Filed 10/25/13 In re J.M. CA2/5

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

In re J.M., a Person Coming Under the Juvenile Court Law.	B246692 (Los Angeles County Super. Ct. No. CK91568)
LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. G.H., Defendant and Appellant.	

APPEAL from orders of the Superior Court of the County of Los Angeles, Mark A. Borenstein, Judge. Reversed and remanded.

Lori A. Fields, under appointment by the Court of Appeal, for Defendant and Appellant.

No appearance by Plaintiff and Respondent.

INTRODUCTION

G.H. (father) appeals[1] from the juvenile court's orders made ancillary to the order terminating jurisdiction over his child, J.M. By those ancillary orders, the juvenile court granted J.M.'s mother, R.M. (mother), joint legal custody over J.M. and monitored visits with J.M. in a therapeutic setting. Father contends that the juvenile court abused its discretion in making those ancillary orders. The Department of Children and Family Services (the Department) takes no position in this appeal, but states that it was "aligned" with father regarding his claims before the juvenile court.

The juvenile court exceeded its discretion because at a prior contested adjudication and disposition hearing the juvenile court found that mother failed to protect J.M. from sexual abuse, but mother continued to, in effect, reject or minimize that fact. In addition, J.M. expressed that she would commit suicide if she was required to be in mother's presence, and J.M.'s therapist advised against mother visiting with J.M. at this time. In view of these and other basically uncontradicted facts, the juvenile court erred in awarding joint legal custody to mother. The juvenile court also erred in connection with issuing the visitation order because it failed recognize that the scope of its discretion included ordering monitored visits that would commence when J.M.'s therapist determined that it was appropriate to do so. We therefore reverse and remand the matter to the juvenile court with instruction to enter a modified custody order granting father sole legal and physical custody over J.M., and to determine whether there should be any visitation at all or whether visitation may commence when determined by J.M's therapist.

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[1] Although father appealed a December 18, 2012, order following the contested judicial review hearing, which the juvenile court stayed pending the issuance of a written custody order that was issued on December 24, 2012, we grant father's request pursuant to California Rules of Court, rule 8.100(a)(2) that we construe father's appeal as being from the December 24, 2012, written custody order.

FACTUAL AND PROCEDURAL BACKGROUND[2]

In January 26, 2012, the Department filed a detention report, dated stating that on January 22, 2012, then nine-year-old J.M. and her siblings, J.E., then fifteen years old, J.V., then five years old, B.R., then two years old, and J.R., then about one and one-half years old, came to the attention of the Department based on a referral alleging that F.R. sexually abused J.M.[3]

The January 26, 2012, detention report stated that while J.M. was visiting father, J.M. disclosed to father's girlfriend, J.C., that F.R. had been having "sexual intercourse" with her for the past five years and threatened to kill J.M.'s family if she told anyone about the sexual abuse. J.C. said that J.M. appeared to be very somber and "began to sob uncontrollably" when J.M. disclosed that F.R. had been "touching her."

According to the January 26, 2012, report, one of the Department's children's social workers (CSW) interviewed J.M. Although J.M. was initially "reluctant" to discuss the matter with the CSW, J.M. said that not long after F.R. moved into their home F.R. began "to touch her 'in a bad way'"; F.R. touched her breast and rubbed her crotch with his hand; she was "too scared to tell" mother; F.R. had "sex with her"; F.R. would take her into mother's bedroom and have her remove all of her clothing, and he would remove his clothing; when they were both naked, F.R. would force her to lie on the bed and F.R. would lie on top of her and "put his private part (penis) inside of her private part (vagina)"; each time she had "sex" with F.R. it was very painful; F.R. would place his hand over her mouth so she could not scream; her younger sibling often beat on the door and demanded that F.R. stop hurting J.M.; each time F.R. and J.M. had "sex" there was a "white substance that oozes out of his private part" ; F.R. told her if she told anyone

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[2] Portions of the factual and procedural background are taken from the facts and procedural background set forth in our earlier unpublished opinion—*In re J.M.* (January 2, 2013, B240881 [nonpub. opn.]).

[3] Father is the father of J.M.; F.R. is the father of B.R. and J.R.; the other children have different fathers; and mother is the mother of all five of the children. J.M. is the only child subject to this appeal.

about the abuse he would kill her and mother; and the last time F.R. "raped her" was on January 18, 2012.

The report noted that father said F.R. has ties to the 18th Street Gang. According to the report, "Presently, [F.R.] is under the care of a psychiatrist that requires him to take a psychotropic medication (Lexaprol) once a day to control mood swings." F.R. had a criminal history dating back to April 2000, including arrests for kidnapping, inflicting corporal punishment on a spouse, willful cruelty to a child, and battery. Father said that he believed mother was responsible for the abuse because mother "allowed a known criminal to live in the home." Mother said that the sexual abuse allegations against F.R. "are absolutely untrue," and J.M. was a "habitual liar who is likely to say anything just so that she could live with . . . her father."

