Filed 4/23/12 In re D.J. 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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 D.J., a Person Coming Under the Juvenile Court Law.	B233678 (Los Angeles County Super. Ct. No. CK77107)
LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. N.T., Defendant and Appellant.	

APPEAL from orders of the Superior Court of Los Angeles County. Elizabeth Kim, Referee. Affirmed.

Catherine C. Czar, under appointment by the Court of Appeal, for Defendant and Appellant.

Andrea Sheridan Ordin, County Counsel, James M. Owens, Assistant County Counsel, and Tracey F. Dodds, Principal Deputy County Counsel, for Plaintiff and Respondent.

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N.T. (Father) appeals from the March 2, 2011 orders of the juvenile court establishing a legal guardianship for D.J. and requiring Father to have monitored visits in California. Father contends that the court violated his right to due process when it denied his motion to continue the Welfare and Institutions Code section 366.26 hearing; the court failed to follow correct procedures with regard to his status as an alleged father; and the court abused its discretion by ordering Father to have monitored visits in California.[1] We conclude that the court did not violate Father's right to due process because Father was given notice of the proceedings that he was entitled to as an alleged father. Nor did the court abuse its discretion in denying Father's motion for a continuance because Father did not file a written motion for a continuance and did not establish good cause for a continuance. We also determine that Father has not shown that the court failed to follow correct procedures with regard to his rights as an alleged father and did not abuse its discretion in ordering Father to have monitored visits in California. We affirm.

BACKGROUND

On May 4, 2009, the Los Angeles County Department of Children and Family Services (DCFS) filed a petition on behalf of D.J., born in January 2009, pursuant to section 300, subdivisions (b) (failure to protect) and (d) (sexual abuse). As amended and sustained, the petition alleged under section 300, subdivision (b) that L.H. (Mother) and Father had a substance abuse history and that Father had sexually abused Mother by engaging in sexual intercourse with her when she was a minor.

Mother was 17 years old and a court dependent at the time the petition was filed. Mother told DCFS that she left her foster home on a regular basis to smoke marijuana and drink alcohol with Father, who was 50 years old. Mother had unprotected intercourse with Father and did not take any precautions to prevent disease or pregnancy. Mother said she wanted to move to Arizona with Father when she turned 18 and thought of leaving D.J. and running away from her foster home.

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

Mother was continuously absent without leave from her foster home and was not capable of caring for D.J. Mother did not bathe D.J. or keep him clean. She had to be instructed on a daily basis on how to care for him. DCFS observed that D.J. was not dressed in warm clothing and had recurrent bouts of cradle cap. D.J. was detained and placed in foster care. When interviewed by DCFS on April 29, 2009, Father stated he was unsure if he was D.J.'s father and requested paternity testing. He stated that he would be willing to care for D.J. if he turned out to be D.J.'s biological father.

At the detention hearing on May 4, 2009, Mother submitted three paternity questionnaires indicating that three men, including Father, might be D.J.'s father. One questionnaire indicated that Father did not sign papers establishing paternity at the hospital; Mother and Father were not married; a paternity test had not been performed; Mother and Father were living together at the time of D.J.'s conception, but not at the time of his birth; and Father did not hold himself out as D.J.'s father and accept him openly in his home. D.J. was ordered detained.

On May 12, 2009, law enforcement personnel escorted Mother home, suspecting that she was prostituting herself after observing her dressed provocatively and walking up and down the street late at night. Subsequently, Mother disappeared. In the meantime, Father, who had a criminal record including convictions for vehicle tampering, reckless driving, and "Disorderly Conduct: Prostitution," did not respond to requests for interviews by DCFS. He did not return calls by DCFS made on both May 14 and May 15, 2009. No one answered the door at his residence on May 14, 2009, and Father did not respond to a note left by DCFS at his doorstep requesting him to call DCFS. Father did not respond to a letter mailed to him by DCFS on May 15, 2009, requesting that he contact DCFS.

