendment of the United States Constitution were violated. The United States Supreme Court in *Troxel v. Granville* (2000) 530 U.S. 57 at page 66 (*Troxel*) held that the due process clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions

concerning their children. "A court may not disregard and overturn decisions of fit custodial parents whenever a third party affected by the decision files a visitation petition." (*Chalmers v. Hirschkop* (2013) 213 Cal.App.4th 289, 301 (citing *Troxel*.)

*Troxel* is inapplicable. Here, the dispute is between parents and not between a parent and a third party. (See *Enrique M. v. Angelina V.* (2009) 174 Cal.App.4th 1148, 1156 [noting, while discussing *Troxel*, that "[a] dispute between a parent and grandparents represents a far different dynamic than the dispute between two natural parents with equal rights after a divorce"].) Cook's rights under the Fourteenth Amendment of the United States Constitution were not implicated by the family court's order.

#### E. *Attorney Misconduct*

Cook alleges that Fields's counsel made several misrepresentations at the trial court hearing, thereby committing a "tort" against him. In particular, he alleges that opposing counsel stated that: (i) the flight time from San Diego to Australia was 16 hours (when according to Cook it is 14.5 hours); (ii) the length of Cook's time in Australia was two years (when, according to Cook, it was one year nine months); and (iii) Logan's virtual and emotional relationship with Cook was nonexistent (when, according to Cook, they had been in contact via the internet). He also claims Fields's counsel violated the rules of professional responsibility that govern attorneys in the state of California. We reject these contentions.

First, none of the factual issues Cook asserts involve falsified evidence. At worst, they are arguments without evidentiary support. Second, even assuming Cook's version of facts is correct, the differences are minor and in no way prejudiced Cook. (See Cal.

Const., art. VI, § 13.)

*F. Ineffective Assistance of Counsel*

In his reply brief, Cook suggests for the first time that he received ineffective assistance from his trial counsel. Because Cook raised this issue for the first time in his reply, the issue is deemed forfeited. (See *American Drug Stores, Inc. v. Stroh* (1992) 10 Cal.App.4th 1446, 1453.)

In any event, the "general rule is that attorney neglect in civil cases, if any, is imputed to the client." (*In re Marriage of Campi* (2013) 212 Cal.App.4th 1565, 1575.) Indigent parents are afforded right to counsel only in *dependency* proceedings. (*Ibid.*) However, "[t]here is no such statute or court rule governing dissolution proceedings, and there is no such risk of a loss of the custody of a child, because custody is awarded to one or both parents, not the state." (*Ibid.*) In short, Cook's arguments regarding ineffective assistance of counsel have no merit.

*G. Alleged Bias of the Trial Court Judge*

Cook next contends that the judge was biased and mishandled this case. We agree with Fields that Cook's allegation of judicial bias in favor of female litigants is meritless: it was forfeited and, in any event, has no evidentiary support in the record. Cook also did not object on this basis in the trial court, did not file a writ proceeding and did not provide a meaningful analysis of his claim in his brief.

The Court of Appeal in *Moulton Niguel Water Dist. v. Colombo* (2003) 111 Cal.App.4th 1210 addressed the issue of judicial bias brought for the first time on appeal. In that case, noting that the issue of judicial bias was never raised at the trial level, the court explained: "Bias and prejudice are grounds for disqualification of trial judges.

([Code Civ. Proc.,] § 170.1, subd. (a)(6).) And if judges fail to recuse themselves, there is a statutory procedure to litigate the issue. ([Code Civ. Proc.,] § 170.3.) Owners did not take advantage of these procedures and, based on the record presented here, would have failed if they had. Moreover, owners did not preserve their claim of judicial bias for review because they did not object to the alleged improprieties and never asked the judge to correct remarks made or recuse himself." (*Id.* at p. 1218.)

Here, Cook forfeited his claim to pursue this issue on appeal by failing to request disqualification of the trial judge.

Moreover, even if Cook's claim was cognizable, the record is bereft of the slightest evidence in support of his claim, including his contention that opposing counsel and the judge were on "terms too near friendly for a professional court of law." His brief contains a barebones allegation of bias, summarily stating that "Judge Goldsmith routinely showed prejudice against male litigants." We conclude this showing is woefully insufficient to support a judicial bias claim.

#### H. *Events Following Order*

In his brief, Cook discusses deficiencies in the order's implementation during the six months following its issuance in January 2013. Our review is based on the appellate record and not on any postjudgment evidence. (*In re Josiah Z.* (2005) 36 Cal.4th 664, 676.)

DISPOSITION

The order modifying custody is affirmed. Respondent to recover her costs of appeal.

BENKE, Acting P. J.

WE CONCUR:

AARON, J.

IRION, J.