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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT

BRANDI HOLGUIN,

Plaintiff and Respondent,

v.

JOSE CERDA, JR.,

Defendant and Appellant.

F061878

(Super. Ct. No. 01CEFL03496)

OPINION

APPEAL from a judgment of the Superior Court of Fresno County. James R. Oppliger, Judge.

Fletcher & Fogderude, Norman L. Fletcher for Defendant and Appellant.

David Minyard for Plaintiff and Respondent.

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Appellant Jose Cerda, Jr. (father), appeals from an order entered on his request to modify the existing custody and visitation order for the parties' daughter. Father contends the trial court failed to issue a statement of decision despite his timely request. We hold that, under the circumstances of this case, the trial court's filing of a written order that contained the necessary findings satisfied Code of Civil Procedure section 632's requirement to issue a statement of decision. This is especially true where

(1) father did not raise the issue of preparation of a statement of decision at the final hearing when the court could have made the statement orally or assigned an attorney to prepare it, and (2) father's attorney participated in the preparation of the order, which included factual findings addressing the issues in controversy.

Father also contends the trial court abused its discretion by permitting respondent Brandi Holguin (mother) to move the daughter's residence and change her school. We conclude there is no error and affirm.

FACTUAL AND PROCEDURAL HISTORIES

On August 18, 2010, at father's request, the trial court issued an order to show cause regarding modification of the 2002 child custody and visitation order applicable to the parties' 10-year-old daughter (daughter) and an ex parte order granting temporary physical custody to father with visitation by mother. Father alleged that mother, who had primary custody of daughter, moved daughter's residence out of Fresno County in violation of the existing order. He sought to keep daughter in Selma and to have her continue to attend the elementary school that she had attended since kindergarten. In addition, he opposed mother's plan to enroll daughter in school in Visalia, where mother then resided. A contested hearing was held on September 29 and 30, 2010, before Judge James R. Oppliger.

At a further hearing on October 6, 2010, the trial court delivered what it described as "probably ... a preliminary ruling or judgment" The court broadly outlined its intended order, which included giving mother physical custody 60 percent of the time, granting mother's request to move daughter to Visalia, and permitting mother to enroll daughter in school in Visalia beginning at the semester break. The trial court then instructed the parties either, (1) to agree on the details and draft a joint proposed order reflecting the court's criteria or, (2) if they were unable to agree, for each to draft a proposed order reflecting the court's criteria and the party's version of the details. The

matter would then be submitted to the court. The drafts were due by October 20 and a further hearing was set.

On October 18, 2010, father filed a request for a statement of decision, setting out nine issues for the court to address. The matter was heard again on October 25, 2010. The court commented the parties had “worked out 99 percent of this agreement,” but had three matters left to resolve. It heard argument on these matters and issued oral rulings on them. On November 15, 2010, the court filed its written order after trial.

Father appeals from the November 15, 2010, order. He asserts the trial court failed to issue a statement of decision, despite his timely request, and the error requires reversal. He asserts that Judge Oppliger has since retired, so a remand for preparation of a statement of decision is not feasible. Consequently, he contends the order should be invalidated, which he concludes would result in reinstatement of the prior temporary order that gave primary custody to father. Father also argues the trial court abused its discretion in the November 15, 2010, order because there was no substantial evidence that changing daughter’s school was in her best interests.

DISCUSSION

I. Timeliness of request for statement of decision

“Upon the trial of a question of fact in a proceeding to determine the custody of a minor child, the court shall, upon the request of either party, issue a statement of the decision explaining the factual and legal basis for its decision pursuant to Section 632 of the Code of Civil Procedure.” (Fam. Code, § 3022.3.) Issuance of a statement of decision is mandatory when a timely request is made. (*Espinoza v. Calva* (2008) 169 Cal.App.4th 1393, 1397 (*Espinoza*)). Code of Civil Procedure section 632 provides:

“In superior courts, upon the trial of a question of fact by the court, written findings of fact and conclusions of law shall not be required. The court shall issue a statement of decision explaining the factual and legal basis for its decision as to each of the principal controverted issues at trial upon the request of any party appearing at the trial. The request must be

made within 10 days after the court announces a tentative decision unless the trial is concluded within one calendar day or in less than eight hours over more than one day in which event the request must be made prior to the submission of the matter for decision. The request for a statement of decision shall specify those controverted issues as to which the party is requesting a statement of decision. After a party has requested the statement, any party may make proposals as to the content of the statement of decision.

“The statement of decision shall be in writing, unless the parties appearing at trial agree otherwise; however, when the trial is concluded within one calendar day or in less than 8 hours over more than one day, the statement of decision may be made orally on the record in the presence of the parties.” (Code Civ. Proc., § 632.)

