Filed 1/13/17 Marriage of Hibbard CA5

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

In re the Marriage of CASEY D. and BARRY G. HIBBARD.	
CASEY D. HIBBARD, Appellant, v. BARRY G. HIBBARD, Respondent.	F072263 (Super. Ct. No. S-1501-FL-612299) **OPINION**

APPEAL from a judgment of the Superior Court of Kern County. James L. Compton, Commissioner.

Law Offices of Melvin J. Thompson and Melvin J. Thompson for Appellant.

Law Office of Stacy H. Bowman, Stacy H. Bowman; Klein, DeNatale, Goldner, Cooper, Rosenlieb & Kimball and Catherine E. Bennett for Respondent.

-ooOoo-

Mother sought court permission to move with the parties' two daughters from Bakersfield to Rancho Palos Verdes in Southern California. Father opposed the request and sought to have primary custody transferred from mother to father in the event mother

relocated as proposed. After a hearing at which the trial court took witness testimony and reviewed the child custody evaluation report of a court-appointed psychologist, the trial court denied mother's request. It ordered that the existing custody arrangement remain in effect, but if mother relocated, primary custody would be transferred to father with liberal visitation for mother. Mother appeals. We find no abuse of discretion and affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Mother petitioned for dissolution of the parties' marriage, and requested joint legal and physical custody of the parties' two children, with primary physical custody to mother. On April 4, 2011, the parties stipulated to custody and visitation, and the trial court entered an order on that basis. The parties agreed to joint legal and physical custody, with mother having primary physical custody; they also set out a schedule of visitation for father.

In July, 2013, mother requested a modification of visitation to permit her to move with the children to Rancho Palos Verdes, where she grew up. Father opposed the move. The trial court appointed Dr. Robert Bernstein, a psychologist, to perform a child custody evaluation pursuant to Evidence Code section 730; it also appointed counsel for the children. Dr. Bernstein found both parties to be capable parents, meaningfully involved in their children's lives. He recommended denying mother's request to move away with primary custody of the children; he further recommended that, if the court granted mother's request to move away, father should have liberal visitation and primary custody in the summer.

After a hearing, at which testimony of the parties and others was taken, and posttrial briefing, the trial court found the proposed relocation would not be in the best interest of the children and denied the request to relocate them. It continued the existing order in effect, but ordered that, if mother chose to relocate to the Los Angeles area as proposed, the children's primary residence would be shifted to father, with specified visitation for mother. Mother appeals.

DISCUSSION

I. Standard of Review

"It is well settled that the standard of review for custody and visitation orders, including move-away orders, is whether the trial court abused its discretion." (*In re Marriage of Lasich* (2002) 99 Cal.App.4th 702, 714.) "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*).) "'The abuse of discretion standard affords considerable deference to the trial court, provided that the court acted in accordance with the governing rules of law.'" (*Kayne v. The Grande Holdings Limited* (2011) 198 Cal.App.4th 1470, 1474–1475.) In child custody cases, "[g]enerally, a trial court abuses its discretion if there is no reasonable basis on which the court could conclude its decision advanced the best interests of the child." (*F.T. v. L.J.* (2011) 194 Cal.App.4th 1, 15.) An abuse of discretion may also be found when the trial court applied improper criteria or made incorrect legal assumptions. (*Ibid*.) "When applying the deferential abuse of discretion standard, 'the trial court's findings of fact are reviewed for substantial evidence, its conclusions of law are reviewed de novo, and its application of the law to the facts is reversible only if arbitrary and capricious.'" (*In re C.B.* (2010) 190 Cal.App.4th 102, 123)

II. Move-away Orders

The parties disagree about the standard the trial court was to apply in determining whether to grant mother's request to relocate with the children. Under the Family Code, in any dissolution of marriage proceeding, the court may make an order for child custody. (Fam. Code, §§ 3021, 3022.)[1] The custody determination must be made "according to the best interest of the child as provided in Sections 3011 and 3020." (§ 3040.) Section

---

[1] All further statutory references are to the Family Code unless otherwise specified.

3020 "declares that it is the public policy of this state to assure that the health, safety, and welfare of children shall be the court's primary concern in determining the best interest of children." (§ 3020, subd. (a).) It is also a public policy "to assure that children have frequent and continuing contact with both parents." (§ 3020, subd. (b).) In determining the best interests of the child, the trial court must consider the following factors: the health, safety, and welfare of the child; any history of abuse by either parent; the nature and amount of contact with both parents; and either parent's habitual or continual illegal use of controlled substances or alcohol. (§ 3011, subds. (a)–(d).) Father contends the trial court properly applied the best interest test in determining the appropriate custody arrangement in the event mother relocates.

