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CERTIFIED FOR PARTIAL PUBLICATION*

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

ENRIQUE M., Plaintiff and Appellant, v. ANGELINA V., Defendant and Respondent.	D053395 (Super. Ct. No. D442663)

APPEAL from an order of the Superior Court of San Diego County, Gonzalo Curiel, Judge. Affirmed.

Enrique M., in pro. per., for Plaintiff and Appellant.

No appearance for Defendant and Respondent.

I.

INTRODUCTION

Enrique M. (Enrique) and Angelina V. (Angelina) dated from 1995 to 1997. In September 1997, after their relationship had ended, Angelina gave birth to their son, X. The parties share joint legal custody of X.

* Pursuant to California Rules of Court, rule 8.1110, this opinion is certified for publication with the exception of part III.B. and part III.C.

In February 2008, Enrique filed an order to show cause in which he requested that X. be ordered to enroll in Marshall Middle School (Marshall) the following academic year, and that the court change X.'s last name from "V.-M." to "M.V."[1] Angelina opposed both requests. She requested that the court order that X. be enrolled in Woodland Park Middle School (Woodland Park) and that X.'s name remain X.V.-M. The trial court denied Enrique's requests.

On appeal, Enrique claims that the trial court erred in failing to apply the strict scrutiny standard in ruling on Enrique's request to order that X. attend Marshall. Enrique also claims that the trial court erred in excluding various hearsay statements made by X., which Enrique offered in support of his request that the court order that X. be enrolled in Marshall. Finally, Enrique claims that the trial court erred in denying his request to change X.'s last name. We affirm the trial court's order.[2]

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1 At the hearing on his order to show cause, Enrique clarified that X. currently has a hyphenated last name, "V.[mother's last name] - M.[father's last name]." Enrique requested that the hyphen be removed and that the order of the parents' last names be reversed so that X.'s last name would be, "M.[father's last name] V.[mother's last name]."

2 Angelina has not filed a respondent's brief. Accordingly, we decide the appeal based on the record, Enrique's opening brief, and Enrique's oral argument. (See Cal. Rules of Court, rule 8.220(a)(2).)

II.

FACTUAL AND PROCEDURAL BACKGROUND[3]

In March 1998, Enrique filed a complaint in which he sought to establish a parental relationship with X., and requested child custody and visitation. In June 1998, the trial court entered an order that provided that Enrique and Angelina would share joint legal custody of X., that X.'s primary residence would initially be with Angelina, and that Enrique's custody rights would be gradually increased over time until the parents shared joint physical custody. The order further stated that X.'s last name would be "V.[mother's last name]-M.[father's last name]."

In late 2001, a dispute arose between Enrique and Angelina over where X. would attend kindergarten the following year. In December 2001, the court ordered that X. be enrolled at Richland Elementary School for kindergarten. In a written order filed in February 2001, the trial court stated: "[I]t is appropriate to enroll the child in the district of the primary custodial parent. The court sees Mother in that role."

In March 2006, Enrique filed an order to show cause in which he sought, among other things, to enroll X. in Tierrasanta Elementary School. In October 2006, the court denied this request. In January 2008, this court affirmed the trial court's order,

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3 We have drawn portions of our procedural summary from two prior appeals in this case, *Enrique M. v. Angelina V.* (2004) 121 Cal.App.4th 1371, (*Enrique M.*) and *In re X.M.* (Jan. 16, 2008, D050052) [nonpub. opn.] (*In re X.M.*). It appears that the caption of *In re X.M.* should have been *In re X.V.-M.* in light of the undisputed evidence that X.'s last name has been V.-M. since 1998. We note the error in light of Enrique's claim in the present appeal concerning X's last name.

concluding that the court had not abused its discretion in denying Enrique's request to change X's school.

In February 2008, Enrique filed an order to show cause in which he requested that the court order that X. be enrolled in Marshall the following year, and that the court change X.'s last name from "V.-M." to "M.V." With respect to his request that the court order that X. be enrolled in Marshall the following year, Enrique stated:

> "X. is in the last grade [fifth] offered at his current school. He will need to change schools next year. Marshall Middle School is located such that both Mom and I can share in driving and participating in X.'s academics. Mom drives by Marshall every day on her way to and from work. Marshall is one of the top middle schools in the county. X. wants to go to Marshall too."

Angelina opposed the requests and filed a responsive declaration. With respect to Enrique's request to enroll X. in Marshall, Angelina stated, "X. currently attends Richland Elementary School which filters into Woodland Park Middle School where X. would start the [sixth] grade in the fall of 2008." Angelina stated that Woodland Park has high test scores and that many of X.'s friends would be attending Woodland Park. Angelina explained that Woodland Park is located in the school district in which she lives.[4] Angelina also requested that the court impose sanctions in light of Enrique's alleged "ongoing campaign of harassment since March 1998."