The California Rules of Court¹ require that, if the trial of a question of fact by the court lasts longer than eight hours, the trial court “must announce its tentative decision by an oral statement, entered in the minutes, or by a written statement filed with the clerk.” (Rule 3.1590(a).)² “Within 10 days after announcement or service of the tentative decision, whichever is later, any party that appeared at trial may request a statement of decision to address the principal controverted issues. The principal controverted issues must be specified in the request.” (Rule 3.1590(d).) The court must then either prepare a proposed statement of decision or order a party to prepare it. (Rule 3.1590(f).) Any party may serve and file objections to the proposed statement of decision, and the court may hold a hearing on the objections. (Rule 3.1590(g), (k).)

For short-cause matters, the procedure is simpler: “When a trial is completed within one day or in less than eight hours over more than one day, a request for statement of decision must be made before the matter is submitted for decision and the statement of decision may be made orally on the record in the presence of the parties.”

¹All further references to rules are to the California Rules of Court, unless otherwise specified.

²This rule is made applicable to family law matters by rule 5.21.

(Rule 3.1590(n).) The minute orders from the four days of trial in this matter indicate the hearings consumed approximately 5 hours 28 minutes. Consequently, the trial was completed “in less than eight hours over more than one day,” and the provisions of rule 3.1590(n) apply. As a result, a timely request for a statement of decision was required to be made prior to submission of the matter for decision.

“A cause is deemed submitted in a trial court when either of the following first occurs: [¶] (1) The date the court orders the matter submitted; or [¶] (2) The date the final paper is required to be filed or the date argument is heard, whichever is later.”

(Rule 2.900(a).) The trial court did not order the matter submitted. The final papers—the drafts of the proposed order, including the details—were required to be filed by October 20, 2010, and the final oral argument was heard on October 25, 2010. Father’s request for a statement of decision was filed on October 18, 2010, prior to both dates. Consequently, his request for a statement of decision was timely.

II. Failure to issue a statement of decision

Father contends the trial court failed to issue a statement of decision, in spite of his timely request. “The trial court has a mandatory duty to provide a statement of decision when properly requested,” and a failure to do so is reversible error. (*Espinoza, supra*, 169 Cal.App.4th at p. 1397.) The statement of decision informs the parties and the appellate courts of the factual and legal bases for the trial court’s decision. (*In re Marriage of S.* (1985) 171 Cal.App.3d 738, 747-748.) ““To the court it gives an opportunity to place upon record, in definite written form, its view of the facts and the law of the case, and to make the case easily reviewable on appeal by exhibiting the exact grounds upon which the judgment rests. To the parties, it furnishes the means, in many instances, of having their cause reviewed without great expense....” [Citations.]” (*Id.* at p. 747.)

The trial court issued a tentative or preliminary ruling orally on the record on October 6, 2010. It explained its thinking on the main issues presented by the case: the

percentage of custody and visitation time to be granted to each parent, the mother's request to move daughter's primary residence out of Fresno County, and the school daughter would attend. The court then directed the parties to prepare a proposed final order, jointly if possible, or separately if not. The parties apparently prepared and submitted a joint order that addressed all but three of the issues in dispute. At the final hearing on October 25, 2010, the court heard argument on the remaining three issues, made its determinations, and left it to mother's attorney to revise the proposed order. The final order contained several findings of fact, as well as the language of the order itself.

Father filed his written request for a statement of decision one week before the final day of the hearing. At that time, the court had already made a preliminary oral statement setting out its intended decision and had directed the attorneys to prepare a written order based on those statements. Despite these facts, at the final hearing, father did not present a proposed statement of decision, remind the court that he had requested a statement of decision, or ask the court how it wished to handle preparation of the statement of decision. There was no mention of the need to prepare a statement of decision. At the end of the hearing, mother's attorney indicated he would revise the order to reflect the court's final decision as discussed at that hearing. The final order includes findings of fact and is signed by father's attorney as "[a]pproved as conforming to court order."

The trial of this matter was completed in less than eight hours so the trial court was permitted to deliver its statement of decision orally on the record. Instead, the court essentially included its statement of decision in the written order. Under prior law, when Code of Civil Procedure section 632 required findings of fact and conclusions of law even without a request, findings of fact could be included in the order or judgment. (*Estate of Janes* (1941) 18 Cal.2d 512, 514; *Estate of Exterstein* (1934) 2 Cal.2d 13, 15; 7 Witkin, Cal. Procedure (5th ed. 2008) Judgment, § 47.) It is significant that father did not raise the issue of preparation of a statement of decision at the final hearing when the court

could have made the statement orally or assigned an attorney to prepare it. Further, as we have mentioned, father's attorney participated in the preparation of the order, which included factual findings addressing the issues in controversy. We conclude that, under these circumstances, the requirement that the court issue a statement of decision was satisfied by the entry of the final written order with its included findings.