"In an *initial* custody determination, a trial court, considering all of the circumstances, has the widest discretion to choose a parenting plan that is in the best interests of a child. [Citations.] In contrast, '[o]rdinarily, after a judicial custody determination, the noncustodial parent seeking to alter the order for legal and physical custody can do so only on a showing that there has been a substantial change of circumstances so affecting the minor child that modification is essential to the child's welfare.'" (*F.T. v. L.J.*, *supra*, 194 Cal.4th at pp. 14–15, fn. omitted.) This rule applies in the case of a custodial parent's relocation just as it does in any other proceeding to alter existing custody arrangements based on a change in circumstances. (*Burgess*, *supra*, 13 Cal.4th at p. 37.) When the custodial parent proposes to relocate, the issue is complicated by section 7501, which provides: "A parent entitled to the custody of a child 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).)

Mother contends she was the parent entitled to custody of the children under existing orders, for purposes of section 7501, and therefore she was entitled to change the residence of the children unless father demonstrated the change would be detrimental to

them. Because no showing of detriment was made, she concludes the trial court abused its discretion by ordering primary custody to be awarded to father in the event mother relocated to Southern California.

The parties' primary disagreement is whether the trial court properly applied the best interest of the children standard because it was making an initial custody determination, or whether it should have required a showing by father of detriment to the children from allowing the custodial parent to relocate without a change in custody or visitation, because the trial court was making a subsequent custody determination based on a change in circumstances.

A. Best interest test versus showing of detriment

In *Burgess*, the court applied the best interest test to an initial determination of a permanent custody order, when the parent with temporary physical custody proposed relocating to another city. (*Burgess*, *supra*, 13 Cal.4th at pp. 31–32.) It summarized its case as follows:

> "This matter requires us to determine whether a parent seeking to relocate after dissolution of marriage is required to establish that the move is 'necessary' before he or she can be awarded physical custody of minor children. In this case, a parent with temporary physical custody of two minor children sought a judicial determination of permanent custody and expressed the intention to relocate with the children from Tehachapi to Lancaster, California, a distance of approximately 40 miles. The trial court ordered that it was in the 'best interest' of the minor children to remain in the physical custody of that parent even if she moved to Lancaster; it ordered 'liberal visitation' with the noncustodial parent. The Court of Appeal reversed, on the ground that the custodial parent failed to carry her burden of establishing that relocating with the minor children was 'necessary.'
>
> "We conclude that, in an initial judicial custody determination based on the 'best interest' of minor children, a parent seeking to relocate does not bear a burden of establishing that the move is 'necessary' as a condition of custody. Similarly, after a judicial custody order is in place, a custodial parent seeking to relocate bears no burden of establishing that it is 'necessary' to do so. Instead, he or she 'has the 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.' [Citation.] Accordingly, we reverse the judgment of the Court of Appeal." (*Burgess*, *supra*, 13 Cal.4th at pp. 28–29, fn. omitted.)

The parties in *Burgess* had stipulated to temporary custody and visitation. (*Burgess, supra,* 13 Cal.4th at p. 29.) They had agreed to joint legal custody, with the mother having sole physical custody; they had also stipulated to a visitation schedule for the father, expressly leaving "at issue" visitation in the event the mother relocated to Lancaster. (*Ibid*.) When the mother accepted a job transfer and sought to move the children 40 miles away, the father contended he would not be able to maintain the existing visitation schedule if the children moved; he wanted to be their primary caretaker if the mother relocated. (*Id*. at pp. 29–30.)

The court concluded the trial court had properly applied the best interest test applicable when making an initial custody order. "This matter was in the trial court for an initial permanent custody order. Although the parties had previously stipulated to a temporary custody arrangement, there was no permanent judicial custody determination in place at the time of the hearings." (*Burgess*, *supra*, 13 Cal.4th at p. 31.) Accordingly, the trial court had "'the widest discretion'" and was required to "look to *all the circumstances* bearing on the best interest of the minor child" (*ibid*.), including the presumptive right of the custodial parent to change the children's residence pursuant to section 7501, "so long as the removal would not be prejudicial to their rights or welfare." (*Burgess*, at p. 32.)

The court found no abuse of discretion by the trial court, which ordered joint legal custody, with the mother retaining sole physical custody. The children had been in the mother's physical custody for over a year and she was their primary caretaker, although they saw their father regularly. (*Burgess, supra,* 13 Cal.4th at p. 32.) The proposed move was employment related, and the mother evinced no intention to frustrate the father's contact with the children. (*Id.* at p. 33.) The mother would be closer to work,

reducing her commute and increasing her time with the children; the move would facilitate her participation in their extracurricular activities and her ability to pick them up and take them to be treated at their regular medical facility in Lancaster, in the event of illness or emergency. (*Ibid*.) Visitation would be less convenient for the father, but the trial court had ordered liberal visitation and the father conceded he regularly traveled to Lancaster and considered it an easy commute. (*Ibid*.)

