Filed 4/2/14 Guardianship of Richard C. CA2/2

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

Guardianship of the Person and Estate of RICHARD C., a Minor.	B247332 (Los Angeles County Super. Ct. No. MP005535)
MICHAEL T. GRIFFIN, Objector and Appellant, v. CARLA SMITH, Petitioner and Respondent.	

APPEAL from an order of the Superior Court of Los Angeles County, David Bianchi, Judge. Affirmed.

Michael T. Griffin, in pro. per., for Objector and Appellant.

Sheppard, Mullin, Richter & Hampton, Moe Keshavarzi, Heather L. Plocky and Andrea N. Feathers, for Petitioner and Respondent.

* * * * * *

Michael T. Griffin (appellant) in pro. per., appeals from an order awarding guardianship of his fifteen-year-old son, Richard C. (the minor) to Carla Smith (respondent), a nonparent and appellant's former spouse. We affirm.

FACTS AND PROCEDURAL BACKGROUND

The Minor's Relationship to Appellant and Respondent

In 2001, the minor's biological mother, Stacey C., lost her parental rights to the minor when he was three years old and appellant was awarded sole custody of the minor. The minor began living with appellant and respondent, who were then married. Ever since then, the minor has lived with respondent in her house in Palmdale, California. Respondent has two older sons, who are not related to the minor. Respondent's older sons have lived with the minor since he was three years old. Respondent and appellant had three other children who also live with respondent.

Appellant's May 2010 Arrest

In May 2010, appellant was arrested for a domestic violence incident against respondent. According to respondent, the couple began arguing while appellant was under the influence of drugs and alcohol. When she threatened to call the police, appellant broke her finger while trying to pry the cell phone out of her hand. Respondent then started to walk to a neighbor's home to use the phone. Appellant followed her into the neighbor's yard where he began hitting her with his fists as some of the couple's children watched.

According to appellant, respondent was the aggressor and began to "rassle" with him. Appellant denied breaking respondent's finger. He also denied striking her with his fist or being under the influence of drugs during the altercation. Rather, respondent "caught [him] with a cell phone in [his] mouth, cut the inside of [his] mouth." Appellant had a "vague" memory of swinging a metal pipe as he approached her.

As previously noted, appellant was arrested as a result of the altercation. However, the arrest did not result in a criminal charge. Instead, appellant was found

guilty of violating probation for possession of drug paraphernalia. Appellant was released from prison on November 21, 2011 after serving 18 months of a three-year sentence.

After appellant was incarcerated, the minor remained in respondent's home. Respondent subsequently divorced appellant.

Competing Guardianship Petitions

On July 1, 2010, respondent filed a pro. per. petition to be appointed the minor's permanent guardian. In filing the petition, respondent signed appellant's name on a form indicating that he had consented to the guardianship. Respondent also identified the paternal grandmother as Mary Harvey, and listed her address as "unknown."

Respondent's guardianship of the minor was contested by his paternal relatives. Appellant opposed the petition and requested that his mother, Mary Harvey, and sister, Kim Harvey, be appointed minor's guardians. On June 24, 2011, the paternal grandmother and aunt filed a competing petition for appointment as the minor's guardian. During the course of the three-year proceeding, paternal relatives filed a number of motions and objections to respondent's efforts to be the minor's guardian. Appellant filed two motions seeking to dismiss respondent's July 2010 guardianship petition.

The probate court heard and denied one of appellant's motions on April 12, 2012. At the hearing, the probate court noted that the request to terminate the guardianship related to a temporary as opposed to a permanent guardianship. The probate court also indicated that the temporary guardianship was set to expire on the date of the hearing.[1] The probate court further noted that appellant had recently been arrested for possession of cocaine and was in a drug rehabilitation program for two years under Proposition 36.

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[1] At the trial and in the appeal, appellant raised an issue concerning the discrepancy between the probate court's statement as to when the temporary guardianship expired. Apparently, after the April 12, 2012 hearing, letters were filed on May 24, 2012 extending the temporary guardianship through January 17, 2013, the first day of trial. There was also a discrepancy as to the date on the letters because two dates existed, March 24, 2012 and May 24, 2012. Appellant asserted that either respondent or the minor may have forged the letters while the petitions were pending.

The probate court then offered to treat the motion as an objection to the guardianship. However, because objections had already been filed, the probate court denied the dismissal motion.

