A154368

COURT OF APPEAL
STATE OF CALIFORNIA

First Appellate District
Division 1

In re Marriage of

M.S.,
Respondent,

vs.

M.R.S.,
Appellant.

Appeal from San Francisco Superior Court
Case No. FDI 15-782967
Hon. Monica F. Wiley

RESPONDENT'S BRIEF

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I. INTRODUCTION

This appeal is from a child custody judgment in this marital dissolution action, denying Appellant's request to relocate the parties' three minor children from their long-term residence in San Francisco to Denmark. After a 10-day trial, the court considered the move-away factors in *Marriage of LaMusga* (2004) 32 Cal.4th 1072, 1101 ("*La Musga*") and ruled that it was in the children's best interests to remain in San Francisco. Appellant has asked this Court to reverse the custody judgment with instructions to order the children's relocation to Denmark, arguing that the trial court made findings without substantial evidence and abused its discretion.

No reversible error has been shown, so this Court should affirm the judgment. The trial court explained:

> Decisions about family and children are often difficult. The Court has carefully considered the exceptionally close bond that the children enjoy with each parent and the children's ages and high functioning levels and the need to minimize transitional conflict. Based upon its review of the evidence and the weighing of the relevant factors, this Court finds that it is in the children's best interest to remain in San Francisco in order to preserve and ensure their current stability and consistency and maximize the amount of time the children will be able to spend with each parent.

(2 A.A., p. 272:11-17, fn. omitted.)[1]

[1] "2 A.A." refers to the Appellant's Appendix, volume II.

Appellant's main argument is that the trial court should have granted her relocation request because she is deaf and the children will lose their emotional bond with her unless they become fluent in spoken Danish or Danish Sign Language (DSL)—which, in her view, can only occur if they live with in Denmark. The trial court was not convinced the children must live in Denmark to maintain their ability to communicate with Appellant. The trial court made orders for the children to gain fluency in spoken Danish and DSL in San Francisco. Displeased with those findings and orders, Appellant states throughout the opening brief that the children's ability to communicate with her will dwindle unless they move to Denmark. That is her belief, but it is contrary to what the trial court found.

Appellant's second complaint is that the trial court "ignored" her hearing impairment. This argument is related to the first one, but here she accuses the trial court of disregarding her deafness "[u]nder the guise of neutrality." (AOB, p. 13.) Nothing in the record suggests that the trial court's consideration of Appellant's disability was anything other than genuine. The trial court used the neutrality required by law in evaluating the effect of Appellant's disability on her ability to communicate with the children.

The trial court understood Appellant's disability and recognized the need for the children to communicate with Appellant. To improve their language skills, Respondent was ordered to devote the following time and resources for the children to learn Danish and DSL while in his custody: (1) hire a

nanny fluent in spoken Danish who shall encourage the children to speak Danish; (2) designate two days per week that the children will only speak Danish in Respondent's home; (3) provide Danish and DSL tutors for the children twice weekly; and, (4) encourage the children to write letters to Appellant each week in Danish. In her opening brief, Appellant dismisses those measures "as illusory attempts to ensure that the children do not lose their Danish-language skills in San Francisco." (AOB, p. 45.) Respondent disagrees. The trial court made a reasonable and sincere effort to develop the children's fluency and maintain their ability to communicate with Appellant.

Finally, Appellant claims the trial court "separated" the children from Appellant's minor child of a prior relationship (Ditlev), and failed to acknowledge the connection between Ditlev and the parties' children. (AOB, pp. 45-46; 79-80.) That is not true. As the trial court recognized, Ditlev was a member of the parties' household during marriage, but Appellant returned Ditlev to Denmark to live with his father in 2016, more than a year before trial, because Appellant wanted to end Ditlev's relationship with Respondent. The trial court found that Appellant's actions negatively affected all of the children, yet she blames the trial court for the separation she caused.

The judgment should be affirmed because the trial court's findings are supported by substantial evidence, the custody orders are a reasoned exercise of discretion according to the law, and Appellant has not shown a miscarriage of justice.

II. STANDARD OF REVIEW

Findings of fact are tested for substantial evidence and child custody decisions are reviewed for abuse of discretion. (See, AOB, p. 64 [acknowledging standards of review].) The interplay between findings, legal conclusions, and discretion was explained succinctly in *Property California SCJLW One Corp. v. Leamy* (2018) 25 Cal.App.5th 1155:

> 'When applying the deferential abuse of discretion standard, "the trial court's findings of fact are reviewed for substantial evidence, its conclusions of law are reviewed de novo, and its application of the law to the facts is reversible only if arbitrary and capricious.' [Citation.] 'It is the appellant's burden on appeal to show the trial court abused its discretion.' [Citation.]

(*Property California SCJLW One Corp., supra,* 25 Cal.App.5th at pp. 1162–1163.)

The opening brief does not assert the trial court made any erroneous conclusions of law. Instead, the appeal challenges certain findings as lacking substantial evidence, and claims the court abused its discretion in denying the relocation. Review should start by examining the findings in the statement of decision for substantial evidence.

> 'Under the substantial evidence standard of review, "we must consider all of the evidence in the light most favorable to the prevailing party, giving it the benefit of every reasonable inference, and resolving conflicts in support of the [findings]. [Citations.] [¶] It is not our task to weigh conflicts and disputes in

> the evidence; that is the province of the trier of fact. Our authority begins and ends with a determination as to whether, on the entire record, there is *any* substantial evidence, contradicted or uncontradicted, in support of the judgment. Even in cases where the evidence is undisputed or uncontradicted, if two or more different inferences can reasonably be drawn from the evidence this court is without power to substitute its own inferences or deductions for those of the trier of fact, which must resolve such conflicting inferences in the absence of a rule of law specifying the inference to be drawn." '

(*Schwan v. Permann* (2018) 28 Cal.App.5th 678, 693–694, emphasis in original.)

A trial court has discretion to apply the law to the facts, which is entitled to deference on appeal. (*Property California SCJLW One Corp., supra,* 25 Cal.App.5th at pp. 1162–1163.) In making an initial custody determination, a trial court has "the widest discretion to choose a parenting plan that is in the best interest of the child." (Fam. Code, § 3040, subd. (c).)[2] "Generally, a trial court abuses its discretion [in a child custody determination] if there is no reasonable basis on which the court could conclude its decision advanced the best interests of the child. [Citations.]" (*F.T. v. L.J.* (2011) 194 Cal.App.4th 1, 15 [order denying move away request]; see also, *Sargon Enterprises, Inc. v. University of Southern California* (2012) 55 Cal.4th 747, 773 [ruling must be " 'so irrational or arbitrary that no

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

reasonable person could agree with it' " to constitute abuse of discretion].)

Even when error has been shown, a judgment must be affirmed unless the error resulted in a miscarriage of justice. (Cal. Const., art. VI, § 13; *F.P. v. Monier* (2017) 3 Cal.5th 1099, 1108.) A miscarriage of justice has occurred when it reasonably appears that the appealing party would have achieved a more favorable result had the error not occurred. (*Cassim v. Allstate Ins. Co.* (2004) 33 Cal.4th 780, 800. A miscarriage of justice is not presumed, absent "structural error" that prevents a reviewing court from evaluating prejudice. (*F.P. v. Monier, supra,* 3 Cal.5th at p. 1108; Code Civ. Proc., § 475.)

III. ISSUES ON APPEAL

(A) Did Appellant violate principles of appellate review by failing to note express findings adverse to her version of the facts?

Appellant's portrayal of the record is incomplete and misleading. The appeal is premised on Appellant's preferred version of the facts, without disclosing express findings to the contrary. Specifically, Appellant claims:

(1) The trial court separated the parties' children from Ditlev (but the court found Appellant caused that separation a year before trial).

(2) The trial court made no finding about the children's needs for stability (but a finding was made).

(3) Appellant is the primary caretaker of the children (but the trial court found the parties shared custodial time nearly equally after separation).

(4) The trial court was silent about the children's wishes (but findings were made).

(5) Appellant cannot travel for visitation as easily as Respondent (despite a finding that each party has equal ability).

These inaccuracies are corrected in section VII(A) below, so this Court can evaluate the record accurately.

(B) Are the challenged findings in the statement of decision supported by substantial evidence?

Appellant claims three findings in the statement of decision lack substantial evidence:

(1) Appellant has difficulty separating the children's needs from her own;

(2) Appellant's disability does not prevent her from communicating effectively with the children; and,

(3) The parties' children can be exposed to other children of deaf adults in San Francisco.

The challenged findings are supported by substantial evidence as discussed in section VII(B) below.