The report observed that father said he only recently began to see J.M. after a two year lapse because mother would not allow him to see J.M. as a result of father refusing to pay an exorbitant amount of child support. Father also was dissuaded from seeing J.M. because F.R. threatened to have him killed if he saw J.M.

On January 23, 2012, J.M. underwent a forensic medical examination. The January 26, 2012, detention report attached a forensic medical report stating that J.M. said, "[F.R.] touches me where he is not suppose to. When [I] am at home with the little kids [F.R.] touches [me]. . . . [F.R.] touches me with his private parts and puts his [*sic*] into my front private part. Sometimes it hurts. [F.R.] takes off [my] clothes and gets on top of [me]. . . . [F.R.] covers my mouth, so that I can't scream. [¶] . . . Sometimes stuff comes out [of F.R.'s penis], white stuff. [F.R.] tells me not to tell, or he will kill me and my family." The forensic medical report added, "[J.M.] states she has never told her mom because [J.M.] was afraid [mother] would not believe her. . . . [J.M.] describes being touched since she was 5 years old. The last incident was Wednesday 01-18-12." J.M.'s medical examination was "normal," and revealed "[n]o evidence of injury." The findings were "[c]onsistent with history," and the interpretation of the findings was, "Normal exam; can neither confirm nor negate sexual abuse."

The Department detained J.M. and placed her with father, placed J.V. with her father, and detained the remaining children, J.E., B.R., and J.R., in foster care. On January 25, 2012, the Department filed a petition on behalf of the children pursuant to Welfare and Institutions Code section 300, subdivisions (a), (b), (d), and (j)[4] alleging, inter alia, that F.R. slapped mother and pulled her hair in the presence of J.E., and attempted to choke J.E. when J.E. attempted to intervene; F.R. sexually abused J.M. by placing his penis in her vagina; and mother knew or reasonably should have known of the ongoing sexual abuse and failed to protect J.M.

At the January 25, 2012, detention hearing, the juvenile court found F.R. to be the presumed father of B.R. and J.R., found father to be J.M.'s presumed father, and stated that father was a non-offending parent. The juvenile court found a prima facie case for detaining the children and showing that they were children described by section 300, subdivisions (a), (b), (d), and (j). As a result, the juvenile court detained the children from mother and F.R.; released J.M. to father; released J.V. to her father; and detained J.E., B.R., and J.R. in the Department's custody for suitable placement. The juvenile court granted mother monitored visits with J.M. and ordered that father not act as a monitor.

At the February 6, 2012, pre-release investigation hearing, J.M.'s counsel stated that he had concerns about mother's visits with J.M., and wanted them monitored because mother was displaying "inappropriate . . . emotions" around J.M. that were "making [J.M.] feel very uncomfortable and [were] outright inappropriate." The juvenile court ordered monitored visits with mother at the Department's office with an approved monitor.

On March 1, 2012, the Department filed a jurisdiction/disposition report stating that F.R. said that he had been incarcerated for assault, battery, attempted murder, and attempted kidnapping, and that he killed a man in prison who had raped a young girl. He

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[4] All statutory references are to the Welfare and Institutions Code, unless otherwise indicated.

said he suffered from mental retardation and at times had been prescribed Lexapro, but was currently not taking any medication.

According to the report, mother said that she never left J.M. alone with F.R. because she knew F.R. was easily angered and had "mental problems." The Department asked mother whether she believed that F.R. sexually abused J.M., and mother responded, "I don't know. I'm not going to say yes or no." According to mother, "[T]his is what they did. I feel that [J.M.] is manipulated by [father's girlfriend, J.C.]"

The March 1, 2012, jurisdiction/disposition report stated that mother said J.M. is known in J.M.'s school as a compulsive liar. J.M. refused to visit mother and refused to speak with her telephonically on three occasions in February 2012. J.M. said that she would only visit with mother if J.C. or a CSW would monitor the visits. The Department reported that J.C. would not be eligible to monitor the visits because she and mother "previously engaged in a violent altercation[]." According to the Department, mother and J.C. had a "tumulus [*sic*] relationship."

According to the March 1, 2012, jurisdiction/disposition report, J.M. wanted to live with father. Father was "afraid" that F.R. would "hurt him." Father also said, "[W]e want what's best for [J.M.] If the court orders joint custody I would rather give up custody and keep paying child support. He ([F.R.]) is not a good person."

At the March 5, 2012, pre-trial resolution conference, mother's counsel stated that mother said she was not getting her visits with J.M., but J.M.'s counsel stated that J.M. said she did not want to visit with mother. The juvenile court ordered that mother's visits with the children should take place at the Department's office, and if J.M. refused such visits, then the visits were to take place in a therapeutic setting.

