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CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

In re JEFFREY M., a Person Coming Under the Juvenile Court Law.	
THE PEOPLE, Plaintiff and Respondent, v. JEFFREY M., Defendant and Respondent; MARIA M., Objector and Appellant.	F048648 (Super. Ct. No. 26423) **OPINION**

APPEAL from a judgment of the Superior Court of Merced County. Thomas S. Burr, Commissioner.

George Bond, Executive Director, and Sandra T. Uribe, under appointment by the Court of Appeal, for Objector and Appellant.

*Pursuant to California Rules of Court, rules 976(b) and 976.1, this opinion is certified for publication with the exception of parts III and IV.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Mary Jo Graves, Assistant Attorney General, Catherine Chatman and Julie A. Hokans, Deputy Attorneys General, for Plaintiff and Respondent.

No appearance for Defendant and Respondent.

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PROCEDURAL AND FACTUAL HISTORIES

This appeal raises an issue of first impression regarding the interpretation of Welfare and Institutions Code[1] section 730.7, which imposes joint and several parental liability for restitution orders made by the juvenile court in delinquency proceedings.

In a delinquency proceeding involving appellant Maria M.'s son Jeffrey, the juvenile court ordered Maria jointly and severally liable for restitution to the victim of Jeffrey's offense in the amount of $5,351.99. Jeffrey, who was age 17 years at the time of the offense, but 18 at the time of the disposition order, entered a plea of no contest to battery on a peace officer. The offense occurred when an officer supervising a school dance placed a hand on Jeffrey's shoulder, asking him to go with the deputy to the front office to call Maria, because it was time for Jeffrey to leave the dance. (Jeffrey was on probation for an earlier offense and had a 10:00 p.m. curfew.) Jeffrey pulled away, causing the officer to lose his balance and fall, injuring his ring finger.

At the hearing set to determine restitution, the juvenile court informed Maria that it needed to decide the legal issue of "whether or not Jeffrey would be responsible for [the restitution ordered]." Maria was told she would be notified of the court's decision by mail. Maria was not represented by counsel, although she had been provided notice according to section 729.5 that she could be held liable for any restitution ordered. Maria

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

was held jointly and severally liable pursuant to section 730.7 for the restitution ordered. Maria appeals from this order only.

DISCUSSION

I. Appealability

The order of the juvenile court making Maria jointly and severally liable for restitution to the victim is an appealable order. Although section 800 does not expressly afford a minor's parent the right to appeal a judgment or order of the juvenile court made in a section 601 or 602 proceeding, a parent has the authority to appeal to protect their own interests. (*Dana J. v. Superior Court* (1971) 4 Cal.3d 836, 841; *In re Dargo* (1947) 81 Cal.App.2d 205, 207.) Also, section 730.7 expressly authorizes the juvenile court to make the mother jointly and severally liable for the restitution ordered pursuant to Civil Code section 1714.1. Judgments obtained pursuant to Civil Code section 1714.1 are reviewable on appeal. (Code Civ. Proc., § 904.1, subd. (a)(1).)

II. Propriety of the restitution order

Section 730.7 provides as follows:

> "(a) In a case in which *a minor is ordered to make restitution to the victim or victims,* or the minor is ordered to pay fines and penalty assessments under any provision of this code, *a parent or guardian who has joint or sole legal and physical custody and control of the minor shall be rebuttably presumed to be jointly and severally liable with the minor in accordance with Sections 1714.1 and 1714.3 of the Civil Code for the amount of restitution, fines, and penalty assessments so ordered,* up to the limits provided in those sections, subject to the court's consideration of the parent's or guardian's inability to pay. When considering the parent's or guardian's inability to pay, the court may consider future earning capacity, present income, the number of persons dependent on that income, and the necessary obligations of the family, including, but not limited to, rent or mortgage payments, food, children's school tuition, children's clothing, medical bills, and health insurance. *The parent or guardian shall have the burden of showing an inability to pay.* The parent or guardian shall also have the burden of showing by a preponderance of the evidence that the parent or guardian was either not given notice of potential liability for payment of restitution, fines, and penalty assessments prior to the petition

> being sustained by an admission or adjudication, or that he or she was not present during the proceedings wherein the petition was sustained either by admission or adjudication and any hearing thereafter related to restitution, fines, or penalty assessments." (§ 730.7, subd. (a), italics added.)

