Filed 10/22/18 In re M.M. CA2/4

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

In re M.M., a Person Coming Under the Juvenile Court Law.	B285335 (Los Angeles County Super. Ct. No.DK17793)
LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. MARCUS J., Defendant and Appellant.	

APPEAL from an order of the Superior Court of Los Angeles County, Lisa Jaskol, Judge. Reversed and remanded to family court with directions.

Mitchell Keiter, under appointment by the Court of Appeal, for Defendant and Appellant.

Mary C. Wickham, County Counsel, R. Keith Davis, Assistant County Counsel, and Jeanette Cauble, Deputy County Counsel for Plaintiff and Respondent.

INTRODUCTION

A dependency case was opened after father Marcus J. was involved in a domestic violence incident with mother Jennifer M., while their nine-year-old son, M.M., was asleep in another room. M.M. continued living with mother and had unmonitored visitation with father while the dependency proceeding was pending in juvenile court for about a year. When the court terminated jurisdiction, it ordered for the first time that father's visitation with M.M. must be monitored. On appeal, father contends that the court's order requiring visitation to be monitored was erroneous. We agree; no evidence in the record suggests that monitored visitation was warranted, or that M.M.'s best interests were considered in making the order. We therefore reverse that portion of the court's order, and remand the case to family court for further proceedings regarding visitation for father.

FACTUAL AND PROCEDURAL BACKGROUND

In May 2016, nine-year-old M.M. lived with his mother and 13-year-old half-brother. Father went to the home in the early morning hours, while the children were asleep, to see mother. Father and mother got into an altercation in which father hit mother in the face and grabbed her arm, causing injury. Mother called police and father was arrested.

In response to a referral from police, a Los Angeles County Department of Children and Family Services (DCFS) social worker visited the family that afternoon. Mother reported that

father had moved out of the family home the previous February, after a 10-year relationship. The night of the incident, father was drunk when he came over uninvited, and he hit mother in the face four or five times, and grabbed her arm. The children did not wake up during the incident. Long Beach police told DCFS that father would be charged with a single count of misdemeanor domestic violence.

Mother reported that M.M. is close to father, and "he would be devastated" if their relationship were severed. Mother was concerned about father's drinking. M.M. told the social worker that father is a good parent, whom he feels safe with and loves very much. Father lived with a paternal uncle, and M.M. enjoyed going there for visits. M.M. confirmed that he slept through the incident between father and mother.

The social worker visited father at paternal uncle's home. Father said he was not drunk the night of the incident, but he was "tipsy." He admitted riding his motorcycle while tipsy that night. Father said that mother hit him, and he defended himself by holding mother's hands. Father denied having a drinking problem, and denied drug use. A police report stated that father reported that he had fallen asleep at mother's house, and mother startled him when she woke him up, so he flung out his arm and struck her accidentally.

On June 8, 2016, DCFS filed a juvenile dependency petition relating to M.M. under Welfare and Institutions Code section 300, subdivisions (a) and (b). [1] The petition asserted that mother and father "engaged in a violent altercation in the child's home"

---

[1] All further statutory references are to the Welfare and Institutions Code unless otherwise indicated. The petition did not name M.M.'s older brother, because he had a different father.

in which father repeatedly struck mother, and this "violent conduct on the part of the father and the mother endangers the child's physical health and safety and places the child at risk of serious physical harm, damage and danger." The detention report filed the same day asserted that "father's drinking leads him to make poor judgments," such as riding his motorcycle while intoxicated and assaulting mother while the children were in the next bedroom. DCFS recommended that the court intervene "in order to ensure the safety of the child," but recommended that M.M. remain in the care of both parents. DCFS also recommended that both parents participate in counseling, parenting classes, and a domestic violence education program.

At the detention hearing, the court found prima facie evidence that M.M. was a person described by section 300. The court ordered M.M. released to both parents. The court also included in its order a "stay-away" instruction for mother and father, and requested that DCFS facilitate visitation exchanges through a neutral third party. The court ordered both parents to participate in domestic violence education programs, and ordered random drug testing for father.

DCFS filed an amended petition on August 8, 2016, asserting additional counts under section 300, subdivisions (a) and (b) against both mother and father relating to the domestic violence incident. The amended petition included allegations that mother struck father during the incident. It also included an allegation that a second domestic violence incident occurred in 2013, and that mother and father have "a history of engaging in violent altercations." The original petition was dismissed.

An August 8, 2016 jurisdiction/disposition report included information about the 2013 domestic violence incident between

mother and father. In that incident, mother and father were arguing, and father "swung his right arm in a hammering motion and hit the victim in the top of her forehead with his right closed fist." Mother and father struggled with each other, and a neighbor eventually separated them. M.M. and his half-brother were in the bedroom at the time and did not see anything. Mother refused medical attention and an emergency protective order. Mother's face did not appear injured but she had a scratch on her forearm. Mother later reported to police that father did not hit her forehead, but instead hit her chin. Father told police that he may have hit mother accidentally as he stood up from a seated position. The case was eventually dismissed with no charges filed.

