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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

In re G.H., a Person Coming Under the
Juvenile Court Law.

SAN DIEGO COUNTY HEALTH AND
HUMAN SERVICES AGENCY,

Plaintiff and Respondent,

v.

S.H. et al.,

Defendants and Appellants,

D061405

(Super. Ct. No. J518059)

APPEALS from an order of the Superior Court of San Diego County, Ronald F. Frazier, Judge. Reversed and remanded with directions.

S.H. and D.H. appeal a custody and visitation order under Welfare and Institutions Code section 362.4.¹ We reverse.

¹ Unless otherwise indicated, all statutory references are to the Welfare and Institutions Code.

FACTUAL AND PROCEDURAL BACKGROUND

In March 2011, two-year-old G.H. was detained in protective custody with her maternal grandparents after her mother, S.H., suffered hallucinations while G.H. was in her care. S.H. diagnosed with psychosis and drug dependence. S.H. had a history of not being able to provide regular care to G.H. She often disappeared for weeks or months at a time, leaving G.H. in the care of G.H.'s maternal grandparents. In June, the court adjudicated G.H. a dependent of the juvenile court. (§ 300, subd. (b).)

G.H.'s father, D.H., visited G.H. regularly and provided financial support. He cared for G.H. during one of S.H.'s absences. D.H. denied any history of drug use. He was employed at a school working with disabled children. Through paternity testing, D.H. learned he was not G.H.'s biological father. The juvenile court granted his request for presumed father status. (Fam. Code, § 7611, subd. (d).)

At the dispositional hearing, the court removed G.H. from her mother's custody, placed her with her father and ordered the San Diego County Health and Human Services Agency (Agency) to provide services to the parents consistent with their case plans. S.H.'s case plan required her to participate in counseling and mental health services, parenting education and substance abuse treatment. D.H. was to provide for G.H.'s well-being but was not required to participate in any rehabilitative services.

In reports prepared for the six-month review hearing, the Agency recommended the court dismiss jurisdiction. The social worker reported there were no concerns about G.H.'s development or behavior. Her home with her father was safe and stable, and he provided for her social, emotional and educational needs and overall well-being. The

social worker also reported that after several months of avoiding services, S.H. began making progress in a substance abuse treatment program, regularly attended therapy and completed a parenting education course. In November, S.H. began having unsupervised daytime visits with G.H. As of December, S.H. had been sober four months.

The social worker said D.H. and S.H. lacked the communication skills to arrange an appropriate visitation schedule. The court ordered the parents to attend family court mediation and set a contested review hearing.

The family court mediator determined D.H. was G.H.'s primary caretaker and there was no information to support S.H.'s request to significantly reduce his parenting time. The mediator recommended D.H. have sole legal custody and primary physical custody of G.H. S.H. would care for G.H. on Monday, Wednesday and Friday from 1:00 p.m. to 5:00 p.m. If the maternal grandmother was present, S.H. would also care for G.H. in the grandparents' home on alternate weekends from 5:00 p.m. Friday to 5:00 p.m. Saturday. The mediator recommended the parents complete a co-parenting course and S.H. participate in individual counseling, attend a self-help substance abuse recovery class twice a week, submit to weekly random drug tests and complete substance abuse treatment and an aftercare program.

The contested six-month review hearing was held on February 3, 6 and 8, 2012. S.H. requested joint legal and physical custody of G.H. Minor's counsel supported S.H.'s request. D.H. asked the court to adopt the mediator's recommendations placing G.H. in his sole legal and physical custody and requiring S.H. to participate in drug treatment services.

