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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Shasta)

In re C.G., a Person Coming Under
the Juvenile Court Law.

C069100

SHASTA COUNTY HEALTH AND HUMAN
SERVICES AGENCY,

(Super. Ct. No.
10 JV SQ 2832301)

Plaintiff and Respondent,

v.

KENNETH G.,

Defendant and Appellant.

In this case—which combines two notices of appeal—Kenneth G., father of the minor, appeals from orders of the juvenile court modifying the disposition judgment, and from later orders terminating the dependency and placing the minor with her mother. (Welf. & Inst. Code, § 395.)¹ We conclude, after careful review of the record, that father’s first notice of appeal is untimely and dismiss that appeal. We shall affirm

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

the termination and placement orders relating to father's second notice of appeal.

FACTUAL BACKGROUND

Shasta County Health and Human Services Agency (Agency) removed the minor (age three and a half) from the mother's custody in January 2010 based on allegations of sexual abuse, although the identity of the perpetrator was unknown. Appellant and the mother were engaged in a highly contested custody dispute. A physical examination verified the minor's report of abuse and the court ordered the minor detained pending further hearing. In February 2010, the court sustained the petition based upon agency reports and the mother's submission. Both parents had regular supervised visits following the initial detention and as later set by the court.

The disposition report recommended services for both parents and a trial home visit for father. The mother had begun attending parenting classes but needed to complete a psychological evaluation. The mother had to be told not to discuss the case during visits and was increasingly angry during visits causing the visit supervisor some concern. Father had not yet enrolled in a parenting class, although he participated in a psychological evaluation and had been in therapy with the minor during the past year. Father's visits included a great deal of physical play but became less so over time. Appellant was frustrated by the supervised setting for visits. The report concluded father was doing well and the mother needed to control

her anger. The court denied trial home visits and set a contested dispositional hearing.

In an addendum report, the Agency stated the mother had made progress in her case plan, completing her psychological evaluation and two separate parenting classes, but she still had difficulty following visit rules as she continued to whisper, give gifts, bring too much food, physically discipline the minor and show hostility and aggression. Father was also progressing in his plan, completing the psychological evaluation and eight sessions of therapy. He was demonstrating better boundaries and was less physical in visits. Father had previously completed a parenting class and was willing to do so again. The minor told both parents she wanted to go home and began crying and begging father to take her home after visits.

A second addendum in August 2010 recommended the court declare the minor a dependent and return her to father and the mother under a family maintenance agreement. Reid McKellar, Ph.D., had completed a psychological evaluation of both parents and recommended that the parents work with a co-parenting instructor to mitigate their mutual animosity and that the minor participate in supportive therapy. The mother was visiting consistently, complying with visitation guidelines and willing to engage in co-parenting therapy. Father had enrolled in a co-parenting course. He had also completed boundary therapy; however, he had become increasingly aggressive with Agency staff. He consistently visited the minor although he did allow

his frustration and anger to show in visits and this behavior had a negative impact on the minor.

At the readiness hearing in August 2010, the Agency noted the minor had been in foster care for nine months and advocated returning the minor home. Following the hearing, the Agency filed a proposed transition plan to return the minor to her parents' care. At the dispositional hearing on September 7, 2010, the court declared the minor to be a dependent, adopted the transition plan, and ordered family maintenance services. The plan included co-parenting therapy, individual therapy and additional parenting classes.

On September 24, 2010, the minor's counsel filed a petition for modification (§ 388) seeking to suspend father's visitation and rescind the trial home placement with father. The petition alleged father had been "wholly uncooperative" in co-parenting therapy and had tape-recorded sessions. The therapist's letter attached to the petition stated that father had tape-recorded two sessions without permission and he was unwilling to work with her. The therapist said that father's behavior showed he was focused on his own goals, not the minor's interests. The therapist stated father was not credible and appeared to be unaware of the minor's best interests. In contrast, the mother was participating in therapy and deeply concerned for the minor. At the hearing on the petition on September 27, 2010, the court admonished father about violating the confidentiality of dependency proceedings and ordered supervised visits for him.

