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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

In re Marriage of JOANNE and LESTER OSTROY.	B151452 (Super. Ct. No. BD226949)
JOANNE OSTROY, Petitioner and Respondent, v. LESTER OSTROY, Appellant.	

APPEAL from a judgment of the Superior Court of Los Angeles County, Ana Maria Luna, Judge. Affirmed.

Lester Ostroy, in propria persona, for Appellant.

Fern Topas Salka; and Bruce Adelstein for Petitioner and Respondent.

BACKGROUND

Father appeals from an order modifying the prior custody order contained in the parties judgment of dissolution.[1] The judgment of dissolution, entered pursuant to the parties' stipulation on March 29, 1999, incorporated the previously entered permanent custody order that had set forth a detailed schedule upon detailed conditions, specifying separate responsibilities with regard the parties' two minor children, Koichi and Noriko. In addition to specified holidays and vacation time, appellant was to have the children from Friday after school through the start of school on Monday of one week ("Week A"), and from Wednesday after school through the start of school on Friday of the next week, or at specified times when there was no school ("Week B"). Mother was given sole responsibility for the children's medical care, and appellant was given sole responsibility for the children's dental care.

Appellant filed his order to show cause for modification on July 17, 2000, seeking a greater percentage of custodial time and sole authority for medical decisions, on the ground that mother had allegedly failed to provide adequate medical care or parental supervision. Mother filed a responsive declaration, seeking an order decreasing father's custodial time. Appellant filed a declaration in reply, and the matter was heard on October 24, 2000.

The trial court modified custody by giving appellant less, not more time with the children. The order changed Week B, so that appellant's time, instead of Wednesday to Friday, runs from Friday after school though Saturday morning at 9:00 a.m., thereby eliminating appellant's custody period during the

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[1] Father was the respondent in the trial court, and mother was the petitioner. To avoid confusion here, we shall refer to father as appellant and respondent as mother.

week. In addition, mother was given the final decision-making authority regarding education, and continued to be solely responsible for medical care.

The order modifying custody was entered on December 21, 2000, subject to further review by the trial court, which took place on February 13, 2001. The court made no changes in the order at the review hearing. Since appellant was not served with a notice of entry of judgment, his notice of appeal, filed within 180 days of the entry of the order on December 21, 2000, was timely.[2]

DISCUSSION

1. *Constitutional Issues*

Appellant contends that Family Code section 3040, subdivision (b) is unconstitutional. Subdivision (a) provides that custody should be granted according to the best interest of the child, giving preference to one or both parents before others, considering certain factors. Subdivision (b) provides: "This section establishes neither a preference nor a presumption for or against joint legal custody, joint physical custody, or sole custody, but allows the court and the family the widest discretion to choose a parenting plan that is in the best interest of the child." Appellant contends that the statute violates the due-process guarantee of the Fourteenth Amendment because it interferes with his liberty interest in his relationship with his children and because it grants overly broad power to the courts to decide custody.

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[2] See California Rules of Court, rule 2(a). Appellant represents in the notice of appeal that he was not served with notice of entry of judgment. It was opposing counsel's obligation to do so. (Code Civ. Proc., § 664.5, subd. (a).) Since mother is represented by the same counsel on appeal, and she has not disputed appellant's representation, we accept it as true.

Appellant relies upon *Troxel v. Granville* (2000) 530 U.S. 57, in which the United States Supreme Court held that a Washington child visitation statute violated the United States Constitution because it impermissibly infringed upon the fundamental liberty interest of parents to raise their children. (*Id*. at pp. 65-66, 69-70.) At issue was a statute which granted grandparents and others a right of visitation without any deference to parental rights. The Supreme Court concluded that the statute was "breathtakingly broad." (*Id*. at p. 67; Wash. Rev. Code, § 26.10.160, subd. (3).) But that is not the situation here where we are dealing with custody issues between the two parents.

