



## In re M.M.

2010 | Cited 0 times | California Court of Appeal | February 18, 2010

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### OPINION

Mother and father appeal from an order terminating their parental rights to their son M.M. (born in 2002) under Welfare and Institutions Code section 366.26.<sup>1</sup> Father contends in his appeal that the order terminating parental rights should be reversed because M.M. was not generally adoptable and, at the time of the section 366.26 hearing (.26 hearing), it was not likely he would be adopted in the foreseeable future. Father also argues the trial court erred in relieving his trial counsel at the end of the .26 hearing in the absence of father's consent or a noticed motion.

Mother joins in father's contentions and further argues in her separate appeal that the order terminating parental rights should be reversed because the Department of Public Social Services (DPSS) failed to prove M.M. was adoptable. Father joins in mother's arguments on appeal.

We conclude there was substantial evidence establishing that M.M. was adoptable. We further conclude dismissal of father's attorney after the juvenile court terminated parental rights does not constitute reversible error. We thus affirm the judgment.

#### 1. Procedural and Factual Background

M.M. is seven and a half years old. He is the only child of mother and father, who married in 1999. Mother has mental health problems requiring her to take medication. Her failure to adhere to her medication regimen and attend her mental health appointments, caused her to have psychotic episodes and hospitalizations.

In December 2004, the DPSS received a referral that father had been sexually abusing M.M. for the past six months. Within a week of the first referral, the DPSS received a second referral that mother attempted to commit suicide by cutting her throat and arms, while M.M. was home with her. M.M. was taken into protective custody.



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The DPSS filed a juvenile dependency petition alleging mother was bipolar and had a history of noncompliance with her psychotropic medication, mother attempted suicide in the presence of M.M., mother was hospitalized with an uncertain discharge date, and father was being investigated for sexually abusing M.M. The trial court ordered M.M. detained.

The DPSS social worker reported in the jurisdiction/disposition report submitted in January 2005, that M.M. had no medical issues and was developmentally on target for his age. Results from a child/adolescent sexual abuse examination were inconclusive. After father passed a polygraph test, M.M. was returned to his care in January 2005. Mother was discharged from the hospital on February 5, 2005. Mother and father resided separately.

In February 2005, the court granted the DPSS's motion to dismiss the petition without prejudice. The court instructed father to obtain family law custody orders and not allow mother to visit M.M. unsupervised.

In October 2005, mother again reported father was sexually abusing M.M. Father denied the allegations. He acknowledged he had not obtained custody orders as previously instructed by the court. The referral was determined to be unfounded.

In February 2006, the DPSS received another referral alleging mother had abducted M.M. and returned M.M. to father three days later. In addition, mother reportedly was not attending her medical appointments or complying with her medication plan. The DPSS received a second referral five days later, in which mother alleged father had sexually abused M.M. The second referral was determined to be unfounded.

In March 2006, mother filed allegations in a family law court that father was sexually abusing M.M. The referral was determined to be inconclusive.

A few weeks later, mother abducted M.M. Mother took M.M. to Michigan. In April 2006, mother was hospitalized in Michigan for mental health issues.

In May 2006, an investigator from the Riverside Child Abduction Unit obtained custody of M.M. and brought him back to California from Michigan. M.M. was placed in protective custody. When interviewed, M.M. stated father had sexually abused him. During a forensic examination, M.M. recanted and there were no physical findings of sexual abuse.

On May 22, 2006, the DPSS filed a second juvenile dependency petition, under section 300, subdivisions (b), (c) and (g). The court ordered M.M. detained. During an examination of M.M. for abuse, M.M. denied any sexual abuse and abuse could not be substantiated. M.M. disclosed he was afraid of mother. Both parents were arrested for alcohol-related incidents.



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Mother was released from the hospital in Michigan and remained there for outpatient treatment. In July 2006, the court dismissed the juvenile dependency petition and returned M.M. to father. Mother and father reconciled.

