X, SBN X
Firm
Address
City, CA zip
Tel:

Attorney for the mother

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF X

In the Matter of , Minor	Case No.: AMENDED BRIEF ON THE DELEGATION OF JUDICIAL AUTHORITY REGARDING VISITATION Hearing: Disposition Date:, 2006 Time: 1:30 P.M. Department:

TO THE HONORABLE JUDGE OF THE ABOVE ENTITLED COURT and to the parties and counsel of record:

ISSUE

Whether the proposed court order for visitation in this reunification case, which authorizes the social worker to adjust the frequency, duration and supervision of the visitation, is improper delegation of judicial authority.

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FACTS

This case is before the court for a partial Disposition Hearing, specifically regarding the proposed language of the visitation order. On X, 2006, the court made a finding that the allegations in the Petition, filed under Welfare and Institutions Code Section 300 __ are true, declared the minor a dependent of the juvenile court and ordered reunification services to the mother. The visitation order proposed by the Human Resources Agency (herein and after "the Agency"), reads as follows:

"7. Visitation between the child and his

a. Mother _____ shall occur twice per week, supervised. So long as the minimum level of court ordered visitation is offered, the social worker shall have discretion to adjust the frequency and duration, as well as supervision of visits."

Mother objects to the proposed order and files this brief in opposition to the delegation of court's authority regarding frequency, length and supervision of visitation to the social worker.

LEGAL ARGUMENT

I. VISITATION IS AN ASPECT OF CONSTITUTIONAL PARENTAL RIGHTS.

A parent's fundamental right to the care and custody of their children is constitutional. I*n re* Marilyn H. *(*1993) 5 Cal.4th 295. In Santosky v. Kramer (1982) 455 U.S. 745, the U.S. Supreme Court ruled: "The fundamental liberty interest of natural parents in the care, custody, and management of their child is protected by the Fourteenth Amendment, and does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the State." Santosky v. Kramer, at pp. 752-754.

Part of parents' fundamental right to care and custody of their children is visitation, whenever a child is removed from parents' custody in dependency proceedings. The law is clear on the fundamental importance of visitation in the reunification process. When a child is removed from custody of a parent and reunification services are ordered, the court is required to order visitation

between the child and the parent "as frequent as possible consistent with the well-being of the child" Welf & Inst Code Section 362.1(a)(1). Consequently, the determination of the exercise of that right rests with the judiciary. In re Jennifer G. (1990) 221 Cal.App.3d 752. Indeed, there is no dispute that parents, whether or not they are in reunification after their child has been removed from their care and custody, have a right to visit with their child, unless there is justification to prevent visitation.

II. THE COURT MUST ESTABLISH AND OVERSEE THE ADEQUACY OF VISITATION

The determination of the right to visitation, the length of visitation, and the frequency of visitation are part of a judicial function and must be made by the court.[1] "In the context of family reunification, the juvenile judge must establish and oversee the delivery and adequacy of reunification services, including visitation."[2] The law has placed the oversight responsibility for the actions of the social services agency with the state juvenile courts. There is no question that the power to regulate visitation between minors determined to be dependent children and their parents rests in the judiciary. (See In re Jennifer G., ibid, at 756.) "Thus, the court must define the rights of the parties to visitation. The definition of such a right necessarily involves a balancing of the interests of the parent in visitation with the best interests of the child. In balancing these interests, the court in the exercise of its judicial discretion should determine whether there should be any right to visitation and, if so, the frequency and length of visitation." . In re Jennifer G., ibid at 757. See also In re Shawna M. (1993, 6th Dist.), 19 Cal.App.4th 1686.

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[1] *See Gary C. Seiser, Kurt Kumli. California Juvenile Courts. Practice and Procedures. 2005 Edition*..p.2-258.

[2] *Leonard Edwards. Judicial Oversight of Parental Visitation in Family Reunification Cases. Juvenile Family Court Journal. Summer 2003*, p. 9 and 5. See also *Adoption of Galvin,* 773 N.E.2d 1007.

III. THE DETERMINATION OF THE FREQUENCY, DURATION AND SUPERVISION OF VISITATION IS A JUDICIAL FUNCTION. ONLY MANAGEMENT OF DETAILS OF TIME, PLACE, AND MANNER ARE SOCIAL WORKER'S RESPONSIBILITIES.

