

Filed 4/13/17 Mark M. v. Superior Court CA2/5

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REPORTS**

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IN THE COURT OF APPEAL OF THE STATE OF  
CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

MARK M.,

Petitioner,

v.

THE SUPERIOR COURT OF  
LOS ANGELES COUNTY,

Respondent;

LOS ANGELES COUNTY  
DEPARTMENT OF  
CHILDREN AND FAMILY  
SERVICES et al.,

Real Parties in Interest.

No. B278474

(Los Angeles Super. Ct.  
No. CK76202)

ORIGINAL PROCEEDINGS; petition for  
extraordinary writ. Rudolph Diaz, Judge. Denied.  
Pamela Rae Tripp for Petitioner.

No appearance for Respondent.

Mary C. Wickham, County Counsel, R. Keith Davis, Assistant County Counsel, and Peter Ferrera, Principal Deputy County Counsel, for Real Party in Interest Los Angeles County Department of Children and Family Services.

Craig T. Liu for Real Party in Interest Minor V.S.

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Mark M., a prospective adoptive parent, seeks extraordinary writ review of an order removing minor V.S. after termination of parental rights. (Welf. & Inst. Code, § 366.28;<sup>1</sup> Cal. Rules of Court, rule 8.456.) Mark contends the juvenile court abused its discretion in determining the permanent removal of V.S. from his home was in the child's best interest. He further contends the court committed reversible error by excluding the expert testimony of Dr. Bradley McAuliff, and by permitting an attorney of a non-party witness to participate in the dependency proceedings. We reject Mark's arguments and deny the petition.

## **FACTUAL AND PROCEDURAL HISTORY**

In November 2010, the Los Angeles County Department of Children and Family Services (the Department) initiated dependency proceedings on behalf of V.S. (born January 2009) and his brother, I.S. (born

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<sup>1</sup> All further statutory references are to the Welfare and Institutions Code, unless otherwise stated.

October 2010). The court subsequently declared the children dependents under section 300.

On July 21, 2014, V.S. was placed in Mark's home on an emergency foster care basis, with the ultimate goal of adoption. Since V.S.'s placement, Mark helped V.S. "reduce his negative behaviors and continue adjusting to placement." In addition to adopting V.S., Mark expressed interest in transitioning I.S. into his home with the goal of adopting him as well. I.S. was placed in Mark's home on May 22, 2015. The Department found, "[V.S.] and [I.S.] are well cared for by [Mark], who continues to ensure that the children's physical, emotional and social needs are met. There appears to be a developing mutual attachment between [Mark] and the children." Both children referred to Mark as "daddy."

The Department assessed Mark for adoption of both children. The Department noted that in September 2012, there were allegations of physical and emotional abuse toward a former foster child, Manuel M. (Manny), now 15 years old. However, the Department concluded the physical abuse allegation was inconclusive and the emotional abuse allegation was unfounded. On August 27, 2015, the juvenile court terminated parental rights as to both children and identified Mark as the prospective adoptive parent.

On November 15, 2015, a referral was made involving I.S. and V.S. Manny, the foster child who was placed in Mark's home from October 2011 to December 2013, disclosed he was sexually abused by Mark. Manny told his foster mom's adult daughter, Jackie Chavez, that

Mark had sexually abused him. Manny told Chavez that Mark would come into his room and molest him while he was asleep. Manny said, “Mark had sex with me” and, after the incident, he (Manny) began to verbally and physically act out against Mark.<sup>2</sup> Even though Manny was subsequently placed in a different foster home, Mark contacted him and still had educational rights over him.

The police responded to the referral and interviewed Manny. Manny stated that one night while he was asleep in his bed, Mark came into his bedroom and put his hand on Manny’s penis for about five to six minutes. Manny said that there were no other incidents where Mark touched him inappropriately. Upon further questioning, Manny told the police that he had taken “Seroquel” the evening of the incident, as he did every night. This medication caused him to fall asleep.

Children Social Worker (CSW) Linda Kiefer was assigned to investigate the sexual abuse allegations. On November 24, 2015, Kiefer made an unannounced visit to Mark’s home. Mark reported that Manny had “a lot of behavior issues,” and was on “several psychotropic medications” when he was placed in his home. He had plans to adopt Manny, but eventually gave up on him because he was unable to deal with his behavioral issues. He stated Manny has a key to his home, and he wants to be

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<sup>2</sup> Chavez told a social worker, “I think [Manny] told me [about the molestation] because he wanted me to be his voice. I think [Manny] was just too scared to say anything about it. I knew he wasn’t lying because of the expression on his face; he had a scared expression on his face.”

a resource for Manny. Mark confirmed he retained educational rights over Manny. He denied the sexual abuse allegations. Mark believed Manny may be angry with Mark because he chose to adopt V.S. and I.S.