On May 30, 2009, Mother was arrested for trespassing and placed in juvenile hall. Mother told DCFS that she had told Father that she was 18 years old when they first had intercourse, but that they continued to have intercourse after she told him she was really 16 years old. On June 1, 2009, DCFS had a telephone conversation with Father, who said he met Mother when she got into his car after she asked him if he was a pimp and he

answered no. Mother had told him she was 18 years old when they started their sexual relationship. Father denied continuing to have intercourse with Mother after he found out her true age. Mother also told Father that she left her grandmother's house after her grandmother found that she had a boyfriend over in the home. Mother continued to see other men besides Father. Father has five children and has custody of his 11-year-old and 6-year-old children. Father refused to agree to drug test on demand and wanted a DNA test to establish paternity before participating in any services.

Although Father was mailed a notice of the jurisdictional and dispositional hearing set for June 16, 2009, he did not appear in court on that date. The matter was continued to June 23, 2009. The juvenile court found notice of proceedings had been given to all appropriate parties. Mother submitted a waiver of rights, which the court found was freely and voluntarily made. The court dismissed the section 300, subdivision (d) allegation, found the section 300, subdivision (b) allegations of the amended petition true and took jurisdiction over D.J. The court ordered D.J. removed. The court ordered family reunification services for Mother, but not for the three alleged fathers.

Mother was placed at a residential treatment facility on July 27, 2009, where she received counseling for substance abuse and parenting, and had weekly visitation with D.J. Mother was later placed in transitional housing and continued to receive reunification services. Subsequently, Mother was discharged from transitional housing for failure to comply with the program. She stopped visiting D.J. and stopped complying with DCFS orders. Mother wanted relative Pamela A. to adopt D.J.[2]

On February 1, 2010, Father called DCFS and stated that Mother told him she could not comply with DCFS's orders and wanted DCFS to release D.J. to him. Father said he was not sure if he was D.J.'s father and said he wanted DNA testing.

Father appeared and was represented by counsel at the April 13, 2010 progress hearing. The court ordered paternity testing, ordered DCFS to send a paternity testing "'kit'" to Father at his Arizona address, advised Father's counsel to arrange the analysis

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[2] Pamela A. is referred to in the record as maternal great aunt, maternal aunt, paternal aunt, and paternal cousin. She appears to be a maternal third cousin.

through Labcorp in Arizona, and continued the matter to May 24, 2010. DCFS reported that on May 11, 2010, Labcorp informed DCFS that it had not received a specimen from Father. On May 24, 2010, the court continued the matter to June 21, 2010, because paternity test results were not available. Labcorp reported on June 8, 2010, that it still had not received a specimen from Father. In the meantime, Pamela A.'s home assessment was completed pending approval for placing a sixth child in the house. Pamela A. owned a two-story, six-bedroom house and provided adequate care and supervision for her two biological children and three adopted children. She also was the legal guardian of her niece, who stayed at Pamela A.'s home 50 percent of the time.

On June 21, 2010, the court instructed Father's attorney to make sure the paternity test was completed. On July 13, 2010, the court ordered DCFS to arrange for D.J. to be tested and a "kit" to be sent to Father "at the address stated in today's order." On August 16, 2010, Father missed an appointment with Labcorp because he had "forgotten about the appointment." On August 22, 2010, Labcorp confirmed receipt of D.J.'s specimen. Father submitted a specimen at the rescheduled appointment on August 27, 2010.

The section 366.21 hearing was held on September 1, 2010. Father's counsel's request for a continuance on the basis that she had been unable to contact Father, whose phone was "not accepting calls," was denied by the juvenile court. The court terminated Mother's reunification services and set a section 366.26 permanency planning hearing on January 5, 2011.

Labcorp paternity test results dated September 8, 2010, reported that Father was D.J.'s biological father. At the progress hearing on October 13, 2010, the juvenile court ordered DCFS to investigate Father's request for presumed father status and to determine whether he was interested in participating in services. DCFS reported on October 27, 2010, that Father wanted presumed father status and custody of D.J. He stated he was willing to participate in reunification services. On October 26, 2010, Father was provided referrals for services in Arizona, including drug testing and counseling, individual counseling, and parenting programs.

