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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

In re JACOB M., a Person Coming Under  
the Juvenile Court Law.

SAN DIEGO COUNTY HEALTH AND  
HUMAN SERVICES AGENCY,

Plaintiff and Respondent,

v.

KEVIN M.,

Defendant and Appellant.

D060476

(Super. Ct. No. EJ3407)

APPEAL from a judgment of the Superior Court of San Diego County, Ronald F. Frazier, Judge. Affirmed.

Presumed father Kevin M. appeals following the dispositional hearing in the juvenile dependency case of his son, Jacob M. Kevin contends the juvenile court erred

by limiting his right to make educational decisions for Jacob (Welf. & Inst. Code,<sup>1</sup> § 361, subd. (a)) and ordering supervised visitation. We affirm.

## BACKGROUND

Jacob was born in May 1997. His mother, Angela A., and Kevin divorced in 2000. They shared joint legal custody of Jacob. Kevin had visitation on alternate weekends. There were reports of domestic violence between Angela and Kevin before they separated.

In June 2011, the San Diego County Health and Human Services Agency (the Agency) filed a petition alleging 14-year-old Jacob suffered from attention deficit hyperactivity disorder, rapid cycling bipolar disorder and oppositional defiant disorder and Angela had been unable to provide the required mental health treatment Jacob needed (§ 300, subd. (c)). Jacob was detained with Angela. Two weeks later, the Agency filed an amended petition alleging Angela had a mental illness, rendering her incapable of providing regular care, and Kevin was unaware of this and was therefore unable to protect and supervise Jacob (§ 300, subd. (b)).<sup>2</sup> Jacob was detained in Polinsky Children's Center, and then in a foster home where he remains.

Kevin submitted on the Agency's reports. In August 2011 the court made a true finding on the section 300, subdivision (b) allegation; dismissed the section 300,

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<sup>1</sup> All further statutory references are to the Welfare and Institutions Code.

<sup>2</sup> The amended petition originally alleged Kevin had failed and had been unable to protect and supervise Jacob. It was amended before the jurisdictional and dispositional hearing to read as set forth above.

subdivision (c) allegation; declared Jacob a dependent; and ordered him placed in foster care. The court appointed the foster parent to make educational decisions for Jacob (§ 361, subd. (a)). The court ordered supervised visits for Kevin, and gave the social worker discretion to lift the supervision requirement with 48 hours' notice to Jacob's counsel, and to allow overnight visits and a 60-day trial visit in Kevin's home, both with the concurrence of Jacob's counsel.

### EDUCATIONAL DECISIONS

Kevin contends the juvenile court erred by limiting his right to make educational decisions for Jacob. "We review the . . . order . . . under an abuse of discretion standard [citation], bearing in mind '[t]he focus of dependency proceedings is on the child, not the parent' [citation]." (*In re R.W.* (2009) 172 Cal.App.4th 1268, 1277.) We conclude the juvenile court did not abuse its discretion by limiting Kevin's right to make educational decisions for Jacob.

"The law recognizes the vital role that education plays in today's society." (*In re Samuel G.* (2009) 174 Cal.App.4th 502, 509.) " '[E]ducation is a major determinant of an individual's chances for economic and social success in our competitive society; . . . education is a unique influence on a child's development as a citizen and his participation in political and community life.' " (*Ibid.*, quoting *Serrano v. Priest* (1971) 5 Cal.3d 584, 605.) " '[T]he distinctive and priceless function of education in our society warrants, indeed compels, our treating it as a "fundamental interest." ' " (*In re Samuel G.*, *supra*, at p. 509, quoting *Serrano v. Priest*, *supra*, at pp. 608-609.) Additionally,

"[p]arents have a constitutionally protected liberty interest in directing their children's education." (*In re R.W.*, *supra*, 172 Cal.App.4th at p. 1276.)

The state's responsibility "for educating all children within its borders" extends to each child who is the subject of a dependency proceeding "at every stage of the child's case." (*In re Samuel G.*, *supra*, 174 Cal.App.4th at p. 509.) Before a declaration of dependency, the court may temporarily limit the parent's right to make educational decisions if the parent is "unable, or unwilling to exercise educational . . . rights for the child," among other requirements. (§ 319, subd. (g)(1)(A).) When, as here, the child "is adjudged a dependent child of the court [under section 300] . . . , the court may limit the control to be exercised over the dependent child by any parent . . . . The limitations may not exceed those necessary to protect the child. If the court specifically limits the right of the parent . . . to make educational . . . decisions for the child, the court shall at the same time appoint a responsible adult to make educational . . . decisions . . . ." (§ 361, subd. (a).) Finally, at the review hearings held every six months, "[i]f the parent . . . is unwilling or unable to participate in making an educational decision for his or her child, or if other circumstances exist that compromise the ability of the parent . . . to make educational decisions for the child, the county welfare department or social worker shall consider whether the right of the parent . . . to make educational decisions for the child should be limited. If the supplemental report makes that recommendation, the report shall identify whether there is a responsible adult available to make educational decisions for the child pursuant to Section 361." (§ 366.1, subd. (e).) At each review hearing, "[t]he court must consider the child's education, including whether it is necessary to limit

the right of the parent . . . to make educational decisions for the child . . . ." (Cal. Rules of Court, rule 5.708(f).)

