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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

In re K.F., a Person Coming Under the
Juvenile Court Law.

ALAMEDA COUNTY SOCIAL
SERVICES AGENCY,

Plaintiff and Respondent,

v.

JONATHAN F.,

Defendant and Appellant.

A141116, A143083, A144778

(Alameda County
Super. Ct. No. OJ11016842)

Jonathan F., the presumed father of the minor K.F., appeals from several visitation orders issued after reunification services had been terminated. Specifically, Jonathan argues (1) the juvenile court lacked the power to enter interim orders limiting his visitation rights, (2) the juvenile court erred by leaving those interim orders in place after a mistrial was declared due to a missing transcript, and (3) the evidence did not support the orders limiting Jonathan's visitation. We disagree and affirm.

I. BACKGROUND

In April 2011, Alameda County Social Services Agency (the Agency) filed a Welfare and Institutions Code¹ section 300 petition for K.F. Among other things, the petition asserted Shannon, K.F.'s mother, had a longstanding and serious substance abuse problem, K.F. was born drug-exposed, and there was reported domestic violence between

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

Shannon and Jonathan, her live-in boyfriend. The juvenile court detained K.F. on April 27, 2011. In a May 2011 jurisdiction/disposition report, the Agency recommended K.F. be declared a dependent of the court and placed out of the home, with family reunification services offered to his mother.

DNA testing revealed Jonathan is not K.F.'s biological father. Nevertheless, Jonathan has stated he cares for K.F. as his own child. Jonathan and Shannon had been in an ongoing relationship since around 2007. Jonathan has been a registered sex offender since 1999. In 2008, he was charged with a violation of Penal Code section 243, subdivision (e), battery committed against a spouse or significant other. In July 2011, K.F.'s maternal grandmother expressed concerns to the Agency that Jonathan was selling Shannon's prescription drugs on the street, and Jonathan had previously advertised Shannon on Craigslist's "erotica section." Shannon's sister told the Agency that Shannon told her "Jonathan would hide in the back bedroom or bathroom with a gun while Shannon had her 'clients' over."

Contested jurisdiction/disposition hearings took place from August through December 2011. The case was assigned to Judge David Krashna. At the conclusion of the hearings, the juvenile court took jurisdiction and declared K.F. a dependent child of the court. The court elevated Jonathan to presumed father status. It also ordered reunification services for Shannon and Jonathan.

Due to the lengthy jurisdiction proceedings, the six-month review hearing for the dependency petition coincided with the 12-month review hearing on June 5, 2012. In a status review report submitted in connection with the hearing, the Agency recommended family reunification services be terminated and a section 366.26 hearing be set to free K.F. for adoption. The Agency found Jonathan was in compliance with several aspects of his case plan, but also expressed several significant concerns. Among other things, Jonathan had failed to secure stable housing, and it was unclear to the Agency where he was actually living. Jonathan failed to provide documentation of his income, and the Agency was concerned he was interfering with Shannon's substance abuse treatment. The Agency was also concerned Jonathan continued to be "very angry" about its

involvement in the family and had failed to take responsibility for his actions, including his past crimes and domestic violence.

In August 2013, following a contested hearing, the juvenile court found reasonable services had been provided, terminated reunification services to Shannon and Jonathan, and found by clear and convincing evidence that return of K.F. to the parents would be detrimental. The court ordered visitation between K.F. and his parents as frequently as possible consistent with K.F.'s well-being and the court's prior orders. All visits between Shannon and K.F. were to be supervised by the Agency. The matter was continued for a permanency planning hearing pursuant to section 366.26. Jonathan filed a writ challenging the juvenile court's orders. We denied the writ, finding the juvenile court's findings were supported by substantial evidence.

On December 6, 2013, K.F.'s foster mother (Foster Mother) filed Judicial Council form JV-290, a caregiver information form, asserting K.F. was negatively affected by visitation with Jonathan. After one of Jonathan's visits, K.F. had six episodes of extreme anger, sadness, or defiance, and at one point he hit Foster Mother repeatedly.

The Agency also expressed concerns about Jonathan's visits in a section 366.26 report submitted on December 11, 2013. The Agency reported the majority of Jonathan's visits with K.F. were spent watching television, even when K.F. explicitly asked for a nap or a trip to the playground. On one visit in March 2013, when K.F. was only three years old, Jonathan left K.F. alone in the house watching television. Jonathan claimed he had run across the street to the store and that K.F. had been asleep when he left. In the days after that visit, K.F. was concerned whenever adults left his presence. K.F.'s tantrums tended to happen more after visits with Jonathan, sometimes as many as six a day. The Agency also reported Jonathan had tested positive for opiates. While Jonathan stated this was due to prescribed medication, he declined to produce a prescription.