On November 25, 2015, Manny told Kiefer that he was aware Mark was in the process of adopting V.S. and I.S., but “he doesn’t have any feeling[s] about [Mark] adopting him.” Manny stated that Mark did not want to adopt him and “he wasn’t the right dad for me.” He explained, “[Mark] was always mean to me. He would get mad and [was] always restrain[ing] me.” Manny reported he is happy in his current foster home. When Kiefer asked for more detail about the sexual abuse allegations, Manny was too embarrassed to talk about it or did not remember. Manny’s current foster mom, Ramona Barrera, told Kiefer that Manny was a good kid and “has never been known to lie about anything.” Barrera reported that when the police were interviewing Manny, “they were hard on him[;] [t]hey told him that if he was lying he’d go to jail.” Barrera confirmed that, over one year ago, she told Manny that Mark was going to adopt V.S. and I.S.

On December 15, 2015, CSW Nora Montesdeoca interviewed V.S. at school. V.S. told her that Mark bathed him and scrubbed his body, including his private parts, with “just his hands and soap.” Two days later, Montesdeoca interviewed I.S. at school. When she inquired about bath time, I.S. stated that Mark helped him clean by using soap and his hands, “put[ing] soap everywhere.” I.S. volunteered that “sometimes Mark showers with [him],”

but he did not respond when asked if Mark washed I.S.'s private parts.

On January 4, 2016, Manny's therapist, Davidia Benavidez, told Kiefer that Manny confirmed he was sexually abused by Mark, but refused to provide the details. Benavidez agreed with Kiefer's assessment that Manny appears to be "child like" and emotionally immature for his age. The therapist believed Manny was molested by Mark, but Manny seemed conflicted "in that he tries to protect [Mark] as well as he was concerned that by disclosing the abuse that [Mark] 'would be in trouble.'" She reported that Manny had always been open and honest with her.

On January 12, 2016, Kiefer contacted Gina Donnelly, who handled respite care for the children when Mark was out of town and assisted Mark in the evenings with the children. Kiefer summarized Donnelly's statement as follows: the children are "self sufficient as they are able to bathe themselves; she reported that the only thing she may have to help them with is the shampoo to ensure that it is all rinsed out." Donnelly did not know how Mark approached bathing the children because she is "not in the bathroom when Mark's in there."

On January 19, 2016, Manny participated in a forensic interview. Manny reported that the abuse started when he was 10 years old, and he was abused "one or two times." He stated Mark had sex with him. When asked to elaborate, Manny said, "[H]e put his penis in my butt." Manny reported he was half-asleep in his bedroom when the incident occurred. He knew Mark's penis was inside of

him because he “felt something going inside [his] butt, [he] felt pressure.” Manny tried to push Mark off of him. He explained when he was able to get away from Mark, he ran to the kitchen and stayed there for a couple of minutes. When asked to clarify if there were one or two incidents, Manny responded, “One I guess. I don’t know.” Manny said he finally reported the sexual abuse to his foster mom’s daughter, Chavez, because he trusts her.

On January 22, 2016, Kiefer spoke to CSW Rosalba Arroyo, who was the school-based social worker at Manny’s school. Manny refused to speak to her about the sexual abuse allegations. Arroyo stated Manny had never lied to her: “He’s not that type of person. I’ve never seen him be manipulative.”

On January 28, 2016, Kiefer completed her investigation, finding that the sexual abuse allegations against Mark were substantiated primarily based on Manny’s disclosure in the forensic interview. On February 2, 2016, the Department placed Mark’s home on an “indefinite hold” and indicated it could no longer be used as a resource home for I.S. and V.S. due to the substantiated allegations of sexual abuse. However, the Department was informed the district attorney would decline to file criminal charges against Mark because, according to the investigating police detective, “it is his word against the suspect and vice versa,” and there is not enough evidence to prove the charges “beyond a reasonable doubt.”

On February 9, 2016, the court granted the Department’s request that the children be removed from

Mark's care (§ 366.26, subd. (n)). On February 11, 2016, Mark filed an objection to removal.

On April 14, 2016, the Department recommended to the court that the children be separated “[d]ue to concerns regarding [V.S.]s sexualized behavior towards his brother [I.S.]” On one occasion, V.S. exposed himself to I.S. and attempted to kiss him. V.S. also pulled down his pants, and positioned his penis against I.S.’s buttocks. On May 11, 2016, the court ordered I.S. removed from his current foster home and placed with his other sibling, Amelia S.

