Filed 2/28/18 In re H.V. CA2/1

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

In re H.V., et al., Persons Coming Under the Juvenile Court Law.	B284067 (Super. Ct. L.A. County No. DK21083)
LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. GILBERTO V., Defendant and Appellant.	

APPEAL from an order of the Superior Court of Los Angeles, Julie Fox Blackshaw, Judge. Affirmed and remanded with directions.

Christopher R. Booth, under appointment by the Court of Appeal, for Defendant and Appellant Gilberto V.

Mary C. Wickham, County Counsel, R. Keith Davis, Assistant County Counsel, and William D. Thetford, Principal Deputy County Counsel, for Plaintiff and Respondent.

Gilberto V., father of H.V. and H.G.V. (Father), appeals from a dispositional order made pursuant to Welfare and Institutions Code section 361, subdivision (c)(1) removing the children from his custody.[1] Father contends section 361, subdivision (c)(1) applies only to a parent with whom a child resides, and because H.V. and H.V.G. did not reside with Father, the court had no authority under that section to make the orders restricting his rights to the children. Father also contends the juvenile court erred by limiting him to monitored visitation. We agree with Father that section 361, subdivision (c) does not apply but we conclude that Father has failed to demonstrate prejudice. We do not agree that the juvenile court erred by limiting Father's visitation with the children. Therefore, we affirm but remand with directions.

FACTUAL AND PROCEDURAL BACKGROUND

At 3:15 in the morning on January 10, 2017, agents of the Huntington Park Police Department and the federal Drug Enforcement Agency executed a search warrant at a two-room business premises in Walnut Park. Before searching the

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[1] All statutory references are to the Welfare and Institutions Code unless otherwise indicated.

premises, agents detained three occupants, Cynthia S. (Mother), her six-year-old daughter H.G.V., and her 16-year-old nephew Freddy R. (Freddy).

The premises had one entrance that led to a room to the south. The south room was separated from a room to the north by an internal solid wall and a door fitted with a deadbolt. The agents observed there was no source of heat, no toilet, and no ventilation. Clothing, blankets, children's toys, ammunition and discarded food were strewn across the floor and furniture.

The agents found two military hand grenades hidden in the ceiling of the south room. They also found an unloaded .22 caliber rifle hidden above ceiling tiles in the north room. The agents found a loaded nine-millimeter handgun and an iPhone in a red and gray phone case under a couch cushion. Next to the couch, agents found a shoebox containing ammunition and gun cleaning equipment. Resting on a chair was a military style tactical vest fitted with metal plates. Agents also found and took into evidence a notebook containing "gang writing." Freddy told agents the iPhone belonged to him, but denied any knowledge of the handgun.

Mother denied any knowledge of the hand grenades, guns, or ammunition. She told officers that she and H.G.V. moved to California on December 1, 2016, and had been staying both at the business and her grandmother's house. Mother told agents that her sister Myrna S. had rented the premises to open a clothing store.

Huntington Park police placed Mother under arrest for a violation of California Penal Code section 273a, subdivision (a), abandonment and neglect of children. Officers contacted the

Department of Children and Family Services (Department), which took H.G.V. and Freddy into protective custody.

Mother told a Department social worker that she had recently moved from Las Vegas to Los Angeles to be near family after Father filed for divorce. Mother said she had found work at a Winchell's donut shop, but did not have enough money to find a place of her own. Mother claimed she had been moving between her sister Brenda S.'s home and the home of a friend, but started staying at the business two days before the police raid because she did not want to expose her daughter to constant arguing between her sister and her sister's boyfriend. Mother claimed she knew nothing about any gangs, drugs, or guns on the premises. Mother said she had never been arrested before, had never used drugs, and was " 'just in the wrong place at the wrong time.' " Mother said she was in the process of finding suitable housing and a second job.

Mother told the social worker that she has another daughter, H.V., who was then eight years old and living with Father in Las Vegas. Mother said she wanted to fight for custody of H.V. but knew it would be a battle with Father because he also is seeking full custody of her. Mother said she separated from Father in December 2015 because he cheated, visited strip clubs, and abused alcohol. Mother remained in Las Vegas with the children until she came to Los Angeles on December 1, 2016.

The social worker interviewed H.G.V. on her own. H.G.V. said that when they lived with Father in Las Vegas, he would pull her hair and once threw a chair at her when he was angry. H.G.V. said Father liked to pull pranks on Mother, including once pretending that he had slit his own throat with a knife by pouring ketchup on his neck and the living room floor.

