Filed 11/9/17 In re K.A. CA2/3

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

In re K. A. et al., Persons Coming Under the Juvenile Court Law.	B276063
LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. CEDRIC A., Defendant and Appellant.	(Los Angeles County Super. Ct. No. CK94363)

APPEAL from orders of the Superior Court of Los Angeles County, Teresa Sullivan, Judge. Affirmed.

Neale B. Gold, under appointment by the Court of Appeal, for Defendant and Appellant.

Mary C. Wickham, County Counsel, R. Keith Davis, Assistant County Counsel, and Tracey F. Dodds, Deputy County Counsel, for Plaintiff and Respondent.

INTRODUCTION

Cedric A., father of eight children, appeals from orders of the juvenile court denying his request for a continuance, declaring a guardianship over two of his sons, K. (age 18) and Addison (age 16), and awarding him one visit with them per year. (Welf. & Inst. Code, § 366.26.)[1] None of the other six children is a party to this appeal. We hold that the juvenile court did not abuse its discretion or deny father due process when it denied father's request for a continuance of the section 366.26 hearing for K. and Addison, appointed maternal aunt Lillian G. the guardian, and fixed visitation for father and the boys.

FACTUAL AND PROCEDURAL BACKGROUND

1. *The dependency*

The children's mother died in 2010 after the youngest child was born. In June 2012, the family moved from Texas to live with the paternal aunt R. and uncle Kevin A. in California. (*In re M.A.* (Apr. 21, 2014, B248359 [nonpub. opn.]) [2014 WL 1571350, at p. *1].)

In early 2013, the juvenile court issued orders declaring all eight children dependents under section 300, subdivisions (b)

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

(failure to protect), (d) (sexual abuse), and (j) (abuse of a sibling), removing them from father's custody, and limiting father's ability to make educational decisions for K. In father's earlier appeal, we affirmed those orders because, inter alia, the record contained substantial evidence, based on statements made by children R., M., Virginia, and Catherine, that father physically abused the children when the family lived in Texas, and " ' "inappropriately sexually touched" ' " five-year-old daughter Catherine, which conduct put all eight children at risk of harm. (*In re M.A.*, *supra*, B248359, 2014 WL 1571350, at pp. *3-4.) The children were declared dependents while the family was living with the A.s, and so the Department of Children and Family Services (the Department) directed father to move out of the A. house. (*Id*. at p. *2.) Our opinion is final and law of the case. (See *A.H. v. Superior Court* (2013) 219 Cal.App.4th 1379, 1386.)

2. *Criminal charges against father in Texas*

In August 2013, the Department filed a subsequent petition, alleging as new facts (§ 342) S.'s disclosure that father sexually abused her. She told the A.s that she watched pornography with father when they lived in Texas and he rubbed her vagina. Three months later, the Department asked the juvenile court to dismiss that subsequent petition because the children had already been declared dependents under the original petition based on father's sexual abuse of a different child, namely Catherine.

Father was extradited to Tarrant County, Texas, in November 2013, on charges involving "[i]ndecency-[f]ondling" of S.

In August 2014, the Tarrant County District Attorney notified father's Texas defense counsel that S. had recanted her

allegations against father. The Department informed the juvenile court of S.'s recantation in September 2014, the same month that father was released from custody. He remained in Texas. Father had *no* contact with the children after his release from Texas custody.

3. *Permanent planning*

Meanwhile, in May 2014, the juvenile court had terminated reunification services for father and ordered the Department to devise a permanent plan for all of the children (§ 366.26).

Between December 2014 and August 2015, the juvenile court continued the section 366.26 selection and implementation hearing several times to consider father's several *Marsden* motions (*People v. Marsden* (1970) 2 Cal.3d 118) and enable his new attorneys time to prepare. The court also granted continuances to allow the Department to fashion a permanent plan for the eight children, and in particular, to assess a legal guardianship with Lillian for K. and Addison.

The juvenile court identified guardianship with Lillian as the permanent plan for K. and Addison in August 2015. However, the court continued the section 366.26 hearing at the request of both the Department and father's final attorney. Again in November 2015, the court announced that legal guardianship with Lillian was the plan for the two boys.

