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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

In re Marriage of TAPAS and IRINA  
MUKUTMONI.

TAPAS MUKUTMONI,

Respondent,

v.

IRINA MUKUTMONI,

Appellant.

G045409

(Super. Ct. No. 07D001724)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, David L. Belz, Judge. Affirmed.

Irina Mukutmoni, in pro. per., for Appellant.

Law Office of Gary A. Perotin and Gary A. Perotin, for Respondent.

Irina and Tapas Mukutmoni<sup>1</sup> have shared joint legal and physical custody of their daughter during their lengthy and highly contentious five-year marital dissolution action. Throughout this period, the same two issues have been repeatedly and hotly litigated. First, the parties are never satisfied with the custody timeshare allocation with their daughter, Masha. Second, Tapas constantly seeks to stop Irina from vacationing with Masha in Russia, the country of Irina's birth. On August 22, 2011, the court entered a final judgment with respect to the issues of custody and visitation.

As to the custody issue, several experts have evaluated the case and for the past five years Irina has been awarded primary physical custody. Throughout the years, Irina has steadfastly expressed extreme fear and anxiety that 81-year-old Tapas is not competent to care for a special needs child and has abused Masha, causing the child night terrors. On the other hand, Tapas has tenaciously insisted he is a good father and he wishes to take part in raising Masha. The custody dispute was evaluated (1) in early 2008 by a child custody investigator, (2) in 2009 by a court-appointed expert, Dr. Miriam J. Galindo, who conducted an Evidence Code section 730 evaluation (hereafter 730 evaluation), (3) in 2010 by a court-appointed special master Dr. Paul Hoernig, and (4) in 2011 by Dr. Leslie Drozd to prepare a follow up 730 evaluation and act as the successor special master. The court determined it would be in Masha's best interests to follow Drozd's recommendations, giving Irina primary custody but gradually increasing visitation time with Tapas. On appeal, Irina suggests Drozd's report was faulty and therefore the court's reliance on it and ruling on custody was an abuse of discretion.

The second issue on appeal regarding Irina's ability to visit Russia was discussed at length in our prior opinion *In re Marriage of Mukutmoni* (Aug. 25, 2010,

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<sup>1</sup> As in many family law cases, we refer to the parties by their first names to avoid confusion. (E.g., *In re Marriage of Witherspoon* (2007) 155 Cal.App.4th 963, 967, fn. 2 ["We refer to the parties by their first names for clarity and ease of reference, and intend no disrespect".])

G042721) [nonpub. opn.].) While the issue was on appeal, the parties continued to litigate this custody issue in the trial court and the trial court limited Irina's authority to travel to a period of 16 days, not based on changed circumstances, but to better facilitate Drozd's visitation plan for Tapas and Masha. On appeal, Irina asserts this was error.

We have reviewed the record provided, and on our own motion, we took judicial notice of the entire trial court file to have a more complete picture of the status of the case. (Evid. Code, § 452, subd. (d).) We conclude Irina's contentions on appeal lack merit, and we affirm the court's final judgment concerning visitation and custody.

## I

In our prior opinion, we provided a comprehensive and detailed summary of the contentious marital dissolution proceedings and incorporate it by reference. (*In re Marriage of Mukutmoni* (Aug. 25, 2010, G042721) [nonpub. opn.].) In this opinion, we have summarized and repeated some of those facts and included a factual summary of events occurring after Irina filed her prior appeal.

In February 1993, Tapas (then 63-years-old) flew to Moscow, Russia, to meet Irina (then 39-years-old), and after a week she accepted his proposal of marriage. In March 1994, Irina immigrated to the United States and married Tapas. She spoke and understood only Russian, but nevertheless she agreed to sign a prenuptial agreement written entirely in English.

The couple lived together for less than a year and then Irina returned to Russia to care for her sick mother. She returned to the United States when her mother died in 1999. Masha, born in March 2003, began living with the couple as a foster child when she was 18 months old (in September 2004). She was born with fetal alcohol syndrome and suffered from several developmental delays. The couple adopted Masha on August 23, 2005, and soon thereafter the marriage deteriorated.

On September 12, 2005, Tapas was arrested and pled guilty to spousal abuse, which resulted in a three-year restraining order. He and Irina separated. Initially,

Irina remained living with Masha in Tapas's house and Tapas moved to live in an apartment.

In 2006, Tapas filed a petition for custody and support (Case No. 06FL000448) and later separately filed a marital dissolution action (Case No. 07D001724). The first case was eventually consolidated with the second, and all documents were thereafter filed in the dissolution action.

In April 2006, Judge Frederick P. Aguirre accepted the parties' stipulation as to custody and visitation rights. Tapas and Irina agreed to share joint legal and physical custody of Masha. However, the order specified the child would be with Tapas on "hours and days" designated by Irina with her written permission and "with [Irina] at all other times." The order did not delineate any further information regarding Tapas's visitation schedule. The stipulation specifically provided Irina could "travel to Russia with the minor child, one time each year, for a period up to two months and every alternating year up to three months without prior written permission of [Tapas]." Irina traveled to Russia with Masha without incident during October and November 2006, and they returned to California.

In September 2007, Tapas obtained a new attorney (Betty C. Carrie Teasdale) who filed a flurry of documents on his behalf. For example, Tapas requested modification or termination of the criminal protective order, a restraining order against Irina, an order evicting Irina from his residence, modification of the visitation stipulation, a court ordered child custody investigation, exclusive control of Masha's passport, civil damages against Irina for elder abuse, and sanctions (terminating sanctions, monetary sanctions, and an order of contempt) against Irina.

In 2007, Judge Aguirre awarded Irina primary physical custody pending a child custody investigation report. Tapas was awarded visitation Monday, Wednesday, Thursday, and Friday from 8:30 a.m. to 6:00 p.m. during which time the child also attended preschool and therapy. The court ordered the 2006 stipulation and order would

otherwise remain in full force and effect. At the end of 2007, the case was reassigned to Commissioner Richard G. Vogl after Tapas filed a motion seeking to disqualify Judge Josephine Staton Tucker. (Code Civ. Proc., § 170.6.)

