Filed 12/20/04

**CERTIFIED FOR PUBLICATION**

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

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| In re Marriage of NICOLE F. BROWN and ANTHONY YANA. | 2d Civil No. B170252<br>(Super. Ct. No. DR 21998)<br>(San Luis Obispo County) |
| NICOLE F. BROWN (YANA),<br><br>Respondent,<br><br>v.<br><br>ANTHONY YANA,<br><br>Appellant. | |

Here we hold that in a "move-away" case, a parent without legal or physical custody is entitled to an evidentiary hearing. We reverse.

FACTS

Nicole Brown and Anthony Yana are divorced. Their son, Cameron, is now 12 years old. Brown has sole legal and physical custody of Cameron. She has remarried and has two children, age six and two, with her second husband. Brown and Yana each resided in San Luis Obispo County.

On June 12, 2003, Yana filed an order to show cause to modify legal custody from sole to joint, to expand his visitation and to appoint counsel for Cameron. The grounds were that he and Brown were now getting along better and that Cameron expressed an interest in spending more time with him. He stated in an affidavit in

support of his petition that Cameron is doing well. Shortly thereafter, Brown informed Yana she is moving with Cameron to Las Vegas, Nevada, at the end of the summer. Yana filed an ex parte motion to restrain Brown from moving out of state, for a custody evaluation and for an evidentiary hearing.

On June 27, 2003, Brown filed a move-away motion seeking to adjust Yana's visitation schedule upon her move to Las Vegas. In an affidavit in support of her motion, Brown declared that her husband had taken a job in Las Vegas and that the family would be residing in Green Valley, Nevada. She stated there is no basis for changing custody since, as Yana admitted, Cameron is doing well. She also stated that Cameron is extremely close to his two half-siblings. She objected to a psychological evaluation on the ground that her family had already been through two of them. She denied Yana's assertion that the parties were now getting along well.

The trial court temporarily restrained Brown from leaving with Cameron, appointed an attorney for Cameron, and set the matters for a hearing.

At oral argument, Yana requested an evidentiary hearing. His attorney stated: "Mr. Yana's [*sic*] prepared to offer to the court a lot of evidence about Las Vegas, Nevada, such as the high student-to-teacher ratio; the fact that the state of Nevada has one of the highest dropout rates in junior high and high school of any state in the nation; the amount of crime over there; the volume of the people moving in and out of the community of Las Vegas, Nevada, and what the transient effect has upon people in that community."

Cameron's attorney also spoke to the court at oral argument. He stated he interviewed Cameron at each parent's home. Cameron spoke about his ties to San Luis Obispo County and his reluctance to break those ties. A few days later, Cameron called his attorney and said he did not feel comfortable speaking at his mother's house. He said he would like to stay with his father in San Luis Obispo County. Cameron also told his attorney, "There are problems in my mom's home." The attorney did not specify what problems, if any, Cameron reported. The attorney said, however, that Cameron's

statement seemed to be a paraphrase of what Cameron might have heard from someone else. Nevertheless, the attorney said the statement caused him concern.

The trial court denied Yana's requests for an evidentiary hearing, a psychological evaluation, a stay of the move and a change of legal or physical custody. The court's order established a modified visitation schedule for Yana.

DISCUSSION

I

Yana contends the trial court erred in denying his request for an evidentiary hearing.

Our Supreme Court decided in *In re Marriage of Burgess* (1996) 13 Cal.4th 25, 38, that a parent with sole physical custody has the presumptive right to relocate with her child for any sound, good faith reason. The noncustodial parent who seeks a change in custody because of the move bears the substantial burden of showing that as a result of the relocation, the child will suffer a detriment rendering it essential or expedient for the welfare of the child that there be a change. (*Ibid.*)

Recently, the court affirmed *Burgess* in *In re Marriage of LaMusga* (2004) 32 Cal.4th 1072. There the court stated: "Among the factors that the court ordinarily should consider when deciding whether to modify a custody order in light of the custodial parent's proposal to change the residence of the child are the following: the children's interest in stability and continuity in the custodial arrangement; the distance of the move; the age of the children; the children's relationship with both parents; the relationship between the parents including, but not limited to, their ability to communicate and cooperate effectively and their willingness to put the interests of the children above their individual interests; the wishes of the children if they are mature enough for such an inquiry to be appropriate; the reasons for the proposed move; and the extent to which the parents currently are sharing custody." (*Id.* at p. 1101.)

We considered a noncustodial parent's right to an evidentiary hearing in a move-away case in *In re Marriage of Campos* (2003) 108 Cal.App.4th 839. There wife had sole physical custody of the parties' minor children. She announced she would move

from their home in Santa Barbara to Moorpark, two hours away. Husband filed an order to show cause for a change in custody. Husband claimed the move would cause detriment to the children because they were opposed to the move and it would separate them from their extended family, friends and classmates. The trial court denied husband's order to show cause without an evidentiary hearing. We reversed, holding that the trial court should have heard evidence on the issue.

Similarly, Cameron's attorney told the trial court that Cameron spoke about his ties to San Luis Obispo County, his reluctance to break those ties and his desire to live with his father. The wishes expressed by "mature enough" children are one of the factors cited by *LaMusga* that the court should consider. *Campos* makes it clear that the consideration should be in the context of an evidentiary hearing.

More importantly, Cameron told his attorney that there are problems in his mother's home. It may well be, as Cameron's attorney suggested, that the statement paraphrased what Cameron heard from someone else. It may also be that if any problems exist, they are insignificant. But without an evidentiary hearing the court is simply left to speculate.

Finally, Yana offered to prove that the Las Vegas area is not a good environment in which to raise a child. The trial court should have taken evidence on that assertion also.

