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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Plumas)

ANGELA PADGETT-GODDEN,

Plaintiff and Appellant,

v.

DAMON GODDEN et al.,

Defendants and Respondents.

C068076

(Super. Ct. No. FL08-28535)

On the record of a settled statement (Cal. Rules of Court, rule 8.137) Angela Padgett-Godden (mother) appeals from a child custody order granting her and Damon Godden (father) joint legal custody of their two children, Olivia and Zephyr, with primary physical custody of Olivia to mother and primary physical custody of Zephyr to father. On appeal, mother contends the trial court abused its discretion in finding sufficient evidence of compelling circumstances to separate the siblings' households. We disagree and shall affirm the order.

FACTUAL AND PROCEDURAL BACKGROUND

The parties have two children: son Zephyr (born February 2003) and daughter Olivia (born May 1996). In October 2008, mother sought a marital dissolution from father. From this point until the present matter, mother had physical custody of Olivia and Zephyr.

Following a December 2010 dissolution trial at which mother did not appear, an evidentiary custody and visitation hearing was held in February 2011. At the evidentiary hearing, father, mother, and Richard Tiran (mother's neighbor) testified. Separate counsel for father, mother, and the children (together), presented argument. A summary of this testimony and these arguments constitutes the settled statement, which comprises the record on appeal here. (Cal. Rules of Court, rule 8.137.)

Father testified that mother's constant moves with the children—totaling seven times in just two-and-a-half years (from fall 2008 to January 2011) and covering different counties—created an unstable environment for the children. Mother moved without notifying father or the court. Father believes the children need a stable and consistent home, especially since Zephyr was struggling in school and had been dropped from the home school program. A subsequent school in which Zephyr was enrolled (in the first grade) reported that he was having behavioral problems, until father volunteered there regularly (which was compatible with father's work schedule). Father testified that Olivia and Zephyr fight constantly, Olivia is

very bossy and hard on Zephyr, and Olivia does not allow father to parent Zephyr.

Mother testified that even with the moves, Olivia is excelling in school. However, mother acknowledged that Zephyr is struggling in that realm. In mother's opinion, Olivia and Zephyr "have a positive, healthy, and close sibling relationship with little conflict." Mother also stated that Olivia and father have a strained relationship.

Tiran, mother's neighbor, testified on her behalf. In Tiran's opinion, Olivia and Zephyr appeared to be well-adjusted kids who were close with one another.

In argument, minors' counsel presented what amounted to an offer of proof regarding the following facts. Minors' counsel stated that Zephyr stressed how much he enjoyed spending alone time with father, especially since it freed him from the constant fighting with Olivia. Zephyr also stated that he wanted to live with father and strongly preferred not to live with Olivia because he dislikes the constant fighting.

There is a seven-year age difference between the children, with Olivia in high school and Zephyr in second grade (as of January 2011).

In addition, the settled statement notes that Olivia has expressed a preference to live with mother.

After this evidentiary hearing, the trial court ordered mother and father to retain joint legal custody, with primary

physical custody of Olivia to mother and primary physical custody of Zephyr to father. Moreover, the trial court adopted a visitation schedule to provide the children with a substantial amount of time together and with each parent.¹ The trial court decided to separate the siblings because it concluded there was a conflict that existed between the children, the difference in age between the siblings would not negatively impact the siblings in the same manner as siblings of closer ages, and the frequent moves of mother provided an unstable environment, particularly for Zephyr. In regards to Olivia, the court noted she was at an age where her preference to live with mother should be given strong consideration.

DISCUSSION

On appeal, mother contends the trial court abused its discretion in finding sufficient evidence of compelling circumstances to separate the siblings' households, under the standards set forth in *In re Marriage of Williams* (2001) 88 Cal.App.4th 808 (*Williams*) and *In re Marriage of Heath* (2004) 122 Cal.App.4th 444 (*Heath*). We disagree.

¹ The visitation schedule is as follows: On the first weekend of each month, Olivia shall visit with father and Zephyr; on the second weekend of each month, and the fifth when there is one, Olivia shall visit with father, and Zephyr shall visit with mother; on the third weekend of each month, Zephyr shall visit with mother and Olivia; on the fourth weekend of each month, Olivia will remain with mother, and Zephyr with father; holidays and summer breaks are to be shared.

In reviewing this custody decision, as mother notes, we employ the deferential abuse of discretion standard. (*Williams, supra*, 88 Cal.App.4th at p. 812.) Under *Williams* and *Heath*, a trial court may separate siblings' households "only when compelling circumstances dictate that such separation is in the children's best interest." (*Williams*, at p. 809.)

Before we address mother's contention, we must examine *Williams* and *Heath*.

In *Williams*, the family law court divided four minor siblings, awarding physical custody of two of the children to the mother, and the other two to the father. (*Williams, supra*, 88 Cal.App.4th at pp. 809-810, 813.) The family law court separated the siblings because the mother had remarried and was moving to Utah. (*Ibid.*) On appeal, the court described the order as an "arrangement so unusual and onerous to all concerned that it cannot be considered a routine exercise of judicial discretion." (*Id.* at p. 813.) The court reasoned, "At a minimum, the children have a right to the society and companionship of their siblings. . . . We can envision a case in which an extraordinary emotional, medical or educational need, or some other compelling circumstance, would allow the separation of siblings" (*id.* at p. 814.), but because there was no such evidence nor evidence concerning the extent to which the siblings were bonded, the appellate court reversed.