The social worker assessed that H.G.V. was at a very high risk for future abuse and her safety could not be assured based on the deplorable and dangerous living conditions in which she was found. The Department detained H.G.V. and placed her in foster care. On January 13, 2017, the Department filed a juvenile dependency petition regarding H.G.V. pursuant to section 300, subdivision (b)(1). The Department alleged that Mother placed H.G.V. in a detrimental and endangering home environment where firearms and hand grenades were accessible to her.

Both Mother and Father attended the January 13, 2017 detention hearing. The court considered that Mother and H.G.V. had taken refuge at the business temporarily to avoid a violent situation at Mother's sister's home, and had since secured other housing. The juvenile court took jurisdiction, but found no basis for detaining H.G.V. and ordered her released to her parents. The court also directed the Department to contact its counterpart in Clark County, Nevada to determine whether it wished to assert home state jurisdiction under the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA). The court warned Mother not to change her residence without first letting the social worker know. The court continued the detention hearing to January 19, 2017, and set the Department's section 300 petition for adjudication on February 28, 2017.

On February 6, 2017, a social worker interviewed Mother about domestic violence. Mother stated that in 2012, upon leaving a family gathering at which Father had been drinking, she and Father began arguing because he accused her of talking to another man. Mother told the social worker that Father slapped her on the face with his open hand, causing pain and redness, and yelled at her. According to Mother, their children

were not present. Mother said she did not file a police report or seek medical attention because she did not want to put her children's father in jail. Mother stated that was the only time Father struck her, but on other occasions he would shove her and she would shove him back.

On February 9, 2017, the Department obtained a copy of a Las Vegas Police Department report reflecting that Father was arrested for domestic violence on May 28, 2015. The report's narrative stated that Father had consumed several cans of beer and began arguing with Mother. Father put a kitchen knife to his throat, saying he wanted to kill himself. He then threw down the knife, began following Mother around the house, and shoved her twice. Fearing that Father would strike her, Mother telephoned 911. Mother's brother Manuel M. witnessed these events.

On February 9, 2017, a social worker interviewed Father. Father denied any incidents of domestic violence, and stated, " 'I have never hit any women, not even my children. [Mother] is lying about a lot of things just to get the kids in her custody.' " Father claimed he felt intimidated by Mother's threats to call child protective services in Nevada because he is in the process of obtaining legal residency and did not want to jeopardize his legal status. For that reason, Father said, he agreed to let H.G.V. move to California with Mother, but now wants custody of both children.

On February 14, 2017, the Department filed a first amended section 300 petition regarding H.G.V., adding a count alleging Mother and Father had a history of engaging in violent altercations. The allegation cited Father as having slapped Mother on her face, causing pain and redness, and his

May 28, 2015 arrest for domestic violence. The Department also alleged Mother failed to protect the children by allowing Father to remain in the home.

On February 21, 2017, a social worker made an unannounced visit to the home of Mother's sister, Priscilla S., where Mother and both of her children reportedly lived. The social worker left the visit unconvinced that Mother and her children lived there. On February 23, 2017, the social worker interviewed H.G.V. at her school, and observed that she was clean, neatly groomed, and dressed appropriately. H.G.V. told the social worker that she, her sister, and Mother stayed at Priscilla S.'s home for only one night, and were then living at their late maternal grandmother's home with their maternal aunts, Myrna S. and Brenda S. H.G.V. described the one-bedroom home as " 'nasty,' " with rats, and trash, and rotting food everywhere. Asked about domestic violence in the home, H.G.V. said Brenda's husband " 'hits my auntie Brenda.' "

The Department responded to a referral alleging general neglect by Mother and, on February 24, 2017, a social worker interviewed H.V. at her school. H.V. denied that Father hit her, but stated that he sometimes grabbed her arm. H.V. said that when they lived in Las Vegas, Father would hit her sister, H.G.V., when she soiled herself. Father ignored Mother's pleas that he stop hitting H.G.V. H.V. also stated that when they lived together in Las Vegas, Mother and Father fought a lot and would hit each other, which frightened her.

H.V. told the social worker that after Mother and H.G.V. left Las Vegas, she continued to live with Father, and he and his girlfriend would say bad things about Mother. H.V. said that when her sister was taken away from Mother, Father brought

H.V. to California. H.V. described an incident when she told Father she did not want to live with him, and he responded by dragging her by the arm to force her to go with him. After Mother and Father talked, he agreed that H.V. could remain with Mother, which H.V. preferred.