The court admitted the Agency's reports in evidence and accepted S.H.'s stipulated testimony. It found that S.H. and D.H. made substantive progress with their case plans and there was no longer a protective issue requiring juvenile court involvement. The court ordered that the parents would have joint legal custody with respect to educational and major medical decisions. D.H. had sole legal custody to determine all other decisions relating to G.H.'s health, education and welfare. The court followed the mediator's initial recommendations for physical custody but also ordered that if S.H. remained sober and complied with all other services recommended by the mediator, she would gain full joint legal custody of G.H. in three months' time and joint physical custody in six months' time. The court continued the case to allow counsel to prepare custody orders.

On February 8, by agreement, the parties added the following provision to the custody and visitation order: "Mother will provide proof of enrollment or completion of therapy to the father prior to May 3, 2012, or the changes to mother's legal and physical custody outlined in these orders will not take place." The court found that father had made substantive progress and mother had made some progress with the provisions of their case plans, and there was no longer any protective issue. The court issued custody orders and terminated dependency court jurisdiction.

DISCUSSION

A

The Parties' Contentions

S.H. contends the court abused its discretion when it denied her request for joint legal and physical custody of G.H. She argues the court acted in a manner inconsistent with the evidence before it and made contradictory findings regarding her progress with the provisions of her case plan. S.H. requests this court reverse the orders terminating jurisdiction and awarding sole legal and physical custody to D.H.

D.H. argues the court abused its discretion when it granted S.H. joint legal custody in decisions regarding G.H.'s education and major medical treatment. He contends S.H. had not yet completed a substance abuse treatment program and thus her ability to care for and protect G.H. remained highly questionable. D.H. asks this court to modify the custody and visitation order to grant him sole legal custody for all decisions relating to G.H.'s welfare and require S.H. to complete all remedial programs recommended by the mediator before she is awarded joint legal custody of their daughter.

B

Statement of Law and Standard of Review

When the juvenile court terminates dependency jurisdiction, it may issue a custody and visitation order. (§ 362.4.) Under section 362.4, the court has broad discretion to fashion custody and visitation orders, considering the totality of the child's circumstances and the best interests of the child. (*In re Chantal S.* (1996) 13 Cal.4th 196, 202-203; *In re John W.* (1996) 41 Cal.App.4th 961, 973; see *In re Marriage of Burgess* (1996)

13 Cal.4th 25 (*Burgess*.) A juvenile court custody and visitation order, commonly referred to as an "exit order," is enforceable in family court. (*In re John W.*, *supra*, at p. 970; *In re Chantal S.*, *supra*, at p. 213.)

When making a custody determination, the juvenile court's focus and primary consideration must always be the best interests of the child. (*In re Nicholas H.* (2003) 112 Cal.App.4th 251, 268 (*Nicholas H.*.) The juvenile court is not bound by family court "preferences or presumptions." (*Ibid.*, citing *Chantal S.*, *supra*, 13 Cal.4th at p. 206.) The *Nicholas H.* court explained, "Thus, for example, a finding that neither parent poses any danger to the child does not mean that both are equally entitled to half custody, since joint physical custody may not be in the child's best interests for a variety of reasons. [Citation.] By the same token, a finding that the parent from whom custody was removed no longer poses a risk of detriment or that the parent whose custody has been subject to supervision no longer requires supervision is relevant to, but not necessarily determinative of, the best interests of the child." (*Nicholas H.*, *supra*, at p. 268.)

After the court has made an initial custody and visitation order, "the noncustodial parent seeking to alter the order for legal and physical custody can do so only on a showing that there has been a substantial change of circumstances so affecting the minor child that modification is essential to the child's welfare." (*Burgess*, *supra*, 13 Cal.4th at p. 37; *F.T. v. L.J.* (2011) 194 Cal.App.4th 1, 14-15.) The changed circumstances rule provides that once the court has determined a particular custodial arrangement is in the best interests of the child, the court should preserve the established mode of custody

unless some significant change in circumstances indicates that a different arrangement would be in the child's best interests. The rule promotes "the dual goals of judicial economy and protecting stable custody arrangements." (*Burchard v. Garay* (1986) 42 Cal.3d 531, 535 (*Burchard*.)

