Filed 2/25/05 In re Joanna P. CA6

**NOT TO BE PUBLISHED IN OFFICIAL REPORTS**

**California Rules of Court, rule 977(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 977(b). This opinion has not been certified for publication or ordered published for purposes of rule 977.**

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

In re JOANNA P., et al., Persons Coming Under the Juvenile Court Law.

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

Plaintiff and Respondent,

v.

DULCIE P.,

Defendant and Appellant.

_____/

H027841

(Santa Clara County Super. Ct. Nos JD14709, JD14710, JD14711)

Appellant Dulcie P.'s three children were removed from her custody in August 2003 and placed in their father's custody with family maintenance services. Between October 2003 and May 2004, Dulcie visited the children just twice and repeatedly failed to appear for her weekly scheduled visits. Dulcie was originally provided with reunification services, but those services were terminated after the court concluded that, due to her mental illness, she was incapable of caring for the children and unable to utilize reunification services. (Welf. & Inst. Code, § 361.5, subds. (b)(2), (c).) After terminating services, the juvenile court ordered weekly supervised visitation between Dulcie and the children. However,

the court provided that the social worker had "the discretion to reduce the visits" if Dulcie failed to appear for scheduled, confirmed visits. On appeal, Dulcie asserts that the court's visitation order was invalid because it improperly delegated to the social worker the court's discretion to determine the appropriate level of visitation. We conclude that the juvenile court's visitation order was not an improper delegation of the court's discretion to the social worker.

## I. Background

A petition was filed on August 4, 2003 alleging that 6-year-old Joanna, 6-year-old Katherin and 4-year-old Fernando came within the jurisdiction of the juvenile court under Welfare and Institutions Code section 300, subdivisions (b) and (j). The children were placed in their father's custody, and reunification services were ordered for Dulcie. Two psychological evaluations of Dulcie thereafter concluded that she suffered from a mental disability that rendered her unable to care for her children and unable to utilize reunification services.

Between October 2003 and May 2004, Dulcie visited the children just twice even though weekly supervised visitation had been ordered and numerous visits were arranged. She cancelled or failed to appear for many of the scheduled visits. Her only visits with the children were on December 22, 2003 and January 26, 2004. Dulcie refused to meet with the social worker and was verbally abusive.

In June 2004, the juvenile court held a contested hearing to decide whether to terminate Dulcie's reunification services and to consider the issue of visitation. The social worker recommended that Dulcie's reunification services be terminated, and the court did so.

As to visitation, the juvenile court made it clear from the outset that its focus was on Dulcie "regaining some kind of a relationship, visiting relationship, with the children." The social worker recommended that Dulcie continue to have

weekly supervised visitation with the children, and he had made substantial efforts to arrange and facilitate visits. He testified that Dulcie had refused to come and meet with him and refused to allow him to come to her residence and meet with her. This had interfered with his efforts to arrange visits. Dulcie testified that, although she "miss[ed] them," she "can't get there" to visit her children because she could neither drive nor use public transportation. Dulcie asserted that she had recently obtained approval for paratransit services that would provide her with transportation for visitation with the children.

The court asked Dulcie's trial counsel: "[D]o you think it is realistic that your client will visit her children, because the record we've had for the ten months since removal has been very, very poor, [and] it does not all have to do with [Dulcie's] health problems." Dulcie's trial counsel responded that she believed that Dulcie would visit her children, but Dulcie was "some what frail right now" and it might be better to have "a longer visit every other week to start out . . . ." Dulcie herself told the court that she would start visiting her children "[a]s soon as possible." The court noted that Dulcie "told me that before, but you have not done it." Dulcie proceeded to go through a litany of excuses for her prior failures to visit her children. The court rejected her assertions and excuses as not credible.

The attorney for the children expressed concern that a "number of times" the children had been "brought to a visit and mom didn't show," which was "clearly very detrimental to them." She suggested "a pretty minimal visitation order to start with."

The court told Dulcie "I want to make the visits work, that is my goal. Right now I want you to see your children and they want to see you." "But you know what a disappointment it is for them when they come there and you don't appear." "It breaks their hearts." "This is what we're going to do. Mr. Weidman [the social worker], let's start with a visit a week, but I want you to be flexible

with it. You two have to be in contact with each other before the visit starts. If you are not feeling well, you can't make it, you call him fast so he can call the kids off so they know that you are not going to make it." "We're going to do once a week visit, the social worker is going to work with you and we're going to call the visit off if you can't make it." Dulcie insisted that she would visit the children; "I've been trying." The court said "You have not."

The children's attorney asked the court "with respect to visitation now just in case mom fails to show up." The court replied that "[t]he social worker has the discretion to reduce the visits if the mother does not appear for visitation." The court also granted the social worker "discretion to permit the children to have family counseling with their mother if the mother is consistent with her visits." When Dulcie again told the court "I've been trying [to visit]," the court said: "Prove it to me. Prove it to me now." The court's written order provided for weekly supervised visitation and directed Dulcie to "call if she cannot make the visit." The next review hearing was set for November 16, 2004. Dulcie filed a timely notice of appeal from the court's order.