In January 2008, Irina sought a “travel order” from the court, explaining she wanted to take Masha on vacation to visit relatives in Moscow, Russia, from March 20, 2008, to June 18, 2008. She was concerned her plans would conflict with the court’s temporary order authorizing Tapas visits with the child four days a week pending the child custody investigation report. Tapas filed two oppositions, making disparaging remarks about Irina and arguing there was a high flight risk. He filed a separate motion asking the court to evict Irina from his separate property.

At the end of January 2008, the child custody investigator, Veronica Lopez-Lawrence, filed a report. We will not divulge details about the confidential information contained in that report other than information critical to the custody issues at hand. Lawrence recommended Irina have sole legal and physical custody and the child’s primary residence would remain with Irina. Lawrence first proposed Tapas visit Masha on Monday, Wednesday, Thursday, and Friday from 8:30 a.m. to 6:00 p.m. and have supervised overnight visits on Wednesday nights. The overnight visit could be supervised by Tapas’s adult daughter. A few weeks later, Lawrence filed an addendum changing her recommended plan to supervised visits during the week for a much shorter period of time (Monday, Wednesday, Thursday, and Friday from 4 p.m. to 9 p.m.), pending Tapas’s compliance with a neurological evaluation to rule out dementia or Alzheimer’s disease.

In 2008, Orange County Social Services Agency (SSA) began investigating a report of sexual abuse made by Masha’s doctor after the child described physical and sexual abuse by her father. However, the case was closed and deemed “unfounded” after Masha was interviewed again and her responses were inconsistent.

On March 4, 2008, Commissioner Vogl held a hearing on Irina's plans to travel to Moscow. After reciting the lengthy procedural history of the case, the court ruled, "Pursuant to the terms of the parties' April 21, 2006 . . . stipulation and the order made therein, and over the objection of [Tapas], the court grants the request of [Irina] to travel to Russia with the child . . . . Specifically, [Irina] may remove the child, Masha, on vacation from March 20, 2008, to June 18, 2008. [¶] It is ordered that [Irina] provide to [Tapas] an itinerary of her travel plans prior to exiting the United States of America."

One week later, on March 12, 2008, Tapas filed an ex parte application for an order shortening time to serve and hear his motion for reconsideration of the court's decision allowing Irina to travel to Moscow. In the motion, he also requested the court make Irina post a bond, give him permission to move back into the house and videotape when Irina is in Russia, block the child's funds, set aside the 2006 stipulation, and adopt the court investigator's report. In addition, Tapas filed a separate request for a child abduction prevention order pursuant to Family Code section 3048. Irina opposed the motion and her counsel filed a *Borson* motion for Tapas to pay Irina's attorney fees (*In re Marriage of Borson* (1974) 37 Cal.App.3d 632). Irina hired a new attorney, Robert C. English, who filed a second opposition to Tapas's motion.

The court denied the motion for reconsideration but granted Tapas's counsel's request Irina post bail in the sum of \$10,000. Tapas filed a writ petition, which this court summarily denied. Irina traveled to Russia with Masha on March 21 and returned to the United States on June 18, 2008, with Masha, as promised.

Tapas obtained a new attorney, Indu Srivastav. On May 7, 2008, the court considered but did not impose sanctions against Tapas's former counsel (Teasdale) for carelessly publicizing confidential information contained in the child custody investigation report. The court appointed counsel (Daniel Boehm) to represent Masha. Tapas was ordered to pay monthly \$632 spousal support and \$755 in child support. The

court ordered Irina to move out of the family residence by September and ordered Tapas to pay her \$1,500 before July 15 for moving expenses. Irina moved to an apartment.

Irina hired attorney Kevin F. Harrison and filed a motion seeking modification of support, attorney fees, and use of Tapas's car (the Mazda he had abruptly repossessed without giving notice). Tapas filed a motion requesting additional visitation with Masha and stated Irina should not be permitted to take the child away for more than two weeks in the future. On November 6, 2008, the parties (each represented by counsel) entered into a stipulation. Judge Francisco F. Firmat signed the order.

The stipulation and order provided the parties agreed to have a 730 evaluation focusing on Tapas's competency and capacity to care for Masha overnight, the minor's night terrors, and any other issues her counsel deemed "appropriate and necessary." Masha was also to be evaluated by a neurologist to determine if there was a neurological basis for her night terrors. Masha would begin counseling with a therapist. Tapas's visitations were modified to exchange Thursdays for Saturdays (9 a.m. to 6 p.m.), and the court ordered Tapas's adult daughter "shall" be present.

Moreover, the court ordered, "Pending completion of the 730 evaluation and as an interim order only . . . neither party shall remove the minor child from the State of California without written consent of the court. Upon completion of the 730 evaluation the order of [April 21,] 2006, regarding travel is reinstated." After accepting the stipulation, the court heard testimony and concluded "irreconcilable differences had caused the irremediable breakdown of the marriage." It entered a judgment of dissolution of marriage as to status only. After this hearing, Tapas fired Srivastav and rehired Teasdale.

The 730 evaluation was not completed until nine months later. In the meantime, Tapas filed an Order to Show Cause (OSC) seeking many changes, including a modification of child custody to give him sole legal and physical custody. In addition,

he no longer wanted to pay spousal support, he wanted control of the child support funds, and he requested \$2,000 sanctions from Irina for making false child abuse reports. Attached to the OSC was a Judicial Council form requesting a child abduction prevention order (Fam. Code, § 3048) based on allegations Irina had strong ties to Russia and she had started filing unfounded child abuse reports against Tapas. Before the hearing, Tapas fired Teasdale and began to represent himself in propria persona.

At the hearing on March 25, 2009, the court entered a decision stating it was confused as to several issues and asked counsel for clarification before the next hearing on April 28, 2009 (which was later continued to June). Tapas hired a new attorney, Ann E. Khyltash, who updated the court on the status of the case. She stated Dr. Sheffner had never been retained to conduct the 730 evaluation, but in February 2009, the case was transferred to Galindo (a clinical psychologist, licensed clinical social worker, and registered child play therapist) for an evaluation. Khyltash informed the court that Family Court Services agreed to file the custody investigation report with the court.