The court also placed the minor with the mother on a trial basis. The minute order did not reflect this ruling. No formal order beyond the September 27, 2010 minute order was filed memorializing the ruling until June 27, 2011.²

On November 19, 2010, the minor's counsel filed a second petition for modification (§ 388) seeking orders for additional therapy sessions for father, therapeutic visits and conditioning visits on concurrence of the minor's counsel. The petition alleged father went to therapy but did not apply the information learned in therapy, he was intrusive with the minor at visits, the minor was having nightmares before visits with father and the minor did not want to go to visits. A visit log for a November 10, 2010 visit, later referred to as "the donut visit," described father's interaction with the minor that raised concerns about father.³

² As we shall discuss later, the court brought this to the parties' attention on June 22, 2011. The stipulation filed on June 27, 2011, was unsigned by father's counsel.

³ Father brought donuts to the visit. He finished his first and demanded that the minor share hers. When the minor declined, he took the donut, put it in a bag, twisted and squashed the bag and told her it was gone, reminding her she had to share with him. The minor began to cry. They began watching a movie and he kept insisting on physical interaction to the point of being intrusive with the minor, although she did not want him touching her and told him not to and tried to ignore him. Father then turned off the movie although the minor wanted to watch it. The minor began to play with toys and father continued to be physically intrusive in spite of the minor yelling at him to stop and refusing to respond to him. Father tried to question her and ultimately became frustrated and ended the visit early. The minor would not say goodbye or give him a kiss and he left.

The petition for modification was set for hearing. At the hearing, the court suspended visits until further order of the court and continued the hearing. The hearing was continued several times because father was ill. At the third continuance, the court ordered father to get a doctor's note explaining his illness and continued absence. At the next hearing, father's counsel advised the court on the state of father's health. The court responded that the doctor's note was required by the end of the day or a contempt order would issue. Father did not appear at the continued hearing on the minor's petition for modification on December 27, 2010, and the matter was dropped.

A family maintenance review report filed in February 2011 recommended termination of the dependency with custody to the mother. The mother was doing well and adjusting to the minor being returned to her care. Father was angry at the social worker and blamed the Agency for the minor's "suffering." Father did not do the co-parenting therapy but did continue individual therapy. Father also completed a parenting class and enrolled in a co-parenting class but did not attend it. Father had not visited the minor since November 2010. He insisted he did not need the therapist monitoring visits, and wanted to return to split custody. Father accepted no responsibility for his actions or their effect on the minor. After visits with father stopped, the minor said she did not want to see him. Her behavior had improved after visits with father were suspended. The therapist still recommended therapeutic visits. The mother

was continuing in therapy, had completed parenting classes and had successfully transitioned the minor back home.

At the review hearing on March 1, 2011, father filed a petition for modification, seeking to reinstate visitation and arguing the suspension order was improper because his counsel did not appear on the day the court suspended visits, the court abused its discretion in granting the interim order and cessation of visits was not in the minor's best interests. The court ordered therapeutic visitation pending a contested review hearing.

On April 14, 2011, father filed a second petition for modification, seeking to modify the dispositional orders of September 7, 2010, and the custody order of September 27, 2010, arguing the legal requirements for a dispositional hearing were not followed and both orders were in excess of jurisdiction because the court did not make findings to support removal pursuant to section 361, subdivision (c). Father sought a return to evenly split custody.

An addendum report filed in April 2011 recommended termination of the dependency with custody to the mother. The report stated father continued to express distrust of the Agency. The minor was generally doing well in the mother's custody but was acting out, apparently as a result of anxiety and confusion from resumption of visits with father.⁴ However,

⁴ The behaviors included complaints of stomach ache and nervousness before the first visit, conflicting statements about

at visits, the minor was happy and interacted well with father. At the review hearing on April 22, 2011, the court ordered father to drug test and suspended further therapeutic visits as detrimental until the next hearing.

On May 5, 2011, father filed a third petition for modification seeking to reinstate visits and provide a neutral therapist for the minor. Father asserted the evidence before the court was skewed by the team of therapists, which was headed by an individual who had a conflict of interest and made recommendations that were not in the minor's best interests.

An addendum filed May 11, 2011, stated father said he was unable to test after the hearing on April 22, 2011, due to lack of referral from the Agency, however, the probation office reported no record of father attempting to test that date. Father did test three days later and provided a dilute sample which was considered a positive test by the Agency.

