CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

ALLIANCE FOR CHILDREN'S RIGHTS, Plaintiff and Respondent, v. LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Defendant and Appellant.	B146391 (Super. Ct. No. Unassigned)

APPEAL from an order of the Superior Court of Los Angeles County. Terry B. Friedman, Judge. Affirmed.

Lloyd W. Pellman, County Counsel, Ada Gardiner, Assistant County Counsel, James M. Owens, Brandon T. Nichols and Jerry M. Custis, Deputy County Counsel, for Defendant and Appellant.

Horvitz & Levy, David S. Ettinger and Patricia Lofton; The Alliance for Children's Rights, Andrew A. Bridge, Amy Pellman and Lara J. Holtzman for Plaintiff and Respondent.

Costa Newspapers, Inc. v. Superior Court (1998) 61 Cal.App.4th 862, 868; *Kalivas v. Barry Controls Corp.* (1996) 49 Cal.App.4th 1152, 1158-1160), we would issue an OSC and have the matter briefed and argued. Because the parties and the court treated the case as an appeal, we leave it in that posture, without thereby deciding whether it constituted an injunction or a blanket order. Again, for convenience, we label the challenged ruling an order.

On the merits, DCFS raises several related challenges to the order. DCFS contends the order violates the separation of powers by wrongly (1) imposing judicial review of decisions properly made exclusively by DCFS, and (2) by compelling the spending of money. DCFS also contends the order is based on legal and factual errors and omissions, including the trial court's reliance on its own experience which was not part of the record. Finally, DCFS argues Alliance failed to show the existing practice harmed dependent wards, or that the challenged order would better protect them.

Alliance responds the order is proper as part of the dependency court's exercise of jurisdiction over each ward's case, and was legally and factually supportable.

We reject DCFS' claims and affirm the challenged order.[2]

FACTS

In April 2000, Alliance petitioned the juvenile court for a "special order" "prohibit[ing] the use of children's social worker visitation waivers by . . . [DCFS] for children placed in state licensed and foster family agency certified foster homes." The petition alleged: "Without minimal monthly visitation, Los Angeles County lacks the ability to know the full nature and quality of care foster children receive, the full extent of

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2 We grant the parties' requests to augment the record and for judicial notice. We also permit Alliance to file its supplemental November 7, 2001, letter brief.

5) Several dependency court attorneys who represented dependent children and the director of the Western Child Welfare Law Center declared less frequent visits generally were not in the children's best interest and frequently failed to detect deteriorating conditions in the placement, child, or both.

6) Alliance submitted a Public Records Act request to DCFS for the monthly number of waivers in DCFS-supervised wards and documents supporting these waivers. DCFS responded that it "does not currently compile this information and is unable to meet your request."

7) DCFS submitted extensive documentation regarding the Los Angeles County Board of Supervisors' study of the issue. The Board's Foster Care Task Force recommended the Board adopt a mandatory monthly visit standard, which the Task Force believed would require additional funding and legislation. DCFS opposed the recommendation because it would require nearly $4 million in annual costs, but noted that much of that cost could be reimbursed by the state. DCFS also responded it would be in favor of the recommendation if it was sufficiently funded.

DCFS objected to Alliance's additional briefing and evidence. DCFS moved to dismiss and to strike the additional briefing as expanding the case, and lodged evidentiary objections to the evidence.

The trial court held a hearing on September 25, 2000. Regarding DCFS' motions to strike and dismiss and objections to Alliance's evidence, DCFS argued Alliance's supplemental briefing and evidence "put [DCFS] in a position where we had no opportunity to reply to the documents that they submitted to the court. [¶] [DCFS] think[s] that basic fairness would allow us an opportunity to reply. There is a case that basically says you can't enlarge the application for a motion in a reply. The reason is that

"Mr. Owens: I think it largely depends on whether the order is based upon facts that are present within the circumstances of the case that would justify the issue --

"The Court: Let's presume that the court . . . makes a report that states facts that indicate this is a special needs child who's had recent emotional problems or any number of other possibilities.

"Mr. Owens: On first blush, I would say yes, you have the authority to do this on a case-by-case basis. That's not what [Alliance is] asking for."