The probate court considered appellant's second dismissal motion on the first day of trial on January 17, 2013. The probate court described the motion as one to terminate respondent's temporary guardianship. Because the matter was set for trial on the permanent guardianship petitions on the same date, the probate court determined the dismissal motion was moot.

Trial on the Guardianship Petitions

Respondent testified at the trial that the minor has the most stable home with her. The minor had lived with her since he was three years old. The minor refers to respondent as "Mom" and she refers to him as "Son." Respondent was "there for all his birthdays and for each Christmas and Thanksgiving." Respondent was seeking the guardianship of the minor "because he should not have to leave his home where he's fine just where he is." The minor asked her "to stand in for him" so he would not have to leave his home.

Respondent further testified that the minor has always lived in Palmdale. He has had the same friends and same people around him all of his life. The minor attends church in Palmdale and is a member of the church's youth group. The minor is not in danger, is not in harm's way and goes to school every day. He is a normal teenager and is happy. He is bonded with his stepbrothers and half sisters. Appellant did not give the minor anything for Christmas, for his birthday, or for graduation. Appellant did not buy the minor school clothes.

After the minor began attending high school, he had some failing grades. However, his grades improved after respondent obtained a tutor for him at the church. Respondent also would not allow him to play basketball until his grades improved. Appellant and the paternal aunts testified that they had monitored the minor's grades online. They also attended school conferences and helped the minor with homework.

Respondent admitted that she forged appellant's name on a parental consent form. She testified that she did so with his consent. Prior to filing the petition, respondent visited appellant at the detention center and during the visit, he consented to the guardianship. Respondent testified that appellant did not sign the form because appellant's jailers would not allow her to pass the form to appellant. Appellant changed his mind after respondent testified against him at a preliminary hearing on the domestic violence arrest. Appellant denied giving respondent consent to be the minor's guardian.

Respondent also admitted that she did not provide the paternal grandmother's address in the guardianship petition. According to respondent, she wrote "unknown" because she could not remember the paternal grandmother's address when she was filling out the paperwork for her guardianship petition.

While they were married, respondent caught appellant at times smoking cocaine in their garage. Prior to 2009, appellant had been in drug rehabilitation programs three or four times.

Appellant testified that prior to his separation from respondent he was the primary caretaker. Respondent only did small things around the home. Appellant was employed as a landscaper during the course of the marriage.

Respondent instigated most of the physical fights he had with her. On one occasion, respondent stabbed him. Around 2006, he worked at Home Depot for about six months until he was terminated. Appellant told his supervisor about an incident with respondent in which respondent rammed his vehicle with her vehicle. Appellant was terminated for "that event and other things." During the marriage, appellant knew that respondent used marijuana; however, respondent and appellant did not use drugs together.

Appellant and the minor's biological mother used drugs. After appellant was released from prison in November 2011, he had a drug possession case in March 2012. He successfully completed drug rehabilitation for that case in September 2012.

Appellant initially testified that he had been off probation for a week and then corrected his testimony to state it was actually three days.

Appellant denied ever consenting to have respondent sign his name on the form which would allow respondent to act as the minor's guardian. His refusal to have her act as guardian is unrelated to her testimony against him at the preliminary hearing. Appellant has provided "minimal" support for the minor. He did not provide gifts at Christmas because of religious beliefs.

While appellant was imprisoned, he did not correspond with the minor. He sent two letters but stopped corresponding when the minor did not respond. Appellant lives in Palmdale with his fiancée and in Los Angeles with his mother. Appellant lives on food stamps and works for family members doing paint jobs and things of that nature. He also has a pending disability claim.

Appellant did not know the birthdates of his three daughters but appellant did know the minor's birthdate.

Appellant was questioned about his extensive criminal history by the probate court. Appellant has been arrested 12 or 13 times. Some of those arrests were for probation violations. Appellant has been incarcerated twice for domestic violence with other women prior to his marriage to respondent. Appellant was convicted of child stealing in 1994. Appellant testified that he is an alcoholic and has had four or five arrests for driving under the influence. In 2001, appellant was convicted of possession of cocaine. In 2004, appellant violated probation by drinking and driving. At the time of the May 2010 domestic violence arrest, appellant was on probation for a possession of cocaine conviction.

The probate court also questioned appellant about efforts to reunite the minor and appellant. The probate court noted that, about a year prior to the trial, appellant indicated that he was not ready to reunite with the minor. At the trial, appellant testified that he was ready to have the minor live with him.

