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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

In re Marriage of PAUL MICHEL SAAB and MYLE PAULETTE ZAGORSKY.	
PAUL MICHEL SAAB, Respondent, v. MYLE PAULETTE ZAGORSKY, Appellant.	A166160 (San Francisco County Super. Ct. No. FDI-16-786110)

Paul Michel Saab (father) and Myle Paulette Zagorsky (mother) are the divorced parents of a nine-year-old daughter. In 2016, they stipulated to entry of a final custody order which states that they will share joint legal custody. In May 2022, following an eight-day court trial, the court issued a judgment which maintained the joint legal custody order but modified it to grant father exclusive authority to make health care and educational decisions in the event of parental disagreement.

Mother's appeal asserts that the judgment must be reversed because the trial court failed to apply the "changed circumstances" standard in reaching its decision, or, alternatively, because the trial

court abused its discretion in awarding father "tie-breaker" decision-making authority on healthcare and educational decisions. We affirm.

BACKGROUND

Parties Stipulate to Pre-judgment Final Custody Order

In June 2016, father petitioned to dissolve his marriage to mother. Father and mother entered into a written stipulation in August 2016 to share joint legal and physical custody of the child. The stipulation states: "This custody agreement will be a 'final' custody order within the meaning of Montenegro v. Diaz."[1] The trial court entered an order pursuant to the parties' stipulation in September 2016.

A "status only" dissolution judgment was entered in February 2017, followed by a stipulated judgment on reserved issues in January 2018. The judgment on reserved issues did not contain custody or visitation orders.

In December 2018 and January 2019, mother filed three "Requests For Order" (RFO) seeking orders granting her sole legal custody to make medical and educational decisions for the child. Two of mother's RFOs sought relief on an emergency basis. In response to mother's RFOs, father asked the court to order a custody evaluation pursuant to Family Code section 3110 et seq.[2] In August 2019, the court appointed Deborah Roberto, Ph.D. as the court's expert, and directed her to prepare a child custody evaluation.

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[1] *Montenegro v. Diaz* (2001) 26 Cal.4th 249 (*Montenegro*).

[2] Undesignated statutory references are to the Family Code.

Between 2017 and 2021, with the assistance of their respective attorneys and their parenting coordinator,[3] the parties entered into several stipulations regarding parenting issues such as summer and holiday schedules, summer camp, FaceTime calls, international travel with the child, child's education through eighth grade, and parent participation at the child's school. Several stipulations were reached following substantial litigation on RFOs which had been filed seeking to modify the terms of custody or visitation.

Dr. Roberto completed her custody evaluation in May 2020 and the parties stipulated to the admissibility of her report at trial. The parties filed three "trial stipulations" between November 2020 and March 2021, which set forth areas of parental agreement and outlined issues still in dispute. In his trial brief, father asked the court to modify the legal custody order by awarding him exclusive decision-making authority for medical and educational decisions.

The Parties Proceed to Trial on Unresolved Custody Issues

The matter proceeded to trial on the disputed custody issues over eight days between November 2020 and March 2021. The evidence focused on the parents' difficulty in reaching consensus on a range of parenting issues.

Father testified that mother had created significant barriers to enrolling the child in individual therapy by insisting on family therapy instead, and later requesting emergency orders to block the appointment of the therapist recommended by the parenting

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[3] The parties stipulated to the appointment of a parenting coordinator in February 2017 based on their mutual desire to, among other reasons, "de-escalate parental conflict to which the child is exposed."

coordinator. Mother also asked for the child's therapist to be removed based on her belief that the therapist did not provide "a safe space for [the child's] therapy."

According to father, mother treated the child as though she suffered from serious bowel and bladder issues even though the child's doctors advised that the child's constipation was not serious, and the child did not appear to have any urinary tract problems. Mother continued to administer Mira-lax after medical professionals said the child could be weaned from it, excused the child from school because she had to use the restroom frequently, and placed her in diapers on trips. Mother's behavior caused the child to feel anxious and perseverate about bodily functions in an unhealthy manner.