The removal hearing began on June 27, 2016, and continued for a contested hearing spanning multiple days where witnesses testified, motions were heard, and closing arguments took place. The court entered its oral ruling on September 14, 2016, permanently removing V.S. and I.S. from Mark’s custody. Mark timely filed his petition for extraordinary writ.<sup>3</sup> On March 10, 2017, we issued an order to show cause why the relief prayed for in the petition should not be granted. On March 23, 2017, the Department filed an answer, and on March 27, 2017, V.S. joined in Mark’s petition.

## **DISCUSSION**

### **Removal Order**

“The juvenile court has the authority and responsibility to determine whether removal from the home of a prospective adoptive parent is in the child’s best

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<sup>3</sup> Mark does not challenge the removal order as to I.S.



interests. (§ 366.26, subd. (n)(3)(B).)” (*T.W. v. Superior Court* (2012) 203 Cal.App.4th 30, 45.) “If a prospective adoptive parent objects to the child’s removal from the home, the [Department] must prove by a preponderance of the evidence that removal from the prospective adoptive parent is in the child’s best interests.” (*Ibid.*) “[T]he child may not be removed from the home of the designated prospective adoptive parent unless the court finds that removal is in the child’s best interest.” (§ 366.26, subd. (n)(3)(B).) The juvenile court’s decision is reviewed for an abuse of discretion. (*In re N.M.* (2011) 197 Cal.App.4th 159, 171.)

In finding removal from Mark’s home was in V.S.’s best interests, the juvenile court made several observations. The court noted that Manny disclosed the sexual abuse to somebody with whom “he had developed trust.” The court stated, “[T]he fact [Manny is] changing his story from time to time is not totally unexpected and maybe not even unreasonable. But one thing is consistent in each instance that he talks about sexual abuse.” The court ultimately found Manny to be credible and gave considerable weight to his testimony.<sup>4</sup>

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<sup>4</sup> The court recognized the district attorney may have elected not to file charges but found that decision was not determinative because the juvenile court looks to the best interest of the child, not whether the prosecutor can prove beyond reasonable doubt that a prospective adoptive parent is guilty of a crime. The court’s point is well-taken. As an aside, however, we note the record does not state definitively that the district attorney ultimately decided not to file charges. Rather, the record is replete with

The court also found the testimony of Mark's expert, Dr. Veronica Thomas, failed to "take into consideration the totality of the circumstances and opportunity to weigh Manny's testimony."<sup>5</sup> The court did not understand Mark's explanation for washing V.S.'s and I.S.'s genitals and was concerned that Mark's had used a belt to impose discipline.<sup>6</sup>

This case turned on whether the court could rationally conclude V.S. was in danger of being molested if he were to remain under Mark's care. After all parties had ample opportunity to cross-examine Mark's former foster child (Manny) and address any inconsistencies in his

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references indicating the district attorney would *at some point* reject the case.

<sup>5</sup> Dr. Veronica Thomas is a clinical and forensic psychologist who specializes in "the assessment of deviant sexual interest," and conducts treatment and evaluations for sex offenders. Dr. Thomas conducted an evaluation of Mark, and her written report was entered into evidence. Dr. Thomas administered various tests to Mark, which showed that he had normal homosexual interest and there was no finding for deviant sexual interest regarding children. However, she admitted that, on one or two occasions, she discovered her assessment was wrong. Dr. Thomas testified, "[w]hether or not somebody molested a child is not for me to say."

<sup>6</sup> Mark testified he washed the genitals of V.S. and I.S. because the boys were uncircumcised and he was concerned about cleanliness. Mark sought advice about the children's hygiene from his barber.

testimony, the court found Manny credible. The molestation of Manny rings of truth—Manny first told of sexual abuse to his confidant (Chavez), then to his therapist, and finally, adding a degree of graphic consistency, he described Mark’s specific acts to the forensic examiner. V.S.’s statements to Montesdeoca tended to establish Mark’s molestation of his foster children was chronic as V.S. described how Mark washed V.S.’s private parts with his bare hands and soap.<sup>7</sup> The court’s findings are rational and are supported by the record. The juvenile court could reasonably conclude V.S. was in danger of being molested if he remained under Mark’s care. We hold the court did not abuse its discretion in ruling that removal from Mark’s home was in V.S.’s best interest.

