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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

In re J.W., a Person Coming Under the  
Juvenile Court Law.

ORANGE COUNTY SOCIAL SERVICES  
AGENCY,

Plaintiff and Respondent,

v.

JAMES W.,

Defendant and Appellant.

G048131

(Super. Ct. No. DP020554)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Jackie C. Brown, Judge. Dismissed.

Daniel G. Rooney, under appointment by the Court of Appeal, for Defendant and Appellant.

Nicholas S. Chrisos, County Counsel, and Karen L. Christensen, Deputy County Counsel, for Plaintiff and Respondent.

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James W. (father) appeals from a juvenile court order restricting visitation with his son, J.W. At the time the court terminated reunification services, father was receiving two-hour supervised visits twice a week. The juvenile court's order left this schedule in place pending the selection and implementation hearing under Welfare and Institutions Code section 366.26 (366.26 hearing; all statutory reference are to the Welfare and Institutions Code unless noted), but authorized the Orange County Social Services Agency (SSA) to "liberalize and restrict visits as to frequency, duration and need for monitoring, reinstating original visitation order if deemed necessary to protect the child's health and/or safety." SSA later broadened visitation significantly to include unsupervised overnight and weekend visits, and recommended returning J.W. to father for a 60-day trial visit. On the date originally set for the section 366.26 hearing, the court learned SSA had liberalized father's visitation schedule, suggested SSA had violated the "spirit" of its earlier order, and reinstated twice weekly supervised visitation. Father appealed. While his appeal was pending, father stipulated in the juvenile court to a new visitation schedule. SSA contends father's stipulation renders this appeal moot. For the reasons discussed below, we agree and therefore dismiss the appeal.

## I

### FACTUAL AND PROCEDURAL BACKGROUND

In November 2012 the juvenile court terminated father's reunification services with his son J.W. and set a 366.26 hearing for March 4, 2013.<sup>1</sup> At the conclusion of the November hearing, J.W.'s counsel asked the court to impose monitored visitation rather than let stand father's twice weekly two-hour supervised visitation. J.W.'s counsel explained she made the request because of father's anger issues, and also argued the court should end the conjoint therapy sessions because those "efforts are no

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<sup>1</sup> We denied father's petition for writ relief in an opinion filed in February 2013. (James W. v. Superior Court (Feb. 28, 2013, G047636 [nonpub. opn.].)

longer [necessary] to reunify the child with the father. [¶] The child is, hopefully, going to be placed in a concurrent adoptive home and needs to be bonding with that caregiver . . . .” Finally counsel asked the court to prohibit SSA from liberalizing visitation “unless they bring it back before the court.”

The court rejected the request of minor’s counsel for monitored visitation and instead approved the case plan contained in SSA’s August 13, 2012 social services report. The court expressly adopted the report’s recommendation “for supervised visitation two times a week of two hours each . . . .” The court explained it declined to strike the provision allowing the social worker to liberalize visitation, stating “there may be instances in which the agency needs to address the child’s needs of a specific nature that would require a liberalization of one of the visitation provisions. I am going to continue that as proposed in that case plan.” The court, however, agreed with minor’s counsel “conjoint therapy was for the purpose of family reunification” and therefore “is no longer ordered or permitted.”

In late November 2012, SSA notified the parties of the upcoming section 366.26 hearing, and noted the social worker recommended termination of parental rights and implementation of an adoption plan. In late January 2013, however, SSA informed the parties the social worker now recommended a plan of long-term foster care.

On February 22, 2013, the social worker filed his report for the section 366.26 hearing. He recommended the court authorize a 60-day trial visit with father and continue the section 366.26 hearing for 60 days to coincide with the end of the trial visit. The social worker reported father had “been consistently participating in services with the hope to regain custody,” and visits had “started off twice per week for a total of seven weekly monitored hours and have gradually increased. As of December 23, 2012, the undersigned authorized an additional eight hour unsupervised Sunday visit . . . .” On February 7, the social worker authorized unmonitored visits and subsequently authorized

overnight visits. J.W. was “excited, happy, and in a good mood when he knows he is going to see his father, but will cry and tantrum when it is time to leave the visit.”