Maria argues that section 730.7 allows parental liability only when the restitution order is imposed upon a person who is a "minor," and that the operable date is the date of the restitution order. She argues that the purpose behind section 730.7 is not to impose liability on parents per se, because this is contrary to the general rule found in the common law that parents are not liable for damages arising out of the torts of their children. (*Perry v. Simeone* (1925) 197 Cal. 132, 136; *Van Den Eikhof v. Hocker* (1978) 87 Cal.App.3d 900, 904.) She contends that the statute simply recognizes the support obligation arising out of the parent/child relationship and that, once Jeffrey turns 18, the premise for the vicarious liability provided in section 730.7 disappears. Before age 18, Jeffrey is not an emancipated person. Once 18, however, he is, and the victim may recoup his losses directly from Jeffrey's future earnings, consistent with the Legislature's intent that restitution be imposed directly on Jeffrey. He is no longer a minor and the statute does not authorize vicarious liability. (See § 730.6, subd. (a)(1) [victim shall receive direct restitution from minor].) Using this analysis, Maria contends that she cannot be held liable for the restitution order because Jeffrey was 18 on the date the order was imposed.

We have found no cases addressing the term "minor" as used in section 730.7. The term is not defined in the Welfare and Institutions Code per se. The Family Code defines "minor" as traditionally understood, anyone under the age of 18. (Fam. Code, § 6500.) We accept this definition as far as it goes. The issue in this case becomes, however, at what time must the person in question be a "minor" for purposes of section 730.7—at the time of the offense, the date of the dispositional hearing, the date of the restitution order, or some other time?

Section 602 sets the time for determining whether a person falls within the jurisdiction of the juvenile delinquency law as one who is under the age of 18 *at the time he or she violates the law of the state*. The statutory scheme uses various words throughout to describe persons subject to delinquency jurisdiction and the orders of the juvenile court. "Ward," "dependent child," "person," and "minor" are all used, alone and in combination. (See §§ 634, 903, 871, 880, 903.1.) Section 730.7 uses only the word "minor." To determine the meaning of a word or term used in a statutory scheme, we must look at the context of the statutory scheme. (*Lakin v. Watkins Associated Industries* (1993) 6 Cal.4th 644, 658-659 [meaning of a statute may not be determined from a single word or sentence but must be construed in context; provisions relating to same subject matter must be harmonized if possible]; see also *Webster v. Superior Court* (1988) 46 Cal.3d 338, 344 [when interpreting statute each sentence must be read in light of the statutory scheme].)

Maria relies on *In re Jesse V.* (1989) 214 Cal.App.3d 1619 to support her contention that the Legislature intended the vicarious liability provisions of section 730.7 to apply only where the restitution order is made at a time where the delinquent was still a minor and has not reached the age of majority. In *Jesse V.*, the issue was whether a county could seek reimbursement pursuant to section 903 from the parents of a section 602 ward for the reasonable costs expended for the support and maintenance of a ward placed outside the family home after the ward turns 18. Section 903 provides that a parent or guardian liable for the support of the "minor" who is placed outside the home is liable to the county for the cost of the minor's placement up to the statutory limits. (§ 903.) The county argued, as does the respondent here, that the term "minor" should be interpreted throughout the Welfare and Institutions Code to mean all wards of the juvenile court, i.e., any person who is a minor at the time of the offense. In a brief discussion, we rejected this argument by looking at section 902, another related provision dealing with the cost of support for a ward placed outside the home. In section 902, the

Legislature used multiple terms to describe persons subject to its provisions, "ward, dependent child, or other minor person." We concluded that the Legislature must not have intended the term "minor" to apply to all wards of the juvenile court in section 903, because it limited its reference to "a minor." Rather, we reasoned that by not including "a ward or dependent child" in section 903, the legislative implication is that the term "minor," as used in section 903, was intended "in the traditional sense, i.e., a person under 18 years of age." (*In re Jesse V., supra,* 214 Cal.App.3d at pp. 1622-1623.) We agree with this analysis as far as it goes, but do not believe the same result is compelled here.