Enrique filed a declaration in support of his requests. With respect to his request to enroll X. in Marshall, Enrique argued, among other contentions, that Marshall's

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4 It is undisputed that Woodland Park is located in San Marcos, where Angelina lives, and that Marshall is located in Scripps Ranch, where Enrique lives.

location would allow both parents to be involved in X.'s academics, and that Marshall was academically superior to Woodland Park. Enrique also stated, "If this Court were to select Woodland Park it would place a severe and undue burden upon my ability to parent X." Enrique also stated:

> "This Court is respectfully requested to take Judicial Notice under Evidence Code § 451[, subdivision] (a) that 'parenting one's child' is a protected fundamental right subject to strict scrutiny. This court is further respectfully requested to take Judicial Notice under Evidence Code § 451[, subdivision] (a) that 'participating in one's child's educational upbringing/academics' is part of 'parenting one's child.'"[5]

In April 2008, the trial court held a hearing on Enrique's order to show cause and Angelina's request for sanctions. The trial court denied Enrique's requests, and denied Angelina's request for sanctions. The court ordered that X. would attend Woodland Park and that he would maintain the last name of V.-M.

With respect to the issue of where X. would attend middle school, the court noted the proximity of Woodland Park to Angelina's residence and the fact that Angelina is responsible for taking X. to school on seven of the 10 school days in a two-week period. The court noted that Enrique's proposal would entail placing X. in a school approximately 15 miles from the residence in which X. primarily resides. The court further stated that it had examined the various ratings of the schools that the parties had offered, and found that "Woodland [Park] appears to have good scores." The court

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[5] Evidence Code section 451 provides in relevant part: "Judicial notice shall be taken of the following: (a) The decisional, constitutional, and public statutory law of this state and of the United States and the provisions of any charter described in Section 3, 4, or 5 of Article XI of the California Constitution."

observed that Angelina had resided in the same neighborhood for approximately eight and one-half years, which had allowed X. to attend a single school that feeds into Woodland Park. The court commented that some of X.'s current classmates would likely attend Woodland Park. The court also noted that Enrique had changed residences numerous times in the preceding years.

The court summarized its ruling by stating:

> "So for all of these reasons, at this time the court finds that the parents are unable to agree on a school at this juncture. The present orders provide for joint legal custody, which provides for issues involving education to be made jointly by the parents. To the extent that the parents cannot . . . mutually agree on the school, then it's placed upon this court to decide between the two options offered to the court. Considering all . . . of the factors that the court has noted, the court believes in this instance Woodland [Park] would be the superior school. For that reason, the court will side with the mother in the selection of Woodland [Park] for the next school."

On May 6, Enrique filed a notice of intention to move for a new trial on several grounds, including "newly discovered evidence" and "error in law." On May 16, 2008, Enrique filed a combined declaration and memorandum in support of his motion for a new trial. On June 30, Enrique filed a supplemental declaration and memorandum.

On July 5, having declined to rule on Enrique's motion for new trial, the trial court denied the motion by operation of law. (Code of Civ. Proc., § 660.)

On July 8, Enrique filed an appeal from the trial court's April 22, 2008 order.

III.

DISCUSSION

A. *The trial court did not err in failing to apply the strict scrutiny standard in ruling on Enrique's request that the court order that X. attend Marshall*

Enrique claims that the trial court erred in failing to apply the strict scrutiny standard in considering his request that the court order that X. attend Marshall.[6] Enrique claims that the trial court was required to apply the strict scrutiny standard because the court's decision had the potential to burden Enrique's fundamental right to parent X. Whether the strict scrutiny standard applies in this case raises a question of law, which we review de novo. (See *Enrique M., supra,* 121 Cal.App.4th at p. 1378 [determining "the appropriate legal standard to apply in ruling on [Enrique's] requests raises a question of law, which we review de novo"].)

Neither the United States Supreme Court, nor any other court of which we are aware, has ever applied the strict scrutiny standard to a custody or custody related dispute between two parents of a minor child.[7] In *Palmore v. Sidoti* (1984) 466 U.S. 429 (*Palmore*), the United States Supreme Court concluded that a state trial court had violated

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6 We rejected a nearly identical claim in one of Enrique's prior appeals in this case. (*In re X.M., supra,* D050052, slip. opn. at pp. 14-16.) Ordinarily, a ruling adverse to a party in a prior appeal precludes relitigation of the issue by that party unless there are significantly different facts in the second appeal. (*Bigbee v. Pacific Tel. & Tel. Co.* (1983) 34 Cal.3d 49, 56-57.) In light of our rejection of Enrique's claim on the merits, we need not consider whether our prior ruling precludes Enrique from relitigating his claim in this appeal.

7 By "custody related" we mean, as in this case, a dispute between two parents concerning the manner in which their joint legal custody will be exercised.

the equal protection clause by awarding a father custody of a child after the mother married an African-American. The trial court based its award on the rationale that the child would likely suffer social stigma from the interracial marriage of his mother. (*Id*. at p. 431.) In concluding that this order violated the equal protection clause, the *Palmore* court endorsed the best interest standard for adjudicating custody disputes between parents. (*Id*. at p. 432 ["The [trial] court correctly stated that the child's welfare was the controlling factor"].) The *Palmore* court further explained:

> "The State, of course, has a duty of the highest order to protect the interests of minor children, particularly those of tender years. In common with most states, Florida law mandates that custody determinations be made in the best interests of the children involved. [Citation.] The goal of granting custody based on the best interests of the child is indisputably a substantial governmental interest for purposes of the Equal Protection Clause." (*Id*. at p. 433.)

