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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Placer)

In re H.V. et al., Persons Coming Under
the Juvenile Court Law.

PLACER COUNTY DEPARTMENT OF HEALTH AND
HUMAN SERVICES,

Plaintiff and Respondent,

v.

E.V.,

Defendant and Appellant.

C068799

(Super. Ct. Nos.
53-003042, 53-003043)

E.V., the father of seven-year-old H.V. and 11-year-old N.V., appeals from orders of the Placer County Juvenile Court terminating dependency status and awarding sole legal and physical custody to C.V., their mother.

On appeal, father contends the award of sole legal custody to mother must be reversed because it was based, not on the best interest of the children, but on the speculative possibility that shared legal custody would result in continuous litigation in family court. We affirm the order.

FACTUAL AND PROCEDURAL BACKGROUND

Originating Circumstances

Mother and father are married but separated. On May 19, 2010, father arrived at the garage of mother's residence, punched her in the back of the head, knocked her down, evidently apologized, but then opened his fly and urinated on her. When mother got up, father approached her, put his hands around her neck, moved his hands to her mouth so that she could not breathe, and forced her back onto the floor. Father tied up mother with duct tape and taped her mouth closed. While he was doing this, father stated that he would take her for a drive and would slit the throats of mother and her boyfriend. Father purportedly assured mother that their children would be taken care of. Mother "pushed up" and managed to get into the house where the children were located. Father left the residence but returned five to 10 minutes later.

The children asked mother why she was crying and shaking. Father addressed the children, stating, "'Okay, you two, Mom's a whore! Mom's a slut. She sleeps around.'" When H.V. asked, "'Mommy, why'd you do that?,'" father said, "'I should just kill the fucking bitch.'" H.V. cried and screamed, "'Daddy, No!'" Father said words to the effect of, "'You guys won't have much longer with'" Father fled the scene.

Mother suffered bruises on her back and leg, a swollen left knee, pain at the front of her throat, and difficulty swallowing.

Father told a social worker that he had gone to mother's residence and had found her boyfriend at the house doing laundry. Mother and the boyfriend were drinking in the garage while the children were inside. Father threatened the boyfriend before assaulting mother.

On a previous occasion in August 2009, father had pushed mother down onto a bed frame and had threatened to shoot the entire family.

In a separate incident, Rocklin Police had arrested father for assaulting an animal control officer.

Petition

The Placer County Department of Health and Human Services (Department) filed a petition alleging the children came within the provisions of Welfare and Institutions Code section 300, subdivisions (b), (c), and (i), in that they had been exposed to numerous acts of domestic violence including father's recent assault and threat to kill mother; the children were suffering or at risk of suffering serious emotional damage; and the children were exposed to, and not protected from, one or more acts of cruelty by a parent.¹

Detention

At a detention hearing in May 2010, the juvenile court found that a prima facie case had been established and made the

¹ Further statutory references are to the Welfare and Institutions Code.

appropriate findings and orders. The children were placed with mother and father was granted supervised visitation.

Child Custody and Visitation Order

On June 10, 2010, in case No. SDR-34787, the superior court issued a child custody and visitation order granting mother sole legal and physical custody of both children.

Jurisdiction and Disposition

At the jurisdiction and disposition hearing in August 2010, father submitted on the social worker's report. The juvenile court found the children to be dependents of the court. The court appointed a Court Appointed Special Advocate (CASA) for the children. The children were placed with mother and father was granted reunification services. Father was also granted visitation as arranged and facilitated by the Department.

Three-Month Status Review

In a report for the three-month status review, the Department noted that mother's restraining order against father had lapsed and that the Rocklin Police Department was investigating an incident in which father had broken into the family home.

At the status review in November 2010, the juvenile court granted father supervised visitation, subject to approval of the children's therapist.

CLETS Domestic Violence Restraining Order

On December 16, 2010, in case No. SDR-0037157, the superior court issued a CLETS Domestic Violence Restraining Order that

was set to expire on January 20, 2011, and was extended to February 25, 2011.

Six-Month Review

Although father had been slow to begin services, by the six-month review in February 2011 he had completed a psychological evaluation and a 12-week parenting class.