We now turn to whether the court's final written order/statement of decision covered the necessary issues. The request for a statement of decision must "specify those controverted issues as to which the party is requesting a statement of decision." (Code Civ. Proc., § 632.) "In issuing its statement of decision, the court need not address each question listed in appellants' request. All that is required is an explanation of the factual and legal basis for the court's decision regarding such principal controverted issues at trial as are listed in the request. [Citation.]" (*Miramar Hotel Corp. v. Frank B. Hall & Co.* (1985) 163 Cal.App.3d 1126, 1130.) The statement of decision is not required to address issues not specified in the request; the party is deemed to have waived any right to a statement regarding those issues. (*City of Coachella v. Riverside County Airport Land Use Com.* (1989) 210 Cal.App.3d 1277, 1292.) "[A] statement of decision is required only to state ultimate rather than evidentiary facts" (*In re Marriage of Ananeh-Firempong* (1990) 219 Cal.App.3d 272, 282.) It need not "address how it resolved intermediate evidentiary conflicts" (*Muzquiz v. City of Emeryville* (2000) 79 Cal.App.4th 1106, 1126.)

Father's request for a statement of decision specified nine matters to be addressed, including whether the parties had joint legal and physical custody of daughter and what percentage of custody or visitation time father had in 2010; whether the court applied the best-interest-of-the-child test; whether the court accepted the family court mediator as an expert witness and the weight it gave her testimony; whether the court found that daughter had expressed a preference to remain at school in Selma; and what weight it gave to that preference.

The final order included findings regarding physical custody. The court found that the original physical custody was 80 percent with mother, and that neither party had proven the percentage of actual physical custody of the parties under their subsequent informal custody arrangement. The court made no express finding regarding legal custody, but no issue regarding legal custody was raised by the parties during the trial.³ The order states that the parenting plan it contains is in the best interest of the child. Father's questions regarding the testimony of the family court mediator and daughter's preferences present intermediate evidentiary issues that are not required to be addressed in the statement of decision. Consequently, the final order addressed the issues properly presented by father's request for a statement of decision.

The final order also includes findings that "father's current availability for greater participation in this child's upbringing provides a significant benefit to the minor"; that "primary custody by the mother is a benefit which outweighs the benefit of remaining in the same school system"; and that the move of daughter's residence was "to a nearby community and the distance is not great" Thus, the order explains the basis for the court's decision on the principal controverted issues, and its findings support the court's conclusion that the order made is in the best interest of daughter. As we previously indicated, the written order satisfied the requirement that the court provide a statement of decision. As a result, we reject father's argument that the matter must be remanded for the preparation of a statement of decision or that the order should be declared void because the trial judge is no longer available to prepare a statement of decision.

III. Abuse of discretion

Father contends the trial court abused its discretion in entering the order granting mother primary custody and permitting her to enroll daughter in the Visalia school

³The prior custody order, filed April 4, 2002, granted the parties joint legal custody.

because there was no substantial evidence that changing daughter's school was in her best interest. "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 (*Burgess*)).

At the trial of this matter, there was evidence that mother had primary custody of daughter since the 2002 custody order was entered. Father visited inconsistently until 2010, when his visits became more regular. Prior to 2010, father visited one to two weekends a month. At the time of trial, daughter was in fifth grade and had always attended the Selma elementary school. The elementary school goes up to sixth grade; the students then attend middle school. Mother moved to Visalia in April 2010; she drove daughter to and from school in Selma until the end of the school year. The elementary school in Visalia is about two blocks from mother's home. Daughter's school in Selma is approximately 25 miles from mother's home. Mother visited the Visalia school; it was a very nice school and the staff seemed nice and willing to help. She invited father to visit the school with her, but he declined. Daughter has made friends in Visalia; there are neighborhood children who will go to the same elementary school in Visalia.

There is sufficient evidence in the record to support the trial court's conclusion that mother should resume primary custody and should be permitted to enroll daughter in the elementary school near her home. Father asserts: "The evidence was essentially uncontradicted and there was no evidence which would actually favor mother's request to move the child to Visalia, rather, the evidence showed detriment to [daughter]." He then lists several matters, some of which were not evidence at the trial and none of which establish that any detriment to daughter would result from permitting her to attend the school near her primary residence. There was no evidence of any detriment to daughter from changing schools, other than father's opinion that her grades would slip because she is "extremely shy and timid when it comes to new people"

“[T]he paramount need for continuity and stability in custody arrangements—and the harm that may result from disruption of established patterns of care and emotional bonds with the primary caretaker—weigh heavily in favor of maintaining ongoing custody arrangements. [Citations.]” (*Burgess, supra*, 13 Cal.4th at pp. 32-33.) Mother had primary custody of daughter from 2002 until father filed his petition to change custody in August 2010 and was granted temporary primary custody, pending resolution of this custody dispute. The need for continuity and stability favored maintaining primary custody with mother. Substantial evidence supported the trial court’s finding that mother’s move was to a nearby community, not a great distance from the community where she and daughter previously resided and father still resides; substantial evidence also supported its conclusion that the benefit of returning primary custody to mother outweighed the benefit of having daughter remain in the Selma elementary school.

The trial court did not abuse its discretion by restoring primary custody to mother and permitting her to enroll daughter in the elementary school near mother’s residence in Visalia. Based on the evidence presented, it reasonably could have concluded that the order advanced daughter’s best interests.

DISPOSITION

The order is affirmed. Mother is awarded her costs on appeal.

Wiseman, Acting P.J.

WE CONCUR:

Detjen, J.

Franson, J.