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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

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

ORANGE COUNTY SOCIAL SERVICES  
AGENCY et al.,

Plaintiffs and Respondents,

v.

JACK H.,

Defendant and Appellant.

G050119

(Super. Ct. No. DP022945)

O P I N I O N

Appeal from orders of the Superior Court of Orange County, Caryl Lee,  
Judge. Affirmed.

Grace Clark, under appointment by the Court of Appeal, for Defendant and  
Appellant Jack H.

Nicholas S. Chrisos, County Counsel, Karen L. Christensen and Aurelio  
Torre, Deputy County Counsel, for Plaintiff and Respondent Orange County Social  
Services Agency.

Law Offices of Arthur J. LaCilento and Arthur J. LaCilento for Plaintiff  
and Respondent Cassandra H.

Nicole Williams, under appointment by the Court of Appeal, for the Minor.

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## **INTRODUCTION**

Jack H., the father of the minor Savannah H., has appealed from the exit orders entered by the juvenile court after it terminated jurisdiction over Savannah and sent the matter to family law court, where the divorce proceedings of Jack and his wife, Cassandra H., were pending. Orange County Social Services Agency (SSA) detained Savannah after a drunken incident involving Jack, Cassandra, Savannah, and a shotgun, during which officers from the Huntington Beach Police Department arrested Jack. Upon terminating jurisdiction, the juvenile court gave legal custody of Savannah to Jack and Cassandra, primary physical custody to Cassandra, and visitation of 16 hours per week to Jack, with no overnight visits.

Jack has confined his appeal to the portion of the exit orders prohibiting overnight visits, which he challenges for insufficient evidence. We review these orders for abuse of discretion. We find no abuse here, and we therefore affirm the orders. Although Jack had made some progress in therapy and in his sobriety, the trial court has great discretion in these matters, and the court acted within its discretion when it decided his progress was not enough to warrant overnight visits yet. The court concluded Jack still had a way to go before he could be entrusted with his daughter to this extent, and we find nothing unreasonable in that decision.

## **FACTS**

Although there were various versions of the event that precipitated Savannah's detention, the court ultimately relied on the allegations of the modified amended petition, to which the parties stipulated in October 2012. In August 2012, when Savannah was 16 months old, Jack and Cassandra got into a physical altercation, the

latest in a series of unreported incidents of domestic violence witnessed by Savannah. Jack was drunk.<sup>1</sup> Within an hour of the altercation, Cassandra heard a sound she recognized as the loading or racking of a shotgun. She stepped into the hall with Savannah and saw Jack pointing a gun at them. Cassandra ran out of the house with Savannah and called the police. Officers from the Huntington Beach Police Department arrested Jack and charged him with assault with a firearm, child endangerment, brandishing a firearm, and domestic violence. Cassandra bailed Jack out of jail the next day and declined to seek a restraining order as suggested by the police. She also declined to press charges.

SSA left Savannah with Cassandra and filed a detention report. Jack went to stay at his sister's house. Cassandra finally requested a restraining order against Jack on August 21, two days after the incident. SSA had obtained a protective custody order the day before.

Both Jack and Cassandra participated in various programs mandated by their case plan. Jack entered a chemical dependency program, took parenting classes, worked with a therapist, tested for drugs and alcohol, and attended a batterer's intervention program. As of September, he had supervised visits with Savannah three times a week for four hours each visit.

In October 2012, the parties requested and received a settlement conference with Judge Hatchimonji. As a result, a modified amended petition, to which both Jack and Cassandra stipulated, was filed on October 30, 2012. Judge Hatchimonji carefully explained to both parents in open court the consequences of submitting on the modified petition and secured their knowing, voluntary, intelligent waiver of their right to a trial. One of the allegations stated, "On August 19, 2012, within an hour after the above

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<sup>1</sup> Jack had completed an alcohol abuse program two years earlier, but he had stopped going to Alcoholics Anonymous meetings in March 2012 and was drinking again in June.

incident,<sup>2</sup> [Cassandra] heard a clicking sound. [Cassandra] recognized the clicking sound to be either the loading of ammunition into the shotgun or the racking of the shotgun slide. After hearing the noise, [Cassandra] picked up Savannah and stepped out into the hall. She looked down the hall toward the master bedroom and saw [Jack] standing in the hall with a long gun at hip level pointed at her. While holding Savannah, she ran down the spiral stairs and out of the home.”