At the progress hearing on October 27, 2010, Father's counsel stated that Father wanted to be considered a presumed father, that he had received the referrals from the social worker, and that he wished to have paternal aunt Janine B. in Arizona considered for placement, which would allow him more frequent contact with D.J. The juvenile court requested a progress report to address whether Janine B. had requested placement, as well as updated information on Pamela A. The court gave DCFS the discretion to place D.J. with any appropriate relative in the interim. The court discussed with Father's counsel that Father needed to file a section 388 petition to request a change in status from alleged to presumed father. Father's counsel indicated she would file "appropriate paperwork" for the next hearing in November.

On November 16, 2010, Father told DCFS that he had enrolled in all of the programs "per court order," but did not provide dates or other verification to DCFS. DCFS reported it was investigating an allegation regarding child abuse against Pamela A. Janine B. told DCFS that she wanted custody of D.J., had recently completed foster parent training, and her home was pending approval by the foster family agency. DCFS reported it was willing to initiate placement of D.J. with Janine B. through the interstate compact on placement of children (ICPC).

At the hearing on November 17, 2010, Father's counsel informed the juvenile court that he had enrolled in programs through Southwest Behavioral Services on November 12, 2010, and wanted D.J. placed with him or Janine B. The court ordered DCFS to assist Janine B. with an expedited ICPC evaluation. The court ordered that Father could have monitored visits with D.J. in Los Angeles County.

On December 2, 2010, Pamela A. filed a section 388 petition requesting that D.J. be placed with her, claiming she could prove that DCFS's report that allegations of sexual abuse had been filed against her was incorrect. In its January 5, 2011 report, DCFS admitted Pamela A. had not been a target of sexual abuse allegations and that its previous report was incorrect. DCFS reported that Pamela A. was instrumental in obtaining records dating back to 1994 to clear up the mistake, she had consistently visited with D.J. over the past six months while he was in foster care, and she had formed a close

bond with D.J. DCFS had placed D.J. with Pamela A. on December 10, 2010. DCFS reported that D.J. had adjusted well to being placed in Pamela A.'s home, the other children were gentle and patient with D.J., Pamela A. met D.J.'s physical and developmental needs, maternal grandmother lived with Pamela A. and assisted with D.J.'s daily needs, and Pamela A. was committed to raising him in a loving and stable environment. Pamela A. was willing to allow Father to arrange to visit D.J. any time. DCFS did not pursue the ICPC placement with Janine B. because D.J. was placed with Pamela A. DCFS also reported that Father had not complied with court orders, had not made himself available to DCFS to discuss his ability to care and provide for D.J., and had not made an effort to be an active parent in D.J.'s life. Father and his counselor in Arizona informed DCFS that he was enrolled in programs, including parenting and substance abuse counseling, and that he participated in random drug testing.

At the January 5, 2011 hearing on the section 388 petition, the juvenile court noted that the issue of placement with Pamela A. was moot and took the section 388 petition off calendar. At Father's request, the court again ordered an ICPC for Janine B. Father's counsel stated that a "presumed-father motion" would be "coming up shortly." The court placed D.J. with Pamela A. and ordered "no replacement absen[t] exigent circumstances." The court ordered Father to return for the March 2, 2011 section 366.26 hearing.

DCFS reported on March 2, 2011, that Father stated he had not been involved with D.J. initially because he did not know if he was D.J.'s father, but after his paternity was established, Father wanted custody. DCFS had spoken with Father's counselor in Arizona, who informed DCFS that Father was in full compliance with "all his court orders[,] which [was] not limited to parenting, drug treatment program and drug testing," and that he would complete his program very soon. It also reported that an ICPC had been initiated for Janine B. on February 9, 2011. D.J. was evaluated by a psychologist, who reported that D.J. was autistic, had delayed speech, was hard of hearing, tolerated change poorly, liked routines, and became anxious on leaving the house. D.J. was happy and his needs were fully and timely met in the home of Pamela A., who provided D.J.

"with [a] nurturing environment filled with unconditional love." Pamela A. stated she might consider adoption in the future.