On April 17, 2012, the Department filed an interim review report stating that J.M. had been diagnosed with post traumatic stress disorder and depressive disorders not otherwise specified. J.M. was participating weekly in individual therapy, but "experienced difficulty coping with the emotional distress triggered by seeing her alleged perpetrator, [F.R.,] in court . . . . [¶] [J.M.] . . . verbalized depressive symptoms such as suicidal ideations triggered by thoughts of visitation, reunification and seeing the alleged

perpetrator[, F.R.,] and his acquaintances." Dr. Lauren Colston, J.M.'s behavioral therapist, believed that J.M.'s "emotional and well being should take precedence over having visits with mother at this time as visits with mother are retraumatizing the child and [causing] an increase in symptoms and level of distress." Because J.M. refused to visit mother on March 1, the CSW arranged for mother to attend part of a sibling visit to help J.M. feel more comfortable. After the sibling visit, J.M. reported having suicidal ideations and refused to attend the next sibling visit for fear mother would be there. Dr. Colston reported that father, J.C., and paternal grandmother were actively engaged in J.M.'s treatment and that they participated in family therapy and appeared "affectionate and concerned" for J.M.'s physical safety and mental well-being.

The contested adjudication and disposition hearing was held on April 18 and 19, 2012. J.M., then nine years old, testified in chambers. J.M. explained that after mother and father separated, she initially lived with father. When J.M. was five years old, her school intervened and said she "was going dirty," so she then went to live with mother and F.R.

At the contested adjudication and disposition hearing, mother testified, "I don't believe [J.M.], and I don't believe [F.R.], because they both lie." When mother was asked whether she thought that J.M. was lying about being sexually abused by F.R., she stated, "I am not sure." Although mother "want[ed] to believe" J.M., she did not believe her. Mother explained, "I am getting classes so I can try to believe in my daughter. But I can't believe . . . ." When mother was asked whether F.R. was lying by denying the abuse, mother responded, "No." J.M. testified that she did not want to "see [mother] because she didn't believe me. What kind of mom would do that?"

At the adjudication and disposition hearing, F.R. submitted to jurisdiction based on the allegations of domestic violence, but asked the juvenile court to dismiss the sexual abuse allegations against him. The juvenile court stated, "I found [J.M.] to be very credible. Very detailed. Very willing witness. Not so anxious to get her story out. She is nine years old. Kids get some details confused; especially when you're talking about events that occurred since she was five years old and moved around so much. I would be

surprised if she were not confused. It was very consistent. [¶] The forensic interview was done with great . . . expertise. Not in a leading or suggestive fashion. And she was consistent then. She . . . seemed calmer then. But she is in the midst, in chambers with a whole group of people having to tell this very embarrassing story. Full of shame. And she broke down on numerous occasions. It has been suggested that there is a . . . motive for fabrication due to the fact that she wanted to be with her father. [¶] I did find that she preferred to be with her father. But this wasn't a custody battle. I didn't see a suggestion that father was coaching her. This was too elaborate a story. She can't be that good an actor that this nine-year-old has come up with this detailed, elaborate story. To tell you the truth I was close to finding this true, if I needed to find it beyond a reasonable doubt. But our standard is preponderance of the evidence. And this is clearly more likely than true." The juvenile court added, "Mother created . . . an atmosphere of distrust . . . . Kids come up with lies, but [J.M.] was made to feel that all she was was a liar and whatever she said wasn't going to be believed."

The juvenile court amended and sustained the petition, found that the children were described by section 300, subdivisions (a), (b), (d), and (j), and declared the children dependants of the court. The juvenile court found true the allegations that mother had inappropriately disciplined J.M. by striking J.M. with a hanger, mother and F.R. had engaged in domestic violence during which F.R. choked J.E., F.R. had sexually abused J.M., and mother failed to protect J.M.

With regard to the sexual abuse findings, the juvenile court sustained the following language: "On numerous occasions for the past four years . . . [F.R.] . . . sexually abused . . . [J.M.], by forcibly raping the child by placing [F.R.'s] penis in the child's vagina, inflicting pain to the child. [F.R.] fondled the child's breasts and vagina, and inserted his finger into the child's vagina. [F.R.] removed the child's clothes and his own clothes prior to sexually abusing the child. [F.R.] ejaculated in front of the child. [F.R.] frequently covered the child's mouth while sexually abusing the child. [F.R.] threatened to kill the child and [mother] if the child disclosed [F.R.'s] sexual abuse of the child. [Mother] knew or reasonably should have known of [F.R.'s] ongoing sexual abuse

of the child and failed to protect the child. The child is afraid of [F.R.] and does not wish to reside in the mother's home due to [F.R.'s] sexual abuse of the child. Such sexual abuse of the child by [F.R.] and the mother's failure to protect the child, endangers the child's physical health and safety, and places the child and the child's siblings[, J.E., J.V., B.R. and J.R.,] at risk of physical harm, damage, danger, sexual abuse and failure to protect."