Section 361, subdivision (a), the statute applicable upon a declaration of dependency, authorizes the court to appoint a responsible adult to make educational decisions for the minor, but does not condition that authority on the parent's inability or unwillingness to make such decisions. Although a parent's inability and unwillingness to make educational decisions are clearly relevant to a determination whether a limitation is "necessary to protect the child" (§ 361, subd. (a)), such findings are not dispositive. Moreover, "[a]ll educational decisions must be based on the best interests of the child." (*In re Samuel G.*, *supra*, 174 Cal.App.4th at p. 510.)

Kevin contends the differing standards at the dispositional hearing and the subsequent review hearings suggest he should have had "a reasonable initial opportunity" to make educational decisions before the court decided whether he was "unwilling or incapable of acting in [Jacob]'s educational interests." The argument is unpersuasive as it is inconsistent with the plain language of the statute. Additionally, Kevin had the opportunity before Jacob was declared a dependent to participate in his educational decisions but failed to do so. As discussed below, there was ample evidence that at the time of the hearing, limitation of Kevin's right to make educational decisions was in Jacob's best interests, and the court did not exceed limits necessary to protect Jacob.

Jacob has special needs and an Individualized Educational Program (IEP).<sup>3</sup> In part, this is attributable to Angela's poor decisionmaking and the emotional stress her conduct has caused him. Over the years, Angela has given Jacob various medications and "over medicated him severely at one point." Angela has behaved erratically, threatened him, screamed at him and blamed him, causing him great distress. Angela's home was filthy, littered with animal waste and infested with flies. Jacob's teacher said "Jacob was good at school but very much needed a special environment due to his emotional needs." He had trouble behaving in class and needed more consistency and structure than he was receiving. A March 2010 IEP report stated Jacob was "intellectually about average but 'clinically significant' in a number of areas including" hyperactivity, aggression, depression, anxiety and conduct problems. Jacob lacked confidence and social skills.

Angela kept Jacob out of school from mid-March to June 14, 2011. In May, she took him to Hawaii, where they became stranded and Jacob panhandled and begged for food. Angela and Jacob returned to San Diego on May 29. On June 15, shortly before the amended dependency petition was filed, Jacob sought help from a neighbor because Angela was not behaving normally and would not stop screaming at him. Jacob told the neighbor he wanted to call Kevin. The neighbor called Kevin a couple of times and sent him a text message, but Kevin did not call back until several hours later, after midnight. By that time, Jacob had been taken to Polinsky Children's Center.

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<sup>3</sup> The record does not disclose how long Jacob had had an IEP.

Despite these facts, Kevin believed Angela did a great job managing Jacob's behavior and that the Agency's involvement was primarily Jacob's fault. Kevin said Jacob needed the medication Angela gave him and described her as "patient and loving" with Jacob.

Like Angela, Kevin led an unstable life. He suffered from mental health problems and drug and alcohol abuse. He had been arrested four times for driving under the influence (DUI): in April 2008; in October 2010; and twice in December 2010. In April 2011 Kevin was arrested for alien smuggling.

Kevin's contact with Jacob had been limited. When Jacob was nine years old, the paternal grandmother watched him on weekends in Kevin's stead. In June 2010 Kevin moved to northern California and stayed there until December. He had no visitation with Jacob during that time.

Kevin did not attend the June 7, 2011 detention hearing. After the hearing, the social worker called him at least three times, but Kevin did not return the calls. As a result, the social worker was unable to arrange visits between Kevin and Jacob.

On June 24 the social worker sent Kevin a letter with the date, time and place (the Agency's office) of a team decision meeting. Kevin arrived an hour late for the June 27 meeting, explaining he thought the meeting was at the courthouse. Kevin informed the social worker he was attending a court-ordered alcohol program stemming from his 2010 DUI's, but had missed some of the classes. He was busy with an attempt to obtain Supplemental Security Income (SSI), and the timing of the SSI hearings often conflicted with the timing of the dependency hearings.