The social worker reported in February 2011 that, since December 2010, father had been having supervised visits with the children. The CASA and the children's therapist indicated that the visits were good for the children. The children's behavior had been improving, and counseling had been reduced to once every other week. However, counsel for the children was opposed to liberalization of father's visitation.

The Department noted that father's drug tests had been positive for marijuana and that father had furnished a copy of a valid medical marijuana certificate. The Department noted that father sometimes complains about the dependency case during visitations with the children.

The Department recommended that father receive an additional six months of reunification services. The court so ordered.

At the hearing on February 25, 2011, the juvenile court orally dismissed the CLETS Domestic Violence Restraining Order and replaced it with a temporary juvenile restraining order. However, the court signed a written order stating that the CLETS Domestic Violence Restraining Order "shall continue in effect" with a new expiration date of April 22, 2011. The written order

authorized "peaceful contact with the [children] during supervised therapeutic visits as arranged and directed by" the Department. The court orally granted father permission to attend his son's birthday party.

Criminal Protective Order -- Domestic Violence

On April 20, 2011, in case No. 62-104707, the superior court issued a three-year criminal protective order directing father to have no contact with mother or the children, except for visitation as authorized by CPS (the Department).

Eight-Month Status Review

In a report for an April 2011 status review hearing, the Department noted that father had been arrested, jailed, and released on electronic monitoring. Father's visitation with the children was going well and the Department anticipated that visits would become unsupervised. Reunification was expected to occur prior to the 12-month review in July 2011.

At the hearing on April 22, 2011, the juvenile court found that both parents were in compliance with the case plan. Father's trial counsel furnished copies of the criminal protective order. The court advised father's counsel to ask the criminal court to revise the restraining order to permit peaceful contact by e-mail between mother and father to facilitate visitation.

Twelve-Month Review

The CASA report for the 12-month hearing noted that in May 2011, N.V. refused a scheduled visit with father. Father became angry, used profane language, engaged in name-calling, and

threatened to damage the visitation supervisor's vehicle. H.V. was present and witnessed the outburst. Thereafter, the supervisor's agency refused to supervise any further visits. On three of four ensuing scheduled visits with father, one or both children refused to visit.

The Department recommended that father's reunification services be terminated because there was not a substantial probability that the children would be returned to his physical custody within 18 months following removal. The Department further recommended that dependency jurisdiction be terminated, mother receive sole physical custody of both children, and both parents receive joint legal custody.

At the hearing in July 2011, counsel for the children objected to the Department's recommendation of joint legal custody for father. The juvenile court responded: "I don't want to set up a situation forever running into court because they can't agree. . . . Because if it's . . . going to come down to where I could see them disagreeing where to get [the children] a haircut . . . , and all of a sudden they're back in Family Law Court, litigating some of these trivial issues, because they can't agree on them, because of a joint legal status of the case."

Mother's counsel remarked that "in a lot of ways, joint legal is going to set this family up for some more conflict, and going back to where we were. I think mother can . . . keep dad informed of things."

The juvenile court responded: "Well, in fact -- and I'll be honest . . . that was my fear when I saw the [recommendation for] joint legal myself. There's a long -- a long-term situation here of conflict between these two, and I don't want to set the family up for failure, find themselves conflicted again, over again, just on what could be minor issues."

The children's CASA recommended that, until the parents' divorce becomes final, mother be the decision maker "[b]ecause they do need decisions made about what to wear, if they need to buy shoes, if they need to do something extracurricular, deal with an issue at school. Mom's been dealing with that. Just for consistency, until they hammer it out in divorce court."

The juvenile court further explained its ruling as follows: "[L]ooking at the long-term conflictual nature of the relationship between mother and father, . . . the serious domestic issues that brought this matter to court, as I read some of these reports, still some of the issues regarding father's visits with the children while they continue with their therapy right now, I'm going to leave the day-to-day legal decision to be made by mother, and the children are in her care. She's going to make their medical, educational, dental -- she'll make all those decisions on the order. Mother can make those decisions. So father can then discuss those issues with you. The ultimate decision will be made by mother. Sole legal, sole physical custody to mom."

