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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

In re Victoria H. et al., Persons Coming
Under the Juvenile Court Law.

CONTRA COSTA COUNTY CHILDREN
& FAMILY SERVICES BUREAU,

Plaintiff and Respondent,

v.

Dawn M.,

Defendant and Appellant.

A143563

(Contra Costa County Super. Ct.
Nos. J14-00423, J14-00424)

Appellant Dawn M. (Mother) has two children, Mark H., and his older sister, Victoria H. For much of their lives, both children have been dependents of the juvenile court, primarily as a result of their parents' drug and alcohol abuse. After reunification services were denied in the most recent dependency proceeding, the children disclosed that they had also been victims of sexual abuse while under their parents' care. Victoria adamantly refused visitation with either parent. The court adopted a plan of long-term foster care for both children, denied parental visitation with Victoria, and granted Mother monthly visitation with Mark. The visitation order regarding Mark required the Contra Costa County Children and Family Services Bureau (Department) first confirm, after consultation with Mark and his therapist, that visits would not undermine Mark's

emotional stability. Mother challenges the latter order as an improper delegation of discretion over visitation.¹ We affirm.

I. BACKGROUND

In June 2004, the Department filed a dependency petition on behalf of Victoria, after Mother and Victoria tested positive for amphetamine and methamphetamine at Victoria's birth. The juvenile court removed Victoria from Mother's custody, ordered reunification services for Mother, and denied reunification services for Father. After 12 months of reunification services, Victoria was returned to Mother's custody in July 2005. However, nine months later the Department filed a supplemental petition on behalf of Victoria. The court sustained the supplemental petition, removed Victoria from Mother's care, denied further reunification services, and scheduled a permanency planning hearing pursuant to Welfare and Institutions Code section 366.26.² In the interim, Mother gave birth to Mark and the Department filed a petition on his behalf. The court sustained the petition, ordered Mark to remain in his parents' custody with family maintenance services, and granted Mother's motion under section 388 for renewed reunification services with Victoria. Both cases were dismissed in 2008.

Between 2009 and 2011, the Department received four referrals alleging general neglect of the children due to the parents' drug and alcohol abuse. In May 2013, the Department again filed dependency petitions on behalf of both children, alleging that both parents had substance abuse problems, Mother had untreated mental health issues, and the home was unsanitary and unsafe. The home was extremely cluttered, weapons and a methamphetamine pipe were located within reach of the children, bugs and cockroaches infested the home and were crawling on the children's food, and defective electrical wiring posed a fire hazard. Father reported that only he and the children lived

¹ Mother's notice of appeal encompassed several orders regarding both children (long-term foster care, visitation, and denial of a modification petition). In her briefing on appeal, however, Mother has abandoned all issues except the court's alleged improper delegation of discretion over her visitation with Mark. The children's father (Father) is not party to this appeal.

² All statutory references are to the Welfare and Institutions Code.

in the home. Mother had left about three years earlier because of methamphetamine use and conflict with Father, but she visited frequently. Mother had been seen “screaming hysterically walking up and down the street ranting about someone pulling her hair and dragging her down the street.” Both parents denied drug or alcohol abuse, but Mother acknowledged she needed mental health treatment.

The court sustained the petitions as amended after dismissing a substance abuse allegation against Mother. At an October 2013 disposition hearing, the children were returned to Father’s care with family maintenance services and Mother was granted twice-monthly supervised visitation. Father eventually completed his case plan. Mother, however, did not participate in services. The dependency cases were dismissed on April 7, 2014. The following day, Father was taken to the emergency room after he fell off a bicycle while highly intoxicated. He told medical personnel he was celebrating “a win over CPS.” The children were with Father when the accident occurred, and Victoria called 911 thinking he had a heart attack. Six days after the accident, Father sounded intoxicated during an interview with the Department. Mother denied using drugs even though she had a burn on the part of her finger where she would have held a methamphetamine pipe. Father expressed concern that Mother’s boyfriend was a pedophile.

On April 21, 2014, the Department filed new petitions on behalf of both children based on Father’s chronic alcohol abuse. The petitions were sustained. The children were placed with a nonrelated extended family member (Caregiver) who expressed interest in providing the children with permanency. At a July disposition hearing, the court denied services to both parents and scheduled a section 366.26 hearing. Mother challenged the disposition order by writ petition, but her petition was summarily denied.