Child custody matters present some of the most difficult questions a court can face. Move-away cases are particularly difficult. When a parent moves away with a child, invariably there are impediments, some insurmountable, for the noncustodial parent wishing to maintain a close relationship with the child. The gravity of the trial court's decision mandates that the parties have a full opportunity to present, and the trial court have a full opportunity to consider, the relevant evidence. Here there are a number of issues for the court's consideration. Since 1999 Yana has had neither legal nor physical custody. Although his status calls into question his fitness as a parent, it is nevertheless not an insuperable barrier to a hearing to determine custody.

We decide only Yana's right to an evidentiary hearing. Nothing in our opinion should be construed as indicating how the trial court should decide the matter. The trial court retains its discretion to choose a parenting plan that is in the best interest of the child. (See *In re Marriage of LaMusga*, *supra*, 32 Cal.4th at p. 1087.) This is a far cry from "micromanaging" the case as the dissent suggests. Unlike the dissent, we lack the prescience to state with certainty what the result will be.

The judgment is reversed. Costs are awarded to appellant.

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GILBERT, P.J.

I concur:

COFFEE, J.

YEGAN, J., I respectfully dissent.

The move-away cases cited by the majority all involve shared custody arrangements. (*In re Marriage of LaMusga* (2004) 32 Cal.4th 1072, 1080-101 [joint legal custody, primary physical custody to mother]; *In re Marriage of Burgess* (1996) 13 Cal.4th 25, 29 [joint legal custody, sole physical custody to mother]; *In re Marriage of Campos* (2003) 108 Cal.App.4th 839, 841 [same].) *Burgess* and its progeny stand for the principle that the parent with primary physical custody has a presumptive right to change the child's residence unless the noncustodial parent (i.e., the parent who has joint legal custody but is not the primary caregiver) shows that, as a result of the move, the child will suffer detriment rendering it " ' "essential or expedient for the welfare of the child that there be a change." ' (Ibid.)" (*In re Marriage of Burgess, supra,* 13 Cal.4th at p. 38.)

Here, mother was previously awarded *sole physical and sole legal custody* of the child. " 'Sole legal custody' means that one parent shall have the right and the responsibility to make decisions relating to the health, education, and welfare of a child." (Fam. Code, § 3006.) " 'Sole physical custody' means that *a child shall reside with and be under the supervision of one parent,* subject to the power of the court to order visitation." (Fam. Code, § 3007, emphasis added.) *Unlike Burgess, Campos, and LaMusga*, here there is no shared custody arrangement. Assuming mother and the child move to Nevada, there is no necessity to re-examine custody in an evidentiary hearing.

Even under a shared custody arrangement, *Burgess* makes it clear that a move-away is not enough, by itself, to justify a reexamination of an existing custody order. (*In re Marriage of Burgess*, *supra*, 13 Cal. 4th at pp. 38-39 & fn. 10.) "The changed circumstance rule provides 'that once it has been established that a particular custodial arrangement is in the best interests of the child, the court need not reexamine that question. Instead, it should preserve the established mode of custody unless some significant change in circumstances indicates that a different arrangement would be in the child's best interest. The rule thus fosters the dual goals of judicial economy and

protecting stable arrangements. [Citations.]' [Citation.]" (*In re Marriage of LaMusga*, *supra,* 32 Cal.4th at p. 1088.)

The majority, however, conclude that a parent who has no legal and no physical custody is entitled to a move-away evidentiary hearing where custody can be relitigated. This conclusion is at variance with both the letter and spirit of the Family Law Code sections 3607 and 3608**.** It is also at variance with the trial court's adverse factual finding that father wants to go on a "fishing expedition:" "Mr. Yana [father] would like to poke around in an evaluation and find out if there is something detrimental, but he hasn't really said what it is . . . ."

If father is granted his wish, mother will have to defend against the speculative claim that a new psychological evaluation and evidentiary hearing may show a change of circumstances. It comes at a substantial cost to mother, the child, and the child's half-siblings. In 1999, when mother was awarded sole legal and sole physical custody, the trial court found: "The primary cause of the extended litigation in this matter has been the behavior of [father]. He has been deceitful to [mother], the therapists, the evaluators, the school personnel, the probation department, the criminal court and to this court. But for this behavior, the expenses would not have been incurred to the extent that they have been incurred. [mother] was required to pursue the litigation to protect the child from the consequences of [father's] actions, most particularly . . . his refusal to comply with court orders regarding visitation."

The majority concede that father does not have legal or physical custody. The 1999 ruling calls into question father's fitness as a parent. Based on the history of this case, evidence the child has done well under the existing custody order, and no prima facie showing of detriment to the child, the trial court denied father's request for an evidentiary hearing. There was no abuse of discretion. The trial court reasonably found that the move-away may require a modification of visitation, but not custody. (See e.g., *In re Marriage of Edlund & Hales* (1998) 66 Cal.App.4th 1454, 1473.)

Appellate courts are not in the business of micromanaging move-away cases. As stated in *In re Marriage of LaMusga*, *supra,* 32 Cal.4th at p. 1101 "we must permit our superior court judges - guided by statute and the principles we announced in *Burgess* and affirm in the present case - to exercise their discretion to fashion orders that best serve the interests of the children in the cases before them." This is such a case. The trial court's order should be affirmed.

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YEGAN, J.

Donald G. Umhofer, Judge

Superior Court County of San Luis Obispo

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John F. Hodges, Daniel L. Helbert, Misho, Kirker & Associates and Vanessa Kirker for Appellant.

Jeffrey W. Doeringer for Respondent.