First, the discussion in *Jesse V.* was limited to two related provisions of the statutory scheme, sections 902 and 903. These two sections deal with the exact same subject matter. There was no attempt in *Jesse V.* to apply the same rationale to the entire statutory scheme. (*Roberts v. City of Palmdale* (1993) 5 Cal.4th 363, 372 [cases are not authority for propositions they do not consider].) Second, the analysis did not stop with a comparison of the words used, but extended to the underlying rationale behind the right of the county to seek reimbursement from parents for the maintenance and support of their children while in custody. As we stated, "[t]he statute refers to the costs of support of the minor while the minor is 'placed, or detained in, or committed to, any institution or other place' indicating the ward must be a minor while placed outside the family home. Further, as noted above, the validity of section 903 is dependent on the existence of a support obligation. In general, once the child turns 18, this support obligation ends." (*In re Jesse V., supra,* 214 Cal.App.3d at p. 1623.)

In contrast, there are other provisions of the Welfare and Institutions Code where it would be ludicrous to conclude that the use of the word "minor" alone is justification for reading the word in its traditional sense only. For example, sections 633 and 634 address the right to counsel during delinquency proceedings, and both use only the word "minor." (§ 633 ["minor" must be informed at detention hearing that he or she has a

right to counsel]; § 634 [provides for appointment of counsel where a "minor" desires counsel but is unable to afford one].) With regard to these two sections, there is no question that we would have to interpret the word "minor" to mean any person who is subject to delinquency jurisdiction, i.e., any person who was under the age of 18 at the time of the offense. The right to counsel does not dissolve if the minor turns 18 before delinquency jurisdiction ends. (*In re Gault* (1967) 387 U.S. 1, 41 [Fourteenth Amendment grants right to appointed counsel in any delinquency proceedings likely to result in commitment, even though proceedings are civil, not criminal].) A person subject to the jurisdiction of the juvenile court in delinquency proceedings is entitled to representation of counsel at every stage of the proceedings. (§ 633.)

Likewise, section 701 provides that at the jurisdictional hearing the court must consider whether the "minor" is a person described by section 300, 601, or 602. Yet, it is entirely probable that a person who is 17 when the offense is committed could be 18 by the date of the jurisdictional hearing. If we accept Maria's restricted definition of the term "minor" when reading section 701, a person falling within the definition of section 602 would escape a jurisdictional finding by turning 18 before the jurisdictional hearing. The same problem arises when interpreting the meaning of the word "minor" in section 639, which authorizes the juvenile court to order reappearance of the "minor," or section 664, which authorizes the attorney of record for the "minor" to issue subpoenas requiring attendance of witnesses in delinquency proceedings. The obvious reference in these sections is any person subject to the jurisdiction of the juvenile court as defined by section 602, "minor" or not. As a result, we are compelled to limit *Jesse V.*'s discussion regarding the choice of terms used by the Legislature to the facts of that case and do not extend it to those presented here.