The *Palmore* court was clear that the court was reversing the trial court's order because of "the Constitution's commitment to eradicating discrimination based on race." (*Palmore, supra*, 466 U.S. at p. 432.)

More recently, as Enrique notes, a plurality of the United States Supreme Court has stated, "The Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children." (*Troxel v. Granville* (2000) 530 U.S. 57, 66 (plur. opn. of O'Connor J.) (*Troxel*).) In *Troxel, supra,* 530 U.S. at pages 66-67, the United States Supreme Court concluded that a Washington nonparental visitation statute, applied so as to require visitation between two minor children and their paternal grandparents, unconstitutionally

infringed on the petitioner mother's fundamental right to make decisions concerning the care, custody, and control of her children.

Ordinarily, governmental action that "substantially interferes with the enjoyment of a fundamental right is subject to strict scrutiny [citation], i.e., it must be set aside or limited unless it serves a compelling purpose and is necessary to the accomplishment of that purpose." (*In re Santos Y.* (2001) 92 Cal.App.4th 1274, 1315.) However, the *Troxel* plurality did not expressly state whether it was subjecting the statute at issue in that case to the strict scrutiny standard. (See also *Troxel, supra,* 530 U.S. at p. 80 (conc. opn. of Thomas, J.) [noting that the opinions of the plurality, Justice Kennedy, and Justice Souter all recognize that "parents have a fundamental constitutional right to rear their children, including the right to determine who shall educate and socialize them," but that "curiously none of [the opinions] articulates the appropriate standard of review"].)

In *Jonathan L. v. Superior Court* (2008) 165 Cal.App.4th 1074, 1102, the court cited *Troxel* and noted that the "level of scrutiny to which alleged violations of the parental liberty interest in directing the education of one's children are subject is not clearly established." However, the *Jonathan L.* court did note that, in the wake of *Troxel*, two California cases have applied strict scrutiny in cases alleging violations of the parental liberty interest. (*Herbst v. Swan* (2002) 102 Cal.App.4th 813, 819; *Punsly v. Ho* (2001) 87 Cal.App.4th 1099, 1107.) The courts in both *Herbst* and *Punsly* applied *Troxel* in concluding that Family Code section 3102, which authorizes certain forms of nonparental visitation, unconstitutionally infringed on a parent's fundamental right to

parent their child under the circumstances of those cases. (*Herbst, supra*, 102 Cal.App.4th at p. 819; *Punsly, supra*, 87 Cal.App.4th at p. 1107.)[8]

Enrique has not cited, and our own independent research has not uncovered, any California case in which a court has concluded that a trial court must apply the strict scrutiny standard in resolving a custody, or custody related, dispute *between the parents* of a minor child. This is so despite the fact that California appellate courts, including the California Supreme Court, have routinely considered such disputes. Courts in these cases have uniformly stated that, pursuant to applicable Family Code provisions, a trial court is to resolve such disputes in the best interests of the child. (E.g., *In re Marriage of Brown and Yana* (2006) 37 Cal.4th 947, 955; *Montenegro v. Diaz* (2001) 26 Cal.4th 249, 255; *In re Marriage of Burgess* (1996) 13 Cal.4th 25, 31-32.)

Enrique also has not cited, and our own independent research has not uncovered, a single sister state case that supports Enrique's position. (See *McDermott v. Dougherty* (2005) 385 Md. 320 [869 A.2d 751, 809] [stating that "[t]he best interests of the child standard is, axiomatically, of a different nature than a parent's fundamental constitutional right," and that "In cases *between fit natural parents* who both have the fundamental constitutional rights to parent, the best interests of the child will be the 'ultimate, determinative factor.'"]; *In re R.A.* (2005) 153 N.H. 82 [891 A.2d 564, 576] (lead opn. of

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8 Family Code section 3102, subdivision (a) provides: "If either parent of an unemancipated minor child is deceased, the children, siblings, parents, and grandparents of the deceased parent may be granted reasonable visitation with the child during the child's minority upon a finding that the visitation would be in the best interest of the minor child."

Broderick, C.J.) ["We note that, generally, strict scrutiny need not be applied to custody disputes. This is because in most cases courts will be balancing the rights of two fit parents, both of whom have the same constitutional right to custody of their children."]; *In re Parentage of L.B.* (2005) 155 Wash.2d 679 [122 P.3d 161, 178] ["No case has ever applied a strict scrutiny analysis in cases weighing the competing interests of *two parents*"]; accord Brinig, *Does Parental Autonomy Require Equal Custody at Divorce*? (2005) 65 La. L.Rev. 1345, 1358 ["as a matter of constitutional law, the best interests of the child, protected by the state, should prevail over the constitutional interests of either of the competing parents"].)