Finally, Khyltash informed the court that the child had met with Beth Lo, a neurologist, who prepared a letter in February 2009. Lo stated Masha should have no further contact with her father. In the letter, Lo opined Masha had a “clear history of night terrors that appear to have been precipitated by traumatic events involving visitation with her father. Per the report, her father has been physically and sexually abusive with her and this likely has exacerbated her episodes of night terrors. Her night terrors remitted in the past when she had no visitation with her father including a [three]-month vacation to Russia.” Khyltash asserted the doctor’s opinion was likely tainted by statements made to her by Irina.

In the summer of 2009, Boehm was relieved as the child’s counsel and Irina filed an ex parte petition requesting her counsel release Masha’s passport so she could obtain a travel visa from the Russian consulate. Irina stated she understood all travel

plans were temporarily suspended pending completion of the 730 evaluation. She explained she was eligible for a Russian state pension in mid-October 2009 but to start collecting the funds she was required to physically be present in Russia for approximately one month. She had made and paid for travel arrangements but needed to obtain a visa from the Russian consulate and required Masha's passport. Tapas would not stipulate to release the passport to process the visa unless he was permitted to take Masha to India.

Tapas's counsel apparently misunderstood the nature of the ex parte request and filed a declaration opposing an alleged request for a travel order. Counsel suggested Irina travel to Russia and leave Masha in the care of Tapas and a nanny. Commissioner Vogl ordered temporary release of the passport for the purpose of obtaining a visa. Although Irina had not asked for permission to travel, the court stated in its order, "The court does not grant permission to [Irina] to travel on the visa."

The court continued the pending issues of custody and visitation to be determined at the next hearing. The 730 evaluation was completed at the end of August 2009. The evaluation is 48 pages long and discusses the history of the case, as well as descriptions of telephone calls and meetings with the various parties and witnesses. In the beginning of the report, Galindo noted she had been asked to address Tapas's competency and capacity to handle the minor for overnight visits, parental alienation, and the minor's night terrors. Galindo specifically stated international travel was not within the scope or purpose of the evaluation.

We will not divulge the confidential findings made in the report other than information critical to the custody issue on appeal. Galindo recognized both parents had made poor choices generating conflict for Masha. Galindo found there was insufficient evidence to prove a causal relationship between Masha's night terrors and visits with her father. She noted Lo's report was inconsistent with the results of five (not seven as Tapas alleged) SSA child abuse investigations (made from January to December of 2008). Galindo noted the first report was made by Masha's physician, but there were four other

reports made by Irina (between September and December 2008) that were all deemed unfounded or inconclusive. During the last investigation the social worker cautioned Irina about making reports and warned the child would be taken into protective custody if it was determined the child was being coached to make false statements. Irina did not file any child abuse reports in 2009.

Galindo also confirmed there was a basis for Irina's concerns about Tapas's ability and capacity to care for Masha. She concluded 78-year-old Tapas appeared to be suffering from a mild cognitive impairment, which was progressive in nature, but unlikely to turn into "Frank Dementia." She noted Tapas had started taking medicine typically prescribed in cases of dementia to improve cognition from his neurologist, David Holstein. Galindo recounted that beginning in 2005, Tapas's family observed him to become uncharacteristically forgetful, paranoid, and hostile. Galindo observed that currently Tapas's executive abilities appeared to be somewhat impaired, but he was doing a good job of compensating in this area. She stated Tapas was depressed about his current situation in the American justice system.

Galindo also discussed evidence Tapas was napping during his custodial time, leaving a special needs child unsupervised. Galindo explained why Masha's condition required better supervision. Galindo also discussed potential problems with Tapas's parental judgment. He had a tendency to be too permissive likely due to his misunderstanding of Masha's cognitive and physical abilities.

With respect to parental alienation, Galindo stated it appeared Masha was no longer exhibiting polarized symptomatology. Irina was doing her best not to influence her daughter out of fear the child would be taken away. However, Galindo opined the risk of polarization remained high due to Masha's involvement in the parental conflict. Galindo concluded the parents' history of poor parenting choices was generating conflict that was detrimental to Masha.

Galindo recommended Irina retain primary physical custody of Masha. Galindo recommended Tapas continue visits with Masha after school and attempt a monitored overnight stay “under experimental conditions.” Galindo stated it needs to be determined what, if anything, may be contributing to Masha’s night terrors. She recommended that because change was distressing to Masha, the overnight visits occur during calm periods in the child’s life. In addition, because Masha had been sleeping with Irina in her bed, Galindo recommended Tapas schedule a slumber party involving his daughter and her children. Galindo stated the current schedule of switching back and forth on a daily basis was inappropriate for Masha’s special needs and was likely to create stress as the child begins school.

Galindo opined Masha was not at immediate risk of harm while in Tapas’s care, but she was concerned about his current need to nap, his permissive parenting style and conflict with Irina. She recommended the parents share joint legal custody, but Irina retain primary physical custody. Because of Masha’s developmental needs, Galindo suggested that after school visits occur in blocks of time, with Irina picking her up from school on Monday and Tuesdays, and Tapas getting her every Wednesday, Thursday, and alternating Fridays. Irina would then pick up Masha at 6 p.m. from Tapas.

Galindo stated Tapas’s after school visits and Saturday visits should be contingent on his follow through with Holstein for dementia medication. She recommended Tapas check in regularly with Holstein and discuss the possibility of antidepressant medication. In addition, Galindo recommended the court make the duration of Tapas’s visits contingent on his ability to stay awake during his custodial time. Galindo recommended the first experimental overnight visit occur soon after Irina returned from Russia. Galindo stated the parents should be ordered not to discuss money, family business, or the court case during visits. Tapas should not criticize the Mormon church or Irina’s friends in front of his daughter.