The immediate context of section 730.7 supports construing the term "minor" to mean any person who at the time of the offense was under the age of 18; in other words,

any ward of the court. Section 729.5,[2] the statute requiring notice to the parents that they may be held liable for any restitution order imposed under section 730.7, provides:

> "(a) If a petition alleges that a minor is a person described by Section 602 and the petition is sustained, the court, in addition to the notice required by any other provision of law, may issue a citation to the minor's parents or guardians, ordering them to appear in the court at the time and date stated for a hearing to impose a restitution fine pursuant to Section 730.6.
>
> "(b) The citation shall notify the parent or guardian that, at the hearing, the parent or guardian may be held liable for the payment of restitution if the minor is ordered to make restitution to the victim.…"

The notice mandated by this section refers specifically to section 602 and requires notice of liability to parents of a "minor" as defined by section 602. This is consistent with our reading of the statute. Liability is tied directly to jurisdiction of the juvenile court as defined by section 602, i.e., a person under 18 years of age at the time of the offense.

Section 730.6, the statute imposing direct liability for restitution on the minor, without which there can be no vicarious liability, states that it is the intent of the Legislature that a victim recover directly from a "minor" who "is found to be a person described in section 602 …." (§ 730.6, subd. (a)(1).) Subdivision (a)(2) of section 730.6 again puts the operative date at the date of the offense by direct reference to section 602. The remaining portions of the statute use only the term "minor," and not the term "ward" or "dependent child." (§ 730.6, subds. (d)(1) & (2), (e), (g) & (p).) Under this section, the operative date for purposes of the restitution order is the date of the offense. As a

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[2]Section 729.5 governs the notice requirements of section 730.7 and provides that the parents be issued a citation ordering them to appear in court at the time and date set for a hearing at which a restitution fine will be imposed on the minor pursuant to section 730.6. (§ 729.5, subd. (a).) The citation must notify the parents that, at the hearing, they may be held liable for the payment of restitution ordered and must contain a warning that the failure to appear at the time and date stated may result in an order that the parents pay restitution up to the limits set by Civil Code section 1714.1. (§ 729.5, subd. (b).)

result, an examination of section 730.7 in the context of its related provisions within the statutory scheme, sections 729.5 and 730.6, supports a broader interpretation of the term "minor" than the one proffered by Maria. (*Collection Bureau of San Jose v. Rumsey* (2000) 24 Cal.4th 301, 310 [we are to examine the statutes in their context and with other legislation on the same subject].)

The legislative intent of section 730.7 is to impose joint and several liability on the parents for the economic damages arising out of the criminal acts of their children while they are minors, even when the delinquent child reaches majority before the restitution order can be imposed. Section 730.7 is intended to transfer the vicarious liability policy endorsed by Civil Code section 1714.1 to juvenile court proceedings, in part, so that victims of a crime committed by a minor may seek restitution from the parents without the need for a separate independent civil action. (See Assem. Com. on Public Safety, analysis of Assem. Bill No. 1629 (1993-1994 Reg. Sess.) Jan. 11, 1994 [adds rebuttable presumption language to § 731.1,[3] author states bill "'simplifies procedures for victims to receive restitution from parents of delinquent minors'"]; Public Safety Subcom. on Juvenile Justice, analysis of Assem. Bill No. 3050 (1995-1996 Reg. Sess.) Apr. 23, 1996 [referring to AB 3050 which reenacts § 730.1; arguments in support include, "By awarding restitution as part of the juvenile court case, this bill could obviate the need for a separate civil proceeding"].)

Civil Code section 1714.1 provides that "[a]ny act of willful misconduct of a minor which results in injury or death to another person or in any injury to the property of another *shall be imputed to the parent or guardian* having custody and control of the minor for all purposes of civil damages, and the parent or guardian having custody and

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[3]Former section 731.1 applied only to minors committed to California Youth Authority, but mirrored the language of section 730.7. Section 731.1 was repealed in 1995 when section 730.7 was added. (Stats. 1995, c. 313, §§ 21, 23.)