The court continued its questioning: "[DCFS] concede[s] and agree[s] with [Alliance] and the court that the court has the lawful authority to issue such an order, contrary as that may be to the language of the regulation? That, according to your argument, fully and exclusively empowers [DCFS] to follow the procedure in the regulation waiver process and file the waiver. How is that different in an individual case, just on a legal basis, from the court doing so on a blanket basis?"

Mr. Owens answered: ". . . [Y]ou still have the regulation. The regulation is still valid. Perhaps maybe even the waiver that [DCFS] had made to the regulation is still valid. [¶] However, what you have is you have a court order that's saying that after reviewing this case what I'm saying on this case, because of the special circumstances of this child, that I think that I'm going to order that you visit every three weeks or whatever. And [if DCFS did not comply] what [DCFS] would be violating isn't that regulation. [DCFS] would be violating your court order."

As the colloquy continued, DCFS counsel repeatedly agreed that the court could order visitation more frequently than the regulations permitted, so long as it did so in an individual case after considering the specific facts of that case.

the court in any case where it seeks a waiver from the 30-day visitation rule. And if in fact this is the order that I make, I will set forth in detail what I would expect to be contained as the minimum required contents of such a request, the absence of which would permit the individual judicial officer to deny it without hearing." The court explained why it was considering such an order, that it would continue to study and think about the issue, and would permit each side to submit one additional brief to address all the issues previously briefed and discussed, including the tentative ruling.

On December 5, 2000, the court held a second hearing. After hearing further argument, the court issued its 6-page ruling. The court made the following findings: "1. DCFS conducted a random audit of cases in June 1999 which revealed that DCFS social workers requested waivers from the monthly visitation standard in 11% of 1100 cases audited. It appears that all such audited waivers were granted. [Declaration of Anita Bock, August 24, 2000] Based on this evidence, the Court finds that the practice of obtaining foster child visitation waivers is common practice in Los Angeles County.

"2. No evidence was presented to the Court regarding whether any process exists whereby . . . DCFS or any other entity reviews and considers individual waiver requests to determine whether the request meets the regulatory established criteria.

"3. DCFS admitted that juvenile dependency judicial officers have the authority on a case by case basis to order DCFS to visit dependent children monthly or more often if necessary.

"4. Los Angeles County juvenile dependency judicial officers rely upon DCFS court reports in order to meet their statutory obligations set forth above . . . .

"5. The information, observations, evidence and child statements contained in these court reports must be current, accurate and complete in order for Los Angeles

At the hearing, the court explained its ruling: "I don't see any basis that the Alliance . . . lacks standing. This organization and/or others like it have often brought petitions to the court for blanket orders that often have been agreed to by the County without such an objection being made.[4]

"The question about preemption is not persuasive as it is set forth here. Particularly referencing action by the County Board of Supervisors seeking legislative action or that the court is requiring the allocation of funds to carry out the order.

"The court's order will simply set forth what the court believes is consistent with the law. The court is not ordering [DCFS] to spend money in issuing whatever blanket order that I issue anymore than [in] an individual case. When a court orders a social worker to visit a child more frequently because of certain specific facts . . . , that is not an order to spend money. Even if there is an order to carry out that order, [DCFS] has to expend more money; so I'm not persuaded by the statements that the court lacks authority to require the spending of money because that's not what this court is doing. . . . [I]f that was the status of the law, the court[]s could rarely order anything because generally it cost[s] money for most orders that most courts make most of the time.

"The issue of separation of powers is an important one, and frankly, that is the reason that I declined to issue the order requested by [Alliance]. Al[though] I am not necessarily persuaded by the county's argument that to do so would violate the separation of powers. I believe that it is a possibility that it would do so. It's a close issue. It's a difficult issue. I don't have a clear answer . . . so therefore, I wanted to issue an order that I believed raised no constitutional issues.

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4 In its Opening Brief, DCFS did not raise a standing issue. It did so in its reply brief. We consider the argument waived. (*Reichardt v. Hoffman* (1997) 52 Cal.App.4th 754, 764-765; 9 Witkin, Cal. Procedure (4th ed. 1997) Appeal, §§ 616, 665, pp. 647-648, 698.)

were generally appropriate. The court as the fact finder was not required to accept the study's accuracy or conclusions, particularly where it was contradicted by the declarations of other juvenile court attorneys and judges who had handled thousands of cases and reached the opposite conclusion. In any event, the court eventually accepted the study, citing it in its factual findings. Thus, the court did not err.