Finally, Galindo recommended a special master (pursuant to Code of Civil Procedure section 639) be assigned to monitor Tapas's competency, whether the parents were actively attempting to alienate the child from the other parent, and whether the parents had developed an understanding and appropriate response to Masha's night terrors. Galindo stated the special master should have authority to make advisory findings directly to the court regarding all facets of parenting decisions and notify the court if changed circumstances or the best interests of Masha warranted review by the court. She recommended the court appoint Hoernig (specializing in adult and child psychiatry) to serve as special master and the parents attend parenting classes.

Before the next hearing date, the parties submitted additional documents for the court's consideration. On September 14, 2009, the court issued a lengthy minute order reciting the procedural history of the case and ruled Irina could not take Masha to Russia.

Irina appealed this ruling, and as stated above, we reversed the order. (*In re Marriage of Mukutmoni* (Aug. 25, 2010, G042721) [nonpub. opn.].) In short, we concluded the 730 evaluation did not highlight any circumstances warranting modification of the current travel order. To the contrary, the evaluator reported the conflict between the parents remained constant and, sadly, unchanged. The expert had not considered the issue of international travel. Galindo's recommendation the court appoint a special master was to address other issues.

In the opinion we noted that after looking through the entire court file it became plainly evident "Tapas has a habit of waving the 'flight risk' red flag anytime he files a document with the court. Certainly, it is an easy allegation for him to make against an immigrant, and obviously it is one that cannot be lightly brushed aside by the trial court. However, over the last four years he has repeatedly been proven wrong on this issue, and this litigation tactic appears to have become an easy way for him to harass Irina. We conclude Tapas certainly has given Irina ample cause to flee over the years,

but it also can reasonably be inferred from her actions she intends to stay in the United States. . . . Given what she has endured, there is no reason to question her declaration the United States is her ‘dream country’ and after 15 years as a legal resident she intends to stay.” (*In re Marriage of Mukutmoni* (Aug. 25, 2010, G042721) [nonpub. opn.] )

While appeal was pending, Irina’s attorney withdrew from the case and Irina proceeded in propria persona. On November 4, 2009, the court followed Galindo’s recommendation and appointed Hoernig to be the special master. The court also ordered both parties to comply with the recommendations made by Galindo, which included supervised experimental overnight visits with Tapas. The court set the matter for trial for February 8, 2010.

On November 12, 2009, Irina filed an income and expense declaration to support her OSC seeking a court order for Tapas to pay her attorney fees, special master fees, and health insurance. On November 25, she filed an ex parte OSC asking that the special master’s fees be paid by Tapas and “no experimental overnight visits occur before the special master takes the case” and monitors Tapas’s mental state. Tapas filed oppositions to these OSCs.

The following month, Tapas filed an OSC seeking modification of child support, spousal support, and attorney fees. He sought a vocational evaluation of Irina’s earning potential. He requested the OSC be heard the same day as Irina’s OSCs.

On December 14, 2009, the court considered the pending OSCs. The court reviewed the parties’ 2008 stipulated court order. It considered the parties’ arguments and ordered each party to pay one-half of the special master fees. It denied Irina’s request to modify visitation. It ordered Irina’s former attorney to give Tapas’s counsel the child’s passport to hold and not release it to either party without a court order.

At the end of December 2009, Tapas filed an OSC for contempt based on Irina’s refusal to permit overnight visitation. In January 2010, Irina hired

Marc E. Mitzner as her attorney. She stipulated to a vocational evaluation. Also in January 2010, the case was reassigned to Judge David L. Belz.

In February 2010, Tapas filed a declaration with the court stating Irina had made another false allegation of abuse against him to thwart the next scheduled overnight visit. Tapas requested the court transfer custody to him because it would be in his daughter's best interests. He hurled many other accusations against Irina and requested that of all the issues pending on the court's calendar, the issue of custody must be dealt with as soon as possible. At the next hearing, the court ordered overnight visitations were to continue so that information about the progress of those visits could be provided to the special master. The court deferred the issue of the report's cost until after its completion.

The trial date was continued from February 8, 2010, to April 20, 2010. However, on that day the trial was again continued to June 15, 2010, based on the parties' stipulation.

Hoernig's special master report is dated April 26, 2010. He reported that in the past eight months, since the last report, there had been no significant changes to the original visitation recommendations. Masha began overnight visits in February 2010, in the presence of Tapas's older daughter and her children, and visits have continued without incident. Hoernig stated the parties were unhappy with the current custody arrangement. Irina would like visits to be shorter because Tapas ignored Masha's homework after school and she was too tired to finish it when she got home. Masha complained she was bored during visits with Tapas, and he continued to nap while she was there. She was still suffering from night terrors. Tapas reiterated he wanted to be an active participant in Masha's life and for her to have a positive experience. He stated the legal proceedings caused him a great deal of stress and he was very upset about the amount of money being spent. He felt the judicial system was biased against him

because of his skin color. Tapas's daughter stated she no longer wanted to monitor overnight visits, and she felt Tapas could care for Masha on his own.

Hoernig interviewed the parents, Tapas's daughter, Masha's teacher, and Galindo. Hoernig observed both parents acted in an appropriate fashion with Masha, and the child appeared to be very close to her mother. He obtained a secondary neurological opinion from Dr. Michael Mahdad, who examined Tapas and concluded he suffered from an age related minimum cognitive impairment. Mahdid recommended a neurological reassessments every 6 to 12 months. Hoernig reported it appeared Tapas had deteriorated since the last evaluation in 2009. Hoernig reported Tapas had difficulty focusing and controlling impulses and emotions, particularly angry ones. He witnessed Tapas having paranoid and angry outbursts. Tapas angrily accused Hoernig's office staff of being prejudiced against him because of his skin color. Masha's teacher reported that due to an angry outburst at school, the school administration had prohibited Tapas from talking with any of the teachers, and the administration was handling all interactions.

