Filed 11/27/17 Guardianship of Brian M. CA

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

Guardianship of BRIAN M. et al., Minors.	B269487 (Los Angeles County Super. Ct. No. KP014388)
GARY M. et al., Petitioners and Respondents, v. JENNIFER D., Objector and Appellant. [And four other cases.*]	

* Gary M. v. Jude L. (No. B271346); Gary M. v. Jennifer D. (No. B271347); Gary M. v. George D. (No. B271348); Gary M. v. Jennifer D. (No. B272325).

APPEALS from orders of the Superior Court of Los Angeles County, Thomas Trent Lewis, Judge. Affirmed.

George J., in pro. per., for Objector and Appellant in No. B271348.

Jennifer J., in pro. per., for Objector and Appellant in Nos. B269487, B271347, and B272325.

Jude L., in pro. per., for Objector and Appellant in No. B231346.

Haslam & Perri, Donald G. Haslam; Arias & Lockwood, and Christopher D. Lockwood for Petitioners and Respondents.

In November 2007, Jennifer D. (mother) and George D. (stepfather) abducted then-eight-year-old Brian C. M., and six-year-old twins Christian M. and Evan M. (the boys), mother's sons with Brian G. M. (father), to thwart a trial court custody order. Mother and stepfather were apprehended in Mexico in 2011 and they and the boys were returned to the United States. Gary M. and Cathleen M., the boys' paternal grandparents, petitioned the trial court for the boys' guardianship, and paternal grandfather requested protective orders against mother, stepfather, Jude L. (maternal grandfather), and Alicia L. (maternal grandmother). The trial court granted all of those requests. Mother appeals from the trial court's permanent guardianship order (B269487) and an order denying mother's subsequent petition to terminate the guardianship (B272325). Maternal grandfather (B271346), mother (B271347), and stepfather (B271348) also appeal from renewals of the protective orders. We affirm.

BACKGROUND[1]

Factual Background

Father petitioned the trial court in 2006 to establish a parental relationship with the boys. After protracted and contentious litigation featuring mother's allegations—eventually discredited—that father sexually abused the boys, father and mother on November 13, 2007 entered into a stipulated custody order intended to normalize the boys' relationships with both parents. Mother was to leave the boys at paternal grandparents' home beginning November 18, 2007 for what the order termed an "extended visit," and both parents were to arrange separate supervised visits with the boys through a reunification counselor. These terms were to continue until further court order or until the parties stipulated to a different arrangement.

Mother never took the boys to paternal grandparents' home. Instead, claiming she was protecting the boys from father, mother abducted the boys and took them to Mexico.[2] With help from stepfather, maternal grandparents, and other maternal relatives, mother gave the boys assumed names and hid them in Mexico for nearly four years. She home schooled them and

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[1] Appellants designated neither a reporter's transcript nor a sufficient clerk's transcript for us to extract a complete factual or procedural history. Much of the information in this summary, therefore, is from the trial court's June 16, 2015 statement of decision on permanent guardianship.

[2] Although mother's sexual abuse accusations were discredited in 2007, they pervade the record and continue to drive mother's argument. And mother argued for the first time at the guardianship hearing that the twins, almost 14 by that time, were conceived as a result of father raping her.

taught them to lie about their identities. Mother moved the boys to eight different locations in Mexico to avoid detection.

In August 2011, Mexican authorities cooperating with the Federal Bureau of Investigation apprehended mother and stepfather and returned them and the boys to California. (*People v. D[.]* (2015) 237 Cal.App.4th 1124, 1127 (*D.2*).) Upon the boys' return, they were placed in paternal grandparents' physical custody, where they remain.

Criminal Proceedings

Mother and stepfather were each charged under Penal Code section 278.5 with three counts of depriving paternal grandparents of their visitation rights. (*People v. D[.]* (Jan. 23, 2014, B245146) [nonpub. opn.] (*D.1*).) They pled nolo contendere to the charges and appealed, challenging the charges on legal grounds. (*Ibid.*) Because we concluded we could not reach mother and stepfather's legal argument after a nolo contendere plea, we reversed and remanded the case on January 23, 2014, instructing the trial court to vacate the pleas and reinstate the information for further proceedings. (*Ibid.*)

On remand, mother and stepfather consented to a court trial in April 2014 on stipulated facts. (*D.2*, *supra*, 237 Cal.App.4th at p. 1128.) The trial court found them each guilty on all three counts. (*Ibid.*) We affirmed. (*Id.* at p. 1132.)