Father testified that it was difficult for the parents to agree on something as simple as whether to trim the child's hair.

During her testimony, mother admitted that "in the beginning" she had made statements disparaging father and father's spouse in front of the child. In deposition testimony read into the record at trial, mother acknowledged summoning the police to father's house because she thought he had withheld food to punish the child. Father clarified that on the night in question he had fed the child dinner but not dessert. Dr. Roberto testified that sending police to a parent's house can be very frightening for a child and was unwarranted under these circumstances.

Based on interviews, family observation, and the results of psychological testing conducted during the custody evaluation, Dr. Roberto opined that father is generally "stable, reliable and consistent," and "has the interpersonal competence and skill to manage

and understand interactions and relationships." In contrast, mother's "poor reality testing is likely to compromise her day-to-day functioning, including her judgment and decision-making." Mother overidentified with the child and distrusted other adults to understand and act on what is best for the child. Dr. Roberto believed that mother's "skewed thinking" "would stand in the way of [the child] having significant relationships with other adults in her life, her father included." For example, mother gave the child a journal and encouraged her "to write down things that her father did that upset her"; sent blankets and toys scented with her perfume, daily letters, and "rocks and crystals to keep [the child] safe" to father's home; and acted as though father was incapable of caring for the child when she felt ill while on vacation. Mother's actions telegraphed to the child that she was not safe with father. Dr. Roberto explained that mother's enmeshment with the child had the potential to interfere with "the child developing as an autonomous and separate individual with . . . the skills to manage—to tolerate discomfort."

Posttrial Proceedings

On June 30, 2021, the trial court issued its "Findings and Order After Trial." The court found that despite the stipulated joint legal custody order, the parties "have had difficulty cooperating with one another and making decisions for [the child] without the involvement of their attorneys and the intervention of this Court." It noted that "their inability to work together is the greatest danger and threat to their daughter's future safety and well-being." The court determined that mother "has difficulty placing [the child's] needs—both medical and emotional—before her own," and that her "poor judgment" and "lack of

insight and inability to be introspective about her behavior" had generated many of the parenting conflicts.

After finding that father "has met his burden of proof that an award of sole medical and educational decision-making is in [the child's] best interest," the trial court ordered that the parents would continue to share joint legal custody with the following caveat: "The parties will meet and confer to try and reach agreements concerning all issues related to [the child's] health, education, and welfare. If the parties are unable to reach an agreement after engaging in good faith discussions, [father] shall have sole and exclusive decision-making authority concerning [the child's] health care decisions." Additionally, "[father] shall have sole and exclusive decision-making authority with respect to [the child's] education."

Both parties requested a statement of decision. (Fam. Code, § 3022.3[4]; Code Civ. Proc., § 632[5].) The parties asked the trial court to

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[4] Section 3022.3 provides: "Upon the trial of a question of fact in a proceeding to determine the custody of a minor child, the court shall, upon the request of either party, issue a statement of the decision explaining the factual and legal basis for its decision pursuant to Section 632 of the Code of Civil Procedure."

[5] Code of Civil Procedure section 632 provides, in pertinent part: "The court shall issue a statement of decision explaining the factual and legal basis for its decision as to each of the principal controverted issues at trial upon the request of any party appearing at the trial. The request must be made within 10 days after the court announces a tentative decision unless the trial is concluded within one calendar day or in less than eight hours over more than one day in which event the request must be made prior to the submission of the matter for decision. The request for a statement of decision shall specify those controverted issues as to which the party is requesting a statement of decision. After a party has requested the statement, any party may make proposals as to the content of the statement of decision."

clarify whether it intended to incorporate the terms of trial stipulations 1, 2, and 3 into its final order. Mother also asked the court to state the factual and legal basis of its decision on 32 discrete issues. Fifteen of mother's enumerated requests asked the court to explain why its findings were in the child's "best interest." Mother did not mention the change of circumstances rule in her request for statement of decision.