4. *K. and Addison*

K. and Addison lived in four placements during their dependency. In June 2015, they went to live with Lillian, who as the only relative willing to take K., indicated interest in providing a permanent home for the two boys.

The Department reported in early 2016 that K. and Addison were "doing very well with their aunt, Lillian" where they "appear[ed] to be more relaxed, at ease and happy" and "more talkative than they were at [their] previous placements." Lillian preferred that the boys remain with family and not be placed with strangers. She loved and cared for them because they were her sister's children, and was committed to providing the most appropriate permanent plan for them. Neither boy wanted to be adopted. Both were "comfortable with the status of [l]egal guardianship" and agreed to having Lillian serve as their guardian. They respected Lillian and believed that she looked out for them and their best interests. They loved their school and living where they did.

5. *The April 18, 2016 selection and implementation hearing* (*§ 366.26*)

Father submitted his " 'Verified' Parent Objections and Corrections to . . . Lillian [G.]" on April 18, 2016. He argued that Lillian was unfit to serve as guardian because "[o]n or about November 2010 through August 2011, *The* [*G.*] *Family* had taken [father's] [c]hildren into bathrooms to tell them what to say when they would call Texas [Department of Family and Protective Services] against their Father as reported and investigated by Texas [authorities] and found Father innocent." (Italics added.) Father also claimed that the same Texas authorities made him sign statements promising not to "allow the [G.] family any further contact for causing the children emotional and mental abuse." Repeatedly, father recited that "EVIDENCE, DOCUMENTS[,] and/or EMAIL PROVIDED UPON COURT REQUEST," suggesting he had that evidence.

At the contested section 366.26 hearing on April 18, 2016, everyone except father, who appeared from Texas by telephone, was ready to proceed. Father's attorney told the juvenile court that father believed Lillian was unfit to serve as legal guardian based on her conduct toward the children "back at the beginning of this case" that caused the Texas Department of Family and Protective Services to keep the children away from Lillian. Father requested a continuance of "approximately 30 days" to secure documents corroborating his allegations about . . . the "[G.] *family*." (Italics added.) The juvenile court denied father's continuance request stating "there ha[d] been adequate time to prepare any investigation that would be needed and adequate notice as to the permanent plan for these children in guardianships."

Proceeding with the hearing, the juvenile court found it was in the best interest of K. and Addison that the guardianship be granted. (§ 366.26, subd. (c)(4)(A).) The court appointed Lillian as guardian and received signed and certified letters of guardianship. As for visitation, the court awarded father monitored two-hour visits with K. and Addison, once a year in California. (*Id.*, subd. (c)(4)(C).)

CONTENTIONS

Father contends that the juvenile court abused its discretion and denied him due process by denying his continuance request. He also challenges the orders appointing Lillian as guardian and fixing visitation.

DISCUSSION

1. *The juvenile court's order denying father's request for a continuance was neither an abuse of discretion nor a denial of due process.*

Father contends that the juvenile court abused its discretion in denying his request for a 30-day extension to obtain evidence showing that it would be harmful for K. and Addison to have Lillian serve as their guardian. He claims that Lillian was a part of the reason for the false sex abuse allegations against him.

The juvenile court has discretion "to consider a motion for continuance which is to be heard before the commencement of a selection and implementation hearing under section 366.26." (*In re Michael R.* (1992) 5 Cal.App.4th 687, 694.) However, " '[c]ontinuances are discouraged in dependency cases.' [Citation.]" (*In re F.A.* (2015) 241 Cal.App.4th 107, 117.) Section 352, subdivision (a) authorizes the juvenile court, upon request of counsel for the parent to continue a hearing "only upon a showing of good cause," unless the continuance would be "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." (§ 352, subd. (a).) We review the court's rulings on continuance requests for abuse of discretion. (*In re F.A.*, at p. 117.) Discretion is abused by the court when its decision is arbitrary, capricious, or patently absurd, and results in a manifest miscarriage of justice. (*In re Karla C.* (2003) 113 Cal.App.4th 166, 180.)

