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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

In re Z.M. et al., Persons Coming
Under the Juvenile Court Law.

LOS ANGELES COUNTY
DEPARTMENT OF CHILDREN
AND FAMILY SERVICES,

Plaintiff and Respondent,

v.

REGINALD M.,

Defendant and Appellant.

B294680

(Los Angeles County
Super. Ct. No. 18CCJP02260)

APPEAL from orders of the Superior Court of Los Angeles County, Diane C. Reyes, Juvenile Court Referee. Reversed and remanded.

Cristina Gabrielidis, under appointment by the Court of Appeal, for Defendant and Appellant.

Mary C. Wickham, County Counsel, Kristine P. Miles, Assistant County Counsel and Sally Son, Deputy County Counsel for Plaintiff and Respondent.

INTRODUCTION

Reginald M. appeals from custody and visitation orders the juvenile court entered upon terminating jurisdiction. The orders gave Dana B. sole legal and physical custody of her and Reginald's children—five-year-old Z.M. and two-year-old D.M.—and required Reginald's visitation to be monitored. Although Reginald does not challenge the order terminating jurisdiction, he argues the juvenile court misinterpreted Family Code section 3044, which creates a presumption in family law cases that awarding custody to a perpetrator of domestic violence is detrimental to the best interests of the child. Reginald also challenges the order requiring monitored visitation.

We asked the parties to submit supplemental briefs on whether Family Code section 3044 applies to juvenile court proceedings in light of the court's recent decision in *In re C.M.* (2019) 38 Cal.App.5th 101, which held it does not. In his supplemental brief, Reginald argues the juvenile court erred in relying on the presumption in Family Code section 3044 as the "basis of its ruling," rather than considering the children's best interests. In its supplemental brief, the Department concedes Family Code section 3044 does not apply, but argues that Reginald forfeited his challenge to the physical custody order and that the juvenile court's error was harmless because the court's reasons for requiring monitored visitation would also support the custody order. Because the juvenile court based its custody order entirely on the presumption in Family Code section 3044 and the court did not otherwise consider the children's best interests in making its custody orders, we reverse the custody and visitation orders and remand the matter to the juvenile court.

FACTUAL AND PROCEDURAL BACKGROUND

A. *Petition and Detention*

After an incident of domestic violence, Dana obtained a restraining order against Reginald in family law court. The order, which did not list Z.M. and D.M. as protected persons, gave sole legal and physical custody to Dana and allowed Reginald unmonitored visitation with the children.

Two weeks later, the Los Angeles County Department of Children and Family Services filed a petition alleging Z.M. and D.M. came within the jurisdiction of the juvenile court under Welfare and Institutions Code section 300, subdivisions (a) and (b),¹ because Reginald and Dana had “a history of engaging in violent altercations in the presence of the children.” The juvenile court found Z.M. and D.M. were persons described by section 300, but released the children to both parents “subject to the terms of the existing family law custody order” and on conditions Reginald attend a domestic violence program, enroll in individual counseling, and comply with the restraining order.

B. *Jurisdiction and Disposition*

For the combined jurisdiction and disposition hearing, the Department submitted a report stating Reginald refused to comply with those court orders he believed were not related to case issues. The Department recommended the court remove the children from Reginald and order monitored visitation.

¹ Undesignated statutory references are to the Welfare and Institutions Code.

Reginald testified at the hearing that his actions resulted, in part, from his frustration with Dana because they did not share the same “understanding of joint custody” and that he “wanted a role in making important decisions in the children’s lives.” Reginald also stated he attended domestic violence classes, which helped him gain insight. Reginald, however, was hostile with Department case workers and stated court was a “waste” of time.

The juvenile court found that Reginald had “decided to take an approach of aggressive noncooperation” with the Department and that his conduct had not “done him any favors.” The juvenile court sustained an amended petition under section 300, subdivision (b), and declared Z.M. and D.M. dependents of the court. The court ordered the children to remain with Dana but removed them from Reginald. The court ordered Reginald to complete a case plan that included a domestic violence program, parenting classes, random drug testing, individual counseling, and monitored visits with the children. The court gave the Department discretion to liberalize visitation. Reginald appealed the juvenile court’s disposition orders, and this court affirmed. (*DCFS v. Reginald M.* (Feb. 5, 2019, B290829) [nonpub. opn.])

C. *Six-month Review Period*

During the review period, Reginald successfully completed a domestic violence program. He visited Z.M. and D.M. regularly, and they “enjoy[ed] spending time with him.” Reginald insisted “he would not participate in [court-ordered] services” unless he was “assured” he would obtain joint custody of the children. Reginald explained the monitored visitation schedule was “emotionally harmful” to Z.M. because she was “accustomed to

daily contact with him” while she was “recovering from a serious medical condition.” Despite Reginald’s refusal to comply with his case plan, the Department allowed unmonitored day visits. Two weeks later, however, the visitation reverted to monitored when Reginald again informed the Department he would not be “forced” to comply with orders not related to domestic violence. Reginald declined a proposed visitation schedule because he did not “want to be a part-time father,” and his visits with the children “became more sporadic” because of his school schedule and efforts to seek employment.