The August 2016 jurisdiction/disposition report also noted that M.M. reiterated that he had not witnessed the 2016 domestic violence incident between mother and father; he only knew about it because mother told him days later. M.M. said he remembered another incident between mother and father a year or two earlier, when "I saw my dad's hand on my mom's arm." Father moved out after that incident, but "then he came back because they sorted it out."

Mother told the social worker about the 2013 incident, saying that she and father had gotten into an argument, and father swung his hand through the air and hit her in the chin. Mother denied any other incidents. She said that father "takes no responsibility for his actions." Mother said that she has no concerns about M.M. being in father's care. Father did not drink when he was with M.M., and "I never had to worry about his dad hurting him." Mother also said, "He's never done anything wrong to [M.M.] He was a really good father to M.M." DCFS noted that

M.M. "appears safe in the home of the mother and father," and noted that they were living separately.

Father did not make himself available for interviews with the social worker. DCFS stated that "father has not been cooperative with the Department and is not participating in any services. . . . The Department feels that Court intervention is necessary to ensure the safety of the child in the parents' home." DCFS therefore requested that the court declare M.M. a dependent of the court; order family maintenance services, counseling, and domestic violence education for both parents; and order drug and alcohol testing for father. DCFS also recommended that M.M. remain released to both parents.

At the jurisdiction/disposition hearing on August 18, 2016, mother asked that the amended counts be stricken for lack of evidence that she struck father. Father's counsel asked that the court find no jurisdiction, because M.M. was not present during either incident and therefore there was no evidence that M.M. was ever placed at risk, and there was no evidence of any ongoing risk. M.M.'s counsel asked that the petition be sustained, stating that two different incidents showed there was a history of domestic violence. DCFS joined the arguments of minor's counsel.

The court acknowledged that no evidence of the effects of domestic violence had been submitted in this case, but "what we've all learned" is that "if children are in another room . . . when there is just arguing, let alone what this looks like, there's a part of their brain, the part that learns, that grows into the fight or flight reaction. In other words, the part of their brain [that] is supposed to be used for learning, they are using to protect themselves from the violence in the home. So to say that

when there is domestic violence if the kids are in another room it doesn't count is to negate everything we know about domestic violence and what that does to children. Boys generally become aggressors themselves. Girls generally select an aggressor. That's what you've done to your kid." The court sustained the petition, and found that M.M. was a child described by section 300, subdivisions (a) and (b). The court stated, "[T]he department left this child home of parents with primary residence with mom. I need dad to convince me why I shouldn't remove this child from his legal custody."

The court questioned why father had not yet started services. Father explained that he only received information from DCFS eight days earlier about how to enroll, and he said the requirements needed to be flexible because his job required him to travel for up to several months a time. The court released M.M. to both parents, with his primary residence with mother. The court ordered father to complete a domestic violence education program, parenting classes, and individual counseling, and allowed father to "stack" them—complete them sequentially—to allow flexibility for his work schedule. The court also said the parenting classes and individual counseling were "in abeyance" because "[i]f a 52-week domestic violence treatment program says he's learned everything, then we will strike that." The court noted that mother and father had a stay-away order in place, and stated that if monitored visitation were ordered in the future because father failed to comply with the court's requirements, mother could not monitor the visits.

In a February 8, 2017 status review report, DCFS noted that M.M. lived with mother and was doing well. Mother and father were not in a relationship, but were planning to co-parent.

M.M. had attended court-ordered therapy, and it had ended because M.M. had met all treatment plan goals. The status review report noted that M.M. was bonded to both mother and father. Mother had not attended a domestic violence program because she was busy with a heavy work schedule, but she had scheduled an intake appointment.

Father had started a domestic violence program and had attended 13 of 52 sessions. Father visited with M.M. on Sundays when father's work schedule allowed. Mother transported M.M. to the visits. Mother reported that M.M. appeared to be in a good mood and happy after his visits with father, and M.M. told the social worker that he enjoyed his visits with father. M.M. "reported that he is looking forward to going golfing with his father during the next visit. Child [M.M.] appears to be excited when he speaks about his father and their visits. Child [M.M.] and father Marcus appear to have a strong bond."

Both parents wanted the juvenile court case to close. DCFS recommended that the case remain open because mother had not yet enrolled in a domestic violence program, and therefore she "has not alleviated the circumstances that brought her to the attention of DCFS."

An interim review report dated April 12, 2017 stated that M.M. enjoyed living with mother and visiting father. Mother had completed 11 sessions of her domestic violence program; father had attended 34 sessions. DCFS recommended that the case be closed, and that a family law order be issued giving joint legal custody to both parents, physical custody to mother, and "monitored visits" to father.