The California Supreme Court has noted that "[u]nder California's statutory scheme governing child custody and visitation determinations, the overarching concern is the best interest of the child." (*Montenegro v. Diaz* (2001) 26 Cal.4th 249, 255.) It has also addressed the conflict which arises between a parent's liberty interest and this overarching concern: "Although a parent's interest in the care, custody and companionship of a child is a liberty interest that may not be interfered with in the absence of a compelling state interest, the welfare of a child is a compelling state interest that a state has not only a right, but a duty, to protect. [Citations.]" (*In re Marilyn H.* (1993) 5 Cal.4th 295, 307.) It is the very discretion of which appellant complains which avoids a potential conflict between appellant's liberty interest and the interest of the state in providing for the best interest of the child. (See *Jermstad v. McNelis* (1989) 210 Cal.App.3d 528, 550-551.)

Appellant also argues that, if both parents are fit, any custody arrangement granting the mother more than 50 percent of the child's time works to the disadvantage of the father and unconstitutionally favors the mother. This argument ignores the express provisions of the statute: "In making an order granting custody to either parent, the court . . . shall not prefer a parent as

custodian because of that parent's sex." (Fam. Code, § 3040, subd. (a)(1).) By inserting that language into the statute, the "Legislature clearly has articulated the policy that irrational, sex-based differences in marital and parental rights should end and that parental disputes about children should be resolved in accordance with each child's best interest." (*In re Marriage of Schiffman* (1980) 28 Cal.3d 640, 645 [discussing prior statute, Civ. Code, § 4600, subd. (b)(1), reenacted without substantive change in the Fam. Code as § 3040, subd. (a)(1)].) Fathers now have equal custody rights with mothers under the law. (*In re Marriage of Carney* (1979) 24 Cal.3d 725, 730.)

Nevertheless, appellant reasons that the statute unconstitutionally favors the mother because it grants discretion to judges, and judges have an historical bias against fathers and in favor of mothers. "'A statute is not facially unconstitutional simply because it may not be constitutionally applied to some persons or circumstances. . . . [Citation.]'" (*Rupf v. Yan* (2000) 85 Cal.App.4th 411, 424.) It is appellant's burden to demonstrate that the statute's provisions "'inevitably pose a present total and fatal conflict with applicable constitutional prohibitions. . . . [I]f the court can conceive of a situation in which the statute can be applied without entailing an inevitable collision with constitutional provisions, the statute will prevail. [Citation.]'" (*Id*. at pp. 423-424.)

Appellant fails to carry this burden. He shows only that the discretion granted by the statute creates the possibility of a discriminatory application by individual judges, but we cannot assume that all judges will ignore the dictates of the statute and always rule from a position of bias. (See Evid. Code, § 664; cf.,

Thompson v. Thames (1997) 57 Cal.App.4th 1296, 1308.) We cannot, therefore, find an inevitable conflict with the Constitution in this case.[3]

2. *Best Interests of the Children*

Appellant next contends that the trial court abused its discretion by failing to determine the best interests of the children. Instead, appellant asserts, the judge arbitrarily ruled in favor of mother, basing her decision on bias, rather than a consideration of all the circumstances.

Family Code section 3040, subdivision (b), gives the court "the widest discretion to choose a parenting plan that is in the best interest of the child," but it "must look to *all the circumstances* bearing on the best interest of the minor child." (*In re Marriage of Burgess* (1996) 13 Cal.4th 25, 31-32.) As we understand appellant's argument, the trial court's alleged failure to consider all the circumstances consisted of failing to give due weight to father's evidence, giving too much weight to mother's evidence, and failing to reconsider evidence submitted prior to the 1998 custody order incorporated into the 1999 judgment.

The trial court was not required, as appellant's argument suggests, to make a de novo determination of the children's best interest based upon the circumstances in evidence prior to the 1999 judgment. (See *Burchard v. Garay* (1986) 42 Cal.3d 531, 535.) The court's task was to identify the prior final custody

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[3] Apparently to show that judges have manifested a bias toward mothers in the past, appellant suggests that we apply the burden-shifting rule that guides a determination of whether a prima facie case of discrimination has been established under Title VII of the federal Civil Rights Act. (See *McDonnell Douglas Corp. v. Green* (1973) 411 U.S. 792, 802-804.) Since appellant provides no authority or comprehensible argument connecting the Civil Rights Act to any issue in this case, we decline to do so. (See *Paterno v. State of California* (1999) 74 Cal.App.4th 68, 106.)

decision based upon circumstances then existing which rendered that decision in the best interest of the child, *without reexamining those circumstances*. (*Id.* at pp. 534-536.)[4] The court's next task was to examine only events which occurred subsequent to the decision, in order to determine whether the alleged new circumstances represent a significant change from preexisting circumstances. (*Ibid*.)