Father did not show good cause for the continuance. (§ 352, subd. (a).)[2] He requested time to obtain evidence showing that Lillian was unfit to serve as guardian because of alleged actions by her family in 2010 and 2011. Father was not incarcerated in May 2015 when the Department and juvenile court identified guardianship with Lillian as the permanent plan. He was living in Texas where the evidence was located. Father offered no explanation why, a year after the permanent plan was announced, he needed still more time to gather six-year-old evidence, that involved the G. *family*, as opposed to Lillian herself. To the contrary, father repeatedly promised in his " 'Verified' Parent Objections" to provide documentation if the court requested it, suggesting he already had the necessary proof.

Moreover, another continuance would have been contrary to the boys' interest. (§ 352, subd. (a).) The children had been dependents of the juvenile court since March 2013 and so the

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[2] Section 352, subdivision (a) reads in relevant part: "Upon request of counsel for the parent, guardian, minor, or petitioner, 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."

dependency should not have lasted beyond January 2015. (§§ 361.5, subd. (a)(1)(C) & 366.22, subd. (a)(1) & (3) [the permanency planning hearing must be held 18 months after the children were removed from father's physical custody and the 366.26 hearing must be held no later than 120 days thereafter].) Repeated continuances had already extended this dependency more than a year beyond that contemplated by statute. K. and Addison were happy and doing well in Lillian's care, and so a continuance would have only further delayed finality, stability, and resolution of their custody status. The juvenile court properly exercised its discretion when it denied father's continuance request.

Father insists that the evidence he sought was "exculpatory" and "would exonerate him from *all* child abuse claims" (italics added) because the Texas authorities determined he was "innocent" of the allegations that Lillian's family made against him in 2010 and 2011. To the contrary, the evidence father sought would not have negated the basis for this dependency.

The sexual abuse that triggered this dependency was perpetrated by father on *Catherine*, not on S., as revealed by R., M., Virginia, and Catherine, *not* by S. or Lillian.[3] (§ 300, subds. (b) & (j); *In re M.A.*, *supra*, B248359, 2014 WL 157139, at pp. *2 & *4.) In contrast, the Texas sex-abuse charges were based on S.'s allegations made to the *paternal* relatives about father's

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[3] Lillian's statements to the Department in 2012 concerned father's *physical* abuse of the children, another basis for this dependency that would not have been affected by the evidence for which father sought a continuance.

abuse of *S*. The evidence father sought had nothing to do with the basis for this dependency, namely his sexual abuse of Catherine and physical abuse of all of the children, and so the evidence he sought was not exculpatory in the sense that it would not exonerate him for this dependency.

The juvenile court had already been informed that Texas dropped the charges against father that were based on S.'s allegations. (See Cal. Rules of Court, rule 5.546(c).) The court also knew that this dependency was premised, inter alia, on father's sexual abuse of *Catherine*. Thus, S.'s allegations were irrelevant as the children were already dependents under section 300, subdivision (d).

Nor was father prejudiced or denied due process by the juvenile court's ruling. In the dependency context, "[d]ue process includes the right to be heard, adduce testimony from witnesses, and to cross-examine and confront witnesses. [Citation.]" (*In re Armando L.* (2016) 1 Cal.App.5th 606, 620.) " 'The due process right to present evidence is limited to relevant evidence of significant probative value to the issue before the court. [Citations.]' [Citation.]" (*In re J.S.* (2017) 10 Cal.App.5th 1071, 1081.)

Father contends he had the due process "right to present an adequate *defense* at the hearing on April 18, 2016, or to make any *case for reunification services* or *return of custody* of his sons." (Italics added.) While " 'preservation of a minor's family ties is one of the goals of the dependency laws, it is of critical importance only at the point in the proceeding when the court removes a dependent child from parental custody [citation]. . . . Family preservation ceases to be of overriding concern if a dependent child cannot be safely returned to parental custody