(C) Did the trial court abuse its discretion in denying Appellant's request to relocate?

Appellant claims the denial of her request to relocate the children to Denmark was an abuse of discretion for these reasons:

> [1] the trial court's failure to consider the children's need for stability and continuity in their custodial arrangements;
>
> [2] the court's treating [Appellant]'s deafness as a neutral factor, effectively ignoring its impact on her relationship with her children; and
>
> [3] the court's failure to consider the children's interest in living with their half-brother."

(AOB, p. 53.)

Respondent disagrees. The trial court carefully considered the move-away factors in *Marriage of LaMus*ga, *supra,* 32 Cal.4th at p. 1101, and denied the relocation request based on its findings of fact and assessment of the children's best interests, as discussed in section VII(C) below.

(D) <u>If error has been shown, did it result in a miscarriage of justice?</u>

The opening brief does not explain how the alleged errors resulted in a miscarriage of justice, other than Appellant's bare conclusion these were "harmful errors…." (AOB, p. 53.) Appellant seeks reversal with instructions to grant the relocation request, as if the only reasonable conclusion is that the children must relocate to Denmark. (See, AOB, p. 81.) Child custody decisions are not forgone conclusions. Appellant has not shown a reasonable probability the relocation would have been granted had the alleged errors not occurred, as explained in section VII(D) below.

IV. APPEALABILITY

The judgment is appealable. (Code Civ. Proc., § 904.1, subd. (a)(14) [bifurcated custody judgment].)

V. PROCEDURAL HISTORY

On August 31, 2016, the Court entered a Judgment of Dissolution, resolving all issues except for child custody and child support. (2 A.A., p. 276:1-2.) Following a 10-day trial on custody and Appellant's move-away request, a final judgment was filed on January 12, 2018. (2 A.A., pp. 337-349.) A notice of appeal from the judgment was filed on March 8, 2018. (2 A.A., p. 352 [register of action notation].) On Respondent's application, this Court changed the caption of the appeal to *In re the Marriage of M.S. v. M.R.S.* on August 16, 2018.

VI. STATEMENT OF FACTS

This recitation is from the findings in the statement of decision. (See, 2 A.A., pp. 271-293.)[3]

(A) The parties have three children together and have lived in the U.S. since 2009.

The parties are originally from Denmark and were married on October 11, 2006. (2 A.A., p. 273:2-4.) Each party is a legal U.S. resident. (*Ibid.*)

[3] The statement of decision contains extensive footnotes with citations to the trial court record as an evidentiary basis for its findings. The footnote citations are omitted here, where indicated, for readability.

Respondent is the founder and chief executive officer of a publicly-traded company he started in Denmark. (2 A.A., p. 273:9-15.) In 2009, the parties moved to the United States to pursue greater opportunities. (*Ibid.*) When the parties left Denmark, they had two young children: Ella, born in September 2006, and Erna, born in December 2007. (2 A.A., p. 273:9-15.) The family settled in San Francisco where their third child, Eva, was born in November 2012. (*Ibid.*)

(B) After separation, Appellant made Denmark her new residence and sought to relocate the children there.

The parties separated in January 2015 and a marital dissolution action was filed the same month. (2 A.A., p. 274:2-6.) Soon after separation, Appellant stated her desire to relocate the children to Denmark. (2 A.A., p. 275:20-22, fn. 26.) Appellant then purchased a home in Copenhagen—which she declared her new permanent residence—and selected new schools for the children in Denmark. (2 A.A., pp. 274:5-6; 282:17 - 283:2.) Appellant did not inform Respondent of either decision. (*Ibid.*)

Respondent objected to the proposed relocation of the children from San Francisco because of "his desire to be an active participant in his children's lives and his desire to raise the children in the United States…." (2 A.A., p. 278:9-13.) The parties and their children remained in San Francisco pending trial. (2 A.A., pp. 274:5-6; 275:13-15.)

(C) The parties agreed to a near-equal, temporary parenting plan in San Francisco pending trial.

Respondent filed a request for the parties to temporarily share joint legal and physical custody of their children pending trial on Appellant's move-away request. (2 A.A., pp. 275:19-20, fn. 25; 276:14-16.).) The parties eventually agreed on joint custody of the children in San Francisco. (2 A.A., p. 275:12-15.) The schedule alternated, with Appellant having eight consecutive days of parenting time and Respondent having the next six consecutive days. (*Ibid.*)

(D) A custody evaluation favored the relocation to Denmark.

Bram Fridhandler, Ph.D., was appointed to conduct a child custody evaluation. (2 A.A., p. 275:12-13.) Dr. Fridhandler was tasked to make a custody recommendation based on Appellant's desire to live in Denmark with the children and Respondent's desire that the children remain with him in San Francisco. (2 A.A., p. 275:22-24, fn. 27.) In his confidential report of November 8, 2016, the evaluator recommended that Appellant be allowed to relocate the children to Denmark. (*Ibid.*)[4]

[4] See, Conf. A.A. (Confidential Appellant's Appendix), pp. 6-86 for the Confidential Custody and Visitation Evaluation report by Bram Firdhandler, Ph.D. dated November 7, 2016.

(E) Following a 10-day trial, the court found it was in the children's best interests to remain in San Francisco.

The trial lasted 10 days in May 2017. (2 A.A., p. 271:24-25, fn. 2.) The trial court issued a 23-page statement of decision on August 9, 2017, denying the relocation request. (2 A.A., pp. 271-293.) The trial court made the findings described below.

1. Appellant was the primary caretaker during marriage, but they shared joint physical custody after separation.

"Historically, [Appellant] has been the primary caretaker for the children. The status quo changed once the parties separated and the children began living in two separate and complete, households." (2 A.A., at p. 280:12-17.) After separation, the parties agreed to share parenting time on a 57%-43% basis in San Francisco. (2 A.A., at p. 279:3-4.)

"[B]oth parties are very good parents who are loving, warm, available and attentive to their children. Each parent has a healthy and enduring relationship with the children. Both [parents] are actively involved in their children's lives—both at home and at school. (2 A.A., p. 281:3-12.) "The children love and trust their parents equally." (*Ibid.*) "The children are bonded with both parents and the participation of both parents in their lives will be necessary for their continued success and emotional well-being." (2 A.A., p. 278:10-13.)

2. The children are deeply rooted in San Francisco.

San Francisco was home to the children for eight years preceding trial. (2 A.A., p. 279:2-3.) "[T]hey are deeply rooted in their San Francisco school and community. They all have friends and active social ties that they have worked hard to develop and maintain." (2 A.A., pp. 281:14-16.) The children have benefited from attending their school and The Scandinavian School (which is also in San Francisco). (2 A.A., p. 282:3-6.)

3. A move to Denmark would require the children to change schools and adapt to a new social environment.

Ella and Erna have not lived in Denmark since they were three and two years old, respectively; Eva was born in San Francisco. (2 A.A., pp. 281:14-18 & 273:9-15.) The children have extended family in Denmark. (*Id.*, at p. 281:14-18.) A move to Denmark would require the children to adapt to a new social environment and enroll in new schools. (2 A.A., p. 286:1-13.)

The school Appellant unilaterally selected for the children in Denmark could not be evaluated by the trial court because its appropriateness "is dependent upon an assessment that has not yet taken place." (2 A.A., p. 282:3-6.) The children do not read or write Danish, so their acceptance into a general education class in Denmark would be predicated on their individual language needs. (2 A.A., p. 285:19-21, fn. omitted.) The trial court considered cultural differences involved in the proposed move, including that the children do not write or read Danish, have not experienced Denmark as their permanent residence, must attend

new schools, and will need to build a new social network there. (2 A.A., pp. 285:13 - 286:2, fn. omitted.)

4. The trial court believed it would be detrimental to each child's need for stability and continuity if they moved from San Francisco.

The trial court considered evidence of the children's ties to San Francisco and their bonds with each parent in assessing whether relocating them to Demark was in their best interests. The trial court stated:

> Given the importance of 'stability and continuity in the life of a child, and the harm that may result from disruption of established patterns of care and emotional bond[s],' the children's ability to continue to live in their current community and attend [their current school] are factors that weigh heavily in favor of the children remaining in San Francisco.

(2 A.A., at p. 279:1-10, fn. omitted, quoting *Burchard v. Garay* (1986) 42 Cal.3d 531, 541.)