In a February 2014 report, the Agency stated Jonathan's visits were unsupervised and scheduled for eight hours every other week. K.F.'s caregivers said K.F. continued to have nervous energy before visits, "where he is unable to stop talking or moving." K.F. threw up in the car on the way to a January 2014 visit, even though he did not have the

flu. The Agency reported that, since the end of November 2013, K.F.'s behavior after his visits with Jonathan had improved, and he was able to act out his anger in play therapy and not on his foster mother.

On February 19, 2014, K.F.'s attorney filed a section 388 petition requesting Jonathan's visits be reduced from twice per month to once a month due to K.F.'s stress and manifesting physical symptoms after his visits with Jonathan. Attached to the petition was an unsworn declaration by Foster Mother. She stated K.F. told her Jonathan had held him down and hurt his leg, and that he no longer wanted to visit with Jonathan. K.F. would also cling to her and repeatedly say he did not want to stay with Jonathan. In July 2013, K.F. experienced leg pain and inconsolably cried prior to a visit with Jonathan. K.F. also experienced leg pain after a stressful visit with Jonathan in October 2013, during which Jonathan expressed displeasure that K.F. was calling his foster father "Dad." Although K.F. had not experienced leg pain since August, Foster Mother reported he was still stressed around visits with Jonathan, and he was "confus[ed by] things that have happened at visits."

On February 20, 2014, Judge Krashna scheduled a hearing on the section 388 petition for March 6, 2014, and ordered Jonathan's visits be reduced to one four-hour visit per month pending the outcome of the hearing. Five days later, Jonathan filed a notice of appeal from this order.

In connection with the March 6, 2014 hearing, the Agency reported that, after a January 2014 visit with Jonathan, K.F. began acting out angrily. Jonathan told K.F. he was going to buy a "big house," and K.F. had spoken excitedly about living with Jonathan in that house. Foster Mother attempted to explain to K.F. this was not realistic.

A contested hearing on K.F.'s section 388 petition commenced on March 6, 2014. On that day, Jonathan requested a *Marsden*² hearing. Judge Krashna denied the request.

² *People v. Marsden* (1970) 2 Cal.3d 118 (*Marsden*) holds that when a criminal defendant seeks a substitution of appointed counsel, the trial court must permit the defendant to explain the basis of his contention and to relate specific instances of inadequate performance. Relying on *Marsden*, juvenile courts have permitted parents,

Foster Mother testified in the morning and afternoon sessions regarding K.F.'s behavioral issues following his visits with Jonathan. The hearing was continued to March 7, and the juvenile court stated the current orders would be maintained until it could hear more evidence.

On March 7, Foster Mother completed her testimony and K.F.'s foster father (Foster Father), commenced his. At the conclusion of testimony, Jonathan requested a *Marsden* hearing for the second time. Judge Krashna discharged Jonathan's attorney, appointed a new one, and granted a continuance to allow the new attorney to familiarize herself with the case. Judge Krashna also issued a new visitation schedule, increasing Jonathan's visitation from four hours a month to eight hours a month. The court explained: "[Jonathan] has not lost his parental rights, so he has the right to visitation at this point. But given the testimony I've heard so far, I am very concerned about there being a connective tissue between [K.F.]'s very harmful behavior, harmful to himself and maybe others, and his visits with [Jonathan]. I still think that there is some connection there. [¶] The leg pain, for example, that only seems to pop up around visits with the father and not other people"

On April 16, 2014, K.F.'s foster parents filed another caregiver information form. This one asserted there had been a mix up with transportation to see Jonathan, and K.F. had stated he was "scared to go to Jonathan's and happy he did not have a visit that day."