control shall be jointly and severally liable with the minor for any damages resulting from the willful misconduct." (Civ. Code, § 1714.1, added by Stats. 1955, ch. 820, § 1, italics added.) Liability is limited under the statute to $25,000. (Civ. Code, § 1714.1, subd. (b).) The statute reflects an intentional departure from the common-law rule that parents are not ordinarily liable for the torts of their minor child. Instead, it adopts a policy that, as between innocent third parties and the parents of a minor child causing damage through willful misconduct, the parents should bear the burden of *responsibility* of the loss in order to ensure recovery of any losses incurred. (*Robertson v. Wentz* (1986) 187 Cal.App.3d 1281, 1288-1289; see also *Cynthia M. v. Rodney E.* (1991) 228 Cal.App.3d 1040, 1046.) Civil Code section 1714.1 imputes *liability for the tort committed, and* not merely for the resulting judgment. Civil Code section 1714.1 is expressly referenced in section 730.7.

Although we have found no case addressing the issue, upon a review of the case law arising under Civil Code section 1714.1, we cannot locate any attempt by the courts to distinguish between the date of the tortious acts and the date liability is reduced to dollars and cents. For example, in *Robertson v. Wentz, supra,* 187 Cal.App.3d 1281, the plaintiffs' son murdered the victim five days before turning 18. Liability was still imposed on the parents several years down the road after trial. In *Jamshid-Negad v. Kessler* (1993) 15 Cal.App.4th 1704, a 17-year-old college freshman broke into a home in April 1992 and, in May 1993, the appellate court held that an action brought pursuant to Civil Code section 1714.1 could proceed against out-of-state parents. Obviously the 17-year-old was no longer 17 at the time the court ruled. In *Thrifty-Tel, Inc. v. Bezenek* (1996) 46 Cal.App.4th 1559, the court found the parents vicariously liable for intentional torts committed by teenage sons some five years earlier. Given the time frame, it is most likely that one or more of the sons had reached the age of majority by the time the decision was issued. In each of these cases, vicarious liability was determined as of the date of the acts committed without regard to the age of the child at the time liability was

reduced to a legal claim for damages. We see no reason why we should not take the same approach when evaluating liability under section 730.7.

Numerous statements in the legislative history of section 730.7, and related sections 729.5 and 730.6, make it clear that the Legislature intended to extend the policy considerations behind Civil Code section 1714.1 to juvenile delinquency cases. (See Sen. Rules Com., 3d reading analysis of Assem. Bill No. 989[4] (1995-1996 Reg. Sess.) July 5, 1995, p. 2 [referring to Assem. Bill No. 989, amending § 730.1, bill would provide for parental liability for a delinquent minor's restitution obligations]; Legis. Analyst, analysis of Assem. Bill No. 3050 (1995-1996 Reg. Sess.), p. 3 [AB 989 established new procedure to allow victims of juvenile crime to obtain restitution from parents of the offender].) Unquestionably, the legislative intent was to abrogate the common-law rule.[5] A statute's legislative history and the wider historical circumstances of its enactment may be considered in ascertaining legislative intent and are proper matters for our consideration. (*People v. Peña* (1999) 74 Cal.App.4th 1078, 1082.)

Finally, we also observe that section 730.7, subdivision (a), assigns to parents the burden of showing that they were not present during the jurisdictional and any related

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[4]Assembly Bill No. 989 led to section 730.7, which was then inadvertently chaptered out by Assembly Bill No. 817, Stats. 1995, ch. 313. Assembly Bill No. 3050 reenacted provisions of Assembly Bill No. 989 accidentally chaptered out by Assembly Bill No. 817.

[5]Civil Code section 1714.1 is not the only statutory provision in California that rejects the common-law rule. (See Veh. Code, § 17708 [provides for joint and several liability of parents when civil liability of minor arises out of operation of motor vehicle on public highway].) Numerous other jurisdictions have adopted statutes abrogating the common-law rule and imposing vicarious liability on parents arising solely out of the parent/child relationship. (See Annot., Validity and Construction of Statutes Making Parents Liable (1966) 8 A.L.R.3d 612.) We do, however, acknowledge that, because a parental responsibility statute such as Civil Code section 1714.1 is in derogation of the common-law rule, it must be strictly construed. (*Cynthia M. v. Rodney E., supra,* 228 Cal.App.3d at p. 1046.)

hearings at which an admission was received or adjudication occurred. If a parent was not present at the date of adjudication, he or she is relieved of responsibility under section 730.7. This language implies a legislative intent that section 730.7 relates to liability for the offense, not simply liability for the subsequently imposed restitution. We believe this requires a conclusion that the *date of the offense* is the operative date for section 730.7 purposes. Jeffrey was a minor on the date of the offense and Maria can be held vicariously liable for the restitution ordered.