## II. Analysis

Dulcie claims that the trial court's visitation order improperly delegated the court's discretion to the social worker.

Once reunification services have been terminated, the court may terminate visitation if "it finds that visitation would be detrimental to the child." (Welf. and Inst. Code, § 361.5, subd. (f).) If the court decides to permit visitation, it "must define the rights of the parties to visitation." (*In re Jennifer G.* (1990) 221 Cal.App.3d 752, 757.) A juvenile court improperly delegates its authority if it permits another agency to determine whether or not a parent should have visitation. (*Jennifer G.* at p. 757.) *Jennifer M.* found an improper delegation

where the order merely provided for "Visitation . . . under the direction of the Department Social Services." (*Id.* at p. 755.) And this court found an improper delegation in *In re Shawna M.* (1993) 19 Cal.App.4th 1686 where the order was for "visitation to be arranged through, and approved by, the San Benito County Human Services Agency." (*Shawna M.* at p. 1688.)

In *In re Julie M.* (1999) 69 Cal.App.4th 41, improper delegation was found in an order "giving the children absolute discretion to decide whether [the mother] could visit with them." (*Julie M.* at p. 48.) In *In re Donnovan J.* (1997) 58 Cal.App.4th 1474, improper delegation was found in an order that there be no visitation unless the children's therapist gave permission. (*Donnovan J.* at p. 1475.) The court held that this order was an improper delegation because it provided no criteria for the therapist to utilize and the private therapist, unlike the social worker, was not an "arm" of the court. (*Donnovan J.* at pp. 1475-1478.) In *In re S.H.* (2003) 111 Cal.App.4th 310, a visitation order was reversed where the court had not specified the length or frequency of visitation and had permitted the children to veto visits. (*S.H.* at pp. 316-319.)

"This does not mean the juvenile court must specify all the details of visitation. The statutory scheme contemplates that the probation department (§ 280) or the county welfare department (§ 272) has discretion in recommending and implementing visitation ordered by the court." (*In re Moriah T.* (1994) 23 Cal.App.4th 1367, 1373-1374.) The juvenile court is properly guided by its obligation to promote the best interest of the minor. (*In re Danielle W.* (1989) 207 Cal.App.3d 1227, 1238.) In *Moriah T.*, the court found no improper delegation where the order specified that the parent visit minors "regularly." (*Moriah T.* at pp. 1373-1374.) In *Danielle W.*, the court found no improper delegation in an order that "Visitation will be at DCS's discretion and the children's discretion." (*Danielle W.* at p. 1233.)

"The juvenile court has the sole power to determine whether visitation will occur and may not delegate its power to grant or deny visitation to the DSS. The court may, however, delegate discretion to determine the time, place and manner of the visits. Only when the court delegates the discretion to determine whether any visitation will occur does the court improperly delegate its authority and violate the separation of powers doctrine." (*In re Christopher H.* (1996) 50 Cal.App.4th 1001, 1008-1009.) *Christopher H.* held that a "bare bones" order for "reasonable visits" was not an improper delegation. (*Christopher H.* at p. 1008-1009.)

Here, the juvenile court's visitation order was structured so that it provided for the initial length and frequency of visitation and provided specific criteria to guide the social worker in subsequently exercising limited discretion to adjust the frequency of visitation. The court ordered that Dulcie have visitation once a week for one hour and directed that "[y]ou two [Dulcie and the social worker] have to be in contact with each other before the visit starts." If Dulcie simply failed to appear for scheduled, confirmed visits, the court granted the social worker "discretion to reduce the visits" thereafter. If, on the other hand, Dulcie was "consistent with her visits," the court granted the social worker "discretion to permit the children to have family counseling" with Dulcie.

Unlike the orders in *Jennifer M.*, *Shawna M.*, *Julie M.*, *Donnovan J.* and *S.H.* that were found to be improper delegations, the juvenile court's order in the case before us ensured that visitation would take place, identified the initial frequency and length of the visits, provided specific criteria for scheduling and confirming the visits and carefully structured the limited discretion granted to the social worker to reduce the visits in the future. The juvenile court's order here was far more definite and specific than the orders that were found *not* to be improper delegations in *Moriah T.*, *Danielle W.* and *Christopher H.* The limited

discretion granted to the social worker was not an improper delegation because it provided adequate criteria for the exercise of discretion and ensured that visits would take place. We find no abuse of discretion in the juvenile court's visitation order.

## III. Disposition

The juvenile court's order is affirmed.

_____

Mihara, J.

WE CONCUR:

_____

Bamattre-Manoukian, Acting P.J.

_____

McAdams, J.