The social worker also reported J.W. began participating in weekly “Parent Child Interaction Therapy” with his father on February 8. Father continued to attend weekly therapy sessions with his own therapist, who believed father possessed the parenting skills necessary to safely parent J.W. and supported father’s efforts to regain custody. Father completed the county’s alcohol and drug treatment plan, and his probation officer terminated probation supervision, explaining father “has been doing well with both of our programs.” Father continued to submit negative drug tests. Father missed one test, but requested an “on demand” make up test, which he passed. Father continued to attend alcoholics and narcotics anonymous meetings twice a week and served as a sponsor for two other recovering addicts. He attended church weekly and submitted a letter from a church leader, who stated father was “equipped and qualified to give [J.W.] a safe, loving and nurturing environment to grow in.”

The social worker also obtained “wraparound” services, and the wraparound coordinator and a parent partner “have been working diligently with the father to promote reunification with his child.” Services included obtaining child furniture and a car seat, governmental financial assistance, food stamps, Medi-Cal, and educational services. Father also completed a parenting program and the instructor described father as “an exemplary participant who always encouraged others, had great input and was engaged throughout.” Father also worked with an in-home parenting coach.

Addressing the permanent plan, the social worker recommended “returning the child home,” noting father “consistently visits with the child, has a positive attachment and relationship with the child, therefore, it may be detrimental or undesirable for parental rights to be terminated.”

On March 4, 2013, father filed a section 388 petition (JV-180 request) to change the November 2, 2012 order terminating reunification services and denying return of J.W. to father's care. He requested a 60-day temporary release and continuance of the section 366.26 hearing.

At the hearing on March 4, the court expressed its dissatisfaction with SSA's decision to broaden father's visitation. The court noted it had "inquired of County Counsel . . . as to why the social worker has conducted the case in the manner it has because of the court's specific order to the contrary."<sup>2</sup> The court stated it had reviewed its minute orders and concluded that on November 2 it had ordered father to have supervised visitation two times a week, two hours per visit "consistent with the . . . recommendation made [in the] August 13th, 2012, report. [¶] The court did not approve or act on the requested change in the position of [SSA] that had been made on the date of the original setting of a hearing." The court later added, "I will specifically order that as of the end of the hearing . . . [on November 2, 2012] I specifically had ordered visitation for the father two times a week, two hours per visit, supervised. [¶] There was no request made by the child's counsel to eliminate that order. And I specifically ordered that I was approving only the case plan and the recommendation in the report of August 13th, 2012, on that date. Therefore, I am making it very clear that that is the order that the court had made before. That is the order the court, again, is reiterating to the agency." The court scheduled a hearing on March 11 to address father's section 388 petition. The court also set an order to show cause and ordered the social worker to attend.

At the hearing on March 11, county counsel pointed out the court's November 2012 visitation order authorized the social worker to liberalize father's visits. Over the objections of father's counsel, who questioned the purpose of the proceeding, the court called the social worker to the stand and examined him under oath. The social

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<sup>2</sup> A "specific order to the contrary" would have prohibited the social worker from liberalizing visitation. The court made no such order.

worker explained the express terms of the case plan and visitation order allowed him to liberalize visitation, and pointed out the court expressly had rejected J.W.'s counsel's request to deny SSA that authority.

The social worker also described additional services provided to father after November 2. SSA continued to pay for father's therapist and drug testing after the court terminated services on November 2. The social worker explained he continued services because he felt it was in J.W.'s best interests. County counsel noted the November 2 minute order erroneously recorded that "conjoint therapy is permitted. The court does not include this as a visit nor is the court ordering this therapy."

The juvenile court concluded the social worker believed he had been complying with the court's orders and was "perhaps, understanding [the orders] in light of [SSA's] goals without correlating all the different aspects of the court order in a realistic light" and this had "educated this judge that making a court order is insufficient to compel and convince social workers to obey the spirit, as well as the letter of the order." The court relieved J.W.'s counsel<sup>3</sup> and trailed the matter to the next day (March 12) to appoint new counsel for J.W. and to address father's section 388 petition.<sup>4</sup>

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<sup>3</sup> On March 4, J.W.'s counsel declared a conflict and sought to be relieved. On March 11, father filed a challenge for cause (Code Civ. Proc., § 170.1, subd. (a)(6)) against Judge Brown. Father's counsel argued that in seeking to be relieved, J.W.'s counsel disclosed to the court that she feared for her personal safety if J.W. returned to father because she would be required to visit J.W. in father's home. Father asserted "[J.W.'s] counsel's elaborations regarding her conflict presented *extremely prejudicial* information regarding the father and should not have been elicited from the court, nor presented to the court, and should not be considered by the Court." Father asserted the court had "agree[d]" with J.W.'s counsel's "stated personal 'fears' and indicated that such concerns were 'valid'" without any further information having been provided by J.W.'s counsel. The court struck the statement and declaration of disqualification, stating it had not indicated there was a factual basis for J.W.'s counsel's fears, but rather that her fears were "sincerely presented."