At the hearing on May 18, 2011, 18 months after the minor was detained and over eight months after the minor was placed with the mother under a family maintenance plan, the court had before it three petitions for modification filed by father, two filed by the minor, a motion to quash and the family maintenance review. The court discussed the status of the various pending matters with counsel and resolved the matters as follows:

liking and disliking her parents, putting her fingers in her bottom, smearing feces and shutting down in therapy.

(1) no evidence having been presented on father's petition for modification filed April 14, 2011, the court took the matter under submission; (2) father's counsel withdrew the petition filed March 1, 2011, as moot because the court had reinstated therapeutic visits; (3) all counsel stipulated that, as to the minor's petition for modification filed September 24, 2010, the matter was addressed and resolved on September 27, 2010; (4) the minor's counsel withdrew the petition filed November 19, 2010; and (5) the court proceeded to hear evidence on father's petition for modification filed May 5, 2011, dealing with the most recent suspension of visitation and on the family maintenance review.

The minor's preschool teacher testified the minor began putting feces on the wall in January 2011 and continued to do so about once a month until April, when she did so three times, and then once again in May. At first, the teacher was not concerned because other children have done the same thing, but she became concerned with the multiple acts in April. The minor was unable to explain why she was doing it.

The mother's roommate described an incident in March 2011, when she was reading a book to the minor, who put her finger in her bottom, and, when asked why she did that, said the book reminded her of her dad and she missed him and that was why she was doing it. The roommate testified the minor's behavior deteriorated after she was told she would have visits with father again and after the visit.

The Court Appointed Special Advocate (CASA) volunteer testified she learned the minor was smearing feces in February 2011 and informed the therapist. She stated the minor sometimes mentioned the donut visit and explained that was why she did not have visits with father. The CASA volunteer saw a little girl who was conflicted, caught in a nasty situation and continued to be the one suffering. She testified that the minor acted out under pressure and, while the behaviors had decreased, they had not disappeared. She said she spoke to father in February 2011, and asked why he did not do counseling and he replied that he did not want to and that he did not need someone in the room while he visited the minor.

The visit supervisor testified that, after September 2010, when the minor was placed with the mother, father's attitude in visits changed. He was loud and posturing and the minor began to be standoffish. The visit supervisor thought he was trying too hard.

The court continued the hearing to June 22, 2011.

On June 22, 2011, the court noted that it had not received a signed stipulation regarding the September 24, 2010 petition for modification. The Agency's counsel informed the court that father's counsel declined to execute the stipulation. The court stated that the September 27, 2010 orders modified the dispositional orders of September 7, 2010, and the proposed orders in the stipulation would be submitted to the judge who presided at the hearing so he could execute it if he thought the

orders were appropriate. The court then denied father's April 14, 2011 petition for modification, finding no removal ever occurred and the dispositional orders merely transitioned the minor back to parental custody; therefore, section 361, subdivision (c) was not applicable and no removal findings were required. The court observed that father's proper remedy was to have appealed the dispositional orders.

On June 27, 2011, a stipulation and order was filed, signed by all counsel, except for father's counsel, and by the judge who heard the matter. The order stated that, on September 27, 2010, the court made orders regarding the minor's petition for modification filed September 24, 2010. The orders included placing the minor with the mother, supervised weekly visitation for father, who was to continue counseling and, when ready, participate in co-parenting therapy. Father filed a notice of appeal on August 25, 2011, from this order.

The court then heard further testimony on the remaining petition for modification and the pending review hearing. The social worker testified that the mother initially had difficulty with anger and related issues. Father initially maintained boundaries with the minor and demonstrated good parenting ability in meeting the minor's needs. These factors led to a recommendation for a trial placement with father. The disposition was continued after the recommendation was made. Both parents then engaged in services, so the recommendation changed to a shared placement with both parents. Father became

difficult after the recommendation changed to shared custody and his hostility increased over time. The social worker stated father completed a parenting class but did not complete the co-parenting class required in this case. Father sabotaged the therapeutic relationship with the co-parenting instructor assigned to both parents and was sent to another therapist for individual therapy. He had completed his other services prior to the donut visit and the social worker concluded he had not benefitted from services because his anger issues should have been resolved. She testified that the mother had residual anger from the divorce but it was not necessary to refer her to an anger management course because the assessment by Dr. McKellar alleviated her concerns about the anger issues. In the social worker's opinion, the mother's care of the minor was currently appropriate and would remain so if the dependency were terminated. The mother had completed the plan except for the co-parenting and continued supervision was not necessary. The minor and the mother were doing well and the conditions that existed when the petition was filed had been alleviated.