The minor's counsel requested the probate court to allow the minor to testify in chambers. The probate court denied the request to have the minor testify on the ground that it would not be productive for him to be part of the process. The minor's interest was being represented by counsel.

At the conclusion of the parties' presentation of evidence, the probate court indicated it was troubled by respondent's forging of appellant's name on the consent form as well as her failure to provide the paternal grandmother's address. The probate court indicated that it was inclined to believe respondent was attempting to mislead the court. Respondent replied that she had taken "the word of an unstable person," who changed his mind. Respondent stated that she made a mistake and apologized.

On January 25, 2013, after taking the matter under submission, the probate court granted respondent's petition appointing her as the minor's guardian. The probate court: denied appellant's and the Harveys' objections to respondent's petition; sustained respondent's objections to the Harveys' petition; and denied appellant's dismissal motion. In granting respondent guardianship of the minor, the probate court indicated it considered: the minor's age; the minor's grades; the minor's wishes; the minor's relationship with all parties; the minor's residence since he was three years old; and the minor's half siblings living in respondent's home. The probate court also considered: respondent's forgery on the consent form; respondent's failure to provide the paternal grandmother's address; the acrimony between respondent and the paternal relatives; and appellant's criminal record and drug history.

The probate court found appellant's testimony was not credible. The probate court further found, by clear and convincing evidence, it would be detrimental for the minor to be in appellant's custody. The guardianship was in the minor's best interest. Respondent was suitable and qualified to be the minor's guardian.

The probate court entered the order appointing respondent as guardian on March 28, 2013 and issued letters of guardianship on April 2, 2013. Appellant filed a premature notice of appeal on February 19, 2013. We deem the premature appeal to be timely. (See

Cal. Rules of Court, rule 8.104(d); *In re Social Services Payment Cases* (2008) 166 Cal.App.4th 1249, 1262, fn. 4.)

DISCUSSION

I. Guardianship and Review Standards

"After the passage of the juvenile dependency statutes, probate guardianships . . . provide an alternative placement for children who cannot safely remain with their parents. [Citation.] The differences between probate guardianships and dependency proceedings are significant. [Citation.] Probate guardianships are not initiated by the state, but by private parties, typically family members. They do not entail proof of specific statutory grounds demonstrating substantial risk of harm to the child, as is required in dependency proceedings. [Citations.] Unlike dependency cases, they are not regularly supervised by the court and a social services agency. No governmental entity is a party to the proceedings. It is the family members and the guardians who determine, with court approval, whether a guardianship is established, and thereafter whether parent and child will be reunited, or the guardianship continued, or an adoption sought under [Probate Code] section 1516.5." (*Guardianship of Ann S.* (2009) 45 Cal.4th 1110, 1122.)

The probate court may appoint a guardian, "if it appears necessary or convenient." (Prob. Code, § 1514, subd. (a).) "A relative or other person on behalf of the minor, or the minor if 12 years of age or older, may file a petition for appointment of a guardian." (Prob. Code, § 1510, subd. (a).)

When a parent objects to the guardianship, he or she is entitled to notice and a hearing. (Prob. Code, § 1511.) "Early authorities held that in contested guardianship cases, parents were entitled to retain custody unless affirmatively found unfit. [Citation.] However, the unfitness standard fell out of favor and the best interest of the child, as determined under the custody statutes, became the controlling consideration. [Citations.] The Probate Code now specifies that the appointment of a guardian is governed by the Family Code chapters beginning with sections 3020 and 3040. (Prob. Code, § 1514, subd. (b).)" (*Guardianship of Ann S.*, *supra*, 45 Cal.4th at pp. 1122-1123.)

Family Code[2] section 3020 provides: "(a) The Legislature finds and declares that it is the public policy of this state to assure that the health, safety, and welfare of children shall be the court's primary concern in determining the best interest of children when making any orders regarding the physical or legal custody or visitation of children. The Legislature further finds and declares that the perpetration of child abuse or domestic violence in a household where a child resides is detrimental to the child."

Section 3011, subdivision (a) requires the probate court to consider the health, safety and welfare of the child in determining the best interests of a minor in a custody case including such factors as domestic abuse and habitual and continual illegal use of controlled substances and alcohol by a parent.

In determining the minor's best interests as provided in sections 3011 and 3020, section 3040 specifies the order of preference as: (1) joint custody or either parent; (2) a person in whose home the minor is living in a wholesome and stable environment; and (3) any person deemed suitable by the court who can provide adequate and proper care and guidance for the minor.