As of April 2013, Jack had received two 8-hour supervised visits with Savannah per week. By this time, Jack and Cassandra were heading toward divorce. At the end of April, Jack began unsupervised visits, over Savannah’s counsel’s objection.

An addendum report in June 2013 apparently gave the juvenile court pause about Jack’s progress. In the report, SSA quoted Jack’s counselor as stating, “[Jack] admitted to this social worker with remorse and takes full responsibility for drinking alcohol while *cleaning his firearm.*” (Italics added.) No mention of pointing a loaded gun at his wife and daughter. At the hearing in June 2013, the court ordered SSA to provide a copy of the amended petition to Jack’s counselor and forbade any liberalization of Jack’s visitation.

In September 2013, the juvenile court appointed Michael Tramell, a psychiatrist, to evaluate Jack. The doctor’s mission was described as follows: “There is a concern that [Jack] is not taking responsibility for the behavior stated in the petition and found true by the court. It needs to be addressed whether the father is sufficiently rehabilitated and can progress to overnight visits with [Savannah].” The doctor was also to evaluate the likelihood that Jack would physically abuse Savannah if she were returned to his care, the extent of Jack’s substance abuse, and whether he would be a danger to himself, Savannah, or Cassandra. Dr. Tramell’s report was filed on October 29, 2013.

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<sup>2</sup> “The above incident” referred to Jack’s pushing Cassandra and grabbing the back of her neck while “under the influence of alcohol.”

At the hearing on that date, Jack asked for overnight visits. The court denied the request. The matter was set for a contested hearing in early November.

Dr. Tramell testified at the November hearing. As it turned out, he had not read the amended petition, and it had not figured into his evaluation. Having read the petition, Dr. Tramell acknowledged that if Jack denied pointing the gun at his wife and daughter, the risk to Savannah would be increased. He also agreed that Jack's denying he had ever engaged in domestic violence – as he did to his therapist – would be a matter of concern and a possible risk. Dr. Tramell ended up recommending that Jack's visits with Savannah be supervised, then changed his mind after learning that Jack had been having unsupervised visits. One of Jack's counselors also testified regarding Jack's participation in a year-long batterers' program.

On November 13, 2013, the parties entered into a stipulation obviating the necessity for a juvenile court ruling on the visitation issue. The stipulation consisted of two parts. The first part articulated three therapy goals for Jack. These were: “[ (1.) [Jack] to accept responsibility for his actions that caused [Savannah] to come before the court, including those reasons stated in the sustained petition. ¶ [(2.) Identify the triggers that led to the domestic violence with [Cassandra] and be able to articulate and understand coping mechanisms used to de-escalate any future relational conflicts. ¶ [(3.) Address [Jack's] minimization in regard to the domestic violence with [Cassandra].” The parties also stipulated to conjoint therapy for Jack and Cassandra to improve their ability to care for Savannah without conflict. Two monitored overnight visits for Jack were set up for the Christmas holidays.

The parties were back in court on January 3, 2014, to discuss how visitation went and to review the visitation orders, which still did not include routine overnight visits. Jack asked for an order permitting overnight visits or one conferring discretion on SSA to allow overnight visits. Counsel for Cassandra and for Savannah both opposed the

request. The court held that it could not make changes in visitation orders without a motion under Welfare and Institutions Code section 388.<sup>3</sup>

On April 7, 2014, the juvenile court held an evidentiary hearing on two section 388 motions – Jack’s motion to permit overnight visits and SSA’s motion to terminate jurisdiction. The new social worker, who had had the case for two months, testified.<sup>4</sup> Jack testified as well. When confronted with the allegation of the modified petition, to which he had stipulated, regarding pointing a gun at Cassandra and Savannah, he testified that his counsel had told him to stipulate to the petition, and he had just signed everything to move the case along. When asked point blank whether he had pulled a gun on Cassandra in August 2012, he refused to answer, citing the Fifth Amendment.