Pending the section 366.26 hearing, the court granted a monthly visit to each parent. Mother’s visits with the children in May, June and July 2014 went well. According to the Department, “Victoria was more reserved from her mother during visits, in regards to not being affectionate towards her mother. Whereas, Mark was observed

being affectionate with the mother.” According to Mother, Mark sat on her lap, hugged her, played with her, and called her “Mom” or “Mommy.”

On August 28, 2014, the court granted the Department’s ex parte application for a suspension of visitation based on evidence that the children had been sexually abused while in their parents’ care. The section 366.26 hearing was continued pending an investigation into the possible abuse. In an October 2014 section 366.26 report, the Department reported that Mark had tried to grope Caregiver, and Victoria said Mark groped her all the time. Both children said someone had urinated in their mouths in the past. Mark wrote in a journal that he had sex with Victoria, and Victoria disclosed she had been raped by Mother’s boyfriend, Father’s friend, and a neighbor. Mark admitted he had been part of Victoria’s sexual abuse. The children also disclosed that they had been left alone for two weeks while in Father’s care, and Victoria said Father would hit her with a belt. Victoria showed distress by sucking on her arms so hard she gave herself bruises and she displayed severe anxiety whenever Caregiver left the home. Victoria was “very vocal” about not wanting visits with her parents and her therapist recommended no contact between Victoria and her parents. Because Caregiver was overwhelmed by the disclosures, the children were placed in a new foster home on about September 11, 2014.

On September 29, 2014, Mother filed a motion pursuant to section 388 requesting reunification services including visitation. Mother claimed she had been taking steps to address her substance abuse and mental health problems by voluntarily participating in services. Mother presented evidence that she had enrolled in increasingly-intensive outpatient substance abuse recovery programs, started taking antidepressants, and obtained housing where she could care for her children.

At an October 27, 2014 combined section 366.26 hearing and hearing on Mother’s section 388 petition, the court denied Mother’s petition except as to visitation with Mark, and adopted a permanent plan of long-term foster care. The court found that any contact or visitation between Victoria and either parent would be detrimental to her and ordered no contact, subject to modification by way of a section 388 petition. “As it relates to Mark, I will order that [the Department] arrange visitation. Visitation with mother will

be a minimum of one hour, one time per month, and must be supervised and subject to the holdings of *In re Daniel[le] W.*, *Chantal S.* and *Julie M.*^[3] [T]hose visits are only to occur after consultation with the child’s therapist and the child to ensure that contact with [mother] would not undermine his emotional stability.” Father was denied visits with Mark because he had not been in contact with the Department for months. Mother filed a timely notice of appeal.

II. DISCUSSION

As noted *ante* (see fn. 1), the only issue Mother pursues on appeal is the court’s alleged improper delegation of discretion over her visitation with Mark. We affirm.

When a juvenile court adopts a permanent plan of long-term foster care or guardianship, it must “make an order for visitation with the parents or guardians unless [it] finds by a preponderance of the evidence that the visitation would be detrimental to the physical or emotional well-being of the child.” (§ 366.26, subd. (c)(4)(C); *In re M.R.* (2005) 132 Cal.App.4th 269, 274; *In re Ethan J.* (2015) 236 Cal.App.4th 654, 661.) As with visitation during a reunification period, the court may not delegate complete discretion over whether visitation will occur to a social service agency or third party, but it may delegate limited discretion over the time, place and manner of visits. (*M.R.*, at p. 274; *Ethan J.*, at p. 661; *In re Hunter S.* (2006) 142 Cal.App.4th 1497, 1505.)

The juvenile court here ordered monthly supervised visitation after consultation with the child’s therapist and “subject to” the holdings of *Danielle W.*, *supra*, 207 Cal.App.3d 1227, *Chantal S.*, *supra*, 13 Cal.4th 196, and *Julie M.*, *supra*, 69 Cal.App.4th 41. *Julie M.* summarizes the holdings of these cases: “*Danielle W.* approved a visitation order which vested *limited* discretion in the county welfare agency to consider the children’s desires regarding visits with their mother. The court found that [the] order . . . meant ‘. . . the children should not be forced to visit with their mother against their will *and in no way suggests that the minors are authorized to do more than*

³ *In re Danielle W.* (1989) 207 Cal.App.3d 1227 (*Danielle W.*), *In re Chantal S.* (1996) 13 Cal.4th 196 (*Chantal S.*), and *In re Julie M.* (1999) 69 Cal.App.4th 41 (*Julie M.*).

