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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

In re C.D. et al., Persons Coming Under the
Juvenile Court Law.

B256499

LOS ANGELES COUNTY
DEPARTMENT OF CHILDREN AND
FAMILY SERVICES,

(Los Angeles County
Super. Ct. No. CK98077)

Plaintiff and Respondent,

v.

T.W.,

Defendant and Appellant;

D.D.,

Defendant and Respondent.

C.D. et al.,

Appellants.

APPEAL from orders of the Superior Court of Los Angeles County. Julie Fox Blackshaw, Judge. Affirmed.

Patricia K. Saucier, under appointment by the Court of Appeal, for Appellants C.D. and B.D.

Anne E. Fragasso, under appointment by the Court of Appeal, for Appellant T.W.

Mark J. Saladino, County Counsel, Dawyn r. Harrison, Assistant County Counsel, Jeanette Cauble, Deputy County Counsel, for Plaintiff and Respondent.

David A. Hamilton, under appointment by the Court of Appeal, for Respondent D.D.

The court terminated dependency jurisdiction over twins C.D. and B.D., ordered joint legal custody for their parents, T.W. (Mother) and D.D. (Father) and awarded Father monitored daytime visits and semi-monitored overnight visits. Mother and the twins appeal both orders. We affirm.

FACTS AND PROCEEDINGS BELOW

The Department of Children and Family Services (DCFS) filed a petition on behalf of seven months old C.D. and B.D. and their two half-siblings J.D. (age 5) and A.M. (age 3), alleging that the children were at substantial risk of serious physical harm or illness pursuant to Welfare and Institutions Code section 300, subdivisions (a), (b) and (j).¹ In addition, based on charges by Mother, the petition alleged that A.M. had been sexually abused by Father. The petition further alleged that Father had a history of alcohol abuse and was currently abusing alcohol.

At the detention hearing the court found a prima facie case for detaining C.D. and B.D. The court ordered the children released to Mother and ordered family maintenance services for both parents.

The following month, DCFS filed an amended petition adding an allegation that all four children were at substantial risk of harm under section 300, subdivision (b), due to the domestic violence between Mother and Father committed within the previous five years.

Father and A.M. were interviewed by police. Father denied that he sexually abused A.M. and passed three lie detector tests. A.M. stated that she was not afraid of “Daddy” and no one had touched her. Mother stated she had never observed Father act inappropriately toward A.M. A case against Father was rejected by the District Attorney for lack of evidence.

At the jurisdictional hearing the court dismissed the allegations against Father regarding the sexual abuse of A.M. and assumed jurisdiction over the children pursuant

¹ All statutory references are to the Welfare and Institutions Code except where otherwise stated.

to section 300, subdivisions (a), (b), and (j). The court ordered the children placed in Mother's home under family maintenance services. In addition, the court ordered Father to participate in services including a drug and alcohol program, random drug testing, a 12-step program, a domestic violence program, conjoint counseling, parenting, and individual counseling. The court also ordered supervised visitation for Father.

At a progress hearing the court gave DCFS discretion to liberalize Father's visitation with C.D. and B.D. and ordered Father to drug test with DCFS.

At the next review hearing the court terminated jurisdiction over J.D. and A.M. and ordered them placed with Mother. The court set a contested review hearing as to C.D. and B.D.

At the contested review hearing DCFS reported that after the previous hearing it liberalized Father's visitation to unmonitored. Mother was upset by the change and attempted to have management override the change in visitation. Mother did not have the children available for the first weekend visit, and did not confirm the second weekend visit with Father. Father came to Mother's home on the visit day. Mother telephoned the police and Father was arrested for violating a restraining order that Mother had obtained. At the time of Father's arrest, police stated there was a very strong odor of alcohol on his breath. DCFS also reported that it had randomly tested Father a few days before this incident and that he tested positive for alcohol. Based on the Father's frequent use of alcohol and his inability to display any techniques learned in his counseling, parenting and domestic violence classes, DCFS changed its recommendation and requested that Father's visitation continue to be monitored.