The section 366.26 hearing was held on March 2, 2011. Father made an oral motion to continue the hearing because he wanted more time to elevate himself to presumed father status. Father argued that because the ICPC for Janine B. had not been initiated on January 5, 2011, when first ordered by the court, Father had been unable to visit D.J. frequently and therefore had not been given the opportunity to elevate himself to presumed father status. Mother's counsel argued against the request for a continuance, noting that Father was an offending party who had a petition sustained against him, and that because Father was merely an alleged father, he had not been given reunification services. Mother's counsel argued that Father had not filed a section 388 petition requesting presumed father status or reunification services. DCFS argued that Father had been aware from the time of his first court appearance in April 2010 of what he needed to do to attain presumed father status, but had not filed a section 388 petition. D.J.'s counsel argued there was no legal basis to continue the matter and it was in D.J.'s best interest to grant legal guardianship to Pamela A.

The juvenile court denied Father's request for a continuance, appointed Pamela A. the legal guardian of D.J., and ordered monitored visitation for Mother and Father.

Father filed an appeal from the juvenile court's order establishing a legal guardianship for D.J. and ordering Father's visits to be monitored in California.

DISCUSSION

A. The juvenile court did not violate Father's right to due process or abuse its discretion in denying Father's motion for a continuance

Father contends that the juvenile court violated his right to due process when it denied his motion to continue the section 366.26 hearing. We conclude that the court did not violate Father's right to due process because he was given notice of proceedings that he was entitled to as an alleged father. Nor did the court abuse its discretion in denying Father's motion for a continuance because Father did not file a written motion for a continuance and did not establish good cause for a continuance.

Father cites *In re B.G.* (1974) 11 Cal.3d 679, 688–689, for the proposition that the juvenile court must afford a parent adequate notice and an opportunity to be heard before depriving him of his interest in the companionship, care, custody and management of his children. Father, as an alleged biological father, properly was given notice of proceedings under section 300 as required by section 316.2, subdivision (b). (*In re Joseph G.* (2000) 83 Cal.App.4th 712, 715.) Thus, the issue before us is not lack of notice, but whether the court abused its discretion in denying Father's request to continue the section 366.26 hearing.

Section 352, subdivision (a) provides: "Upon request of counsel for the parent . . . the court may continue any hearing under this chapter beyond the time limit within which the hearing is otherwise required to be held, provided that no continuance shall be granted that is contrary to the interest of the minor. In considering the minor's interests, the court shall give substantial weight to a minor's need for prompt resolution of his or her custody status, the need to provide children with stable environments, and the damage to a minor of prolonged temporary placements. [¶] Continuances shall be granted only upon a showing of good cause and only for that period of time shown to be necessary by the evidence presented at the hearing on the motion for the continuance. . . . [¶] In order to obtain a motion for a continuance of the hearing, written notice shall be filed at least two court days prior to the date set for hearing, together with affidavits or declarations detailing specific facts showing that a continuance is necessary, unless the court for good cause entertains an oral motion for continuance." The juvenile court's order denying a continuance will be reversed "only upon a showing of an abuse of discretion." (*In re Gerald J.* (1991) 1 Cal.App.4th 1180, 1187.)

Father did not file a motion for a continuance and we conclude he has failed to show that good cause existed for the juvenile court to entertain a last-minute oral motion for a continuance. (*In re B.C.* (2011) 192 Cal.App.4th 129, 144 [no good cause for untimely motion for continuance on the date of hearing where Mother's conservator became aware of hearing two weeks prior to hearing].) Father was represented by counsel at the April 13, 2010 hearing, almost a year before the March 2, 2011 section

366.26 hearing. And both Father and his counsel were present in court on January 5, 2011, when the court ordered him to appear at the section 366.26 hearing on March 2, 2011. Therefore, Father and his counsel had sufficient notice of the hearing and time to file a written motion for a continuance, which they failed to do.

Nevertheless, Father contends that there was good cause to continue the hearing because he "just found out he was the biological father the previous fall," after many delays in paternity testing. He also contends it had been difficult to elevate himself to presumed father status because he could not visit D.J. as frequently as he wanted because he lived out of state. And he urges that had the ICPC been ordered earlier for Janine B. and had D.J. been placed with her, he would have been able to visit D.J. more frequently. We are not persuaded by Father's arguments. Father was contacted when D.J. was first detained in May 2009, but failed to keep in touch with DCFS, and did not appear at the detention, jurisdiction/disposition hearing, and the first six-month review hearing. He first appeared before the juvenile court, represented by counsel in April 2010, almost a year after D.J.'s detention. There is no evidence that he visited D.J. while D.J. was in foster care, or that he attempted to form a bond with D.J., or that he arranged to visit D.J. after he was placed with Pamela A. He admitted that he was not involved with D.J. initially and only wanted custody after his paternity was established.

