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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

In re NINA H., a Person Coming
Under the Juvenile Court Law.

B271943
(Los Angeles County
Super. Ct. No. CK82330)

LOS ANGELES COUNTY
DEPARTMENT OF CHILDREN
AND FAMILY SERVICES,

Plaintiff and Respondent,

v.

NINA H. et al.,

Defendants and Appellants.

APPEALS from orders of the Superior Court of Los Angeles County. Teresa T. Sullivan, Judge. As to Nina H. and T.N. reversed and remanded with directions. As to James H. appeal dismissed.

Janette Freeman Cochran, under appointment by the Court of Appeal, for Defendant and Appellant T.N.

Joseph T. Tavano, under appointment by the Court of Appeal, for Defendant and Appellant James H.

Aida Aslanian, under appointment by the Court of Appeal, for Defendant and Appellant Nina H, Minor.

Mary C. Wickham, County Counsel, R. Keith Davis, Assistant County Counsel, and William D. Thetford, Deputy County Counsel for Plaintiff and Respondent.

In this dependency case, the juvenile court removed Nina H. (minor) from the custody of her custodial parent, James H. (father), and placed her with her paternal grandmother. The juvenile court declined to place minor with her nonoffending, noncustodial parent, T.N. (mother).

Father appeals from both the jurisdictional and dispositional orders. His counsel filed a no merit brief pursuant to *In re Phoenix H.* (2009) 47 Cal.4th 835. Because there are no arguable issues, we dismiss his appeal.

Mother and minor both appeal the juvenile court's dispositional order, arguing that it was error for the juvenile

court not to place minor with mother pursuant to Welfare and Institutions Code section 361.2, subdivision (a).¹ Also, mother argues that the case plan with respect to her is not appropriate under the facts of this case.

We agree that minor should have been placed with mother. As a result, the matter must be remanded to the juvenile court to exercise its discretion under section 361.2, subdivision (b). The current case plan must be reversed. If the juvenile court decides to retain jurisdiction pursuant to section 361.2, subdivision (b)(2) or (b)(3), it will have the discretion to devise a new case plan pursuant to subdivision (b)(3).

FACTS

Background

Minor was born in August 2013.

Mother had a job at the Office of the Los Angeles County Public Defender, and she also worked part time as a tax preparer. She had a home and a car.

On December 13, 2014, mother and father were no longer together. He picked minor up from daycare and refused to return her to mother. Because mother had told father that minor could spend the Christmas holiday with him, mother waited until January 2015 to go to the Long Beach Police Department to file

¹ All further statutory references are to the Welfare and Institutions Code unless otherwise indicated.

charges. The police told her that because he was the father and there were no custody orders, there was nothing the police could do to help mother. She was told the same thing when she went to the Compton Police Department in March 2015.

At one point, father filed for child support. Mother thought the related proceedings would decide minor's custody. She learned only in early October 2015 that she needed to file for custody, and that the child support issue had nothing to do with custody. She prepared the custody papers. But she was unable to file the papers because she was arrested for accessory to murder after the police accused her of refusing to identify the person who had the murder weapon.

On October 20, 2015, law enforcement received a report that father kidnapped his girlfriend, T.F., at gunpoint. He told T.F. that she "better do what I say or I'm going to throw your body in the Compton Wash and shoot it." At the time, they were in a vehicle that father was driving, and minor was in the backseat. Subsequently, father drove T.F. to her apartment and sexually assaulted her while minor was alone in the living room.

Father was arrested on October 21, 2015. In an interview by the investigating detective, father stated he had sex with T.F., and that she orally copulated him. The interviewing detective asked if she orally copulated him because she was afraid of him, and he said that was possible. The detective searched the home

of father's mother (paternal grandmother), which is where he lived, and found a BB gun that fit the description of the gun described by T.F. The detective took minor into protective custody.

A social worker interviewed mother at the Century Regional Detention Center. She was informed of minor's detention, and asked that minor be released to mother's parents (maternal grandparents) in Modesto, California. According to mother, she expected to be bailed out of jail within one to two weeks. She stated that this was her first arrest, and she explained she had gotten caught up with the wrong people. In addition, mother denied the criminal allegations against her.

Mother reported that there was domestic violence between her and father in July 2014, and that minor was not present. According to mother, father had been arrested. In 2010, mother was involved in domestic violence with the father of minor's half-sibling, Khloe T. (Khloe).² As a result of that incident, Khloe was removed from mother's custody. The Department of Children and Family Services (Department) detained Khloe and initiated a juvenile dependency case. Eventually, Khloe was returned to mother's care. Mother asked maternal grandparents to care for Khloe when her relationship with father ended. They agreed to care for Khloe for a year. Mother had planned to bring Khloe

² Khloe is not a subject of this appeal.

back to Los Angeles, but mother later decided not to take Khloe out of school in Modesto.