In connection with the disposition, mother asked the juvenile court that J.E., J.M.'s sibling, be returned to her immediate custody. The juvenile court removed custody of the children from mother and F.R. pursuant to section 361, subdivision (c); ordered J.M. home with father; J.V. home with her father; placed J.E., B.R., and J.R. in the Department's custody; ordered F.R. not to have contact with J.M. and J.V.; suspended visits between mother and J.M. until there was further input from J.M.'s therapist; and scheduled a judicial review hearing for J.M.

On April 19, 2012, F.R. filed a notice of appeal challenging, inter alia, the sufficiency of the evidence in support of the juvenile court's jurisdictional finding that he sexually abused J.M. In our prior unpublished opinion in this matter, we held that F.R.'s contention was nonjusticiable and affirmed the jurisdictional order.

At the April 26, 2012, progress report hearing, J.M.'s counsel advised that J.M.'s therapist recommended completing 18 sessions of individual trauma therapy before beginning conjoint sessions with mother, and those initial sessions had not been completed because J.M.'s therapist had "a lot of crisis sessions" with J.M. that at least, in part, resulted from an incident with mother. J.M.'s counsel requested that the juvenile court continue the order that there would be no visits between mother and J.M. until there was further input from J.M.'s therapist. The juvenile court ordered monitored visits between mother and J.M. in a therapeutic setting, and said that the visits would not occur until the "therapists say we have made enough progress."

The Department's June 7, 2012, interim review report stated that mother attempted to contact J.M. by telephone every Friday to determine if J.M. had changed her mind about visitation, but the paternal family did not answer the telephone, or J.M. "simply

states she does not want to go to the visits." J.M. told the CSW that she was "not ready to go" and she did not want to visit mother. J.M., father, and father's girlfriend, J.C., said that father and J.C. believed their physical safety was at risk; they reported "passive harassment (i.e., the same car circulating the . . . residence and park where visitations occur) by individuals believed to be associated with [F.R.]"

On October 18, 2012, the Department filed a status review report stating that mother was compliant with the juvenile court's orders, had engaged in individual therapy, and was "still working on concepts of child safety and appropriate boundaries," but "continue[d] to minimize the sexual abuse of her daughter [J.M.] by [F.R.]" Mother's therapist stated, "[Mother] does not completely believe the abuse happened and states that 'people (referring to [father] and [J.C.]) have put things in her head.'" According to the report, "mother is not having visitation with [J.M.] due to [J.M.] refusing visitation and due to [J.M.'s] therapist['s] recommendation not to have visitation with mother," and mother continued to pose serious safety risks to J.M.

The October 18, 2012, status review report stated that father was compliant with the juvenile court's orders and remained in contact with the Department. Father and J.C. were participating in individual and family counseling, appeared to be committed to "improving parenting skills," and were responsive to "treatment interventions."

The October 18, 2012, report stated that J.M. was well-adjusted in father's home and appeared to be affectionate with and bonded to him and J.C. J.M. stated tearfully that she was "scared" that the juvenile court was going to make her go back to mother at the next juvenile court hearing. J.M. stated she did "not want to see or talk to her mother and that she want[ed] to live with her father and [J.C.] forever." J.M. was "very fearful of having to return to her mother and fears [F.R.]." J.M. was still in therapy and had made "steady progress" toward reducing her symptoms of anxiety and depression, but she still had difficulty coping with her thoughts and emotions about the abuse she suffered, and experienced distress caused by fears of reunifying with F.R. and mother and about upcoming juvenile court hearings. The Department's October 18, 2012, status review report attached a September 24, 2012, treatment progress report from J.M.'s therapist

stating that J.M. told her, following monitored visits with mother and scheduled juvenile court proceedings, that "I will kill myself if I see [mother] again. . . . I will kill myself if I have to go back there."

The CSW recommended continued family maintenance services and supervision over J.M.'s case to permit father to benefit fully from all services, even though the risk in his home remained "low." Father wanted to obtain legal and physical custody of J.M. so that she could reside permanently with him.

In a December 5, 2012, interim review report, mother said she had almost completed her court-ordered programs and she was "ready to have the children back." J.M. stated, "I don't want to see my mom, I don't ever want to live with her. I want to live with my dad."