At the next review hearing the twins' trial counsel requested that jurisdiction over the children be terminated and that the court order monitored visitation for Father. Father requested unmonitored visitation with the children. The court stated it was concerned about Father's recent conduct at Mother's home and therefore ordered that Father's visitation be monitored. Father's counsel requested one overnight visit for Father to be monitored by the paternal grandmother. The twins' counsel objected on the ground that

those would essentially be unmonitored visits. Counsel for Mother and DCFS also objected.

The court made findings that Father had not shown substantial progress with his alcohol abuse treatment and random testing, his domestic violence program and individual counseling.

DCFS requested that in light of those findings the court address DCFS's earlier recommendation that Father not receive joint legal custody under the Family Code presumption that a person who has perpetrated domestic violence on the other parent should not have joint legal custody of their children. (Fam. Code, § 3044, subd. (a).) The twins' trial counsel stated she was in agreement with joint legal custody for Father. Mother's counsel continued to object, however, and requested findings pursuant to Family Code section 3044. The court made no specific findings in that regard. The court ordered jurisdiction over the children to terminate, subject to family law orders that would issued the following day. The court continued the hearing to the following day to allow counsel time to present case law on the issue of whether the court could order a monitored overnight visit. (This issue is discussed in Part II, *post*.)

At the hearing the following day, the court ordered nine hours of monitored visitation for Father per week and "one monitored overnight visit a month that must occur in the home of [p]arental [g]randmother [Ms. B]. At [the] time [Ms. B.] is asleep, Father is awarded unmonitored visits so long as [they] take[] place in the home of the paternal grandmother."

Counsel for the county requested a stay of the order for the unmonitored part of the overnight visit, but the court denied that request.

The court found the Family Code section 3044 presumption against joint legal custody was overcome by a preponderance of the evidence that granting Father joint legal custody was in the best interests of the children. In making this finding, the court found that Father had been compliant with his programs and the relationship he had with the children overcame the presumption. Counsel for the children stated she was "absolutely . . . in agreement for joint legal custody for the father." She noted that "it is

important that he's involved in the twins' lives. He has been visiting I believe three times a week, so I am definitely in agreement with [joint legal custody].”

Mother and the twins filed timely notices of appeal.

DISCUSSION

I. THE COURT DID NOT ABUSE ITS DISCRETION IN ORDERING JOINT LEGAL CUSTODY OF THE TWINS.

Mother and the twins argue that the court abused its discretion in finding that Father rebutted the presumption that a parent who has perpetrated domestic violence on the other parent should not have joint legal custody of their children. (Fam. Code, § 3044.)² Family Code section 3044, subdivision (a) states in relevant part: “Upon a finding by the court that a party seeking custody of a child has perpetrated domestic violence against the other party seeking custody of the child or against the child or the child’s siblings within the previous five years, there is a rebuttable presumption that an award of sole or joint physical or legal custody of a child to a person who has perpetrated domestic violence is detrimental to the best interest of the child This presumption may only be rebutted by a preponderance of the evidence.”

Subdivision (b) of the statute lists a number of factors the court shall and shall not consider in determining whether the presumption has been rebutted. It provides: “In determining whether the presumption set forth in subdivision (a) has been overcome, the court shall consider all of the following factors: (1) Whether the perpetrator of domestic violence has demonstrated that giving sole or joint physical or legal custody of a child to the perpetrator is in the best interest of the child. In determining the best interest of the child, the preference for frequent and continuing contact with both parents . . . or with the noncustodial parent . . . may not be used to rebut the presumption, in whole or in part. (2) Whether the perpetrator has successfully completed a batterer’s treatment program (3) Whether the perpetrator has successfully completed a program of

² We question whether the children’s’ attorney on appeal can take a stand different from that advocated by the children’s’ attorney in the trial court. We need not address that question, however, because we affirm the position taken by trial counsel.

alcohol or drug abuse counseling if the court determines that counseling is appropriate.

