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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION FOUR

E.M.,

Petitioner,

v.

THE SUPERIOR COURT OF LAKE
COUNTY,

Respondent;

LAKE COUNTY DEPARTMENT OF
SOCIAL SERVICES, et al.,

Real Parties in Interest.

A145808

(Lake County
Super. Ct. No. JV320398A)

This case involves a registered sex offender who sexually abused his stepdaughter over the course of seven or eight years, eventually impregnated her, and was allowed to raise their daughter, ten-year-old Minor, for several years before authorities stepped in to remove her. Minor was removed from her father's home in April 2014, but her father was allowed to have visitation with her until the juvenile court put an end to it on July 1, 2015, pending a hearing under Welfare & Institutions Code¹ section 366.26 set for October 21, 2015. Her father, E.M., has now filed a petition for extraordinary relief seeking to postpone the hearing. (Cal. Rules of Court, rule 8.452.)² He challenges the juvenile court's order denying him visitation with Minor. He contends the court's order

¹ Undesignated statutory references are to the Welfare & Institutions Code.

² References to rules are to the California Rules of Court.

will preclude him from establishing at the section 366.26 hearing a “beneficial relationship” to Minor so as to avoid termination of parental rights (§ 366.26, subd. (c)(1)(B)(i)), unless he is allowed visitation pending the hearing. He therefore asks us to reverse the court’s order denying him ongoing visitation and to stay the hearing set for October 21 so he can make up for the lapse in visitation occasioned by the court’s order. Because the court did not abuse its discretion in terminating visitation, we deny the writ and the stay.

BACKGROUND

On April 8, 2014, the Lake County Department of Social Services, Child Welfare Services (Department) filed a section 300 petition on behalf of Minor and her two half-sisters (Sister #1 and Sister #2), who share a common mother, L.F. (Mother). Although the children share the same last name, they in fact have different fathers. The father of Sister #1 and Sister #2 is B.M., who is E.M.’s nephew.

The petition, as amended May 22, 2014,³ alleged Minor came within subdivisions (b) and (j) of section 300 (failure to protect and abuse of a sibling). Allegations were also made under section 300 subdivision (d) (sexual abuse) with respect to Sister #1. The Department’s concern about the children arose out of a referral indicating that Sister #1, then seven, had been sexually assaulted over time by a male cousin (Cousin), age 15, who was being raised by E.M. and his live-in girlfriend, M.F., who is also Mother’s mother. The sexual abuse occurred when the children were under E.M. and M.F.’s care. Sister #1 told investigators that from the time she was four years old, Cousin had sexually assaulted, abused and molested her “more times than [she] can remember.”⁴

E.M. and B.M. had known about Cousin’s sexual abuse of Sister #1 for two-and-a-half years before it was reported. B.M. told the social worker E.M. had discovered the

³ The first amended petition filed May 22, 2014, added detail about E.M.’s criminal history, his sex offender registration status, and his “fail[ure] to appreciate the severity of these events and crimes by minimizing them even to this day, thus placing any child in his care or home at great risk of harm and abuse.”

⁴ The matter was turned over to the district attorney’s office in early May 2014.

two minors partially unclothed just after Cousin had apparently molested Sister #1 in a fort they had built on E.M. and M.F.'s property. When questioned in April 2014, though, E.M. denied knowing anything about the sexual abuse. B.M. disputed this, saying, "It happened. He knows."

After E.M. told B.M. about the abuse, B.M. asked Mother to keep Sister #2 and Sister #1 away from E.M. and M.F.'s house (and hence away from Cousin), but Mother continued to leave the children with E.M. and M.F. E.M., though aware of the abuse, continued to allow Cousin to live in the home. And despite her own history of childhood sexual abuse, when a sheriff's deputy informed Mother that Sister #1 was being molested by Cousin at E.M.'s house, she said Sister #1 was lying and she welcomed an investigation to prove her daughter was lying.

On April 14, 2014, the court ordered the three children detained in an emergency shelter. Minor and her half-sisters are enrolled members of the Robinson Rancheria Pomo tribe (Pomo tribe), subject to the Indian Child Welfare Act, 25 U.S.C. § 1901 et seq. The children were later placed in a tribally-designated relative placement with E.M.'s sister, L.T. (B.M.'s mother and Sister #1 and Sister #2's grandmother), where they now remain. The court allowed E.M. supervised visits with Minor one hour per week.

E.M. is 61 years old, while Mother recently turned 27. As noted, E.M. was and is the live-in boyfriend of Mother's mother. Since she was two years old, Mother was raised by E.M. and M.F., and from the age of eight or nine, she was sexually molested by E.M. Finally, when Mother was 15 or 16, she became pregnant with Minor as a result of one of E.M.'s many sexual assaults. Sometime after giving birth to Minor in April 2005, Mother left the baby in the care of M.F. and E.M., who raised Minor ever since, until she was detained by the court in April 2014. So, E.M. is both Minor's father and her step-grandfather, and Minor lived in the home of her mother's molester all her life until she was removed last year.