Legal decisions regarding visitation are judicial. "They may not be delegated to the social worker, the therapist or the child."[2] The court must decide whether visitation is to occur and provide the social services agency with guidelines on any prerequisites to or limitations on visitation. The court can properly delegate to the social services agency "the ministerial task of overseeing the right as defined by the court…. Such matters as time place and manner of visitation do not affect the defined right of a parent to see his or her child and do not infringe upon the judicial function" (In re Jennifer G., op cit. at 757.) [3] The court may delegate some decisions over the time, place and manner of visits, but cannot delegate the visitation decision itself. Furthermore, and perhaps it goes without saying, the visitation order may not give the social services agency or the child total discretion to decide whether visitation occurs. In re Danielle W. (1989) 207 CA3d 1227, 1237 and In re Shawna M. supra, at 1690.

What can be delegated to the social worker is necessarily everything else about visitation not ordered or agreed to by stipulation or waiver, such as time, place, and manner, not whether or not visitation is to occur, the frequency and length of visitation, nor the level of supervision.

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IV. STIPULATION OR WAIVER IS ONLY FOR EXPANSION OF VISITATION RIGHTS.

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[3] See also *Gary C. Seiser, Kurt Kumli. California Juvenile Courts. Practice and Procedures.,* p. 2-259

It is the general practice of this jurisdiction for parties to agree (or by waiver for failing to object) that the social worker has the discretion to increase the frequency and length of visits, and to allow unsupervised visitation between a parent or guardian and her/his dependent child. Given the discussion above, this practice is tantamount to a stipulation; a waiver of a right to have judicial delegation of authority over increases in visitation, since the task of controlling frequency and duration and level of supervision of visitation is exclusively a judicial function.

Because delegation of such judicial authority is categorically contradictory to the judicial oversight of visitation, permission can only be made when all the parties agree to not follow the strict mandates of the law. A parent would agree because it is not potentially detrimental to that parent, since the permission is only granted to expand the exercise of parental rights. It is also consistent with the intended goal of reunification between a parent and dependent minor for the social worker to have such discretion; if exercised, the permission can only result in positive movement toward the goal of reunification. Notably, parents would not need to exercise a right to be heard as to an expansion of the exercise of their parental rights. Nevertheless, it is noteworthy that the Jennifer G. court makes explicit that, under the theory of law laid out by it, a parent or agency would have to file a section 388 petition to modify a visitation order to either expand or restrict the right to visitation:

> "While neither the administrative agency nor the parents have the power to redefine the right to visitation, each may petition the court to modify its order defining that right; i.e., either can seek to further extend or limit the right to visitation or to terminate visitation altogether." Jennifer G., supra, at p. 757

V THE MORIAH T. COURT ERRED

With the proposed order, giving the social worker discretion to adjust the frequency, duration and supervision of visitation, the Agency is asking the court to follow In re Moriah T., 23

Cal.App 4th 1367, which rejects In re Jennifer G., supra. Incidentally, In re Christopher H., (1996) 50 Cal.App. 4th 1001 follows the reasoning of, adds little to (if anything), and commits the same errors as, the Moriah T. court. In Moriah T. the appellate court approved an order for regular visitation and delegated to the Department the responsibility to arrange and monitor visitation and held that the order did not have to specify the frequency and the length of visitation (which by default would then be delegated to the agency). To follow this case and issue the requested orders would violate the mother's due process rights.

A) MORIAH T. IMPERMISSIBLY SHIFTS THE BURDEN OF PROOF TO THE PARENT

Dependency statutes offer fundamental protection to a parent by balancing the power between the agency and parent, which the Moriah T. Court so glibly unraveled.

> "The State's ability to assemble its case almost inevitably dwarfs the parents' ability to mount a defense. No predetermined limits restrict the sums an agency may spend in prosecuting a given termination proceeding. The State's attorney usually will be expert on the issues contested and the procedures employed at the factfinding [sic] hearing, and enjoys full access to all public records concerning the family. The State may call on experts in family relations, psychology, and medicine to bolster its case. Furthermore, the primary witnesses at the hearing will be the agency's own professional caseworkers whom the State has empowered both to investigate the family situation and to testify against the parents. Indeed, because the child is already in agency custody, the State even has the power to shape the historical events that form the basis for termination." Santosky v. Kramer, supra, at p. 763.

THE fundamental and historical "raison d'etre" of the U.S. constitution (from which parental rights stem legally) is to protect the individual against the abuses (power) of the government. Consequently, the statutory scheme is one which can be reasonably characterized as existing primarily to provide procedural (due process) safeguards in order to protect parental rights. In dependency cases by statute, the burden of proof lies almost exclusively with the (governmental) Agency. Only in very specific instances, and always after a governmental agency's burden has been satisfied, does the burden shift to a parent. See, for example, WIC 361.5(c) and 366.21(e & f).