The trial court filed and served its statement of decision on December 6, 2021. The statement of decision explained that pursuant to an agreement reached in July 2021, the parties had prepared and submitted an updated custody stipulation on September 9, 2021, which would be incorporated into the court's final statement of decision "so that the parties have a single comprehensive custody order." The court's factual findings reiterated and expanded upon its original findings set forth in the findings and order after trial filed in June 2021. The orders were divided into two sections: (1) orders stipulated by the parties, and (2) orders decided by the court.

On December 21, 2021, mother filed objections to the statement of decision. Mother's 55 objections primarily challenged the court's factual findings and restated the issues raised in her request for a statement of decision. Several of the objections referred to the child's best interest; the change of circumstances rule was not referenced in mother's objections to the statement of decision.

The trial court did not initially take action on mother's objections given its prior designation of its initial findings and order after trial filed in June 2021 as the "Tentative Statement of Decision" and the statement of decision filed in December 2021 as the "Final Statement of

Decision." Mother filed an RFO in February 2022, which asked the court to set a hearing on her objections. Father opposed.

The trial court issued a final statement of decision on May 25, 2022, which rejected mother's objections and re-stated the court's prior conclusions. Judgment was entered on July 14, 2022. Mother's timely appealed followed.

DISCUSSION

Mother makes two primary arguments on appeal. First, she contends that "the trial court critically erred" by applying the best interest standard to father's custody modification request instead of the changed circumstances standard. Second, she alleges that the trial court abused its discretion in awarding father exclusive decision-making authority for healthcare and educational decisions because the factual findings underpinning its decision are not supported by substantial evidence. We find that mother forfeited the first claim, and we reject the second claim on the merits.

I.

Mother Waived Her Right to Challenge the Alleged Failure to Apply the Changed Circumstances Standard

A. Standard of Review for Child Custody Decisions

A trial court charged with making an initial child custody determination "must make an award 'according to the best interests of the child.' [Citation.] This test, established by statute, governs all custody proceedings." (*Burchard v. Garay* (1986) 42 Cal.3d 531, 535 (*Burchard*).)

"The changed-circumstance rule is not a different test, devised to supplant the statutory test, but an adjunct to the best-interest test. It provides, in essence, that once it has been established that a particular

custodial arrangement is in the best interests of the child, the court need not reexamine that question. Instead, it should preserve the established mode of custody unless some significant change in circumstances indicates that a different arrangement would be in the child's best interest." (*Burchard*, *supra*, 42 Cal.3d at p. 535.) The changed circumstance rule applies whenever final custody has been established by judicial decree. (*Ibid.*) "[A] stipulated custody order is a final judicial custody determination for purposes of the changed circumstance rule . . . if there is a clear, affirmative indication the parties intended such a result." (*Montenegro*, *supra*, 26 Cal.4th at p. 258.)

The parties assert that the September 2016 custody order is a final custody order modifiable only upon a showing of a significant change of circumstances. (*Montenegro*, *supra*, 26 Cal.4th at pp. 258–259.) Whether father's request to modify this order required a showing of changed circumstances raises a question of law which we review de novo. (*Enrique M. v. Angelina V.* (2004) 121 Cal.App.4th 1371, 1378.)

B. Alleged Deficiencies in a Statement of Decision Must be Brought to the Trial Court's Attention

"A judgment or order of a lower court is presumed to be correct on appeal, and all intendments and presumptions are indulged in favor of its correctness." (*In re Marriage of Arceneaux* (1990) 51 Cal.3d 1130, 1133 (*Arceneaux*).) Code of Civil Procedure "[s]ections 632 and 634 . . . set forth the means by which to avoid application of these inferences in favor of the judgment." (*Arceneaux*, at p. 1133.) Under Code of Civil

Procedure section 634,[6] the party must state any objection he may have to the statement in order to avoid an implied finding on appeal in favor of the prevailing party. . . . The clear implication of this provision, of course, is that if a party does not bring such deficiencies to the trial court's attention, that party waives the right to claim on appeal that the statement was deficient in these regards, and hence the appellate court will imply findings to support the judgment." (*Ibid.*)

