Filed 10/23/17 In re John P. CA2/7

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

In re JOHN P., a Person Coming Under the Juvenile Court Law.	B279011 (Los Angeles County Super. Ct. No. CK65359)
LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. NICOLE P., Defendant and Appellant.	

APPEAL from an order of the Superior Court of Los Angeles County, Philip L. Soto, Judge. Affirmed.

Maryann M. Goode, under appointment by the Court of Appeal for Defendant and Appellant.

Tarkian & Associates and Arezoo Pichvai for Plaintiff and Respondent.

Nicole P., mother of John P., now 14 years old, appeals from the order of the juvenile court denying her petition under Welfare and Institutions Code section 388[1] seeking a home-of-parent order or, as discussed at the hearing on the petition, restoration of reunification services for an additional six months to allow her to reunify with John. Nicole contends the court incorrectly believed it lacked authority to order additional reunification services at a post-permanency plan review hearing when the parent has already received 18 months of services and, consequently, failed to properly exercise its discretion in considering the merits of her request. Because the trial court properly based its denial of the petition on John's best interests, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

1. *The Initial Section 300 Petition*

On July 1, 2013 the Los Angeles County Department of Children and Family Services (Department) filed a petition alleging domestic violence between Nicole and her live-in boyfriend, Jose R. (the presumed father of John's younger siblings, six-year-old Nicholas R. and five-year-old Jamie R.), placed the three children at substantial risk of serious physical

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[1] Statutory references are to this code.

harm under section 300, subdivisions (a) and (b). The petition alleged the couple had a history of violent altercations, including physical abuse, in the children's presence and earlier Department intervention had not resolved the problem.[2] At the detention hearing the juvenile court released the children to Nicole and Jose, on condition the couple not fight in front of the children and participate in domestic violence classes. The court ordered counseling for all members of the family. At the jurisdiction/disposition hearing on August 8, 2013, the court sustained the petition as amended and released the children to the home of Nicole and Jose under the Department's supervision with continuing family maintenance services.[3]

2. *The Subsequent Petition Under Section 342*

On September 30, 2013 the Department detained the children after social workers witnessed a fight between Nicole

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[2] The family had a lengthy history with the Department. As a minor Nicole had been the subject of several child abuse referrals alleging neglect from 1998 until 2003. John was born in 2002 and was the subject of a 2006 substantiated allegation of neglect arising from Nicole's drug abuse that was resolved through a voluntary family maintenance (VFM) plan. A second VFM plan was initiated in 2010 after the Department substantiated allegations Nicole was emotionally abusing her children. A third VFM plan was initiated in 2012 after the Department substantiated allegations of general neglect. In addition to VFM services, Nicole completed 52 weeks of domestic violence classes as a perpetrator after she was convicted of battery of a cohabitant in 2004. She was also convicted of infliction of corporal injury on a spouse in 2007.

[3] John was released on a home-of-parent-mother order; Nicholas and Jamie with a home-of-parents order.

and Jose over texts Jose had found on Nicole's cell phone. On October 3, 2013 the Department filed a subsequent petition under section 342 alleging continuing domestic violence between Nicole and Jose and physical abuse of Nicholas. (§ 300, subds. (a), (b) & (j).) At the November 12, 2013 jurisdiction/disposition hearing the court sustained the domestic violence allegations under section 300, subdivisions (a) and (b), removed the children to shelter care and ordered Nicole and Jose to participate in reunification services. Nicole's and Jose's visits were to be monitored and separate.

John and Nicholas were initially placed together in foster care. Soon after their first placement, however, the foster parent requested the boys be moved because of interference from Nicole, who was verbally abusive with John and aggressive with the foster parent. The boys were moved to another foster home, but in December 2013 the foster parent asked that John be moved because he had become violent with her and another child in the home. Yet another placement failed in March 2014 when the foster parent reported John had become noncompliant, refusing to do his chores, bathe or communicate with the foster parent.