At the conclusion of the hearing, the court denied Jack’s motion, finding that the circumstances had not changed. The trial court was particularly concerned that the experts rendering opinions – the psychiatrist, the new social worker, Jack’s counselor – had all done so without knowing a crucial fact: the court had found the allegation that Jack pointed a loaded gun at Cassandra and Savannah true. The court was also concerned about the frequency with which Jack invoked the Fifth Amendment during his testimony and his efforts to focus attention on Cassandra’s conduct instead of addressing his own actions.

The final hearing took place on May 8, 2014. Jack asked for joint legal and physical custody. Cassandra’s and Savannah’s counsel both asked the court to leave the orders as they were and terminate jurisdiction. SSA asked to close the case.

Observing that the circumstances in May were what they had been in April, the juvenile court terminated its jurisdiction without changing the visitation order. The

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<sup>3</sup> All further statutory references are to the Welfare and Institutions Code.

<sup>4</sup> The previous social worker was removed from the case on the court’s own motion for allegedly interposing herself between Cassandra and her attorney. Although some document regarding this interference was supposed to be filed, the record before us does not contain any such document.

exit orders provided for Jack and Cassandra to share legal custody. Cassandra was to have physical custody and the primary residence. Jack had 16 hours per week of unsupervised visitation, but no overnight visits. The court ordered the custody orders to be filed with the family law court, where Jack and Cassandra had divorce proceedings pending.

## **DISCUSSION**

As Jack points out, the juvenile court's exit orders cast a long shadow in the divorce proceedings. Section 302, subdivision (d) provides: "Any custody or visitation order issued by the juvenile court at the time the juvenile court terminates its jurisdiction pursuant to Section 362.4 regarding a child who has been previously adjudged to be a dependent child of the juvenile court shall be a final judgment and shall remain in effect after that jurisdiction is terminated. The order shall not be modified in a proceeding or action described in Section 3021 of the Family Code unless the court finds that there has been a significant change of circumstances since the juvenile court issued the order and modification of the order is in the best interests of the child."

The family law court does not write on a clean slate when it comes to custody and visitation after a child has been a dependent of the juvenile court. Although a parent seeking to alter custody orders in family law court must show changed circumstances, an alteration of the visitation schedule not amounting to a change of custody does not require such a showing. (*In re Marriage of Lucio* (2008) 161 Cal.App.4th 1068, 1077-1078.) Where visitation is concerned, then, the juvenile court orders put a burden on Jack that he would not have in a purely family law setting. (See *In re Marriage of David & Martha M.* (2006) 140 Cal.App.4th 96, 103 [court erred in basing change only on best interests].) We therefore review the exit orders, notwithstanding the termination of the juvenile court's jurisdiction. (See *In re Joshua C.* (1994) 24 Cal.App.4th 1544, 1547 [appeal not moot if error would infect outcome of subsequent proceedings].)

Having determined that the appeal is not moot, we next tackle the problem of what specifically we are to review. Jack does not contest the termination of the court's jurisdiction. Presumably he does not object to having legal custody of Savannah, and he does not appear to challenge the court's order that he share legal custody with Cassandra. He also does not appear to object to Cassandra's having primary physical custody, or at least we can find no specific objection to this aspect of the order in his brief. The introduction to his brief mentions the 16-hour limit on visitation. The body of his brief, however, refers only to the denial of overnight visitation as lacking in substantial supporting evidence.<sup>5</sup>

In the face of this uncertainty, and adhering to the rule that we consider only those issues identified for review on appeal (see *In re Marriage of Falcone & Fyke* (2008) 164 Cal.App.4th 814, 830), we concentrate on the denial of overnight visits. We review the juvenile court's custody (or "exit") orders, issued pursuant to section 362.4, for abuse of discretion (*In re Stephanie M.* (1994) 7 Cal.4th 295, 318), and we do not disturb the orders unless the court "“exceeded the limits of legal discretion by making an arbitrary, capricious, or patently absurd determination [citations].”"” (*Ibid.*; see *In re Nicholas H.* (2003) 112 Cal.App.4th 251, 265, fn. 4.)