During a family vacation to Yellowstone National Park in October 2006, the family stopped in Las Vegas and mother abducted M.M. a third time. Mother took M.M. to Puerto Rico and reported that father had sexually abused M.M. Puerto Rican authorities conducted forensic sexual abuse testing and believed there was evidence of past sexual abuse. However, mother recanted the allegations, telling a priest she had made them up.

Upon returning to this country in October, mother made sexual abuse allegations to the Barstow Police Department and a county social worker. An investigator believed mother was coercing M.M. to disclose he was sexually and physically abused. M.M. said mother made him tell lies. When the social worker asked father to come get M.M., father declined. M.M. was permitted to leave with mother. The referral was closed.

Mother took M.M. to his paternal grandfather's home in Adelanto. The grandfather purchased tickets for mother and M.M. to go to Michigan. Mother and M.M. lived there for several weeks until a Child Abduction Unit investigator retrieved M.M. in December 2006. M.M. was again placed in protective care.

After the DPSS received a referral that mother had abducted M.M., the DPSS filed a third petition under section 300, subdivisions (b), (c), and (d). The court ordered M.M. detained. The court found mother had abducted M.M., father had failed to obtain custody orders, father had allowed mother unsupervised visits with M.M., and there were findings from a forensic evaluation in Puerto Rico of possible abuse by father.

Another forensic examination was conducted in December 2006, during which M.M. disclosed sexual abuse. There was no other evidence, however, of sexual abuse. The social worker recommended M.M. not be placed with either parent. Father had failed to protect M.M. and was manipulated by mother. Mother's mental health placed M.M. at risk. The social worker reported that M.M. appeared to be developmentally appropriate for his age and mentally and emotionally stable, although he exhibited anxiety and nervousness when he visited mother.

At the jurisdiction and disposition hearing in February 2007, the court found the allegations true, with the exception of the sexual abuse allegations. The matter was placed in family reunification status. Reunification services were continued at the six-month review hearing in August 2007.

In the 12-month status review report filed in January 2008, the social worker reported that mother had abducted M.M. in December 2007, a fourth time during a supervised visit at a restaurant. The social worker also discovered father had reconciled with mother during the summer of 2007. Father



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admitted to an investigator that he intended to get custody of M.M. and then resume his relationship with mother.

In March 2008, mother was arrested after a police chase with M.M. in the car. M.M. was released to the DPSS. He told a social worker he had slept with mother in parks, under a bridge, at the beach and on the roof of a grocery store. Mother had given him medicine that made him feel funny, and spanked and punched him.

M.M. vehemently requested no contact with mother. M.M. was diagnosed with posttraumatic stress syndrome (PTSS) and exhibited an anxious mood, short attention, and rambling speech. He was having difficulty sleeping and experienced nightmares. He was clingy and easily frightened. M.M. reportedly was making progress in therapy. In March 2008, M.M. was placed with his paternal uncle and aunt.

In April 2008, the court ordered M.M. have no further visitation with mother and supervised visits with father.

At the 12-month review hearing in May 2008, the social worker testified that M.M. had regressed from kindergarten to a preschool level and was under medical supervision for a severe illness, which included hepatitis. M.M. had been acting out at home and at school.

At the 12-month review hearing in June 2008, the court terminated both parents' reunification services and set a .26 hearing. Father filed a notice of intent to file a writ petition but it was dismissed for failure to file a writ petition.

M.M. had several placements between December 2006 and August 2008, but, according to the social worker, M.M. was "moved from his placements for issues relating to the foster homes and not due to any of [M.M.'s] behaviors."

Around July or August 2008, M.M.'s teacher reported that M.M. was misbehaving at school. He displayed aggressive behavior toward other students particularly after his visits with father. M.M. told his teacher father had sexually abused him.

On August 25, 2008, M.M. was moved from his paternal aunt and uncle's home to his current prospective adoptive home. A few days later, the court ordered visits between father and M.M. to cease immediately due to M.M. acting out after visiting with father and reporting that father had sexually abused him.