Probate Code section 1500 allows a parent to nominate or consent in writing to the nomination of a guardian for a minor child. (*Guardianship of Ann S.*, *supra*, 45 Cal.4th at p. 1122.) If a parent makes a nomination, in determining whether a nonparent should have custody under section 3040, subdivision (a)(2) or (3), the court must "consider and give due weight to the nomination of the person of the child by a parent." (§ 3043.)

Before granting custody to a nonparent over a parent's objection, "the court shall make a finding that granting custody to a parent would be detrimental to the child and that granting custody to the nonparent is required to serve the best interest of the child." (§ 3041, subd. (a).) The detriment finding must be by clear and convincing evidence. (§ 3041, subd. (b).) "[D]etriment to the child' includes the harm of removal from a stable placement of a child with a person who has assumed, on a day-to-day basis, the role of

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[2] All further statutory references are to the Family Code unless otherwise indicated.

his or her parent, fulfilling both the child's physical needs and the child's psychological needs for care and affection, and who has assumed that role for a substantial period of time. A finding of detriment does not require any finding of unfitness of the parents." (§ 3041, subd. (c).) In addition and notwithstanding the clear and convincing standard in subdivision (b), "if the court finds by a preponderance of the evidence that the person to whom custody may be given is a person described in subdivision (c), this finding shall constitute a finding that the custody is in the best interest of the child and that parental custody would be detrimental to the child absent a showing by a preponderance of the evidence to the contrary." (§ 3041, subd. (d).)

We review the probate court's custody determination for an abuse of discretion. (*In re B.G.* (1974) 11 Cal.3d 679, 699; *Guardianship of Vaughan* (2012) 207 Cal.App.4th 1055, 1067.) "The appropriate test for abuse of discretion is whether the trial court exceeded the bounds of reason. When two or more inferences can reasonably deduced from the facts, the reviewing court has no authority to substitute its decision for that of the trial court." (*In re Stephanie M.* (1994) 7 Cal.4th 295, 318-319.) "Only in an exceptional case, in which the record so strongly supported a party's claim to custody that a denial of that claim by the trial court would constitute an abuse of discretion may an appellate court itself decide who should be granted custody . . . ." (*In re B.G.*, *supra*, at p. 699.)

We review de novo the legal issue of the claim that the probate court did not comply with the Fourteenth Amendment of the United States Constitution by failing to find defendant unfit before appointing respondent as the minor's guardian. (*Guardianship of Vaughan*, *supra*, 207 Cal.App.4th at p. 1067; see also *Aryeh v. Canon Business Solutions, Inc.* (2013) 55 Cal.4th 1185, 1191.)

II. The Order Appointing Respondent as Guardian

Appellant contends the probate court erred in appointing over his objections respondent as the minor's guardian. We conclude the probate court acted well within its

discretion in determining it was in the minor's best interest to have respondent appointed as the minor's guardian.

The appointment was made three years after the petition was filed and after the completion of a two-day court trial. The minor, who was 15 at the time of trial, had been living in respondent's Palmdale home since he was three years old. The minor calls respondent "Mom." Respondent calls the minor "Son." The minor has younger half siblings, who also live in the home. The minor has two older stepsiblings, who have lived in the home since the minor was three years old. The minor attends school and church in Palmdale. The minor belongs to a youth group at the church. When the minor had academic issues, he obtained tutoring at the church.

During appellant's incarceration and drug rehabilitation program stays, the minor lived with respondent. Respondent gave the minor a stable home environment and provided for the minor's needs including clothing, food, shelter and care for the minor in appellant's absence. The minor spent holidays and birthdays with respondent. Even after appellant was released from custody, the record shows that respondent provided the bulk of minor's needs. Respondent testified that the minor wanted to stay in her home where he had lived most of his life.

Appellant had an extensive criminal history which included at least two domestic violence convictions and several drug and driving under the influence convictions dating back to 2000. (§ 3011, subd. (a).) Appellant testified that he was an alcoholic and admitted he was a drug user. Appellant was in drug rehabilitation programs while he had custody of the minor. Appellant was arrested for the domestic violence incident with respondent in May 2010. Respondent testified that appellant was under the influence of drugs and alcohol when he broke her finger and struck her. At the time of the May 2010 incident, appellant was on probation for a drug possession conviction. Appellant was arrested and incarcerated in state prison for violating his probation. His conduct led to this guardianship proceeding. After appellant was released from custody for the probation violation, he had a subsequent drug conviction. While appellant completed a

drug program for the latter conviction, at the time of trial, he had only been off probation for three days.