The Los Angeles County District Attorney's Office declined to prosecute father due to insufficient evidence.

The Petition

On October 26, 2015, the Department filed a four-count petition under section 300, subdivision (b). It alleged that father was incarcerated and failed to make a plan for minor's ongoing care; he had a history of substance abuse and drug convictions; he had a conviction for voluntary manslaughter; and he had been arrested and charged with rape. The petition alleged that mother was incarcerated and unable to provide care for minor.

The Jurisdiction/Disposition Report

On December 21, 2015, the Department reported that minor was in a foster home. The Department detailed its interviews with the family.

On November 13, 2015, mother stated that father would never place minor at risk, she denied father failed to make a plan to care for minor, and claimed that they were "working things out." According to mother, paternal grandmother should have been given custody after minor was detained. Mother denied that father drank alcohol or used drugs during the three years they were together. She knew about his prior "convictions," but stated that "was his past" and that he was "fully capable of taking care

of” minor. He was minor’s primary caregiver because he had only temporary jobs whereas mother worked full time. She claimed that he had never been violent around her or the children, and she had no problem leaving him alone with her children. Mother said she was being charged with the unlicensed sale/loan/transfer of a firearm. As to whether she had a plan during her incarceration, mother stated that the plan was for minor to stay with father and paternal grandmother.

Father said his plan during his incarceration was to leave minor with the paternal grandmother. Though he admitted to selling drugs in the past, he claimed that he had never used them. He said he was sentenced to 19 months in prison for his first drug conviction. As for the manslaughter conviction at age 14, father said he was trying to avoid a fight but the other man came at him. Father had a knife in his hand. When the other man body-slammed him, they fell and the other man fell on father’s knife. Father said he pled to a manslaughter charge and received a 11-year sentence. He served 10 years two months and a day and a half.

Father said he was sent to the California Youth Authority and then Tehachapi State Prison. He took classes to get out early, such as anger management and yoga. He also went to Alcoholics Anonymous. He said his incarceration was before minor was born, and stated, “I’m a different man. My children

have changed my life.” Regarding his arrest for rape, he denied the allegations. He stated that he saw some inappropriate sexual related text messages with a male coworker on T.F.’s phone, and they argued about her being unfaithful. He admitted to hitting her in the head. But then they “made up” and had consensual sex.

After having sex with T.F., he drove her to her job. When he returned to her apartment, someone shot at the car 17 times while he and minor were still in it. Father believed it was T.F.’s former boyfriend. Father did not report the incident to the police because he wanted to find the shooter himself. Father admitted to having been a member of the Palmer Block Compton Crip Gang, but denied being involved since he went to prison in July 2008.

Paternal grandmother stated she was willing to care for minor.

The First Amended Petition

On February 5, 2016, the Department filed a first amended petition. Three of the four counts were unchanged. Count B-3 against father was amended to allege: “[Father] has a criminal history and unresolved history of violent acts and crimes of moral turpitude including but not limited to a conviction of Voluntary Manslaughter and has gang affiliation.” It also alleged: “On or about 10/20/15, the father raped his girlfriend, punched her in

the head, and threatened to kill her in the presence of [minor]. In addition, on or about 10/20/15, father was involved in a dangerous situation in which [minor] was in the car when father's car was fired upon.”³ The petition maintained that father's conduct and acts impaired his ability to parent and protect minor, and placed minor at risk of serious harm.

The Supplemental Report; Mother's Request for a Restraining Order; the Jurisdiction and Disposition Hearings

On March 22, 2016, the day of the jurisdiction and disposition hearing, the Department filed a supplemental report. It indicated that on March 1, 2016, the criminal charges against mother were dismissed. Mother represented that she had resumed full-time employment with the public defenders' office and part-time employment as a tax preparer. The social worker assessed mother's home and found it appropriate. Mother stated she had visited minor four times since being released from custody and asked for minor to be returned to her care.

³ In count B-3 in the first amended petition provided in the clerk's transcript, the words "raped" and "punched her" were crossed out. Also, one word is missing in that same sentence. We note that at the jurisdiction hearing, the juvenile court did not orally indicate that any words were being crossed out or deleted. Rather, it sustained the allegations as they were alleged by the Department.

At some point that same day, mother filed a request for a restraining order against father with the juvenile court. In her supporting declaration, mother stated father had threatened her numerous times; he took minor from mother's custody without mother's consent; on January 13, 2015, father called and threatened to kill mother; in March 2015, father threatened to take minor out of state; in June 2015, father threatened to beat mother; on March 22, 2016, outside the courtroom, father told mother she would never see minor again.

