Filed 3/25/14 In re Evian C. CA2/3

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

In re EVIAN C., a Person Coming Under the Juvenile Court Law.	B248162
LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. ANGEL W., Defendant and Appellant.	(Los Angeles County Super. Ct. No. CK97316)

APPEAL from an order of the Superior Court of Los Angeles County, Jacqueline H. Lewis, Juvenile Court Referee. Reversed.

Robert McLaughlin, under appointment by the Court of Appeal, for Defendant and Appellant.

No appearance by Plaintiff and Respondent.

INTRODUCTION

Angel W. appeals from the order of the juvenile court terminating its dependency jurisdiction over her six-year-old daughter, Evian. As the record does not support the juvenile court's order, we reverse.

FACTUAL AND PROCEDURAL BACKGROUND

On January 7, 2013, Angel was arrested and charged with stabbing Evian's maternal aunt in the hand. Angel was reportedly abusing drugs and alcohol and appears to have mental health issues and a criminal history involving arrests for assault with a deadly weapon, possession of narcotics, prostitution, child cruelty, and theft. There is also an open child welfare case in New Jersey involving Angel and Evian. The child described witnessing Angel's violent confrontation with the aunt and other confrontations between Angel and her female companion involving knives and guns. Evian declared she was scared of Angel and cried when the maternal aunt " 'got five shots from my mommy with the knife.' "

Brandie, named by Angel as Evian's other parent, and Angel had planned to raise Evian together. Brandie was present at the child's birth but is not on the child's birth certificate, and has not adopted the child, or arranged to be Evian's legal guardian. Angel and Brandie broke up in 2009. Angel took Evian to New Jersey but returned in the spring of 2012, at which time Evian went to live with Brandie.

The juvenile court detained Evian from Angel and placed the child in the temporary custody of the Department of Children and Family Services (the Department). After declaring Brandie to be Evian's presumed parent, the court released the child to Brandie and ordered monitored visits for Angel.

A month later at the adjudication hearing, the juvenile court sustained the petition as amended alleging the facts of domestic violence and Angel's physical abuse of the maternal aunt, other companions of Angel, and Evian. (Welf. & Inst. Code, § 300, subds. (a) & (b).)[1] The court declared Evian a dependent, subject to the supervision of the

[1] All further statutory references are to the Welfare and Institutions Code.

Department, and then asked why it was necessary to continue dependency jurisdiction. As the Department's counsel had not received direction, and as its report had recommended Angel receive reunification services, counsel "submit[ed] on this issue." Evian's attorney, joined by Brandie's counsel, asked that the case be closed because the child had been placed with a nonoffending parent, i.e., Brandie, and was doing well in Brandie's care, with the result that under section 361.2, all that was needed was a family law order. Angel argued that the court should retain jurisdiction so it could provide her with family reunification services.

The juvenile court ordered the child to remain in the home of parent-Brandie, who was nonoffending. The minute order reflects that the court found that the conditions which would justify the initial assumption of jurisdiction under section 300 no longer existed and were not likely to exist if supervision were withdrawn. The court granted Brandie physical and legal custody of Evian and terminated its jurisdiction. As part of its order, the court awarded Angel monitored visitation with a professional monitor paid for by Angel until she was able to show the family law court a change in circumstances involving her participation and progress in random drug testing, anger management, individual counseling, and parenting classes. Angel appealed.

CONTENTIONS

Angel contends the juvenile court abused its discretion in terminating its jurisdiction.

DISCUSSION

Angel contends that the juvenile court prematurely terminated jurisdiction by incorrectly utilizing the test for termination under section 364, and otherwise there were many reasons for the court to retain jurisdiction under section 361.2.

The juvenile court had no authority to terminate its jurisdiction under section 364, although it appears to have utilized the standard of section 364. The court stated: "The court finds that those conditions which would justify the initial assumption of jurisdiction under WIC section 300 no longer exist and are not likely to exist if supervision is withdrawn and the court terminates jurisdiction with a family law order." This finding

mimics section 364, subdivision (c) which provides, "The court shall terminate its jurisdiction unless the social worker or his or her department establishes by a preponderance of evidence that the conditions still exist which would justify initial assumption of jurisdiction under Section 300, or that those conditions are likely to exist if supervision is withdrawn."

However, section 364 applies by its terms to "[e]very hearing in which an order is made placing a child under the supervision of the juvenile court pursuant to Section 300 and in which the child is *not removed* from the physical custody of his or her parent or guardian." (§ 364, subd. (a), italics added.) Here, the juvenile court removed Evian from Angel's physical custody and so it could not have proceeded under section 364.