The aforementioned evidence supports the probate court's finding that it would be detrimental to the minor if respondent was not his guardian. (§ 3041, subd. (c).) The evidence also overwhelmingly demonstrates that it was in the minor's best interest to remain with respondent. Appellant has failed to show that the probate court abused its discretion in appointing respondent as the minor's guardian.

III. Appellant's Nomination of Paternal Relatives

Appellant claims that consistent with his nomination under the Probate Code, the probate court should have appointed the paternal relatives as the minor's guardians. However, as noted above, the Probate Code specifies that the appointment of a guardian is governed by sections 3020 and 3040 of the Family Code. (*Guardianship of Ann S., supra,* 45 Cal.4th at p. 1122.) Those statutes require the probate court to make the appointment based on the minor's best interests. Thus, appellant's nomination of paternal relatives was subject to the probate court's determination of the minor's best interests.

In this case, the probate court determined that it was in the minor's best interests to remain with respondent. In making the determination, the probate court rejected the paternal relatives' competing guardianship petition and denied appellant's dismissal motion. We cannot conclude that the probate court's exercise of its discretion under the circumstances of this case exceeded the bounds of reason. (*In re Stephanie M., supra,* 7 Cal.4th at pp. 318-319.)

IV. Miscellaneous Arguments

We are also not persuaded the guardianship order must be set aside because there was evidence respondent forged appellant's name and failed to give the paternal grandmother's address on the consent form. The probate court noted its concern over respondent's conduct in filling out the consent form. However, the probate court implicitly concluded that evidence did not outweigh the minor's best interest in having

respondent as his guardian or make respondent unsuitable to act as the guardian. The weight of this factor balanced against other factors in the case was within the probate court's province. (*Guardianship of Chandler* (1959) 170 Cal.App.2d 606, 610-611.) We cannot disturb its determination because it does not exceed the bounds of reason. (*In re Stephanie M., supra*, 7 Cal.4th at pp. 318-319.)

There is also no merit to the contention the minor's grades should have precluded the guardianship order. The probate court indicated that it had considered the minor's grades in appointing respondent as the guardian. Furthermore, the evidence showed that the minor's grades started to fail after he entered high school and participated in basketball. After respondent obtained a tutor for the minor, his grades improved. Respondent also prohibited him from participating in the basketball program at school until his grades improved. The weight of this factor balanced against other factors in the case was within the probate court's province. (*In re Stephanie M., supra*, 7 Cal.4th at pp. 318-319.)

Similarly, the claim that there were discrepancies in the dates concerning the temporary guardianship does not require that the guardianship order be set aside. The probate court's determination regarding the minor's best interest was within its discretion notwithstanding any discrepancies related to the temporary guardianship letters.

Appellant also claims the probate court improperly resolved his two dismissal motions related to the temporary guardianship by denying one and finding the other moot. Respondent argues the orders concerning the dismissal motions are not appealable because orders granting or revoking letters of temporary guardianship are not appealable. (§ 1301, subd. (a); *Conservatorship of Smith* (1970) 9 Cal.App.3d 324, 329.) Even if we assume that the probate court's rulings on the motions concerning temporary guardianship are reviewable, appellant did not include in the record on appeal the motion

which was denied at the April 12, 2012 hearing. (Cal. Rules of Court, rule 8.204(a)(1)(C) & (a)(2)(C).) We do not presume error and appellant's failure to provide the motion precludes further discussion on this issue. "A fundamental principle of appellate law is the judgment or order of the lower court is presumed correct and the appellant must affirmatively show error by an adequate record." (*Parker v. Harbert* (2012) 212 Cal.App.4th 1172, 1178.) The same standards apply to appellant who is representing himself on appeal because pro per status is not a ground for more lenient treatment. (*Rappleyea v. Campbell* (1994) 8 Cal.4th 975, 984–985; *Kobayashi v. Superior Court* (2009) 175 Cal.App.4th 536, 543.)

The clerk's transcript does contain the November 2012 dismissal motion seeking to set aside the temporary guardianship. However, we find no error in the probate's court's conclusion made during the hearing that motion was moot given that the trial of the permanent guardianship petitions was scheduled for the same date. In addition, the record shows that the motion contains all the objections, arguments and claims as to why respondent should not be the minor's guardian which were raised in the two-day trial. The probate court specifically resolved all the issues raised in the motion in the guardianship order.