(4) Whether the perpetrator has successfully completed a parenting class if the court determines the class to be appropriate. (5) Whether the perpetrator is on probation or parole, and whether he or she has complied with the terms and conditions of probation or parole. (6) Whether the perpetrator is restrained by a protective order or restraining order, and whether he or she has complied with its terms and conditions. (7) Whether the perpetrator of domestic violence has committed any further acts of domestic violence.”³

We review the court’s custody order for abuse of discretion. (*In re Stephanie M.* (1994) 7 Cal.4th 295, 318.) We find no abuse of discretion here.

It is undisputed that Father was not on probation or parole and that he had not committed any further acts of domestic violence.

The DCFS reports showed that Father was completing his domestic violence and parenting classes as directed by the court and that he attended his monitored visits with the twins twice a week for two hours each visit. Father “is attentive to his children’s needs, brings supplies and toys for them, and does an excellent job in providing care to his children during the visitation.” The children’s worker concluded that Father “appears very dedicated and skilled in caring for his children [and] is very consistent with his child visitation.”

Mother points out that Father violated the restraining order by coming to her house to pick up the children on one of his visitation days and that he does not have perfect attendance at his classes and counseling sessions. Nonetheless, the evidence supports a finding that the father has rebutted the presumption regarding domestic violence by his participation in programs and excellent parenting.

³ Father maintains that Family Code section 3044 does not apply to custody orders in dependency cases. (See Fam. Code, § 3021.) We need not decide this question, because assuming that the presumption does apply to dependency cases, we agree with the trial court that Father rebutted it.

II. THE COURT DID NOT ABUSE ITS DISCRETION IN PERMITTING FATHER A SEMI-MONITORED VISIT WITH HIS CHILDREN ONCE A MONTH AT HIS MOTHER’S HOME.

In addition to nine hours of monitored visits with C.D. and B.D. per week, the court also allowed Father “one monitored overnight visit a month that must occur in the home of Parental Grandmother [Ms. B].” We refer to this as a semi-monitored visit because it allows Father to remain in the grandmother’s home with the children even when grandmother is asleep and no one else is present.

Mother and the twins’ counsel object to the overnight visits arguing that the same risks that require Father’s daytime visits with the children to be monitored would exist at night when grandmother is asleep. They cite as instructive a decision in which the appellate court held that it was an abuse of discretion to allow overnight visits by an adoptive parent who had molested his adopted son Ethan, the dependent child. (*Los Angeles County Dept. of Children & Family Services v. Superior Court* (2006) 145 Cal.App.4th 692 (*Ethan*).) The court reasoned that even if the non-offending parent would be at home most of the time, there would be periods when that parent was showering or asleep and therefore not monitoring the visit. “At least when the threat to the dependent child is the likely recurrence of sexual abuse, the concept of monitored visitation is fundamentally incompatible with around-the-clock in-home contact.” (*Id.* at p. 699.)

The *Ethan* decision does not aid Mother.

The court in our case was aware of the *Ethan* decision, discussed it at length with counsel for the parties, weighed the pros and cons and concluded: “For the period of time that the grandmother is asleep, it is considered to be an unmonitored visit. But the court believes that the risk is not enough to not permit that to happen.”

Furthermore, as the court pointed out, the present case is distinguishable on its facts from the *Ethan* case. In *Ethan* the offending parent was allowed to move back into the family home with the child he had molested. (*Ethan, supra*, 145 Cal.App.4th at p. 698.) In our case, Father never abused either of the twins and was only spending the night with them, not moving in.

Any risk to the twins is further minimized by the court's instructions to Father that on his visiting nights he was not to put the children to bed and then go out drinking but to stay in the home with his mother and his children.

DISPOSITION

The orders are affirmed.

NOT TO BE PUBLISHED.

ROTHSCHILD, P. J.

We concur:

CHANEY, J.

BENDIX, J. *

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