Turning to section 361.2, it "describes the juvenile court's discretion when it places a dependent child with a formerly noncustodial parent." (*In re Sarah M.* (1991) 233 Cal.App.3d 1486, 1495, disapproved on other grounds in *In re Chantal S.* (1996) 13 Cal.4th 196, 204; compare *In re N. S.* (2002) 97 Cal.App.4th 167, 172 [rejecting *In re Sarah M.*'s narrow reading of § 364]; *In re Janee W.* (2006) 140 Cal.App.4th 1444, 1450-1451.) Under section 361.2, after the court orders removal of a child from a parent pursuant to Section 361, it "shall first determine whether there is a parent of the child, with whom the child was not residing at the time that the events or conditions arose that brought the child within the provisions of Section 300, who desires to assume custody of the child." (§ 361.2, subd. (a).) "If so, the court must place the child with that parent unless it finds that doing so poses a risk of harm to the child. (§ 361.2, subd. (a).)" (*In re Janee W.*, *supra*, at p. 1451.)

Although there is a suggestion in the record that Evian was living with Brandie at the time she was detained, Brandie was not a parent then, but legally merely a friend of the family. That is because Brandie was not on Evian's birth certificate, and had not adopted Evian, nor was Brandie the child's legal guardian. Brandie did not become a parent until the juvenile court detained Evian from Angel and placed the child in the temporary custody of the Department. Only then did the court declare Brandie to be Evian's presumed parent. At that point, the court ordered that Evian be placed with

Brandie, the formerly non-custodial parent who wished to take custody of the child. Accordingly, section 361.2 applied to this case.

Section 361.2 gives the juvenile court three options when it places a child with a formerly noncustodial parent: It may (1) order that the parent become the legal and physical custodian of the child, order reasonable visitation by the noncustodial parent and "then terminate its jurisdiction over the child" (§ 361.2, subd. (b)(1)); (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 (*id*., subd. (b)(2)); or it may (3) order that the parent assume custody subject to the supervision of the juvenile court and order reunification services for one or both parents (*id*., subd. (b)(3)). The court must make a finding on the record of the basis for its determination. (*Id*., subd. (c).)

"The discretion afforded the juvenile court in this area appears very broad." (*In re Sarah M*., *supra*, 233 Cal.App.3d at p. 1496.) However, before terminating its jurisdiction under section 361.2 the court must determine whether supervision was still necessary (*In re Sarah M*., *supra*, at p. 1498), "not whether the conditions that justified taking jurisdiction in the first place still exist, as required under section 364." (*In re Janee W*., *supra*, 140 Cal.App.4th at p. 1451.) We review the court's determination whether supervision was still necessary for sufficiency of the evidence. (*In re Sarah M*., *supra*, at p. 1498.)

The appellate court in *In re Janee W*., *supra*, 140 Cal.App.4th 1444, affirmed the termination of jurisdiction in a case where section 361.2, subdivision (a) applied. (*In re Janee W*., *supra*, at p. 1453.) The court reasoned that the Department's reports were unambiguous in their praise for how well the children were doing in the custody of the previously noncustodial parent, the father. (*Id*. at p. 1452.) There, the father's house was safe and clean; there was always food for the children; neither child exhibited mental or emotional issues; and the children seemed well adjusted, clean and well groomed in the father's care. (*Ibid.*)

Here, by contrast, there is no evidence whatsoever about how Evian is faring in Brandie's care. Although Brandie's attorney represented that Evian was doing well with

Brandie, "[i]t is axiomatic that the unsworn statements of counsel are not evidence. [Citations.]" (*In re Zeth S.* (2003) 31 Cal.4th 396, 413-414, fn. 11.) Instead, the record shows the Department had recommended that Angel receive reunification services, signaled that further investigation was necessary to determine whether Brandie physically abused Evian, and had only recently received an order for a mental health evaluation for the child. The record is utterly devoid of any reference to Brandie's care of Evian. Therefore, the evidence does not show, as required by section 361.2, that supervision was no longer necessary. (*In re Sarah M.*, *supra*, 233 Cal.App.3d at p. 1498; *In re Janee W.*, *supra*, 140 Cal.App.4th at p. 1451-1453.) In the absence of evidence concerning the necessity for supervision, the juvenile court's order was an abuse of discretion. (*In re Sarah M.*, *supra*, at p. 1498.)

DISPOSITION

The order appealed from is reversed.

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ALDRICH, J.

We concur:

KLEIN, P. J.

KITCHING, J.