We find particularly instructive an opinion from the Court of Appeals of Wisconsin, *Arnold v. Arnold* (Wis. Ct. App. 2004) 270 Wis.2d 705 [679 N.W.2d 296] (*Arnold*), in which a father claimed that a custody and placement order violated his constitutional right to participate equally in the raising of his children. Like Enrique, the father in *Arnold* relied heavily on *Troxel* to support his claim that a trial court's order violated his fundamental right to parent his child. In rejecting the father's argument, the *Arnold* court distinguished *Troxel*:

> "A dispute between a parent and grandparents represents a far different dynamic than the dispute between two natural parents with equal rights after a divorce. The grandparents in *Troxel* simply did not have a fundamental right to the care and custody of the children as do the parents here. So, when the *Troxel* court was speaking of fundamental rights in the raising of children, it was speaking to the existing disparity between natural parents and grandparents.
>
> "Second, insofar as disputes between natural parents are concerned, while parents do have a natural right to care and custody of their children, [fn. omitted] this does not mean that parents have a

> 'fundamental right' to 'equal placement periods' after divorce. David has not demonstrated why, following a divorce between parents, the state does not have the right to arbitrate any dispute those parents may have over what happens to their children. [Citation.] We conclude that David has not met his heavy burden to show why the state should be foreclosed from allowing its courts to set placement schedules commensurate with the best interests of the children even if it means less than equal placement. His substantive due process argument fails." (*Arnold*, *supra*, 679 N.W.2d at p. 299.)

We agree with the *Arnold* court that *Troxel*, which involved *nonparental* visitation, does not compel courts to apply a substantive due process analysis in resolving custody or custody related disputes *between parents*. (*Troxel, supra,* 530 U.S. at pp. 100-101 (conc. opn of Kennedy, J.) ["In short, a fit parent's right vis-a-vis a complete stranger is one thing; her right vis-a-vis another parent or a *de facto* parent may be another"]; accord *Reno v. Flores* (1993) 507 U.S. 292, 303-304 [stating in dicta, '"The best interests of the child,' a venerable phrase familiar from divorce proceedings, is a proper and feasible criterion for making the decision as to which of two parents will be accorded custody"].)

There is an absence of authority to support the application of the strict scrutiny standard in custody disputes between two parents generally, much less in a dispute between parents who share joint custody, concerning how their custody rights will affect the selection of a school for their child. Accordingly, we conclude that the trial court did

not err in failing to apply strict scrutiny to Enrique's request to order that X. attend Marshall.[9]

B. *The trial court did not err in refusing to consider hearsay evidence of X.'s "emotional suffering" and X.'s "desire to attend the Marshall Middle School," in determining that X. would attend Woodland Park*

Enrique claims that the trial court erred in refusing to consider evidence of X.'s "emotional suffering" and X.'s "desire to attend the Marshall Middle School," in determining that X. would attend Woodland Park. Specifically, Enrique claims that the trial court erred in excluding various hearsay statements made by X., which Enrique offered in support of his request that the court order that X. be enrolled in Marshall.[10] We review a trial court's evidentiary rulings for an abuse of discretion. (*People v. Guerra* (2006) 37 Cal.4th 1067, 1113, disapproved on another ground by *People v. Rundle* (2008) 43 Cal.4th 76, 146-147.)

1. *Factual and procedural background*

In March 1998, Enrique filed the original complaint in this case to establish a paternal relationship, pursuant to the Uniform Parentage Act (Fam. Code, § 7600 et seq.). (*Enrique M.*, *supra*, 121 Cal.App.4th at p. 1378.) In June 1998, the trial court entered an order determining the issues that Enrique raised in his complaint. (*Ibid.*)

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9 In light of our conclusion, we need not consider the manner by which a trial court would apply strict scrutiny in such cases. Nor need we consider the merits of the trial court's best interest determination in this case, because Enrique's claim is limited to his contention that the trial court failed to apply the proper legal standard.

10 Enrique claims that the trial court erred in excluding the evidence "on procedural grounds (i.e. child's statements to each of his parents were objectionable as hearsay) . . . ."

In February 2008, Enrique filed an order to show cause in which he requested that the court order that X. attend Marshall the following year. In a section entitled "Facts in Support," Enrique asserted, "X. wants to go to Marshall. . . ."

In April 2008, Enrique filed a declaration in support of his order to show cause in which he made various assertions concerning statements allegedly made by X. For example, Enrique stated, "X. has repeatedly asked to play football for the Scripps Ranch Pop Warner team, which would give him the opportunity to know boys in the area well in advance of starting sixth grade."[11] Enrique also stated, "X. has repeatedly asked to be able to spend more time with me," and "X. has repeatedly asked to be able to spend more time with [Enrique's daughter from a previous relationship]."

Enrique filed a declaration in response to Angelina's request for sanctions. Enrique attached as exhibits to his declaration copies of three letters that he said he had sent to Angelina in an attempt to amicably resolve the issue of where X. would attend middle school. In one of the letters, dated January 8, 2007, Enrique states that X. told Enrique that he wanted to go to Marshall.