In light of these behaviors, Hoernig recommended changing the visitation schedule because it would not be in Masha's best interests to spend extended periods of time with her father. He recommended after school visits on Tuesdays and Thursdays end at 5 p.m. rather than 6 p.m. Saturday visits should start at 9 a.m. and end at 2 p.m. Overnight visitations should cease. Hoernig recommended Tapas be treated by a geriatric psychiatrist to consider appropriate medication to manage his thought disorder and difficulties maintaining control of his emotions. Hoernig also did not think it would be in the best interests of the child to travel to Russia for an extended period of time and be away from her father. He opined Masha did not have a strong bond with Tapas and it was important she saw him frequently to encourage a more positive relationship.

On June 2, 2010, Tapas fired his attorney and sought a continuance of the June trial date to the end of July. The court granted the requested continuance. In addition, the parties stipulated that Hoernig's special master report would be received

into evidence. The parties discussed the report, and over Tapas's objection the court adopted the special master's recommendations. The court terminated overnight visits until the trial set for July 21, 2010. The court encouraged Tapas to "work with Hoernig to determine why there are concerns regarding overnight visits with [his daughter] and what can be done to address those concerns." The court's minute order reflects the court advised Tapas to accept the recommendation and work towards the goal of having the recommendations modified, or hire his own expert to refute Hoernig's findings.

In July 2010, Tapas hired attorney Gary A. Perotin. The July trial was continued to October 25, 2010. A week later Tapas filed an OSC seeking modification of the order rescinding overnight visitation. He argued there had been no problems with overnight visits and Hoernig merely recommended temporarily terminating overnight visitations pending the June 2010 trial date (continued to July 21, 2010). However, at the July hearing, the court discovered the superior court file was transferred to the appellate court due to Irina's appeal and it continued the case to October 2010. Tapas complained Irina's "meritless" appeal should not require him to wait three months to have overnight visits. Tapas also alerted the court that Hoernig planned to retire in September and a new special master should be appointed.

In August 2010, this court filed its opinion, overruling the court's September 2009 order forbidding Irina from traveling from Russia. (*In re Marriage of Mukutmoni* (Aug. 25, 2010, G042721) [nonpub. opn.].) In early September, the court granted Tapas's request to continue the hearing on his July 2010 OSC to the trial date scheduled on October 25. Before the hearing, Mitner filed a declaration regarding attorney fees and costs incurred in representing Irina and requested the fees be paid by Tapas.

The court granted the parties' request to continue the October hearing date to December 22, 2010. In November, Tapas filed an OSC to appoint a new special master. He attested Hoernig had retired and although Hoernig agreed to testify regarding

his findings, Tapas argued this evidence would not be as helpful because it was stale, and a new special master should be appointed. The parties were willing to stipulate to a successor special master but could not agreed on who it should be.

At the hearing held on December 22, the parties conferenced in chambers and off the record. In the courtroom, the minute order reflects the court appointed clinical psychologist, Drozd, to prepare a follow up 730 evaluation report. Tapas was ordered to pay two-thirds of the fees and Irina the remainder. Tapas's counsel was ordered to prepare an order regarding the "child custody evaluator pursuant to the terms discussed in chambers." The trial and Tapas's OSCs were continued to January 28, 2011.

The court's January 28 minute order states, "Parties have engaged in negotiations to resolve some issues. Counsel indicate that although the parties continue to work on these issues, it would be beneficial to take testimony from an expert witness today." The court considered Mary Hobson Thompson's testimony regarding the rental value of Tapas's residence in 2007.

The January minute order also reflected that Tapas's behavior in court was inappropriate. It stated, "Court wants stability for the minor child. Based on comments made by [Tapas] in open court today, the [c]ourt is concerned over the stability of [Tapas]." In addition, the court noted in the order that Tapas's "statements [regarding bias] have no foundation in truthfulness, and the [c]ourt can find no bias on behalf of the [c]ourt appointed experts. [Tapas] is directed to focus on what the [c]ourt is looking for in a parent; the [c]ourt is looking to see if both of the custodial parents are emotionally stable and capable of performing the responsibilities of a parent."

The court continued the matter to allow time for Drozd to complete her report. The court stated it was inclined to grant Irina's request to vacation in Russia with Masha from April 16 to 25, but it wanted to consider Drozd's recommendations first. The court ordered counsel to investigate the conditions for travel pursuant to the Hague Convention. The trial was continued to April 5, 2011.

On April 5, the court's minute order stated it would consider Irina's request to take Masha to Russia for vacation on May 25, 2011, and hold a hearing on all remaining issues on August 18, 2011. A few weeks later, Irina filed an ex parte OSC regarding spousal support and attorney fees and sought an order shortening time. After considering the matter, the court ordered Tapas to pay Mitzner \$10,000.

On May 25, 2011, the court held a trial on the issues of custody and visitation, as well as Tapas's two OSC's seeking modification (filed on December 10, 2009, and July 23, 2010). In the minute order, the court ruled, "Matter is before the [c]ourt for [t]rial on custody and visitation issues. Counsel indicate there are no agreements, and matter is ready to proceed." Drozd was the first witness. The parties stipulated she was an expert and her report was submitted into evidence. After Drozd's testimony, the matter was continued to May 31.

Drozd's report is 38 pages long. In addition to reviewing the prior reports and interviewing the parties, she asked Christopher Ingalls (a clinical psychologist) to conduct a neurological assessment of Tapas. Thereafter, Drozd administered and interpreted two psycho-diagnostic tests. In her report, Drozd clarified the two issues addressed in the report were whether Tapas should have overnight visits and if Irina should travel to Russia with Masha over the summer. She clarified her role was as case manager and she had not conducted a child custody evaluation.

Without revealing the details of the confidential report, we note Drozd's report is similar to Galindo's 2009 report and Horning's 2010 report. As detailed in those reports Tapas was diagnosed as suffering from a mild cognitive impairment that was not dementia. Like Galindo, Hoernig, and the trial court, Drozd observed first hand Tapas's problematic outbursts, his difficulty staying on topic, and his apparent paranoia about being the victim of racism. She noted Tapas would nap in her office and during custodial time with Masha. Tapas got lost in her office complex and often looked disheveled and

confused. He was no longer taking prescribed medication but claimed he napped less when he took a caffeine-based stimulant from the store.