express their desires in this regard.’ ([*Danielle W.*, at p. 1237], italics added.) *Danielle W.* recognized that a child’s aversion to visiting an abusive parent may be a ‘dominant’ factor in administering visitation, but it could not be the *sole* factor. ([*Ibid.*]) [¶] At a minimum, the court should . . . provide [the county welfare agency] with ‘broad “guidelines as to the prerequisites of visitation or any limitations or required circumstances.” ’ [Citation.] Such an order may assign the task of overseeing visitation to the [county welfare agency] to ‘promptly respond to changing dynamics of the relationship between parent or guardian and child, which changes may dictate immediate increases or decreases in visitation or demand variations in the time, place and length of particular visits.’ [Citations.] [¶] In this regard, the court may appropriately rely upon an evaluation by treating therapists of the children’s emotional condition and evolving needs. ([*Chantal S., supra*,] 13 Cal.4th 196.) That is because dependency courts ‘simply do not have the time and resources to constantly fine tune an order in response to the progress or lack thereof in the visitation arrangement, or in reaction to physical or psychological conduct which may threaten the child's well-being.’ [Citation.] But the ultimate supervision and control over this discretion must remain with the court, not social workers and therapists, and certainly not with the children.” (*Julie M.*, at pp. 50–51.) The *Julie M.* court held that an order barring visitation without the children’s consent was an abuse of discretion, but that an order allowing a therapist to determine when visitation would resume within an eight-month time frame would have been appropriate. (*Id.* at pp. 46, 51.)

Construed consistently with *Danielle W.*, *Chantal S.*, and *Julie M.*, the visitation order in this case required the Department to arrange a minimum of monthly supervised visitation between Mother and Mark *unless* it determined, based on consultation with Mark and his therapist, that visitation would undermine Mark’s emotional stability. That is, the court established the minimum frequency and duration of the visits *absent* evidence of detriment to the child, set guidelines for the visits, and granted the Department only limited discretion to discontinue them. Mother faults the court for not making a finding of whether visitation would be detrimental to Mark, but the record had

not yet been fully developed on that matter. New allegations of abuse were still under investigation and Mark had only just started (or was about to start) therapy on the new disclosures. The court's order setting a visitation goal and delegating limited discretion to respond to unfolding events was appropriate in the circumstances. "[P]arties in a dependency proceeding should not be locked into a visitation order which specifies a rigid schedule and length of visits. Such an order is not in the best interests of either the child or the parent or guardian because it fails to allow the flexibility necessary to rapidly accommodate the evolving needs of the dependent child and his or her parent or guardian." (*In re Moriah T.* (1994) 23 Cal.App.4th 1367, 1376.)

Cases cited by Mother are distinguishable. *In re Rebecca S.* (2010) 181 Cal.App.4th 1310 involved visitation under a permanent plan of guardianship where the court had terminated dependency jurisdiction. The juvenile court abused its discretion in allowing the guardian to determine the frequency and duration of visits without setting any minimum guidelines. (*Id.* at pp. 1312–1313.) *In re M.R., supra*, 132 Cal.App.4th 269 similarly involved a permanent plan of guardianship and the guardians were given complete discretion over visitation. (*Id.* at pp. 272, 274.) And the visitation order in *In re Jennifer G.* (1990) 221 Cal.App.3d 752 granted complete discretion over visitation to the social services agency, set no minimum frequency or duration for visits, and provided no guidelines for the agency's exercise of discretion. (*Id.* at pp. 755, 757.) Here, the juvenile court ordered visitation, set the minimum frequency and duration of that visitation, and provided guidelines related to Mark's emotional stability for whether and when visits should occur. The Department could override the order for visitation only if it received information from Mark or his therapist that visitation would be emotionally detrimental for him. Moreover, the court maintained dependency jurisdiction, an investigation into new disclosures of abuse was ongoing, and new developments could be brought to the court's attention through a section 388 petition or at a future review hearing. (See *In re Christopher H.* (1996) 50 Cal.App.4th 1001, 1006, 1009–1012 [order allowing agency to determine "reasonable" visitation with

incarcerated father not an improper delegation due to child's age and health, and the court's continuing supervision pursuant to § 388].)

The juvenile court did not improperly delegate discretion over Mother's visitation with Mark.

III. DISPOSITION

The October 27, 2014 visitation order is affirmed.

BRUINIERS, J.

WE CONCUR:

JONES, P. J.

NEEDHAM, J.

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