The hearing on K.F.'s section 388 petition resumed on May 14, 2014. In connection with the hearing, the Agency reported there had been no "major issues" after K.F.'s most recent visit with Jonathan. The Agency also reported that since the February 2014 reduction in visits, "[K.F.] has displayed more stable behavior, without the extreme tantrums that he was having before." At the beginning of the May 14 hearing, Jonathan requested a *Marsden* hearing for the third time. Judge Krashna granted Jonathan's request, and arranged for Jonathan to meet with a new attorney that day. That

who have a statutory and a due process right to competent counsel, to air their complaints about appointed counsel and request new counsel be appointed. (*In re M.P.* (2013) 217 Cal.App.4th 441, 455.)

attorney declined appointment after meeting with Jonathan, stating, “[W]e’re a *Marsden* waiting to happen.” Jonathan then accused Judge Krashna of being “the issue.” The matter was continued so Jonathan could find a new attorney and the court ordered that all current orders were to remain in full force and effect.

The section 388 hearing was continued on May 27, 2014, June 4, 2014, and July 24, 2014. It appears Jonathan still did not have counsel at the May 27 and June 4 hearings. Foster Father was not present at the July 24 hearing, and no testimony was taken because Jonathan objected to any witnesses being taken out of order. At the July 24 hearing, the court ordered that its prior visitation order of one eight-hour visit per month remain in place pending the next hearing. Jonathan challenged this visitation order in a second appeal filed on September 18, 2014.

In the meantime, on June 25, 2014, Foster Mother submitted a caregiver information form stating K.F. had reported an incident where Jonathan was driving K.F. and began yelling at people in another car. K.F. also said Jonathan would not listen when he told Jonathan to stop. The incident upset K.F. and he asked Foster Mother to tell Jonathan “ ‘to never ever do that again.’ ” Jonathan claimed he was angry because the other driver “ ‘was on drugs and nearly hit us.’ ” Also, in connection with the hearing scheduled for July 24, the Agency reported Jonathan had transported three-year-old K.F. in a car without a car seat. K.F. later told his foster parents Jonathan took him to his “uncle’s house,” and there was nothing to do except watch television all day. An Agency report and caregiver information form submitted in September 2014, stated K.F. was experiencing problems controlling urination and bowel movements surrounding visits with Jonathan, and was worried about moving away from his foster parents’ home.

Prior to the September 18, 2014 hearing on the section 388 petition, Jonathan’s current attorney filed a motion requesting to be relieved as counsel, stating there had been a breakdown of the attorney/client relationship. At the hearing, Jonathan requested a *Marsden* hearing for the fourth time. Counsel argued Jonathan did not agree to her appointment and had not been willing to work with her. Jonathan asserted it was counsel

who had been unresponsive. Judge Krashna granted counsel's motion to be relieved, and appointed new counsel for Jonathan. The matter was continued to October 16, 2014.

In connection with the October 16 hearing, the Agency reported K.F. said he did not want to visit with Jonathan, but he would agree to do so because Jonathan " 'misses him.' " Additionally, the Agency reported K.F. did not exhibit the same problematic behaviors after visits with other relatives as he did after visits with Jonathan. The Agency also submitted a letter from K.F.'s therapist, stating: "The child frequently demonstrates signs of distress after transitions from visitation, including increased motor arousal, anger outbursts, oppositional behavior, somatic symptoms, and avoidance of affect."

At the beginning of the October 16 hearing, Jonathan requested a *Marsden* hearing for a fifth time, stating he "deserve[d] a better level of service," and counsel was forced on him because sheriff's deputies were present when she was appointed. Judge Krashna explained he requested security for all the hearings in this matter because of Jonathan's behavior in court. Jonathan's motion was denied and Foster Father completed his testimony. Among other things, Foster Father testified K.F.'s visits with Jonathan were detrimental. Jonathan's counsel then called Jonathan as a witness, at which point Jonathan requested a *Marsden* hearing for a sixth time, claiming counsel was "not prepared for this." When the discussion turned to Jonathan's visitation schedule, Jonathan accused Judge Krashna of being unfair, dishonorable, cruel, "inhumane," and "a cold-hearted beast." Based on the evidence concerning the effect of Jonathan's unsupervised contact with K.F., the court reduced Jonathan's visitation to one two-hour supervised visit per month. Jonathan later filed a third notice of appeal challenging the court's October 16, 2014 visitation order.

On October 30, 2014, Judge Krashna granted Jonathan's sixth *Marsden* motion and appointed a new attorney to represent him.

The hearing on K.F.'s section 388 motion resumed on January 21, 2015. In connection with the hearing, the Agency filed an addendum report from K.F.'s therapist stating his "symptoms of anxious, oppositional, and aggressive behavior significantly

decreased in September, likely coinciding with reduction of visits becoming supervised.” The therapist also found it was “in the best interests of the child to continue receiving supervision for visits, to ensure the child receives consistent messages regarding future placement options.”