Because the cognitive tests showed only mild impairment, Drozd offered seven different hypothesis regarding Tapas's problematic conduct. The theories ranged from Tapas being fatigued by the court battle, to depression, to Tapas exhibiting social skill barriers. Drozd admitted the root of Tapas's outbursts may be any or all of her hypothesis.

Drozd acknowledged Tapas's behavior and tangential thinking had resulted in a disconnection with his eight-year-old daughter. Their lack of emotional closeness could also be due to the generational gap between them, Masha's struggles caused by Fetal Alcohol Syndrome, the lack of time they spent together, Masha's knowledge of the past domestic violence, or Irina's lack of support and interference with the father-daughter relationship. Drozd concluded another factor that attributed to the dysfunctional family dynamics was Irina's "gatekeeping." Drozd explained a parent may restrict a relationship with the other parent (restrictive gatekeeping) or in cases of abuse restrict access to protect the child (protective gatekeeping.) She opined Irina's protective gatekeeping had recently become more restrictive than protective.

Drozd concluded her recommendations are not very different from Galindo's and Hoernig's, but she believed there had been poor follow through with the specifics of their recommendations. Her recommendations would call for specific kinds of treatments, goals, and accountability. She explained something must be done to build the father daughter relationship and better family dynamics. Drozd reasoned there were no viable allegations Tapas was abusive or suffering from dementia. His inappropriate outbursts, strange behavior, and tangential thinking did not establish he was a danger to his daughter. Unless any of his functioning should change, it was safe for Masha to be in his care without supervision. Drozd concluded if overnight visits were to be started, the process should be gradual and supervised. As for Irina's plans to travel to Russia, Drozd

said she was not qualified to determine if there was a risk of abduction. However, Drozd recommended that Masha not be away from Tapas for more than two consecutive weeks.

To treat the dysfunctions of the Mukutmoni family, Drozd made five recommendations: (1) legal custody should be joint but there must be guidance to set a system, with the help of a special master, to work towards co-parenting rather than fighting between the parents; (2) Tapas needed to receive neuropsychology and family therapy and find ways to better relate and connect with his daughter at her level and maintain his cognitive functioning; (3) Irina needed to receive therapy to address issues of alienating behavior and inappropriate gatekeeping; (4) the court should implement a multi-phase plan to gradually increase Masha's time with her father as well as "a system" to "keep everyone accountable for working on specific treatment goals with small steps towards an increase in time occurring slowly over time;" and (5) the parents must work with the case manager on a weekly bases until a system of accountability is in place. Drozd delineated a detailed 10-phase plan to implement the fourth recommendation to increase visitation between Masha and Tapas. It began with a phase one, calling for the status quo for period of 30 days "while the system to assure reliable reports is established." The 10th phase (scheduled to begin summer 2012), anticipated Tapas would be able to have one overnight visit during the week and every other weekend. In addition, the recommendations called for strict accountability measures with the therapists frequently communicating with the case manager. Drozd offered to continue as the case manager.

On May 31, both parties testified. The minute order stated the court considered testimony and determined Ingalls was a qualified neuropsychologist. Irina expressed concern about Ingalls's level of expertise, recalling that Hoernig recommended evaluation by a medical doctor (a geriatric psychiatrist). The court concluded Ingalls testified in a more comprehensive manner than that of a geriatric psychologist.

Finally, in the minute order, the court stated it had read the special master's report and reviewed the recommendations. The court determined Masha would benefit from having a better relationship with Tapas, and he had demonstrated a strong desire to have a good relationship with his child. The court agreed Tapas would benefit from counseling and developing better parenting skills. The court observed there was a large age gap and Tapas needed to develop new skills as an 80-year-old man to effectively communicate with his eight-year-old child.

The court also discussed Drozd's concerns regarding Irina's tendency to alienate Masha from Tapas. The court noted Irina would benefit from counseling because she had "a very strong protective attitude towards the minor child, with some possible restrictive behaviors." On the other hand, the court acknowledged there was some basis for Irina's concerns. It stated, the "tangential, circumstantial and irrational behaviors mentioned in the prior reports should not be shoved aside. . . . Drozd will have oversight on this issue. The parties should focus on moving forward. [¶] [The court] finds the recommendations within [Drozd's] report . . . points the parties in the right direction. [¶] [C]ourt encouraged [Tapas] to do everything possible to eliminate [Irina's] concerns regarding the safety of the minor child." The court concluded Drozd's recommendations addressed Irina's concerns and opened the door to increased time between Tapas and his daughter.

In conclusion, the court ordered the parties would have joint legal custody. It ordered Tapas and Irina to participate and pay for their respective counseling as outlined in Drozd's report. It concluded there was insufficient evidence to show Tapas posed a risk to Masha and the court encouraged Tapas to have more time with her "by way of implementation of recommendation number [four regarding a 10-phase visitation plan] within Drozd's report." The court determined Drozd would remain the special master, with Tapas paying 80 percent of the cost and Irina paying 20 percent. The court stated it was up to the parties to choose to live in peace or conflict and that good parents

protect their children. The court encouraged the parties to become invested in protecting Masha.

Finally, as for Irina's desire for a lengthy trip to Russia, the court determined "implementation of the increased time to [Tapas] is more important than a trip to Russia and more important than the minor child's involvement in [second] grade activities." The court ordered Irina could take the child to Russia for no longer than 16 days. The court reserved jurisdiction over the issue of what should occur if Irina failed to return and the issue of whether Tapas could travel with the child to India. Tapas's counsel was ordered to prepare a formal order.

On August 22, 2011, the court signed a final judgment containing the ruling discussed on May 21, 2011. In the interests of justice, we will construe Irina's notice of appeal regarding the May 2011 order as being from the subsequent August 2011 judgment simply memorializing that minute order.

## II

### A. *Relevant Legal Authority*

"Under California's statutory scheme governing child custody and visitation determinations, the overarching concern is the best interest of the child. The court and the family have 'the widest discretion to choose a parenting plan that is in the best interest of the child.' (Fam. Code, § 3040, subd. (b).) When determining the best interest of the child, relevant factors include the health, safety and welfare of the child, any history of abuse by one parent against the child or the other parent, and the nature and amount of contact with the parents. [Citation.]" (*Montenegro v. Diaz* (2001) 26 Cal.4th 249, 255, fn. omitted (*Montenegro*).)