The trial court faulted the evaluator for not considering these factors, and noted that "[t]he children's ongoing stability is a primary concern to the Court considering their developmental ages and closeness to each parent." (2 A.A., p. 279:9-18, fn. omitted.) "[R]emoving Ella and Erna from San Francisco and the structure and stability they have developed in the school and social community, would be detrimental to their current emotional stability and well-being." (2 A.A., p. 279:17-25, fn. omitted.) "Ella in particular has a need for the stability and continuity associated with [her current school] because of her

earlier struggles developing strong socialization skills with her peers." (2 A.A., p. 279:9-11, fn. omitted.)

The trial court considered Eva's "young age and the fact that [Appellant] has been her primary caregiver." (2 A.A., p. 279:22-25, fn. 38.) In determining it was in Eva's best interests to remain in San Francisco, the trial court was "swayed by the comments of [Eva's teachers]…. Eva is described as a well adjusted, happy, and confident child who is extremely close to her sisters...." (*Ibid.*)

5. The trial court understood Appellant's reasons for wanting the children to live in Denmark.

The trial court explained:

> [Appellant] is deaf and a large part of her individuality and confidence is derived from her ability to communicate in [Danish Sign Language]. [Appellant]'s identity is integrated with the deaf community and the cultural aspect of deafness. [Appellant] wants to return to Denmark so that she can return to a community and supportive network she is familiar with and re-engage in the deaf community. She also wants to expose her children to the deaf community so that they can better interact with her and understand her. [Appellant]'s reasons for the proposed move largely focus on her subjective feeling of isolation and ineffectiveness in San Francisco. [Appellant] wants her children to become fluent in DSL and involved in the Danish deaf community.

(2 A.A., p. 284:9-16, fn. omitted.)

6. The trial court disagreed with Appellant's claim that the children must live in Denmark to maintain their ability to communicate with her.

The trial court noted that "… [Appellant] made only minimal efforts to teach [the children] DSL prior to her decision to relocate." (2 A.A., p. 284:23-24, fn. 52.) Despite that fact, the trial court understood the important of DSL to Appellant. "At times described as the language that 'provides her the greatest access to the world' and the language that she is 'best able to describe her feelings and emotions in,' the Court acknowledges that DSL is critical to [Appellant]'s ability to feel connected to the community around her." (*Ibid.*)

Although her preferred language is DSL, the trial court found that Appellant can "function at a very high level in terms of her ability to communicate in the Danish language by both speaking and reading lips." (2 A.A., p. 274:7-12, fns. omitted.) The trial court observed: "Despite [Respondent's] failure to learn DSL, the parties' relationship flourished into marriage, and during the marriage, the parties communicated with each other primarily through spoken Danish." (2 A.A., p. 274:13-16, fns. omitted.) The trial court explained why it did not believe Appellant's claim that the children had to live in Denmark to maintain their ability to communicate with her.

> [Appellant] argues that the children's inability to communicate with her fluently in DSL presents obstacles to her communication with the children. [¶] [Appellant]'s focus on the use of DSL to communicate with her children ignores the reality

> that she is able to effectively communicate with and parent her children. In fact, the majority of [Appellant]'s parenting has taken place in San Francisco, and whatever obstacles she has encountered, she has overcome. [Appellant] has attended and participated in school activities and is a loving, devoted, and exceptionally capable parent. There is no evidence that [Appellant] has not been able to emotionally bond with her children as a result of her hearing impairment or significant use of DSL. These arguments marginalize the vital role [Appellant] has played in her daughters lives, and the Court does not weigh this factor for or against the relocation.

(2 A.A., pp. 284:16 - 285:8.)

"Ella, the oldest child, speaks Danish, English, and a limited amount of DSL, but is unable to read or write in Danish." (2 A.A., pp. 274:17-18, fn. omitted.) "Erna, the middle child, speaks Danish, English and a nominal amount of DSL, and is also unable to read or write in Danish." (2 A.A., pp. 274:17-19, fn. omitted.)

"Eva, the youngest child, understands English, Danish and some basic signs in DSL, but has been described as 'lagging' in her expressive language." (2 A.A., pp. 274:18 - 275:1, fn. omitted.) "Although Eva's proficiency in English is at this time greater than her proficiency in Danish, language is not static and she will continue to improve her Danish language skills with time. The improvement in her language skills will allow Eva to continue to strengthen and improve her emotional bond with both parents." (2 A.A., p. 279:17-25, fn. 38.)

7. Exposure to other children of deaf adults (CODAs) could occur in San Francisco.

Appellant argued there are fewer opportunities in San Francisco for the children to interact with other children of deaf adults (CODAs) which would "enhance the children's understanding of [Appellant]." (2 A.A., pp. 281:17 - 282:2.) The court did not find that claim persuasive because "exposure [to CODAs] can occur just as effectively in San Francisco." (2 A.A., pp. 281:17 - 282:2.)

8. The children's step-brother, Ditlev, lived with the parties during marriage, but Appellant sent him to Denmark a year before trial.

Appellant has a 14-year-old son, Ditlev, from a prior relationship. (2 A.A., p. 273:23-25, fn. 12.) Ditlev resided with the parties in San Francisco in 2010, and from 2013 to the summer of 2016. (*Ibid.*) "Ditlev was an active part of the [parties'] San Francisco household for over four years." (2 A.A., p. 282:21-23.) In 2016, Ditlev returned to Copenhagen to live with his father. (2 A.A., p. 273:23-25, fn. 12.) The trial court found that Appellant interfered with Ditlev's relationship with Respondent after the parties separated:

> [T]he Court notes that [Appellant]'s 'protective gatekeeping' of Ditlev's relationship with [Respondent] has affected not only Ditlev and [Respondent] but has also had a negative impact on the children. The Court does not believe that Ditlev and [Respondent]'s relationship should be an accepted casualty of the demise of the parties'

> marriage. The children's feelings of consistency and stability are served by allowing [Respondent] to have a relationship with Ditlev and for Ditlev to have a relationship with [Respondent] and feel welcome in [Respondent]'s home.

(2 A.A., p. 284:20-23, fn. 51.)

The trial court and the child custody evaluator each concluded that Appellant took no responsibility for her conduct: "[Appellant's] inability or unwillingness to encourage and foster Ditlev's relationship with [Respondent] after the parties' separation also concerns the Court…. As discussed in Dr. Fridhandler's report, [Appellant]'s 'biased view of [Respondent]'s relationship with Ditlev is also demonstrated in her failure to acknowledge fully her role [in] the cessation of contact between them.'" (2 A.A., pp. 282:16 - 283:2, fns. omitted.)

Though the evaluator traveled to Denmark as part of his evaluation process, he did not interview Ditlev while there. (2 A.A., p. 283:21-23, fn. 45.) The trial court was critical of that omission:

> Dr. Fridhandler's failure to interview Ditlev while he was in Copenhagen is inexplicable given his proximity to the parties both before and after the parties separated. Moreover, Ditlev continues to have a close relationship with the children and visit [Appellant] in San Francisco. Information from Ditlev would have been helpful to the Court in understanding why he has no contact with [Respondent].

(2 A.A., p. 283:21-23, fn. 45.)

9. The trial court considered the parties' ability place the children's interest ahead of their own.

The trial court considered "the ability of the parties to communicate and to place the interests of the children above their individual interests. Given the distance of the move and the historical difficulty the parties have had in reaching parenting timeshare agreements, this is a critical factor to consider in the context of this international move." (2 A.A., p. 282:9-12.)

> The Evaluation Report suggests that [Respondent] has a greater capacity than [Appellant] to place the children's needs above his own and ensure that they are protected and their emotional needs are met. Despite [Appellant]'s assertion that she is a collaborative co-parent, her actions in purchasing a home in Copenhagen without informing [Respondent] beforehand and selecting schools for the children in Denmark, suggest otherwise. [Appellant's] inability or unwillingness to encourage and foster Ditlev's relationship with [Respondent] after the parties' separation also concerns the Court….

(2 A.A., p. 282:16 - 283:2, fns. omitted.)

Despite the differences between the parties, the trial court found that "both parents have shown a willingness to communicate and engage in discussions concerning their children's welfare." (2 A.A., p. 283:17-18.) "Following their separation they retained a recommending mediator … and engaged in co-parent counseling.... Any animosity they may have

towards each other has not significantly undermined their commitment to their children." (2 A.A., p. 284:2-7, fn. omitted.)

