Filed 3/23/17 Marriage of Koelewyn CA5

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

In re the Marriage of JENNIFER and RYAN KOELEWYN.	
RYAN KOELEWYN, Respondent, v. JENNIFER KOELEWYN, Respondent; GLORIA KOELEWYN, Appellant.	F072322 (Super. Ct. No. VFL255652) **OPINION**

APPEAL from a judgment of the Superior Court of Tulare County. Antonio A. Reyes, Judge.

Gloria Koelewyn, in pro. per., for Appellant.

Jennifer Koelewyn, in pro. per., for Respondent.

No appearance for Respondent Ryan Koelewyn.

-ooOoo-

Appellant Gloria Koelewyn (Gloria or the grandmother) appeals from the trial court's denial of her petition for court-ordered visitation with her minor grandchildren. The children's mother, respondent Jennifer Koelewyn (Jennifer or the mother), opposed the request for reasons we explain below. The trial court found that the mother's decision on this issue should prevail. We find no abuse of discretion and affirm the order of the trial court.

FACTS AND PROCEDURAL HISTORY

Jennifer and Ryan Koelewyn (Ryan) were married on March 17, 2007, and permanently separated on February 23, 2014.[1] In March 2014, a petition for dissolution of marriage was filed. The marriage lasted 6 years 11 months. Jennifer and Ryan had two children by their marriage, who were six years old and four years old at the time of the separation. Jennifer also had a daughter from a prior marriage, who was 14 years old at the time of the separation. Gloria and William Koelewyn are Ryan's parents and, thus, the paternal grandparents of Ryan's and Jennifer's two minor children.

On April 9, 2014, Jennifer sought a no-contact order to keep Ryan away from all three minor children in light of pending charges against Ryan that he molested Jennifer's 14-year-old daughter. In addition, there were charges that Ryan had been watching child pornography while an employee for Tulare County Superior Court. The trial court granted the no-contact order. One month later, a protective order of greater duration was issued to protect the three children and Jennifer.

On or about April 18, 2014, Ryan was arrested for sexual molestation of Jennifer's 14-year-old daughter. Ryan eventually pled no contest to the molestation charges, and he was sentenced to eight years in state prison.

---

[1] Due to the sparse record, many of the general background facts are taken from the parties' briefs.

On November 12, 2014, a final dissolution of the marriage was granted. The trial court decreed that Jennifer was to have sole legal and physical custody of the minor children. Ryan was not permitted any visitation of the children, but could send letters or cards, with Jennifer having the discretion to determine whether to give the children said letters or cards after reviewing them.

In November or December 2014, Gloria filed a petition in the trial court seeking visitation with her grandchildren. Apparently, from the time it was discovered that Ryan had molested Jennifer's 14-year-old daughter, Jennifer had not allowed visits between the children and their paternal grandparents. Initial hearings concerning the issue of grandparent visitation were held on December 15, 2014, March 16, 2015, and April 13, 2015, and a contested evidentiary hearing was held on June 15, 2015, at which time the trial court heard and considered the parties' arguments and testimony. Among other witnesses, both paternal grandparents testified at the hearing in favor of the petition, while Jennifer testified in opposition.

At the conclusion of the contested hearing on June 15, 2015, the trial court denied Gloria's request for court-ordered visitation, thereby leaving the issue of grandparent visitation in Jennifer's sole discretion. On June 15, 2015, a formal order to that effect was entered by the trial court. On August 12, 2015, Gloria filed a timely notice of appeal.

DISCUSSION

I. Applicable Law and Standard of Review

Grandparent rights to court-ordered visitation with their grandchildren are purely statutory. (*In re Marriage of Harris* (2004) 34 Cal.4th 210, 219.) Sections 3102 to 3104 of the Family Code govern the issue of grandparent visitation, each involving different situations.[2] Section 3102 is applicable in the event of a deceased parent. Section 3103

[2] Unless otherwise indicated, all further statutory references are to the Family Code.

concerns grandparent visitation during the pendency of judicial proceedings involving child custody. Section 3104 governs grandparent visitation after a judgment dissolving the marriage and determining the custody of the child (or children) has been entered. (*In re Marriage of Harris*, *supra*, at pp. 222–223; see § 3104, subd. (f).) Here, because the trial court dissolved the marriage and granted sole legal and physical custody to Jennifer, section 3104 is the applicable provision.