The court rejected the test formulated by the Court of Appeal, which required the custodial parent to show the move was necessary. (*Burgess*, *supra*, 13 Cal.4th at pp. 33–34.) The court noted that, although section 3020 expressed a public policy "'to assure minor children frequent and continuing contact with both parents,'" that policy did not "constrain the trial court's broad discretion to determine, in light of *all* the circumstances, what custody arrangement serves the 'best interest' of minor children." (*Burgess,* at p. 34.) The Family Code established no preference for any particular custody arrangement. (*Burgess*, at pp. 34–35.) To construe section 3020 to impose a burden of showing necessity on a parent seeking to relocate would abrogate the presumptive right of a custodial parent under section 7501 to change the residence of the minor child. (*Burgess*, at p. 35.) "More fundamentally, the 'necessity' of relocating frequently has little, if any, substantive bearing on the suitability of a parent to retain the role of a custodial parent." (*Id*. at p. 36.)

Having resolved the issue posed by the case before it by determining the trial court properly applied the best interest test to its formulation of an initial custody and visitation order, and rejecting the appellate court's requirement of a showing of necessity, the *Burgess* court continued its discussion, concluding in dicta that a showing of necessity also is not required "when a parent who has sole physical custody under an *existing* judicial custody order seeks to relocate." (*Burgess*, *supra*, 13 Cal.4th at p. 37.) In that situation, the same allocation of the burden of persuasion and the same standard of proof apply as in any other proceeding to alter existing custody arrangements: the noncustodial

parent bears the burden of persuading the trier of fact that, in light of the change in circumstances caused by the relocation of the custodial parent, a change in custody is in the child's best interests. (*Id*. at pp. 37–38.) The court opined:

> "The showing required is substantial. We have previously held that a child should not be removed from prior custody of one parent and given to the other '"unless the material facts and circumstances occurring subsequently are of a kind to render it essential or expedient for the welfare of the child that there be a change."' [Citation.] In a 'move-away' case, a change of custody 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."' [Citation.]
>
> "This construction is consistent with the presumptive 'right' of a parent entitled to custody to change the residence of his or her minor children, unless such removal would result in 'prejudice' to their 'rights or welfare.' [Citation.] The dispositive issue is, accordingly, *not* whether *relocating* is itself 'essential or expedient' either for the welfare of the custodial parent or the child, but whether a *change in custody* is '"essential or expedient for the welfare of the child."'" (*Burgess, supra*, 13 Cal.4th at p. 38.)

In *In re Marriage of LaMusga* (2004) 32 Cal.4th 1072 (*LaMusga*), the court reiterated the *Burgess* conclusion that a custodial parent who plans to relocate is not required to establish that the move is necessary in order to retain custody. (*LaMusga*, at p. 1078.) It concluded that, similarly, the noncustodial parent does not "have to establish that a change of custody is 'essential' to prevent detriment to the children from the planned move" in order to obtain a change of custody. (*Ibid*.) "Rather, 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.… If the noncustodial parent makes such an initial showing of detriment, the court must perform the delicate and difficult task of determining whether a change in custody is in the best interests of the children." (*Ibid*.)

Thus, if the trial court has not entered an initial permanent custody order, it applies a best interest standard in determining custody in the event the custodial parent proposes to relocate with the children. If the trial court has already made a permanent custody order, then in order to change the custody arrangement due to the custodial parent's intention to relocate to another area, the noncustodial parent has the initial burden of showing the move would cause detriment to the children; if that burden is met, the trial court then must determine whether a change in custody would be in the best interest of the children. The threshold question in this case is whether the trial court correctly determined there was no permanent custody order in effect at the time mother requested authorization to relocate with the children.

B. Determination there was no prior permanent custody order

In *Burgess*, the parties had entered into an agreement for temporary custody and visitation, which the trial court had entered as an order. When the mother sought a judicial determination of permanent custody, expressing an intention to relocate to another city, the court treated this as an initial judicial custody determination to which the "best interest" test applied. (*Burgess, supra,* 13 Cal.4th at pp. 28–29.) The court did not place the burden on the noncustodial parent to show changed circumstances or demonstrate that the move would be detrimental to the children.