10. Either party can easily travel on a regular basis to the other's location.

The trial court took judicial notice that the distance between San Francisco and Copenhagen is approximately 5,500 miles, the cities are several time zones apart, and a non-stop flight is over 11 hours. (2 A.A., p. 280:2-10, fn. 39.) Appellant does not work and has flexibility to travel; Respondent has less flexibility due to his work schedule but can arrange his work commitments around the timesharing schedule with suitable notice. (2 A.A., p. 285:12-14.) "There is no evidence to indicate that either party is unable to travel on a regular basis to facilitate the parenting timeshare. The Court does not weigh this factor for or against the relocation." (2 A.A., p. 285:14-16, fn. omitted.)

"The Court does not consider the distance to be a major factor in its analysis given the parties' commitment to their children and the financial resources the parties have at their disposal…. The Court finds that the distance of the move, while inconvenient and burdensome for the travelling party, is not insurmountable." (2 A.A., p. 280:2-10.)

11. Based on the *LaMusga* factors, the court concluded it is in the children's best interests to remain in San Francisco.

The trial court noted that it had "made findings of credibility … and accorded the evidence … the weight the Court believes it deserves." (2 A.A., p. 272:6-8.)

> This Court has considered all of the circumstances bearing on the children's best interests as stated in *LaMusga* [*supra,* 32 Cal.4th at p. 1101], and while acknowledging that there is no rigid definition of 'best interest of the child,' this Court has nevertheless attempted to answer the question of whether a 'particular set of circumstances relative to an alternative set of circumstances is in the best interest of the child,' as in *Adoption of Michelle T.*, (1975) 44 Cal.App.3d 699. After considering and balancing all of the *LaMusga* factors, the Court believes that remaining in San Francisco is in the children's best interests at this time.

(2 A.A., pp. 285:13 - 286:13, fns. omitted.)

(F) The trial court made a custody plan.

The children's primary residence during the academic school year will be in San Francisco. (2 A.A., p. 344, ¶ 10(a).) Ella and Erna will remain enrolled in the Synergy School until further order or agreement. (2 A.A., p. 342, ¶ 4.) Eva will remain at the Scandinavian School for the 2017-2018 school year, then start the pre-kindergarten program at Synergy School for the 2018-2019 school year. (2 A.A., p. 342, ¶ 4.) Eva will also continue to participate in an after-school Danish program. (*Ibid.*)

The children will spend their summer vacations and Christmas holidays with Appellant in Denmark. (2 A.A., p. 345, ¶ 10(b) & (c).) Appellant will have visitation with the children in San Francisco three times per year (maximum of 25 days per period), plus two visits for 10 days each. (2 A.A., p. 345, ¶ 10(d).) Respondent has limited visitation during the periods allocated to Appellant. (2 A.A., p. 345, ¶ 10(b) & (d).)

Ella and Erna are to be assessed by a child therapist to determine whether individual counseling is recommended. The trial court believed that "[t]herapy is necessary due to the high degree of conflict between the parties and will be beneficial to the children in light of [Appellant]'s move to Denmark…. Therapy will assist the children in dealing with [Appellant]'s relocation and assist the parents helping the children deal with relocation issues and strengthening the bonds with both parents." (2 A.A., p. 348-349, ¶ 21.)

(G) <u>Orders were made to facilitate the children's language proficiency.</u>

Respondent will employ a nanny/*au pair* fluent in spoken Danish and proficient in both reading and writing Danish. (2 A.A., p. 347, ¶ 14.) That caregiver will encourage and facilitate the children speaking Danish consistently in Respondent's home so Ella and Erna retain their spoken fluency and enhance their proficiency in reading and writing Danish. (2 A.A., p. 347, ¶¶ 14-15.) Respondent will also select two days each week that the children will only speak Danish in the home. (2 A.A., p. 347, ¶ 15.)

Respondent will pay for the children to receive one and one-half hours of tutoring in oral and written Danish each week, plus one and one-half to two hours of tutoring in DSL per week when the children are in his custody. (2 A.A., p. 347, ¶ 16.) The trial court emphasized the importance of this part of its order, and recognized that Eva may need additional tutoring given her age and developmental level. (2 A.A., pp. 347-348, ¶ 16.) "The goal is fluency at grade level for each child." (2 A.A., p. 348, ¶ 16.) Respondent will encourage the children to write letters to Appellant in Danish each week. (2 A.A., p. 348, ¶ 17.)

The children are to be afforded unlimited access to the non-custodial parent by telephone, text, email and Face Time. (2 A.A., pp. 344-346.) For video-conferencing calls, the custodial parent must ensure the children are focused on the communication and not distracted. (2 A.A., p. 346, ¶ 11.)

VII. DISCUSSION

Appellant's argument relies on her overturning the adverse findings in the statement of decision, upon which the trial court denied her relocation request. This is not a good basis for an appeal, as illustrated by *In re Marriage of Boswell* (2014) 225 Cal.App.4th 1172:

> Mother [in *Boswell*] contends that the trial court erroneously did not credit her factual showing…. This is folly. The trial court was not required to believe her and, sitting as trier of fact, had the power and the right to not do so, just as it had the power and right to believe father. [Citation.] We do not judge credibility on appeal. An adverse factual

> finding is a poor platform upon which to predicate reversible error. [Citation.] 'We sit as a court [of law] to review errors of law and not [claimed] errors of fact.' [Citation.]

(*In re Marriage of Boswell, supra,* 225 Cal.App.4th at p. 1175 [action to enforce 25 year old child support order].)

(A) <u>Appellant's recitation of facts conflicts with express findings in the statement of decision.</u>

In challenging the sufficiency of the evidence to support the trial court's findings, Appellant was required to discuss the unfavorable findings in the statement of decision and the inferences that can reasonably be drawn from the evidence in support the trial court's decision. Instead, Appellant recited her preferred version of the "facts" as if the adverse findings in the statement of decision did not exist.

"Where [a] statement of decision sets forth the factual and legal basis for the decision, any conflict in the evidence or reasonable inferences to be drawn from the facts will be resolved in support of the determination of the trial court decision." (*In re Marriage of Hoffmeister* (1987) 191 Cal.App.3d 351, 358; but see Code Civ. Proc., § 634 [when appellant objects to an ambiguity or omission in the statement of decision prior to entry of judgment, it shall not be inferred the trial court decided that issue for the respondent].) A party who challenges the sufficiency of the evidence to support a finding must set forth, discuss, and analyze all the evidence on that point, both favorable and unfavorable." (*Doe v. Roman Catholic Archbishop of Cashel & Emly* (2009) 177 Cal.App.4th 209, 218; Cal. Rules of Court, rule 8.204(a)(2)(C)

[appellant's opening brief shall "[p]rovide a summary of the significant facts ..."]; *In re Marriage of Davenport* (2011) 194 Cal.App.4th 1507, 1531 [reciting evidence favorable to appellant as though the trial court's "comprehensive, fact-based statement of decision did not exist … is not to be condoned"].) When an opening brief ignores evidence favorable to respondent, the substantial evidence argument may be deemed waived. (*Doe, supra,* 177 Cal.App.4th at p. 218.)

1. Appellant separated the children from Ditlev a year before trial, but claims the trial court caused the separation.

Appellant faults the trial court for its "separation of the children from Ditlev" as if it were an established fact that the trial court caused the separation. (AOB, pp. 79-80; see also, p. 75 ["Did the trial court abuse its discretion by separating the girls from … Ditlev...].) Appellant also argues that "the court did not consider the weighty factor of *keeping the children and Ditlev together* in its calculus of custody" implying they were living together at time of trial. (AOB, p. 77, emphasis added.)

While Appellant may ask this Court to review the trial court's consideration of Ditlev's relationship with the parties' children, she must accurately state the facts in making her argument. The appeal, however, is based on Appellant's statement that the trial court caused a separation of the parties' children from Ditlev, when it was *Appellant* who separated the children from Ditlev by sending Ditlev to Denmark to live with his father a year before trial. (2 A.A., p. 273:23-25, fn. 12.)

The statement of decisions acknowledges "[Appellant] has a 14 year-old son, Ditlev, from a prior relationship who now lives in Copenhagen with his father…. Ditlev initially moved to the United States with the parties for nine months but returned to Copenhagen in 2010. In 2013, Ditlev returned to the United States with live the [parties'] family, but then returned to Copenhagen in summer of 2016. Currently, Ditlev lives in Copenhagen." (2 A.A., p. 273:23-25, fn. 12.) "Ditlev was an active part of the [parties'] San Francisco household for over four years" before he moved to Denmark in 2016. (2 A.A., p. 282:21-23.)[5]

The trial court understood that Ditlev had been separated from the parties' children at the time of trial, and that Appellant wanted to reunite them by relocating the parties' children to Denmark. The trial court considered the circumstances in which the separation of the children had occurred, and concluded that Appellant wanted to end Ditlev's relationship with Respondent after the parties separated, which harmed the parties' children because they could not have contact with Ditlev while they were in Respondent's care:

> [Appellant]'s 'protective gatekeeping' of Ditlev's relationship with [Respondent] has affected not only Ditlev and [Respondent] but has also had a negative impact on the children. The Court does not believe that Ditlev and [Respondent]'s relationship should

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[5] Despite these findings, Appellant claims: "[N]owhere does the court acknowledge that Ditlev is the girls' half-brother and that he has an exceptionally strong and close connection with Eva." (AOB, p. 77.)