Procedural Background

After mother and stepfather abducted the boys, the boys' attorney moved the court for an order granting father sole legal and physical custody. The trial court granted the motion on November 19, 2007.[3] Father stipulated the boys would be placed in paternal grandparents' physical custody on their recovery.

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[3] Mother's custodial rights have never been reinstated.

Upon the boys' return from Mexico, paternal grandparents petitioned the trial court to be appointed the boys' guardians and the trial court granted temporary guardianship in September 2011, again ordering supervised visitation with both parents. Paternal grandfather also requested and received protective orders against mother, stepfather, and maternal grandparents pursuant to the Domestic Violence Prevention Act, Family Code section 6200 et seq. (DVPA).

The meager record suggests that after the trial court entered its initial orders, it held the guardianship proceedings in abeyance pending the outcome of the criminal proceedings.[4] The trial court heard the paternal grandparents' guardianship petition over seven days in 2015. On June 16, 2015, pending entry of a final permanent guardianship order, the trial court filed a lengthy and detailed statement of decision coupled with temporary custody orders.

The trial court found by clear and convincing evidence it would be detrimental for the boys to return to the custody of either parent and placement with paternal grandparents was in

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[4] The trial court's written ruling granting permanent guardianship notes that mother and stepfather invoked their right to remain silent in the guardianship proceedings. The factual stipulation mother and stepfather entered in the criminal case in April 2014 likely allowed the guardianship proceedings to move forward. The criminal proceedings, coupled with the trial court's description of mother's vigorous opposition to the guardianship petition, could readily account for what appears to be a lag between the trial court's 2011 temporary guardianship order and the 2015 permanent guardianship order.

the boys' best interest.[5] On November 10, 2015, the trial court entered its final order granting permanent guardianship and setting the terms of mother's supervised visitation.[6] Mother timely appealed. (Cal. Rules of Court, rule 8.104(a); *G & W Warren's, Inc. v. Dabney* (2017) 11 Cal.App.5th 565, 570, fn. 2; Code Civ. Proc., § 12a.)

In conjunction with permanent guardianship, paternal grandfather also sought to renew the protective orders against mother, stepfather, and maternal grandfather. Mother simultaneously requested an order terminating the guardianship. Over three days in February 2016, the court heard the protective order renewals and mother's request.

In March 2016, the trial court renewed the protective orders permanently as to paternal grandparents and for five years as to the boys. It later denied mother's request to terminate the guardianship. Mother, stepfather, and maternal

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[5] The trial court based its decision, at least in part, on mother's acknowledgment that she would abduct the boys again. The trial court stated: "Based on [mother's] testimony, the court finds a grave and substantial risk that mother would abduct the children again if she had the chance; and she would remove the boys from the United States for the purpose of keeping the boys from having any relationship with the paternal grandparents or [the boys'] father."

[6] The trial court reported that father's participation in the litigation below and toward reunification and normalization with the boys was lacking. The trial court therefore ordered father to have no contact with the boys pending father's compliance with the trial court's existing orders and further order of the court. Father did not appeal and is not a party in these consolidated appeals.

grandfather timely appealed the renewed protective orders, and mother timely appealed the order denying her request to terminate the guardianship.[7]

DISCUSSION

Mother, stepfather, and maternal grandfather raise several broad categories of challenges to the trial court's orders. First, they challenge the legality of the orders renewing the DVPA protective orders, arguing the orders are invalid because the trial court lacked subject matter jurisdiction and because the protective orders' initial and renewed terms violated Code of Civil Procedure section 527.6. Mother challenges the legality of the permanent guardianship order, arguing that it differs from the earlier statement of decision. Next, appellants raise a variety of constitutional challenges to all of the trial court's orders, arguing: (1) the protective orders violate the Second Amendment because they prohibit owning or possessing guns; (2) the protective orders operate as criminal penalties against mother and stepfather, and the guardianship orders operate as criminal penalties against mother, violating constitutional double jeopardy prohibitions; and (3) the court's guardianship orders violate mother's due process rights because the court did not make an express finding that mother was an unfit parent. As a separate constitutional challenge, mother contends judicial bias permeated the proceedings below, violating her right to due process. Mother

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[7] We understand the order granting the paternal grandparents' request for permanent guardianship to be an order granting letters of guardianship, and the order denying mother's request to terminate the guardianship to be a refusal to grant an order revoking letters of guardianship, under Probate Code section 1301, subdivision (a).

further contends the trial court erred by finding it would be detrimental for the boys to return to her custody. And mother and maternal grandfather contend the trial court abused its discretion by admitting testimony from a witness they characterize as having been bribed by the boys' guardians.