The minor's therapist testified she first saw the minor in July 2010 and the focus at that time was sexual abuse. The November 2010 visit with the donut incident was very significant to the minor and the minor connected it to the most recent visit in that the minor mentioned food in the recent visit. After the therapeutic visit with father, the minor said the visit was good and father was not mean. The mother told the therapist that the

minor's behavior had improved in recent weeks. The therapist also had eight sessions with the mother to work through issues between the mother and the minor, but anger was not the primary issue, anxiety was more of a problem for both. The therapist discussed anger issues with the mother but found the mother did not need specific therapy. According to the therapist, the mother's coping skills improved over time and there was now some stability in the mother's relationship with the minor.

A clinical psychologist testified as an expert witness, relying on visit logs and other documentary evidence. She testified generally that she saw an insecure attachment between the mother and the minor and the minor's acting out behavior when in the mother's care was an attempt to control her environment because she did not feel protected and was expressing frustration and anxiety. She stated the minor's bond with father seemed more secure.

The therapist who supervised father's therapeutic visit in April 2011 testified that, when the minor entered the room and saw father, she was excited and happy to see him. The therapist saw attachment and bonding behavior, as the minor was totally fixated on father and she did not have to intervene at all in the visit. The therapist testified that a child separated from a person to whom they are attached will show distress and may act out.

The program manager at the family center where the parents had visited testified that father and the minor had a positive

relationship. The minor was happy to see the mother and they did activities well together but the minor was a little bossy with the mother. Visits with father just flowed although he did provide some structure. It was apparent that the minor loved and was bonded to both parents. Father had visits at the facility from March to September of 2010 and the mother had visits from July to September of 2010.

Dr. McKellar testified about the evaluations he performed on the parents. He saw potential risk factors in both parents based on testing, and recommended co-parenting and therapy for the minor. The recommendations were to help the Agency guide the family in improving parenting, the minor's therapy was to address abuse and risks from poor parenting. He was concerned that father was in therapy for boundary issues, yet his interview presentation suggested he did not internalize the information. While this could lead to poor parenting, he did not have enough information to conclude that it would in this case.

An addendum filed in August 2011 stated the minor continued to do well in the mother's custody and her preschool teacher felt the minor was ready for kindergarten and would do well there. The minor was continuing in therapy and rebuilding her relationship with the mother. The therapist was hesitant to begin visitation with father because the minor was making progress. Although the minor had not asked for visits with father, the therapist believed that the minor would agree to

visit if asked. Father had not had contact with the social worker since April 2011 at father's request.

After completion of testimony and argument the court set a hearing on September 2, 2011, for ruling. The court reviewed the modifications father sought in the petition, i.e., reinstatement of visitation, appointment of a neutral therapist for the minor and a psychological evaluation for the mother. The court explained it had to find new evidence or a change in circumstances from the April 22, 2011 order and find that visitation with father would serve the best interests of the minor. The court stated that it had reviewed the entire file and noted that it was clear that the perception of father changed in September 2010 and his change in behavior during a co-parenting session led to the request to deny a trial home visit for him. The court then reviewed the circumstances that led to the visit suspension order of April 22, 2011, including father's supervised visits, the minor's increasing display of stress behavior, father's alarming behavior at the November 2010 visit, the order for therapeutic visits, the improvement in the minor's behavior when she had no visits, the minor's statement connecting her stress behavior with father, the marked increase in the minor's stress behavior around the time of the therapeutic visit in April 2011 and her regression in therapy. The court looked at whether things had changed since then. The court found the evidence showed that father tested on April 25, 2011, three days after he was ordered to, and had a dilute test

that was considered positive; the minor was improving again in the absence of visits; and the therapist said modifying the order would likely result in the minor's regression. The court denied father's petition for modification filed May 5, 2011.