Similarly, we reject DCFS' arguments that some of the court's findings were not supported by substantial evidence. The declarations and voluminous reports demonstrated the experience of many lawyers, judges, and groups who had handled and studied thousands of cases. They concluded that waivers were granted without the particularized examination DCFS concedes is required even under its own regulations, and that waivers frequently were deleterious to the child. While the declarations did not discuss specific cases in detail, they provided substantial evidence to support the court's factual conclusions. DCFS' position was supported by its small statistical study, and other reports concluding that implementing monthly visitation in all cases would cost an additional $4 million annually. The DCFS study involved a sampling of only two percent of its cases.

Children become dependent court wards because they are abused, abandoned, or neglected by their parents. (§ 300.) "The purpose of [statutes governing dependent court wards] is to provide for the protection and safety of the public and each minor under the jurisdiction of the juvenile court . . . . When the minor is removed from his or her own family, it is the purpose of this chapter to secure for the minor custody, care, and discipline as nearly as possible equivalent to that which should have been given by his or her parents. This chapter shall be liberally construed to carry out these purposes." (§ 202, subd. (a).) In addition, "[m]inors under the jurisdiction of the juvenile court who

consistent with statutes and court rules. (*Los Angeles County Dept. of Children etc. Services v. Superior Court* (1996) 51 Cal.App.4th 1257, 1267; *In re Jeanette H.* (1990) 225 Cal.App.3d 25, 34-35.) These basic principles are undisputed.

The issue is whether the trial court's order, requiring individual dependency court bench officers to determine whether a waiver is in the best interest of the particular ward being supervised by that bench officer, violates the separation of powers.

Under state standards set by the Department of Social Services, social workers must visit each dependent child monthly. (DSS Manual, §§ 31-320.2, .3, .41.) This monthly visitation requirement is mandatory, not discretionary. (*Scott v. County of Los Angeles* (1994) 27 Cal.App.4th 125, 142.) However, the manual permits exceptions: "The social worker shall be permitted to have less frequent visits, up to a minimum of once every three calendar months, only if all of the following criteria are met and written supervisory approval has been obtained: [¶] (a) The child has no severe physical or emotional problems caused or aggravated by the placement. [¶] (b) The placement is stable. [¶] (c) Subsequent to development of the case plan, and prior to any exception, the child has been visited in three of the most recent four consecutive months. [¶] (d) The case record documents the existence of at least one of the following circumstances: [¶] (1) The child is placed with a relative. [¶] (2) The child is placed with a foster parent who has provided continuous care for the child for a minimum of 12 months. [¶] (3) The child is placed voluntarily and the parent(s)/guardian(s) identified in the case plan is making visits at least monthly. [¶] (4) The child is under two years of age and less frequent social worker-child visits would facilitate reunification by permitting more frequent social worker-parent/guardian visits. [¶] (5) The child is visited once each calendar month by one or more of the following persons when such persons are providing

the court's ability to supervise visitation, nor does it conflict with a requirement that the court may inquire into the efficacy of visitation. The manual provisions simply do not remove the court's power to supervise, and ultimately control, the frequency of visitation to comply with its statutory oversight responsibilities.

If DCFS were correct, only it could decide whether less frequent visitation were appropriate. Having done so in an individual case, DCFS could prevent the court from reviewing or altering the frequency of visitation. Such an interpretation is inconsistent with the dependency court's undisputed power to regulate visitation frequency in each case.

Much, if not all, of DCFS' argument seems addressed to the original order sought by Alliance, rather than the actual, far more limited order made by the trial court. We conclude the trial court's order does not violate the separation of powers or improperly divest DCFS of its discretionary role in the waiver process.

DISPOSITION

We affirm the challenged order.

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ORTEGA, Acting P.J.

We concur:

VOGEL (Miriam A.), J.

MALLANO, J.

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The Alliance for Children's Rights
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