E.M.'s sexual abuse of Mother first came to light in November 2004, when Modoc County child welfare authorities received a referral resulting from M.F.'s having

discovered E.M. in the act of having sexual intercourse with Mother, who was then 16. M.F. could see them through a bedroom door that had been left ajar, so she entered the bedroom and confronted E.M. E.M. told her to leave the room, so she did, and he continued having sex with Mother while M.F. waited outside the door. After that incident, M.F. and Mother left the home temporarily, and Mother was sent to stay with relatives in Modoc County. M.F., at least for a time, terminated her romantic relationship with E.M.

The case was cross-referred to law enforcement. M.F. told the Lake County Sheriff's deputies she had known E.M. all her life and had been involved with him romantically for 25 to 30 years. She said E.M. also physically abused her and Mother, "using intimidation to control them." M.F. also told them E.M. drank alcohol every night and smoked marijuana, and the preceding summer he had given both alcohol and marijuana to Mother.

Mother told the deputies E.M. had been sexually abusing her since she was eight or nine years old. The abuse occurred every Friday and Saturday night, and sometimes on Sunday night. Mother also reported that E.M. threatened her with physical harm if she did not accommodate him sexually. He told her "she better do a good job 'sucking his dick' or he would hit her."

In the spring of 2005 the Department received further referrals about the sexual abuse of Mother and the birth of Minor but did not investigate because the matter had already been reported to law enforcement. The law enforcement reports from that period show Mother and M.F. both had moved back in with E.M. prior to Minor's birth. Someone accused E.M. of kidnapping them to bring them back, but they both told the social worker they had returned voluntarily.

After Minor's birth, Mother and the baby moved back in with E.M. in an almost husband-wife relationship, while M.F. stayed in Alturas in Modoc County. In early June 2005, M.F. explained to a sheriff's deputy that she had recently stayed for two weeks with E.M. and Mother, and during that time E.M. and Mother regularly slept together in the same bed and Mother "seemed to enjoy her sexual relationship with [E.M.]." M.F.

admitted her relationship with her daughter had “deteriorated” as a result of the sexual relationship between E.M. and Mother; M.F. felt Mother was “jealous” of her “past” relationship with E.M. M.F. apparently did not report E.M. to the police or the Department until the sheriff’s deputies contacted her, effectively acquiescing in his unlawful sex with Mother. M.F. told the deputies she thought B.M. was Minor’s father, but DNA tests showed it was E.M.

In November 2005, E.M. was charged in an eight-count felony complaint with violations of Penal Code sections 288, 261.5 and various other penal statutes relating to his illicit conduct with Mother. In a negotiated disposition, he pled guilty to two counts of violating Penal Code section 261.5, subdivision (c) (unlawful sexual intercourse with a minor more than three years younger, or statutory rape), occurring on the dates November 18–19, 2004 and September 6, 2005. He was sentenced to three years, eight months in state prison. The sentencing court ordered E.M. to register as a sex offender under Penal Code section 290, but registration is not universally required after conviction under Penal Code section 261.5. (§§ 290, subd. (c), 290.006.) He claimed the judge who sentenced him for statutory rape assured him he would be allowed to reunify with Minor after he served his sentence and was discharged from parole.

In interviews with the Department in April 2014, E.M. admitted only one act of sexual intercourse with Mother, which resulted in her pregnancy with Minor. He explained that he was drunk, Mother wanted to “wrestle around,” he had a lapse in judgment, and he carried the physical contact too far. He denied any other sexual incidents with Mother. Of course, in 2005 he admitted two acts of sexual intercourse with her in entering his guilty pleas, and neither of the dates specified in those charges would have corresponded to the date on which Mother became pregnant. He explained he had accepted a plea deal based on his lawyer’s advice and to avoid putting Mother through the ordeal of a trial. E.M. also testified under oath at the jurisdiction hearing that he had sex with Mother only one time.

E.M. was discharged from parole on October 29, 2010 and apparently moved back in with M.F. Thus, E.M. was in prison for some time during Minor’s early childhood, but

he returned to M.F.'s home—and to Minor—when his daughter was approximately five years old.

The Department's first amended jurisdiction report showed that E.M.'s prior offenses were not limited to sexual misconduct with children. In December 1983 he and M.F. were referred to the Department for severely physically abusing M.F.'s eight-year-old son, Michael, Mother's older brother. Michael reported to the police that he had been beaten and kicked by E.M., who was wearing steel-toed boots, because he stacked a cord of firewood beside the porch instead of on the porch, where E.M. wanted it. E.M. kicked him about ten times and slapped him about five times. E.M. then took Michael outside and kicked him in the chest, sending him reeling backwards into the icy cold water of a nearby creek. E.M. made him stay in the creek for an hour.

One time, E.M. and M.F. went out of town, leaving Michael to fend for himself. Michael became cold and tried to light a fire in "a little plastic tub or something." When E.M. returned and found what Michael had done he was angry. As punishment, he held Michael's hand in the flame of a gas stove for several seconds, giving him third-degree burns. Michael described struggling to get his hand out of the flame and being unable to free himself. Afterwards, E.M. gave Michael a rag to wrap up his hand and told him not to let anyone see his injury. If anyone asked about it, E.M. instructed Michael to tell them he fell into a pot of hot water. E.M. told Michael he would kill him if he told anyone about the abuse. After that incident, Michael ran away from home (at age eight) and started hitchhiking out of town. He was picked up by some adult friends who took him to the police station to report the abuse. Michael was then taken to the hospital.