During the hearing on Enrique's order to show cause, Enrique stated, "Marshall has been X.'s choice." Angelina's counsel registered a hearsay objection. The court responded, "Well ─ and I do want to explore this motion. And I was prepared to hear

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11 Enrique indicated in his declaration that Marshall is located in Scripps Ranch.

from either side. And I guess these are Reiflerized proceedings; correct?"[12] Angelina's counsel responded, "That's correct, your honor." The following colloquy then occurred:

> "The court: So how do the parties anticipate dealing with the child's views and whether or not the court wants to consider them? And if so, under what guise? What form?"
>
> "[Angelina's counsel]: Your honor, I would object to any statements attributed to the child as being hearsay. . . ."
>
> "[The court]: [¶] I did see that there was a letter; I believe it's dated January 8, 2007 ─ I don't know if that was an error, that it was, in fact January 2008 ─ that references something that the child reportedly stated. And at this point, I think it is hearsay. And to the extent this is a Reiflerized proceeding, there's no declaration that's been offered on this matter. And with that, the court will sustain the objection as to what the child has said."

Later during the hearing, the court sustained another hearsay objection that Angelina's counsel raised concerning Enrique's reference to another out-of-court statement allegedly made by X. regarding X.'s desire to join a football team.

In a motion for a new trial, Enrique claimed that a new trial was warranted on the ground that there was newly discovered evidence. Enrique reiterated his request that the court consider evidence of X.s preferences. Enrique stated, "Since [Angelina] is formally objecting to [Enrique's] testimonial evidence of [X.'s preferences] as hearsay, and since putting 10-year-old X. on the witness stand for direct examination would be in conflict with this Court's overarching concern of X.'s best interest, said critical facts are incapable

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12 The trial court's reference to a "Reiflerized" proceeding is a reference to *Reifler v. Superior Court* (1974) 39 Cal.App.3d 479, in which the court held that a trial court may rely on declarations in lieu of live testimony in postjudgment marital dissolution proceedings. (See part III.B.2.b., *post*.)

of positive averment. Accordingly a declaration based on information and belief would be appropriate here." Enrique proceeded to set forth a number of statements concerning X.'s preferences "upon information and belief," such as "X. wants to go to Marshall Middle School . . . ." (Italics omitted.)

2. *Governing law*

a. *A trial court's consideration of a child's preferences in custody matters*

Family Code section 3011 provides in relevant part:

> "In making a determination of the best interest of the child in a proceeding described in Section 3021, the court shall, among any other factors it finds relevant, consider all of the following:
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> "(a) The health, safety, and welfare of the child."[13]

Family Code section 3042 provides:

> "(a) If a child is of sufficient age and capacity to reason so as to form an intelligent preference as to custody, the court shall consider and give due weight to the wishes of the child in making an order granting or modifying custody.
>
> "(b) In addition to the requirements of subdivision (b) of Section 765 of the Evidence Code, the court shall control the examination of the child witness so as to protect the best interests of the child. The court may preclude the calling of the child as a witness where the best interests of the child so dictate and may provide alternative means of obtaining information regarding the child's preferences."

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13 Section 3021 et seq. governs custody proceedings involving minors, including those arising under the Uniform Parentage Act. (Fam. Code, § 3021, subd. (f).)

b. *Hearsay evidence*

The hearing on Enrique's order to show cause constituted a postjudgment Uniform Parentage Act (Fam. Code, § 7600 et seq.) proceeding. "The Family Code establishes as the law of the state ─ and superior courts are without authority to adopt rules that deviate from this law ─ that except as otherwise provided by statute or rule adopted by the Judicial Council, 'the rules of practice and procedure applicable to civil actions generally . . . apply to, and constitute the rules of practice and procedure in, proceedings under [the Family Code].'" (*Elkins v. Superior Court* (2007) 41 Cal.4th 1337, 1354, quoting Fam. Code, § 210.)

Among these rules are those pertaining to hearsay evidence. " 'Hearsay evidence,' is evidence of a statement that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter stated." (Evid. Code, § 1200, subd. (a).) "Except as provided by law, hearsay evidence is inadmissible." (Evid. Code, § 1200, subd. (b).) The prohibition on the introduction of hearsay evidence is known as "the hearsay rule." (Evid. Code, § 1200, subd. (c).)

The *Elkins* court noted that there are important exceptions to the hearsay rule that commonly apply in family law matters. For example, affidavits may be admissible for their truth, notwithstanding their hearsay character, in certain motion proceedings:

> "Another statutory exception to the hearsay rule permits courts to rely upon affidavits in certain motion matters. (Code Civ. Proc., § 2009.) [Fn. omitted.] . . . . [¶] [I]n [*Reifler, supra,* 39 Cal.App.3d 479] the Court of Appeal considered a challenge to a Los Angeles Superior Court policy of adjudicating long-cause hearings on postjudgment *motions* in marital dissolution matters solely on the basis of affidavits. The reviewing court acknowledged that

> affidavits ordinarily are excluded as hearsay, but concluded Code of Civil Procedure section 2009 provides a hearsay exception that grants a trial court discretion to decide *motions* on the basis of affidavits ─ even when facts are controverted . . . ." (*Elkins, supra*, 41 Cal.4th at p. 1355.)[14]

3. *Application*

We assume for the sake of argument that the trial court was obligated to consider evidence of X.'s preferences in this matter. (Cf. Fam. Code, §§ 3042, 3011 [pertaining to *custody* orders].)[15] However, Enrique failed to offer any admissible evidence pertaining to those preferences. Enrique did not provide either X.'s live testimony nor an affidavit from X., pursuant to the procedure for postjudgment motion proceedings outlined in *Elkins*. Enrique's own statements as to X.'s preferences constituted inadmissible hearsay. We reject Enrique's argument that "a trial court may not use its procedural discretion to avoid exercising its substantive discretion." The trial court was not obligated to admit inadmissible evidence in ruling on Enrique's request. Accordingly, we conclude that the trial court did not abuse its discretion in sustaining Angelina's objections to X.'s hearsay statements that Enrique offered to demonstrate those preferences.