Generally, a trial court abuses its discretion if there is no reasonable basis on which the court could conclude its decision advanced the best interests of the child. (*In re Marriage of Melville* (2004) 122 Cal.App.4th 601, 610; *Burgess, supra*, 13 Cal.4th at p. 32.) However, a discretionary decision may be reversed if improper criteria were applied or incorrect legal assumptions were made. (*Linder v. Thrifty Oil Co.* (2000) 23 Cal.4th 429, 435–436.) "A discretionary order that is based on the application of improper criteria or incorrect legal assumptions is not an exercise of informed discretion, and is subject to reversal even though there may be substantial evidence to support that order. [Citations.]" (*Mark T. v. Jamie Z.* (2011) 194 Cal.App.4th 1115, 1124-1125.) If the record affirmatively shows the court misunderstood the proper scope of its discretion, remand is required to permit that court to exercise informed discretion with awareness of the full scope of its discretion and applicable law. (*F.T. v. L.J., supra*, 194 Cal.App.4th at pp. 15-16.) The appellant bears the burden of showing the trial court abused its discretion. (*Ibid.*)

C

The Record Shows the Court Misunderstood the Proper Scope of Its Discretion

The court made an order changing the legal and physical custody of the child conditioned on a future event. In doing so, the court misunderstood the proper scope of

its discretion. As in family court, the purpose of a custody and visitation order is to provide stability to the child consistent with the child's best interests. (*Burchard, supra*, 42 Cal.3d at p. 535.) These arrangements are to be maintained for the child unless and until the noncustodial parent shows there is a substantial change of circumstances and modification of the established custody and visitation order is essential to the child's welfare. (*Burgess, supra*, 13 Cal.4th at p. 37; *F.T. v. L.J., supra*, 194 Cal.App.4th at pp. 14-15.)

Here, the court ordered G.H. to remain in the sole physical custody of her father, and that her father had sole legal custody in all matters except major medical and educational decisions, for which the parents would share legal responsibility (current custody arrangement). The court also determined that if mother remained sober and complied with the mediator's recommendations for counseling and substance abuse treatment, she would gain joint legal custody in three months and joint physical custody in six months (future custody arrangement). The court exceeded the scope of its discretion when it ordered a future modification of its custody orders conditioned on mother's compliance with treatment.

This order is problematic for several reasons. First, it presupposes that a future modification of the custody order will be in the child's best interests without a current assessment of the child's circumstances. Second, while the current custody arrangement reflects the court's determination it is in the child's best interest for her mother to have only a limited role in her life, the future custody arrangement implicitly acknowledges it is in the child's best interest for her mother, if clean and sober, to share an equal parenting

role in her life. If the intent of the juvenile court was to allow the mother and father to share legal and physical custody, it could have conditioned joint custody on mother's continued participation in substance abuse treatment and other recommended services. If the court did not believe it was safe for G.H. for her mother to share joint custody at the time it issued the exit orders, then it should have left a future modification of the custody arrangement to the family court on a showing of changed circumstances.

While it is within our authority to order a modification of the appealed judgment, the record does not clearly show what the court would have ordered if it had acted within the scope of its discretion. In addition, as S.H. points out, the juvenile court made summary and inconsistent findings about her progress with the provisions of her case plan. Remand is required to permit the juvenile court to exercise informed discretion with awareness of the full scope of its discretion and applicable law. (*F.T. v. L.J.*, *supra*, 194 Cal.App.4th at pp. 15-16.)

DISPOSITION

The order terminating jurisdiction is reversed. The matter is remanded to the juvenile court with instructions to vacate the exit order and, if there are no protective issues, issue a new exit order without any conditional future changes in legal and/or physical custody. The court shall also make findings concerning S.H.'s compliance with the provisions of her case plan.

NARES, Acting P. J.

WE CONCUR:

O'ROURKE, J.

IRION, J.