"The standard of appellate review of custody and visitation orders is the deferential abuse of discretion test. [Citation.] The precise measure is whether the trial court could have reasonably concluded that the order in question advanced the 'best interest' of the child. We are required to uphold the ruling if it is correct on any basis, regardless of whether such basis was actually invoked. [Citation.]" (*In re Marriage of Burgess, supra*, 13 Cal.4th at p. 32.) Further, the trial court was not required to give *any* weight to appellant's evidence, but was entitled to disbelieve all of it and to believe all of mother's evidence. (See *Ducharme v. Ducharme* (1957) 152 Cal.App.2d 189, 193.) And, "it is not the function of this court to reweigh conflicting evidence and redetermine findings; neither is this court vested with discretion to be exercised in the premises. Our function has been fully performed when we find in the record substantial evidence which supports the essential findings of the trial court. [Citations.]" (*Sanchez v. Sanchez* (1961) 55 Cal.2d 118, 126.)

One way appellant may establish abuse of discretion is by showing that the trial court's order is not supported by substantial evidence. (*Hoffman v. Hoffman* (1961) 197 Cal.App.2d 805, 811.) To do so, appellant was required to set

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[4] Both parties relied on prior evidence for more than a starting point to show changed circumstances, relying extensively upon the opinions of a custody evaluator dated March 4, 1998, apparently as evidence in this proceeding.

forth in his brief *all* material evidence, not merely his own evidence. (See *Foreman & Clark Corp. v. Fallon* (1971) 3 Cal.3d 875, 881.) Appellant's recitation of facts presents the evidence in the light most favorable to his arguments and thus violates this basic rule of appellate law. Instead, the law requires that we view the evidence in the light most favorable to the prevailing party, resolving any conflicts and drawing all reasonable inferences in favor of the prevailing party. (*In re Marriage of Mix* (1975) 14 Cal.3d 604, 614.) After reviewing the entire record, we find that substantial evidence supports the order modifying custody time.[5]

The trial court expressly found changed circumstances, based upon Koichi's academic performance and the observations of his psychiatrist. After the 1999 judgment, Koichi's academic performance deteriorated as his schoolwork became more difficult. In June 1999, eight-year-old Koichi was diagnosed as having a learning disability, became eligible for special education services, and was included in an individualized education program (I.E.P.). (See generally, Ed. Code, §§ 56341, 56345.) Koichi's resource teacher and his I.E.P. team have recommended structure and routine in his schoolwork.

In the spring of 2000, the school psychologist reported that tests had shown that Koichi exhibited significant difficulty with inattentive and impulsive behaviors, and recommended medical evaluation for possible attention deficit disorder. His pediatrician placed him on a low dose of Adderall, a medication for attention deficit disorder, and he was scheduled to see a psychiatrist, Steven

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[5] Appellant has also submitted an appellant's appendix with pages missing from mother's declaration. It was appellant's burden to support his contentions with an adequate record. (*Ballard v. Uribe* (1986) 41 Cal.3d 564, 574-575.) We assume that the missing pages were sufficient to support the trial court's findings. (*Supreme Grand Lodge etc. v. Smith* (1936) 7 Cal.2d 510, 513.)

Lawrence, M.D. Dr. Lawrence diagnosed Koichi with attention deficit hyperactivity disorder, and prescribed medication and neurofeedback.[6] Dr. Lawrence recommended routine, stating: "Routine is important for patients with ADHD. Koichi is challenged by living in two households with two different routines. The extent to which his homework routine is similar in the two households will be beneficial to Koichi and offer him the best chance of success. It is important to understand that the medicine Koichi takes is likely to wear off in the late afternoon thus making completion of homework attempted after 6 P.M. more difficult."

Mother stated in her declaration that she monitors the children's homework, and has them do it right after school. At appellant's home, however, the children often start their homework after 8:00 p.m., and have no regular bedtime. She claimed that work on long-term projects gets done only at her home.