On February 27, 2017, a social worker telephoned Mother to advise her that the Department intended to seek a removal order for H.G.V. and H.V. due to the concern that Mother's housing situation exposed the children to detrimental and unsafe environments. The social worker also telephoned Father and informed him the Department would seek a removal order to detain H.G.V. and H.V. based on Father's history of domestic violence. Father claimed he and Mother had merely argued and denied having committed any domestic violence. He stated he completed a court-ordered anger management class and agreed to provide a copy of the certificate.

On March 2, 2017, the juvenile court issued a removal order, and the next day a social worker detained both H.G.V. and H.V. from their school and placed them in foster care. Both children told the social worker they did not want to go to Father's home because he was "mean" and hit H.G.V. The social worker had the impression that the girls had been coached. On March 6, 2017, the Department filed an ex parte application requesting that H.G.V. be detained from Mother's custody.

On March 7, 2017, the juvenile court conferred with the Clark County, Nevada court regarding UCCJEA issues. Upon learning the facts and procedural posture of the case, the Nevada court agreed that the juvenile court in California was in a better position to adjudicate the matter.

On March 8, 2017, the Department filed a section 300 juvenile dependency petition on behalf of H.V. that alleged the May 28, 2015 domestic violence incident, the parents' mutual shoving, and Father's slapping Mother. The petition also alleged that Mother failed to protect H.V. On March 9, 2017, a social worker telephoned Father for a follow-up interview. Father stated he had no additional statements and added, " 'You guys already got what you wanted, my kids. I have nothing to say to you guys.' "

At a hearing on March 14, 2017, the Department recommended the children be removed from parental custody and the family be provided with reunification services. The juvenile court noted the Department's determination that Mother had rented a new home, which the department had given a positive assessment, and stated the court was prepared to release the children to Mother. The Department objected based on Mother's prior lack of cooperation and the current lack of proof that Mother had a lease for the new home. The court placed Mother under oath, and she testified that she had a month-to-month rental agreement on a back house where she was planning to remain, and a school for the girls was nearby. The juvenile court ordered the children released to Mother's care and directed her to provide the Department with a copy of her rental agreement and enroll the children in school. The court ordered wrap around services and unannounced visits. The court set an adjudication hearing on the Department's section 300 petitions for both girls, which was continued to April 19, 2017.

Prior to the hearing, the Department reported to the juvenile court that Mother had provided a copy of her rental agreement and there were no safety hazards observed at her

home. It also confirmed that H.V. and H.G.V. were enrolled in school. The Department reported that Father had remained in California, but had not visited the children. Father informed the social worker that he was looking for work, and had not visited the children because he did not agree with his visits being monitored and had no one who could serve as a monitor. When told the Department could provide a monitor, father said, " 'I don't have time for all that. I'm looking for work and I don't have time to be meeting when you guys say I can see my kids.' " Father supplied a copy of a certificate showing he completed an impulse control and anger management course in August 2016.

At the April 19, 2017 hearing, the juvenile court admitted into evidence the Department's reports and Father's certificate of completion of an anger management course. Mother's counsel asked the court to dismiss the petitions because there was no evidence of current domestic violence and no evidence Mother was aware of the firearms, grenades, or ammunition in the business premises where she and the children were found. Father's counsel asked the court to dismiss the domestic violence count, contending there was no current risk because the parents had separated and had commenced divorce proceedings.

The Department asked the juvenile court to sustain the domestic violence count based on the May 2015 arrest report and accounts given by the children and Mother concerning other instances of Father's violent behavior. The Department contended Father's denial that any domestic violence had occurred showed Father had neither acknowledged nor resolved the issue. This concerned the Department because Father planned to move to California and have a relationship with his

children, but no safety measures were in place to ensure the girls' protection.

The juvenile court dismissed the domestic violence counts, stating it would "address the violence between the parents in the disposition plan." The court sustained the remainder of the petition as to H.G.V. Turning to the disposition, the court asked, "should the father be considered custodial or noncustodial in this case?" Father's counsel responded, "Custodial, your Honor. He had custody of both of the girls." After an off-the-record discussion between Father and his counsel concerning the case plan, Father's counsel stated, "Your Honor, father submits on the case plan."

The Department requested the children remain with Mother and Father's visits remain monitored. The children's attorney joined the Department's request, and asked for conjoint counseling between Father and the children.