Although at the hearings in October 2010 and January 2011 Father's counsel stated that she intended to file a section 388 petition requesting a change in status to presumed father, Father never filed a section 388 petition requesting to be declared a presumed father or reunification services. By the time Father's counsel requested a continuance, D.J. had been placed with Pamela A. for almost three months and was doing very well. And it was uncertain whether the ICPC for placement of D.J. with Janine B. would have been approved, let alone that the court would have found it in D.J.'s best interest to replace D.J. from Pamela A. to Janine B. because the court had ordered that D.J., who was a special needs child, was not to be removed from Pamela A. absent exigent circumstances. And it is not certain that the court would have granted a section

388 petition finding Father to be a presumed father and ordered reunification services for Father at that late date in the proceedings.

Accordingly, we conclude that the court did not abuse its discretion in determining that there was no good cause to continue the hearing.

B. Father has not shown that the juvenile court failed to follow correct procedures with regard to him as an alleged father

Father contends that the juvenile court failed to follow procedures that would have ensured timely paternity testing and allowed him to elevate his paternity status. He also claims the court erred when, before the test results were available, it set the case for the section 366.26 hearing. We disagree.

"Due process for an alleged father requires only that the alleged father be given notice and 'an opportunity to appear and assert a position and attempt to change his paternity status. [Citations.]' [Citation.] The statutory procedure that protects these limited due process rights is set forth in section 316.2." (*In re Paul H.* (2003) 111 Cal.App.4th 753, 760.) "Section 316.2, subdivision (a), requires the juvenile court to conduct an inquiry as to the identity of all presumed or alleged fathers. Section 316.2, subdivision (b), describes the juvenile court's duties once an alleged father has been identified. It provides: '[E]ach alleged father shall be provided notice at his last and usual place of abode by certified mail return receipt requested alleging that he is or could be the father of the child. The notice shall state that the child is the subject of proceedings under Section 300 and that the proceedings could result in the termination of parental rights and adoption of the child. Judicial Council form Paternity-Waiver of Rights (JV-505) shall be included with the notice. . . .' (See also [Cal. Rules of Court,] rule 1413(g).)" (*In re Paul H.*, at p. 760.) "If a man appears in a dependency matter and requests a finding of paternity through Judicial Council form JV-505, 'the court shall determine whether or not he is the biological father of the child.' (Rule 1413(h).) The court may make such determination either by ordering blood testing or based on testimony, declarations or statements by the mother and alleged father. (Rule 1413(e)(1) & (2).)" (*In re Paul H.*, at p. 761.)

In re Paul H., cited by Father, does not assist him. In that case, the Court of Appeal reversed the juvenile court's order terminating the father's parental rights based on the court's failure to abide by procedures with respect to alleged fathers. (*In re Paul H.*, *supra*, 111 Cal.App.4th at p. 762.) Upon being advised that he might be the father of the dependent child, the alleged father consulted an attorney, sent e-mails to child support services and made numerous phone calls to child support services, adoption workers, the district attorney's office, and the court in order to set up paternity testing. His efforts to obtain testing were unsuccessful, and in the meantime, the juvenile court terminated parental rights. The Court of Appeal held that the juvenile court failed to follow the procedures set forth in section 316.2, subdivision (b), and California Rules of Court, rule 1413, by failing to serve the father with a form by which the father could indicate his desire to request paternity testing. And the father was prejudiced by the court's failure to follow the required procedures because "he was denied access to a procedure by which he could have compelled court-ordered paternity testing, as well as assistance from the social services agencies in arranging for such testing. Instead, [the father's] extensive, if ineffective, efforts to obtain paternity testing on his own were met with repeated roadblocks and, ultimately, were unsuccessful. (*Id*. at p. 761.)

