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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 CANDICE E., a Person Coming Under the Juvenile Court Law.	B278648, B280141 (Los Angeles County Super. Ct. No. DK06846)
LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. GORDON E., Defendant and Appellant.	

APPEALS from orders of the Superior Court of Los Angeles County. Steff R. Padilla, Commissioner. Modified and affirmed with directions.

Daniel G. Rooney, under appointment by the Court of Appeal, for Defendant and Appellant.

Mary C. Wickham, County Counsel, R. Keith Davis, Assistant County Counsel, and William D. Thetford, Principal Deputy County Counsel, for Plaintiff and Respondent.

In a previous nonpublished opinion, we reversed the juvenile court's 2015 order terminating visitation for defendant and appellant Gordon E. (Father). We reasoned it was not proper to terminate visitation without Father and his then-14-year-old daughter (Daughter) participating in at least one monitored visit. We made clear, however, that our ruling did "not prohibit the court from reevaluating visitation, based in part on Daughter's input, after the monitored therapeutic visitation occurs." (*In re Candice E.* (Jan. 7, 2016, B265130, p. 7).)

A monitored therapeutic visitation has now occurred. Following the visit, the juvenile court terminated jurisdiction and determined it would not be in Daughter's best interest to continue visitation with Father. Nonetheless, the juvenile court ordered monthly monitored visitation in a therapeutic setting, with the caveat that Daughter did not have to go to the visits. Father appealed the orders, arguing visitation was only "illusory" because Daughter did not have to attend and, in effect, the orders were implicit no contact orders. The Los Angeles County Department of Children and Family Services (Department) argues the juvenile court should not have ordered any visitation. We agree with the Department and affirm the juvenile court's orders as modified below.

BACKGROUND

1. August 2016 Monitored Visit

In March 2016, following remittitur from this court, the juvenile court ordered "at least one monitored visit in a therapeutic setting with [Daughter]." For months, Mother and the Department tried unsuccessfully to locate a therapist who would conduct the court-ordered monitored visit. One therapist told Daughter's attorney that he would not monitor the visit because he was "against having [Daughter] in the same room as her perpetrator."

In addition, Daughter refused to see Father. She told a Department social worker that "the thought of her having to physically be in the same room and see her father makes her sick to her stomach." She said she did not want to "see or hear or smell" Father. Daughter also submitted a handwritten letter to the court. She wrote, "I do not want to see or speak to my father. I am absolutely terrified of him. What he did to me was horrible and just the thought of him makes me fearful. I do not want nor do I think I'm capable of being in the same room as him. I thought this nightmare was over and I could be happy. I have nothing to say to my father. Please do not force me to see him."

Eventually, a therapist was located who would conduct the monitored visitation. The monitored visit took place on August 17, 2016. Daughter asked the Department social worker to come into the room with her because she did not want to go in alone. When the visit began, Daughter began to cry and shake her leg. She would not face or look at Father. Through tears, Daughter said Father hurt her and that she never wanted to see him again. She told the therapist who was monitoring the session that she did not want to be there, she did not want to talk

to Father, and she did not want to listen to him. Daughter did not respond when Father spoke to her, she only cried and kept shaking her leg. After 15 minutes, the therapist ended the visit. The therapist encouraged Daughter and Father to continue with reunification therapy, and in a report to the juvenile court she also encouraged reunification therapy. The therapist noted, however, that Daughter should begin with individual therapy sessions and letter writing before meeting with Father again. The Department social worker and the therapist walked Daughter outside to her mother, who was waiting for her. Daughter "fell into her mother's arms and continued to sob."

Daughter's individual therapist, Sabrina Santiago, also submitted a report to the juvenile court. Santiago met with Daughter five times over an approximate two-month period, including one session a few days after Daughter's monitored visit with Father. Santiago reported Daughter was experiencing sleep disturbances, intrusive thoughts, panic attacks, and flashbacks to previous events of abuse. Daughter had expressed her fear of Father to Santiago on many occasions, stating she was "terrified" of Father and scared he would harm her again. Santiago stated Daughter's symptoms were consistent with a diagnosis of post-traumatic stress disorder. Santiago reported Daughter was "visibly distressed" during their session that followed the monitored visit with Father. Santiago recommended against reunification therapy with Father because Daughter was still exhibiting symptoms of distress.

