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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SIXTH APPELLATE DISTRICT

In re DANIEL M. et al., a Person Coming
Under the Juvenile Court Law.

H038657
(Santa Clara County
Super. Ct. Nos. JD12035, JD20298,
JD20299, JD20300)

SANTA CLARA COUNTY
DEPARTMENT OF FAMILY AND
CHILDREN'S SERVICES,

Plaintiff and Respondent,

v.

KIMBERLY M.,

Defendant and Appellant.

Appellant Kimberly M. (the mother) appeals from an interim visitation order entered after the court had held the Welfare and Institutions Code section 366.26 hearing but before it had issued its decision. Her sole claim on appeal is that the juvenile court abused its discretion because the court erroneously believed that it was increasing rather than decreasing the frequency of visitation, and reduced visitation was not in the children's best interest. We reverse the juvenile court's order.

I. Background

In September 2010, the court took jurisdiction over the mother's four children due to the mother's long-standing substance abuse. At the October 2010 dispositional hearing, the children were removed from parental custody, and the mother was granted reunification services. The court ordered that she would have supervised visits with the children once a week for two hours. At the six-month review hearing in June 2011, the court continued reunification services and the same level of visitation. As of October 2011, the mother was actually visiting with the children twice a week. She continued to use PCP. At the contested 12-month review hearing in February 2012, the court terminated reunification services and set a Welfare and Institutions Code section 366.26 hearing for May 24. Visitation was continued at once a week for two hours.

The Department recommended that the permanent plan for the children be a legal guardianship with their adult brother Anthony and his girlfriend. The children were placed with Anthony and his girlfriend on May 11, 2012. The mother was continuing to visit the children twice a week, but the Department was recommending that her visitation be reduced to one supervised visit each month. Anthony and his girlfriend reported that the mother had harassed them.

At the May 24, 2012 hearing, the mother's trial counsel told the court that the mother "objects to her visitation . . . being reduced from one time a week to once a month." The court ordered the parties to mediate the issues of the appropriate permanent plan, educational rights, and visitation. The mediation was held on July 5, 2012, and the mother requested a contested Welfare and Institutions Code section 366.26 hearing, which was set for August 9.

At the August 9, 2012 hearing, the mother informed the court that she did not oppose a legal guardianship. The Department informed the court that it had changed its recommendation as to visitation from "one visit per month" to "two visits per month,

which in the intervening time the Department feels is more appropriate.” The mother sought weekly visits with the children from “Thursday through Sunday.” The children’s trial counsel agreed with the Department’s visitation recommendation. “I think it’s an appropriate minimum given the children’s very busy schedules and their capacity for visits.” She opposed the mother’s request for “weekend visits” that could not “be properly supervised.”

The court said to the mother’s trial counsel: “Well, let me then hear your arguments regarding visitation and the reasons that you would request something different than the Department and minor’s counsel are recommending.” The mother’s trial counsel argued that “two times a month for two hours supervised is just not enough and it’s not a natural setting.” The Department argued that “visitation needs to remain supervised for the protection of the children,” and, because the children had recently moved to Anthony’s care, “they need to transition to that environment” The children’s trial counsel argued that the children’s safety would be at risk if they had unsupervised, extended visits with the mother. The advocates for the children agreed with the Department’s recommendation regarding visitation.

The court took a recess to review the reports. After the recess, the court notified the parties that it would be continuing the matter to October 11, 2012 for decision. “In the interim, I am going to increase the previously ordered minimum visitation for the mother from a minimum visitation order of supervised one time a month for two hours to a minimum of two times per month for two hours each visit. [¶] I have considered the mother’s request for more expansive lengthier and overnight visits, I do not believe it is in the children’s best interest given the current circumstances to expand the minimum to her desires, but I do believe it is appropriate to reflect the visitation that has been occurring and that has been recommended by the Department by minor’s counsel and also by the advocates who have spoken to that issue today and to allow the visits to be a minimum of two times per month for two hours per visit.”

The court's signed minute order states: "The Court modifies visitation as follows: Mother is to have supervised visitation a minimum of two (2) times per month for two (2) hours each visit." The matter was continued for decision to October 11, 2012. The mother timely appealed from the court's visitation order.

II. Analysis

Visitation orders are reviewed for abuse of discretion. (*In re Brittany C.* (2011) 191 Cal.App.4th 1343, 1356.) "The abuse of discretion standard is not a unified standard; the deference it calls for varies according to the aspect of a trial court's ruling under review. The trial court's findings of fact are reviewed for substantial evidence, its conclusions of law are reviewed de novo, and its application of the law to the facts is reversible only if arbitrary and capricious." (*Haraguchi v. Superior Court* (2008) 43 Cal.4th 706, 711-712, fns. omitted.)

Here, we cannot properly evaluate the juvenile court's exercise of its discretion because its ruling was expressly based on inaccurate facts. As the mother correctly points out, the juvenile court's ruling contained three critical factual errors. The visitation order prior to the court's ruling was a minimum of one visit per *week*, not, as the court stated, one visit per *month*. The "visitation that has been occurring" was twice a *week*, not, as the court stated, twice a *month*. The juvenile court's ruling did not, as the court stated, "increase" the mother's visitation; it decreased her visitation. These were not immaterial mistakes. If the juvenile court had really intended by its ruling to "increase" the mother's visitation to "reflect the visitation that has been occurring," it would have granted the mother visitation twice a week, not twice a month. Due to these factual errors, we find the juvenile court's ruling fatally defective.

The mother also claims that the juvenile court's order was an abuse of discretion because it was not in the children's best interest. We do not agree with this contention. The juvenile court could have concluded that a temporary reduction in visitation was

merited while the children continued to adjust to their new living situation, particularly in light of the mother's recent harassment of Anthony and his girlfriend. However, due to the court's misunderstanding of the facts, we cannot discern whether the court had a proper or an improper basis for its ruling.

Consequently, the appropriate remedy is to remand the matter to allow the juvenile court to reconsider its ruling with an accurate understanding of the facts. Although the August 2012 interim visitation order has presumably been replaced by a new order at the October 2012 hearing, we cannot know whether the August 2012 order influenced subsequent visitation orders by establishing a new status quo. We therefore consider it appropriate to direct the juvenile court to reconsider any subsequent visitation orders with a correct understanding of the nature of the prior visitation orders and of the prior "visitation that has [actually] been occurring."

III. Disposition

The order is reversed.

Mihara, J.

WE CONCUR:

Premo, Acting P. J.

Bamattre-Manoukian, J.