The report stated that mother asked the CSW why mother had not had any visits with J.M., and the CSW responded that J.M. was "fearful of mother and seeing [F.R.]," she cried "every time visitation is brought up," and had "suicidal ideation when discussing the possibility of reuniting with" mother. The CSW asked mother if she believed J.M. was abused by F.R., and mother said that she "does not have an opinion about it." When pressed for an answer, mother said that she "doesn't think that [F.R.] sexually abused [J.M.] the way [J.M.] says it happened," there was no physical evidence, and "if it happened why didn't [J.M.] tell anyone at school or the people around her about that." Mother then said, "I believe that he may have touched her, but he did not do what she said he did to her. He may have touched her but he didn't penetrate her." According to the report, when the CSW told mother that her continued denial was very worrisome and placed her children at risk of future abuse, mother "proceeded to change her story and stated that she does believe her daughter." The report stated that the CSW told mother that mother's statements were contradictory, and mother said that she "believes her daughter because if she doesn't she is not going to get her kids back." When the CSW advised mother to address her denial during her therapy, mother cried and blamed the Department for all her problems and issues with the children.

The December 5, 2012, interim review report stated that mother was in compliance with the juvenile court's orders and was participating in all required counseling programs. Mother was half way through a 20-session individual therapy program with counselor Monica Alfaro, a marriage and family therapist (MFT) "trainee," and according to Alfaro, mother was "not in denial" about the sexual abuse. The CSW asked Alfaro to elaborate about how mother had overcome her denial. Alfaro refused to discuss the issue further claiming the communications were confidential. At the CSW's request, Alfaro provided her with a letter on November 29, 2012, stating that mother had completed 35 out of 52 weeks of individual, conjoint, and domestic violence counseling; had made progress; and believed that her child, J.M., was a victim of "child abuse."

The interim review report stated that father and J.C. were also in parenting counseling and that their counselor reported no concerns about their ability to care for J.M. Father appeared very loving towards his child, showed dedication to providing her with long-term care, and was "supporting the child's needs and therapeutic program." Father wanted "full custody" of J.M., and she was observed to be "very bonded" with him. Dr. Colston stated that J.M. was doing well and was progressing in her therapy but needed to continue her therapy. The Department recommended termination of court jurisdiction over J.M. with a family law custody order giving father sole legal and physical custody over her and monitored visits for mother.

At the December 18, 2012, contested judicial review hearing, counsel for the Department, J.M., and father requested that the juvenile court, in an "exit order," close the case concerning J.M., and give father sole legal and physical custody over J.M. The Department requested that the prior visitation order continue—mother should be permitted to visit J.M. in a therapeutic setting "if [J.M.] is ready for that." The Department added, however, that "it does not appear that . . . [J.M.] has made significant progress in her feelings towards her mother such that she's ready to have regular visitation with her." J.M.'s counsel requested that mother not be permitted to visit J.M. if the juvenile court found, at the time of the hearing, that it would be detrimental to J.M.. J.M.'s counsel said that if the juvenile court did not make such a finding of detriment,

mother should be permitted to visit J.M. in a therapeutic setting. At the time of the hearing, father's counsel requested that mother not be permitted to visit J.M. Mother's counsel requested that the juvenile court not terminate jurisdiction over J.M.'s case, and provide mother with an additional six months of reunification services.

The juvenile court stated, "[I]f I terminate jurisdiction, . . . my view is that the terminating order has to be crystal clear as to what the . . . visitation orders are. And that delegating responsibility to somebody else is something I shouldn't or can't do. So—and I'm troubled by the notion of a juvenile law custody order that says no visits." The juvenile court then stated that its determination about whether to terminate jurisdiction over J.M.'s case had to be made in accordance with the standards set forth in sections 361.2, subdivision (b)(2) and 245.5, and it could consider a "wide range of issues" in making its ruling. The juvenile court "readily conclude[d] that there is no further need for continued court supervision of [J.M.]," and believed J.M.'s best interests were served by terminating jurisdiction with a juvenile law custody order. The juvenile court deviated from the Department's recommendation and granted joint legal custody to mother and father requiring them "to confer in good faith about all of the major decisions about [J.M.] except that father will have the authority to make mental health decisions concerning her."

The juvenile court granted father primary physical custody. With respect to mother's visitation of J.M., the juvenile court stated, "I can't give discretion to a therapist or to a child to decide when those visits will occur. So the visits will occur at least every two weeks in a therapeutic [setting]." The Department's counsel objected to the juvenile court's visitation order regarding mother and J.M., stating, "[T]he entire time that we've had this case under our [supervision], we've been unable to start visitation for mother. I think it's irresponsible to start a forced order of therapeutic visitation on the day that we are closing the case. So that is . . . very much over the Department's objection." The juvenile court responded that the referee's "order that the therapist would decide when the visits would occur is not a legal order in my view." The juvenile court then stated, "[S]o the choices that I think the court has . . . is to have no visits or therapeutic session

visits. And I reread the statements that she made and I looked at . . . what [J.M.'s counsel] cited to me, and there are clearly major issues between mother and child. I think a no-visit order is also irresponsible." J.M.'s counsel asked the juvenile court whether it had read the September 24, 2012, progress report from J.M.'s therapist and whether it was "unable to find detriment to J.M." so as to justify a no-visitation order. The juvenile court responded that it considered the therapist's progress report, but the juvenile court did not state whether it was "unable to find detriment to J.M."