The trial court also considered the 1998 custody evaluation of Mary Elizabeth Lund, Ph.D., to the extent that her findings "dove-tailed" with the observations of Dr. Lawrence, although the court did not specify what those findings were. The findings of Dr. Lund's that appear to be relevant to Dr.

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[6] No declaration of Dr. Lawrence appears in the record, but appellant attached an unsigned exhibit on Dr. Lawrence's letterhead, entitled "Treatment Plan for Koichi Ostroy," dated October 4, 2000, to his declaration filed October 19, 2000. In that declaration, appellant states that Dr. Lawrence prepared the plan at appellant's request, and that the plan reflects recommendations made orally to appellant. Even though he submitted it, appellant takes issue with Dr. Lawrence's conclusions, but does not challenge the admissibility of the plan. Since it was proffered by appellant without objection, it is deemed competent evidence. (*Berry v. Chrome Crankshaft Co.* (1958) 159 Cal.App.2d 549, 552.) It may also be considered as substantial evidence. (*Smith v. Smith* (1955) 135 Cal.App.2d 100, 105.)

Lawrence's observations are that mother is the most structured parent, and better able to keep the children on task and get them to bed on time.

Appellant contends that this finding, based on a 1998 report, proves that the circumstances were, in fact, no different in 2000 than they had been in 1998. Further, Koichi's academic performance was improving since he was taking medication, proving, appellant contends, that medical treatment, not more custody time for the mother, would have been the better solution. While the trial court might have drawn the inferences that appellant believes are more reasonable, it did not, and since we have found substantial evidence to support the findings of the trial court, we are without power to draw different inferences. (See *Sanchez v. Sanchez, supra*, 55 Cal.2d at p. 126.)

Appellant also contends that the judgment should be reversed, because none of the evidence with regard to Koichi justifies changing his custody time with Noriko. In the trial court, however, appellant conceded that Noriko's obesity was a change in circumstances that would justify a modification of custody. Indeed, he urged that position in his application. Now, appellant complains that the trial court did not give sufficient weight to his evidence that Noriko's obesity was getting worse under mother's care.

Once again, we point out that the trial court was not required to give *any* weight to appellant's evidence, but was entitled to disbelieve all of it and to believe all of mother's evidence. (See *Ducharme v. Ducharme, supra*, 152 Cal.App.2d at p. 193.) It is appellant's burden to establish an abuse of discretion by showing that the court's determination was not supported by substantial evidence. (*Hoffman v. Hoffman, supra*, 197 Cal.App.2d at p. 811.) That burden is not satisfied by a recitation of appellant's own evidence. (See *Foreman & Clark Corp. v. Fallon, supra*, 3 Cal.3d at p. 881.)

Our review of the evidence reveals no abuse of discretion. Noriko was seven years old at the time of the hearing. Appellant urged the trial court to give him more time with Noriko because he would not allow her to have French fries or other high-calorie foods, such as ice cream.[7]

Mother submitted a declaration of Dr. Savitt, dated August 8, 2000, in which he stated that the children were in good health, and he had seen no signs of negligent medical care. Mother stated in her declaration that Dr. Savitt did not recommend putting Noriko on a diet, but had advised her to keep her active. To that end, mother has signed Noriko up for soccer, and at home she has a trampoline, a bike, scooter, and skates. Mother also enrolled Noriko in summer camp, which included daily swimming. Noriko has told her mother that appellant has called her fat and has put her on a diet. Mother does not think Noriko will respond well if told that that she is fat or needs a diet, and so she does not do so.[8]

At hearing, the court questioned mother about Noriko's weight and diet.[9] Mother stated that she keeps Noriko active, and without emphasizing diet,

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[7] Prior to the review hearing on February 13, 2001, appellant submitted a declaration dated November 21, 2000, in which the children's pediatrician, Dr. Savitt, stated that at the time of her well-check in October 1999, Noriko's weight was consistent with significant obesity compared to her height. At that time, Dr. Savitt outlined a plan that included both diet alteration and increased exercise. He stated that in January 2000, when appellant brought her for a visit, Noriko's weight had gone up four pounds. Dr. Savitt gave appellant the same information regarding weight control that he had given mother. Appellant also submitted two news articles regarding the link between heart disease and diabetes with childhood obesity.