III. Due-process allegations

Maria contends that the court violated state law when it imposed the restitution order without her being present and because she was denied her right to appointed counsel. She also contends that these violations deprived her of due process as guaranteed under the Fourteenth Amendment of the United States Constitution.

A. Right to counsel

In her reply brief, Maria concedes there is no constitutional right to appointed counsel in civil proceedings. Maria was not threatened with loss of liberty in the delinquency hearings, but only with liability for a civil judgment. (See *People v. Harvest* (2000) 84 Cal.App.4th 641, 649-650 [victim restitution is a civil remedy not a criminal penalty and constitutional guarantees governing criminal prosecutions not applicable]; *People v. Madeyski* (2001) 94 Cal.App.4th 659, 662 [as general rule, there is no due process right to counsel in civil cases].)

Turning to Maria's statutory claim, section 633 gives a parent or guardian of a minor an absolute right to be represented by counsel at every stage of the juvenile court proceedings. "Section 634 gives the court discretionary authority to appoint counsel for the minor *or* the parent in case of indigency except that it is mandatory that counsel be appointed for a minor alleged to come within Welfare and Institutions Code section 601 or 602. A distinction is thus made in section 634 between a minor and his parent insofar as the right to a court-appointed attorney is concerned. The minor has an absolute right

to a *court-appointed attorney* while a parent does not possess such right." (*In re Robert W.* (1977) 68 Cal.App.3d 705, 716.) Under these two provisions, had Maria asserted a right to be represented by counsel, the court could not have precluded counsel from appearing on Maria's behalf and participating in the proceedings. Maria could also have asked the juvenile court to appoint counsel for her at public expense. Upon a proper showing, the court could have exercised its *discretionary* authority under section 634 to do so. Maria did neither of these two things, despite being notified that she had these options. She has thus waived the right to assert either of these two statutory options. (*People v. Scott* (1994) 9 Cal.4th 331, 353 [failure to challenge discretionary choices at trial waives claim of error on appeal].)

We find no merit to Maria's contention that the juvenile court led her to believe it would not impose vicarious liability by telling Jeffrey at the dispositional hearing that he was now 18 and must take responsibility for himself. The court made this statement to Jeffrey during a discussion about whether Jeffrey should enter a drug rehabilitation program. The court stated, in this context, "[Y]our parents no longer have the legal obligation to clothe you, to house you, to feed you. They're no longer responsible for anything you do. When you are a juvenile under the age of 18 your parents are liable for all of those things. But now you are 18 you essentially are your own person Jeffrey." This statement about future personal responsibility does not negate earlier warnings to Maria that she could be found liable for Jeffrey's conduct during his minority. Maria appeared at the restitution hearing, while Jeffrey did not. She obviously understood her risk.

Maria contends nonetheless that the court was obligated to appoint counsel for her at the dispositional hearing because a conflict of interest existed between her and Jeffrey on the restitution issue. Section 634 requires that if a conflict of interest arises between the parent and the minor such that "one attorney could not properly represent both," the court shall appoint additional counsel so that both the minor and the parent are

represented. (§ 634.) A conflict exists whenever a lawyer, in representing one client, is duty bound to assert that which he or she, in representing a different client, is duty bound to oppose or when the representation of one client will be directly adverse to the representation of another client. (See *Flatt v. Superior Court* (1994) 9 Cal.4th 275, 283.) Our review of the record shows that there was no conflict of interest. Jeffrey's interests and Maria's interests were the same. The issues raised by Jeffrey's attorney, the legality of ordering restitution paid to an insurance company, double recovery, and the need to substantiate the medical expenses, are consistent with Maria's interests. In fact, the amount ordered by the juvenile court is substantially less than the $9,681.03 originally recommended by probation. This was, in large part, due to the efforts of the public defender. There is no apportionment of fault because the liability stems vicariously from the parent/child relationship. There was no statutory violation and Maria was not denied legal representation.

