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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

In re JOSE N., A Person Coming Under the
Juvenile Court Law.

B242139

(Los Angeles County
Super. Ct. No. CK77184)

LOS ANGELES COUNTY
DEPARTMENT OF CHILDREN AND
FAMILY SERVICES,

Respondent,

v.

JORGE N.,
Appellant.

APPEAL from orders of the Superior Court of Los Angeles County.

Veronica McBeth, Judge. Affirmed. Motion to dismiss denied.

Lauren K. Johnson, under appointment by the Court of Appeal, for Appellant.

John F. Krattli, County Counsel, James M. Owens, Assistant County Counsel, and
William D. Thetford, Deputy County Counsel, for Respondent.

Jorge N. (father) appeals from orders regarding visitation after his son Jose was put into guardianship with his maternal aunt, contending the trial court improperly granted the aunt authority to prohibit visitation and improperly terminated dependency jurisdiction. We conclude father forfeited his claims, which also fail on the merits.

BACKGROUND

A. Prior Proceedings

This is the second appeal in this matter. We take the preliminary background facts from our opinion in the first appeal. (*In re Jose N.* (Oct. 30, 2012, B238244) [nonpub. opn.])

On May 8, 2009, the Los Angeles Department of Children and Family Services (DCFS) filed a dependency petition under Welfare and Institutions Code¹ section 300, alleging Gabriela R. (mother) physically abused her eight-year-old son Jose N., engaged in violent altercations with a male companion in Jose's presence, and failed to obtain appropriate medical care for Jose. The petition and detention report stated father's whereabouts were unknown.

Jose began living with a maternal aunt, Martha R., in April 2009. In May 2009, DCFS initiated a parent locator search for father but was unable to locate him until February 2011, although it was undisputed he had been paying child support from New Mexico since 2008. In the meantime, the trial court found father was the presumed father, adjudicated the petition, removed Jose from mother's and father's custody, ordered reunification services for mother, later terminated those services, and set the matter for a permanency hearing under section 366.26. At an October 2010 hearing, Jose told the juvenile court he wanted Martha R. to adopt him.

Before the permanency hearing, father contacted DCFS, traveled to California, submitted to Live Scan (an electronic fingerprinting system that checks an individual's criminal history), visited Jose, and sought further visitation and custody. He represented

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

that he lived in New Mexico with his wife and eight-year-old stepdaughter, could support Jose financially, and would move to a three-bedroom home if Jose came to live with him.

However, Jose told the court he still wanted his aunt to adopt him and would “never change” his answer. DCFS reported he was “very scared about [the] possibility [of] leaving California to live with his father in New Mexico,” and he did not want to have visits with father if doing so meant he would have to move. He did not know if he wanted to visit father in New Mexico, and would sometimes refuse to speak with father on the telephone.

Father appeared for a hearing on July 15, 2011, and requested unmonitored visitation with Jose in New Mexico. However, Jose’s counsel informed the court that Jose preferred that the visits take place in California.

The court ordered monitored visits to occur in California.

In October 2011, DCFS reported Jose had said that “when he talks to [father] by telephone, he gets hurt by father and does not want to talk to him for a long period of time.” In a status review report in November 2011, DCFS reported: “Jose continues to have telephonic conversation with father twice a week for a few minutes. Jose states that he is uncomfortable talking with father.” DCFS also stated that “[i]nteraction with father is distasteful to Jose and any further forced interaction with father would be a disruption to Jose’s life and not in his best interest at the present time.” DCFS also reported that “Jose stated that he is uncomfortable with his telephone calls because father tells Jose that he comes to California and wastes his time and money. [The social worker] asked Jose if he would like to have a visit with father in New Mexico and Jose stated no. [The social worker] asked if he would like to live with father, Jose stated no. On 10/14/11, 10/21/11 and 10/28/11, [the social worker] monitored telephone contact between Jose and father. [The social worker] observed Jose to be very uncomfortable during the telephone contact. Jose had agreed to talk with his father for 5 minutes and did not want to be on the phone a minute more. When 5 minutes elapsed, Jose informed [the social worker] that he did not want to talk anymore. . . . Jose refused to talk with father after the last visit on 11/10/11. Jose does not have any type of bond with his father and is not willing to attempt to

develop one.” In December 2011, DCFS reported Jose told a social worker he wanted no further telephone contact or visitation with father, and stated he wanted to be adopted by Martha R. and have the dependency case closed. Jose’s therapist recommended that telephone contact between Jose and Father be at Jose’s discretion “[d]ue to Jose’s consistent discomfort with having weekly phone contact with father.”

DCFS recommended the juvenile court order legal guardianship as the permanent plan for Jose.