and the juvenile court terminates reunification services. Then, the focus shifts from the parent's interest in reunification to the child's interest in permanency and stability. [Citation.]' [Citation.]" (*In re Richard C.* (1998) 68 Cal.App.4th 1191, 1195.) Father's reunification services were terminated in May 2014. The April 18, 2016 hearing was to select and implement a permanent plan for the children. " 'The sole issue at the selection and implementation hearing is whether there is clear and convincing evidence that the child is adoptable [citations],' " and if not, whether long term foster care or guardianship is in the child's best interest. (*In re Josue G.* (2003) 106 Cal.App.4th 725, 733.) Hence, a defense to the section 300 petition, the resumption of reunification services, and the return of the boys to father's custody were irrelevant at the April 18, 2016 section 366.26 hearing. The court did not deny father due process by denying him a continuance to obtain irrelevant evidence. (*In re J.S.*, *supra*, 10 Cal.App.5th at p. 1081.)

Father also argues he was denied the opportunity to obtain the Texas Department of Family and Protective Services records showing why he believed Lillian was not fit as a guardian. Father argues that a continuance would have benefited K. and Addison if he had been able to demonstrate that their guardian was unfit. Father was the one who requested that the section 366.26 hearing be contested. Yet he made no effort at that hearing to call Lillian or anyone in the G. family to examine them about what occurred in Texas in 2010 and 2011. Five years later, the record showed that K. and Addison, who were almost adults, were relaxed and happy, more talkative than before, and their needs were being met. K. and Addison were "comfortable" and agreed to a legal guardianship with Lillian. The denial of a

continuance did not deprive father of due process because father made no showing that the evidence he sought would have benefited K. and Addison.[4]

2. *The juvenile court exercised its discretion when it made father's visitation order.*

Section 366.26 requires, if the juvenile court orders a legal guardianship for dependent children at the selection and implementation hearing, that it "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*." (§ 366.26, subd. (c)(4)(C), italics added.) Accordingly, the juvenile court has the statutory obligation to make an order for visitation at a section 366.26 hearing unless it affirmatively finds that visitation with the parent would be detrimental to the children. (*Ibid.*; *In re M.R.* (2005) 132 Cal.App.4th 269, 274.)

When making a visitation order, the juvenile court may delegate authority to the legal guardian to decide the time, place, and manner in which visitation will occur (*In re M.R.*, *supra*, 132 Cal.App.4th at p. 274), but must "define the rights of the parties to visitation by balancing the rights of the parent with the best interests of the child." (*In re R.R.* (2010) 187 Cal.App.4th 1264, 1284.) The "parent's liberty interest in the care, custody and companionship of children cannot be maintained at the expense of [the children's] well-being." (*In re Julie M.* (1999) 69

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[4] Hence, we reject father's additional contention that the selection of Lillian as the boys' guardian was an abuse of juvenile court discretion as father has not demonstrated error.

Cal.App.4th 41, 50.) " '[T]he child's input and refusal and the possible adverse consequences if a visit is forced against the child's will are factors to be considered in administering visitation.' [Citation.]" (*In re Brittany C.* (2011) 191 Cal.App.4th 1343, 1356.)

Father contends that the juvenile court abused its discretion in fixing visitation because "the evidence did not support a finding it would be detrimental to the minors to visit with their father[.]" The contention is meritless. First, the court was only required affirmatively to find detriment if it *denied* father visitation. (§ 366.26, subd. (c)(4)(C).) But the court did not deny father all visitation; it awarded visitation and fixed the visits' frequency and length. Second, the court's visitation order was an exercise of discretion. The record shows that father has had no contact with the boys for at least a year and a half – from the time he was released from Texas jail in September 2014 through the April 18, 2016 hearing when the court issued the visitation order father challenges. Father has cited no evidence that he requested or attempted visitation with the children, notwithstanding the court awarded him visits in 2013 when it took jurisdiction. Moreover, K., who is an adult, and Addison who is nearly an adult, have not wanted to visit with father since 2013 and the court nonetheless ordered them to visit father. We cannot conclude that the court's ruling was " ' "arbitrary, capricious, or patently absurd," ' or that no reasonable court would have ruled the same way." (*In re S.A.* (2010) 182 Cal.App.4th 1128, 1139.)

DISPOSITION

The orders are affirmed.

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BACHNER, J.*

We concur:

EDMON, P. J.

LAVIN, J.

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