> be an accepted casualty of the demise of the parties' marriage. The children's feelings of consistency and stability are served by allowing [Respondent] to have a relationship with Ditlev and for Ditlev to have a relationship with [Respondent] and feel welcome in [Respondent]'s home.

(2 A.A., p. 284:20-23, fn. 51.)

The trial court found that Appellant failed to recognize her role in the cessation of contact between Ditlev and Respondent after separation:

> [Appellant's] inability or unwillingness to encourage and foster Ditlev's relationship with [Respondent] after the parties' separation also concerns the Court. Ditlev was an active part of the [the parties'] San Francisco household for over four years. As discussed in Dr. Fridhandler's report, [Appellant]'s 'biased view of Father's relationship with Ditlev is also demonstrated in her failure to acknowledge fully her role the cessation [sic] of contact between them.'

(2 A.A., pp. 282:17 - 283:2, fns. omitted.)

Despite Appellant's argument on appeal about the importance of Ditlev's relationship with the parties' children, Appellant placed her desire to end Ditlev's relationship with Respondent ahead of the needs of the parties' children and Ditlev to maintain their relationship with each other. (2 A.A., p. 284:20-23, fn. 51.) The trial court's findings are supported by the opinion of the child custody evaluator, who stated:

- "The parties' *au pair's* confident recollection was that [Respondent] was a caring, warm, and attentive stepfather to

Ditlev. This is what would be anticipated based on [Respondent's] general personality, the way he spoke of Ditlev and their relationship in interviews for the present evaluation, and the warmth in his observed behavior with his daughters." (Conf. A.A., p. 68.)

- "[Appellant's] criticisms of [Respondent's] actions toward Ditlev don't stand up well. … In her description of [Respondent's] perceived mishandling of his relationship with Ditlev, she said, 'You have to build a relationship,' but when [Respondent] did things to try to rebuild the relationship, albeit some of them clumsy, [Appellant] rejected them." (Conf. A.A., pp. 68-69.)

- "[Appellant's] biased view of [Respondent's] relationship with Ditlev is also demonstrated in her failure to acknowledge fully her role in the cessation of contact between them. She described the cessation of Ditlev's visitation at [Respondent's] home as something that just 'happened' when in fact it appears to have resulted from her own wish (and Ditlev's father's preference) that the visitation stop. …." (Confid. A.A., p. 69.)

- "In short, [Appellant's] gatekeeping of Ditlev's relationship with [Respondent] appears to have been influenced by her anger at [Respondent], her wish to assert control in this area, and perhaps a wish for Ditlev's company, independent of what would have been best for him and for his half-sisters, who were no longer with him during their visitation with [Respondent]. (Again, the lack of dedicated

space for Ditlev in Father's home was another obstacle to his visitation.) …." (Confid. A.A., p. 69.)

Appellant admits in her opening brief that "Ditlev and the girls enjoy a very close relationship." (AOB, p. 15; see also, 2 A.A., p. 283:21-23, fn. 45 [same finding].) This was possible for them to maintain even though Ditlev had lived in Denmark for a year before trial while the parties' children remained in San Francisco. And it remains possible for them to maintain that relationship going forward.

The claims by Appellant about Ditlev are a new theory on appeal. There was no objection to the tentative decision about the alleged separation of the children from Ditlev that would occur because of the denial of the relocation request. (See, 2 A.A., pp. 233-250 [objections to tentative decision].)[6]

The cases cited in the opening brief all concern children separated by court order. (See, AOB, pp. 77-80.) None involved children already separated by their parents before trial. (See, *In re Marriage of Williams* (2001) 88 Cal.App.4th 808, 809-810 ("*Williams*") [trial court allowed two children to move with their mother to Utah, while the other two children remained with their father in Santa Barbara]; *In re Marriage of Heath* (2004) 122 Cal.App.4th 444, 447-448 ("*Heath*") [the trial court ordered each

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[6] Appellant's objection to the tentative decision regarding Ditlev was that it "omits evidence regarding the *quality* of the children's relationship with Ditlev…." (2 A.A., 242:18-20, emphasis.) That objection is unrelated to her claim of stepsibling separation.

parent would have custody of one child]; *In re Valerie A.* (2006) 139 Cal.App.4th 1519 [state's placement of children following removal from their homes]; *Fresno County Dept. of Children & Fam. Servs. v. Superior Court (Lily G.)* (2004) 122 Cal.App.4th 626 [same]; *In re Marriage of Steiner & Hosseini* (2004) 117 Cal.App.4th 519, 529 [affirming separation of siblings to protect against alienation].)

There is a different rule for stepchildren. In *J.M. v. G.H.* (2014) 228 Cal.App.4th 925 ("*J.M.*"), the appellate court declined to extend the rule requiring compelling circumstances to separate children to stepsiblings. "No case has extended the reasoning in *Williams* and *Heath* to stepsiblings." (*J.M., supra,* 228 Cal.App.4th at p. 938.) "Equating the relationship of a stepsibling with whom a child has spent half of his time since the age of five with that between a child and his biological sibling would be inappropriate, and requiring compelling circumstances to separate stepsiblings would affect all cases in which the subject of a custody dispute has a blended family." (*J.M., supra,* 228 Cal.App.4th at p. 939.)

The common thread in the cases cited by Appellant is that the children were living together when they were separated by court order. Appellant, herself, separated Ditlev from the parties' children over a year before trial. The trial court considered the parties' relationship with Ditlev and the fact Ditlev was living in Denmark. The law did not require the trial court to reunite Ditlev with the parties' children. Appellant cannot complain on appeal about the harm caused by her own conduct in separating

Ditlev from the children. (See, Civ. Code, §§ 3515 ["He who consents to an act is not wronged by it"] & 3517 ["No one can take advantage of his own wrong"].)

2. Appellant incorrectly states the trial court made no finding about the children's needs for stability.

In considering the children's need for stability under *LaMusga*, Appellant claims the statement of decision is "silent on [the children's] for stability and continuity in their custodial relationship." (AOB, p. 47; see also, p. 53 [same].) Appellant then builds her abuse of discretion argument on the premise that the trial court failed to consider the children's need for stability and continuity, a required *LaMusga* factor. (AOB, p. 55, citing *LaMusga, supra*, 32 Cal.4th at p. 1093.)

Appellant is incorrect. There is a heading in the statement of decision entitled: "The Children's Interest in Stability and Continuity of the Custodial Relationship." (2 A.A., p. 279:1-2.) The trial court noted "the importance of 'stability and continuity in the life of a child, and the harm that may result from disruption of established patterns of care and emotional bond[s]' " (2 A.A., p. 279:6–8, quoting *Burchard v. Garay* (1986) 42 Cal.3d 531, 541.) The trial court made detailed findings about the custodial arrangement and the children's ties to their school and community:

> San Francisco has been home to the children for the past eight years. Following separation, [Respondent]'s custodial timeshare gradually increased…. Currently, the parties 8/6 timeshare

> provides [Appellant] with a 57% timeshare and [Respondent] with a 43% timeshare. Given the importance of 'stability and continuity in the life of a child, and the harm that may result from disruption of established patterns of care and emotional bond[s],' the children's ability to continue to live in their current community and attend [their current school] are factors that weigh heavily in favor of the children remaining in San Francisco. [Citation.] Ella in particular has a need for the stability and continuity associated with [her current school] because of her earlier struggles developing strong socialization skills with her peers…. The children's ongoing stability is a primarily concern to the Court considering their developmental ages and closeness to each parent. The Court finds based upon the evidence that removing Ella and Erna from San Francisco and the structure and stability they have developed in the school and social community, would be detrimental to their current emotional stability and well-being.

(2 A.A., p. 279:2-20, fns. omitted.)

3. Appellant claims she was the primary caretaker of the children at time of trial, but the parties shared custodial time nearly equally after separation.