The juvenile court stayed its orders and continued the matter for the preparation of a written custody order. On December 24, 2012, the juvenile court signed and filed the written "Custody Order—Juvenile—Final Judgment" form stating, inter alia, that jurisdiction was terminated over J.M.'s case.

DISCUSSION

Father contends that the juvenile court abused its discretion in connection with the exit order by granting mother joint legal custody over J.M. and monitored visits with J.M. in a therapeutic setting. As we discuss, we agree with father.

1. Standard of Review

A juvenile court's order awarding custody is reviewed for an abuse of discretion (*In re Tamneisha S.* (1997) 58 Cal.App.4th 798, 806), as is the juvenile court's order awarding visitation (*In re Robert L.* (1993) 21 Cal.App.4th 1057, 1067). A juvenile court's ruling is an abuse of discretion when it is arbitrary, capricious, or patently absurd. (*Bridget A. v. Superior Court* (2007) 148 Cal.App.4th 285, 300.) In addition, an error of law may be an abuse of discretion. (*In re T.C.* (2009) 173 Cal.App.4th 837, 843.)

2. Analysis

In terminating jurisdiction over a dependent child, the juvenile court is empowered to make "exit orders" regarding custody and visitation. (§§ 364, subd. (c); 362.4; *In re Kenneth S., Jr.* (2008) 169 Cal.App.4th 1353, 1358.) "[I]n making exit orders, the

juvenile court must look at the best interests of the child." (*In re John W.* (1996) 41 Cal.App.4th 961, 973.) The juvenile court is not limited by "any preferences or presumptions" in fashioning "exit orders" pursuant to section 362.4. (*In re Jennifer R.* (1993) 14 Cal.App.4th 704, 712; *In re Nicholas H.* (2003) 112 Cal.App.4th 251, 268.) The court must be guided by the totality of the circumstances and issue orders that are in the child's best interests. (*In re Chantal S.* (1996) 13 Cal.4th 196, 201; *In re Roger S.* (1992) 4 Cal.App.4th 25, 30-31.)

Family Code section 3003 provides, "'Joint legal custody' means that both parents shall share the right and the responsibility to make the decisions relating to the health, education, and welfare of a child." In granting mother joint legal custody, the juvenile court stated that mother and father would be required "to confer in good faith about all of the major decisions about [J.M.] except that father [would] have the authority to make mental health decisions concerning her."[5]

Vesting mother with joint legal custody is not in J.M.'s best interest. The record reflects that father and mother had a strained relationship. Mother accused father of causing J.M. to fabricate the sexual abuse allegations, a theory rejected by the juvenile court. In addition, father stated that he did not want joint custody over J.M. with mother because F.R. had ties to the 18th Street Gang, F.R. threatened to have him killed if he did see J.M., and he was afraid of F.R. J.M., father, and J.C. said that they experienced "passive harassment" by individuals they believed were associated with F.R. who had circled the residence in a car and park where visitations occurred. Also, J.C. and mother "previously engaged in . . . violent altercations," and according to the Department had a "tumulus [*sic*] relationship." The record demonstrates that the parents could not "confer in good faith about all of the major decisions" concerning J.M., and mother having joint legal custody of J.M. would not be in J.M.'s best interests.

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[5] The written custody order appears to be ambiguous and does not clearly reflect the juvenile court's ruling. It provides that father will be responsible for making "mental health decisions," but the order also said that the parents shall exercise joint legal custody in making decisions concerning the "[b]eginning or ending of psychiatric, psychological, or other mental health counseling or therapy."

The record also establishes that mother was not capable of managing J.M.'s health, education, and welfare. At the contested adjudication and disposition hearing held on April 18 and 19, 2012, the juvenile court found that J.M. was very credible; J.M. preferred to be with her father; mother created an atmosphere of distrust and J.M. was made to feel that she was a liar and whatever she said was not going to be believed; and F.R. had sexually abused J.M. and mother failed to protect J.M. The juvenile court sustained the sexual abuse allegations in the petition: F.R. sexually abused J.M., and mother's failure to protect J.M. endangered J.M.'s physical health and safety. In F.R.'s appeal, we affirmed the jurisdictional order.