Section 3104 provides that, on a petition to the trial court by a grandparent of a minor child, the court "may grant reasonable visitation rights to the grandparent if the court does both of the following: [¶] (1) Finds that there is a preexisting relationship between the grandparent and the grandchild that has engendered a bond such that visitation is in the best interest of the child. [¶] (2) Balances the interest of the child in having visitation with the grandparent against the right of the parents to exercise their parental authority." (§ 3104, subd. (a).) In applying this section, "[t]here is a rebuttable presumption that the visitation of a grandparent is not in the best interest of a minor child" if the parents agree that the grandparent should not be granted visitation rights. (*Id.*, subd. (e).) The same rebuttable presumption against grandparent visitation exists "if the parent who has been awarded sole legal and physical custody of the child … objects to visitation by the grandparent." (*Id.*, subd. (f).) In light of Jennifer's objection to Gloria's visitation request, the presumption set forth in section 3104, subdivision (f), was and is clearly applicable.[3]

---

3 The presumption accords "special weight" to the decision of the children's parents (or the particular parent awarded sole legal and physical custody), thereby providing a measure of protection to parents' fundamental constitutional right to direct the upbringing of their own children. (See *In re Marriage of Harris*, *supra*, 34 Cal.4th at pp. 223, 226 [referring to "special weight" concept from *Troxel* case]; see also *Troxel v. Granville* (2000) 530 U.S. 57, 66, 70 (plur. opn. of O'Connor, J).) As a further safeguard to such fundamental rights, two recent appellate decisions have held that the presumption may only be overcome if the grandparents present *clear and convincing* evidence to establish that the proposed visitation is in the best interest of the grandchild or the grandchildren (i.e., *Ian J. v. Peter M.* (2013) 213 Cal.App.4th 189, 207–208; *Rich v. Thatcher* (2011) 200 Cal.App.4th 1176, 1179–1181).

To overcome the presumption against court-ordered grandparent visitation in cases of parental objection thereto, courts have required grandparents to present clear and convincing evidence that visitation is in the minor children's best interest. (*Ian J. v. Peter M.*, *supra*, 213 Cal.App.4th at pp. 207–208; *Rich v. Thatcher*, *supra*, 200 Cal.App.4th at pp. 1179–1181; see *Chalmers v. Hirschkop* (2013) 213 Cal.App.4th 289, 302.) On appeal, we must affirm the trial court's determination if it is supported by substantial evidence. (*Ian J. v. Peter M.*, *supra*, at p. 208.)

We review the trial court's denial of a grandparent's request for a visitation order under the deferential abuse of discretion standard. (*Rich v. Thatcher*, *supra*, 200 Cal.App.4th at p. 1181.) Under that standard, we will not reverse unless the trial court's order exceeded the bounds of reason (*In re Stephanie M.* (1994) 7 Cal.4th 295, 318–319; *Shamblin v. Brattain* (1988) 44 Cal.3d 474, 478), such as by making an arbitrary, capricious or patently unreasonable determination (*Stuard v. Stuard* (2016) 244 Cal.App.4th 768, 786). When two or more inferences can reasonably be deduced from the facts, the reviewing court has no authority to substitute its own decision for that of the trial court. (*Ibid.*) Moreover, the party challenging the trial court's ruling on visitation bears the burden of establishing an abuse of discretion. (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 566.) "'"[U]nless a clear case of abuse is shown and unless there has been a miscarriage of justice a reviewing court will not substitute its opinion and thereby divest the trial court of its discretionary power." [Citations.]'" (*Rich v. Thatcher*, *supra*, at p. 1182.)

II. No Abuse of Discretion

In support of Gloria's petition for visitation, testimony was heard from Gloria, William, and their daughter-in-law, Laura Koelewyn, among others. By way of summary, it was asserted that Gloria and William were involved in their grandchildren's lives and had a significant bond with them. Gloria and William testified that they loved the grandchildren and wanted to continue to be part of their lives. Both Gloria and

William expressed that they were ashamed of what their son, Ryan, had done, but they did not want their son's bad deeds to cause them to be excluded from the minor grandchildren's lives. Nor did they think it was wise for Jennifer to keep the grandchildren from them. In fact, Gloria and William believed that it would be best for the grandchildren to be able to see their grandparents.

Jennifer's view of the matter was quite different. She explained at the outset of the proceedings that she opposed the requested visitation order due to the trauma the children had been through: "My children are in counseling.… [¶] Right now I'm focusing my time and my energy on making sure that my children come out of this the best they can, and I would have to say that them having any contact with [the paternal grandparents] would go against that. It wouldn't be in their best interest …." Jennifer noted a further concern: "[B]oth of the [paternal] grandparents have supported Ryan 100 percent through this entire thing. They supported—I understand it's their son, but they supported a man who molested one of my children. That's a concern for me. I don't want people like that around my children. [¶] They supported somebody who did that to one of my children. And those same people are requesting to see my other children. I don't think—that's not in the children's best interest whatsoever." The same reasons and concerns were reiterated in Jennifer's testimony at the contested hearing.

At the same time, Jennifer also expressed her hope that, in the future, when the timing and circumstances are right, she might allow the children to see the paternal grandparents once again, but she added that that should be her decision to make as the children's mother. She explained: "I'm not unreasonable. [¶] It's just in this kind of situation, what has happened, what my kids are going through, what they're trying to get over, I don't think this is the right time. When I feel it is the right time, I have no problem with letting them see them when the time is right. I think that I would be the one who would determine that … when that time would be."