"For the doctrine of implied findings to be disabled on appeal, both steps of the two-step procedure under section 632 and 634 must be followed. [Citation.] Where a party fails to 'specify . . . controverted issues' or otherwise 'make proposals as to the content' of a statement of decision under section 632 (forcing the trial court to guess at what issues remain live during presentation of the statement of decision), or where a party complies with section 632 but fails to object under section 634 (depriving the trial court of the opportunity to clarify or supplement its statement of decision before losing jurisdiction), objections to the adequacy of a statement of decision may be deemed waived on appeal." (*Thompson v. Asimos* (2016) 6 Cal.App.5th 970, 983.)

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[6] Code of Civil Procedure section 634 states: "When a statement of decision does not resolve a controverted issue, or if the statement is ambiguous and the record shows that the omission or ambiguity was brought to the attention of the trial court either prior to entry of judgment or in conjunction with a motion under Section 657 or 663, it shall not be inferred on appeal or upon a motion under Section 657 or 663 that the trial court decided in favor of the prevailing party as to those facts or on that issue."

C. Mother Forfeited the Claim that the Trial Court Applied the Wrong Legal Standard

Mother contends that the judgment must be reversed because the trial court did not require father to prove a significant change of circumstances prior to granting his request to modify the legal custody order. On its face, the court's statement of decision frames the issue to be decided as "whether an award of final decision-making authority to [father] is in [the child's] best interest as described in . . . section 3011." Mother notes that "[t]he phrase 'change of circumstance' does not appear in the 27-page Statement of Decision whatsoever in any form or fashion," and asserts that its absence demonstrates "the trial court critically erred in applying the wrong legal standard to the custody modification request before it."

The shortcoming in mother's argument is her failure to raise it in the trial court. (Code Civ. Proc., § 634; *Arceneaux*, *supra*, 51 Cal.3d at p. 1133.) Whether mother (1) was uncertain which standard the trial court had utilized in rendering its decision, or (2) suspected that the trial court had improperly relied on the best interest standard, she had a duty to raise this issue in her request for statement of decision and objections to the statement of decision so that the omission or ambiguity could be addressed. (*Thompson v. Asimos*, *supra*, 6 Cal.App.5th at p. 983.)

Mother did neither of these things. As described above, her request for statement of decision did not ask the trial court to apply the changed circumstances standard or to specify the facts which established a significant change of circumstances and thus supported modification of the legal custody order. Mother's lengthy and detailed objections to the court's standard of decision did not ask the court to

clarify which standard it used. Mother's failure to bring the issue to the trial court's attention "waives [her] right to claim on appeal that the statement was deficient in these regards," notwithstanding mother's unsupported claim in her reply brief that she "did not need to make an objection to the statement of decision" because the record unambiguously reflects that the trial court relied on the wrong standard. (*In re Marriage of Furie* (2017) 16 Cal.App.5th 816, 827 (*Furie*).)

In her reply brief, mother cites *Brewer v. Carter* (2013) 218 Cal.App.4th 1312, 1320 (*Brewer*) for the proposition that findings should be implied where the record is silent but not, as in this case, where the record reflects what the court actually did. While *Brewer* cites this general rule, the case offers no support for mother's position. *Brewer* reversed a trial court's decision that California was an inconvenient forum in which to render an initial custody decision (§ 3427) because the trial court had raised the issue on its own motion and did not offer the parties an opportunity to submit relevant evidence on the issue. (*Brewer*, at pp. 1319–1320.) Not only is *Brewer* factually inapposite, it is devoid of any reference to Code of Civil Procedure sections 632 or 634, the statutes which require this court to imply findings which support the trial court's judgment.