Mother was a party to the contested and disposition hearing held on April 18 and 19, 2012, and she had a full and fair opportunity to litigate the issues. Mother did not appeal the jurisdictional findings made at that hearing, and could not have challenged those findings at the time of the December 18, 2012, contested review hearing. (*People v. Carter* (2005) 36 Cal.4th 1215, 1240 [collateral estoppel]; *In re Matthew C.* (1993) 6 Cal.4th 386, 393, superseded on other grounds as stated in *People v. Mena* (2012) 54 Cal.4th 146, 157 ["the issues determined by" an appealable order from which a timely appeal was not taken "are res judicata"]; *Bernhard v. Bank of America* (1942) 19 Cal.2d 807, 813 [res judicata]; *Nein v. HostPro, Inc.* (2009) 174 Cal.App.4th 833, 845 [collateral estoppel]; *Ferraro v. Camarlinghi* (2008) 161 Cal.App.4th 509, 532 ["'A judgment or order . . . become[s] res judicata [when it is] final in the. . . sense of being free from direct attack'"]; *Wanda B. v. Superior Court* (1996) 41 Cal.App.4th 1391, 1396 [the issues determined by an appealable order "are res judicata" if not timely appealed].)[6] Nevertheless, mother apparently adhered to her position that there was no sexual abuse.

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[6] "[T]he term 'res judicata' [as used by some of the authorities in cases such as this] has been used to encompass both claim preclusion and issue preclusion . . . . 'The doctrine of collateral estoppel is one aspect of the concept of res judicata. In modern usage, however, the two terms have distinct meanings.' [Citation.]" (*Mycogen Corp. v. Monsanto Co.* (2002) 28 Cal.4th 888, 896-897, fn. 7.) "'Res judicata' describes the preclusive effect of a final judgment on the merits. Res judicata, or claim preclusion, prevents relitigation of the same cause of action in a second suit between the same parties

Thus, in December 2012, the Department reported that mother continued to pose substantial risks to J.M.'s well-being. Mother, however, continued to be in denial about the sexual abuse, and she had not completed her court-ordered counseling. When the CSW asked mother if she believed J.M. was abused by F.R., mother said that she "does not have an opinion about it." When the CSW continued to ask mother about it, mother said that she "doesn't think that [F.R.] sexually abused [J.M.] the way [J.M.] says it happened," there was no physical evidence, and "if it happened why didn't she [J.M.] tell anyone at school or the people around her about that." Mother then said, "I believe that he may have touched her, but he did not do what she said he did to her. He may have touched her but he didn't penetrate her." When the CSW told mother that her continued denial was very worrisome and placed her children at risk of future abuse, mother "proceeded to change her story," and said she "believes her daughter because if she doesn't she is not going to get her kids back." Although mother's therapist, an MFT "trainee," told the CWS that mother was not in denial about J.M.'s sexual abuse, the trainee's subsequent written report stated only that mother had made progress in her therapy and she believed J.M. had been the victim of "child abuse." Mother remains incapable of properly discharging her duties as J.M.'s parent, and granting on her any right to make critical decisions about any aspect of J.M.'s life was detrimental to J.M.'s best interests.

The juvenile court must look at the best interests of the child in issuing an exit order. (*In re John W., supra*, 41 Cal.App.4th at p. 973.) In view of the uncontroverted and established facts outlined above, we determine that the juvenile court abused its discretion in granting mother joint legal custody over J.M.

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or parties in privity with them. . . . Under the doctrine of res judicata, if a plaintiff prevails in an action, the cause is merged into the judgment and may not be asserted in a subsequent lawsuit; a judgment for the defendant serves as a bar to further litigation of the same cause of action." (*Id.* at pp. 896-897, fn. omitted; see also *Citizens Planning Assn. v. City of Santa Barbara* (2011) 191 Cal.App.4th 1541, 1549; Code Civ. Proc., § 1908, subd. (a)(2).) In contrast, the doctrine of "collateral estoppel, or issue preclusion, 'precludes relitigation of issues argued and decided in prior proceedings.' [Citation.]" (*Mycogen Corp. v. Monsanto Co., supra*, 28 Cal.4th at p. 896.)

Those and other facts also demonstrate that the juvenile court erred in ordering monitored visits between mother and J.M. in a therapeutic setting. "Absent a showing of detriment caused by visitation, ordinarily it is improper to suspend or halt visits even after the end of the reunification period. [Citations.] Visitation may be seen as an element critical to promotion of the parents' interest in the care and management of their children, even if actual physical custody is not the outcome. [Citation.]" (*In re Luke L.* (1996) 44 Cal.App.4th 670, 679.) Nevertheless, it is also established that "a parent's liberty interest in the care, custody and companionship of children cannot be maintained at the expense of their well-being. [Citation.] While visitation is a key element of reunification, the court must focus on the best interests of the children 'and on the elimination of conditions which led to the juvenile court's finding that the child has suffered, or is at risk of suffering, harm specified in section 300.' [Citation.] This includes the 'possibility of adverse psychological consequences of an unwanted visit between [parent] and child.' [Citation.]" (*In re Julie M.* (1999) 69 Cal.App.4th 41, 50.)