Mark contends Manny and Kiefer were not credible. However, we decline to reevaluate the credibility of a witness. (*T.W. v. Superior Court, supra*, 203 Cal.App.4th at p. 47 [appellate courts “defer to the juvenile court’s findings of fact and assessment of the credibility of witnesses”].) Additionally, Mark calls our attention to the fact that V.S.’s attorney argued it was in the child’s best interest to be

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<sup>7</sup> A reasonable inference can be drawn from the evidence that I.S. had the same experience with Mark. I.S. explained to Montesdeoca that Mark used his hands to put soap “everywhere” but refused to answer whether that included his genitals.

returned to Mark's home.<sup>8</sup> Although probative, in light of the entire record, it does not change our assessment of whether the court's removal order was within the bounds of its discretion.

### **Expert Witness**

We generally review evidentiary rulings for abuse of discretion. (See *In re Robert L.* (1993) 21 Cal.App.4th 1057, 1065, superseded by statute on another ground as stated in *Cesar V. v. Superior Court* (2001) 91 Cal.App.4th 1023, 1032.) An error in an evidentiary ruling will not result in reversal unless it can be shown that, absent the error, it is reasonably probable the result obtained in the case would have been more favorable to the appealing party. (Cal. Const., art. VI, § 13; Evid. Code, §§ 353, 354; *People v. Watson* (1956) 46 Cal.2d 818, 836.) The same standard applies in dependency matters. (*In re Celine R.* (2003) 31 Cal.4th 45, 59-60.)

On May 3, 2016, Presiding Judge of the Juvenile Court Michael Levanas ordered disclosure of Manny's juvenile case file for the purpose of the section 366.26, subdivision (n) hearing. Dr. McAuliff's report relied on this file, specifically a Health and Education Passport, an Educationally Related Intensive Counseling Services Report, and a Psychoeducational Assessment Report.<sup>9</sup> He

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<sup>8</sup> V.S.'s counsel, Sonali Jandial, declared a conflict on April 19, 2016, and Frank Ostrov replaced her as counsel.

<sup>9</sup> The court excluded admission of these three reports based on applicable psychotherapist or physician privileges.

did not interview Manny. Dr. McAuliff's report challenged the credibility of Manny's sexual abuse allegations. Manny's attorney moved to exclude the expert report because the expert relied on the above-referenced privileged information and admission of the report "would be an end run around Manny's privilege." She also argued it would be "extremely prejudicial" to Manny.

On August 5, 2016, the juvenile court excluded the expert report and the expert's proposed testimony rooted in the findings of the report. It appears the ruling was based on the court's application of one or more privileges as well as a finding that the probative value of the evidence was outweighed by the undue consumption of time pursuant to Evidence Code section 352. We reject Mark's argument that this ruling constituted reversible error.

First, the expert's opinion regarding the credibility of Manny was inadmissible. It was the court's prerogative to assess Manny's credibility. (*People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 82 ["The general rule is that an expert may not give an opinion whether a witness is telling the truth, for the determination of credibility is not a subject sufficiently beyond common experience that the expert's opinion would assist the trier of fact; in other words, the jury generally is as well equipped as the expert to discern whether a witness is being truthful."].)

Second, Mark has not carried his burden of showing that any error committed by the court was prejudicial. We see nothing in the record to suggest the court would have been influenced by the expert's opinion about Manny's credibility. Dr. McAuliff never interviewed Manny or

otherwise observed him. Inconsistencies in Manny's testimony were exposed through vigorous cross-examination which included the solicitation of evidence that Manny's account of the sexual molestation to the police was different from what he subsequently told the forensic examiner. Manny's credibility was also attacked through Mark's testimony—Mark vehemently denied the sexual abuse allegations and testified Manny had behavioral problems. Mark was even permitted to offer his opinion that Manny concocted the sexual abuse allegations because Mark wanted to adopt V.S. and I.S. instead of him. Finally, it is worth mentioning that the report has no bearing on the court's finding that Mark's method of bathing both V.S. and I.S. was inappropriate and without justification. It is not reasonably probable the result of the proceedings would have been any different if the expert's report and testimony were admitted.

### **Attorney of Non-Party Witness**

Mark contends the juvenile court committed reversible error when it permitted Manny's attorney to object to testimony of other witnesses because Manny was not a party to the proceeding. Mark makes the allegation that the "court was not in possession of critical additional information about Manny" because Manny's attorney was permitted to participate in the proceedings. However, Mark fails to support this conclusory allegation with any citation to the record. Therefore, Mark's contention has

been waived. (*In re Marriage of Falcone & Fyke* (2008) 164 Cal.App.4th 814, 822.)

### **DISPOSITION**

Mark's petition for extraordinary relief is denied.  
NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

KUMAR, J.\*

We concur:

KRIEGLER, Acting P.J.

BAKER, J.

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