Unlike the father in *In re Paul H.*, who made unflagging, consistent, and numerous attempts to obtain testing, Father, after initially telling DCFS that he wanted a paternity test in April 2009, subsequently failed to return calls or letters throughout May 2009. DCFS contacted Father in June 2009, then in February 2010. Both times Father stated that he wanted custody of D.J. only if he was proven to be D.J.'s biological Father, but Father did not appear before the juvenile court to request testing until April 2010. It is unclear when Father moved to Arizona, although his counsel on appeal states he was living in Arizona "as of April 2010 at least." Father does not contend that he did not receive proper notice of the hearings, and the court ordered the testing kits to be sent to his address in Arizona at the April 2010 progress hearing. Thus, it cannot be said that the court failed to comply with the proper procedures of section 316.2, subdivision (b). Further, Father failed to submit specimens in May and June 2010 and failed to show up at

a scheduled appointment on August 16, 2010, because he had "forgotten" about it, causing another delay.

Father contends that the juvenile court erred when, before Father received his paternity test results, it set the section 366.26 hearing on March 2, 2011. We disagree. In *In re Ninfa S.* (1998) 62 Cal.App.4th 808, the juvenile court did not abuse its discretion in denying the alleged father's request for a continuance of the section 366.26 hearing pending receipt of results of his paternity testing, which the court determined were irrelevant for purposes of the hearing, which is concerned only with a long-term placement plan for the child. Here, at the September 1, 2010 hearing, the court terminated Mother's reunification services and set the section 366.26 hearing on January 5, 2011. Father's counsel had been unable to reach him regarding the paternity test because his phone was not accepting calls.

Accordingly, we conclude that Father has not shown that the juvenile court failed to follow correct procedures with regard to him as an alleged father.

C. The juvenile court did not abuse its discretion in ordering Father to have monitored visits in California

Father contends the juvenile court abused its discretion by ordering Father to have monitored visits in California. We disagree.

"Courts have long held that in matters concerning child custody and visitation trial courts are vested with broad discretion. On appeal the exercise of that discretion will not be reversed unless the record clearly shows it was abused." (*In re Megan B.* (1991) 235 Cal.App.3d 942, 953, called into doubt by statute on other grounds as stated in *Anthony D. v. Superior Court* (1998) 63 Cal.App.4th 149, 156.)

Father argues that he was improperly denied visitation, citing *In re Mark L.* (2001) 94 Cal.App.4th 573, 581, for the proposition that it is improper to deny visitation to a parent absent a showing of detriment. He also cites section 366.26, subdivision (c)(4)(C), which provides as follows: "The court shall also make an order for visitation with the parents or guardians unless the court finds by a preponderance of the evidence that the visitation would be detrimental to the physical or emotional well-being of the child." *In*

re Mark L., supra, 94 Cal.App.4th at page 580 also holds that visitation must be consistent with the well-being of the child and shall not jeopardize the safety of the child, citing section 362.1, subdivision (a)(1)(A) and (B). But the juvenile court did not *deny* Father visitation; rather, it ordered Father, who was merely an alleged father, to have monitored visits in California.

We conclude that the juvenile court took into account D.J.'s best interests and acted within its discretion when it ordered Father to have monitored visits in California. Father refused to on-demand drug test in April 2009, when first interviewed by DCFS. Father did not contact DCFS in May 2009, even though DCFS repeatedly attempted to contact him. He did not appear in court until April 2010, did not deliver DNA specimens to Labcorp in June and July 2010, and missed his first scheduled DNA test in August 2010. Father's involvement with D.J. was minimal, even after it was determined he was D.J.'s biological Father. Although Pamela A. agreed to allow Father to visit D.J., there is no evidence that he visited D.J. at her home. DCFS reported that Father had not attempted to form a bond with D.J., parent him, or provide for him. Further, D.J. was autistic, had delayed speech, was hard of hearing, tolerated change poorly, and became anxious on leaving the home. The court could have reasonably determined that unmonitored visitation and allowing D.J. to travel outside of California to visit Father would be distressing to D.J. and not in his best interests.

Accordingly, we conclude that the juvenile court acted within its discretion when it ordered Father to have monitored visits in California.

DISPOSITION

The juvenile court's March 2, 2011 orders establishing a legal guardianship for D.J. and requiring Father to have monitored visits in California are affirmed.

MALLANO, P. J.

We concur:

ROTHSCHILD, J.

CHANEY, J.