The California Supreme Court in *Montenegro* explained, "[a]lthough the statutory scheme only requires courts to ascertain the 'best interest of the child' [citations], this court has articulated a variation on the best interest standard once a final judicial custody determination is in place. Under the so-called changed circumstance

rule, a party seeking to modify a permanent custody order can do so only if he or she demonstrates a significant change of circumstances justifying a modification. [Citation.]” (*Montenegro, supra*, 26 Cal.4th at p. 256.)

In this case, a final judicial custody determination was not in place and the parties agree the best interest standard applies.<sup>2</sup> We recognize the parties entered into a detailed stipulated custody order in 2006, however, the order did not contain a clear, affirmative indication that the parties intended it to be a final judicial custody determination. (See *Montenegro, supra*, 26 Cal.4th at p. 258 [“Although we conclude that stipulated custody orders *may* be final judicial custody determinations for purposes of the changed circumstance rule, we also recognize that many stipulated custody orders are not intended to be final judgments”].) Thus, the trial court in this case was not to apply the changed circumstances test, but rather apply the best interest standard and “look to *all the circumstances* bearing on the best interest of the minor child.” (*In re Marriage of Burgess* (1996) 13 Cal.4th 25, 31-32 (*Burgess*).)

“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. We are required to uphold the ruling if it is correct on any basis, regardless of whether such basis was actually invoked. [Citation.]” (*Burgess, supra*, 13 Cal.4th at p. 32.)

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<sup>2</sup> On appeal, Irina questions whether the May 31, 2011, minute order is a final judicial custody determination because it did not provide any award regarding physical custody. As noted above, Irina’s counsel prepared a final judgment in August 2011 on the “reserved issues of custody and visitation” that was signed by the court and recites the ruling made in the May 2011 minute order. The order does not specify primary physical custody was awarded to Irina, however that she has primary physical custody can be inferred from the detailed and limited visitation plan arranged for Tapas.

## *B. Analysis*

Irina's appeal raises many issues, but central to them all is her disbelief that any time with Tapas would be in Masha's best interests. In sum, she claims the court did not consider the circumstances showing it would not be in Masha's best interests to be in Tapas's care, but rather relied entirely on Drozd's allegedly prejudicial report. Irina is highly critical of Drozd's report, asserting Drozd did not conduct a child custody evaluation, omitted findings contained in Galindo's report regarding Tapas's mental competency, failed to address Irina's safety concerns, and ignored Hoernig's opinions to limit time between Tapas and Masha. She faults Drozd for referring Tapas to Ingalls rather than a medical doctor for an evaluation. She argues the court failed to consider her testimony or address the cause of Masha's night terrors. She complains the court had unwittingly caused her to incur unnecessary expenses and costs for a third investigation by Drozd. In addition, Irina maintained the judgment's statements (and Drozd's report) concerning Irina's alienating behavior was based on improper evidence and Drozd's prejudicial findings.

We conclude no abuse of discretion appears on this record. After reviewing the reports from three different medical experts, who all essentially reached the same conclusions about this dysfunctional family, it was not unreasonable for the trial court to conclude it was in the "best interest" of Masha for (1) the parents to share joint legal custody, and (2) have Irina retain primary physical custody with implementation of a multi-phase plan to increase Masha's visits with her father dependent on counseling, accountability conditions, and continuing supervision by the case manager and the court. Because of the many continuances in this case, we remind Irina that the court implemented the two other plans for a period of time (recommended by Galindo and Hoernig) with no success. Therefore, it cannot be said it is an abuse of discretion for the court to implement Drozd's more detailed and structured approach. All the experts

agreed something must be done to effectuate a change in the way Irina and Tapas share the task of co-parenting their daughter.

Irina's briefing on appeal is full of evidence favorable to her position that Tapas is incompetent to care for Masha and she concludes the court should have disregarded Drozd's report and testimony in favor of Galindo's or Hoernig's recommendations. She attempts to retry her case on appeal, asking us to reweigh portions of the various expert reports and reach a different result. However, as stated above, our review of the judgment is limited, and we conclude Irina failed to demonstrate the court abused its discretion in adopting Drozd's recommendations.

Irina does not dispute Drozd's professional experience or expertise, in fact she stipulated at trial that Drozd was an expert. The court could reasonably rely on Drozd's report, which was very similar to Galindo's and Hoernig's reports. All the experts were concerned about the level of distressing conflict between the parents and how it was negatively affecting Masha. They all considered the safety of the child while in Tapas's care due to his issues with tangential thinking, napping, emotional outbursts, and parenting shortcomings.<sup>3</sup> However, none of the experts opined Masha was in any immediate risk of harm while in Tapas's care. Tapas strongly desired to be involved in his daughter's life and the experts agreed efforts should be made to create a more favorable relationship and stronger father-daughter bond. Where the expert's reports and opinions disagreed related to how to address these findings.

Galindo's evaluation recommended Irina retain primary physical custody and Tapas visit his daughter after school and attempt a monitored overnight stay under experimental conditions, i.e., supervision by Tapas's daughter. Galindo also

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<sup>3</sup> Because the psychologists and psychiatrists who evaluated Tapas were essentially in agreement about his level of cognitive impairment, we find no merit in Irina's assertion Drozd's reliance on Ingalls (a neuropsychologist) rather than a geriatric psychiatrist was a reason to disregard Drozd's recommendations.

recommended parenting classes, and appointment of a case manager to continually monitor the issue of Tapas's mental competency and issues with parental alienation. As Irina points out, Hoernig expressed more concern about Tapas's competency to care for Masha, but he also concluded visitations should continue and it was "important" Masha had the opportunity to see her father frequently to encourage a more positive relationship. Hoernig did not recommend overnight visits but strongly expressed the opinion it would not be in Masha's best interest to be away from her father for an extended period of time (such as two months in Russia) because the prolonged absence would further weaken the father-daughter bond.