Meanwhile, Nicole and Jose had reconciled and were again living together. They had enrolled in the required programs, and the Department had liberalized visitation to allow joint visits. John had been placed in a temporary setting in March 2014 but was allowed to return home for an extended visit when the Department was unable to find a suitable placement close to the family. At the May 13, 2014 six-month review hearing the court found Nicole and Jose were in compliance with the case plan and returned the children to them under Department supervision. Nicole and Jose were ordered to complete their 52-week domestic

violence programs and to participate in individual and conjoint counseling, as well as wraparound services for the children. As recommended by the Department, the court maintained the same placement and services at section 364 hearings on November 10, 2014 and May 11, 2015. Neither Nicole nor Jose had yet completed a domestic violence program.[4]

3. *The Supplemental Petition Under Section 387*

On October 21, 2015, after Nicole called the police to report Jose had threatened her with a knife, the Department filed a supplemental petition under section 387 alleging Nicole and Jose's failure to comply with juvenile court orders and complete mandated services had again placed the children at a substantial risk of serious harm.[5] At the section 387 hearing on October 21, 2015 the children were released to Nicole. Jose was ordered to move out of the family home and to stay away from Nicole. He was granted monitored visitation with Nicholas and Jamie.

In response to an October 28, 2015 complaint by Jose that Nicole was yelling at the children and not feeding them, a Department investigator inspected the home and interviewed the children. The home was messy and dirty, and there was very little food in the refrigerator. Nicholas confirmed that Nicole yelled and cursed at the children. On November 4, 2015 the

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[4] In December 2014 Nicole was terminated from her domestic violence program for aggressive behavior during class. She and Jose transferred to a different program.

[5] Jose was arrested but was never charged with a crime. According to Jose, Nicole had fabricated the allegation about the knife. He told a social worker, "Everyone thinks . . . I am the angry one with the problem, but it is not me. It is Nicole . . . ."

Department filed an ex parte application pursuant to section 385 requesting the court modify its previous order and detain the children from Nicole. The court removed the children from Nicole and placed them with the paternal aunt—who lived in the same apartment—forcing Nicole to leave the residence. At the November 9, 2015 jurisdiction/disposition hearing on the section 387 petition, the court sustained the petition, terminated the home-of-parent orders, found Nicole and Jose had exhausted the time for reunification services and set the matter for a section 366.26 selection and implementation hearing.

In February 2016 the paternal aunt notified the Department she could no longer care for John because of his behavior. John had struck Nicholas several times with an iPad and had bitten his older cousin when he tried to intervene. The Department placed John in a group home.

At the March 9, 2016 section 366.26 hearing the court identified long-term foster care as the permanent plan for John and set a review of permanent plan hearing for July 7, 2016. The court identified adoption by the paternal aunt as the permanent plan for Nicholas and Jamie but, to allow time for a home study, continued the section 366.26 hearing to the same date. At the continued hearing in July, the court identified legal guardianship by the paternal aunt as the permanent plan for Nicholas and Jamie. Long-term foster care remained the permanent plan for John. Because Nicole had raised complaints about the group home, the court ordered an investigation of those complaints to assure John's safety. The court also ordered the Department to facilitate conjoint counseling between Nicole and John, provided John's therapist concurred.

John's behavior continued to deteriorate after his placement in the group home. In an April 2016 visit with Nicole and his siblings, John argued with Nicole, who threatened to tell the court she did not want him. John began to cry and accused Nicole of never talking to him and only paying attention to Jamie. Although Nicole later admitted to a social worker that John was right and promised she would visit him to discuss his feelings, she did not. In response to the court's investigation of Nicole's accusations against the group home, the program director reported that Nicole was the problem and was encouraging John to misbehave in the home and provoke the other boys into hitting him. On several occasions over the next few months John initiated fights with other boys in the home, left the home without permission or hid from staff. Although John acknowledged in July 2016 he wanted to remain in the group home, the program director reported that John, when agitated, did not respond to staff behavioral interventions and asked to call Nicole, who continued to encourage John to engage in behaviors inconsistent with his treatment goals. John's therapist advised the Department John's only trigger was Nicole. Nicole's inconsistent visits and negative reactions upset John and caused him to misbehave in the group home.

