M.V. v. T.M.

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NOT TO BE PUBLISHED

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The paternal grandparents (hereafter Grandparents) of J.V. and M.V. appeal from the trial court's order denying the introduction into evidence of a videotaped deposition and dropping from the family court trial calendar a contested hearing on grandparent visitation. They contend the deposition was admissible as a matter of law under Code of Civil Procedure section 2025, subdivision (u)(3)(A), and the court's ruling denied them a fair hearing. We agree and shall reverse the order.

FACTUAL AND PROCEDURAL BACKGROUND

In 2001, M.V., Jr. (hereafter Father) and T.M. (hereafter Mother) shared legal custody of J.V., born February 17, 1989, and M.V., born December 12, 1987. Father had physical custody, and Mother, who lives out of state, had specified parenting time.

Grandparents filed a petition for guardianship in June 2001, based on substantiated reports of emotional abuse of J.V. and M.V. by Father and his current wife. The probate court determined that the boys did not fit criteria applicable to dependency actions (Welf. & Inst. Code, § 300), and thus transferred the case to family court. Grandparents joined the custody case between Father and Mother. Father agreed only to supervised visitation, believing that Grandparents were systematically undermining his parental role.

On June 6, 2002, the trial court denied without prejudice Grandparents' petition for guardianship/custody of J.V. and M.V., but ruled that for purposes of grandparent visitation, the case was an exception to the holding in Troxel v. Granville (2000) 530 U.S. 57 [147 L.Ed.2d 49] (hereafter Troxel) regarding a parent's right to control a child's visitation with grandparents. The court found that "Father is unwilling to offer unsupervised visitation time absent court orders, and that it is in the children's best interest to have court ordered visitation with their paternal grandparents on alternative weekends, except when the children [were] with their mother, who currently resides in Virginia." The court ordered Grandparents and Father to participate in joint counseling with a mutually agreed upon family counselor.

A year later, Father moved to terminate the boys' visitation with Grandparents, citing changed circumstances. He attached to his points and authorities a declaration signed by Mother stating she also was "opposed to any further court-ordered grandparent visitation." Mother declared that she and Father should, "without court interference," decide with whom the children will have contact. Grandparents filed written opposition to the requested modification of the June 2002 order.

The trial court found that the "united position of parents in opposition to grandparent visitation by court order" created a change of circumstances and removed the case from the exception to the holding in Troxel. Thus, the court vacated its earlier order without prejudice.

Grandparents, in papers not included in the appellate record, apparently challenged the ruling on Father's motion, and the court set the matter for trial. In a settlement conference statement filed in preparation for trial, Grandparents "dispute[d] that mother voluntarily signed anything stating she did not agree to them having Court ordered visitation" and argued that "nothing has changed in the lives of the boys, as far as father and his wife continuing to abuse them and the paternal grandparents being their lifeboat since the trial in 2002." They asserted that "father sent one of the boys to mother January 15, 2003 and told mother she could keep him during the school year, but would only send her paperwork authorizing his attendance in school in Maryland if mother signed a paper father sent her objecting to the paternal grandparents having Court ordered visitation."

In a supplemental settlement conference statement, Grandparents told the court and opposing counsel they had videotaped Mother's deposition in Maryland and they intended at trial to introduce the videotape and transcript of the deposition. Grandparents said the deposition "evidences father's intentional coercion of mother and misrepresentations to this Court of mother's legal position, which is actually for the children to have Court ordered visitation with their paternal grandparents[.]" Grandparents gave Father notice of their intent to introduce the videotape at trial and of the evidence they sought to adduce from it. They also gave Father's attorney a copy of the videotape. Father responded in his settlement conference statement that Grandparents were not entitled to visitation because both Father and Mother opposed it.

In a second supplemental settlement conference statement, Grandparents argued for judicial notice of documents previously filed in the case. They provided the following rationale for the court's consideration of the videotaped deposition: "Additionally, pursuant to Reiffler [sic] [Reifler v. Superior Court (1974) 39 Cal.App.3d 479], which opposing counsel should also be aware of and of which the Court is well aware, allows for such pleadings and evidence, including Mother's recent [v]ideo deposition showing Court ordered visitation is agreed to by Mother, voiding Father's knowingly false assertions to the contrary, could have, without oral testimony at a hearing, served as the Court's basis for Orders as Father's pleadings did for the vacating of the June[] 2002 Court ordered visitation for the Grandparents." Before trial, Father did not file written objection to introduction of the videotaped deposition. Grandparents gave Mother notice of the trial date, but she did not appear.