B. Presence at hearing

Maria states, without further discussion, that she was "not present when the court held [her] liable for restitution." We reject this contention because it simply is not true. (See also *Stevenson v. Baum* (1998) 65 Cal.App.4th 159, 167, fn. 8 [issue is waived where brief mentions point "in passing" but made "no legal argument developing the point"].) The ex parte hearing set for consideration of the restitution issue was held on May 26, 2005. Maria was present along with the public defender. After hearing the arguments of counsel, the juvenile court provided counsel with an opportunity to submit written citations or cases for the court's consideration. The court informed Maria it was going to take the matter under submission after looking at the authorities submitted by counsel and would render its decision in writing as soon as possible. Maria asked how she would be notified of the decision, and the court responded that the probation department would mail it to her. No further hearings were held and apparently counsel did not submit any additional materials. The court's minutes state that the matter was

submitted on May 26, 2005. The juvenile court rendered its written decision on July 11, 2005, ordering restitution in the amount of $5,351.99.

C. Ability to pay

Section 730.7 requires that the juvenile court consider the parent's ability to pay when making its restitution order. The statute states that restitution may be imposed up to the limits set in Civil Code sections 1714.1 and 1714.3, subject to the parent's or guardian's ability to pay. (§ 730.7, subd. (a).) The record does not establish affirmatively that the juvenile court considered Maria's ability to pay. Maria contends that because "there is no indication the court considered appellant's ability to pay" and the "facts suggest she did not have an ability to pay," the order is invalid. She argues that, given the record, she "could very well have rebutted the presumption that she has the ability to pay the court-ordered restitution."

We reject Maria's contentions for several reasons. First, she has waived any claim that she is unable to pay by her failure to raise the issue before the juvenile court. (See *In re S. S.* (1995) 37 Cal.App.4th 543, 547-548 [failure to object to juvenile court's finding concerning amount of direct victim restitution waives issue on appeal]; *People v. McMahan* (1992) 3 Cal.App.4th 740, 750 [failure to object to sentencing or dispositional order concerning ability to pay statutory restitution fine constitutes waiver]; see also *People v. Tillman* (2000) 22 Cal.4th 300, 302-303 [routine defects in the court's statement of reasons are easily prevented and corrected if called to the court's attention; issue waived if not raised before trial court].) If she truly could have rebutted the statutory presumption, she was obligated to do so before the juvenile court ruled. "As in other waiver cases, we hope to reduce the number of errors committed in the first instance and preserve the judicial resources otherwise used to correct them." (*People v. Scott, supra,* 9 Cal.4th at p. 353.)

Second, there is no requirement under the statute that the juvenile court make express findings on the record concerning the parent's ability to pay or consider the

parent's ability to pay. (*In re Enrique Z.* (1994) 30 Cal.App.4th 464, 467-468.) In the absence of a requirement that the court make express findings, we will presume on a silent record that the juvenile court performed its duty. (Evid. Code, § 664; *People v. Frye* (1994) 21 Cal.App.4th 1483, 1485-1486.)