2. Review Hearing and Disposition

On August 29, 2016, the juvenile court held a review hearing to address Father's visitation and termination of jurisdiction. The juvenile court characterized Daughter's visit

with Father as a "disaster," noting "it went horribly wrong for this child." The court stated, "It will be detrimental to this child to continue to have contact with her father." Despite finding detriment to Daughter, the juvenile court ordered monthly monitored visitation for Father. The court immediately qualified its visitation order, however, by stating Daughter did not have to attend the monthly visits and Mother did not have to force her to go. The juvenile court stated, "I'm ordering visits, monitored visitation. I'm indicating she does not need to be forced to go, and she's to continue with individual counseling." The court also stated, "If she changes her mind, there's a mechanism in place for her to be able to see her father if she wishes to do so." The juvenile court believed it had "to make that order because that's what the court of appeals [*sic*] is directing me to do."

The juvenile court terminated jurisdiction and ordered sole legal and physical custody to Mother and monitored visitation for Father once a month in a therapeutic setting with the caveat that Daughter "does not have to go to the visits." The court stayed its orders pending receipt of the final juvenile custody order.

Both the Department and Father objected to the visitation order. Father filed a notice of appeal on September 28, 2016, which became case No. B278648.

On September 29, 2016, upon the court's receipt of the family law order, the juvenile court lifted the stay of its orders.

On December 5, 2016, Father filed an amended notice of appeal, which became case number B280141. On March 8, 2017, we consolidated case No. B280141 with case No. B278648 for all purposes.

DISCUSSION

1. Applicable Law

As we noted in our prior opinion in this case, there is a split of authority with respect to the correct standard of review to apply when reviewing a juvenile court's order terminating visitation. Some courts apply an abuse of discretion standard of review. (See, e.g., *Montenegro v. Diaz* (2001) 26 Cal.4th 249, 255; *In re Brittany C.* (2011) 191 Cal.App.4th 1343, 1356; *In re J.N.* (2006) 138 Cal.App.4th 450, 459; *In re R.R.* (2010) 187 Cal.App.4th 1264, 1284; *In re Alexandria M.* (2007) 156 Cal.App.4th 1088, 1095–1096; *In re Emmanuel R.* (2001) 94 Cal.App.4th 452, 465.) Other courts apply a substantial evidence test. (See, e.g., *In re C.C.* (2009) 172 Cal.App.4th 1481, 1492; *In re Mark L.* (2001) 94 Cal.App.4th 573, 577; *In re Dylan T.* (1998) 65 Cal.App.4th 765, 775; *In re Danielle W.* (1989) 207 Cal.App.3d 1227, 1238.) Some courts have applied a blended standard. (*In re Daniel C.H.* (1990) 220 Cal.App.3d 814, 837–839 [no abuse of discretion where substantial evidence supported order].) At least one court has acknowledged the discrepancy. (*In re Brittany C.*, *supra*, 191 Cal.App.4th at p. 1356.) Another has questioned "whether the two standards are so different in this context." (*In re D.B.* (2013) 217 Cal.App.4th 1080, 1092, fn. 7 [applying abuse of discretion after trial court made detriment finding].) Under either standard, however, we conclude the juvenile court's visitation order was improper.

"[T]he purpose of juvenile court proceedings is to protect children who have been seriously abused, neglected or abandoned by their parents." (*In re Chantal S.* (1996) 13 Cal.4th 196, 207.) The juvenile court's most important consideration is the needs of the child. (*In re J.T.* (2014) 228 Cal.App.4th 953, 960.) " '[T]he

parents' interest in the care, custody and companionship of their children is not to be maintained at the child's expense.' " (*In re T.M.* (2016) 4 Cal.App.5th 1214, 1220.) " 'When a juvenile court terminates its jurisdiction over a dependent child, it is empowered to make "exit orders" regarding custody and visitation. (§§ 364, subd. (c), 362.4; [citation].)' "[1] (*In re A.C.* (2011) 197 Cal.App.4th 796, 799.)

Section 362.4 is applicable here and provides: "When the juvenile court terminates its jurisdiction over a minor who has been adjudged a dependent child of the juvenile court prior to the minor's attainment of the age of 18 years, and proceedings for dissolution of marriage . . . are pending in the superior court of any county, or an order has been entered with regard to the custody of that minor, the juvenile court on its own motion, may issue . . . an order determining the custody of, or visitation with, the child." "The juvenile court has the sole power to determine whether visitation will occur and may not delegate its power to grant or deny visitation" to anyone. (*In re Christopher H.* (1996) 50 Cal.App.4th 1001, 1008–1009.)