Jack's opening brief fails to acknowledge that the juvenile court did not make its exit orders in a vacuum. One month before, the court heard testimony from Jack and the current social worker on the very issue of overnight visits, pursuant to Jack's section 388 motion. Before that, the court heard from the psychiatrist appointed to evaluate Jack on, among other issues, visitation recommendations.

The court declined to change the visitation orders in April 2013. It referred specifically to the unhelpfulness of the testimony from the social worker and the

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<sup>5</sup> It is also possible that Jack objects to the exit orders in toto and wants the family law court to decide legal and physical custody as well as visitation. If that is so, he did not provide any argument directed to the custody issue, and we therefore treat it as waived. (See *Nelson v. Avondale Homeowners Assn.* (2009) 172 Cal.App.4th 857, 862.)

psychiatrist, who had formed their opinions without full knowledge of the facts. While acknowledging Jack's improvement, ultimately the court based its decision on the lack of sufficient progress in Jack's rehabilitation after an incident combining "the trifecta, alcohol, guns and [domestic violence]." Jack was still minimizing the incident – "you're talking about a child who was literally in the arms of her mother after [Jack] is drinking and pointing a gun." He continued to refuse to testify under the Fifth Amendment when he was asked about details of the event of August 2012, a refusal the court found "questionable" in light of the passage of time without charges being filed against him.<sup>6</sup> The court also pointed out the lack of progress on the therapeutic goals hammered out in November 2013. The court found that circumstances had not changed sufficiently to warrant a change in visitation, and specifically not enough to support routine overnight visits.

At the termination hearing a month later, the court remarked that nothing had changed since the hearing on Jack's section 388 motion in April. The court reiterated its concerns about the value of the psychiatrist's and the social worker's testimony, in light of their imperfect grasp of the facts. Because nothing had changed in the intervening month, the court made the same ruling about visitation it had made in April.

When evaluating the juvenile court's use of its discretion in issuing exit orders, we look at the total picture. The explanation the court gave for its April ruling bears on its May decision, given that the situation did not change in the interim. While Jack's insufficient evidence argument leans heavily on positive reports from the psychiatrist, the therapist, and the social worker, the court specifically found that their incomplete knowledge of the case's background rendered their opinions questionable at best. "[T]he opinion of an expert is only as good as the information that the expert was

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<sup>6</sup> Although a criminal defendant's right to invoke the Fifth Amendment against self-incrimination is absolute – and no adverse inference may result from it – the same is not true in civil proceedings. "[A] witness or party may be required either to waive the privilege or accept the civil consequences of silence if he or she does exercise it." [Citation.] (*Blackburn v. Superior Court* (1993) 21 Cal.App.4th 414, 426.)

supplied with.” During both hearings the court acknowledged Jack’s progress, but concluded this progress was insufficient to warrant a change in visitation.

The juvenile court did not abuse its discretion when it found that circumstances had not changed sufficiently to alter the previous visitation schedule. In light of the events precipitating Savannah’s detention, the court was justified in being extremely cautious about entrusting her to Jack for overnight visits. This caution was not based solely on his refusal to admit he had pointed a shotgun at Cassandra and Savannah, although this refusal factored into the decision. The court was also concerned about his entire history of refusing to acknowledge fully the gravity of his actions and of his abdication of his role as a father. Although his months of sobriety were commendable, he had resumed drinking in the past after a period of sobriety, another factor to consider.

Finally – and most importantly – the juvenile court heard Jack testify; we did not. The juvenile court could evaluate Jack’s demeanor as well as his words. We cannot. The court was positioned to judge whether Jack would walk the walk, not simply talk the talk. We are not. That is why the juvenile court is entrusted with discretion to make these decisions.

### **DISPOSITION**

The juvenile court’s exit orders concerning visitation are affirmed.

BEDSWORTH, ACTING P. J.

WE CONCUR:

MOORE, J.

THOMPSON, J.