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14 Code of Civil Procedure section 2009 provides in relevant part: "An affidavit may be used . . . upon a motion, and in any other case expressly permitted by statute."

15 The only statutory authority Enrique offers in support of his argument that the court was required to consider X.'s preferences is Family Code section 3011.

Nor did the trial court err in denying, by operation of law, Enrique's motion for a new trial based on the asserted ground of newly discovered evidence.[16] We are aware of no authority that requires a trial court to consider a parent's declaration, made upon information and belief, concerning a child's preference, in a family law proceeding. Further, there are several recognized methods by which Enrique could have requested that the trial court "obtain[] information regarding the child's preferences." (Fam. Code, § 3042.) For example, Enrique could have requested that the court interview X. in chambers. (*In re Marriage of Slayton* (2001) 86 Cal.App.4th 653, 659.) Alternatively, Enrique could have requested that the court appoint counsel for X. (Fam. Code, § 3150 ["If the court determines that it would be in the best interest of the minor child, the court may appoint private counsel to represent the interests of the child in a custody or visitation proceeding"]; *In re Marriage of Brown and Yana, supra,* 37 Cal.4th at p. 965, fn. 11 ["By appointing counsel to represent and interview [the child] and having counsel report the results of his interviews at the hearing, the court obtained the information sought regarding [the child's] views"]). A third option would have been for Enrique to ask the court to appoint an expert pursuant to Evidence Code section 730 for the purpose

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16 We assume for purposes of this decision that Enrique's July 8, 2008 appeal from the trial court's April 22, 2008 order encompasses the trial court's July 5, 2008 denial of Enrique's motion for a new trial. (*Walker v. Los Angeles County Metropolitan Transp. Authority* (2005) 35 Cal.4th 15, 19 ["[A]n order *denying* a motion for a new trial is not independently appealable and may be reviewed only on appeal from the underlying judgment."].) As with a trial court's evidentiary rulings generally, "It is settled law that the standard of review for an order denying a new trial motion based on newly discovered evidence is abuse of discretion." (*Richardson v. Superior Court* (2008) 43 Cal.4th 1040, 1047.)

of considering X.'s preferences. (See *Niko v. Foreman* (2006) 144 Cal.App.4th 344, 366 ["Testimony about [child's] preferences from the . . . expert [appointed pursuant to Evidence Code section 730] . . . properly satisfied the requirements of [Family Code] section 3042"].)[17]

Accordingly, we conclude that the trial court did not abuse its discretion in failing to grant Enrique's motion for a new trial based on Enrique's own declaration regarding X's purported preferences.

C. *The trial court did not err in denying Enrique's request to change X.'s last name*

Enrique claims the trial court erred in denying his request to change X.'s last name.

1. *Factual and procedural background*

As noted previously, in February 2008, Enrique filed an order to show cause in which he requested that X.'s last name be changed to M.V. from V.-M. In support of his request, Enrique stated:

> "There is a great deal of confusion regarding X.'s last name. Mom only uses V. I only use M. Third parties, such as the school, naturally first use M., unless directed otherwise. The customary format for [H]ispanic last names is [First] [Middle] [Father's Last]

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17 Evidence Code section 730 provides in relevant part: "When it appears to the court, at any time before or during the trial of an action, that expert evidence is or may be required by the court or by any party to the action, the court on its own motion or on motion of any party may appoint one or more experts to investigate, to render a report as may be ordered by the court, and to testify as an expert at the trial of the action relative to the fact or matter as to which the expert evidence is or may be required. The court may fix the compensation for these services, if any, rendered by any person appointed under this section, in addition to any service as a witness, at the amount as seems reasonable to the court."

> [Mother's Last]. This will end all confusion, it will fit into social norms, and it will give X. the widest options throughout his life as to which name(s) he chooses to go by."

Angelina opposed the request. In a declaration opposing Enrique's request, Angelia noted that in April 1998, when X. was seven months old, the trial court granted Enrique's previous request to change X.'s name.[18] Angelia stated that X. was currently 10 years old and that it would not be in his best interest to change his name, noting that doctors and teachers were aware of X.'s full name, and that family and friends know X. by that name.

Enrique filed a responsive declaration in which he requested, pursuant to Evidence Code section 451, subdivision (f),[19] that the court take judicial notice of the fact that it is customary for children to go by their father's last name, and that it is customary for Hispanic surnames to be in the format of [Father's Last] [Mother's Last]. Enrique also stated that Angelina continually omitted Enrique's last name in referring to X.[20] Enrique further stated that X. "does not really use his last name yet," but that he would begin to do so in middle school. Enrique claimed that in the "long run it would be better for X. to have the choice of whether he wants to use his dad's last name (in the American tradition)

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18 X.'s last name at birth was V. In March 1998, Enrique requested that the court change X.'s last name to M. In June 1998, the trial court changed X.'s last name to V.-M.