<sup>4</sup> SSA informs us the court denied the section 388 petition. The order is not part of this appeal.

The following day, father filed a notice of appeal in propria persona from the court's March 11 order "regarding W & I Code § 170.1 being denied." We appointed appellate counsel for father and filed an order indicating the court was considering a dismissal of his appeal because the notice of appeal was based on a nonappealable order. (See Code Civ. Proc., § 170.3, subd. (d).) Father's appellate lawyer filed a letter and a corrected notice of appeal indicating father was appealing the March 4 order "unilaterally altering, without notice, [father's] current visitation arrangement from agency approved unmonitored extended visits to 'visitation of two times a week, two hours per visit, supervised.'" We accepted the corrected notice of appeal.

SSA filed motions to take additional evidence (Code Civ. Proc., § 909; Cal. Rules of Court, rule 8.252(c)) and to augment the record (Cal. Rules of Court, rule 8.155) with a May 9, 2013 stipulation and minute order reflecting all parties except J.W. stipulated at the section 366.26 hearing that termination of parental rights and adoption was not in J.W.'s best interests, and the permanent plan was to maintain J.W. in his foster placement with services for his father and the specific goal of returning him home to his father. All parties, including J.W., stipulated to increased visitation pending a May 30, 2013 visitation review, as follows: "a. Week 1: Three times per week up to six hours per visit, supervised. Father is authorized an additional four hours per week of unmonitored visitation to participate in church or other structured activity with [J.W.]. [¶] b. Week 2: Three times per week up to six hours per visit, supervised. Father is authorized [an] additional 12 hours per week of unmonitored visitation to participate in church or other structured activity with [J.W.] [¶] c. Week 3: If visitation is reported to be progressing well and father is otherwise in compliance with the orders herein, all visitation may be unmonitored, up to 24 hours per week (but not to include overnight visitation)."

SSA did not file a respondent's brief, explaining in a letter brief it took "no issue with Father's legal claims," but later filed a motion to dismiss Father's appeal based on mootness.

## II

### DISCUSSION

Father does not oppose SSA's motions to take additional evidence or augment the record. We hereby grant these unopposed motions.

Father opposes the motion to dismiss the appeal as moot. He states the stipulation and order "do not moot the instant appeal" but rather "highlight the fact [father] has yet to receive the relief he seeks and, moreover, demonstrate that he was not treated fairly – i.e., he was denied due process."

We agree with father the May 9 visitation stipulation and order does not provide identical relief to that sought by father in the appeal. The stipulation and order lengthened visits but they remain partially supervised and the scheme provides no overnight visits. But as SSA notes, father stipulated to the new visitation schedule on May 9. If we reversed the March 4 order, the May 9 order would presumably still stand. Thus the less restrictive May 9 order based on father's stipulation effectively superseded the court's more restrictive March 4 order. Even if we ignored the father's stipulation and reversed the March 4 visitation order, the most we could do is order a hearing addressing visitation in the context of J.W.'s current best interests. But J.W.'s current best interests were addressed on May 9, and presumably again on May 30 (the parties have not advised us what occurred May 30). "It is well settled that an appellate court will decide only actual controversies. Consistent therewith, it has been said that an action which originally was based upon a justiciable controversy cannot be maintained on appeal if the questions raised therein have become moot by subsequent acts or events." (*Finnie v. Town of Tiburon* (1988) 199 Cal.App.3d 1, 10; see generally 9 Witkin, Cal.

Proc. (5th ed. 2008) Appeal, § 749, p 814.) When subsequent events render it impossible for this court, if it should decide the case in appellant's favor, to grant any effectual relief whatever, the court will not proceed to a formal judgment, but will dismiss the appeal. (*Consol. etc. Corp. v. United A. etc. Workers* (1946) 27 Cal.2d 859, 863.) Because we cannot provide father effective relief at this time, we agree father's appeal is moot.

### III

#### DISPOSITION

The appeal is dismissed as moot.

ARONSON, J.

WE CONCUR:

BEDSWORTH, ACTING P. J.

FYBEL, J.