The social worker reported in the September .26 hearing report that M.M. was in good general health but his foster mother reported she was concerned about his heart. Testing was scheduled. The social worker also reported M.M. was attending therapy once a week and progressing in therapy. He



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exhibited symptoms of trauma and displayed signs of sexual abuse.

The social worker reported in the October 2008 status review report that M.M. was still timely reaching his developmental milestones. He was happy with his prospective adoptive family and feared his parents. His prospective adoptive family was committed to adopting M.M.

M.M.'s therapist, however, reported in October that M.M. had posttraumatic stress syndrome, ADHD, and bipolar mood disorder. Cessation of M.M.'s visits with father had helped. The therapist reported that M.M.'s prospective adoptive mother was upset because M.M. might not remain in public school because of his "maladaptive behaviors." She was also frustrated "with slowness in medication eval[uation] for ADD/bipolar."

In November 2008, the DPSS filed an application for psychotropic medication for M.M. due to "poor focusing, decreased performance at school, insomnia, aggressive behavior toward peers." M.M. was diagnosed with ADHD and oppositional and defiant disorder. He also had a history of heart murmurs. M.M.'s behavior at home and at school had reportedly improved with medication.

According to the .26 hearing report filed in January 2009, M.M. would likely have to repeat first grade. M.M. was in good general health. He was an active and friendly child. M.M.'s current prospective adoptive family was committed to helping M.M. deal with the trauma he had been through. This is reflected in the preliminary assessment of M.M.'s prospective adoptive parent. M.M. was happy and comfortable in his prospective adoptive home, had become closely attached to his prospective adoptive mother and brother, and stated he would like to be adopted by his prospective adoptive mother.

The adoptive assessment report stated that M.M. was closely bonded to his prospective adoptive mother and her nine-year-old son, whom she had adopted. M.M. said he did not want to return to father's care because he was afraid mother would find him. M.M. was having difficulty sleeping and concentrating at school. M.M. believed father could not protect him from mother. He feared mother would find him and abduct him again. M.M. had been receiving individual therapy and he and his prospective adoptive mother had been attending family therapy since November 2008. Additional therapy was recommended. M.M.'s medication had improved his performance in school but M.M. still required tutoring.

At the .26 hearing in January, the social worker testified that the therapist believed it was not in M.M.'s best interests to return to father. The therapist said she believed the sexual abuse allegations were true based on M.M.'s behavior. The social worker recommended terminating parental rights so that M.M. could continue bonding with his foster family unhindered by mother and father. The court continued the .26 hearing.

In February 2009, the trial court denied a request for appointment of a guardian ad litem for mother



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and denied mother a Marsden hearing.

In March 2009, mother filed a section 388 petition, which the court heard and denied on April 21, 2009. The court also denied mother's request for a continuance of the .26 hearing so that an evaluation by the Interstate Compact on the Placement of Children could be completed concerning M.M.'s placement with his maternal aunt. The court resumed the .26 hearing. Mother's attorney argued M.M. was not adoptable because M.M. had serious emotional issues, as evidenced by his need for therapy during the past year. He continued to have nightmares, shaking, and tremors, and was traumatized and terrified. The court disagreed, finding it was likely M.M. would be adopted and therefore terminated parental rights.

### 2. Sufficiency of Evidence of Adoptability

Mother and father contend there was insufficient evidence establishing M.M. was adoptable. Father argues the social worker's assessment of M.M.'s adoptability was overly optimistic and conclusory. Furthermore, father claims the evidence established M.M. was not adoptable due to his severe psychiatric, emotional, behavioral and physical problems.

Father argues these problems were caused by M.M. being repeatedly questioned about sexual abuse, being coerced into believing he was sexually abused, and by being abducted by mother four times in two years. A therapist had stated M.M. might even become a sexual "predator" due to his mental health problems.