E.M. and M.F. had also used belts and wire to beat Michael. E.M. had previously made Michael bleed from his nose, mouth and back as a result of the beatings. E.M. beat Michael almost every day, and M.F. beat him about half as often. When he was examined after reporting to the police he had two black eyes and scratches and bruises extending from his back to his calves. M.F., too, would beat Michael with a belt if E.M. told her to. If she did not do what E.M. told her to do, he would beat her. Michael once witnessed E.M. burn M.F.'s forehead with a cigarette lighter from his car, leaving a scar.

Michael also had a bedwetting problem as a child, so E.M. and M.F. made him sleep in a closet. When the bedwetting continued, Michael was forced to sleep in an old car in the yard, with two windows broken out, instead of in the house. He was not allowed to eat dinner until after E.M. and M.F. had finished, when he ate their leftovers. E.M. refused to feed Michael if he “mess[ed] up,” such as by putting something away in the wrong place or missing the bus to school. Before he reported the abuse, Michael had gone most of two days without food, including on Christmas day.

E.M. was convicted by jury verdict of two counts of inflicting injury upon a child (one with a great bodily injury finding) (Pen. Code, § 273d), willful cruelty to a child (Pen. Code, § 273a), and assault by means of force likely to produce great bodily injury (former Pen. Code, § 245, subd. (a)(1)). Michael was removed from the home and was raised by his grandmother, and E.M. was sentenced to 11 years in prison for his crimes. All of this transpired before Mother was born.

Again, when E.M. was interviewed in April 2014, he minimized the abuse, saying he had only held Michael’s hand over a flame to teach him not to start fires, and in his struggle to free himself, Michael put his own hand in the flame. In addition, when he testified at the jurisdiction hearing, E.M. denied abusing Michael and claimed he could not remember the sexual abuse of Mother. He claimed the family had “healed,” and he would not discuss either form of abuse except by reference to the convictions he had sustained. He did testify, though, that he had never in his lifetime intentionally or unintentionally hurt a minor.

This was, of course, inconsistent with the information developed through the Department’s investigation. The twelve-month review report disclosed that on February 24, 2015, Sister #1 reported that E.M. had slapped Sister #2 at some time prior to the detention and had given her a bloody nose because she was “not listening to him.” E.M. told Sister #2 the blow would “build character.” The Department had also investigated other referrals against E.M. for physical abuse of children in his care (other than Mother) in 1999 and 2002, but the investigations were inconclusive. The referral in 2002 included

an allegation that E.M. had “punched” Mother, who was then 14, in the face, leaving a scar.

E.M.’s testimony was also significantly undercut by Michael’s own testimony at the jurisdiction hearing. Now 33 years old, Michael described the abuse he received at his stepfather’s hands and also testified that E.M. sexually abused him as a child by having “intercourse” with him two to four times, although he had never told anyone about it before. He said he was finally revealing the sexual abuse “because I think this, from what I understand, is [the] third generation of abuse that’s going on, and I would like to stop it.” Judge Hedstrom, who presided over the jurisdiction hearing, did not believe E.M.’s testimony that he never hurt Michael. The court found Michael’s testimony “very persuasive” and “among the most powerful” he had heard “over the last 35 years or so.”

In addition to his child abuse conviction in 1984 and his unlawful sexual intercourse convictions in 2006, E.M. had sustained convictions for receiving stolen property, assault, and drunk driving. After being paroled on the child abuse conviction, he violated parole three times (in 1990, 1991 and 1992) and was returned to prison for each violation.

The contested jurisdiction hearing was held on multiple dates from May 22 through July 14, 2014, when it concluded and the court made its findings and orders. Judge Hedstrom declared all three children dependents and sustained findings against E.M. on allegations under section 300, subdivision (b), that he “has an extensive criminal history and compromised character that precludes him from safely parenting a child,” including “charges and/or convictions in approximately 1984, 1991, 1992 & 2005. The 1984 conviction involve[d] acts of great bodily injury upon a child—specifically the . . . then 8 year old brother, Michael[.] Further, [E.M.] was most recently convicted in 2006 on two charges by plea of 261.5(c) PC—unlawful sexual intercourse with a minor. The victim in that case was the Mother . . . [and] the criminal conduct resulted in [Mother]’s pregnancy and the birth of the minor in this matter” Under subdivision (d) of section 300, the court sustained an allegation that “[E.M.] is a registered sex offender for

the rest of his life due to the current risk he poses to children. [E.M.], while in an intimate relationship with [M.F.], had ongoing sexual relations with her daughter, ultimately impregnating her, resulting in the birth of [Minor]. [E.M.] pled guilty and was convicted on charges of lewd acts with a child and aggravated sexual assault of a child. [E.M.] continues to minimize his criminalized conduct and also minimized the sexual abuse of [E.M.] [*sic*: Cousin] with [Sister #1] establishing that he lacks the judgment and character to intervene and protect his child from his own abuse or that of others. [Minor] is at risk of being sexually abused if in his care. He further is in an ongoing relationship with [M.F.], and it was in their home that [Mother] was abused with the knowledge and lack of intervention by either adult.” Following the jurisdiction hearing, E.M. was again allowed weekly supervised visits with Minor.