[8] The judge agreed, commenting that moderation would be better for a young child, and that it would be detrimental to make her feel overweight and deprived.

[9] Appellant complains that the court failed to swear the parties before hearing their testimony, but he did not object below. Every witness must be properly sworn (see Evid.

she talks about nutrition, and provides nonfat milk and low calorie foods, such as broiled chicken. Once a week she allows Noriko to have French fries, so she does not feel resentful at being denied food that she likes. Mother said that Noriko says, "I hate it when daddy gets to eat stuff I don't. He gets to eat everything I don't." She told the court that Dr. Savitt advised her to delay dieting until she is older, so she does not develop self-esteem problems. The night before the hearing, Noriko weighed 79 pounds, not 90 pounds as appellant claimed.

Thus, substantial evidence supports the finding implied by the court that mother's approach to Noriko's obesity was the preferred one, and that it was in Noriko's best interest to be with her mother for a greater period of time during the week.

Appellant contends that the trial court did not, in fact, consider any of the evidence, but based its ruling on "the commonly held bias, that children are to be cared for by their mothers."

Behavior or decisions that appear to be based upon stereotypical attitudes about the nature and roles of women and men are indicative of gender bias. (*Catchpole v. Brannon* (1995) 36 Cal.App.4th 237, 245, fn. 2.) "Reversal has . . . been required in cases alleging gender bias where it is 'reasonably clear that [the trial judge] entertained preconceptions about the parties because of their gender . . . [which make] it impossible for [a party] to receive a fair trial.'" (*Id*. at p. 245, quoting *In re Marriage of Iverson* (1992) 11 Cal.App.4th 1495, 1499, fn. omitted.) Since proof of gender bias is sometimes difficult, we apply an objective test, and ask if a reasonable man or woman would entertain doubts concerning the judge's impartiality. (*Catchpole v. Brannon*, *supra*, 36 Cal.App.4th at p. 246.)

Code, § 710), but the requirement is waived by a failure to object. (*Estate of Da Roza* (1947) 82 Cal.App.2d 550, 555-556.)

The trial court's bias is demonstrated, appellant contends, by several of its comments. First, the court announced an intended ruling, stating, "My thoughts, just on the paperwork . . . would be to put the children with the mother during the week and put them with you on weekend time." This was not evidence of bias, but a normal practice that promotes efficiency by permitting the parties to focus and shorten their arguments to the court. (See *In re Marriage of Wood* (1983) 141 Cal.App.3d 671, 684.)

Appellant contends that the trial court's comments revealed a bias, because they were critical of appellant, and praised mother. For example, the court said to appellant, "Your paperwork struck me that you are quite a micromanager of [mother's] parenting style, and, frankly, not focused on the children, not willing to co-parent these children"; and, "I see that the mother has made substantial movement in her dealings with you, including physically coming back into the area so that the children are able to see you frequently, that she is trying hard to co-parent with you in this matter and is coming up with some resistance from you, because she's not doing 100 percent what you want to have done. I see no bending or compromise on your part. "

With regard to mother, on the other hand, the court said, "I find nothing to reflect on her credibility in any fashion"; and, "I am impressed with the mother's change of heart, particularly in moving back to the Redondo Beach area, and basically giving you more access to the children"; and, "I guess I'm really comparing you to some of the disasters I've seen, Ms. Ostroy. I think you've done a great job so far in getting over problems you have with Mr. Ostroy. I hope you can continue to be as accommodating as you can with it."

It is by no means reasonably clear from appellant's examples that the court entertained any preconceptions about the parties because of their gender, or

that a reasonable man or woman would entertain doubts concerning the judge's impartiality. (See *Catchpole v. Brannon*, *supra*, 36 Cal.App.4th at pp. 245-246.)

Appellant's real complaint appears to be that the trial court's observations were erroneous, in his opinion, because they were contradicted by evidence that the court should have given more weight. Appellant invites us to assume bias simply because he is a man and mother is a woman. We cannot do so, since an order is presumed correct, absent an affirmative showing to the contrary (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 564); and the assumption that appellant advocates here would require reversal in nearly every child custody matter, even where there is no evidence of bias. In any event, correct or incorrect, the court's comments are gender-neutral, and betray no stereotypical attitudes about a mother's ability to parent as opposed to a father's ability to parent.