Contrary to Irina's arguments on appeal, Drozd's recommendations incorporate many of the same elements as the prior two reports but with more specific guidelines and oversight. Drozd reasonably recommended therapy for both parents, who have been unable to agree on anything regarding their child for the past five years. We recognize this is a significant step up from Galindo's suggestion the court order parenting classes, but we cannot say the court's decision to order counseling was unreasonable. The experts agreed each parent had unresolved issues, and the trial court reasonably concluded the family dynamics could improve with specific therapy goals.

In addition, the court's order for therapy added an extra layer of oversight and further addressed Irina's safety concerns about Tapas's parenting skills and mental competency. Tapas's therapist was to keep in contact with the special master and presumably alert everyone if there was new cause to be concerned.<sup>4</sup> Irina does not refute

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<sup>4</sup> The trial court stated there was no difference in expert opinion between a psychiatrist and psychologist for purposes of evaluating Tapas's level of mental competency. Irina failed to adequately refute this conclusion, and we will not speculate as to its accuracy. However, we note Irina also complains Tapas should be evaluated by a geriatric psychiatrist, but Drozd recommended he receive therapy from someone trained in neuropsychology. We find no reason to conclude the court's agreement with this kind of therapist. We merely note there may come a time when Tapas must be seen by a psychiatrist who can consider and prescribe appropriate medication to manage Tapas's

that all the experts agreed it was in Masha's best interests to have a more positive relationship with her father. And Drozd's multi-phase plan regarding visitation adequately addressed Irina's concerns about supervision, accountability, and safety during those visits.

Unlike Galindo's vague experimental plan for overnight visits, Drozd proposed a sensible approach by gradually changing visitation schedules to give Masha ample opportunity to adjust to having more time with her father, as well as to afford Tapas time to develop new parenting skills in therapy. The plan provided for much needed oversight from several neutral third parties (the therapists, the case manager, and the trial judge) to protect Masha if Tapas should experience any further age-related cognitive deterioration or otherwise put her at risk of harm.

We note Galindo and Hoernig proposed visitation arrangements that this court typically sees in child custody disputes. The record shows the parties were perpetually unhappy and returned to court practically every month with OSCs seeking modification. Given this clear history, Drozd reasonably recognized that keeping with the status quo would not remedy the family's dysfunctional relationships. Drozd explained her plan was similar to those in the past but called for specific treatment goals and accountability. Her plan to gradually step up visitation time with Tapas was reasonable and well thought out.

Specifically, phase one of the plan permitted Tapas to continue visits with Masha after school twice a week, for a period of 30 days, during which they would develop a system of "reliable reports." Phase two increased Tapas's weekday time from after school until 6 p.m. (one hour longer) twice a week. Phase three introduced a third after school day (on every Friday) for a period of 30 days. Phase four involved a visit on Saturdays (9 a.m. to 4 p.m.) for a period of 30 days.

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apparent thought disorder and paranoia. Medication cannot be prescribed by a psychologist. (Bus. & Prof. Code, §2904.)

Essentially the proposed plan for the first four months was to gradually reincorporate the prior custody orders suggested by Galindo and Hoernig. The only difference is that Drozd's multi-phased plan contained more specific treatment goals and a safety net of additional oversight. The parents were required to participate in counseling and report to the case manager once a week. The parents were going to be asked to work with the case manager to set up a better system for co-parenting. Tapas's neuropsychologist and Irina's therapist would also be involved in the process, reporting to the case manager about whether the parents were meeting their respective therapy goals. Given the inclusion of accountability and supervision in her plan, we presume the case manager also has the authority to delay or postpone advancement to the next phase if there was a setback in therapy or a risk of harm. In addition, the parties always will have the option of going to court to seek modification of the visitation plan based on evidence of changed circumstances.

The remaining phases, five through ten, provide for an incremental increase in overnight visits. Phase five changes Saturday's visits to start at a later time (4 p.m.) but continue to 10 a.m. on Sunday for a period of 30 days. Tapas could progress in phase six to visits every other weekend from Saturday morning to Sunday night. This phase continues for 90 days. Phase eight introduces Friday nights being added to the every other weekend time. Phase nine states that at one year, the visits will include two week day visits ending at 7 p.m. And phase ten, scheduled to begin in the summer of 2012, entails spending the night one week night per week and every other weekend. This would not be an unreasonable visitation schedule in healthy co-parenting relationships. Only time will tell if Tapas and Irina will ever progress to this final phase.

On a final note, we conclude Irina's complaints about the court limiting her vacation time in Russia to 16 days is irrational. She presented no evidence an extended

time away (two months) from Tapas was in Masha's best interests. To the contrary, the record shows the experts agreed Masha needed more frequent contact with her father to strengthen their bond. Not a single expert recommended the child be separated from either parent for two months. She can still visit Russia with Masha, but for a shorter period of time. We find no abuse of discretion as to this ruling.

The only portion of the court's ruling that we question is the statement Tapas need not be concerned about Masha's schoolwork when she is visiting him. In the court's minute order, the court stated increasing time with Tapas was more important than her "involvement in second grade activities." Based on our review of the record, it appears this statement was intended to address Irina's complaints that Tapas ignored Masha's homework and as a result the child was too tired to complete her schoolwork when she returned home near bedtime. Tapas's disregard for Masha's homework is somewhat surprising given his high level of academic achievement, earning a PhD in engineering and his work as a research scientist.

In any event, we see several problems with the court's statement, but because it is not included in the final judgment we need consider a reversal on this issue. Suffice it to say for purposes of this appeal, the involvement with and support of a child's education is a fundamental aspect of parenting. It is in Masha's best interests to be successful in school and supported by both parents with her studies. We sincerely hope the special master will appreciate Irina's legitimate concerns and hold Tapas accountable on this important issue as one of his parenting therapy goals.

III

The judgment related to custody and visitation is affirmed. In the interests of justice, neither party shall recover their costs on appeal.

O'LEARY, P. J.

WE CONCUR:

RYLAARSDAM, J.

BEDSWORTH, J.