At the January 21, 2015 hearing, Jonathan requested a *Marsden* hearing for a seventh time. K.F.’s counsel opposed the court appointing new counsel for Jonathan, arguing he merely wanted to delay and obstruct the proceedings. Judge Krashna granted Jonathan’s request, and indicated a new attorney would be appointed as soon as possible.

At a hearing on February 17, 2015, Jonathan’s new counsel moved for a mistrial because a portion of the transcript from the March 6, 2014 hearing, which contained some of Foster Mother’s testimony, was missing. All other parties supported the motion, and the court granted it. The court ordered its pending orders regarding visitation remain in place because there was no new evidence that would warrant changing those orders.

Jonathan’s attorney moved to withdraw as counsel. Judge Ursula Jones took up the matter at a March 11, 2015 hearing, at which Jonathan was not present. The court found Jonathan had been properly noticed and granted counsel’s motion to be relieved. The court explained: “[I]t is maybe not even short of some level of harassment. . . . [I]t seems to me that when an attorney specifically says that your physical safety is an issue or concern when dealing with a client, I take that seriously.” At a March 23, 2015 hearing, Judge Jones appointed new counsel for Jonathan, his ninth attorney in the case, and continued the matter to May 12, 2015 for a section 366.26 hearing.

On April 7, 2015, Jonathan filed two additional notices of appeal. The first challenged the court’s March 11, 2015 orders regarding withdrawal of counsel and the *Marsden* hearing. The second challenged the court’s February 17, 2015 “order of decreased visitation and mistrial.”

II. DISCUSSION

Jonathan raises three arguments on appeal: (1) the juvenile court erred by reducing his visits prior to the commencement of the section 388 hearing; (2) upon declaring a mistrial, the court was required to vacate its prior orders reducing Jonathan’s

visitation rights; and (3) the trial court's orders reducing his visitation rights were not supported by the evidence.³ Jonathan argues that, as a result of these alleged errors, we should vacate the section 366.26 hearing, increase Jonathan's visitation rights, and offer Jonathan and K.F. sufficient time to reestablish their bond. We disagree and affirm in all respects.

As to his first argument, Jonathan asserts the juvenile court was required to hold a hearing before entering its February 20, 2014 order reducing his visitation rights. In support, he cites *In re Lance V.* (2001) 90 Cal.App.4th 668 (*Lance V.*). In that case, the mother filed an ex parte motion for mediation regarding implementation of the visitation orders. (*Id.* at p. 670.) The request for mediation was granted, but the parties were unable to reach an agreement. (*Ibid.*) Following mediation the court held a hearing and changed the previous visitation order without taking any sworn testimony. (*Id.* at 672–673.) The mother appealed from the order altering her visitation, claiming the juvenile court erred in reducing her visitation without a section 388 petition for modification. (*Id.* at p. 673.) The appellate court agreed, finding the mother's due process rights to notice and an opportunity to be heard were compromised when the court modified the existing order without holding a properly noticed hearing on the merits. (*Id.* at p. 677.)

Lance V. is easily distinguishable. In the instant action, the juvenile court did set a section 388 hearing, and it heard sworn testimony and considered other evidence during those proceedings. As Jonathan points out, the February 20 order reducing his visitation to one four-hour visit per month was entered prior to the section 388 hearing. But that order was temporary. It was to remain in place pending the outcome of the section 388 hearing, which commenced only a few days later on March 6. Under these circumstances, we conclude the juvenile court's decision to curtail Jonathan's visitation during the short period of time before the section 388 hearing could be heard did not

³ The Agency asserts Jonathan's appeals should be dismissed as moot, and requests we augment the record and take judicial notice of subsequent proceedings in the juvenile court. We find the Agency's mootness arguments unavailing and therefore deny the motion to augment.

deprive him of his due process rights. To hold otherwise would significantly limit the juvenile court's power to protect minors' interests. Under Jonathan's view, a juvenile court could never temporarily limit a parent's visitation, even when there is evidence the parent poses a substantial threat to the life, safety, or welfare of a child. This runs contrary to the law, especially in cases such as this where reunification services have been terminated and the focus shifts to the needs of the child for permanency and stability. (*In re Richard C.* (1998) 68 Cal.App.4th 1191, 1196.)