As to the family maintenance review, the court considered the Agency and CASA reports and terminated the dependency, granting custody to the mother. Father filed a second notice of appeal on September 6, 2011.

DISCUSSION

I. Father's First Notice of Appeal

"[A] notice of appeal must be filed within 60 days after the rendition of the judgment or the making of the order being appealed." (Cal. Rules of Court, rule 8.406(a)(1).) That is, the time to appeal an order begins to run from the time the order is pronounced in open court. (*In re Alyssa H.* (1994) 22 Cal.App.4th 1249, 1254; *In re Markaus V.* (1989) 211 Cal.App.3d 1331, 1337.) The only exception is when a statute requires a certain form of order, such as when the court is terminating a dependency and issuing custody orders that must be filed in another action. (*In re Markaus V., supra*, 211 Cal.App.3d at p. 1337.) The order in this case was a ruling on a petition for modification heard in September 2010. There was no requirement for a written ruling and the exception did not apply to extend the time to file a notice of appeal. (See *In re Ryan R.* (2004) 122 Cal.App.4th 595, 600.)

The first notice of appeal was filed August 25, 2011, 59 days after the stipulation and order was filed.⁵ It was, therefore, timely as to the filing of the written order. However, the orders to which the stipulation and order referred were pronounced in open court on September 27, 2010, nearly a year prior to the filing of the notice of appeal. There was no requirement that a written order issue and it was clear that the parties acted as if the oral pronouncement of the modification of the custody order giving sole physical custody to the mother was valid. The notice of appeal filed on August 25, 2011, is untimely as to the September 27, 2010 order. (*Mauro B. v. Superior Court* (1991) 230 Cal.App.3d 949, 953 [appellate jurisdiction is dependent upon filing a timely notice of appeal].) Further, it is also untimely as to the order entered on June 22, 2011, denying father's second petition for modification filed on April 14, 2011, as well as the orders entered on May 18, 2011, addressing various petitions for modification. The appeal arising from the notice of appeal filed August 25, 2011 is dismissed as untimely.

⁵ Assuming the stipulation was not valid because father's counsel did not agree to its terms, the document signed by the judge who heard the petition for modification was nothing more than a correction of the record to accurately reflect the oral pronouncement of the ruling and not a new or different ruling on the petition for modification. (*People v. Mitchell* (2001) 26 Cal.4th 181, 185.)

II. Father's Second Notice of Appeal

Father's second notice of appeal filed September 6, 2011, is timely as to the orders of September 2, 2011, entered in open court and the written custody orders filed on the same day. (*In re Markaus V.*, *supra*, 211 Cal.App.3d at p. 1337.) Thus, challenges to the denial of father's third petition for modification, filed May 5, 2011, and the family maintenance review orders terminating dependency jurisdiction are cognizable in this appeal.

Father contends the juvenile court erred in denying his petition to modify the April 22, 2011 order suspending visitation because the evidence showed changed circumstances and supported reinstatement of visitation.

A parent may bring a petition for modification of any order of the juvenile court pursuant to section 388 based on new evidence or a showing of changed circumstances.⁶ "The parent requesting the change of order has the burden of establishing that the change is justified. [Citation.] The standard of

⁶ Section 388 provides, in part: "Any parent . . . may, upon grounds of change of circumstance or new evidence, petition the court in the same action in which the child was found to be a dependent child of the juvenile court . . . for a hearing to change, modify, or set aside any order of the court previously made or to terminate the jurisdiction of court. . . . [¶] . . . [¶] . . . If it appears that the best interests of the child may be promoted by the proposed change of order, recognition of a sibling relationship, termination of jurisdiction, or clear and convincing evidence supports revocation or termination of court-ordered reunification services, the court shall order that a hearing be held" (§ 388, subds. (a), (d).)

proof is a preponderance of the evidence." (*In re Michael B.* (1992) 8 Cal.App.4th 1698, 1703.) Determination of a petition to modify is committed to the sound discretion of the juvenile court and, absent a showing of a clear abuse of discretion, the decision of the juvenile court must be upheld. (*In re Stephanie M.* (1994) 7 Cal.4th 295, 318-319; *In re Robert L.* (1993) 21 Cal.App.4th 1057, 1067.)