At the conclusion of the contested hearing, the trial court stated its ruling from the bench. In explaining its decision, the trial court noted that when (as here) the natural parent having legal and physical custody of the children is opposed to the requested visitation with the grandparents, a presumption exists that such visitation would not be in the children's best interest. Although Gloria had shown that there was a bond between her and the grandchildren, the trial court found that she had not overcome the presumption.

A factor relied on by the trial court was the significant trauma the children had been through, with their father having molested Jennifer's older daughter and being sent to prison. "Ryan did something terrible … [a]nd … it's something that's gonna effect these children for the rest of their lives." The children were experiencing that emotional trauma, and were going through therapy or counseling to help them cope. The trial court explained that, in all of this, the mother is the one who must deal with these important matters as the parent, raise her children and make the day-to-day decisions on how best to help them. Under these circumstances, the mother's wishes to shelter the children and avoid visits with Ryan's parents at the present time, which she thought would help her children adjust, was a decision for the mother to make as parent, under her inherent parental authority to raise her children, and the trial court would not interfere with it. As the trial court put it, "I'm gonna leave that in her hands."

The final order of the trial court stated simply: "Visitation for the paternal grandparents shall be at the discretion of the Mother." The ruling was plainly within the trial court's discretion to make, and Gloria has failed to demonstrate otherwise. No prejudicial error or abuse of discretion has been shown. Instead, it is clear to us that the trial court weighed the factors in section 3104 and, with the support of substantial evidence, came to a sound and reasonable conclusion under the circumstances.

III. Mediation and Other Issues

In her opening brief on appeal, Gloria argues that the trial court erred by failing to set the matter for mediation pursuant to section 3171, which requires mediation when a grandparent or stepparent has petitioned for a visitation order. (§ 3171, subd. (a).) The record before us is inadequate to ascertain whether there was, or was not, any mediation ordered by the trial court. Lacking an adequate record, we are required to resolve the issue against Gloria by default. (*Hernandez v. California Hospital Medical Center* (2000) 78 Cal.App.4th 498, 502.) In any event, it does not appear that the matter was raised by Gloria in the trial court. Arguments not asserted in the trial court will not be considered for the first time on appeal and are deemed forfeited. (*Franz v. Board of Medical Quality Assurance* (1982) 31 Cal.3d 124, 143; *Ochoa v. Pacific Gas & Electric Co*. (1998) 61 Cal.App.4th 1480, 1488, fn. 3; *Kaufman & Broad Communities, Inc. v. Performance Plastering, Inc*. (2006) 136 Cal.App.4th 212, 226.) Accordingly, the issue of mediation is forfeited. Even assuming the trial court erred in failing to order mediation, Gloria has failed to demonstrate that the absence of mediation made a difference to the outcome of this unique case. Again, under the circumstances, the trial court was well within its discretion in leaving the question of grandparent visitation in Jennifer's hands, as the children's mother. The presence or absence of mediation does not in any way alter that conclusion.

Finally, Gloria argues she should have been given an opportunity to speak to the children's therapist, to ascertain the therapist's thoughts about possible grandparent visitation. At the March 16, 2015, hearing, the trial court had encouraged this, and asked if Jennifer would agree to contact the children's therapist, to see if such a dialogue might take place between the therapist and grandparents, with the results (if any) of that dialogue being reported back to the trial court. The trial court thought it might serve to avoid a contested hearing if the therapist confirmed that visitation would not be in the children's best interest: "So to avoid a hearing … my suggestion would be to allow them

to contact [the] therapist, at least make the contact." Jennifer was unwilling to give out the therapist's phone number, but agreed to bring up the proposal with the therapist.[4] At the follow-up hearings, Jennifer reported to the trial court that the therapist would not give any kind of recommendation, at least not without a release of confidentiality, which Jennifer was unwilling to grant. The trial court responded that it was "not going to make any orders," confirming that the matter was always voluntary. Ultimately, the issue was apparently not material to the trial court's analysis since it was not mentioned by the trial court in its ruling. Gloria has failed to demonstrate any error, much less a prejudicial abuse of discretion and miscarriage of justice on the part of the trial court regarding this matter.

DISPOSITION

The order of the trial court is affirmed. Costs on appeal are awarded to Jennifer.

_____
KANE, J.

WE CONCUR:

_____
LEVY, Acting P.J.

_____
POOCHIGIAN, J.

---

[4] The exchange between the trial court and Jennifer at the March hearing was a bit confusing. Although it was agreed by Jennifer that she would contact the therapist to "see" what the therapist thought of the court's proposal for the therapist to speak with the grandparents, the minute order stated in more definite terms that Jennifer would give Gloria the therapist's phone number. The reporter's transcript indicates otherwise. In any event, Gloria did somehow obtain the phone number and called the therapist; however, due to confidentiality, the therapist did not respond to the phone call.