On June 30 the foster parent had to terminate a telephone conversation between Kevin and Jacob because Kevin spoke about the case and blamed Angela for what had happened. On July 12 Kevin left a telephone message for the social worker. The social worker returned the call three times, leaving voicemail messages on two occasions. Kevin had recently been homeless.

Given this background, the court did not abuse its discretion in concluding Kevin could not meet Jacob's educational needs. Jacob's IEP and his underlying, intertwined emotional and behavioral issues required a high level of adult involvement and guidance. The adult responsible for providing that guidance had to be a strong advocate for educational services meeting Jacob's special needs for consistency and structure. This responsibility entailed a measure of stability that Kevin had not achieved. It required continuous availability and an intensive commitment of time to confer with educators and attend meetings.

Likewise, there is no evidence in the record Kevin had participated in any aspect of Jacob's education. Instead, he was content to leave these decisions to Angela, who demonstrated poor decisionmaking. Jacob missed school for approximately three months in 2011, apparently with no inquiry or action by Kevin. Additionally, Kevin was sometimes difficult to contact and was preoccupied with his own problems. His mental health had not stabilized, and he had only recently acknowledged that Angela might have been verbally abusing Jacob.

Contrary to Kevin's assertion, the juvenile court's order did not deny him the right to participate in Jacob's education. Kevin was not prevented from participating in IEP

meetings, communicating with Jacob's teachers or helping and encouraging Jacob. The order merely limited Kevin's right to make educational decisions for Jacob and left the ultimate decision to the foster parent.

Kevin also argues the limitation of his right to make educational decisions is inconsistent with the goal of reunification. This argument fails both legally and factually. Reunification focuses on protecting the child as well as preserving the family (§ 300.2), and, as noted above, section 361, subdivision (a), restricts any limitations of a parent's right to exercise control over the child to "those necessary to protect the child." While Kevin's participation in Jacob's schooling will undoubtedly further reunification, reunification does not require Kevin's retention of his right to make educational decisions. The Agency's proposed reunification plan for Kevin included a multitude of services, including individual therapy, parenting education, substance abuse testing and, to the extent recommended by a specialist, substance abuse treatment. By the time of the August 2011 dispositional hearing, Kevin had attended three therapy sessions, but had not met with the substance abuse specialist, although the social worker had introduced Kevin to the specialist at hearings and had given Kevin repeated reminders.

Finally, Kevin asserts Jacob's counsel will ensure Jacob receives "educational assessments and appropriate services." Section 361, subdivision (a), calls upon the court to "appoint a responsible adult to make educational . . . decisions," and there is no challenge to the competency of the foster parent, the appointee in this case. If problems were to arise in the future, we are confident Jacob's trial counsel will bring them to the court's attention.

The court did not abuse its discretion by limiting Kevin's right to make educational decisions for Jacob.

### UNSUPERVISED VISITATION

Kevin contends there was no evidence to support a finding that Jacob would be at risk during unsupervised visits.

The Agency requests augmentation of the record with an addendum report filed on December 2, 2011, for the February 16, 2012, six-month review hearing. According to the addendum, on October 14, 2011, Kevin's visits became unsupervised and were "going very well" and Jacob's attorney had been "notified per court orders." Relying on the addendum, the Agency argues Kevin's contention is moot. We disagree. As Kevin points out, the juvenile court has not ordered unsupervised visits; rather, "the unsupervised visitation is pursuant to the discretion of the social worker." On the merits, however, Kevin cannot prevail.

The juvenile court must consider the child's best interests when making a visitation order. (*In re Jennifer G.* (1990) 221 Cal.App.3d 752, 757.) "No visitation order shall jeopardize the safety of the child." (§ 362.1, subd. (a)(1)(B).) Here, the order for supervised visits was necessary to ensure Jacob's safety. Kevin had a longstanding history of drug and alcohol abuse,<sup>4</sup> including four DUI arrests, two of which occurred just eight months before the hearing. He had missed classes in the program required as a

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<sup>4</sup> Early in this case, Jacob reported that Kevin smoked medical marijuana. In June 2011 Kevin said his medical marijuana card had expired approximately three weeks earlier and he did not plan to renew it. Kevin had also taken various medications for depression.

result of his latest DUI's. He had not met with the substance abuse specialist as the social worker had urged him to do, nor had he begun substance abuse treatment or testing. Until Kevin demonstrated progress in dealing with his substance abuse problem, allowing unsupervised visits, during which Kevin might drive with Jacob in the car, would jeopardize Jacob's safety.

The court did not abuse its discretion by ordering that visits be supervised.

DISPOSITION

The judgment is affirmed.

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HALLER, Acting P. J.

WE CONCUR:

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AARON, J.

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IRION, J.