At the jurisdiction hearing, father was the only witness.

The juvenile court listened to argument and then proceeded to dismiss two of the three counts against father, and the lone count against mother. The count B-3 allegations were sustained. In particular, the juvenile court stated: "The [juvenile court] has before it a totality of evidence that despite the father's testimony supports the statements that father is ongoing in his criminal activity and use of force and violence to scare people to get what he wants." The juvenile court found that father's prior statements to social workers corroborated the reliability of T.F.'s claim that he kidnapped, threatened and sexually assaulted her. As a result of the foregoing, the juvenile court concluded that, by a preponderance of the evidence, the minor was a person described by section 300.

Next, the juvenile court proceeded to disposition.

Mother requested placement with her pursuant to section 361.2 because she was a noncustodial parent and the Department had not demonstrated by clear and convincing evidence that placement with her would be detrimental to minor. Mother's counsel stated, in part, that mother was "aware of the danger that father poses to [minor] and is requesting a restraining order to be issued."

Father's counsel objected to minor being placed with mother because he believed she had continuing gang involvement.

Pursuant to section 361, subdivision (c), the juvenile court found by clear and convincing evidence that returning minor to mother or father would place minor at risk of harm, and that there were no means to protect her without removal from parental custody. It noted that while "mother's counsel . . . is claiming that mother was non-custodial pursuant to [section] 361.2, mother indicates that [minor] was kidnapped from daycare by the father, but failed to ever report that to law enforcement or to take any actions to ensure the safety of her child." By clear and convincing evidence, the juvenile court found that placement with mother would be detrimental to minor's safety and well-being "at this time."

The juvenile court ordered that minor remain placed in the home of paternal grandmother. Further, it ordered reunification

services for mother, indicating that pursuant to the case plan she was required to join a domestic violence support group for victims as well as enroll in and complete anger management, parenting classes, individual counseling, and four random or on demand drug tests. If she missed any drug tests, then she would be required to go to a full drug rehabilitation program with testing and a parenting program.

Both parents were given monitored visitation.

When mother's counsel requested a temporary restraining order, the juvenile court stated that it was "striking [minor] from the restraining order," and then stated, "And I'll set the matter for a hearing[.]"

Mother, father, and minor appealed.

On May 17, 2016, the juvenile court issued a restraining order that instructed father not to contact or harass mother.

DISCUSSION

I. Placement of the Minor Not Supported by Substantial Evidence.

Minor and mother argue that the juvenile court erred when it did not grant custody of minor to mother under section 361.2. We agree.

A. Standard of Review.

Dispositional orders as well as orders made pursuant to section 361.2 are reviewed under the substantial evidence test.

(*In re T.V.* (2013) 217 Cal.App.4th 126, 136; *In re K.B.* (2015) 239 Cal.App.4th 972, 979.)

B. Relevant Law.

After a juvenile court declares a minor to be a dependent child, it must hold a disposition hearing to determine an appropriate placement for the minor. (*In re Anthony Q.* (2016) 5 Cal.App.5th 336.) Under section 361.2, subdivision (a), a minor should be placed with a noncustodial parent who desires custody unless there is clear and convincing evidence “that placement with that parent would be detrimental to the safety, protection, or physical or emotional well-being of the child.” (§ 361.2, subd. (a); *In re Marquis D.* (1995) 38 Cal.App.4th 1813, 1829.)

C. Analysis.

The only reason identified by the juvenile court that placement with mother would be detrimental to minor’s safety was that mother did not report minor’s kidnapping to law enforcement or attempt to ensure minor’s safety. This finding is not supported by substantial evidence. The record established that mother went to the police twice to report the kidnapping, only to be told that the police were powerless to help her because she did not have custody papers. Further, the record established that mother believed that the child support proceedings would determine custody. Once she learned otherwise, and that she had to file custody papers, she prepared those papers, only to

have her plans to file them thwarted by being arrested. Thus, the express basis for the juvenile court's ruling cannot be substantiated.

The Department argues that placement of minor with mother would be detrimental to her safety because there was one incident of domestic violence between mother and father in July 2014; mother stated that she had no fear that father would harm minor, and that he was fully capable of caring for minor; and mother knew that father was convicted of voluntary manslaughter when he was 14 years old, but had no concerns about leaving minor with father.