V. The Unfit Parent Finding

Relying primarily *Troxel v. Granville* (2000) 530 U.S. 57 [147 L.Ed.2d 49] (*Troxel)*, appellant claims his Fourteenth Amendment rights under the United States Constitution were violated because the probate court failed to find him unfit before appointing a nonparent as guardian. We disagree.

Troxel, supra, 530 U.S. 57 considered the constitutionality of a Washington State statute which allowed "any person" to petition a superior court for visitation rights "at any time" when the visitation was in the child's best interest. (*Id*. at pp. 60-61.) Paternal grandparents petitioned for more frequent visitation rights with the children of their

deceased son over the mother's objection. (*Ibid*.) In a plurality opinion, *Troxel* concluded the statute was "breathtakingly broad." (*Id*. at p. 67.) And, the visitation statute as applied unconstitutionally infringed on the mother's fundamental parental right. (*Ibid*.)

Troxel explained that the visitation order in the grandparent's favor was not based on any special factors that might justify the State's interference with the mother's fundamental right to make decisions concerning the rearing of her children. (*Troxel, supra*, 530 U.S. at p. 68.) Moreover, there was no allegation or finding that the mother was an unfit parent. (*Ibid*.) *Troxel* reasoned "[t]hat aspect of the case is important for there is a presumption that fit parents act in the best interests of their children." (*Ibid*.)

However, *Troxel* does not control the disposition of this case because it is distinguishable on its facts. *Troxel* involved an overbroad Washington visitation statute. The unfitness discussion concerned whether or not the evidence supported the state's interference with the parent's decision making power over her children. Here, there is no issue of an overbroad visitation statute interfering with a parent's right to make a decision over a child. Rather, in this case, the issue was raised under specific Probate and Family Code guardianship and custody statutes addressing detriment and best interests of a minor, whose custodial parent was incarcerated. The California statutes require: the probate court to give "due weight" to appellant's preference (§ 3043); and to find by clear and convincing evidence that parental custody would be detrimental to the child before granting guardianship to a nonparent (§ 3041, subd. (b)).

This case differs from *Troxel* where there was no issue of fitness raised in that case which would defeat the presumption that mother was acting in the child's best interest. *Troxel* explained that "so long as a parent adequately cares for his or her children (i.e. is fit), there will normally be no reason for the State to inject itself into the

private realm of the family to further question the ability of that parent to make the best decisions concerning the rearing of that parent's children." (*Troxel, supra,* at pp. 68-69.) This was not what occurred in this case. Here, the guardianship issue was raised only after appellant was incarcerated on a drug abuse probation violation and after a domestic violence arrest.

In any event, section 3041, subdivision (c) expressly states that "a finding of detriment does not require any finding of unfitness of the parents." This statute withstood a constitutional challenge in *H.S. v. N.S.* (2009) 173 Cal.App.4th 1131, 1138-1142 (*H.S.*).) The detriment to the minor "requirement narrowly tailors the statute to protect the [minor's] interest with proper acknowledgement of a parent's superior right to custody over a nonparent." (*H.S., supra,* at pp. 1141-1142.) "The Legislature's use of the detriment to the child requirement instead of the parental unfitness requirement focuses on the child's interest. [Citation.] This is an appropriate balancing of the competing interests in cases involving custody because a custody ruling under section 3041 does not permanently sever the parental relationship, but it does have the potential to severely impact a child's well-being. Because the parental relationship can still be maintained notwithstanding an award of custody to a nonparent, and because of the state's compelling interest in protecting the child's well-being, the Legislature could properly conclude that the determinative factor should be harm to the child rather than parental fitness. [Citation.]" (*Ibid.*) Thus, in cases such as this one where termination is not an issue, the unfit showing is not required. "[A] parent who loses legal and/or physical custody in a family law custody proceeding is not foreclosed from regaining custody based on changed circumstances." (*Id.* at p. 1143, citing *Guardianship of Ann S., supra,* 45 Cal.4th at pp. 1129-1130, 1134-1135 & fns. 16-17 and *In re Marriage of Brown & Yana* (2006) 37 Cal.4th 947, 956.) There is no merit to the claim that the failure to find appellant unfit means the guardianship order must be set aside.

DISPOSITION

The guardianship order is affirmed. Respondent is awarded costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J. *

FERNS

We concur:

_____, Acting P. J.

ASHMANN-GERST

_____, J.

CHAVEZ

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* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.