Appellant repeatedly calls herself the primary caretaker of the children in the opening brief. (AOB, pp. 12, 16, 46, 55-57 & 64-65.) Appellant proclaims: "It is correct that [Respondent] took on substantial custodial time after separation, but still [Appellant] remained the primary custodial parent." (AOB, p. 65; see also, pp. 55-56 [same].)

Based on her claimed status as the primary parent, Appellant argues that she should have been allowed to relocate the children to Denmark because one of the *LaMusga* factors is the consideration of " 'the harm that may result from disruption of established patterns of care and emotional bonds with the primary caretaker [which] weigh heavily in favor of maintaining on-going custody arrangements.' " (AOB, p. 55, quoting *LaMusga, supra*, 32 Cal.4th at p. 1093.)

But Appellant's statement that she was the primary caretaker after separation contradicts the finding that the parties agreed to a nearly-equal (57% - 43%) parenting schedule pending trial. (2 A.A., p. 279:2-20.) While true Appellant had over fifty percent of the parenting time at time of trial, the seven percent difference was not significant. The trial court found: "Historically, [Appellant] has been the primary caretaker for the children. *The status quo changed* once the parties separated and the children began living in two separate and complete, households." (2 A.A., at p. 280:12-17, emphasis added.)

During the child custody evaluation, Appellant also minimized Respondent's role in their children's lives. The evaluator stated:

> [Appellant] tended to minimize [Respondent's] past involvement. She has little sense of his special value to them. (Some of that may be that she hasn't seen him being primary parent very much.) She doesn't always distinguish between the girls' feelings and her own and therefore doesn't see very clearly the

cost to them, in terms of relationship with Father, of moving to Denmark.

(Confid. A.A., p. 78.)

4. The wishes of the children were considered despite Appellant's claim the trial court was silent on this issue.

Appellant claims: "No findings on the children's desire to move to Denmark…" were made in the tentative statement of decision, and over her objection on that point, the trial court issued its final decision "with few substantive changes." (AOB, pp. 45-46.) The opening brief implies the trial court failed to include any findings about the children's preferences by failing to mention whether the trial court addressed her objections in issuing its final decision. (See, AOB, pp. 46-47.)

Appellant is incorrect. Under the heading "Children's Ages/Children's Wishes" (AOB, p. 280:11), the trial court found:

- "Ella (age 10) and Erna (age 9) are advanced enough in their development and bonds with their parents that the children's ages, in and of themselves, do not tilt the balance in the direction of [either party]. (2 A.A., p. 280:12-15.)

- Ella and Erna expressed a desire to relocate to Denmark with Appellant. (2 A.A., at p. 280:23-25, fn. 40.) "Ella and Erna's preferences were carefully considered by the Court. While the children's wishes are a significant factor in favor of the move to Denmark, the children's preference to move with [Appellant] to Denmark is not dispositive and the Court must consider all of the other factors as well." (2 A.A., pp. 280:23-25

& 281:22-23, citing *LaMus*ga, *supra,* 32 Cal.4th at p. 1101 [children's preferences should be considered if the children are mature enough for such an inquiry to be appropriate].)

- "Eva (age 4) is more likely to be affected by the loss of daily contact with [Appellant]. While in [Respondent]'s house, Eva relies more on her sisters than she does when she is in [Appellant]'s house. This factor weighs slightly in favor of the relocation to Denmark." (2 A.A., p. 280:17-19.)

5. Appellant claims it is easier for Respondent to travel internationally, but the court found each party can travel regularly for visitation.

Appellant argues that "only [Respondent] can overcome the distance between San Francisco and Denmark easily. He can be in Denmark seven days a month, and he travels frequently to Europe. [Citations.]" (AOB, p. 65.) Appellant also argues, separately, that her deafness is a barrier to communication over distance (AOB, pp. 65-66), but her prior comment is focused on distance and ease of travel.

The trial court found: "There is no evidence to indicate that either party is unable to travel on a regular basis to facilitate the parenting timeshare." (2 A.A., p. 285:14-16, fn. omitted.) Appellant did not acknowledge that adverse finding.

(B) Substantial evidence supports the challenged findings in the statement of decision.

The opening brief identifies three findings challenged by Appellant as lacking substantial evidence. Appellant also, generally, claims "the decision denying her request for her children to move to Denmark with her is not supported by the evidence…." (AOB, p. 64; see also, pp. 67 & 80 [same].) Review should be limited to the three findings specified by Appellant. (See, *Niko v. Foreman* (2006) 144 Cal.App.4th 344, 368 ["One cannot simply say the court erred, and leave it up to the appellate court to figure out why"].)

The findings challenged by Appellant are supported by substantial evidence as discussed below.

1. Appellant has difficulty separating the children's needs from her own.

Appellant criticizes the trial court for commenting on the testimony of the child custody evaluator about her trouble distinguishing the children's needs from her feelings. (AOB, pp. 44, 66-67.) Appellant argues, instead, that the evidence showed she was "much better able than [Respondent] to address the children's emotional needs." (AOB, p. 44.)

The trial court stated: "The Evaluation Report suggests that [Respondent] has a greater capacity than [Appellant] to place the children's needs above his own and ensure that they are protected and their emotional needs are met." (2 A.A., p. 282:16 - 283:2.) The trial court was merely referring to what the child custody evaluator observed in his report:

- "[Appellant] may blur the distinction between others' needs and her own, that is, she may believe that what is in her interest is automatically in others' interest as well." (Conf. A.A., p. 17; see also, p. 74 [same].) "[Appellant's] thinking shifts frequently between [the children's] needs and her own feelings. Although she clearly cares about their needs, this difficulty somewhat undermines her ability to meet them." (Conf. A.A., p. 73.)

- "[Appellant] doesn't always distinguish between the girls' feelings and her own and therefore doesn't see very clearly the cost to them, in terms of [their] relationship with [Respondent], of moving to Denmark." (Conf. A.A., p. 78.) "[Appellant's] greater difficulty in separating the children's needs from her own feelings also weighs in favor of the children remaining in San Francisco." (Conf. A.A., p. 73.)

In commenting on Appellant's difficulty in separating the children's needs from her own, the trial court also stated that Appellant failed to act as "a collaborative co-parent … in purchasing a home in Copenhagen without informing [Respondent] beforehand and selecting schools for the children in Denmark … [and by her] inability or unwillingness to encourage and foster Ditlev's relationship with [Respondent] after the parties' separation…." (2 A.A., p. 282:16 - 283:2, fns. omitted.)

2. Appellant and the children can effectively communicate with each other.

Appellant claims: "The finding that [Appellant] is able to communicate effectively with her children is not supported by the evidence." (AOB, p. 72.)

The evaluator stated in his report that "[Appellant's] deafness is not a significant impediment to her parenting. She is very capable at reading lips (in Danish) and, when observed, monitored and responded to all three children's activity and needs simultaneously, without noticeable fatigue. … She has successfully communicated with hearing English-speakers involved in caring for the children, such as teachers, using email, text, and some face-to-face speech." (Conf. A.A., p. 75.)

In assessing the evidence, the trial court found:

- "[Appellant is] able to effectively communicate with and parent her children. In fact, the majority of [Appellant]'s parenting has taken place in San Francisco, and whatever obstacles she has encountered, she has overcome…." (2 A.A., p. 285:1-8.)

- Although Appellant is deaf, she "has residual hearing which allows her to function at a very high level in terms of her ability to communicate." (2 A.A., p. 274:7-8, fn. omitted; see also, 5 R.T., pp. 647:16 - 648:17 [Appellant testifies "I do have some residual hearing, which helps me be more able to speak in Danish. And I'm able to use the phone with some people if I know them very well. And with the residual hearing that I have, I'm also able to hear some sounds"]..)

- "There is no evidence that [Appellant] has not been able to emotionally bond with her children as a result of her hearing impairment or significant use of DSL." (2 A.A., p. 285:1-8.)

- Respondent does not know DSL, but the parties effectively communicated primarily through spoken Danish. (2 A.A., p. 274:13-16; see also, 7 R.T., pp. 916:25-917:5 [Respondent's testimony to the same].)

- Appellant "made only minimal efforts to teach [the children] DSL prior to her decision to relocate" even though DSL "is critical to [Appellant]'s ability to feel connected to the community around her." (2 A.A., p. 284:23-24, fn. 52.)

In addition to her claim that she could not communicate effectively with the children at time of trial, Appellant argues that the language obstacles in San Francisco are insurmountable, so the children must live with her in Denmark to learn DSL and become fluent in spoken Danish, or they will lose their ability to communicate with her. (AOB, pp. 37, 56-57 & 71-72.) The opening brief states:

> Dr. Fridhandler … said that speaking Danish—if not DSL—'*may determine* whether the children maintain or lose their relationship with their mother, as well as numerous other relatives.' [Conf. A.A. 81.] … [¶] Dr. Fridhandler emphasized that the children's ability to communicate with [Appellant] would be *in serious doubt* if they stayed in San Francisco. [Conf. A.A. 76.]