In *Heath*, the family law court separated two brothers-born two years apart, the oldest of whom had autism. (*Heath, supra*,

122 Cal.App.4th at p. 447.) After hearing testimony that the younger brother was displaying autistic-like behavior, the family law court theorized, largely on its own, that the younger brother was mimicking the older brother. (*Id.* at pp. 447-448, 450.) Based on this conclusion, the family law court believed it was in the best interest of the children to be separated. (*Heath*, at p. 448.) The appellate court, relying on *Williams*, concluded that the family law court had failed to recognize "the interest of the children in having a meaningful opportunity to share each other's lives, or the potential detriment of their separation." (*Id.* at p. 450.) There was no proof of compelling circumstances, and no evidence regarding the relationship between the children. (*Ibid.*) For these reasons, and because a court cannot presume detriment from a disability, the court reversed. (*Id.* at pp. 450-452.)

Here, the trial court considered the interests of the two children in having a meaningful opportunity to share each other's lives, and the potential detriment of their separation. Unlike *Williams* and *Heath*, the record here was not silent as to the relationship between the children. (*Williams*, *supra*, 88 Cal.App.4th at p. 813; *Heath*, *supra*, 122 Cal.App.4th at p. 450.) On the contrary, much of the attorneys' argument and the testimony by father, mother, and Tiran focused on the relationship between Olivia and Zephyr. Father presented evidence that the children were constantly at odds with one another, and that, rather than having a sibling relationship,

the relationship was more like one of mother and child. Furthermore, minors' counsel, speaking on behalf of the children, stated, "Zephyr strongly prefers not to live with his sister Olivia due to his dislike of their constant fighting." And the settled statement noted that Olivia had expressed her preference to continue living with her mother. This is evidence, or what amounts to an offer of proof of evidence, conveying the relationship between the siblings—evidence that distinguishes the instant case from *Williams* and *Heath*—where there was no evidence of the sibling relationship. (See *Williams, supra*, 88 Cal.App.4th at p. 813; see also *Heath, supra*, 122 Cal.App.4th at p. 450.)

Additionally, unlike *Williams* and *Heath*, the trial court had sufficient evidence of compelling circumstances to evaluate and for this court to review. (*Williams, supra*, 88 Cal.App.4th at p. 814; *Heath, supra*, 122 Cal.App.4th at p. 450.) Based on the evidence of compelling circumstances presented at the evidentiary hearing, the court concluded that it was in the children's best interest to be separated. The circumstances the trial court deemed compelling were the large age difference between the siblings, the extensive conflict between them, the detrimental social and educational environment created by mother's frequent moves (particularly for Zephyr), and the

living preferences of the children.² As *Williams* and *Heath* recognize, the separation of siblings may be warranted upon a showing of "extraordinary emotional, medical or educational need, or some other compelling circumstance." (*Williams, supra*, 88 Cal.App.4th at p. 814; *Heath, supra*, 122 Cal.App.4th at p. 449.)

Mother argues the trial court's determination is based merely on speculation like *Heath*. (*Heath, supra*, 122 Cal.App.4th at pp. 448, 450-451.) We disagree. Unlike *Heath*, the trial court here made its determination based on the evidence presented at the evidentiary hearing. (See *ibid.*) There was testimony regarding the age difference of the children, the effects the age difference had, the relationship between the children, the preferences of each child, and the unstable environment created by mother's frequent moves and testimony from both parents that Zephyr was struggling in school given those frequent moves. This is distinguishable from *Heath*, where the family law court relied on a "simple assumption" about a "complex" process, speculating the non-autistic younger brother was mimicking his autistic older brother. (*Heath, supra*, 122 Cal.App.4th at p. 451.) Here, the trial court did not make simple assumptions; rather the court made a decision that was supported by the evidence.

² Considerable weight was given to Olivia's preference to reside with mother, because of her age and strained relationship with her father.

We recognize that “[c]hildren are not community property to be divided equally for the benefit of their parents”; however, we also recognize that compelling circumstances may warrant their separation. (*Williams, supra*, 88 Cal.App.4th at p. 814; *Heath, supra*, 122 Cal.App.4th at p. 449.) The trial court was faced with a difficult dilemma and ultimately decided that based on the substantial age difference between the siblings and the extensive conflict between them (with Olivia acting in a parental role), the detrimental environment that was created by mother’s frequent moves, and the children’s living preferences, there were compelling circumstances to separate the primary physical custody of the two siblings. We conclude the trial court did not abuse its discretion in making this determination.

DISPOSITION

The child custody order is affirmed. Each party shall bear its own costs on appeal. (Cal. Rules of Court, rule 8.278(a)(1), (5).)

BUTZ, J.

We concur:

RAYE, P. J.

MURRAY, J.