Finally, although the record does not contain much information about Maria's financial status, it does contain enough to sustain the implied finding of the court that Maria has the ability to pay the restitution ordered. Jeffrey, in September of 2004, was employed full-time in the construction industry. He also was working in July 2005. This supports an inference that he is capable of supporting himself and able to pay the restitution imposed. Once Jeffery reached the age of majority, there were no minor children in the home for Maria to support. Maria's opening brief claims that Maria "still supports Jeffrey," however, this assertion is not supported by the record. The citation given to support this assertion is to the probation officer's report filed on July 28, 2004, which states simply that Jeffery lives at the home of his mother. Yet, at the time of the restitution hearing, the record reveals that Jeffrey was employed. We cannot assume that Maria was supporting Jeffrey, who had reached the age of majority and was gainfully employed, even if Jeffrey still lived with Maria in the summer of 2005. "Living with" is not the same as "supporting."

Maria is employed as a court interpreter and has a monthly income of $1000 to $1250. We recognize this is not a substantial amount of money, but no evidence was presented establishing that this amount is exhausted each month due to other financial obligations or that Maria has no other assets from which to pay the amount ordered. The court was authorized under the statute to consider Maria's future earnings as well as her present income. (§ 730.7, subd. (a).) Maria also expressed willingness and an ability to pay for a rehabilitation program for Jeffrey. Given this evidence, and in light of the statutory language placing the burden of proof on Maria (see § 730.7, subd. (a) ["parent or guardian shall have the burden of showing an inability to pay"]), we conclude that the

record supports the juvenile court's implied finding that Maria has the ability to pay the restitution ordered. Our conclusion would be the same even if Maria had not waived her challenge.

IV. Equal protection

Maria contends that holding her, but not Jeffrey's father, jointly and severally liable for the restitution order violates equal protection guarantees. (U.S. Const., 14th Amend.; Cal. Const., art. I, § 7, subd. (a).) Maria's argument fails because she has not shown that she and the father are similarly situated. It is Maria's duty to demonstrate affirmatively her claim of error. (*Reyes v. Kosha* (1998) 65 Cal.App.4th 451, 466, fn. 6.)

Although we agree that both parents have an equal responsibility to support their child (Fam. Code, § 3900), there can be distinctions between father and mother so that one might be held vicariously liable for restitution when the other is not. Maria concedes as much. In this case, there are two facts suggesting that Maria and Jeffrey's father were not similarly situated. First, although the father was present for the dispositional hearing, for some unexplained reason, he was not present at any of the restitution hearings.[6] Since the father was not present, any restitution order directed to him would be subject to challenge. (See § 730.7, subds. (a) & (b)(6).) Secondly, Maria cannot establish that the father had at least joint physical and legal custody of Jeffrey. The statute requires that a parent found vicariously liable for the restitution order arising from his or her minor child's offense must have joint or sole legal and physical custody and control of the minor. (§ 730.7, subd. (a).) The record is completely silent about the custody agreement and/or order in place when Jeffrey committed the offense. The only evidence, as respondent points out and Maria concedes, is that Jeffrey lived with Maria at the time of the offense. (See *Maria P. v. Riles* (1987) 43 Cal.3d 1281, 1295-1296 [failure to provide

[6]As to the September 16, 2004, hearing, the juvenile court noted that Maria was "here for the father," but the hearing was continued on this date.

an adequate record on an issue requires that the issue be resolved against appellant].) Given the statutory requirement of at least joint physical custody and control of the minor, Maria cannot establish that the father was similarly situated to her relative to the restitution order. Consequently, her equal protection claim cannot prevail.[7]

DISPOSITION

The judgment is affirmed.

_____
Wiseman, J.

WE CONCUR:

_____
Vartabedian, Acting P.J.

_____
Hill, J.

[7]Maria argues in her reply brief that if the record is insufficient to show that the father had at least joint physical custody of Jeffrey, it is also inadequate to establish that she had at least joint physical custody. She points to the initial wardship order placing Jeffrey in the custody of probation while placed in his mother's home. This was the order existing at the time of the offense. Maria has waived this claim by not raising it before the juvenile court and by waiting to raise it in her reply brief on appeal. (See *Sunseri v. Camperos Del Valle Stables, Inc.* (1986) 185 Cal.App.3d 559, 562, fn. 4.)