D. *Section 364 Review Hearing, Termination of Jurisdiction, and Custody and Visitation Orders*

For the section 364 hearing, the Department submitted a report recommending termination of jurisdiction with a juvenile custody order granting legal custody to both parents, primary physical custody to Dana, and monitored visitation for Reginald. The Department stated it could not recommend unmonitored visitation for Reginald because the Department had been unable to assess whether Reginald’s self-reported marijuana use interfered with his ability to parent the children. Nevertheless, the Department reported “there did not appear to be child safety concerns” during visits.

At the hearing, counsel for Reginald joined in the Department’s custody recommendations but requested unmonitored visitation. Counsel acknowledged Reginald only partially complied with court orders, but emphasized Reginald completed the domestic violence program and had quality visits with the children. Counsel explained Reginald “would like to be there [for his children] as much as possible and [have]

unmonitored” visits, particularly because of Z.M.’s health concerns. Counsel for the children submitted to the Department’s custody recommendations, but objected to unmonitored visitation because Reginald did not complete his case plan or visit consistently. Counsel for the children suggested Reginald could seek to modify the order in family law court “if his circumstances change.” Counsel for Dana submitted to the Department’s custody recommendations and did not object to Reginald having unmonitored visits with the children.

The juvenile court, after stating it had read and considered the Department’s report and “look[ed] at the whole history” of the case, ordered monitored visitation for Reginald because he refused to “acknowledge that the court had ordered him to do more” and he had not visited “as regularly as he should have.” The court granted Dana sole legal and physical custody of the children and terminated jurisdiction under section 362.4. The court ruled: “The court will not grant joint legal custody under Family Law Code section 3044, as there is a family law presumption that if there is domestic violence in a case, and there is an open restraining order, as there is in this case, that the presumption is for sole legal and sole physical. So, at this time the court will grant sole legal, sole physical to [Dana].”

As the court was stating its ruling, Reginald interrupted the court three times before he “had to step out of the courtroom as he . . . was trying to talk over the court” and object. At the conclusion of the hearing, counsel for Reginald objected to the order granting sole legal custody to Dana, but counsel did not specifically object to the order granting Dana sole physical custody. Reginald timely appealed the juvenile court’s custody and visitation orders.

DISCUSSION

A. *Reginald Did Not Forfeit His Argument the Juvenile Court's Custody Order Was Erroneous*

The Department argues Reginald forfeited his challenge to the juvenile court's custody orders because he submitted to the Department's recommendation of "primary" physical custody to Dana and, at the hearing, he objected to the legal custody order but not the physical custody order. Forfeiture does not apply here.

Reginald submitted to the Department's recommendation that Dana have primary custody of the children, not sole or exclusive custody. Indeed, "the term 'primary physical custody' has no legal meaning." (*In re Marriage of Richardson* (2002) 102 Cal.App.4th 941, 945, fn. 2; see *In re Marriage of LaMusga* (2004) 32 Cal.4th 1072, 1081, fn. 1.) Courts have used the term both to indicate sole physical custody and unequally shared physical custody. (See, e.g., *In re Marriage of Burgess* (1996) 13 Cal.4th 25, 40, fn. 12; *J.M. v. G.H.* (2014) 228 Cal.App.4th 925, 936; *In re Marriage of Condon* (1998) 62 Cal.App.4th 533, 550-552; *Brody v. Kroll* (1996) 45 Cal.App.4th 1732.) Thus, when Reginald submitted to the Department's recommendation, he was not necessarily agreeing Dana should have sole physical custody.

Moreover, the record shows that at the hearing Reginald attempted to object to the court's custody orders. In fact, his attempts were so strenuous he had to leave the courtroom. Forfeiture "is intended to prevent a party from standing by silently until the conclusion of the proceedings" (*In re C.M.* (2017) 15 Cal.App.5th 376, 385), and Reginald was anything but silent. Given Reginald's objection to monitored visitation, his

interruptions while the court was making its custody rulings, his objection to the legal custody order, his refusal to participate in services without the assurance of joint custody, and his testimony that his disagreements with Dana arose from child custody issues, the court was undoubtedly aware of Reginald's objections to unfavorable custody orders. (See *People v. Scott* (1978) 21 Cal.3d 284, 290 ["An objection is sufficient if it fairly apprises the trial court of the issue it is being called upon to decide."]; *People v. Carrillo* (2004) 119 Cal.App.4th 94, 101 [same].) Finally, reviewing courts have the discretion to reach forfeited issues where, as here, the issue involves an important question of law, such as whether the juvenile court applied the wrong legal standard. (*In re S.B.* (2004) 32 Cal.4th 1287, 1293; *In re C.M.*, *supra*, 15 Cal.App.5th at pp. 385-386; *In re Abram L.* (2013) 219 Cal.App.4th 452, 462.)