The juvenile court terminated father's reunification services. Concluding that the children would be protected while

they were in mother's care, the court terminated its dependency jurisdiction.

DISCUSSION

Father contends the award of sole legal custody to mother must be reversed because it was based, not on the best interest of the children, but on the speculative possibility that shared legal custody would result in continuous litigation in family court.

The Department counters that this appeal must be dismissed because father has appealed from a nonappealable order. The Department made an identical contention in its December 2011 motion to dismiss the appeal. We denied the Department's motion (order of Dec. 29, 2011), and we need not revisit the issue here.

"When the juvenile court terminates its jurisdiction over a dependent child, section 362.4 authorizes it to make custody and visitation orders that will be transferred to an existing family court file and remain in effect until modified or terminated by the superior court." (*In re Roger S.* (1992) 4 Cal.App.4th 25, 30, fn. omitted.) Custody determinations are based upon the best interests of the child. (*In re Chantal S.* (1996) 13 Cal.4th 196, 206; *In re Roger S., supra*, at pp. 30-31.)

As father recognizes, we "review the juvenile court's decision to terminate dependency jurisdiction and to issue a custody (or 'exit') order pursuant to section 362.4 for abuse of discretion [citation] and may not disturb the order unless the court "'exceeded the limits of legal discretion by making an

arbitrary, capricious, or patently absurd determination [citations].'" [Citations.]" (*Bridget A. v. Superior Court* (2007) 148 Cal.App.4th 285, 300-301, citing *In re Stephanie M.* (1994) 7 Cal.4th 295, 318.)

Father argues the award of sole legal custody to mother was arbitrary because the court did not "focus on whether under the totality of circumstances it was in the children's best interest to have their father involved in making decisions about their overall welfare." Instead, father claims the court "speculated that there might be conflict and continuous litigation in family court if both parents shared the power to make important decisions about their children's welfare." This was fatal because, in father's view, a "decision based purely on speculation that the parents *might* or *could* disagree is arbitrary." (Original italics.)

Contrary to father's argument, the juvenile court's order was not based on mere "speculation" that, following the termination of court intervention, the parents "might or could" disagree on issues related to the children's general welfare. Rather, the court perceptively recognized that joint custody would "set the family up for failure" by creating new sources of potential conflict that had not existed while the children were within the Department's purview. The parents' history of conflicts was the very reason the dependency had been established. The court could deduce from that history that at least some of the new potential conflicts probably would ripen into actual conflict. Adding new sources of potential conflict

while the parents were still wending their way through family court would have been, at best, counterproductive.

Father claims that the incident underlying the children's detention arose from *his belief mother was having an affair*, as opposed to "a disagreement concerning the children." However, the dependency was based on the children's exposure to "numerous acts of domestic violence," including but not limited to the incident regarding the mother's alleged affair. Moreover, the incident that led to termination of father's reunification services involved the children: when N.V. refused a scheduled visit, father became angry, used profane language, engaged in name-calling, and threatened to damage the visitation supervisor's vehicle. H.V. was present and witnessed the outburst. Thereafter, the supervisor's agency refused to supervise any further visits. On three of four ensuing scheduled visits with father, one or both children refused to visit. Because of statutory time limits, father was not offered services to address his behavior during this incident.

Given the history of conflicts between father and mother as well as between father and visitation providers, the juvenile court could find a substantial probability of future conflict on issues directly related to the children. The fact the parents are capable of cooperating when they choose to do so, such as when father voluntarily departed from the daughter's birthday party in order to avoid a conflict, does not show any infirmity in the custody order as it currently stands.

Thus, the record supports a finding that joint legal custody was not in the children's best interest. The court had no duty to find, as a prerequisite, that a sole legal custody order would eliminate all possibility of conflict. Mother and father are still free to litigate issues in family court, but that does not suggest any infirmity with the sole legal custody order.

In sum, the exit order awarding mother sole legal custody of the children was not arbitrary or based upon impermissible speculation. There was no abuse of discretion.

DISPOSITION

In each child's case, the exit order is affirmed.

NICHOLSON, Acting P. J.

We concur:

BUTZ, J.

DUARTE, J.