Because mother failed to raise the application of the changed circumstance rule in posttrial proceedings as required by Code of Civil Procedure sections 632 and 634, we imply all findings necessary to support the trial court judgment. (*Arceneaux*, *supra*, 51 Cal.3d at p. 1133; *Furie*, *supra*, 16 Cal.App.5th at p. 827.) Here ample evidence supports the trial court's implied finding that a significant change of

circumstances existed which warranted modification of the existing order. The statement reflects the trial court's factual finding the parties have engaged in contentious custody litigation for several years following their agreement to share joint legal custody. "The resulting ongoing parental conflict has led to repeated breakdowns in communication between the parties and has negatively impacted [the child] by delaying necessary decisions that have been a detriment to her best interests. [Mother's] conduct has destabilized [the child's] relationship with her father, father's new wife, and her younger siblings." These factual findings thus support the court's implied finding that circumstances had significantly changed since the order was entered, and that modification of the joint legal custody order to add a "tie-breaker" provision for certain medical and educational decisions was in the child's best interest.

II.

Remand Is Not Required to Ensure That the Trial Court Exercises Informed Discretion

Mother argues that because the trial court utilized the wrong standard, its "discretionary order that is based on the application of improper criteria or incorrect legal assumptions is not an exercise of informed discretion, and is subject to reversal even though there may be substantial evidence to support that order." (*Mark T. v. Jamie Z.* (2011) 194 Cal.App.4th 1115, 1124.) Neither case mother cites convinces us that remand is required to ensure that the trial court exercises its informed discretion.

In *Mark T. v. Jamie Z.*, *supra*, 194 Cal.App.4th at page 1125, the appellate court found that "Although the trial court ostensibly applied the correct legal standard—i.e., the 'best interests' test"—to a mother's

request to relocate with the child out-of-state, it based its custody order on the erroneous legal assumption that the mother would remain in California if her move-away request was denied. (*Id.* at pp. 1119–1120, 1127.) In *Keith R. v. Superior Court* (2009) 174 Cal.App.4th 1047, the appellate court "issue[d] a peremptory writ because the family court erroneously has applied the 'changed circumstances' standard rather than the 'best interest' rule to a move-away order in a child custody case when there has been no final judicial determination within the meaning of *Montenegro*[, *supra*,] 26 Cal.4th [at page] 258." (*Keith R.*, at pp. 1050–1051.) Neither of these factually inapposite cases offers any support for mother's position that the trial court judgment in this case must be reversed. (*B.B. v. County of Los Angeles* (2020) 10 Cal.5th 1, 11 [" ' "cases are not authority for propositions not considered" ' "].)

III.

Mother Has Not Established Prejudice

Mother acknowledges that it is her burden to demonstrate that "it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error." Here, mother fails to establish that she has been prejudiced by the trial court's reliance on the best interest standard. (Cal. Const., art. VI, § 13.)

As discussed above, Mother appears to bear at least some responsibility for the error she claims, given her consistent reliance on the best interest standard in her posttrial filings. "[W]hen a party bears some responsibility for the claimed error, they are generally estopped from taking a different position on appeal or are deemed to have waived the error." (*City of Scotts Valley v. County of Santa Cruz*

(2011) 201 Cal.App.4th 1, 29.) Moreover, the record does not support mother's contention that the case presented a "close call" for the trial court, such that the use of the alternate standard might change the outcome if the matter were remanded.

Finally, it is unsettled whether the changed circumstances standard applies to a trial court's decision to maintain a joint legal custody order while granting one parent "tie-breaker" authority for certain types of decisions. In *Furie*, *supra*, 16 Cal.App.5th at pages 826–827, the trial court modified a joint legal custody order to grant the mother the exclusive authority to oversee the children's orthodontic care. The appellate court noted that "the trial court's order does not amount to a change of legal custody; father continues to share joint legal custody with mother." (*Ibid.*) The court saw "no reason to require a 'changed circumstances' test when a modification amounts to something less than a change of legal custody." (*Id.* at p. 827.)