Subsequently, in *Montenegro v. Diaz* (2001) 26 Cal.4th 249 (*Montenegro*), although the court was not faced with a move-away situation, it was required to determine whether, in addressing custody issues, the trial court was making an initial custody order under the best interest standard or a subsequent order that required the noncustodial parent to show changed circumstances justifying a change in custody. (*Id.* at pp. 254–255.) In the course of the child custody proceedings, the parents had entered into stipulations regarding custody and visitation, which were confirmed in orders by the trial court. (*Id.* at p. 251.) When a further dispute arose, the trial court concluded it was "'an initial trial on custody,'" applied the best interest standard, and awarded primary

physical custody to the father. (*Id*. at pp. 251, 254.) The Court of Appeal reversed, finding the stipulated orders were final judicial custody determinations, subject to modification only on a showing of changed circumstances. (*Ibid*.) The Supreme Court reversed the Court of Appeal, concluding the trial court properly applied the best interest standard rather than the changed circumstances rule. (*Id*. at pp. 254–255.)

The court noted that private resolution of custody disputes is preferred, and may be achieved through mediation. (*Montenegro, supra*, 26 Cal.4th at p. 255.) If the mediation is successful, the parties' agreement is incorporated into a court order; if it fails, the court must choose a parenting plan that is in the best interest of the child. (*Id*. at p. 256.) The changed circumstances rule is a variation on the best interest standard. It "'is not a different test, devised to supplant the statutory test, but an adjunct to the best-interest test. It 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.'" (*Ibid*.) The court saw "no basis for treating a permanent custody order obtained via stipulation any differently from a permanent custody order obtained via litigation." (*Id*. at p. 257.) To do so would contravene the statutory provisions for mediation of custody disputes and the preference for private resolution of such disputes.

The court, however, held 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." (*Montenegro, supra*, 26 Cal.4th at p. 258.) One stipulated order was ambiguous, including the words "'for Judgment'" in the caption, but also containing a notice that the order was temporary. (*Id*. at pp. 252, 258.) Another order "never mentioned the words 'final,' 'permanent' or 'judgment.'" (*Id*. at p. 259.) Additionally, the conduct of the parties indicated they did not intend the stipulated orders to be final judgments as to custody; both regularly sought to modify the

orders and neither claimed they were final determinations requiring changed circumstances for modification. (*Ibid.*) Accordingly, the trial court correctly applied the best interest standard. (*Ibid*.)

In *F.T. v. L.J.*, the parents in a custody dispute stipulated that the recommendations in the Family Court Services (FCS) report "'be adopted as an order of the court without prejudice to either party,'" and the trial court adopted them. (*F.T. v. L.J., supra,* 194 Cal.App.4th at p. 7.) Subsequently, the father, who had primary custody, sought an order permitting him to move out of state with the child, and the mother opposed the request. (*Id*. at p. 8.) The trial court found the move was not in the best interest of the child and denied the father's request to relocate with the child.

On appeal, the father contended the trial court failed to recognize his presumptive right to change the child's residence pursuant to section 7501. (*F.T. v. L.J., supra*, 194 Cal.App.4th at p. 18.) The court concluded that, "absent an existing judicial custody determination, the section 7501 rebuttable presumption does not apply," and "[a] custody order based on a stipulation of the parties does not constitute a final, existing judicial custody determination unless 'there is a clear, affirmative indication the parties intended such a result.'" (*Id*. at p. 19.) The parents' stipulation to adoption of the FCS report's recommendations and the subsequent order doing so did not constitute a final judicial custody determination because neither the stipulation nor the order included any clear language affirmatively showing it was the parents' intent that the order constitute a final judicial custody determination. (*Ibid*.) "Nowhere in the stipulation or order do the words 'final,' 'permanent,' or 'judgment,' or words to that effect, appear. On the contrary, by using the qualifying language 'without prejudice to either party,' the stipulation appeared to express the parties' intent that the stipulated order be only temporary and subject to change and *not* be deemed a final judicial custody determination." (*Ibid*.) Consequently, the section 7501 presumption did not apply and the mother did not have the initial burden of showing detriment to the child from the proposed relocation. (*F.T. v. L.J.,* at p. 20.)

In the present case, in opposing mother's request to relocate with the children, father contended there was no preexisting permanent custody and visitation order, and the trial court agreed. Mother argued in the trial court that a final custody order was entered after a contested hearing on May 21, 2012. The record indicates a ruling was made on May 21, 2012, but the minute order of that date merely recited information regarding father's employment and income, then ordered father to pay specified child and spousal support. It contained no information or orders regarding child custody or visitation.

On appeal, mother's opening brief mentions a May 21, 2012, hearing in a heading; the body of the argument that follows discusses a hearing held on May 4, 2012. She asserts that, if a prior judicial determination of custody was necessary in order to apply the changed circumstances rule and the section 7501 presumption, then that requirement was satisfied by the findings and order entered after the May 4, 2012, hearing. She quotes the following language from the findings and order dated July 24, 2012: "The hearing on Petitioner's Order to Show Cause regarding Custody, Visitation, Child Support, Spousal Support, Injunctive Order and Related Matters was heard for the final time on May 4, 2012 …. After reviewing the pleadings and papers on file, receiving testimony, and taking offers of proof, this Court makes the following orders." Mother does not quote or discuss the orders made thereafter, or the substance of the remainder of the document. She appears to rely on the use of the word "final" to establish this as a final order regarding custody and visitation.