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B) FOLLOWING DUE PROCESS IS NOT OVERLY BURDENSOME OR RESTRICTIVE

The Moriah T. case, with all due respect to the Appellate Court, unrealistically characterizes the burden on the trial court to fluidly address the changes in visitation required during the course

of a dependency (see p. 1376 of the decision). From its description, the impression is given that the Agency would have to get court approval for each and every little change, including a need to immediately protect a child from harm during visitation. Obviously the well being of a child needn't be, and in practice hasn't been, compromised by an alleged inability of the agency to act whenever necessary to restrict a parent's visitation (temporarily and without court approval) whenever such a restriction is necessary to protect the safety of the child. Neither does anyone ever object in practice to the agency having the ability to increase the frequency and duration of visit (ostensibly since such an increase is NOT a further restriction of parental rights -see discussion above).

If the filing of a 388 petition, as the Moriah T. and Danielle W. courts suggests, in their respective perfunctory treatments of the burden such an order places on a parent, is not such a big deal for the parent to do if a restriction has been (allegedly) improperly placed upon visitation by the agency, then why would such a formality be a big deal whenever the agency moves to further restrict visitation (and there is a dispute)? That is, if the Agency is acting in good faith as regards to any proposed reduction of the visitation order, obtaining a court order should normally be a mere formality, as usually a parent wouldn't contest such a change. All of these factors suggest that it would not be overly burdensome for the Agency to be required to formalize further restrictions upon parental rights.

C) MORIAH T. ERRONEOUSLY CLAIMS JENNIFER G. HOLDING IS DICTA

The importance of due process to protect parental rights is high and the burden to respect such rights is not excessive. In short, due process is not something which, because it's merely inconvenient, should be so easily swept aside (see p. 137 where it disagrees with the legal theory of Jennifer G.: "the Jennifer G. dictum is at odds with the purposes and practical necessities of visitation orders in dependency proceedings.") especially since a fundamental purpose of the constitution and the due process rights pursuant to its implementation was to protect the individual from abuses of power by the government. The Moriah T. court gives itself away, as it were, by characterizing the Jennifer G. court's legal theory as dicta. Mother contends that this is an inaccurate depiction of the holding in Jennifer G. since it reads: "The matter is remanded to the juvenile court for clarification of its order for visitation between the minors and their mother and

father consistent with the principles enunciated in this opinion.", at p.759 and/or "We find that the determination of the right to visitation *and the frequency of visitation* are a part of the judicial function and must be made by the court;" at p.755 (emphasis added). In any case, the legal theory in Jennifer G. was essentially adopted as a whole by the 6th District Court of Appeals in the Shawna M. case.

D) MORIAH T. VIOLATES DUE PROCESS BY IMPERMISSIIBLY DELEGATING JUDICIAL AUTHORITY

The decision in In re Moriah T. contradicts the entire string of constitutional and statutory guarantees of parents' due process rights. This case is not followed by later cases (See In re S.B., 127 Cal.Rptr.2d 67 (2002). In *S.B.* the court also follows In re Jennifer G. , supra, 221 and held: "If the juvenile court orders visitation, than it shall give guidance as to time, place and manner of visits." In re S.B. supra, at 73.

If the social worker is allowed to exercise discretion to decrease visitation frequency and/or duration or to move visits from unsupervised to supervised without judicial intervention, the parents will be deprived of their right of notice and hearing regarding this further limitation of their parental rights. Due process of this importance necessarily involves a judicial decision. Due process must be afforded to parents before their parental rights may be restricted. In re B.G. (1974) 11 Cal.3d 679, 688-689. Thus, parents' due process rights have to be guaranteed throughout the entire dependency proceedings, including, during reunification.

The California Constitution prohibits transfer of judicial duties other than subordinate ones. (Cal. Const., art. VI, Section 22.) Given the discussion above about parental rights protections afforded under the 14th Amendment, judicial duties over visitation cannot be characterized as subordinate.

The requested order would improperly transfer judicial authority to the social worker.

CONCLUSION

The determination of the frequency, duration, and supervision of visitation, as it is an exercise of parental rights, is exclusively a judicial responsibility. Changing the visitation frequency, duration and supervision in any way is necessarily a judicial function. The requested authorization to give the social worker discretion to adjust the frequency, the duration and the supervision of the visitation would in fact allow the social worker to illegally exercise judicial authority. The court order cannot permit the social worker to do the court's job (absent stipulation or waiver). The proposed order would violate mother's due process rights.

Respectfully submitted,

Date: _ 2006

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Attorney for the Mother