Father also asserts M.M. had physical problems, which included being diagnosed with a vitamin deficiency, parasites and hepatitis. The type of hepatitis is unknown but father argues it could be a permanent, chronic problem and a life-threatening disease. M.M. also had a history of heart murmurs.

"We review the factual basis of a termination order to determine whether the record contains substantial evidence from which a reasonable trier of fact could find a factual basis for termination by clear and convincing evidence. [Citation.]" (In re Lukas B. (2000) 79 Cal.App.4th 1145, 1154.) In this case, we find that the record before us contains substantial evidence supportive of the conclusion that it is likely M.M. will be adopted. (§ 366.26, subd. (c)(1).)

"The issue of adoptability posed in a section 366.26 hearing focuses on the [child], e.g., whether the [child's] age, physical condition, and emotional state make it difficult to find a person willing to adopt the [child]. . . . [¶] Usually, the fact that a prospective adoptive parent has expressed interest in adopting the minor is evidence that the minor's age, physical condition, mental state, and other matters relating to the child are not likely to dissuade individuals from adopting the minor. In other words, a prospective adoptive parent's willingness to adopt generally indicates the minor is likely to be adopted within a reasonable time either by the prospective adoptive parent or by some other



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family. [Citation.]" (*In re Sarah M.* (1994) 22 Cal.App.4th 1642, 1649-1650, italics in original.)

While there was evidence M.M. had various psychological problems and some physical ailments, there was nevertheless substantial evidence that M.M. was adoptable. According to the preliminary assessment of M.M.'s prospective adoptive family, M.M.'s prospective adoptive mother was committed to adopting M.M., despite his history of problems. The DPSS visited her home and interviewed M.M. and his foster mother twice in December 2008. The DPSS social worker recommended that the court terminate parental rights and that M.M. be adopted by his current prospective adoptive mother.

At the time of the .26 hearing in April 2009, M.M. reportedly had been happily residing with his prospective adoptive mother since August 2008. His prospective adoptive mother had taken him to therapy and attended family therapy with him since November 2008. She had taken him to medical appointments, had been involved in attempting to help him with his school related-problems, and had demonstrated her commitment to caring for M.M. despite his pre-existing problems, which included PTSD, oppositional defiant disorder, ADHD, bipolar mood disorder, hepatitis, and a heart murmur. M.M.'s prospective adoptive mother wished to adopt M.M., and M.M. wanted her to adopt him.

There was also evidence M.M. had shown great improvement by the time of the .26 hearing and that most of his behavioral problems arose from his contact with mother and father. When the visits were withdrawn, M.M.'s behavior improved significantly. With therapy, M.M. was continuing to improve. Father argues that the fact that M.M. had been in therapy since March 2008, and still required therapy, established that M.M. was not adoptable.

We disagree. To the contrary, such evidence demonstrated M.M.'s prospective adoptive mother's awareness of M.M.'s problems and commitment nevertheless to helping him and adopting him. The fact that M.M.'s prospective adoptive parent expressed interest in adopting M.M. "is evidence that the minor's age, physical condition, mental state, and other matters relating to the child are not likely to dissuade individuals from adopting the minor." (*Sarah M.*, supra, 22 Cal.App.4th at pp. 1649-1650.) Furthermore, M.M.'s removal from his previous placements was reportedly, not because of M.M.'s behavior, but because of issues relating to the foster homes.

Mother argues on appeal that the evidence indicated M.M.'s prospective adoptive mother had doubts about adopting M.M. and might not be committed to adopting him. For instance, she expressed financial concerns and indicated she was having difficulty parenting M.M. Mother also argues the social worker never actually testified that M.M.'s prospective adoptive mother was committed to adopting M.M. In addition, since M.M. is an older child (seven years old), it is more difficult to find a prospective adoptive family for him.

