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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(San Joaquin)

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In re E.B. et al., Persons Coming Under  
the Juvenile Court Law.

SAN JOAQUIN COUNTY HUMAN SERVICES  
AGENCY,

Plaintiff and Respondent,

v.

E.B.,

Defendant and Appellant.

C070157

(Super. Ct. No.  
J04567)

E.B., father of 12-year-old El.B., five-year-old R.B. and three-year-old E.B., Jr., appeals from a juvenile court order awarding custody to mother, denying visitation for father, and terminating the dependency.<sup>1</sup>

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<sup>1</sup> Mother is not a party to this appeal.

On appeal, father contends the denial of visitation lacks evidentiary support and exceeds the juvenile court's discretion. We disagree and will affirm the order.

#### BACKGROUND

In March 2007, mother and father were arrested for possession of controlled substances for sale, possession of a firearm by a convicted felon, conspiracy to commit a misdemeanor, child endangerment, and a special allegation of a prior narcotics conviction. El.B. and R.B. were detained as a result of the arrests. A petition was filed alleging that El.B. and R.B. came within the provisions of Welfare and Institutions Code section 300, subdivisions (b) [failure to protect] and (g) [no provision for support].<sup>2</sup>

The July 2007 disposition report stated that, due to his incarceration, father had not visited with the children. The report also stated that, after he was released on bond in June 2007, father had not arranged for visitation or provided contact information to the social worker.

The reports for the six- and 12-month reviews indicated that the parents participated in a reunification case plan. Father began visiting the children in October 2007. In May 2008, the children were returned to mother. In July 2008, father was incarcerated on the charges that had prompted the children's removal. Thereafter, mother transported the children

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<sup>2</sup> Undesignated statutory references are to the Welfare and Institutions Code.

to visitation with father at the San Joaquin County Jail. The dependency was dismissed in January 2009.

In June 2010, a second petition was filed alleging that El.B., R.B. and then-18-month-old E.B., Jr., came within the provisions of section 300, subdivisions (b), (g) and (j) [abuse of sibling]. The petition alleged that the children had been taken into protective custody after the parents were arrested on criminal charges related to drug and weapons sales. The petition added that El.B. reported hearing gunshots in his neighborhood, did not feel safe in the neighborhood, and was aware that the parents sold marijuana.

The report for the jurisdiction and disposition hearing noted that father had been convicted on charges related to drugs, weapons, and child endangerment, and was sentenced to state prison for four years. The report opined that father's incarceration would preclude him from completing a crucial component of any reunification plan, i.e., demonstrating that, following his release from custody, he willingly would refrain from all narcotics activities. The report recommended that father not receive reunification services because such services would be detrimental to the children.

Father submitted on the issue of jurisdiction and the matter was continued to December 2010 for a contested disposition hearing.

At the December 14, 2010, contested disposition hearing, the juvenile court found by clear and convincing evidence that reunification services would be detrimental to the children

based on the following facts: father is incarcerated for a drug-related crime; he has a 25-year prison history of incarcerations for narcotics activities, and the children's safety in the home can be guaranteed only by preventing father's return home. Reunification services were bypassed pursuant to section 361.5, subdivision (e)(1).

The May 2011 status review report indicated that father was still serving his prison sentence and had not been in contact with the social worker regarding visitation or the well-being of the children. Father waived transportation to the review hearing where the juvenile court ordered the children returned to mother's residence.

The November 2011 status review report reiterated that father was serving a state prison sentence and had not been offered reunification services. The report noted that the children were at home with mother and recommended that the dependency case be dismissed.

Father was present at the January 5, 2012, contested review hearing. Following a *Marsden*<sup>3</sup> hearing, the juvenile court appointed new counsel for father. The juvenile court then explained, "the proposed custody order is that all three children, mother will have legal and physical custody to her. Father will not have visitation at this time. At some later

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<sup>3</sup> *People v. Marsden* (1970) 2 Cal.3d 118.

date, father can always go to family court and request visitation. But that's what the recommendation is at present."

The juvenile court took a brief recess while father discussed the matter with his new counsel. Thereafter, counsel told the juvenile court, "I have advised [father] regarding the custody orders. He is objecting to the mannerisms [sic] in which they've been given to him. He does not have legal custody. He does not have physical custody. But he will submit and he just wants his objection noted for the record." The juvenile court noted father's objection and advised him that a "big part of the reason this Court is ordering that is because of his custodial situation at this point in time." The juvenile court awarded legal and physical custody to mother and dismissed the dependency proceeding.

#### DISCUSSION

Father contends the juvenile court's order denying him visitation is not supported by sufficient evidence that visitation would place the children in jeopardy or be detrimental to them. In a separate argument, father contends the denial of visitation exceeded the scope of the court's discretion. Neither argument has merit.