Father filed a section 388 petition in which he asked the juvenile court to vacate all orders and findings made after the disposition hearing, order family reunification services for him, and place Jose with him in New Mexico, arguing he had not received proper notice of the dependency proceedings. The juvenile court denied father’s section 388 petition, noting Jose and father did not have the “kind and quality relationship” where the court could place Jose with father. Although Jose’s counsel informed the court Jose no longer wanted to visit with father, the court ordered that father was entitled to monitored visitation.

Father filed an appeal from the order denying his section 388 petition, but we affirmed the order on October 30, 2012. (*In re Jose N.* (Oct. 30, 2012, B238244) [nonpub. opn.]) We observed that “Father had had no contact with Mother or Jose for well over a year before these dependency proceedings commenced. At the time of the hearing on Father’s section 388 petition, Jose was nearly 11 years old and had been living with Martha [R.] for two and a half years. Father had had nine months to reestablish a relationship with Jose between the time Father learned of the dependency proceedings and the juvenile court denied the section 388 petition. Jose decided he wanted no further contact with Father, and his therapist concluded such contact should be at Jose’s discretion. Throughout the dependency proceedings, Jose maintained he wanted to live with Martha [R.] Regardless of whether Father can establish DCFS should have located him sooner, he cannot establish it is in Jose’s best interest to be placed with Father or to have his permanent plan delayed while Father attempts to reunify with him.” (*Id.* at pp. 12-13.)

B. Current Proceedings

In February 2012, father and Jose had the first of what was intended to be bimonthly conjoint counseling sessions designed to foster a relationship between them. However, because of logistical issues and father's financial hardships, it was the only session.

Jose began receiving weekly individual counseling in September 2009. On May 1, 2012, Brooke McLean, Ph.D., Jose's clinical therapist, expressed concern that Jose had attended only half of the last ten scheduled visits. Dr. McLean reported that Jose's presenting problems included "hyperactivity, anxiety, fearfulness, inattention, distractibility, difficulty completing tasks, irritability, defiance, and poor social skills."

According to Martha R., Jose's symptoms worsened when father began making attempts to be part of his life, and Jose was "wetting the bed almost every night and despite her refusal, she often will find him sleeping at the foot of her bed in the morning." Dr. McLean reported that "Jose has expressed feeling uncomfortable speaking with his father on the phone and views his father in very concrete and rigid terms. In therapy Jose has expressed quite rigid and inflexible opinions about his father, giving no allowance for understanding or forgiveness despite any efforts his father has made. His resistance and defensiveness regarding his father appears to be [a] reasonable reaction and coping mechanism to manage his increased anxiety about the threat he likely perceives from his father. His father's recent return to his life, and the father's intention to obtain custody of Jose, likely is seen as a threat to the stability of his home with Martha [R.], the caregiver who has been providing him with a stable and nurturing home for the past several years. Additionally, father appears to lack insight and ha[s] unrealistic expectations about the time and effort necessary to establish a relationship and meaningful connection with a son he has virtually never had a relationship with."

Martha R. and father agreed that father would have telephonic contact with Jose three times per week, on Monday, Wednesday and Friday, at 7 pm. Although father told a social worker his calls during the week of March 26 to April 6, 2012 went unanswered, they spoke on the phone regularly thereafter. Father stated he generally spoke with Jose

for only five minutes, during which Jose did not say much. He said Jose had “an attitude” with him and did not want to talk.

Jose told a social worker he did not like to talk to father. He did not know what to say and would become uncomfortable and anxious.

Martha R. reported that father would become upset with Jose during telephone calls when Jose had little to say. He hung up on Jose during one telephone call because Jose referred to Martha R. as “mom” and her husband as “dad.” Father also became upset during a visit at the courthouse when he attempted to help Jose with his homework and the child told him he was not doing a problem correctly. Martha R. also complained that father tended to call at times other than those agreed upon and would then report that she was unavailable to take the calls.

In early May 2012, Father called Jose and told him he was “tired of begging” and would not call anymore, after which Jose went to his room, wanting to be alone.

DCFS reported that Jose continued to do well in Martha R.’s home. Martha R. agreed to facilitate telephone calls between father and Jose three times a week, but Jose was uncomfortable talking to father, would not know what to say, and would become anxious and not want to talk. Martha R. nevertheless encouraged Jose to talk to his father.

DCFS also reported that Martha R. had been required to enroll in therapy for the completion of an adoption home study, but failed to do so. Martha stated she received mental health therapy for three to four years to deal with anxiety. She stopped due to insurance issues but was working to reinstate her mental health care.