4. *The Section 388 Petitions*

On September 30, 2016 Nicole and Jose filed separate section 388 petitions requesting the return of the children. Nicole submitted proof she had completed a parenting class and had attended at least 33 of the 52 domestic violence classes. She claimed she had finished the class but had been unable to obtain a certificate because the Department had failed to make the

necessary payments.[6] The court scheduled a hearing on the petitions to coincide with the continued section 366.26 hearing for the younger children and the review of permanent plan hearing for John.

Meanwhile, after starting a fight with another child on October 2, 2016, John was arrested and taken to juvenile hall. John's therapist again expressed concern that Nicole had triggered John's violent episodes and continuing conflict with staff. John was released on October 19, 2016 and placed in a different group home. During a November 1, 2016 visit with the family, John again became upset after he was criticized harshly by Nicole, who threatened to stop trying to bring him home. Nonetheless, John continued to express his desire to return home.

The hearing for the section 388 petitions was held on November 4, 2016. Nicole and Jose submitted to the paternal aunt's legal guardianship of the two younger children, and the court terminated jurisdiction over Nicholas and Jamie. As to John, Nicole's counsel argued Nicole had completed several programs and was ready for custody. Jose's counsel supported the return of custody to Nicole and, alternatively, requested additional services to help the family reunify. John's counsel also supported reunification between John and Nicole but believed return was premature. Instead, she agreed additional services would assist John in working through his emotional issues with his parents. Nicole's counsel joined in the request for additional services if the court was not inclined to grant her custody.

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[6] The Department stopped paying for classes in November 2015 after reunification services were terminated.

John entered the courtroom at this point. The court recessed the hearing and met with John privately in chambers. Addressing John on the record, the court questioned whether it could order additional services "since the parents have already exhausted 18 months of services, which is the amount of services allowed under the law . . . . [I believe] I don't have the right to extend services to parents at this time. But I might have discretion under the code, although it's not clear that I do." However, the court continued, "I understand from your counsel that you have strong feelings about whether or not your mother should get any more services to try and get you back. . . . What would you like to tell me?" John answered he did not believe his mother should have "to go through more services." After conferring with counsel, the court also noted, "[F]rom what we discussed in chambers, [John] doesn't want to have a visit with Mom today. . . . That's indication enough to me he does not believe he wants to go home to Mom today. And I'm not going to return him to the mother. I'm not going to extend any more services to the parents." The court concluded, "Based on all the evidence adduced today in this hearing with regards to both parents' [section] 388's . . . , the court will find as to mother and also as to . . . father that it would not be in the best interest to return any of the children to the parents or to provide any additional services to either parent." The court ordered all visits and telephone calls between Nicole and John to be monitored and directed Nicole not to say or do anything to "inflame the situation or make it impossible for him to maintain his present placement . . . ." The court affirmed the selection of long-term foster care as John's permanent plan until an appropriate guardian could be identified.

Nicole appeals from the denial of her section 388 petition.[7]

DISCUSSION

1. *Section 388 and the Standard of Review*

Section 388 provides for modification of juvenile court orders when the moving party presents new evidence or a change of circumstance and demonstrates modification of the previous order is in the child's best interests. (*In re Jasmon O.* (1994) 8 Cal.4th 398, 415; *In re Stephanie M.* (1994) 7 Cal.4th 295, 317; *In re Y.M.* (2012) 207 Cal.App.4th 892, 919; see *In re Zacharia D.* (1993) 6 Cal.4th 435, 447 ["'[s]ection 388 provides the "escape mechanism" that . . . must be built into the process to allow the court to consider new information'"]; Cal. Rules of Court, rule 5.570(e).) When, as in this case, a section 388 petition is