Based on the foregoing, the Department asserts that there is substantial evidence that mother cannot protect minor from father. In our view, the facts are insufficient to support such a conclusion. The domestic violence incident was almost two years old at the time of the disposition hearing, and mother and father had separated long before that hearing, so there was no risk minor would be subjected to domestic violence between her parents. There was no evidence that father ever physically harmed minor. At most, the juvenile court's findings suggested that when minor was in father's custody, there was a risk that she would be exposed to his criminal activity, or to violence directed toward him. But at the time of the disposition hearing, father was only granted monitored visitation. Thus, if minor was

placed with mother, the risk of minor being exposed to criminal acts surrounding father was unlikely. Finally, even if the juvenile court was concerned that mother would allow father unmonitored access to minor, section 361.2, subdivision (b)(3) provided the juvenile court with the tools to resolve that issue. Section 361.2, subdivision (b)(3) provides that a juvenile court can “[o]rder that the [noncustodial] parent assume custody subject to the supervision of the juvenile court,” and that the noncustodial parent can be given services. As a result, the juvenile court could have required mother to attend appropriate classes and counseling to ameliorate any parental deficits established by the evidence, and it could have otherwise entered orders designed to keep all father’s visits monitored.

The Department adverts to the fact that on the day of the disposition hearing, mother filed a request for temporary restraining order that contained a declaration stating that father had threatened mother numerous times; on January 13, 2015, father called and threatened to kill mother; in March 2015, father threatened to take minor out of state; in June 2015, father threatened to beat mother; on March 22, 2016, outside the courtroom, father told mother she would never see minor again. The Department contends that these facts compel us to affirm. The flaw in this contention is that the juvenile court did not consider mother’s declaration at the March 22, 2016 disposition

hearing. Rather, the juvenile court set the request for a temporary restraining order for adjudication on a date in the future. It was granted on May 17, 2016. Thus, mother's declaration did not provide substantial evidence to support the juvenile court's order. Moreover, it would defy logic for the juvenile court to have relied on mother's request for a temporary restraining order and supporting declaration—which was designed to protect her and minor from father—in support of the finding that mother posed a risk to minor because she did nothing to ensure her safety.

II. Case Plan Must be Reversed.

Because mother should be awarded custody, this matter must be remanded for the juvenile court to exercise its discretion under section 361.2, subdivision (b). As a result, the current case plan must be reversed.

Section 361.2, subdivision (b) provides: “If the court places the child with [the noncustodial] parent it may do any of the following: [¶] (1) Order that the parent become legal and physical custodian of the child. The court may also provide reasonable visitation by the noncustodial parent. The court shall then terminate its jurisdiction over the child. The custody order shall continue unless modified by a subsequent order of the superior court. [¶] The order of the juvenile court shall be filed in any domestic relation proceeding between the parents. [¶]

(2) Order that the parent assume custody subject to the jurisdiction of the juvenile court and require that a home visit be conducted within three months. In determining whether to take the action described in this paragraph, the court shall consider any concerns that have been raised by the child's current caregiver regarding the parent. After the social worker conducts the home visit and files his or her report with the court, the court may then take the action described in paragraph (1), (3), or this paragraph. However, nothing in this paragraph shall be interpreted to imply that the court is required to take the action described in this paragraph as a prerequisite to the court taking the action described in either paragraph (1) or (3). [¶] (3) Order that the parent assume custody subject to the supervision of the juvenile court. In that case the court may order that reunification services be provided to the parent or guardian from whom the child is being removed, or the court may order that services be provided solely to the parent who is assuming physical custody in order to allow that parent to retain later custody without court supervision, or that services be provided to both parents, in which case the court shall determine, at review hearings held pursuant to Section 366, which parent, if either, shall have custody of the child."

III. Father's Appeal is Dismissed.

We appointed counsel to represent father in this appeal. After examination of the record, counsel for father filed a brief pursuant to *In re Phoenix H., supra*, 47 Cal.4th 835, indicating an inability to find any arguable issues. On August 11, 2016, we advised father that he had 30 days in which to submit any contentions or arguments he wished us to consider. He did not submit any arguments or contentions. Accordingly, we note the following: “An appealed-from judgment or order is presumed correct. [Citation.] Hence, the appellant must make a challenge. In so doing, he must raise claims of reversible error or other defect [citation], and ‘present argument and authority on each point made’ [citations]. If he does not, he may, in the court’s discretion, be deemed to have abandoned his appeal. [Citation.] In that event, it may order dismissal. [Citation.]” (*In re Sade C.* (1996) 13 Cal.4th 952, 994.)

Father has established no error in the proceedings below, nor any legal basis for reversal. His appeal must be dismissed.

DISPOSITION

The case plan order regarding mother and the dispositional order are reversed. The matter is remanded to the juvenile court to exercise its discretion pursuant to section 361.2, subdivision (b). Father's appeal is dismissed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, Acting P. J.
ASHMANN-GERST

We concur:

_____, J.
CHAVEZ

_____, J.
HOFFSTADT