At the disposition hearing on October 22, 2014, Mother and B.M. were given reunification services for their daughters, but E.M. was bypassed for reunification services with Minor under section 361.5, subdivisions (b)(8) and (b)(16).⁵ E.M. was nevertheless allowed twice monthly supervised visits with Minor following the disposition hearing. E.M. showed up for his visits with Minor until the time of the six-month review (May 4, 2015), after which he stopped attending, he claimed as a result of confusion over scheduling.

⁵ Subdivision (b)(8) of section 361.5 allows the court to bypass providing a parent with reunification services if “the child was conceived by means of the commission of an offense listed in Section 288 or 288.5 of the Penal Code, or by an act committed outside of this state that, if committed in this state, would constitute one of those offenses. This paragraph only applies to the parent who committed the offense or act.” Section 361.5, subdivision (b)(16) allows the court to bypass reunification services for a parent if he or she “has been required by the court to be registered on a sex offender registry under the federal Adam Walsh Child Protection and Safety Act of 2006 (42 U.S.C. Sec. 16913(a)), as required in Section 106(b)(2)(B)(xvi)(VI) of the Child Abuse Prevention and Treatment Act of 2006 (42 U.S.C. Sec. 5106a(2)(B)(xvi)(VI)).” (See *In re S.B.* (2013) 222 Cal.App.4th 612, 619–622.)

Despite the abuse she had suffered, Mother remained connected to, dependent upon, and emotionally allied with E.M. and M.F.⁶ From November 2014 until April 30, 2015, Mother was living with E.M., M.F. and Cousin. At the jurisdiction hearing, Mother, like E.M., claimed she could not remember E.M.'s sexual assaults and downplayed the extent of E.M.'s power over her and her family. Judge Hedstrom, however, expressly rejected Mother's testimony, finding more credible the statements she had made to sheriff's deputies at the time the molestation was first reported. Mother testified at the July 1, 2015 hearing that she had no qualms about living along with her daughters at E.M. and M.F.'s house, as long as the children did not object. The Pomo tribal representative, like the Department, believed Mother was too "enmeshed" with her mother to be able to protect her daughters from E.M. and Cousin.

On April 7, 2015, the Department filed a six-month status review report, and the hearing was conducted on May 4, 2015. The Department recommended that E.M.'s visits with Minor be reduced to once a month because he had been observed during supervised visits touching her and behaving toward her in a manner the visitation monitors feared might be "grooming" her for future sexual contact. For instance, he called her "baby," obsessively clipped and manicured her fingernails even if she exhibited disinterest or resistance, and he gave her a camcorder, an expensive gift more suited to an older child or an adult, with which he told her she could "take movies of herself."

The Department was concerned about these behaviors based in part on a document entitled "Grooming Dynamic," which had been downloaded from VictimsofCrime.org. That document described how a predator may initiate sexual contact beginning with "touching that is not overtly sexual" and may appear to be "casual," gradually

⁶ The twelve-month review report noted that Mother either "continued to have regular contact and/or live with the abusers until she was informed that the Department was leaning towards terminating her reunification services." When Mother was told the Department would recommend terminating services, she defended her mother, saying M.F. "always took good care" of her, including during the molestation, by teaching her to "manage" or "control" her feelings.

introducing “more sexualized touching.” “By breaking down inhibitions and desensitizing the child, the perpetrator can begin overtly touching the child.” The Department summarized: “Given the child making recent disclosures, having a history of being exposed to sexual perpetrators, and the need for her to learn healthy boundaries, along with [E.M.’s] history of sexually abusing children and the child’s mother, [E.M.’s] noted behaviors, and the fact that [E.M.] was bypassed for services under 361.5(b)(16), as well as the fact that the child was conceived after having a relationship with the mother that started when the mother was a child, the Department recommends that visitation between [E.M.] and the child be reduced to once a month for 2 hours.”

Despite the Department’s concerns, Judge Hedstrom declined to reduce visitation. In so doing, however, he cautioned E.M. that the “grooming” behavior must stop: “The Court would intend to do this, that is to not change the visitation schedule but to bring this back in about . . . [two months]. I think everyone understands what the complaint is and that of course would include [E.M.]. And that complaint either gets alleviated or I’m going to consider terminating all visitation.” The court continued: “And [E.M.], you can obviously see you’re on probation, so to speak, with respect to visitations. I’m not changing the frequency but it doesn’t seem to the Court to be that hard to govern your conduct to comply with the concerns that are expressed. And if your conduct doesn’t comply with those concerns expressed there’s a good chance I will terminate visitation.”

In preparation for the twelve-month review, the Pomo tribe filed a memorandum to the court on May 26, 2015, recommending that all visitation between E.M. and Minor be discontinued, in part because E.M. continued to house and support Cousin. In fact, the tribe had been recommending cessation of visitation for E.M. since at least April 6, 2015. The tribe also pointed out that E.M.’s giving “Eskimo kisses” to Minor during visitation and defending it as part of Pomo culture was inaccurate. “There is no evidence to support [E.M.’s] claim from Robinson Rancheria Pomo Indians of CA tribe that this is part of Pomo custom/culture.”