Father’s attorney, Anuradha Khemka, was relieved at the May 16, 2012 review hearing and Brenda Perez Rodriguez, of the same law firm, was appointed. Father did not attend that hearing or the permanency hearing on May 21, 2012. At the permanency hearing, Rodriguez informed the court she had had no contact with father—his phone was disconnected—and had received no instructions. She raised no objection to the appointment of the legal guardian, visitation orders, or termination of jurisdiction.

The juvenile court appointed Martha R. as Jose's guardian and terminated dependency jurisdiction.

Mother's counsel then asked, "Just for the record, could the court please state the visitation rights for the parents?" The court responded as follows: "Do I have it on here? Mother will have monitored visits, minimum one time per month for two hours and it must be confirmed 24 hours in advance, time and place and monitor to be determined by the legal guardian. [¶] Monitored phone calls one time a week with permission as arranged by the legal guardian and parents. That will include mother and father."

On the same day, the court signed an order providing visitation as follows: "Mother and father: monitored minimum one time per month for 2 hours and must be confirmed at least 48 hours in advance; time, place and monitor as determined by legal guardian; monitored phone calls minimum 1x/a week as arranged by legal guardian and parents."

Father filed a timely appeal, stating in the notice of appeal that he appealed the following order: "May 21, 2012: Maternal Aunt, Martha [R.] was appointed Legal Guardian of Jose [N.]."

DISCUSSION

Father expressly disclaims any challenge to the installation of Martha R. as Jose's legal guardian. He contends instead that the visitation order failed to satisfy the requirements of section 366.26 and the juvenile court should have retained dependency jurisdiction in order to supervise visitation and Jose's and Martha R.'s mental health therapy. We conclude father has forfeited the claims, which at any rate fail on the merits.

A. Waiver

In early May 2012, father told Jose he was "tired of begging" and would not call anymore. A few days later he failed to attend a section 366.26 review hearing and five days after that missed the permanency hearing. He made no attempt below, and makes none on appeal, to explain these absences. If father had concerns about visitation and jurisdiction, the juvenile court was the place to raise them. His failure to take part in the review and permanency hearings below precludes his raising the concerns here. (*In re*

Anthony P. (1995) 39 Cal.App.4th 635, 641 [failure to object to visitation order waived right on appeal to contend permitted visitation was insufficient].)

We will nonetheless briefly address the merits of father's claims if only to demonstrate that his newly appointed counsel did not render ineffective assistance. (§ 317.5 ["All parties who are represented by counsel at dependency proceedings shall be entitled to competent counsel"]; see *Deborah S. v. Superior Court* (1996) 43 Cal.App.4th 741, 748, fn. 5.)

B. Termination of Dependency Jurisdiction

Father first argues termination of dependency jurisdiction was improper because it was "inconsistent with the court's desire to allow father to continue to come forward in a positive way." The juvenile court evinced this desire at the May 16, 2012 review hearing when discussing the negative impact of phone conversations between father and Jose, and father's recent refusal to call.

Section 366.3, subdivision (a) provides in pertinent part: "If a juvenile court orders a permanent plan of . . . legal guardianship . . . , the court shall retain jurisdiction over the child . . . until . . . the legal guardianship is established the court may continue jurisdiction over the child as a dependent child of the juvenile court or may terminate its dependency jurisdiction and retain jurisdiction over the child as a ward of the legal guardianship, as authorized by Section 366.4." "If, however, a relative of the child is appointed the legal guardian of the child and the child has been placed with the relative for at least six months, the court shall, except if the relative guardian objects, or upon a finding of exceptional circumstances, terminate its dependency jurisdiction and retain jurisdiction over the child as a ward of the guardianship, as authorized by Section 366.4." (*Ibid.*)

Father does not explain how retention of dependency jurisdiction would further positive communication between him and his son. When jurisdiction existed and the telephonic visitation was three times per week, the conversations were brief and unpleasant for both parties, and were eventually terminated by father. Nothing suggests retention of dependency jurisdiction would facilitate a different result.

Father also argues the juvenile court should have retained jurisdiction to ensure that Martha R. takes Jose to his mental health therapy sessions and enrolls in therapy herself. The argument is predicated on father's contention that Jose misses half of his therapy sessions and Martha R. has abandoned hers. The predicate is unsupported by the record. By May of 2012 Jose, who began therapy in 2009, had missed half *of the last ten* scheduled visits. Although this may be cause for concern, it does not by itself suggest Jose misses half of all visits or that the court should supervise his therapy. Similarly, the record reflects Martha R. was working to reinstate her own mental health therapy, and nothing suggests she requires court assistance or supervision to do so.