Here, too, the trial court expressly maintained the parties' stipulated joint legal custody order. The judgment requires the parties to meet and confer and attempt to reach joint decisions on all issues affecting the child's health, education, and welfare. Father was awarded tie-breaker authority to make health care and educational decisions only in the event of parental disagreement. In connection with mother's own RFO requesting tie-breaker authority on educational and medical decisions, she asserted in the trial court that such a change *would not* require a showing of change of circumstances

because it would not constitute a modification of the joint custody order.[7]

Ultimately, we need not decide if granting father final tie-breaker decision-making authority for medical or educational decisions is tantamount to a modification of legal custody because any error was harmless. Because it is evident that the trial court actually considered and relied on evidence of changed circumstances—here, the multi-year record of ongoing parental discord which had been emotionally detrimental to the child—its failure to characterize its analysis in terms of "change in circumstances" was harmless.

IV.

Mother Has Not Established an Abuse of Discretion

"The standard of appellate review of custody and visitation orders is the deferential abuse of discretion test." (*In re Marriage of Burgess* (1996) 13 Cal.4th 25, 32.) "A trial court abuses its discretion if there is no reasonable basis on which the court could conclude that its decision advanced the best interests of the child." (*Mark T. v. Jamie Z.*, *supra*, 194 Cal.App.4th at p. 1124.)

" 'Under this test, we must uphold the trial court "ruling if it is correct on any basis, regardless of whether such basis was actually

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[7] In February 2019, mother filed a memorandum of points and authorities in support of her RFO "to ensure that [the child's] educational needs are secured, and her health care is being handled appropriately." Mother requested "limited and focused decision-making authority for educational issues and . . . medical issues." She stated: "Only if [father] fails to cooperate and select a school does she seek to be the tie-breaker on this issue." According to mother, these requests *would not* constitute a modification of the final *Montenegro* custody order.

invoked." ' " (*Chalmers v. Hirschkop* (2013) 213 Cal.App.4th 289, 299.) An abuse of discretion is established "when the trial court exceeds the bounds of reason; even if we disagree with the trial court's determination, we uphold the determination so long as it is reasonable." (*Heidi S. v. David H.* (2016) 1 Cal.App.5th 1150, 1163.)

Mother asserts that the trial court abused its discretion in awarding father sole decision-making authority over medical and educational decisions. Contrary to the trial court's finding that "the parties were unable to 'co-parent and reach even the most basic agreements,' " mother contends that "the agreements the parties reached were breathtaking in both number and scope." She argues that as to the single documented point of medical disagreement, "the evidence showed that [mother] followed the doctor's orders and [father] did not." Mother further alleges that trial court's finding that she was incapable of engaging in joint decision-making is unsupported because the evidence actually showed that she "clearly, repeatedly, and appropriately communicated with [father]." Finally, she points out that the parties' disagreements about the child's school attendance were resolved when "[mother] acquiesced to [father's] wishes." Mother's citation to evidence which arguably favors her position falls far short of convincing us that the trial court abused its discretion.

" ' "To be entitled to relief on appeal from the result of an alleged abuse of discretion it must clearly appear that the injury resulting from such a wrong is sufficiently grave to amount to a manifest miscarriage of justice." ' " (*Chalmers v. Hirschkop*, *supra*, 213 Cal.App.4th at p. 299.) It is obvious that the trial court was well aware of the number and scope of the parties' previous parenting agreements: the written

stipulations were not only received in evidence, but also incorporated verbatim into the court's statement of decision. Notwithstanding the parties' history of eventually reaching agreements—oftentimes with the assistance of attorneys and parenting coordinators, or after protracted litigation—we are not prepared to say that no reasonable trier of fact could have concluded that the "ongoing parental conflict" has "negatively impacted the child." It follows that modification of the legal custody order to grant father final tie-breaker decision-making authority in situations where the parties were unable to reach agreement on medical or educational decisions was not an abuse of discretion.

DISPOSITION

The judgment is affirmed. Father is awarded costs on appeal.

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Mayfield, J.*

We concur:

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Stewart, P. J.

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Richman, J.

In re Marriage of Saab and Zagorsky (A166160)

* Judge of the Mendocino Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.