Scope of Review

Two basic precepts of appellate law constrain our review. First, appellants must raise in the trial court any issue they wish to have an appellate court consider, but neither mother, stepfather, nor maternal grandfather raised in the trial court any question presented now on appeal.

"Points not raised in the trial court will not be considered on appeal." (*Hepner v. Franchise Tax Bd.* (1997) 52 Cal.App.4th 1475 (*Hepner*); *Dimmick v. Dimmick* (1962) 58 Cal.2d 417, 422; *Phillips v. Campbell* (2016) 2 Cal.App.5th 844, 853 [constitutional questions are forfeited in civil cases if not first raised in trial court]; see *People v. Cavanaugh* (1965) 234 Cal.App.2d 316, 321 [claims of trial judge bias or prejudice forfeited if not raised before matter submitted for decision in trial court]; see also Evid. Code, § 353, subd. (a) [erroneous admission of evidence forfeited unless record discloses the issue was properly raised in the trial court].) "Even a constitutional right must be raised at the trial level to preserve the issue on appeal." (*In re Marriage of Fuller* (1985) 163 Cal.App.3d 1070, 1076; accord *U.S. v. Olano* (1993) 507 U.S. 725, 731.)

"'The rule is founded upon considerations of practical necessity in the orderly administration of the law and fairness to the court and the opposite party, and upon the principles underlying the doctrines of waiver and estoppel.'" (*Glendale Unified School Dist. of Los Angeles County v. Vista del Rossmoyne*

Co. (1965) 232 Cal.App.2d 493, 496; accord *People v. Saunders* (1993) 5 Cal.4th 580, 590.) The "general rule is especially true when the theory newly presented involves controverted questions of fact or mixed questions of law and fact." (*Panopulos v. Maderis* (1956) 47 Cal.2d 337, 341.) An exception: When the question is one of law only and is based on undisputed facts, an appellate court has discretion to consider the issue for the first time on appeal. (*Ward v. Taggart* (1959) 51 Cal.2d 736, 742; *Gilliland v. Medical Bd. of California* (2001) 89 Cal.App.4th 208, 219.)

Second, because appellants bear the burden of establishing trial court error, they must provide a record of trial court proceedings sufficient to allow the appellate court to consider issues properly raised. (*People v. Neilson* (2007) 154 Cal.App.4th 1529, 1534; *In re Estate of Kievernagel* (2008) 166 Cal.App.4th 1024, 1031 [reporter's transcript necessary for substantial evidence review]; *Wagner v. Wagner* (2008) 162 Cal.App.4th 249, 259 [reporter's transcript necessary for abuse of discretion review].)

Although the clerk's transcript refers to 10 days' worth of hearings, neither mother, stepfather, nor maternal grandfather designated any part of the reporter's transcript; we therefore have no reporter's transcript. Without a reporter's transcript or settled statement under California Rules of Court, rule 8.137, we are unable to review challenges to evidence or other rulings based on argument before the trial court.

We will, therefore, consider neither mother's challenges to the sufficiency of the evidence nor appellants' claims the trial court abused its discretion by admitting certain evidence. Moreover, the record is insufficient to allow review of any as-applied constitutional challenge; we will not find a constitutional

infirmity where there is no factual basis to do so. (See *California Assn. for Safety Education v. Brown* (1994) 30 Cal.App.4th 1264, 1287 (*Safety Education*); cf. *Southern California Gas Company v. Flannery* (2016) 5 Cal.App.5th 476, 497.) And though we appreciate the weight of *any* claim of judicial bias, mother has not provided a record sufficient for us to resolve that question on any more than a superficial level.

The appellants' pro. per. status relaxes the restrictions neither on our discretion nor on the permissible scope of our review. Neither may we hold litigants in propria persona to different standards than we hold attorneys. (Cf. *Rappleyea v. Campbell* (1994) 8 Cal.4th 975, 985 ["requiring or permitting exceptional treatment of parties who represent themselves would lead to a quagmire in the trial courts, and would be unfair to the other parties to litigation"].)

In spite of appellants' failure to raise below any of the issues they ask us to consider, and their failure to designate an adequate record for our review of any fact-dependent question, we will nevertheless exercise our discretion to consider the pure legal questions they raise. (*Suarez v. City of Corona* (2014) 229 Cal.App.4th 325, 333.)

When questions of law turn on undisputed dispositive facts, our review is de novo. (*Singletary v. Local 18 of the International Brotherhood of Electrical Workers* (2012) 212 Cal.App.4th 34, 41.)