Neither father's problem with telephone conversations nor minor logistical difficulties in Jose's and Martha R.'s mental health therapy constitute exceptional circumstances justifying retention of dependency jurisdiction.

C. Visitation Order

Father contends the order that only telephonic visitation occur fails to satisfy the visitation requirement of section 366.26, and the requirement that he obtain Martha R.'s permission for telephonic visitation is a restriction that is unsupported by substantial evidence and constitutes an abuse of discretion. We disagree with both contentions, disposing of the first with the simple observation that the court did not order that only telephonic visitation occur, but rather ordered that visitation occur a "minimum one time per month for 2 hours," time *and place* to be determined by the guardian. It thus ordered telephonic visitation in addition to personal visitation.

The restriction on telephonic visitation was not improper. When a juvenile court terminates jurisdiction in a dependency case it may issue an order for visitation of the dependent child. (§ 362.4.) In doing so, it has broad discretion to determine what serves the child's best interests, and its decision will not be reversed absent a clear abuse of that discretion. (*Bridget A. v. Superior Court* (2007) 148 Cal.App.4th 285, 300; see also *In re Emmanuel R.* (2001) 94 Cal.App.4th 452, 465 [juvenile court's visitation order reviewed under the abuse of discretion standard].) Any problem that develops respecting visitation may be addressed within the court's continuing guardianship jurisdiction. (§§ 366.3,

subd. (a), 366.4; *In re Twighla T.* (1992) 4 Cal.App.4th 799, 806; California Rules of Court, rules 5.740, subd. (c) [hearing on petition to modify guardianship orders], 5.570 [section 388 petition must be filed to modify guardianship orders].)

We note there appears to be some confusion as to what the visitation order actually states. At the permanency hearing the trial court stated father could have “[m]onitored phone calls one time a week *with permission* as arranged by the legal guardian and parents.” (Italics added.) But that same day, the court signed an order providing for “monitored phone calls minimum 1x/a week as arranged by legal guardian and parents.” The only difference between the oral and written orders is addition of the phrase “with permission” in the oral order. The parties make much of this difference and instruct us at length on rules governing the relative primacy of oral and written orders, father arguing application of these rules leads to the conclusion that telephonic visitation is restricted, and DCFS arguing that Martha R.’s permission is not required before telephonic visits occur.

We need not reach the primacy issue because even if Martha’s permission is required before telephone calls between father and Jose may occur, such a condition would not exceed the bounds of reason.

A visitation order is tailored to serve the interests of the minor, not the parent. (*In re Julie M.* (1999) 69 Cal.App.4th 41, 50.) Only the juvenile court may determine the right and extent of visitation by a noncustodial parent, but it “may delegate to a third party the responsibility for managing the details of visits, including their time, place and manner.” (*In re T.H.* (2010) 190 Cal.App.4th 1119, 1123.)

Here, telephonic visitation between father and Jose was at times problematic, as father sometimes disapproved of Jose’s conversational habits, while Jose shrank from father’s disapproval and found the conversations to be unpleasant. The juvenile court nevertheless ordered that telephonic visitation occur “one time a week,” with Martha R.’s permission.

We do not read the order as giving Martha R. the authority to prevent telephonic visitation altogether. On the contrary, it seems clear the juvenile court established the extent of telephonic visitation—one time per week—and delegated to Martha R. the authority only to set the time, place and manner of it. Father adduces no difficulty created by this arrangement other than his inability to reach Jose for a period of one week in March 2012. From this he suggests Martha R. will unreasonably interfere with telephonic visitation. We reject the suggestion. Martha R. encouraged Jose to speak with father and agreed to even more visitation—three times per week—than was ordered by the court. Father’s inability to reach Jose every time he calls does not suggest Martha intends to prevent visitation.

The visitation order was not an abuse of discretion.

D. Motion to Dismiss

DCFS moves to dismiss the appeal, arguing father failed to identify the orders granting visitation and terminating dependency jurisdiction in his notice of appeal, and raised no argument in his appellate briefs regarding the order identified in the notice, appointing Martha R. as Jose’s guardian. DCFS argues the appeal should be dismissed on the further ground that father forfeited his claim that the visitation and termination orders were improper.

We decline to dismiss the appeal based either on the defective notice of appeal (California Rules of Court, rule 8.100(a)(2) [“The notice of appeal must be liberally construed”]) or on the forfeiture, as father is entitled to a decision on whether the issues he raises have been preserved.

DISPOSITION

The juvenile court's orders are affirmed. Respondent's motion to dismiss the appeal is denied.

NOT TO BE PUBLISHED.

CHANEY, J.

We concur:

MALLANO, P. J.

JOHNSON, J.