3. *Attorney Fees*

In his one paragraph argument on the subject of attorney fees, appellant sets forth in his opening brief almost none of the circumstances which the trial court may have considered in awarding fees to mother. Nor are any of the circumstances recited in appellant's statement of facts. Nevertheless, appellant contends that the circumstances were insufficient to permit imposing fees pursuant to Family Code section 271, and that the award was unjustified under Family Code section 2030, subdivision (a).

Attorney fees awarded pursuant to Family Code section 271 are in the nature of a sanction. In making such an award, the trial court must take into consideration all evidence concerning the parties' incomes, assets, and liabilities, as well as circumstances indicating "the extent to which the conduct of each party or attorney furthers or frustrates the policy of the law." (Fam. Code, § 271, subd. (a).) "The court may make an award of attorney's fees and costs under Section

2030 . . . where the making of the award, and the amount of the award, are just and reasonable under the relative circumstances of the respective parties." (Fam. Code, § 2032, subd. (a).)

"[A] motion for attorney fees and costs in a dissolution proceeding is left to the sound discretion of the trial court. [Citations.] In the absence of a clear showing of abuse, its determination will not be disturbed on appeal. [Citations.] '[T]he trial court's order will be overturned only if, considering all the evidence viewed most favorably in support of its order, no judge could reasonably make the order made. [Citations.]' [Citation.]" (*In re Marriage of Sullivan* (1984) 37 Cal.3d 762, 768-769.)

"'In making its determination as to whether or not attorney fees and costs should be awarded, the trial court considers the respective needs and incomes of the parties [and] may consider all the evidence concerning the parties' income, assets, and abilities. [Citations.]'" (*In re Marriage of Hublou* (1991) 231 Cal.App.3d 956, 965.) Family Code section 2032 permits an award even to a spouse who has sufficient resources to pay, and it does not create any fixed measure of need or the lack of it. (*In re Marriage of Duncan* (2001) 90 Cal.App.4th 617, 629.) Similarly, the party receiving the award need not demonstrate any financial need for it. (Fam. Code, § 271, subd. (a).)

Discretion is abused only where it appears after all of the circumstances are considered, that the court has exceeded the bounds of reason. (*In re Marriage of Lopez* (1974) 38 Cal.App.3d 93, 110, 114, disapproved on other grounds in *In re Marriage of Morrison* (1978) 20 Cal.3d 437, 453.) Abuse of discretion is never presumed, but must be affirmatively established by the appellant. (*In re Marriage of Lopez, supra*, 38 Cal.App.3d at p. 113.)

Appellant has shown neither the circumstances considered by the trial court, nor the circumstances that he believes the court should have considered,

with one exception: he appeared in propria persona, and incurred no attorney fees himself. Appellant appears to be inviting us to state, as an abstract principle, that attorney fees should not be granted to the parent whose opponent appeared in propria persona. Even if we were to do so, it would not affect the outcome of this appeal, since the other circumstances must be considered as well (see *In re Marriage of Lopez*, *supra*, 38 Cal.App.3d at p. 114), and appellant has failed to set them forth. It is not our function to give opinions on abstract propositions or to declare principles which cannot affect the outcome of the appeal. (*Consol. etc. Corp. v. United A. etc. Workers* (1946) 27 Cal.2d 859, 863.)

In any event, we do not agree with appellant's proposition and decline to declare such a principle. The purpose of an award of attorney fees under the statute is to provide an amount adequate to litigate the controversy properly. (*In re Marriage of Hublou, supra*, 231 Cal.App.3d at p. 965.) Since self-representation often fails to foster efficient litigation of a controversy (cf., *Trope v. Katz* (1995) 11 Cal.4th 274, 292), it would not further the purpose of Family Code section 2030 to enunciate a rule discouraging the employment of attorneys.

DISPOSITION

The order modifying custody is affirmed. Mother shall have her costs on appeal.

NOT TO BE PUBLISHED

HASTINGS, J.

We concur:

VOGEL (C.S.), P.J.

EPSTEIN, J.