Due to the long delay in conducting the six-month review, the twelve-month review was set less than one month later, on June 1, 2015. The Department filed a

twelve-month review report on May 22, 2015. The Department's investigation by then had revealed that Minor, too, had been sexually abused by Cousin. She had told E.M. about the abuse, but E.M. continued to allow Cousin to remain in the home. Thus, Minor herself became a victim of sexual abuse on E.M. and M.F.'s watch. The report also attached as an exhibit a scholarly peer-reviewed article by Anne-Marie McAlinden titled, " 'Setting 'Em Up': Personal, Familial and Institutional Grooming in the Sexual Abuse of Children," which had been published in the journal *Social & Legal Studies* in 2006. The Department's report quoted liberally from the article in explaining why the visitation monitors suspected E.M.'s conduct amounted to sexual grooming.

To the same end, the report went into some detail about the quality of visitation between E.M. and Minor. Several visitation monitors had noticed E.M. was "unusually focused on the child Minor's hygiene, and/or touching Minor's face during conversation and frequently making statements regarding her beauty and/or calling her 'baby,' " which the staff found "odd and outside the norm of typical father/daughter interactions." He was particularly obsessed with trimming her nails and brought his own manicure set to the visits for that purpose. In one visit E.M. "frequently pinched Minor's cheeks, touched her nose, commented on her pretty face, and referred to her as 'Baby.' " E.M. told the visitation monitor that it was part of the "family culture" to "touch noses and cheeks." On another occasion a month or so before her tenth birthday, E.M. gave Minor a camcorder. The Department also noted that E.M. had given Minor other gifts during the dependency, including some without the Department's knowledge. For instance, he gave her an iPad outside of the scheduled visits.⁷

The social worker also noted that Minor "was raised by [E.M.] to see herself as more special than her sisters" and this had become an "on-going issue for her and her

⁷ M.F. inadvertently notified the Department of this unauthorized gift by telling the social worker that L.T. had restricted Minor's use of the iPad as a form of discipline. M.F. told the social worker this was a form of "child abuse" and L.T. should be held accountable. The conversation alerted the social worker to the fact that M.F. and E.M. were having unauthorized contact with Minor, L.T. or both.

sisters to get along.” E.M. exacerbated these problems by telling Minor that her sisters and L.T. were “jealous of us” because “their skin is darker” and “we have better things than them.” All of these combined factors led the Department to suspect that E.M.’s conduct amounted to grooming Minor for future sexual contact. And of course, we note that Minor is now of an age comparable to the age at which E.M. began sexually abusing Mother.

E.M. had been warned by the court at the six-month review that he needed to work with the Department to address his behaviors during visitation, but instead he simply stopped attending visitation. The Pomo tribe in its May 26 submission noted that he had missed three scheduled visits, leaving Minor disappointed. E.M. did, however, manage to find a way to have contact with Minor outside the supervised setting. For instance, on May 20, 2015, he and M.F. accompanied L.T. to one of Minor’s softball games without the Department’s knowledge or permission.

The June 1 hearing was brief because Mother’s counsel requested a continuance to allow her to go over the Department’s report with her client. The court again declined to change the visitation schedule, noting that since the visits were supervised, “the supervisor has the authority to make sure that the visitation is a proper visitation.” The visitation order expressly gave authority to the visitation monitor to “stop the behavior and/or cancel the visit” if he or she saw “anything inappropriate.” E.M. was not showing up at visitation during this time.

At the continued twelve-month review on July 1, 2015, a different judicial officer, Judge David W. Herrick, presided. The issue of visitation was again addressed. All counsel joined in a stipulation that if Minor were called to testify, she would say she enjoyed her visits with her father and wished to live with him. Significantly, however, despite the stipulation, Minor’s attorney agreed with the Department that the court should find further visitation detrimental. The attorney acknowledged that Minor’s wish was to continue visitation, but counsel concluded “it’s time for my client to realize that this is just not appropriate.” Minor’s attorney found the grooming evidence “extremely concerning.” Counsel joined in the Department’s position because she felt it was “in

[Minor's] best interest.” The Pomo tribe also agreed with the Department's recommendations. Counsel for Minor has also filed a request to join in the Department's opposition to this writ petition, arguing, “It is not in the best interest of the minor . . . to have continued visitation with her Father, nor should the Court delay the Welfare and Institutions Code 366.26 hearing.” The Pomo tribe, too, has requested to join the Department in opposing E.M.'s writ petition.⁸

At the continued hearing on July 1, 2015, E.M. attempted to counteract the Department's evidence by testifying he had groomed his daughter all her life, in a normal, parental sense—brushing her hair, combing her hair to physically remove nits (as he did not want to expose her to the toxins in anti-lice shampoo), and changing her diaper when she was a baby. He explained that his particular concern about her nails was due to the prospect of getting sick from dirty nails, as well as a family history of ingrown toenails. His counsel argued that the grooming was a normal part of parenting and the problem was “in the eye of the beholder.”