In order to modify the order suspending visitation, father had to show that circumstances had changed following the April 22, 2011 suspension order. Most of the testimony did not establish changed circumstances, but rather, described the minor's behavior prior to the therapeutic visit, evidently to show that her stress behavior was not related to father because it occurred prior to that visit. Also, much of the remaining testimony focused on the parents' attitudes and progress in services before the April 2011 visits, or related to the review hearing. The only evidence about father's changed circumstances was that he had failed to test as ordered, then provided a dilute sample, and had not been in contact with the social worker since April 2011. The evidence about the minor was that, in the absence of visits, the minor was doing well, her behavior improved, there was stability in her relationship with the mother, and she was ready for kindergarten. Because the minor was making progress, the therapist was hesitant to restart visits with father.

All that this evidence shows is that father has apparently maintained his confrontational, aggressive and uncooperative conduct, which arose when the juvenile court did not order that the minor be transitioned to his custody in September 2010. The evidence also shows that the minor has stabilized in the absence of contact with father and the therapist thinks that renewed contact would not further the minor's interests. Father did not meet his burden to show changed circumstances or that renewed visitation would be in the minor's best interests. The juvenile court did not abuse its discretion in failing to grant father's petition for modification filed on May 5, 2011.

III. Termination of Jurisdiction

Father argues the evidence was insufficient to support the juvenile court's orders terminating jurisdiction and awarding full custody to the mother.

When the sufficiency of the evidence to support a finding or order is challenged on appeal, even where the standard of proof in the trial court is clear and convincing, the reviewing court must determine if there is any substantial evidence—that is, evidence which is reasonable, credible and of solid value—to support the conclusion of the trier of fact. (*In re Angelia P.* (1981) 28 Cal.3d 908, 924; *In re Jason L.* (1990) 222 Cal.App.3d 1206, 1214.) In making this determination, we recognize that all conflicts are to be resolved in favor of the prevailing party and that issues of fact and credibility are questions for the trier of fact. (*In re Jason L.*, at p. 1214; *In re Steve W.*

(1990) 217 Cal.App.3d 10, 16.) The reviewing court may not reweigh the evidence when assessing the sufficiency of the evidence. (*In re Stephanie M.*, *supra*, 7 Cal.4th at pp. 318-319.)

A dependency proceeding is maintained to protect the minor's physical and emotional health and well-being. (§ 300.2.) When continued supervision is no longer necessary and the conditions no longer exist that would justify initial assumption of jurisdiction under section 300, the court shall terminate jurisdiction. (§ 364, subd. (c).) When terminating jurisdiction, the court may make custody and visitation orders. (§ 362.4.)

At the beginning of the dependency, father was reasonable, compliant and had good visits with the minor. The mother was angry, resistant to services and had only adequate visits with the minor. Both parents participated in services.

By the disposition, the court believed it was safe to transition the minor back to parental care in the 50-50 custody arrangement previously ordered in the ongoing family law case. Father reacted poorly to this and, in a short period of time, became angry and confrontational, sabotaging services and failing to place the minor's needs ahead of his own. This impacted the minor who began to show stress behavior that decreased when she did not have contact with father.

Over the months of the family maintenance program, the mother benefitted from therapy and she and the minor stabilized

their relationship. The therapist was concerned that renewed contact with father could affect the minor's progress in therapy. Father did nothing to show progress in services or that he had benefitted from the services he did attend and continued to be resistant to court orders. The social worker testified that the conditions that led to the minor's detention had been alleviated. By the time of the conclusion of the hearing, the minor and the mother were doing well and supervision was no longer necessary. Substantial evidence supported the court's orders terminating the dependency and placing the minor in the mother's sole custody.

DISPOSITION

The appeal arising from father's first notice of appeal, filed on August 25, 2011, is dismissed as untimely. The orders of the juvenile court, challenged in father's second notice of appeal, filed on September 6, 2011, are affirmed.

BUTZ, J.

We concur:

HULL, Acting P. J.

MAURO, J.