While the juvenile court's temporary orders remained in place for months, this was primarily due to Jonathan's obstructive conduct. The section 388 hearing should not have taken more than a few days to complete. But the hearing could not proceed because Jonathan refused to work with any of the counsel appointed by the court. Jonathan requested seven *Marsden* hearings and went through nine court-appointed attorneys in the course of the section 388 proceedings. It appears the high turnover rate in counsel was due not to ineffective assistance but to tactical disagreements and a lack of trust, neither of which are generally considered sufficient cause for substitution of counsel. (See *In re M.P.*, *supra*, 217 Cal.App.4th at p. 458.) Moreover, a significant amount of the section 388 hearing was devoted to Jonathan's irrelevant and often disrespectful interruptions. We do not fault the juvenile court for trying to ensure Jonathan receives a fair and impartial hearing. But we do question whether it should have gone to such great lengths to accommodate his unreasonable demands and disruptive behavior. Undoubtedly, allowing Jonathan to substantially delay and obstruct the section 388 hearing was not in K.F.'s best interests.

Next, Jonathan argues that, upon declaring a mistrial, the juvenile court should have vacated all orders entered during the section 388 hearing that further reduced his visitation rights. Jonathan reasons the juvenile court had no power to make an order based on evidence adduced during the proceedings. We cannot agree. The juvenile trial court declared a mistrial because a portion of the transcript went missing and the court

was concerned Jonathan could not proceed with his appeals without it.⁴ Under such circumstances, there was no reason to vacate all interim orders entered for the purpose of protecting K.F.'s interests during the pendency of the section 388 hearing. And when considering whether those interim orders should remain in place, the trial court was not required to bury its head in the sand and ignore evidence that Jonathan's unsupervised visits posed a potential danger to K.F.'s health and safety. Jonathan's authority does not hold otherwise. It merely states a mistrial is the equivalent of no trial. (*In re Alpine* (1928) 203 Cal. 731, 742–743.)

Jonathan also contends the evidence did not support the trial court's October 16, 2014 order reducing his visitation to one two-hour supervised visit per month. The argument is meritless. The court's order is reviewed for abuse of discretion (*In re Stephanie M.* (1994) 7 Cal.4th 295, 318), and contrary to Jonathan's contentions there was substantial evidence of a connection between K.F.'s emotional distress and behavioral issues and his unsupervised visits with Jonathan. After one of his visits with Jonathan in 2013, K.F. hit Foster Mother repeatedly and had six episodes of extreme anger, sadness, and defiance. In March 2013, Jonathan left a three-year-old K.F. at home alone. Following that visit, K.F. expressed concern when adults left his presence. In 2014, it was reported K.F. had nervous energy before his visits with Jonathan, and even threw up in the car on the way to visit Jonathan. In or around February 2014, K.F. told Foster Mother that Jonathan had held him down and hurt his leg. After that visit, K.F. repeatedly experienced leg pain. At times, K.F. expressed a strong desire not to see Jonathan and a relief when his visits with him were cancelled. In September 2014, it was reported K.F. was having problems controlling urination and bowel movements surrounding visits with Jonathan.

Jonathan's arguments on this point are unpersuasive. He asserts there was no basis to find K.F.'s behaviors were caused by visits with him, even as he concedes the

⁴ Neither the parties nor the trial court ever raised the possibility of drafting a settled statement.

behaviors occurred around visitation time. Jonathan suggests a number of alternative hypotheses for K.F.'s behaviors, such as missing naps and traveling back and forth between two homes. But even if those hypotheses were reasonable, we are in no position to second-guess the juvenile court's findings. "The appropriate test for abuse of discretion is whether the trial court exceeded the bounds of reason. When two or more inferences can reasonably be deduced from the facts, the reviewing court has no authority to substitute its decision for that of the trial court." (*Shamblin v. Brattain* (1988) 44 Cal.3d 474, 478–479.) Jonathan's arguments also overlook the fact that K.F. did not exhibit such problematic behavior after visits with other relatives, and K.F.'s behaviors improved after the court reduced Jonathan's visits and ordered they be supervised. As discussed above, once reunification services were terminated, the primary concern became K.F.'s need for permanency and stability. (See *In re Richard C.*, *supra*, 68 Cal.App.4th at p. 1196.)

III. DISPOSITION

The orders on appeal are affirmed. The Agency's motion to augment is denied.

Margulies, J.

We concur:

Humes, P.J.

Banke, J.

A141116, A143083, A144778
In re K.F.