Despite E.M.'s testimony, the court made a finding that further visitation would be detrimental to Minor and terminated visitation, specifically prohibiting E.M. from having telephone or written contact with her, as well, pending the scheduled hearing: “With respect to [Minor]. As I said, I was struggling with the concept of the finding of detriment. And partly because the arguments and the evidence in court were focused on a perceived notion that excessive fingernail trimming was the evidence that essentially turns the tide with respect to the detriment finding with regard to further visitation and contact. [¶] And given the earlier instructions by the Court and the department that such behavior was considered bizarre and should cease and given the subsequent continuance of that behavior, I must agree that that continued behavior is somewhat bizarre and abnormal. But more, and coincidentally and most importantly, a violation of the directives of the department and the Court. [¶] But I am more persuaded by the evidence

⁸ We hereby grant both Minor's and the Pomo tribe's request to join in the Department's opposition and consider their positions on the merits along with the Department's arguments in this opinion.

that is contained outside of the setting of supervised visitation as set forth in the twelve-month report . . . [referencing the Department’s reasons for suspecting grooming activity]. The cited material is supportive of the general proposition that grooming behavior, not just grooming of fingernails, but grooming behavior is suggestive of danger and is suggestive of the possibility, if not likelihood, of further and more harmful contact. And if it was just fingernail trimming, given the evidence that the child would like to see her father and given the fact that there’s going to be a two six hearing and given my earlier comments with respect to the harmlessness, I guess, of continued supervised visitation, I was inclined on the face of things, at least on the surface of things, to make the same orders with respect to [E.M.]. [¶] However, having rereviewed those pages and the numerous instances of violations not just consisting of fingernail trimming but repeated and varied instances of the kind of behavior that is of concern in the treatise and given the comments of all counsel, I am going to make the finding of detriment and order no contact.”

E.M. thereafter filed this writ petition to challenge that order.

DISCUSSION

E.M. argues that he should have been allowed continued visits with Minor because denying him such visitation virtually condemns him to the termination of his parental rights. He had hoped, through continued visitation, to bring himself within the “beneficial relationship” exception embodied in section 366.26, subdivision (c)(1)(B)(i). That section provides, in relevant part, “A finding under subdivision (b) or paragraph (1) of subdivision (e) of Section 361.5 that reunification services shall not be offered, . . . or that the parent has been convicted of a felony indicating parental unfitness, . . . shall constitute a sufficient basis for termination of parental rights. Under these circumstances, the court shall terminate parental rights unless either of the following applies: [¶] . . . [¶] (B) The court finds a compelling reason for determining that termination would be detrimental to the child due to one or more of the following circumstances: [¶] (i) The parents have maintained regular visitation and contact with the child and the child would benefit from continuing the relationship.” Thus, to establish the “beneficial relationship”

exception, the parent must show (1) regular visitation,⁹ and (2) benefit to the child from continuing the relationship. (See *In re Anthony B.* (2015) 239 Cal.App.4th 389, 396 [“[s]poradic visitation is insufficient”]; *In re J.C.* (2014) 226 Cal.App.4th 503, 528–534; *In re Aaliyah R.* (2006) 136 Cal.App.4th 437, 449–450.)

E.M. argues that if he is deprived of visitation with Minor pending the October 21 hearing, his chance of establishing the first prong of the exception will be impaired and he may lose any meaningful opportunity to avoid the termination of his parental rights. True, the erroneous denial of parent-child visitation may compromise a parent’s ability to litigate and establish the section 366.26, subdivision (c)(1)(B)(i) exception. (*In re Ethan J.* (2015) 236 Cal.App.4th 654, 660–661 (*Ethan J.*); *In re Hunter S.* (2006) 142 Cal.App.4th 1497, 1504–1505 (*Hunter S.*)). In both of the cited cases, however, the courts applied statutes mandating continued visitation in the absence of a finding of detriment to the child, which the trial court had not made. (*Hunter S.*, *supra*, at pp. 1504–1505 [§ 366.21, subd. (h)]; *Ethan J.*, *supra*, at p. 661 [§ 366.26, subd. (c)(4)(C)].) And in both cases the children refused to see their parent, even though visitation had been ordered. The error in each case derived from the court’s allowing the child to exercise veto power over the court’s visitation order (*Hunter S.*, *supra*, at p. 1505; *Ethan J.*, *supra*, at p. 661) and thereby issuing an “illusory” order (*Hunter S.*, *supra*, at p. 1505). In *Hunter S.* the juvenile court had terminated parental rights without first giving the mother meaningful visitation, which it had ordered but failed to enforce in the face of the child’s resistance. (*Id.* at pp. 1504–1505.) In *Ethan J.* the court had terminated dependency jurisdiction after establishing a guardianship, thereby abdicating any authority it would

⁹ In addition to the matters discussed in the text, we note E.M.’s concern about losing the opportunity to prove “regular visitation and contact” is somewhat diminished by the rule that the benefit of continued contact between the parent and child must be considered in the context of any limitations on visitation imposed by court order. (*In re Brandon C.* (1999) 71 Cal.App.4th 1530, 1537–1538.) Significantly, too, E.M. would have a difficult time proving “regular visitation and contact” even in the absence of the court’s July 1 order, given that he disappointed Minor by failing to avail himself of scheduled visits between the time of the six-month review and the time his visitation was terminated.

have had to enforce its visitation order and virtually ensuring that visitation would not occur. (*Ethan J.*, *supra*, at pp. 661–662.)