(AOB, p. 37, emphasis added.)

The evaluator, however, stated that "Ella and Erna would be likely to retain their ability to speak Danish and Eva would be likely to develop that ability" in San Francisco, with sufficient effort and support from Respondent. (Conf. A.A., p. 76.) The evaluator proposed that, if the children remain in San Francisco, "[i]ntervention will be required to maintain Ella's and Erna's spoken Danish and to allow Eva to continue to acquire it." (Conf. A.A., p. 81.) The evaluator suggested "a Danish-speaking nanny whose duties include speaking Danish consistently with the children and encouraging them to speak Danish in return. A Danish-speaking nanny … could provide sufficient exposure to spoken Danish." (*Ibid.*)

The opening brief quotes only part of the next sentence of the evaluator's report, which states: "In short, *the presence or absence of a Danish-speaking nanny may determine* whether the children maintain or lose their relationship with their mother, as well as numerous other relatives." (Conf. A.A., p. 81, emphasis added.) Appellant changed the object of that sentence in her opening brief by claiming the key to maintaining communication was "speaking Danish" (AOB, p. 37), rather than having a nanny. The trial court made an order for such a nanny. (2 A.A., p. 347, ¶¶ 14-15.) It went beyond the evaluator's recommendations by ordering Respondent to have Danish-only days and tutoring in DSL while the children are in his care. (2 A.A., p. 347, ¶¶ 15-16.)

The evaluator thought "there is little possibility that [the children] will learn DSL" if they remain in San Francisco. (Conf. A.A., p. 76.) But the opinion of the child custody evaluator was

not binding on the trial court. (See, *Bloxham v. Saldinger* (2014) 228 Cal.App.4th 729, 738 [weight and credence of expert testimony is a question for the trier of fact].) The trial court could make reasonable inferences from the evidence in support of the judgment, even if the evaluator's testimony on that point was undisputed. (See, *Schwan v. Permann, supra*, 28 Cal.App.5th at pp. 693–694.)

Nor was the trial court required to grant the relocation request based on whether the children can learn Danish or DSL better in Denmark than in San Francisco. Their ability to learn or maintain those skills was one of many factors the trial court had to consider.

3. Exposure to CODAs could occur in San Francisco.

The opening brief states: "The court found that exposure to children of deaf adults ('CODAs') could occur in San Francisco. [Citation.] [Appellant] objected to this finding as being unsupported by the evidence. There was no evidence regarding a CODA community in San Francisco." (AOB, p. 44.)

In her testimony, Appellant listed organizations providing opportunities to experience deaf culture in the San Francisco Bay area, such as the School for the Deaf (6 R.T., pp. 815-817), DeafHope (*id.*, at p. 819), and DACRA [Deaf Counseling Advocacy and Referral Agency] (*id.*, at p. 826). She also described several deaf culture events she had participated, including four Deaf Night Out events and a museum cultural event (*id.*, at pp. 828-829), and at least one church event for the deaf (*id.*, at pp. 829-

830). It was reasonable for the trial court to infer that the parties' children could associate with CODAs in those settings. In any event, the trial court commented that spending time with CODAs was not necessary for the children to understand Appellant or remain bonded to her. (2 A.A., pp. 281:19 - 282:2.)

(C) The trial court did not abuse its discretion in ruling on the relocation request.

Trial courts are empowered with wide discretion when ruling on a move-away request. As the Court observed in *LaMusga, supra*, 32 Cal.4th at p. 1101:

> [Cases on relocation], many of which involve heart-wrenching circumstances, remind us that this area of law is not amenable to inflexible rules. Rather, we must permit our superior court judges … to exercise their discretion to fashion orders that best serve the interests of the children in the cases before them. 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: [1] the children's interest in stability and continuity in the custodial arrangement; [2] the distance of the move; [3] the age of the children; [4] the children's relationship with both parents; [5] 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; [6] the wishes of the children if they are mature enough for such an inquiry to be appropriate; [7] the

> reasons for the proposed move; and [8] the extent to which the parents currently are sharing custody.

(*LaMusga, supra,* 32 Cal.4th at p. 1101.)

1. The court considered the *LaMusga* factors.

The trial court recited the *LaMusga* factors in reaching its decision (2 A.A., p. 277:4-19), and the record shows it considered those factors based on the evidence presented (*id.*, at pp. 278-286). The trial court noted this matter involved "a fairly complex application of the *LaMusga* factors." (2 A.A., p. 278:18-21, fn. omitted.) Nothing suggests the trial court acted arbitrarily or capriciously in weighing the evidence and considering the *LaMusga* factors.

2. The court used the correct legal standard.

The parties shared joint physical custody[7] of their children at time of trial, so neither one of them had a presumptive right to relocate the children. (See, *LaMusga, supra,* 32 Cal.4th at p. 1089, fn. 3, citing to *In re Marriage of Burgess* (1996) 13 Cal.4th

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[7] The test for joint physical custody is whether the parents genuinely share significant periods of parenting time with the children, regardless of labels used to describe that time. (*Marriage of Whealon* (1997) 53 Cal.App.4th 132, 137; *Andrew V. v. Super.Ct. (Jessica V.)* (2015) 234 Cal.App.4th 103, 107–108.) Joint physical custody exists in cases where children are "shuttled back and forth" between the parents, or who see a parent four or five times a week. (*Marriage of Lasich* (2002) 99 Cal.App.4th 702, 715, disapproved on other grounds in *LaMusga, supra,* 32 Cal.App.4th at 1097.) Here, the parties shared parenting time on a 57% - 43% basis at time of trial (2 A.A., at p. 279:3-4), which is joint physical custody.

25, 40, fn. 12; *cf.*, Fam. Code, § 7501, subd. (a) [sole custodial parent has right of relocation unless a residence change would prejudice the welfare of the children].)

There was no requirement for either party to show a material change in circumstances to modify that parenting plan—either to justify why the children should remain in San Francisco or relocate to Denmark—because there was no final custody order in effect. (See, 2 A.A., pp. 276:6-24.) The trial court's job was to decide what new arrangement for primary custody would be in the best interest of the minor children based on the *LaMusga* factors. (See, *F.T. v. L.J.* (2011) 194 Cal.App.4th 1, 19-20; Fam. Code, § 3040, subd. (b).)[8]

In making its best interests determination, the trial court had to assume, as a conclusive fact, that Appellant was moving to Denmark—with or without the children—and that Respondent was staying behind in San Francisco. (See, *Mark T. v. Jamie Z.* (2011) 194 Cal.App.4th 1115, 1124 & 1131; *Niko v. Foreman, supra,* 144 Cal.App.4th at p. 365.) Here, the trial court made that assumption, without placing blame on Appellant for wanting to move or making her justify the reasons for her relocation. The trial court stated:

> Neither parent has to justify his or her choice of residence, nor does [Appellant] have to prove that the move is necessary. This Court is not expected to

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[8] Trial counsel for both parties conceded the trial court had "wide discretion to choose a parenting plan that is in the best interest of the children." (2 A.A., p. 276:16-18, fn. omitted.)

> second-guess [Appellant]'s reasons for wanting to move to Denmark or evaluate [Respondent]'s reasons for wanting to stay in San Francisco.

(2 A.A., pp. 278:7-8 & 278:23-24, fn. 34.)

Having assumed that Appellant will live in Denmark and that Respondent will live in San Francisco, the trial court fashioned a custody order according to its assessment of the children's best interests.

3. The court considered which environment and which custodial parent could maintain the children's connection with the non-custodial parent.

Appellant argues that the denial of the relocation was in error because, "[i]f the children remain in San Francisco, both [Appellant] and the children will be deprived of *her* full participation in all aspects of their lives" because of the language barriers that Appellant claims exist in San Francisco. (AOB, p. 73, emphasis added.)

The trial court understood the impact of Appellant's disability on communication, which was one of many factors the trial court had to consider in assessing whether the relocation was in the children's best interests. It was an important factor, but not dispositive as Appellant claims.