The juvenile court stated: "I do believe that there is a basis to remove the children from the Father. If my memory serves me correctly, the children claim they were being hit by the Father and the Father's partner. . . . [¶] Also, [H.G.V.] did witness this event where father pretended to kill himself. That is not a healthy environment for the children. I do believe there is a basis to remove the children from Father. I will order monitored visits for the Father, and the Mother shall not be the monitor."

The juvenile court declared the children to be dependents under section 300, subdivision (b), and found "by clear and convincing evidence pursuant to . . . section 361, subdivision (c)(1) there is a substantial danger to the physical health, safety, protection, physical or emotional well-being of the children if they were to remain in the custody of the Father, and there are no

reasonable means by which the children's physical or emotional health could be protected without removing the children from the care of the Father." The juvenile court also found that the Department had made reasonable efforts to prevent removal. The juvenile court ordered Mother and Father each to complete a parenting program and participate in individual counseling to address case issues, including domestic violence. It then set a six-month review hearing for October 18, 2017.

The juvenile court inquired if there was anything else. Father asked if the order prevented him from taking his daughters to the beach. The juvenile court explained that he could do so, provided he was accompanied by a monitor approved by the Department.

This appeal followed.

DISCUSSION

Father contends the superior court erred by applying the removal statute to him and his daughters, H.V. and H.G.V., and erroneously and unjustifiably restricted him to monitored visitation with them. As discussed below, we agree with Father that section 361, subdivision (c) does not apply but we conclude that Father has failed to demonstrate prejudice. We do not agree that the juvenile court erred by limiting Father to monitored visitation with the children.

I. Application of the Removal Statute to Father

Father contends the juvenile court erred by removing his daughters from his custody because he did not have custody of either of them at the time. He also contends removal was unwarranted because the court struck the domestic violence allegations against him.

The Department contends Father forfeited these arguments because he did not raise them before the juvenile court and he submitted on the case plan. The Department also contends Father invited any error by asking the court to treat him as a custodial parent. Lastly, the Department contends that any error was harmless because the juvenile court had the power under section 361, subdivision (a) and section 362, subdivision (a) to restrict the access of a parent with whom a child does not reside.

"Although in general, a party who does not raise an argument below forfeits the argument on appeal, [when,] as here, an appellant poses a question of law, the appellate court can exercise its discretion to address the issue. [Citation.]" (*In re Julien H.* (2016) 3 Cal.App.5th 1084, 1089 (*Julien H*).) Because Father's arguments regarding the disposition order raise issues that are primarily ones of law, we may consider them.

At the April 19, 2017 disposition hearing, the juvenile court declared H.V. and H.G.V. dependents of the court and ordered them removed from Father pursuant to section 361, subdivision (c), which authorizes a child's removal "from the physical custody of his or her parents or guardian or guardians with whom the child resides at the time the petition was initiated." (§ 361, subd. (c).) Here, Father ceased having physical custody of H.G.V. by December 2016, and relinquished physical custody of H.V. to Mother shortly after he brought H.V. to Los Angeles in January 2017. Accordingly, "the court could not remove [either child] from Father's physical custody under section 361, subdivision (c)(1) because [they were] not residing with him when the petition[s were] initiated. [Citations.]" (*Julien H.*, *supra*, 3 Cal.App.5th at p. 1089.) Thus, as a matter of law, section 361, subdivision (c) did not apply.

Despite this error, "reversal is unwarranted unless the error resulted in prejudice, i.e., it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error." (*Julien H.*, *supra*, 3 Cal.App.5th at p. 1089.)

Father contends he suffered prejudice because the order stripped him of custody and resulted in an inappropriate finding of parental unfitness that may lead to the termination of his parental rights. This contention assumes that no other authority grants the juvenile court the power to limit Father's access to his children in a manner similar to a removal order under section 361, subdivision (c). Father is mistaken.

Confronted with the same issue in *Julien H.*, this Court explained that "the dependency court has the power under section 361, subdivision (a) and section 362, subdivision (a) to limit the access of a parent with whom the child does not reside and thus effectively remove the child from the noncustodial parent. [Citation.] Specifically, section 361, subdivision (a)(1), grants the court authority to 'limit the control to be exercised over the dependent child by any parent or guardian.' [Citation.] And unlike subdivision (c) of section 361, subdivision (a)(1) applies to 'any parent,' not solely to parents with whom the child resides. Similarly, section 362, subdivision (a) further authorizes the court to 'make any and all reasonable orders for the care, supervision, custody, conduct, maintenance, and support of the child.' [Citations.]" (*Julien H.*, *supra*, 3 Cal.App.5th at p. 1090; *accord*, *In re Anthony Q.* (2016) 5 Cal.App.5th 336, 356.) Thus, because the juvenile court could have made the same order under section 361, subdivision (a) or section 362, subdivision (a), Father

has not established prejudice caused by the court's erroneous application of section 361, subdivision (c).