Citing *In re Jayson T.* (2002) 97 Cal.App.4th 75, mother argues these factors establish that M.M. was





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not adoptable, even though a prospective adoptive family wishes to adopt him. Jayson T. is distinguishable since, at the time of the appeal in Jayson T., there was no prospective adoptive family who wished to adopt Jason. In addition, unlike M.M., Jason was diagnosed with reactive attachment disorder, which is "a psychological condition that means an inability to form loving attachments. It entails difficulty bonding, poor impulse control, and insensitivity to the needs of others." (Id. at p. 82.)

In re Asia L. (2003) 107 Cal.App.4th 498, also cited by mother, is distinguishable as well since there was no prospective adoptive family committed to adopting the child. There was only evidence that prospective adoptive parents were considering adoption. (Id. at p. 512.) Unlike in Asia L., in the instant case M.M. had a prospective adoptive mother, with whom he had resided for over eight months, who was committed to adopting him despite his various psychological, behavioral, and physical problems.

We conclude there was substantial evidence supporting the finding of adoptability.

### 3. Withdrawal of Father's Attorney

Father contends the juvenile court erred in ordering his attorney relieved as father's trial counsel at the end of the .26 hearing. Father asserts this was error because his attorney was privately retained, rather than appointed by the juvenile court.

When a child is placed in out-of-home care, or out-of-home placement is recommended, an indigent parent has a statutory right to counsel at the detention hearing and all subsequent proceedings. (§ 317, subds. (b), (d).) A parent also may have a constitutional right to counsel, depending on the nature of the proceedings. (In re Andrew S. (1994) 27 Cal.App.4th 541, 547-548.) There is language in In re Andrew S. suggesting that violation of the constitutional right to counsel may be reversible per se. (Id. at p. 547.) However, that language is dictum, because in Andrew S., which involved a failure to provide counsel at a .26 hearing, the court held there was no constitutional right to counsel at such a hearing. Therefore, the court did not have to decide whether, had there been a constitutional right, deprivation of that right would have been reversible per se.

Section 317 states that "The counsel appointed by the court shall represent the parent . . . at the detention hearing and at all subsequent proceedings before the juvenile court. Counsel shall continue to represent the parent, guardian, or child unless relieved by the court upon the substitution of other counsel or for cause." (§ 317, subd. (d).) This provision pertains to representation by court-appointed counsel, not privately-retained counsel.

Code of Civil Procedure section 284 applies to privately retained counsel. It provides: "The attorney in an action or special proceeding may be changed at any time before or after judgment or final determination, as follows: [¶] 1. Upon the consent of both client and attorney, filed with the clerk, or entered upon the minutes; [¶] 2. Upon the order of the court, upon the application of either client or





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attorney, after notice from one to the other." This provision applies in the instant case since father's attorney, Alfredo Amezcua, was privately retained. The record reflects that Amezcua was not relieved as father's attorney in accordance with Code of Civil Procedure section 284. There was no written consent or noticed application.

During the .26 hearing, after the juvenile court ordered mother and father's parental rights terminated, the court asked Amezcua if he was requesting to be relieved as counsel of record. Amezcua confirmed he was and, accordingly, the court ordered him relieved as counsel of record for father. The court also relieved court-appointed counsel for mother.

Regardless of any error in the trial court ordering father's attorney relieved as attorney of record, such error does not require reversal. There was no miscarriage of justice. Father was represented by counsel throughout the juvenile dependency proceedings, including during the entire .26 hearing. His attorney was not dismissed until after parental rights were ordered terminated. Furthermore, there was no objection to Amezcua's dismissal by either father or Amezcua and it is reasonably probable the result would have been the same had the court not dismissed him at that time. (In re Celine R. (2003) 31 Cal.4th 45, 59-60; People v. Watson (1956) 46 Cal.2d 818, 836; In re Ronald R. (1995) 37 Cal.App.4th 1186, 1195.) Any error in the juvenile court dismissing father's attorney was harmless.

### 4. Disposition

The judgment is affirmed.

We concur: Hollenhorst Acting P. J., King J.

1. Unless otherwise noted, all statutory references are to the Welfare and Institutions Code.