19 Evidence Code section 451 provides in relevant part: "Judicial notice shall be taken of the following: [¶] (f) Facts and propositions of generalized knowledge that are so universally known that they cannot reasonably be the subject of dispute."

20 Enrique provided evidence in support of this assertion, including a first communion booklet referring to X. as "X.V."

or both his mom's and his dad's (in the Latin tradition)." Enrique also stated that he had been "forced to carry [his] mother's maiden name" until he was 14 years of age, when he changed his last name, which caused great confusion and hardship. Enrique argued that X. should be spared a similar burden.

At the hearing on Enrique's order to show cause, Enrique clarified that in 1998, he had requested that X.'s name be X.M., and that the court ruled that X.'s name would be X.V.-M. Enrique reiterated the arguments in his declaration in support of his request to change X.'s name.

Angelina's counsel opposed the request, arguing that the issue had been decided 10 years ago. Her counsel also argued that it was not in X.'s best interest to change his name, given the length of time that X. had been using the current name. Counsel further argued that it was "presumptuous" for Enrique to argue that it is customary for a child to use a father's last name.

The court denied Enrique's request, stating:

> "The court has reviewed the pleadings in this matter. The court has considered Code of Civil Procedure section 1278.5, which relates to any proceeding pursuant to this title in which a petition has been filed to change the name of a minor, and both parents do not join in the consenting, the court may deny the petition in whole or in part if it finds that any portion of the proposed name change is not in the best interests of the child. [¶] In this case the court finds that the name of [X.P.V.-M.] was ordered as a name change on April 8, 1998. That at this point any number of documents, be they related to hospital, education have used that name. That at this point it would not be in the best interest of the child to reverse the order of the surnames, so as to give the paternal name priority or preference or placement before that of V. And as such, the court will deny the request to change the order of the child's last name."

The court did not formally rule on Enrique's requests for judicial notice.

2. *Governing law*

a. *Case law*

"[T]he sole consideration when parents contest a surname should be the child's best interest." (*In re Marriage of Schiffman* (1980) 28 Cal.3d 640, 647 (*Schiffman*).)

> "Under the test . . . the length of time that the child has used a surname is to be considered. [Citation.] If . . . the time is negligible because the child is very young, other facts may be controlling. For instance, the effect of a name change on preservation of the father-child relationship, the strength of the mother-child relationship, and the identification of the child as part of a family unit are all pertinent. The symbolic role that a surname other than the natural father's may play in easing relations with a new family should be balanced against the importance of maintaining the biological father-child relationship. '[T]he embarrassment or discomfort that a child may experience when he bears a surname different from the rest of his family' should be evaluated. [Citation.]" (*Ibid*.)

b. *Statutory law*

Code of Civil Procedure section 1275 et seq. governs petitions for change of name. Code of Civil Procedure section 1276, subdivision (a) provides in relevant part:

> "(a) All applications for change of names shall be made to the superior court of the county where the person whose name is proposed to be changed resides, except as specified in subdivision (e), either (1) by petition signed by the person or, if the person is under 18 years of age, either by one of the person's parents, or by any guardian of the person, or if both parents are dead and there is no guardian of the person, then by some near relative or friend of the person or (2) as provided in Section 7638 of the Family Code.
>
> "The petition or pleading shall specify the place of birth and residence of the person, his or her present name, the name proposed, and the reason for the change of name."

The trial court "may make an order changing the name, or dismissing the petition or application, as to the court may seem right and proper." (Code Civ. Proc., § 1278, subd. (a).)

Code of Civil Procedure, section 1278 subdivision (c) provides: "If the application for a change of name is brought as part of an action under the Uniform Parentage Act (Part 3 (commencing with Section 7600) of Division 12 of the Family Code), the hearing on the issue of the change of name shall be conducted pursuant to statutes and rules of court governing those proceedings, whether the hearing is conducted upon an order to show cause or upon trial."

Code of Civil Procedure, section 1278.5 provides: "In any proceeding pursuant to this title in which a petition has been filed to change the name of a minor, and both parents, if living, do not join in consent, the court may deny the petition in whole or in part if it finds that any portion of the proposed name change is not in the best interest of the child."

c. *Standard of review*

There is a tension in the case law regarding the appropriate standard of review to be applied in a case such as this. In *In re Marriage of Douglass* (1988) 205 Cal.App.3d 1046, 1048 (*Douglass*), the court considered a father's appeal from an order entered on the father's order to show cause in a dissolution proceeding regarding the surname of a soon to be born minor child. The *Douglass* court noted that the case involved a "quarrel concerning the child's surname between the two biological parents." (*Id*. at p. 1053.) Applying *Schiffman, supra*, 28 Cal.3d 640, the *Douglass* court concluded, "[T]he

question should be decided according to the best interests of the child." (*Douglass, supra*, 205 Cal.App.3d at p. 1053.) Without citation to authority, the *Douglass* court applied the substantial evidence standard of review and held that there was substantial evidence to support the trial court's best interest ruling. (*Id*. at p. 1056; accord *In re Marriage of McManamy & Templeton* (1993) 14 Cal.App.4th 607, 610 [following *Douglass* and concluding trial court's determination that name change would be in child's best interest lacked substantial evidence].)