B. *The Juvenile Court Erred in Making Its Custody Order Based on Family Code Section 3044*

Family Code section 3044, subdivision (a), provides: "Upon a finding by the court that a party seeking custody of a child has perpetrated domestic violence within the previous five years against the other party seeking custody of the child, . . . 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 interests of the child This presumption may only be rebutted by a preponderance of the evidence." Family Code section 3044, subdivision (b), provides that a party may "overcome the presumption set forth in subdivision (a)" if the family law court makes certain findings on a number of factors listed in the statute. Reginald's primary

contention is that the juvenile court’s interpretation of Family Code section 3044 was erroneous because, although the “presumption shifts to the perpetrator the burden of persuasion that an award of custody to him would not be detrimental to the best interests of the child,” the statute “does not establish a presumption for or against joint custody.” (See *S.Y. v. Superior Court* (2018) 29 Cal.App.5th 324, 334.)

The preliminary question, however, is whether Family Code section 3044 applies at all to juvenile court proceedings. In *In re C.M.*, *supra*, 38 Cal.App.5th 101 the court held it does not. Citing cases that emphasized the “separate statutory schemes” and “distinct purposes” of juvenile and family law courts (*id.* at p. 108), the court in *In re C.M.* held that, because the juvenile court, “under the Welfare and Institutions Code, [is] guided by the totality of the circumstances in issuing orders that are in the child’s best interests,” the statutory provisions, preferences, and presumptions that apply to family law do not apply to dependency. (*Id.* at pp. 109-110.) The court stated: “We see no basis to depart from the sound reasoning of the cases that conclude Family Code provisions are inapplicable in dependency cases unless expressly stated.” (*Id.* at p. 110.) Reginald and the Department concede that under *In re C.M.* Family Code section 3044 does not apply in juvenile court proceedings and that the trial court erred in applying the presumption in this case and relying on it in making the custody order.²

² Although the Department does not argue *In re C.M.*, *supra*, 38 Cal.App.5th 101 was wrongly decided or is distinguishable, we observe that the court in *In re C.M.* did not address the “updated rationale” that statutes in other codes not expressly applicable to

Here, the juvenile court assumed Family Code section 3044 applied to dependency proceedings and relied on it exclusively in making its custody order. The court did not state it was otherwise considering the best interests of the children. (See *In re Chantal S.* (1996) 13 Cal.4th 196, 206; *In re Nicholas H.* (2003) 112 Cal.App.4th 251, 268 [“When making a custody determination in any dependency case, the court’s focus and primary consideration must always be the best interests of the child.”].) Because the juvenile court’s custody order was based on an error of law, it was an abuse of discretion and must be vacated. (See *In re Priscilla D.* (2015) 234 Cal.App.4th 1207, 1215 [“A decision that rests on an error of law constitutes an abuse of discretion.”]; *In re Autumn K.* (2013) 221 Cal.App.4th 674, 709 [same].) Because the juvenile court cannot determine Reginald’s visitation rights without first making a custody order, the visitation order must be vacated as well.

The Department argues the juvenile court’s erroneous application of Family Code section 3044 was harmless because the juvenile court’s reasons for ordering monitored visitation for Reginald would also support an order granting Dana sole physical custody. The court, however, gave no indication its custody order was based on those reasons. To the contrary, the court relied solely on the presumption in Family Code

the Welfare and Institutions Code may still apply if they are consistent with dependency law. (*In re David H.* (2008) 165 Cal.App.4th 1626, 1639; see *In re Claudia E.* (2008) 163 Cal.App.4th 627, 636 [a statute outside the Welfare and Institutions Code “is *not* necessarily barred” if “the statute at issue is consistent with the overall purposes of the dependency system”].)

section 3044. Moreover, we cannot tell from the record whether the juvenile court's erroneous application of Family Code section 3044 also affected its visitation order. Finally, Reginald's failure to complete all court-ordered programs did not support the court's finding that joint legal custody was not in the children's best interests. Indeed, the Department recommended joint legal custody despite Reginald's refusal to comply with court orders and his inconsistent visitation.

DISPOSITION

The juvenile court's custody and visitation orders are reversed. The matter is remanded to the juvenile court.

SEGAL, J.

We concur:

ZELON, Acting P. J.

FEUER, J.