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[7] Nicole also appealed the juvenile court's initial determination the Indian Child Welfare Act of 1978 (ICWA) (25 U.S.C. § 1901 et seq.) does not apply in this case. An April 5, 2017 order entered after this appeal was filed indicates the court reopened the issue and ordered the Department to make the necessary ICWA inquiries described by this court in *In re Andrew S.* (2016) 2 Cal.App.5th 536, 547-548. Following the Department's report on those inquiries, the juvenile court found on May 2, 2017 there was no reason to believe John was an Indian child. Based on this finding and the acknowledgment of counsel the previous order has been superseded, Nicole's ICWA contention is moot. (See *In re C.C.* (2009) 172 Cal.App.4th 1481, 1488; *In re A.R.* (2009) 170 Cal.App.4th 733, 740; *In re Yvonne W.* (2008) 165 Cal.App.4th 1394, 1404; see generally 9 Witkin, Cal. Procedure (5th ed. 2008) Appeal, § 749, p. 814 ["an action that originally was based on a justiciable controversy cannot be maintained on appeal if all the questions have become moot by subsequent acts or events"].)

filed after family reunification services have been terminated, the juvenile court's overriding concern is the child's best interests. (*Stephanie M.,* at p. 317.) The parent's interests in the care, custody and companionship of the child are no longer paramount; and the focus shifts to the needs of the child for permanency and stability. (*Ibid.*; *In re Vincent M.* (2008) 161 Cal.App.4th 943, 960.)

We are bound by familiar principles in reviewing the denial of a section 388 petition. The proper interpretation of a statute and the application of the statute to undisputed facts are questions of law, which we review de novo. (*People ex rel. Lockyer v. Shamrock Foods Co.* (2000) 24 Cal.4th 415, 432; *In re R.C.* (2011) 196 Cal.App.4th 741, 748.) We review the factual findings upon which the order is based for substantial evidence, viewed in the light most favorable to the juvenile court's order. (*In re Rebecca R.* (2006) 143 Cal.App.4th 1426, 1430.) We review the juvenile court's order for abuse of discretion and may disturb the exercise of that discretion only in the rare case when the court has made an arbitrary, capricious or "patently absurd" determination. (*In re Stephanie M., supra,* 7 Cal.4th at p. 318.) We do not inquire whether substantial evidence would have supported a different order, nor do we reweigh the evidence and substitute our judgment for that of the juvenile court. (*Ibid.*) We ask only whether the juvenile court abused its discretion with respect to the order it actually made. (*In re Jasmine D.* (2000) 78 Cal.App.4th 1339, 1351.)

2. *Notwithstanding the Juvenile Court's Erroneous Belief It Was Not Authorized To Order Further Reunification Services, It Did Not Abuse Its Discretion in Finding Further Reunification Services Were Not in John's Best Interests*

The juvenile court apparently believed it was precluded from granting additional family reunification services to Nicole because services authorized by section 361.5 had been exhausted. Section 361.5, however, does not apply to post-permanency review hearings. Once the case has proceeded to post-permanency plan review under section 366.3, subdivision (e) of that section expressly authorizes the provision of additional reunification services to the parent of a child who remains in long-term foster care if the provision of such services would be in the best interests of the child.[8] (See *D.T. v. Superior Court* (2015) 241 Cal.App.4th 1017, 1035, 1037 [removal under section 387

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[8] Section 366.3, subdivision (e), provides: "Except as provided in subdivision (g), at the review held every six months pursuant to subdivision (d), the reviewing body shall inquire about the progress being made to provide a permanent home for the child, shall consider the safety of the child, and shall determine all of the following: [¶] . . . [¶] (4) The extent of the agency's compliance with the child welfare services case plan in making reasonable efforts either to return the child to the safe home of the parent or to complete whatever steps are necessary to finalize the permanent placement of the child. If the reviewing body determines that a second period of reunification services is in the child's best interests, and that there is a significant likelihood of the child's return to a safe home due to changed circumstances of the parent, pursuant to subdivision (f), the specific reunification services required to effect the child's return to a safe home shall be described."