At a contested section 364 hearing on April 12, 2017, M.M.'s counsel submitted on DCFS's recommendation. Mother's

counsel noted that visits between father and M.M. had been occurring. A criminal protective order had been entered in September 2016, and mother's counsel said that mother had recently "receive[d] a call from the prosecutor in the [criminal] case and had been advised of the specific terms of the criminal protective order that do not have a carve-out for any contact between the parents, including for purposes of visitation." Mother's counsel continued, "I would request that the custody order suggest that a professional monitor paid for by the father or any other mutually agreed-upon monitor to assist with visitation. And mother suggested the Long Beach Police Department downtown for exchanges."

Father's counsel pointed out that the DCFS reports said father and M.M. had a strong bond and enjoyed spending time together, and that mother and father were willing to co-parent M.M. The court responded, "I guess that is my question. I mean, I don't think anybody is talking about stopping the visits. The visits will continue certainly, but how is the coparenting going to happen if the parents can't have any contact?" The parties and court had a discussion about whether the court could modify the criminal protective order to allow communication regarding M.M. Father again suggested visitation exchanges at a police station, and the court said, "[T]hat is not my preference. I don't think it does kids any good to be taken to a police station. Is there any alternative for making the exchange?" Mother's counsel responded, "[I]f the court were inclined to order that a professional monitor monitor the visits, I know the professional monitors do have offices that the exchange could be made at."

Father's counsel stated that father was requesting unmonitored visitation, because there was no evidence that

monitored visitation was required. He also argued that requiring a professional monitor would place a financial burden on father. The court said, "In a case where I have a criminal protective order, I would feel hesitant to order unmonitored visits." But the court also noted that "the criminal protective order does not cover the child, so I guess what I'm sort of struggling with is whether it is possible to order joint legal custody where there is a criminal protective order between the parents." Counsel for M.M. seemed confused, and asked, "Who was the monitor previously?" Again, the parties began to discuss how the criminal protective order could be modified to allow for co-parenting of M.M.

The court eventually stated, "Hopefully the parents can come up with a mutually agreed-upon monitor – or not monitor, but the person who can facilitate the exchange for visits. I hope you can find someone willing to do that so father doesn't pay for a monitor, but a paid monitor is a fall-back option." The court then terminated jurisdiction, stating, "Conditions which justified the initial assumption of jurisdiction under Welfare and Institutions Code section 300 no longer exist and are not likely to exist if supervision is withdrawn." The court said, "I'm staying the order terminating jurisdiction until I receive a family law order which gives the mother . . . sole legal and sole physical custody in light of the criminal protective order. Father will have monitored visits. The monitored visits must take place consistent with the criminal protective order, which means parents may have no contact, and that means that for visits to occur the child will have to be exchanged without the parents having contact. I'm hoping that they can find a mutually agreed-upon person who can bring the child from one parent to the other parent safely."

The court entered a written exit order, which stated that father had monitored visitation, "to be monitored by a mutually agreed upon monitor or a professional monitor paid for by father." On a form titled "Reasons for no or supervised visitation—juvenile," the court checked boxes stating that supervised visitation was required because father had not completed his domestic violence program, parenting classes, or individual counseling. The exit order was forwarded to the Los Angeles Superior Court with orders to file the order in any pending family law case or to open such a case under section 362.4.

Father timely appealed.

DISCUSSION

Father asserts that the court erred in ordering that his visitation with M.M. must be monitored, and that father must pay for a professional monitor. A juvenile court "may make any and all reasonable orders for the care, supervision, custody, conduct, maintenance, and support of the child." (§ 362, subd. (a).) "'The juvenile court has broad discretion to determine what would best serve and protect the child's interest and to fashion a dispositional order in accordance with this discretion.'" (*In re Corrine W.* (2009) 45 Cal.4th 522, 532.) "We review an order setting visitation terms for abuse of discretion. [Citations.] We will not disturb the order unless the trial court made an arbitrary, capricious, or patently absurd determination." (*In re Brittany C.* (2011) 191 Cal.App.4th 1343, 1356.)

In terminating jurisdiction, the court held that the grounds for jurisdiction over M.M. no longer existed. The domestic violence incident had happened nearly a year earlier, father and M.M. had unmonitored visitation while the juvenile court case was pending, and no one had any concerns about father being

inappropriate with M.M. Nevertheless, as it terminated jurisdiction, the court ordered for the first time that father could not visit with M.M. without a monitor. This order was an abuse of discretion because it was neither supported by evidence nor based on findings regarding the best interests of M.M.