Dropping from the trial calendar the Grandparents' challenge to the court's order vacating their visitation, the trial court explained:

"1. Respondent mother not present for the trial date and not excused;

"2. Represents that each parent opposed to grandparents' visitation;

"3. Drop matter from trial due to current state of the law;

"4. Cannot impeach respondent mother with deposition since not present;

"5. Videotaped deposition of respondent mother . . . , dated 8/11/03, lodged with Court."

There is no reporter's transcript of the trial.

DISCUSSION

Family Code section 3103, subdivision (a) authorizes the trial court to grant reasonable visitation to a grandparent of a minor child subject to custody proceedings "if the court determines that visitation by the grandparent is in the best interest of the child." Where a grandparent petitions for visitation, "[t]here is a rebuttable presumption affecting the burden of proof that the visitation of a grandparent is not in the best interest of a minor child if the child's parents agree that the grandparent should not be granted visitation rights." (Fam. Code, § 3103, subd. (d).)

Grandparents sought to rebut this presumption by introducing Mother's deposition testimony that Father had coerced her into signing the declaration stating she opposed grandparent visitation.

Although family court proceedings are generally less formal than ordinary civil trials, the rules of evidence and general civil practice apply. (See In re Marriage of Zywiciel (2000) 83 Cal.App.4th 1078, 1083; and In re Marriage of Reese & Guy (1999) 73 Cal.App.4th 1214, 1222.) In this case, the issue on appeal is resolved by Code of Civil Procedure section 2025, subdivision (u), which governs the admission of depositions at trial in family court and which states in pertinent part:

"At the trial or any other hearing in the action, any part or all of a deposition may be used against any party who was present or represented at the taking of the deposition, or who had due notice of the deposition and did not serve a valid objection under subdivision (g), so far as admissible under the rules of evidence applied as though the deponent were then present and testifying as a witness, in accordance with the following provisions:

"(1) Any party may use a deposition for the purpose of contradicting or impeaching the testimony of the deponent as a witness, or for any other purpose permitted by the Evidence Code.

"(2) An adverse party may use for any purpose, a deposition of a party to the action . . . . It is not ground for objection to the use of a deposition of a party under this paragraph by an adverse party that the deponent is available to testify, has testified, or will testify at the trial or other hearing.

"(3) Any party may use for any purpose the deposition of any person or organization, including that of any party to the action, if the court finds any of the following:

"(A) The deponent resides more than 150 miles from the place of the trial or other hearing." (Further section references are to this code.)

Mother's deposition was admissible at trial pursuant to section 2025, subdivision (u)(1) "for the purpose of contradicting or impeaching the testimony of the deponent as a witness, or for any other purpose permitted by the Evidence Code." The record reflects that Grandparents gave Father written notice of the deposition they scheduled in Maryland on August 11, 2003, and that Father did not serve an objection to the deposition. Grandparents' settlement conference statements show they offered the videotaped deposition (1) to impeach Father's representation that both he and Mother opposed grandparent visitation, and (2) to impeach Mother's declaration in support of Father's position. Where the proponents of the deposition are adverse parties, as Grandparents are, it is immaterial whether the deponent is available to testify in person at trial. (§ 2025, subd. (u)(2).)

Moreover, Grandparents argue for the first time on appeal that the deposition was admissible pursuant to section 2025, subdivision (u)(3)(A) because Mother resided more than 150 miles from Sacramento. Although an appellate court ordinarily does not consider theories that were not raised in the trial court, we have discretion to do so if the argument, like the one raised by Grandparents, involves "a pure question of law determinable from uncontroverted facts." (Hennefer v. Butcher (1986) 182 Cal.App.3d 492, 505-506.) We so exercise our discretion to consider Grandparents' new argument.

Father argues Grandparents produced no evidence at trial to prove that Mother lived more than 150 miles from the hearing. But the location of Mother's residence was undisputed. Father sent J.V. to live with Mother in Maryland on January 15, 2003, and Father served Mother with his settlement conference statement at a Maryland address on August 14, 2003. We take judicial notice that Maryland is more than 150 miles from Sacramento, California. (Evid. Code, §§ 452, subd. (h) & 459.)

Mother was "unavailable as a witness" within the meaning of Evidence Code section 240, subdivision (a)(4), and did not testify at trial. Thus, section 2025, subdivision (u)(3)(A) authorized Grandparents to introduce Mother's deposition testimony. Because the trial court precluded Grandparents from doing so, we shall reverse the court's order.

Father argues that the deposition "could have properly been excluded under Section 352 of the Evidence Code." However, that is an issue which must be raised in the trial court on remand.

DISPOSITION

The order is reversed and the matter is remanded to the trial court for further proceedings consistent with this opinion. The parties shall bear their own costs on appeal. (Cal. Rules of Court, rule 27(a)(4).)

We concur: NICHOLSON, J., RAYE, J.