Section 362.4 provides in relevant part: "When the juvenile court terminates its jurisdiction over a minor who has been adjudged a dependent child of the juvenile court prior to the minor's attainment of the age of 18 years, and . . . an order has been entered with regard to the custody of that minor, the juvenile court on its own motion[] may issue . . . an order

determining . . . visitation with[] the child. [¶] Any order issued pursuant to this section shall continue until modified or terminated by a subsequent order of the superior court. . . .

[¶] If no action is filed or pending relating to the custody of the minor in the superior court of any county, the juvenile court order may be used as the sole basis for opening a file in the superior court of the county in which the parent, who has been given custody, resides." (See *In re Michael B.* (1992) 8 Cal.App.4th 1698, 1705; *In re Roger S.* (1992) 4 Cal.App.4th 25, 29-31.)

In this case, mother completed her case plan and the children were returned to her. Father does not dispute that section 362.4 authorized the juvenile court to make an exit order at the conclusion of the proceedings.

Father visited the children during the 2007 dependency proceedings, but he did not participate in the 2010 dependency proceeding and did not visit the children at any time during its pendency. Nor did he request visitation at any time prior to the juvenile court's exit order. Thus, prior to the exit order, the issue of visitation with father never arose, and father does not claim the juvenile court erred by failing to address it at any of the prior hearings.

Instead, father argues there was no evidence that visitation would be detrimental to the children or jeopardize their safety. Father notes that, because of this lack of evidence, the juvenile court never made a finding that visitation would have any of the stated effects.

The unarticulated premise of father's argument is that a finding of detriment is an essential prerequisite to the order denying him visitation. Father relies by analogy on section 362.1, subdivision (a), which applies to "any order placing a child in foster care, and ordering reunification services." This statute mandates visitation "as frequent as possible, consistent with the well-being of the child," and provides that "[n]o visitation order shall jeopardize the safety of the child." (§ 362.1, subd. (a)(1) (A) & (B); see *In re Dylan T.* (1998) 65 Cal.App.4th 765, 775 [considering visitation with incarcerated parent during reunification period].)

However, section 362.1's stated purposes, to maintain parent-child ties and to "provide information relevant to deciding if, and when, to return" the child to the parent, are not applicable where, as here, reunification services have not been ordered. (§ 362.1, subd. (a); *In re J.N.* (2006) 138 Cal.App.4th 450, 458.) Nothing in section 362.1 supports father's argument that, in the present context, a finding of detriment is an essential prerequisite to an order denying visitation.

Where, as here, reunification services have not been ordered, the juvenile "court may continue to permit the parent to visit the child unless it finds that visitation would be detrimental to the child." (§ 361.5, subd. (f).) This "permissive language" ("may") reflects the "reality" that "visitation is not integral to the overall plan when the parent

is not participating in the reunification efforts." (*In re J.N.*, *supra*, 138 Cal.App.4th at pp. 458-459.)

Father argues that, absent a showing of detriment caused by visitation, ordinarily it is improper to suspend or halt visitation even after the end of the reunification period. (Citing *In re Luke L.* (1996) 44 Cal.App.4th 670, 679, citing § 366.21, subd. (h).) However, "contrary to [father's] contention, section 361.5, subdivision (f) does not dictate a particular standard the juvenile court must apply when exercising its discretion to permit or deny visitation between a child and a parent who has not been receiving reunification services. The Legislature instead has left this determination to the court's discretion for the narrow group of parents described in section 361.5, subdivision (f), who have been denied reunification services at the outset. (Compare § 366.21, subd. (h) [detriment to the child standard applies to visitation requests for parents who have been receiving reunification services].)" (*In re J.N.*, *supra*, 138 Cal.App.4th at p. 459.)

Because section 361.5, subdivision (f) is permissive, and section 362.1 does not make detriment an essential prerequisite to an order denying visitation, any dearth of evidence of detriment to the children does not entitle father to reversal of the no-visitiation order.

Respondent San Joaquin County Human Services Agency (Agency) argues that denial of visitation was within the juvenile court's sound discretion because father "continued to maintain a criminal lifestyle which posed a risk of detriment to

the minors." In his reply, father faults the Agency for failing to provide legal authority for its argument. Nevertheless, father has failed to show that the juvenile court's order was an abuse of discretion.

Father argues that, prior to issuing the no-visitation order, the juvenile court was required to consider "evidence of a change in circumstances warranting a change in visitation." However, as father concedes, there was no prior visitation order regarding father and the children. Thus, the juvenile court was not required to consider in the abstract how circumstances may have changed throughout the course of the proceedings.

DISPOSITION

The order is affirmed.

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MAURO, J.

We concur:

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NICHOLSON, Acting P. J.

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BUTZ, J.