does "'not automatically trigger a new period of reunification services'"; section 366.3 "governs the availability of reunification services on periodic review in the post-permanency phase when the child has been placed outside the parent's home"].) Further, section 366.3, subdivision (f), states, "It shall be presumed that continued care is in the best interests of the child, unless the parent or parents prove, by a preponderance of the evidence, that further efforts at reunification are the best alternative for the child. In those cases, the court may order that further reunification services to return the child to a safe home environment be provided to the parent or parents up to a period of six months, and family maintenance services, as needed for an additional six months in order to return the child to a safe home environment." (See *B.B. v. Superior Court* (2016) 6 Cal.App.5th 563, 570 [court may consider further efforts at parental reunification during post-permanency plan review "'only if the parent proves, by a preponderance of the evidence, that the efforts would be the best alternative for the child,'" quoting Cal. Rules of Court, rule 5.740(c)(4)].) The juvenile court thus erred in concluding reunification services, if warranted, were not available to assist Nicole and John in reunifying during the post-permanency phase.

The court's misapprehension of the scope of its authority with respect to reunification services, however, does not mean it abused its discretion in denying Nicole's section 388 petition. "We typically apply a harmless-error analysis when a statutory mandate is disobeyed, except in a narrow category of circumstances when we deem the error reversible per se. This practice derives from article VI, section 13 of the California Constitution, which provides: 'No judgment shall be set aside, or

new trial granted, in any cause . . . for any error as to any matter of procedure, unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice.'" (*In re Jesusa V.* (2004) 32 Cal.4th 588, 624; accord, *B.B. v. Superior Court*, *supra,* 6 Cal.App.5th at p. 572.) "'Reversal is justified "only when the court, 'after an examination of the entire case, including the evidence,' is of the 'opinion' that it is reasonably probable that a result more favorable to the [petitioning] party would have been reached in the absence of the error."'" (*B.B.*, at p. 572, citations omitted.) Applying that standard, the error in this case was harmless.

Nicole, who was present at the hearing and bore the burden of proving an order to provide additional services would be in John's best interests, did not identify which services she believed might assist her in reunifying with John. As the court was fully aware, Nicole had a history of failing to complete court-ordered programs and was unable to prove her unsubstantiated assertion she had now completed those programs. Even if the court were inclined to order conjoint counseling with John—the services Nicole identifies on appeal—the evidence admitted at the hearing included multiple reports from the Department and those who supervised and counseled John concluding that contact between Nicole and John was detrimental to John's progress and that Nicole had failed to appreciate her role in instigating John's emotional struggles. As the court undoubtedly recognized, to the extent the Department, after consultation with John's counselors and social workers, concluded conjoint counseling would benefit John, nothing precludes the Department from seeking an order for such counseling in the future.

Perhaps most importantly to the court, which met with John privately in chambers, John, who would turn 14 just days after the hearing, stated his belief his mother "should not have to go through more services." When the court asked whether some kind of counseling between John and his mother would help, John answered, "[S]he's already done everything she can" and agreed "more counseling would not make anything better." As the court later acknowledged, John had made it clear in chambers he did not want to visit with Nicole that day, much less return to her custody.

In sum, under the facts of this case, the juvenile court's misunderstanding concerning the availability of reunification services under section 366.3, subdivision (f), if warranted by John's best interests, was harmless error. The court carefully assessed John's best interests and did not abuse its discretion by denying Nicole's section 388 petition.

DISPOSITION

The order is affirmed.

PERLUSS, P. J.

We concur:

ZELON, J.

SEGAL, J.