The ability of each party to fully participate in the children's lives, as their parents, was also an important consideration. What Appellant fails to recognize is that, had the relocation to Denmark been granted, it would have likewise affected *Respondent's* participation in the children's lives. One

parent was bound to have less time with the children because of Appellant's decision to move to Denmark (either Respondent as the "left-behind" parent had the relocation been granted, or Appellant in her new residence if the relocation were denied). The weight to be given to the impact of the proposed relocation on each parent's relationship with the children was for the trial court to determine. As the Court explained in *LaMusga*, it is proper to consider the effect on the left-behind parent:

> [T]he superior court did not place 'undue emphasis' on the detriment to the children's relationship with their father that would be caused by the proposed move. The weight to be accorded to such factors must be left to the court's sound discretion. The Court of Appeal erred in substituting its judgment for that of the superior court.

(*LaMusga, supra,* 32 Cal.4th at p. 1093.)

It was impossible for the parties to continue sharing joint physical custody because the parties would be living in separate countries. A natural consequence of Appellant's international relocation request was the requirement for the trial court to choose which parent will have primary physical custody after the move. The policy of maintaining frequent and continuing contact with each parent (Fam. Code § 3020, subd. (b)) is no longer achievable when parents live in different countries, so courts must "navigate the delta between the ideal and the reality[,] and consider what is in the child's best interests under the circumstances presented." (See, *Jacob A. v. C.H.* (2011) 196 Cal.App.4th 1591, 1601.)

Here, the trial court explained:

> As complicated as move away motions generally are, a move away request is never simply about a child's safety and well-being. It is also about which environment, and to a certain extent which parent, is going to allow a child to maintain and enhance the connection the child has with the noncustodial parent.

(2 A.A., p. 278:13-17.)

Appellant's claim that the distance between Denmark and San Francisco presented insurmountable challenges to her ability to communicate with the children was rejected:

> The Court does not consider the distance to be a major factor in its analysis given the parties' commitment to their children and the financial resources the parties have at their disposal. The Court specifically rejects the proposition that if the children remain in San Francisco, they will lose the frequent and regular contact they have with [Appellant]; or if they move to Denmark, they will lose the frequent and regular contact they have with [Respondent]. The Court finds that the distance of the move, while inconvenient and burdensome for the travelling party, is not insurmountable.

(2 A.A., p. 280:2-10.)

4. The trial court did not abuse its discretion in considering Appellant's deafness.

Appellant states: "*Under the guise of neutrality*, [her] deafness and its profound impact on her communication with her children is being ignored." (AOB, p. 13, emphasis added.) Appellant contends the trial court abused its discretion "by

weighing [Appellant]'s deafness as a neutral factor" (AOB, p. 68), and not giving special weight to her condition in making its best interests assessment (AOB, p. 69 & 71). She claims the denial of her relocation request "violates public policy of encouraging full participation by the disabled in parenting." (AOB, p. 73.) [9]

To support her assertions, Appellant relies on *In re Marriage of Carney* (1979) 24 Cal.3d 725 ("*Carney*"). (AOB, p. 74.) That case, instead, demonstrates that the trial court exercised its discretion along legal lines by viewing Appellant's disability neutrally.

In *Carney,* the mother of two children relinquished sole custody of two sons to the father, who moved to California with the boys while the mother stayed in New York. (*Carney*, *supra*, 24 Cal.3d at p. 729.) After the father was paralyzed by a car accident mother sought a change of custody that would allow her to bring the boys back to New York. Though the mother had not seen the boys in five years, and the father offered ample testimony he was an excellent and capable father (*Carney*, *supra*, 24 Cal.3d at p. 734), the trial court granted the relocation, reasoning "it would be detrimental to the boys to grow up until age 18 in the custody of their father. It wouldn't be a normal

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[9] At the trial level, Appellant objected to the tentative decision denying her relocation request as violating the federal Americans with Disabilities Act of 1990 (ADA), 42 USCA § 12101, et seq. (AOB, p. 43.) No ADA claim is raised in the opening brief.

relationship between father and boys." (*Carney*, *supra*, 24 Cal.3d at p. 734.)

The custody determination in *Carney* was reversed as an abuse of discretion. (*Carney*, *supra*, 24 Cal.3d at p. 740.) The trial court erred by relying on stereotypes of the disabled rather than the father's ability to parent:

> [The stereotype] fails to reach the heart of the parent-child relationship…. Rather, its essence lies in the ethical, emotional, and intellectual guidance the parent gives to the child throughout his formative years, and often beyond. The source of this guidance is the adult's own experience of life; its motive power is parental love and concern for the child's well-being; and its teachings deal with such fundamental matters as the child's feelings about himself, his relationships with others, his system of values, his standards of conduct, and his goals and priorities in life.

(*Carney*, *supra*, 24 Cal.3d at p. 739.)

The Court held in *Carney* that, while a parent's health or physical condition can be considered in making a best interests determination, "this factor is ordinarily of minor importance … and it is essential that the court weigh the matter with an informed and open mind." (*Carney*, *supra*, 24 Cal.3d at p. 736.) A parent's disability is not "[p]rima facie evidence of the person's unfitness as a parent or of probable detriment to the child…." (*Ibid.*) As neutral decision-makers, courts may not be biased against a parent based on his or her disability in awarding custody. (See, *In re Adoption of Richardson* (1967) 251

Cal.App.2d 222, 233-237 [adoption improperly denied because parents were deaf]; Code Judicial Ethics, Canon 3(B)(5) ["A judge shall perform judicial duties without bias or prejudice"].)

Here, the trial court's statement that it viewed Appellant's deafness as a neutral factor merely confirmed that the court did not presume Appellant's deafness made her any less capable of being a good parent. Appellant, though, claims the trial court was "insensitive by simply ignoring the impact of [her] deafness on her ability to communicate with her children. Ignoring [Appellant]'s disability has the same impact of defeating [Appellant]'s right to be integrated into the responsibilities and satisfactions of family life." (AOB, p. 71.)

Appellant's concerns were not ignored. Appellant's ability to communicate and any impact her deafness has had on the parent-child relationship were factors the trial court considered with care and respect in assessing whether the relocation was in the children's best interests. (See, e.g., 2 A.A., pp. 284-285.) The trial court made orders for the children to maintain their ability to communicate with Appellant with an informed and open mind. (See, 2 A.A., pp. 347-348.)

5. The trial court's measures for the children to gain fluency in Danish and DSL were not illusory efforts.

As to the detailed orders for the children to have a Danish-speaking nanny and speak Danish in Respondent's care (2 A.A., pp. 347-348), Appellant claims those were "*illusory attempts* to

ensure that the children do not lose their Danish-language skills in San Francisco." (AOB, p. 45, emphasis added.)

The insinuation by Appellant is that the trial court had no good faith belief in the effectiveness of its orders for Danish and DSL instruction, and pretended to be neutral about her disability as a pretext to mask its underlying bias against her condition. Nothing suggests the trial court had such motives. The statement of decision reflects a careful consideration of the evidence and a reasoned application of the law by a judicial officer who treated the parties respectfully. The measures ordered by the trial court were genuine efforts to address Appellant's concern. The fact the trial court did not agree with Appellant's request to relocate the children is not evidence of bad faith.

(D) <u>There is no showing of a miscarriage of justice.</u>

The opening brief does not explain how a miscarriage of justice has occurred. Appellant, instead, concludes that the alleged errors by the trial court were "harmful." (AOB, 53.) She alleges the only decision the trial court could have made, without abusing its discretion, was to grant the move-away request. (AOB, p. 81 [seeking reversal with instructions to grant the relocation request].)

It is Appellant's burden to articulate how the outcome would have been different had the alleged errors not been made. (See, *Century Sur. Co. v. Polisso* (2006) 139 Cal.App.4th 922, 963 ["Nor will this court act as counsel for appellant by furnishing a legal argument as to how the trial court's ruling was prejudicial"].) None of the *LaMusga* factors are dispositive and

move-away cases are "not amenable to inflexible rules." (*LaMusga, supra,* 32 Cal.4th at p. 1101.) Appellant fails to recognize that the trial court had wide discretion to grant or deny the relocation request. She makes no effort to explain how any error would have reasonably led to a different result.

VIII. CONCLUSION

The judgment should be affirmed because substantial evidence supports its findings, no abuse of discretion occurred, and there was no miscarriage of justice.

Dated: June 11, 2019 WALZER MELCHER LLP

By: /s/
Christopher C. Melcher
Attorneys for Respondent

CERTIFICATE OF WORD COUNT

I certify, under Rule 8.204(c)(1) of the California Rules of Court, the attached brief contains less than 14,000 words according to the program used to create this document, excluding tables, certificates and the cover page.

Dated: June 11, 2019 WALZER MELCHER LLP

By: /s/
Christopher C. Melcher
Attorneys for Respondent

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