In other contexts, a trial court's best interest determination is reviewed for an abuse of discretion. (See, e.g, *In re Marriage of Burgess*, *supra*, 13 Cal.4th at p. 32 ["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"].) Further, an order denying or granting an adult's name change request pursuant to Code of Civil procedure section 1278, subdivision (a) is reviewed for an abuse of discretion. (*Lee v. Superior Court* (1992) 9 Cal.App.4th 510, 514.)

Notwithstanding the *Douglass* court's application of the substantial evidence standard of review, we see no reason why there should be a distinction between cases in which the best interest determination involves a name change, and cases involving custody or visitation. If we were deciding the issue in the first instance, we would conclude that the abuse of discretion standard applies to Enrique's claim. However, we need not resolve the issue of the appropriate standard of review in this case, because Enrique's claim fails under either standard. For the reasons stated below, we conclude

that there is substantial evidence to support the trial court's ruling, and also conclude that the court did not abuse its discretion in finding that Enrique's proposed name change would not be in X.'s best interest.

3. *Application*

The fact that X. has had his current name for approximately 10 years, by itself, constitutes substantial evidence supporting the trial court's conclusion that a name change would not be in X.'s interest. (See *Schiffman, supra,* 28 Cal.3d at p. 647 [length of time child has had a surname is to be considered in determining whether best interest of child would be served by proposed name change]; accord *In re Marriage of McManamy & Templeton, supra,*14 Cal.App.4th at p. 610 [reversing trial court's hyphenation of child's last name to include father's last name where three-year-old child had had mother's surname since birth].) The trial court expressly referred to this lengthy period of time in its ruling.

This same fact also supports the conclusion that the trial court did not abuse its discretion in denying Enrique's request. In addition, although not expressly mentioned by the court in its ruling, the fact that X. already has Enrique's last name as part of his surname and the fact that X. has a significant relationship with Angelina, also supports the trial court's ruling. (*Schiffman, supra,* 28 Cal.3d at p. 647 ["the effect of a name change on preservation of the father-child relationship [and] the strength of the mother-child relationship" are relevant to name change determination]; accord *In re Marriage of McManamy & Templeton, supra,* 14 Cal.App.4th at p. 611 [noting the fact that child's surname was the same as child's mother, with whom child lived with a substantial portion

of the year, supported conclusion that name change would not be in child's best interest].) In sum, whether reviewed under the abuse of discretion or substantial evidence standard of review, the trial court did not err in denying Enrique's request to change X.'s name.

Enrique argues that the trial court erred by failing to rule on his requests that the trial court take judicial notice of various customs pertaining to surnames. Angelina did not oppose Enrique's requests for judicial notice, and there is nothing in the record indicating that the trial court denied Enrique's requests. (See Evid. Code, § 456 [a trial court is required to advise the parties of its *denial* of a request for judicial notice of any matter "at the earliest practicable time . . . and indicate for the record that it has denied the request"].) However, assuming for the sake of argument that the trial court failed to grant Enrique's requests for judicial notice and that this was error, we cannot conclude that there is any likelihood that the court would have reached a different result with respect to Enrique's request to change X.'s name if it had granted the requests. The trial court stated that it had reviewed all of the pleadings in the case, which included Enrique's reference to the customs of which he requested the court take judicial notice. In light of the length of time that X. has had has current name, and the absence of any compelling facts in Enrique's declaration supporting the determination that a name change would be in X.'s best interest, we conclude there is no likelihood that the trial court would have reached a different result if it had formally granted Enrique's requests for judicial notice with regard to various customs pertaining to surnames. Specifically, Enrique's argument that Angelina refers to X.'s last name as V. is not a persuasive reason to change X.'s last name. This is particular so in light of Enrique's statement in his order to show cause that,

in referring to X.'s last name, "I only use M." Similarly, Enrique's assertions that 10-year-old X. "does not really use his last name yet," and Enrique's description of his personal experience with respect to his own last name, are not persuasive reasons to change X.'s name.

We reject Enrique's argument that the trial court erred in denying his request to change X.'s name in order to facilitate a potential future decision by X. to change his surname to M. Enrique's speculation as to X.'s future wishes with respect to his surname does not compel reversal of the trial court's ruling. We also reject Enrique's contention that the trial court erred in referring to the fact that "any number of documents," have used X.'s current last name. As noted above, the lengthy period of time that X. has had his current last name was highly relevant in determining X.'s best interest. The trial court's comment merely reflects a proper consideration of one of the reasons why this lengthy period of time supports maintaining X.'s current last name.

Accordingly, we conclude that the trial court did not err in denying Enrique's request to change X.'s last name.

IV.

DISPOSITION

The trial court's April 22 order is affirmed. The trial court's July 5 denial of Enrique's motion for new trial is affirmed. Enrique is to bear costs on appeal.

AARON, J.

WE CONCUR:

McCONNELL, P. J.

O'ROURKE, J.