The first page of the July 24, 2012, findings and order, however, indicates the order relates to child and spousal support and attorney fees, and is "Not applicable" to custody and visitation. The second page is headed "Child Support Information and Order Attachment"; it approximates the amount of time the children spent with each parent and sets out the child support ordered for each child. The following three pages pertain to child support. The sixth page of the document contains the language quoted by mother, which is introductory language preceding the attachment containing details of the trial

court's orders concerning child support, spousal support, and attorney fees. The final page of the document is a DissoMaster printout for child support. The document contains no custody or visitation orders, and no discussion of or reference to the best interests of the children.

The orders regarding child custody and visitation were entered after hearings on March 17, 2011, April 4, 2011, May 18, 2011, and October 5, 2011. Each minute order reflects that the parties reached an agreement or stipulation. With the exception of the October 5, 2011, minute order, they indicate the parties waived having the clerk take down the stipulation verbatim and agreed to rely on the reporter's transcript. The reporter's transcripts of those hearings are not included in the record; accordingly, we do not have the exact language of those custody agreements. The findings and orders after hearing for the April 4, 2011, and May 18, 2011, hearings contain language similar to that quoted by mother from the July 24, 2012, findings and order after hearing, but without the use of the word "final." Each states: "The hearing on Petitioner's Order to Show Cause regarding custody, visitation, child support, spousal support, injunctive order, and related matters was heard on" the pertinent date, and "[u]pon stipulation of the parties, with the approval of their respective counsels, this court makes the following orders." Mother has not cited us to any portion of the custody and visitation orders in which "the words 'final,' 'permanent,' or 'judgment,' or words to that effect," were used to indicate any one of the stipulated orders was intended by the parties to be the final, permanent custody and visitation order. (See *F.T. v. L.J.*, *supra*, 194 Cal.App.4th at p. 19.)

We also note that the same judicial officer who was present when the parties' stipulations were placed on the record and who made all of the custody orders also ruled on mother's move-away request and concluded there was no final judicial custody determination as a basis for application of the section 7501 presumption. Under these

circumstances, we will not second-guess the trial court's interpretation of its own orders, particularly when there is nothing in the record to support a contrary interpretation.

Because there was no permanent judicial custody determination in place at the time of the hearing of mother's move-away request, the trial court had "'the widest discretion'" in determining the best interest of the children and was required to "look to *all the circumstances* bearing on the best interest of the" children in making its initial judicial custody determination. (*Burgess*, *supra*, 13 Cal.4th at pp. 31, 32.)

III. Abuse of Discretion by Applying the Wrong Standard

Mother contends the trial court abused its discretion by failing to require father to produce evidence of detriment to the children if they are allowed to move with mother. As discussed above, however, the noncustodial parent need not make a showing of detriment when there has been no prior final judicial determination of custody. Since there was no final judicial determination of custody in this case prior to the hearing of mother's move-away request, the trial court properly applied the best interest of the child standard. The trial court did not abuse its discretion by applying that standard.

IV. Application of the "Best Interest" Rule in this Case

Mother contends the trial court abused its discretion by awarding primary custody to father in the event mother moves to Rancho Palos Verdes. She contends it would be in the best interest of the children to move with their mother to a location where she has better employment prospects, in light of father's failure to pay the full amount of spousal and child support ordered by the court. She also contends that, if the trial court found it to be in the children's best interest to grant primary physical custody to mother, with whom they have lived since the parties' separation, in the event she remains in Kern County, it is inconsistent for the trial court to conclude that it is in their best interest to grant primary physical custody to father in the event mother moves to Rancho Palos Verdes.

"In an initial custody determination, the trial court has 'the widest discretion to choose a parenting plan that is in the best interest of the child.' [Citation.] It must look to *all the circumstances* bearing on the best interest of the minor child." (*Burgess*, *supra*, 13 Cal.4th at pp. 31–32.) The statutory factors to be considered include: the health, safety, and welfare of the child; any history of abuse by either parent; the nature and amount of contact with both parents; and either parent's habitual or continual illegal use of controlled substances or alcohol. (§ 3011, subds. (a)–(d).) Other factors that may be considered include: "the children's interest in stability and continuity in the custodial arrangement; the distance of the move; the age of the children; the children's relationship with both parents; the relationship between the parents including, but not limited to, their ability to communicate and cooperate effectively and their willingness to put the interests of the children above their individual interests; the wishes of the children if they are mature enough for such an inquiry to be appropriate; the reasons for the proposed move; and the extent to which the parents currently are sharing custody." (*LaMusga*, *supra*, 32 Cal.4th at p. 1101.) Additional factors include: "community ties; health and educational needs; the attachment and past, present and potential future relationship of the children with each parent; the anticipated impact of the move upon the children's existing social, educational and familial relationships; and each parent's willingness to facilitate frequent, meaningful and continuing contact to the other parent." (*Jane J. v. Superior Court* (2015) 237 Cal.App.4th 894, 905.)