We deal with a very different set of facts and with a different code section. Fundamentally, E.M. puts the cart before the horse. He cannot show the court’s ruling was erroneous *because* it will impair his ability to show “beneficial relationship” at the October 21 hearing. Rather, he must first show independently that the ruling was erroneous. The juvenile court had no obligation to consider E.M.’s ability to prove the beneficial relationship exception in determining whether visitation should continue. At this point in the proceedings, since reunification services to Mother and B.M. have been terminated, the focus must be on the best interests of the children. (See *In re Stephanie M.* (1994) 7 Cal.4th 295, 317; *In re Marilyn H.* (1993) 5 Cal.4th 295, 307.) Any thought of E.M.’s own interests and any effort to reunify the family are past time for consideration.¹⁰

At least two sections of the Welfare and Institutions Code potentially come into play in connection with the denial of visitation pending a section 366.26 hearing: section 366.21, subdivision (h), and section 361.5, subdivision (f). The court did not specify either on the record or in its written order which section it relied upon in denying E.M. further visitation. Likewise, the parties have not indicated in their briefing which code

¹⁰ Even assuming E.M. could show that the court’s denial of visitation was erroneous—which, as we explain below, he has not done—to bring himself within the “beneficial relationship” exception, E.M. would be required to show benefit to Minor from continuing the relationship, which requires him to show the parent-child relationship “*promotes the well-being of the child* to such a degree as to outweigh the well-being the child would gain in a permanent home,” considering “the security and the sense of belonging a new family would confer.” (*In re Autumn H.* (1994) 27 Cal.App.4th 567, 575, italics added; accord, *In re C.F.* (2011) 193 Cal.App.4th 549, 555; *In re Beatrice M.* (1994) 29 Cal.App.4th 1411, 1418–1419.) Given the record in this case, we suspect the second prong of the exception would be even more difficult for E.M. to establish than the first.

section applies and have not clearly designated the standard of review.¹¹ We conclude, as we shall explain, the abuse of discretion standard applies in this case.

Section 366.21, subdivision (h) applies at the twelve-month review and provides in relevant part as follows: “In any case in which the court orders that a hearing pursuant to Section 366.26 shall be held, it shall also order the termination of reunification services to the parent or legal guardian. The court *shall* continue to permit the parent or legal guardian to visit the child pending the hearing unless it finds that visitation would be detrimental to the child.” (Italics added.) Thus, to deny visitation under that section, the court *must* find that continued visitation would be detrimental to the child. Section 366.21, subdivision (h) applies when a parent who had been receiving reunification services has had his or her services terminated. (*Hunter S.*, *supra*, 142 Cal.App.4th at p. 1504; *In re J.N.* (2006) 138 Cal.App.4th 450, 459.) In that situation, we review the court’s factual finding of detriment for substantial evidence. (*In re Mark L.* (2001) 94 Cal.App.4th 573, 580–581; see Seiser & Kumli, *California Juvenile Courts Practice and Procedure* (2015) § 2.129[7][c], p. 2-474.)

Where reunification services are bypassed at the outset of the dependency, however, section 361.5, subdivision (f) gives the court greater leeway to deny visitation. That subdivision reads, in pertinent part: “[T]he court shall not schedule a [section 366.26] hearing so long as the other parent is being provided reunification services pursuant to subdivision (a). The court *may* continue to permit the parent to visit the child unless it finds that visitation would be detrimental to the child.” (Italics added.) Thus, under either section 366.21 or 361.5, if the court makes a detriment finding—as it did here¹²—it *must* deny further visitation. But under section 361.5, use of the word “may” is

¹¹ The Department suggests at one point that the substantial evidence test applies (citing *In re Geoffrey G.* (1979) 98 Cal.App.3d 412, 420), and at another point seems to indicate the abuse of discretion standard governs (citing *In re Jasmine D.* (2000) 78 Cal.App.4th 1339, 1351). Neither case dealt with denial of visitation.

¹² The Judicial Council form JV-400 used by the court to make its findings and orders was designed for use at the twelve-month permanency hearing. It combines a detriment finding with the order for “no contact,” apparently because a detriment finding

significant. The court *may* deny visitation, in its discretion, even in the absence of such a finding. (*In re A.J.* (2015) 239 Cal.App.4th 154, 163; *In re J.N.*, *supra*, 138 Cal.App.4th at pp. 457–459.) Because such a decision is entirely discretionary, we review it only for abuse of that discretion. (*In re J.N.*, *supra*, at p. 459.)

E.M. was denied reunification services at the disposition hearing, so the correct statute to apply in this case is section 361.5, subdivision (f). Therefore, the court’s decision to deny further visitation was proper so long as it was not an abuse of discretion. Reviewing the court’s denial of visitation under that deferential standard, we find no such abuse in this case. Indeed, under either standard of review, we find no error.