As noted above, the juvenile court made numerous findings including that F.R. had sexually abused J.M.; mother failed to protect J.M.; mother created an atmosphere of distrust that made J.M. feel that she was a liar and whatever she said would not be believed; and the Department reported that mother continued to be in denial about the sexual abuse and that she had not completed her court-ordered counseling. Only after the CSW told mother that mother's continued denial was very worrisome and placed her children at risk of future abuse did mother "change her story," stating that she "believes her daughter because if she doesn't she is not going to get her kids back." Mother's "change [in] her story," however, was incomplete because she never admitted the full truth of the established facts—she has not acknowledged that she failed to protect J.M. from the sexual abuse.

J.M testified at the adjudication hearing that she did not want to "see [mother] because she didn't believe me. What kind of mom would do that?" The Department's April 17, 2012, interim review report stated that J.M. expressed to her therapist that she became depressed and suicidal at the thought of visitation, reunification, and seeing F.R.,

"and his acquaintances." After a sibling visit, J.M. reported having suicidal ideations, and she refused to attend the next sibling visit for fear mother would be there. J.M.'s behavioral therapist believed that J.M.'s "emotional . . . well being should take precedence over having visits with mother at this time as visits with mother are retraumatizing the child and [causing] an increase in symptoms and level of distress." On September 24, 2012, J.M.'s therapist reported that J.M. told her, following monitored visits with mother and scheduled juvenile court proceedings, "I will kill myself if I see [mother] again. . . . I will kill myself if I have to go back there." At the December 18, 2012, contested judicial review hearing, J.M., the Department, and father argued that it would be detrimental to J.M. if mother were permitted to visit J.M. at that time. It is not in J.M.'s best interests to be forced to visit mother, when such visits cause J.M. to contemplate suicide, and the child's therapist advises against it. The evidence, which is virtually uncontroverted, shows that it is not in J.M.'s best interests to be required to visit mother.

The Department recommended that visitation between mother and J.M. should not be required at that time, but that the juvenile court should order monitored visits in a therapeutic setting to begin when J.M.'s therapist felt it was appropriate. The juvenile court rejected the Department's proposal because in its view it could not delegate authority to a therapist to decide when visits would occur. The juvenile court misconstrued the scope of its discretion with respect to the visitation order, and thus its ruling rested upon an erroneous legal basis. It did not recognize that it could order visitation to commence when the therapist recommended visitation. Although "the power to decide whether *any* visitation occurs belongs to the court alone," (*In re Christopher H.* (1996) 50 Cal.App.4th 1001, 1008-1009), "[a] therapist . . . may be allowed the limited discretion to determine when court-ordered visitation should begin" (*In re S.H.* (2003) 111 Cal.App.4th 310, 318, fn. 10 citing *In re Chantal S.*, *supra*, 13 Cal.4th at pp. 203-204).

The juvenile court's mistaken belief about the scope of its discretion constitutes a failure to exercise discretion, which is itself an improper exercise of discretion. (*Olsen v.*

Harbison (2005) 134 Cal.App.4th 278, 285 [abuse of discretion when trial court acted "on a mistaken view about the scope of its discretion"]; see also *People v. Sandoval* (2007) 41 Cal.4th 825, 847-848 [failure to exercise discretion may constitute an abuse of discretion]; *People v. Crandell* (1988) 46 Cal.3d 833, 861; *Fletcher v. Security Pacific National Bank* (1979) 23 Cal.3d 442, 454 [because the trial court's decision "rested upon . . . erroneous legal basis . . . its action constituted an abuse of its discretion"]; *Kim v. Euromotors West/The Auto Gallery* (2007) 149 Cal.App.4th 170, 176 [trial court incorrect on law and thus failed to exercise discretion, which is an abuse of discretion].) Based on the record, the only reasonable alternatives for the trial court to exercise its discretion on remand are to order that no visitation occur, or to order that monitored visits in a therapeutic setting begin when J.M.'s therapist deems it appropriate.

DISPOSITION

We reverse and remand the matter to the juvenile court with instructions to enter a modified custody order granting father sole legal and physical custody over J.M., and to exercise its discretion regarding visitation between mother and J.M. consistent with this opinion—i.e., to determine whether any visitation should occur between mother and J.M., or whether monitored visits in a therapeutic setting should begin when the child's therapist recommends that it is appropriate.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

MOSK, J.

We concur:

TURNER, P. J.

KUMAR, J.*

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