Mother's arguments focus on particular factors, rather than all of the factors collectively. Her first argument—that it would be in the best interest of the children to move with their mother to a location where she has a promise of employment—addresses only her expressed reasons for the move. It ignores other relevant factors, such as the children's ties to their hometown community, the distance of the move and its effect on the children's relationship with their father, the impact of the move on the children's existing social, educational, and familial relationships, each party's willingness to

facilitate frequent, continuing contact with the other parent, and each parent's willingness to put the children's interests above their own.

At the trial of the matter, mother testified she was not currently employed, although she did occasional voice-overs. Her uncle offered her a job in Southern California as a real estate agent and an assistant for a management company. She would also have an opportunity there to take real estate classes, help friends with their catering business, and pursue on-camera work, such as commercials. She conceded she had not looked for real estate jobs in Bakersfield, although she was a licensed real estate agent; also, her uncle was over 65 years of age and she had not talked to him about when he might retire.

There was extensive, sometimes conflicting, evidence regarding the support system of family and friends available in Bakersfield and Rancho Palos Verdes. There was evidence that, in addition to father's visitation time, he spent time with the children almost daily by attending or participating in their extracurricular activities. Father consistently sought more visitation time, but mother resisted.

Dr. Bernstein's report reflected that mother's "desire to move to Southern California fulfilled her own wishes, while minimizing the importance of the children's regular contact with their father. According to Dr. Kashwer [the older child's therapist, who apparently made recommendations to the trial court concerning custody and visitation], [mother] resisted [father's] expectation of increased custody from the outset of the parental separation and had difficulty coparenting with him. In effect, [mother's] decision to relocate would preclude a significant increase in [father's] custody time and create distance from him, enabling her to make parenting decisions relatively independently." The report stated both parents were bonded with the children; the older child[2] "initially wanted equal time with both parents and was saddened by the diminished

[2] At the time the formal order was entered, one child was 10 years old and the other was four years old.

contact with her father following the parental separation." Further, the older child evidently had been "exposed to adult information about the move by her mother," and "appeared to mimic her mother's thought processes about the relocation, emphasizing that her mother did not earn much money in Bakersfield but had a 'good job' prospect in L.A., her mother appeared 'very happy' in her childhood home, and there was 'better air quality' at the beach." The child expressed her dislike of extensive car drives, and wished her whole family, including her father and paternal grandmother, could live close to the beach.

Dr. Bernstein concluded "[g]ranting [mother's] move-away petition would undermine [father's] consistent parental involvement in the children's lives, which was not in the children's best interests. Rather, [the children] would benefit from the consistent involvement of both parents in their daily lives." He recommended the move-away request be denied and an equally shared parenting arrangement be implemented. In the event the trial court granted the request to relocate the children, he recommended liberal visitation for father. Dr. Bernstein apparently misconstrued the effect of the trial court's decision. He seemed to assume that, if the trial court denied mother's move-away request, then both mother and children would remain in Bakersfield and "an equally shared parenting arrangement," with each parent having custody two weekdays and alternating weekends, would be feasible. If mother moved with the children, however, he recommended liberal visitation for father, with a plan for minimizing the burden of travel on the children.

"However, 'when the trial court is faced with a request to modify the existing custody arrangement on account of a parent's plan to move away (unless the trial court finds the decision to relocate is in bad faith), the trial court must treat the plan as a serious one and must decide the custody issues based upon that premise. The question for the trial court is not whether the parent may be *permitted* to move; the question is what arrangement for custody should be made [if and when the custodial parent moves].'"

(*F.T. v. L.J.*, *supra*, 194 Cal.App.4th at p. 22.) Thus, regardless whether the request to relocate the children was granted, the children would be required to live primarily with one parent, with travel required for visitation with the other parent.

The trial court did not misconstrue its task. It discussed the ages of the children, the then-existing visitation schedule, the children's primary residence with mother, father's efforts to remain involved in the children's lives, and mother's plans for employment in Rancho Palos Verdes. It noted Bakersfield was the children's hometown, and mother "did not explore her [local employment] options and instead made a unilateral decision to relocate the children." The trial court then concluded relocation of the children to Rancho Palos Verdes would not be in the children's best interest, and it denied mother's request. It ordered that the existing custody and visitation orders would remain in effect but, "[s]hould [mother] choose to relocate to the Los Angeles area, the primary residence shall shift to [father] and [mother] shall have alternate weekend visitation," with holidays to remain as previously ordered.

