

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

GILBERT C.,
Appellant,

v.

DEPARTMENT OF CHILD SAFETY AND K.C.,
Appellees.

No. 2 CA-JV 2017-0104
Filed August 28, 2017

THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.

NOT FOR PUBLICATION

See Ariz. R. Sup. Ct. 111(c)(1); Ariz. R. Civ. App. P. 28(a)(1), (f);
Ariz. R. P. Juv. Ct. 103(G).

Appeal from the Superior Court in Pima County
No. JD20170274
The Honorable Dean Christoffel, Judge Pro Tempore

REVERSED AND REMANDED

COUNSEL

Joel B. Feinman, Pima County Public Defender
By Nicholas Knauer, Assistant Public Defender, Tucson
Counsel for Appellant

Mark Brnovich, Arizona Attorney General
By Dawn R. Williams, Assistant Attorney General, Tucson
Counsel for Appellee Department of Child Safety

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MEMORANDUM DECISION

Presiding Judge Staring authored the decision of the Court, in which Judge Espinosa and Judge Kelly¹ concurred.

STARING, Presiding Judge:

¶1 Gilbert C., father of K.C., an infant, appeals from the juvenile court's dependency adjudication, challenging only that portion of the court's order denying his request for visitation with K.C. at the Pima County Jail.² For the reasons set forth below, we reverse and remand.

¶2 The Department of Child Safety (DCS) filed a dependency petition and petition for paternity on May 1, 2017. In the petition, DCS asserted K.C. was at risk of physical abuse by Gilbert based upon serious physical injuries he allegedly had inflicted on her then-three-year-old half-sibling, who at that time remained hospitalized in "critical condition." At a May 4, 2017, preliminary protective hearing, Gilbert requested visitation with K.C., explaining that family members would transport her to the jail for video visits with him. Citing *Michael M. v. Ariz. Dep't of Econ. Sec.*, 202 Ariz. 198, ¶ 8, 42 P.3d 1163, 1165 (App. 2002), Gilbert argued he has a constitutional right to visitation with K.C. DCS objected to "having a

¹The Hon. Virginia C. Kelly, a retired judge of this court, is called back to active duty to serve on this case pursuant to orders of this court and our supreme court.

²Gilbert and K.C.'s mother, who is not a party to this appeal, were not married. Although the record does not show that Gilbert's paternity has been established, K.C.'s mother claims he is named as the child's father on her birth certificate. See A.R.S. § 25-814(A)(3) (man presumed to be father of child born out of wedlock if birth certificate signed by mother and father). We therefore assume without deciding that Gilbert is entitled to challenge the juvenile court's denial of his request for visitation with K.C.

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six month old go to the jail and do video visits,” asserting “it’s to satisfy the father’s need rather than the child’s need.” At the May 4 hearing, the juvenile court ordered “no visits [with Gilbert] at the present time,” and affirmed its ruling in an unsigned minute entry.

¶3 Gilbert filed a motion for reconsideration, asserting the juvenile court could deny a parent’s constitutionally-protected visitations rights with his child only if the visits endanger the child, *see id.* ¶¶ 8, 11, and requesting the court conduct a hearing on his motion for visitation at the upcoming status adjudication hearing. On May 18, the court denied Gilbert’s motion for reconsideration, without explanation in an unsigned order. At the May 19 status adjudication hearing, the court again denied Gilbert’s request for visitation, and it confirmed its ruling in a signed minute entry filed the same day.³ This appeal followed.⁴

¶4 A juvenile court’s visitation order is a final, appealable order. *See Lindsey M. v. Ariz. Dep’t of Econ. Sec.*, 212 Ariz. 43, ¶ 7, 127 P.3d 59, 61 (App. 2006); *In re Maricopa Cty. Juv. Action No. JD-5312*, 178 Ariz. 372, 374, 873 P.3d 710, 712 (App. 1994) (“juvenile court’s order terminating visitation is a final order because it conclusively defines appellant’s rights regarding visitation of her children”). We review the court’s visitation order for an abuse of discretion. *See Michael M.*, 202 Ariz. 198, ¶ 1, 42 P.3d at 1163.

¶5 Gilbert is correct that an incarcerated parent retains the right to reasonable visitation with his child. *Id.* ¶ 8. And, “[i]t is generally presumed to be in a child’s best interest to have visitation

³Gilbert pled no contest to the dependency petition that alleged he was unable to parent K.C. based on neglect and abuse, and K.C. was adjudicated dependent as to him at the May 19 hearing. At that same hearing, DCS served Gilbert with a petition to terminate his parental rights to K.C., and the juvenile court ordered a concurrent case plan of reunification and severance and adoption.

⁴We declined to accept jurisdiction of Gilbert’s petition for special action in this matter. *Gilbert C. v. Christoffel*, No. 2 CA-SA 2017-0041 (Ariz. App. June 26, 2017) (order).

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with his or her noncustodial parent and the fact that a parent is incarcerated will not, by itself, render visitation inappropriate.” *Id.*, quoting *Thomas v. Thomas*, 715 N.Y.S.2d 818, 819 (N.Y. App. Div. 2000) (alteration in *Michael M.*). Although “[t]he decision to limit visitation rests in the juvenile court’s discretion, . . . that discretion is not wholly unfettered.” *Id.* ¶ 11, citing *Maricopa Cty. No. JD-5312*, 178 Ariz. at 375-76, 873 P.3d at 713-14. However, when the juvenile court determines, in the exercise of its discretion, that “visitation endangers the child,” it may restrict or terminate a parent’s rights. *Id.* ¶ 11.

¶6 Relying on *Michael M.*, Gilbert argues the juvenile court abused its discretion by failing to make any findings of fact or conclusions of law that K.C. would be endangered by visiting him at the jail, and contends, in any event, that the record was “insufficient to justify denial of visitation.” DCS agrees the court abused its discretion, asserting it “failed to articulate a basis for the orders denying [Gilbert’s] requests for visits” or for “finding that visits would be harmful.” DCS thus concedes “this Court should vacate the denial [of visits with K.C.] and remand the matter to the juvenile court for an order articulating a basis for the denial.” We accept DCS’s concession of error, and without expressing any opinion whether *Michael M.* calls for the required findings the parties maintain the court should have made, we remand so the court may determine whether there is sufficient evidence to support a finding that permitting K.C. to visit Gilbert at the jail would endanger her. *See id.* ¶¶ 11, 13.⁵

¶7 Accordingly, we reverse and remand the juvenile court’s order of May 19, 2017.

⁵We also offer no opinion concerning the outcome of the juvenile court’s inquiry on remand.