Subject Matter Jurisdiction

Mother, stepfather, and maternal grandfather contend the trial court lacked jurisdiction to renew the DVPA protective orders because paternal grandparents filed the renewal requests in one department of the Los Angeles Superior Court and then, at the trial court's direction, re-filed them in a different department.

"Subject matter jurisdiction is a fundamental requirement for judicial consideration of claims." (*Saffer v. JP Morgan Chase Bank* (2014) 225 Cal.App.4th 1239, 1248.) "'The jurisdiction of causes is vested by the constitution in the [superior] *court*, not in any particular judge or department thereof.'" (*Magallan v. Superior Court* (2011) 192 Cal.App.4th 1444, 1453 [insertion and italics in original].) "'Transferring a cause for trial or disposition from one of those departments to another does not effect a change or transfer of the jurisdiction of that cause; that remains at all times in the court as a single entity.'" (*Id.* at pp. 1453-1454, quoting *White v. Superior Court* (1895) 110 Cal. 60, 67.) "There is but one Los Angeles Superior Court." (*People v. Dependable Ins. Co.* (1988) 204 Cal.App.3d 871, 874; Cal. Const., art. VI, § 4.) Administrative redistribution of court business does not deprive the court of jurisdiction.

Domestic Violence Prevention Act Protective Orders

Mother, stepfather, and maternal grandfather argue Code of Civil Procedure section 527.6 limited the permissible terms of the initial protective orders to 21 days and any renewal to five years.

The protective orders were entered not under Code of Civil Procedure section 527.6, but rather under the DVPA, which allows initial protective orders for a term of up to five years and permanent renewals. (Fam. Code, § 6345, subd. (a).) The terms of the trial court's protective orders complied with Family Code section 6345.

At oral argument, maternal grandfather raised notice and the permanence of the protective orders as trial court errors. Section 6354 specifies that either the issuance or renewal of a DVPA protective order is "subject to termination or modification

by further order of the court either on written stipulation filed with the court or on the motion of a party." (Fam. Code, § 6345, subd. (a).) An order denying a motion to terminate a DVPA restraining order is an appealable order. (*Loeffler v. Medina* (2009) 174 Cal.App.4th 1495, 1502, fn. 9.) Maternal grandfather, mother, and stepfather have procedures available to them—should circumstances warrant—to have the protective orders terminated or modified.

Likewise, we are not persuaded by the notice contention. As noted above, appellants are responsible for securing the record on appeal. By not securing a record that would allow us to review whether the appellants opposed the restraining orders, whether issues were raised in the trial court, whether notice was challenged, or whether notice was or was not given, the appellants have failed to meet their burden in this court. (*People v. Neilson* (2007) 154 Cal.App.4th 1529, 1534.) We will not presume error where the record does not show it. (*People v. Leonard* (2014) 228 Cal.App.4th 465, 478.)

Inconsistency Between Ruling & Order

Mother contends inconsistency between the trial court's statement of decision and the permanent guardianship order entered based on her perception of that statement of decision invalidates the order. The trial court has discretion to change or modify its own interim decisions. (*Kerns v. CSE Ins. Group* (2003) 106 Cal.App.4th 368, 388.) Differences between the June 16, 2015 statement of decision and the November 10 order—*if* any exist—impact neither the order's legitimacy nor its efficacy.

Constitutional Challenges

The appellants challenge the trial court's orders on a variety of constitutional grounds. A statute may be facially

unconstitutional—unconstitutional because its provisions "inevitably pose a present total and fatal conflict with applicable constitutional provisions"—or unconstitutional as applied to a particular set of facts. (*Kyle O. v. Donald R.* (2000) 85 Cal.App.4th 848, 860-861 (*Kyle O.*).) Whether the challenge is facial or as-applied, the statute is "presumed to be constitutional and . . . must be upheld unless [the] unconstitutionality 'clearly, positively and unmistakably appears.'" (*Hale v. Morgan* (1978) 22 Cal.3d 388, 404.) As we noted above, the paucity of the record before us precludes resolution of appellants' as-applied constitutional challenges. (See *Safety Education*, *supra*, 30 Cal.App.4th at p. 1287.)

Mother argues *Troxel v. Granville* (2000) 530 U.S. 57 (*Troxel*) requires us to either (a) facially invalidate Family Code section 3041 because the statute does not require a finding of parental unfitness, or (b) determine that the trial court's application of the statute to this case was unconstitutional because the trial court did not find mother was an unfit parent. Mother's arguments are unavailing. Permitting "custody to be awarded to a nonparent without a finding of parental unfitness" does not render Family Code section 3041 facially unconstitutional. (*H.S. v. N.S.* (2009) 173 Cal.App.4th 1131, 1141.) "Section 3041, in addition to the best interest of the child requirement, includes a requirement of detriment to the child from parental custody. Considering the competing interests at stake, the use of the detriment standard achieves a proper balance that comports with constitutional due process." (*Ibid.*) We reject mother's facial challenge.