Thus, the trial court considered numerous pertinent factors affecting the determination of the appropriate custody and visitation arrangement. In child custody cases, a trial court abuses its discretion if it could not have reasonably concluded that its decision advanced the best interests of the child. (*Burgess*, *supra*, 13 Cal.4th at p. 32.) On this record, we cannot conclude the trial court abused its discretion by determining that physical custody of the children should be transferred to father, with liberal visitation for mother, if mother relocated to Southern California.

V. Inconsistency in Conditional Order

The trial court ordered that mother would retain primary custody of the children if she remained in Bakersfield, but primary custody would shift to father if mother relocated to Southern California. Mother contends that these alternative orders are inconsistent and cannot both be in the children's best interest. She quotes from *Burgess*: "As we have repeatedly emphasized, the 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." (*Burgess*, *supra*, 13 Cal.4th at pp. 32–33.) The *Burgess* court also recognized, however, that the trial court needed to consider all factors affecting the best interest of the children in making its custody determination. "The trial court must—and here did—consider, among other factors, the effects of relocation on the 'best interest' of the minor children, including the health, safety, and welfare of the children and the nature and amount of contact with both parents." (*Id*. at p. 34.)

The court in *LaMusga* reaffirmed *Burgess's* statement about the need for continuity and stability in custody arrangements, but still set out a list of factors the trial court should consider when deciding on a custody order in light of the custodial parent's proposal to relocate with the child. (*LaMusga*, *supra*, 32 Cal.4th at pp. 1093, 1101.) The weight to be accorded to the factors considered must be left to the trial court's sound discretion. (*Id*. at p. 1093; accord, *In re Marriage of Winternitz* (2015) 235 Cal.App.4th 644, 654.) In *LaMusga*, the court upheld the trial court's decision to transfer custody to the father if the mother moved to another state. The trial court had carefully considered the comprehensive child custody evaluation and the evidence submitted by the parties; it had stressed the detrimental effect the proposed move would have on the "'tenuous and somewhat detached relationship'" the father had developed with the children, because the move would disrupt the progress the children's therapist had made in promoting that relationship. (*LaMusga*, at p. 1093.) The trial court was concerned the move could result in the relationship between the father and the children being lost. (*Ibid*.)

LaMusga and other cases have approved conditional orders, like the order entered in this case, which change custody and visitation only in the event the custodial parent relocates as proposed. (*LaMusga*, *supra*, 32 Cal.4th at p. 1098 [concluding a conditional order is not improper so long as it is not issued for the purpose of coercing the custodial

parent into abandoning plans to relocate]; *F.T. v. L.J.*, *supra*, 194 Cal.App.4th at pp. 22–23 [concluding a conditional order is not an advisory opinion]; *Niko v. Foreman* (2006) 144 Cal.App.4th 344, 365 [same]; *Ruisi v. Thieriot* (1997) 53 Cal.App.4th 1197, 1205–1206 [same].) We find nothing inconsistent in a trial court determining that one parent should be awarded primary custody when the children and both parents all live in close proximity, but awarding primary custody to the other parent when the custodial parent chooses to relocate in a move that is not in the children's best interests. Nothing in the record indicates the trial court utilized a conditional order for any improper purpose. Mother has not demonstrated any abuse of the trial court's discretion.

VI. Abuse of Discretion by Requiring Mother to Show Financial Necessity

Mother contends that, despite the *Burgess* court's holding that "a parent seeking to relocate does not bear a burden of establishing that the move is 'necessary' as a condition of custody" (*Burgess, supra*, 13 Cal.4th at pp. 28–29), the trial court imposed a requirement that she show financial necessity. She finds such a requirement in the following language of the trial court's order: "The court believes that the petitioner could find work and stay in the Kern County area allowing the children to spend time with both parents and to live in what has been their home town. Petitioner did not explore her options and instead made a unilateral decision to relocate the children."

In the context of the order as a whole, we do not construe this language as imposing any requirement that mother show financial necessity in order to justify her request to move to another city. Rather, the trial court considered these facts, among others, in analyzing the factors affecting the best interests of the children. These facts related to the reasons for mother's proposed move, the children's ties to the community and to local family members, mother's willingness to put the interests of the children above her individual interests, and whether mother was using the move as a means of frustrating father's relationship with the children and his involvement in their lives, all of which were relevant factors for the court to consider. (*LaMusga*, *supra*, 32 Cal.4th at

p. 1101; *Mark T. v. Jamie Z.* (2011) 194 Cal.App.4th 1115, 1129–1130.) We find no abuse of the trial court's discretion.