Father next contends that because the court struck the domestic violence allegations against him, there was not clear and convincing evidence of detriment to the children to support the court's order. Father correctly argues that this heightened standard of proof is crucial at the dispositional stage because subsequent proceedings conducted under the less onerous preponderance of the evidence standard may result in termination of his parental rights.

Father, however, ignores the juvenile court's statement, upon dismissing the domestic violence counts, that it would "address the violence between the parents in the disposition plan." In its disposition, the juvenile court found "by clear and convincing evidence . . . [that] there is a substantial danger to the physical health, safety, protection, physical or emotional well-being of the children if they were to remain in the custody of the father, and there are no reasonable means by which the children's physical or emotional health could be protected without removing the children from the care of the father." Thus, because the juvenile court applied the heightened clear and convincing evidence standard, which was supported by substantial evidence in the record described above, Father was not prejudiced by the juvenile court's application of section 361, subdivision (c) to him.

Even had Father been able to demonstrate prejudice caused by the juvenile court having treated him as a custodial parent, we agree with the Department that Father invited the error by *requesting* that the court treat him as a custodial parent. (See *Norgart v. Upjohn Co.* (1999) 21 Cal.4th 383, 403 [" 'Where a party by his conduct induces the commission of error, he is

estopped from asserting it as a ground for reversal' on appeal."].) Father cannot ask the juvenile court to treat him as a custodial parent, and then ask us to reverse because the court did as he requested.

Because Father has failed to show that the court's erroneous reliance on section 361, subdivision (c) was prejudicial to him, and Father invited the error, we will order the juvenile court to amend its order to reflect that it is made pursuant to section 361, subdivision (a) and section 362, subdivision (a).

II. Order Restricting Father to Monitored Visitation

Section 362.1, subdivision (a)(1)(A) provides, "Visitation shall be as frequent as possible, consistent with the well-being of the child." The juvenile court has broad discretion to determine what best serves a child's interests and to fashion visitation orders. (*In re Korbin Z.* (2016) 3 Cal.App.5th 511, 518.) On appeal, we will not reverse the juvenile court's exercise of discretion unless the record clearly shows it was abused. (*In re Stephanie M.* (1994) 7 Cal.4th 295, 318.) " 'The appropriate test for abuse of discretion is whether the trial court exceeded the bounds of reason. When two or more inferences can reasonably be deduced from the facts, the reviewing court has no authority to substitute its decision for that of the trial court.' " (*Id.* at pp. 318-319.)

Father contends the evidence before the juvenile court did not support its order mandating that his visitation with his children be monitored. Father correctly faults the juvenile court for mistakenly recalling that the children claimed to have been hit not just by Father, but also by Father's partner.

On the other hand, Father minimizes his having faked a suicide with ketchup—which the juvenile court cited as creating an unhealthy environment for the children—as an isolated incident that H.G.V. recognized as a joke. Father contends that, without more, the juvenile court's order for monitored visitation was beyond reason and thus an abuse of its discretion. We disagree because more evidence supported the juvenile court's order than Father acknowledges.

The petitions before the juvenile court alleged several examples of Father's violent behavior toward Mother. Father was arrested on domestic violence charges, and Mother claimed that Father physically abused her on other occasions that she did not report to law enforcement. The court dismissed the domestic violence counts because, as Father's counsel contended, the parents had separated. Dismissal of those counts because they were stale did not erase the evidence of violence, or address the Department's valid concern that Father denied ever having been physically violent toward Mother despite such evidence. The juvenile court also had before it statements the children made to social workers detailing Father's violent behavior toward them. H.G.V. reported Father would pull her hair and once threw a chair at her in anger. H.V. told a social worker that Father would hit her sister, H.G.V., in spite of Mother's pleas that he stop doing so. Given these facts and circumstances, the juvenile court did not abuse its discretion in concluding that monitored visitation with Father was in the children's best interest.

DISPOSITION

The order is affirmed, and the matter is remanded to the juvenile court to amend its order to reflect that it is made pursuant to section 361, subdivision (a) and section 362, subdivision (a).

NOT TO BE PUBLISHED.

BENDIX, J.*

We concur:

CHANEY, Acting P. J.

JOHNSON, J.

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