When the juvenile court terminates jurisdiction in a dependency case, it may issue an order for custody and visitation. (§ 362.4; *In re Chantal S.* (1996) 13 Cal.4th 196, 202-203.) This so-called "exit order" is transferred to the family court and remains in effect until modified or terminated by the family law court. (§ 362.4; *Chantal S.*, *supra*, 13 Cal.4th at p. 203; *In re Roger S.* (1992) 4 Cal.App.4th 25, 30.) "[T]he court's power under section 362.4 require[s] it to make an informed decision concerning the best interests of the child." (*In re John W.* (1996) 41 Cal.App.4th 961, 972 (*John W.*); see also *In re Nicholas H.* (2003) 112 Cal.App.4th 251, 268 [in fashioning custody and visitation orders "in any dependency case, the court's focus and primary consideration must always be the best interests of the child."].)

Here, the court gave two reasons for ordering monitored visitation. First, during the final hearing, the court said, "In a case where I have a criminal protective order, I would feel hesitant to order unmonitored visits." However, the court acknowledged that the protective order did not cover M.M., and neither DCFS nor mother suggested that father presented any danger to M.M. Also, M.M. stated that he felt safe with father, and he looked forward to father's visits. By the time of the final hearing, the criminal protective order had been in place for months, and father and M.M. had successful unmonitored visits during that time. Other than issues relating to the logistics of

facilitating an exchange that complied with the protective order, there was no evidence suggesting that monitored visitation with father would serve M.M.'s best interests. Thus, there was no basis for holding that monitored visitation was warranted based on the existence of the protective order.

Second, in its written ruling the court checked boxes stating that monitored visitation was ordered because father had not completed his domestic violence education program, parenting classes, or individual counseling. This reasoning also does not support the court's order for monitored visitation. Father had not completed these programs at any time before the exit order, and yet the court ordered unmonitored visitation during that time. In fact, by the time of the April 12, 2017 hearing, father had attended 34 of 52 sessions in the domestic violence education program. Given that the court allowed father to complete parenting classes and individual counseling consecutively, it appears that father was in full compliance with the family maintenance plan. Moreover, the court's written order does not reflect any of the issues discussed at the hearing. The court did not make any findings as to whether father's completion or lack of completion of his classes had any impact on his ability to be with M.M. while unmonitored, or whether this had any effect on M.M.'s best interests.

Moreover, the jumbled discussion at the hearing about custody, exchanges, and monitors suggests that the court's order for monitored visitation may have been based on factual mistakes or factors other than M.M.'s best interests. For example, the parties and court discussed finding a "monitor," but they did so in the context of finding someone to facilitate exchanges in compliance with the protective order—not to supervise father's

visitation with M.M. In fact, during the discussion the court said, "Hopefully the parents can come up with a mutually agreed-upon monitor – or not monitor, but the person who can facilitate the exchange for visits." Also, M.M.'s counsel asked, "Who was the monitor previously?" when in fact there had been no monitor, because father did not have monitored visits. The court and the parties discussed a Family Code presumption about custody orders in domestic violence cases, but no one knew the Family Code section numbers or whether the juvenile court was bound by the statute.[2] Moreover, while there was considerable discussion about the logistics of facilitating an exchange that would comply with the criminal protective order, there was no discussion about what might be in M.M.'s best interests—a critical issue in fashioning a visitation order.

DCFS asserts that the court's order was not an abuse of discretion because "domestic violence is a serious concern" and therefore father's violence toward mother affects M.M.'s best interests. Domestic violence is indeed a serious concern, and that was the basis for the court's jurisdiction over M.M. However, the court terminated that jurisdiction, finding that the conditions leading to jurisdiction no longer existed. There was no evidence that father had ever been inappropriate in his interactions with

---

[2]DCFS states in its respondent's brief that they were discussing Family Code section 3044, subdivision (a), which states that there is "a rebuttable presumption that an award of sole or joint physical or legal custody of a child to a person who has perpetrated domestic violence is detrimental to the best interest of the child." DCFS also asserts that father could not overcome this presumption. Because father is challenging the court's visitation order and not the award of custody, this statute is irrelevant to our analysis.

M.M. during visitation or at any other time. Thus, the domestic violence incident that brought M.M. to the attention of the court did not warrant ongoing monitoring of father's visitation.

The order requiring father's visits with M.M. to be monitored therefore was not supported by the record, and is reversed. Because the juvenile court terminated jurisdiction but referred the case to family court under section 362.4, remand to the family court is appropriate. (*John W., supra*, 41 Cal.App.4th at p. 975-977; *In re Alexandria M.* (2007) 156 Cal.App.4th 1088, 1096.)

DISPOSITION

The juvenile court's order that father's visits with M.M. must be monitored is reversed. The case is remanded to the family court for a hearing on visitation.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

COLLINS, J.

We concur:

MANELLA, P. J.

MICON, J.*

---

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