VII. Abuse of Discretion by Failing to Consider Father's Alleged Abuse

"Upon a finding by the court that a party seeking custody of a child has perpetrated domestic violence against the other party seeking custody of the child … within the previous five years, there is a rebuttable presumption that an award of sole or joint physical or legal custody of a child to a person who has perpetrated domestic violence is detrimental to the best interest of the child, pursuant to Section 3011. This presumption may only be rebutted by a preponderance of the evidence." (§ 3044, subd. (a).) Mother contends the trial court failed to consider the abuse she alleged father committed against her.

Mother contends she testified father hit her "a couple of times" in September 2011, and "screamed and yelled at [her] in front of the children during exchanges for visitation, prevented her from closing her car door, blocked her with his car and chased after her weaving in and out of traffic." She asserts father did not refute these allegations, and concludes it was an abuse of discretion for the trial court not to address this evidence in making its custody determination.

Under section 3044, the presumption arises only "[u]pon a finding by the court" that one party perpetrated domestic violence against the other. (§ 3044, subd. (a).) The requirement of a finding is satisfied by a criminal conviction of domestic violence. (§ 3044, subd. (d)(1).) Such a finding may also arise out of a proceeding by one party to obtain a domestic violence restraining order against the other. (*Christina L. v. Chauncey B.* (2014) 229 Cal.App.4th 731, 736; *In re Marriage of Fajota* (2014) 230 Cal.App.4th 1487, 1498–1499; § 3044, subd. (d)(2).)

In the child custody proceedings, the trial court must consider any history of abuse by one parent against the other. (§ 3011, subd. (b)(2).) However, "[a]s a prerequisite to considering allegations of abuse, the court may require substantial independent

corroboration, including, but not limited to, written reports by law enforcement agencies, child protective services or other social welfare agencies, courts, medical facilities, or other public agencies or private nonprofit organizations providing services to victims of sexual assault or domestic violence." (§ 3011, subd. (b)(3).)

Mother has not directed us to any preexisting finding of abuse by father, by criminal conviction or by a finding in proceedings for a domestic violence restraining order. In the child custody proceeding, mother testified father hit her on one occasion and she reported it to the police. She testified to various other acts she characterizes as abuse. She did not provide independent corroboration of her accusations. The police report was not introduced into evidence. There was no other testimony or documentation substantiating her claims. The trial court did not make a finding of abuse in the child custody proceeding.

Mother's argument assumes that, if she made an unsubstantiated allegation of abuse against father, then the presumption applied, and in the absence of an express denial by father or other evidence refuting mother's allegations, the presumption should have prevailed. But a "finding by the court" of abuse by the accused parent is a prerequisite to application of the presumption. Because mother has not cited us to any court finding that father committed abuse against her, she has not shown this prerequisite to application of the section 3044 presumption was satisfied.

Mother also has not shown that the trial court either failed to consider her evidence of abuse or erred by failing to make a finding of abuse based on her testimony. "The trier of the fact is the exclusive judge of the credibility of witnesses and may reject *in toto* even uncontradicted evidence by taking into consideration the bias and motive of the person testifying." (*Akopiantz v. Board of Medical Examiners* (1961) 190 Cal.App.2d 81, 90.) "It is fundamental that such matters as demeanor, mannor [*sic*] of testifying, candor or evasiveness, and inherent improbability of the testimony given, exercise a profound effect upon credibility." (*Beeler v. Plastic Stamping, Inc.* (1956) 144

Cal.App.2d 306, 308.) "An appellate court does not reweigh the evidence or evaluate the credibility of witnesses, but rather defers to the trier of fact." (*Cahill v. San Diego Gas & Electric Co.* (2011) 194 Cal.App.4th 939, 958.) In the absence of a statement of decision, the doctrine of implied findings applies and the reviewing court "'must presume the trial court made all factual findings necessary to support the judgment for which there is substantial evidence.'" (*A.G. v. C.S.* (2016) 246 Cal.App.4th 1269, 1272, 1281.) In this case, neither party requested, and the trial court did not issue, a statement of decision. The trial court impliedly found there was insufficient evidence to support a finding that father abused mother, since it did not make such a finding or apply the section 3044 presumption. We defer to the trial court's evaluation of mother's uncorroborated testimony. Mother has not established the trial court abused its discretion in handling mother's evidence regarding father's alleged abuse.

DISPOSITION

The May 1, 2015, child custody order is affirmed. Father is entitled to his costs on appeal.

_____

HILL, P.J.

WE CONCUR:

_____

DETJEN, J.

_____

PEÑA, J.