2. Father's Evidence Argument

As an initial matter, we briefly address Father's argument that, because the juvenile court never admitted the Department's reports and exhibits into evidence, "the contents were not properly before the court." Father did not raise this argument below and, therefore, it is waived. (*In re Christopher B.* (1996) 43 Cal.App.4th 551, 558.) In any event, it is clear the juvenile court

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

read and considered the relevant documents in making its decision.

3. Visitation Order

On appeal, Father does not challenge the juvenile court's order to the extent it ordered visitation. Rather, Father challenges the court's order to the extent it allowed Daughter to decide whether to participate in visitation. The court's final order stated Daughter "does not have to go to the visits." Father argues this was improper and, in reality, an implicit no contact order. We agree with Father on this point. By permitting Daughter to decide whether to attend visitation, the juvenile court improperly delegated its judicial authority to Daughter. (*In re Christopher H.*, *supra*, 50 Cal.App.4th at p. 1009 ["when the court delegates the discretion to determine whether any visitation will occur . . . the court improperly delegate[s] its authority and violate[s] the separation of powers doctrine"].)

Father also argues, however, that, whether done implicitly or explicitly, the juvenile court was wrong to deny him visitation. On this point, we disagree with Father. In terminating jurisdiction, the juvenile court clearly did not want to order visitation. The court stated, "It will be detrimental to this child to continue to have contact with her father." However, the juvenile court believed it had "to make that order [for visitation] because that's what the court of appeals [*sic*] is directing me to do." Contrary to the juvenile court's stated belief, however, we made no such directive. In our previous opinion in this case, we expressly stated our ruling "does not prohibit the [juvenile] court from reevaluating visitation, based in part on Daughter's input, after the monitored therapeutic visitation occurs." (*In re Candice E.*, *supra*, B265130, at p. 7.)

We conclude the record does not support an order of visitation and it was an abuse of discretion for the juvenile court to order any visitation with Father. Based on the reports from therapists as well as the Department's social worker's description of Daughter's August 2016 monitored visit with Father, it is clear visitation was not in Daughter's best interest. Rather, as the juvenile court found, visitation would be detrimental to Daughter.

On appeal, Father relies on cases addressing section 362.1 (*In re C.C.*, *supra*, 172 Cal.App.4th 1481) and section 388 (*In re D.B.*, *supra*, 217 Cal.App.4th 1080). However, it is not clear those cases are relevant here where the juvenile court made its visitation order in connection with its termination of jurisdiction. As noted above, section 362.4 is the applicable statute. Even under those other sections of the Welfare and Institutions Code, however, we would conclude visitation was not proper because those sections also consider the child's best interest, well-being, and safety. (See *In re D.B.*, *supra*, 217 Cal.App.4th at p. 1089 [change in court order under section 388 must be in best interest of child]; *In re T.M.*, *supra*, 4 Cal.App.5th at p. 1219 [section 362.1 requires consideration of the child's safety and well-being, which "includes the minor's emotional and physical health"].)[2]

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[2] In reversing a termination of visitation order made under section 362.1, the court in *In re C.C.* (relied on by Father here) considered only the minor's physical safety. (172 Cal.App.4th at p. 1492 [section 362.1 does not permit suspension of visitation based on finding of detriment to child's overall well-being].) As the Department points out in its brief, however, the weight of authority concludes that, in addition to the minor's physical safety, courts should also consider the minor's emotional well-being when making visitation orders under section 362.1. (See,

In contrast with the last time this case was before us, when no visits had occurred between Daughter and Father, the record now includes sufficient evidence demonstrating the detrimental effects contact with Father had on Daughter. Thus, instead of a blank slate, with only speculation as a guide, we now have Daughter's monitored visit with Father as well as letters from therapists to guide our review. And it is clear, as the juvenile court found but incorrectly believed it could not order, Daughter's well-being is best served by not ordering visitation with Father.

DISPOSITION

The juvenile court's orders of August 29, 2016, and September 29, 2016, are modified by striking the visitation order in each. In all other respects the orders are affirmed. The court is directed to amend the orders to reflect the modification.

NOT TO BE PUBLISHED.

LUI, J.

We concur:

ROTHSCHILD, P. J.

CHANEY, J.

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e.g., *In re T.M.*, *supra*, 4 Cal.App.5th at p. 1220; *In re Brittany C.*, *supra*, 191 Cal.App.4th at p. 1357.)