Reviewing the detriment finding first, we conclude it was supported by substantial evidence. We have already set forth the Department’s concerns about E.M.’s behavior during supervised visitation. Judge Herrick was correct. Although each of the observed behaviors, considered individually, may seem unremarkable, they need not be, and should not be, considered in isolation or in a vacuum. Rather, viewed in light of E.M.’s history of child sexual abuse, they fit a pattern described in the McAlinden article: “[T]he offender will cultivate a ‘special’ friendship by bestowing a variety of inducements such as money, comics or sweets or even unexpected treats such as trips to the cinema or fastfood restaurants. This emphasis on the exclusivity of the relationship helps to ‘distance’ the child from their parents [or other protectors]. It also enables the offender to control the victim through the giving or withholding of rewards. In some cases the use of bribes or rewards may escalate into threats or the use of force to ensure the child’s continued secrecy and compliance.” The phenomenon of “grooming” by sex offenders has also been recognized in the case law: “Sexual grooming consists of planning and deliberate behaviors to befriend and establish an emotional connection with a child to have the child lower and abandon whatever inhibitions the child might have against inappropriate sexual activities.” (*Los Angeles County Dept. of Children & Family Services v. Superior Court* (2013) 222 Cal.App.4th 149, 158; *Morris v. State* (Tex. Crim.

is required to deny visitation under section 366.21, subdivision (h). The form does not easily accommodate an order terminating visitation without a detriment finding.

App. 2011) 361 S.W.3d 649, 660–661 [collecting cases dealing with sexual grooming]; cf. *United States v. Long* (D.C. Cir. 2003) 328 F.3d 655, 665 [expert testified about a “‘seduction process,’ through which the sex offender uses attention, kindness, gifts, and money to lower his or her victims’ inhibitions”].)

The gift of the camcorder and iPad fit this pattern, and E.M. has in the past resorted to threats or the use of force to ensure a child’s secrecy and compliance, thus giving the mildly unusual conduct a sinister meaning in context. And E.M. also told Minor, in essence, she was more special than her sisters, which not only tended to establish the “exclusivity of the relationship” in McAlinden’s terminology, but also to foment harmful friction among the siblings. Given the likelihood that the three sisters will remain together in L.T.’s care, undermining the cohesiveness of those relationships alone may be viewed as detrimental to Minor.

“Finally,” McAlinden wrote, “the offender will exploit the child’s naivety and trust by introducing increasingly intimate physical contact such as play acting, tickling or wrestling and even hugging to gradually sexualize contact with the child. The use of touch is particularly important as this determines whether or not the child is receptive and begins the process of desensitization—gradually the abuser will escalate boundary violations of the child’s body which eventually culminates in enticing the child to acquiesce to engaging in sexual activity.” The Department expressed the fear that E.M. was “exploit[ing]” Minor and “working to desensitize” her through his “constant need to invade her body space by touching her through her cheeks, nose, and hands/finger nails.” Given E.M.’s history, the evidence of excessive nail trimming, cheek touching, sweet-talking, and “Eskimo kisses” becomes more viscerally disturbing and more legally significant than it might otherwise appear.

And though the parties tend to focus primarily on the grooming evidence, the evidence of detriment included much more. The court was not restricted to considering evidence of the quality of prior visits during the dependency in assessing detriment from further visitation. Instead, the whole history of the parent-child relationship could properly be considered.

E.M.'s criminal history and the criminality surrounding Minor's parentage alone raise grave concerns about his having a continuing relationship with his daughter. The fact that his conduct was blatant and unabashed (such as having sex with Mother while M.F. waited outside the bedroom door), that he lied under oath about his prior conduct, minimized it, made excuses for it, and sought to normalize it, suggests he has not taken even the first step toward gaining insight into and control over his behavior. That he historically has forced his will upon the members of his household—including his will to sexually exploit children—through violence and threats of violence and that he overlooked and gave tacit approval to Cousin's molestation of the children in his care (including Minor) are very troubling facts that contribute significantly to a finding of detriment. In our view, particularly when coupled with the grooming evidence, the unhealthy family dynamics constituted substantial evidence to support the trial court's finding that further visitation between Minor and her father would be detrimental to her.

Nor was the order terminating visitation an abuse of discretion. Given the whole history of the parent-child relationship, Minor clearly remains in danger from her father, whether she realizes it or not. The fact that Minor's attorney and her tribe have joined in the Department's opposition to E.M.'s petition reinforces our belief that the court did not err in denying E.M. further visitation.¹³

¹³ Because the court's denial of further visitation for E.M. was not erroneous, it also did not deprive him of due process, as he seems to imply. The Supreme Court has long held that the statutory scheme culminating in termination of parental rights comports with due process when properly applied. (*Cynthia D. v. Superior Court* (1993) 5 Cal.4th 242, 256.) And as the Department, Minor and the Pomo tribe all point out, E.M. retains the right to file a section 388 petition if he can demonstrate a change in circumstances by showing that he now understands the dangers of his behavior and is capable of refraining from inappropriate conduct during visits. (See *In re Marilyn H.*, *supra*, 5 Cal.4th at pp. 309–310; *In re Dakota H.* (2005) 132 Cal.App.4th 212, 224 [“A parent's ability to file a section 388 petition provides an ‘escape mechanism’ that lessens the risk of an erroneous deprivation of the parent-child relationship in the event of a legitimate change in circumstance.”].)

DISPOSITION

The petition is denied on the merits. (See § 366.26, subd. (D)(1)(C); Rule 8.452(h).) The request for a stay of the October 21, 2015 hearing is denied. Our decision is final as to this court immediately. (Rule 8.490(b)(2)(A).)

Streeter, J.

We concur:

Ruvolo, P.J.

Reardon, J.