Mother's reliance on *Troxel* for an as-applied challenge is misplaced. *Troxel* focused heavily on a *custodial* parent's

agreement that the grandparents seeking visitation should have some visitation rights. (*Kyle O.*, *supra*, 85 Cal.App.4th at p. 861; *Guardianship of L.V.* (2006) 136 Cal.App.4th 481, 493 ["decisions in *Troxel* and its California progeny . . . dealt with judicial interference in the day-to-day child rearing decisions of a fit, *custodial* parent"]; *Fenn v. Sherriff* (2003) 109 Cal.App.4th 1466, 1483-1484.) Mother has not had *any* custodial *rights* since 2007, and we can conclude based on her acknowledgment to the trial court that mother would oppose—to the point of again abducting the boys—any of father's family having any part in the boys' lives. *Troxel* is inapposite.

The remaining constitutional challenges are equally unpersuasive. Mother and stepfather urge that the protective orders invoke double jeopardy; mother argues the same about the guardianship orders. Even if the guardianship orders or the protective orders could be construed as punishments for mother and stepfather abducting the boys, the "protections of the Double Jeopardy Clause are not triggered by litigation between private parties." (*United States v. Halper* (1989) 490 U.S. 435, 451, abrogated on another ground by *Hudson v. United States* (1997) 522 U.S. 93; see *In re Carina C.* (1990) 218 Cal.App.3d 617, 624 [state double jeopardy clause not applicable to civil proceeding "designed not to prosecute the parents but to protect the child"]; see also *Guardianship of Ann S.* (2009) 45 Cal.4th 1110, 1133 ["state is not a party to a probate guardianship, and its resources are not pitted against the parent"].)

Neither do the protective orders facially violate the Second Amendment. (*Altafulla v. Ervin* (2015) 238 Cal.App.4th 571, 581.) And the trial court declining to appoint mother counsel in the guardianship proceedings—if it declined to do so—does not, of

itself, violate due process.[8] (*Guardianship of H.C.* (2011) 198 Cal.App.4th 1235, 1245-1246 (*H.C.*).)

Finally, mother's claim the trial court was biased because it ruled against her and because it unduly prolonged the guardianship proceedings finds no support in the record.[9] "'The Due Process Clause entitles a person to an impartial and disinterested tribunal in both civil and criminal cases.'" (*Brown v. American Bicycle Group, LLC* (2014) 224 Cal.App.4th 665, 673 (*Brown*), quoting *Marshall v. Jerrico, Inc.* (1980) 446 U.S. 238, 242.)

Adverse rulings do not reflect personal bias. (*Brown*, *supra*, 224 Cal.App.4th at p. 674.) And the trial court is entitled to control its docket within the bounds of applicable statutes and court rules. (*Rutherford v. Owens-Illinois, Inc.* (1997) 16 Cal.4th 953, 967.) What we *can* discern from the record is that the criminal proceedings and mother's forceful opposition to paternal grandparents' guardianship, including newly-forged accusations of an alleged 14-year-old rape, dramatically increased the scope of the litigation and, therefore, the time required to prepare for trial. Under the circumstances, we find no evidence in the record that the delay was unwarranted or even remarkable.

Mother's failure to secure an adequate record for our review precludes any further bias analysis. (See *H.C.*, *supra*, 198 Cal.App.4th at p. 1246; *Foust v. San Jose Const. Co., Inc.* (2011)

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[8] The record evidences no such request or denial.

[9] We note again mother has forfeited her judicial bias challenge by not raising the issue in the trial court. (*People v. Lewis* (2006) 39 Cal.4th 970, 994; *People v. Guerra* (2006) 37 Cal.4th 1067, 1111.)

198 Cal.App.4th 181, 187.) We find no judicial bias in the proceedings below.

DISPOSITION

The trial court's orders appointing paternal grandparents as the boys' permanent guardians, denying mother's petition to terminate the guardianship, and renewing the DVPA protective orders are affirmed. Paternal grandparents are awarded costs on appeals B269487 and B272325 and paternal grandfather is awarded costs on appeals B271346, B271347, and B271348.

NOT TO BE PUBLISHED.

CHANEY, J.

We concur:

ROTHSCHILD, P. J.

LUI, J.