Filed 6/6/12 In re T.P. CA2/4

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

In re T. P., a Person Coming Under the Juvenile Court Law.	B234788 (Los Angeles County Super. Ct. No. CK84042)
LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. T. P., Defendant and Appellant.	

APPEAL from an order of the Superior Court of Los Angeles County, Stanley Genser, Juvenile Court Referee. Affirmed.

Lori Siegel, under appointment by the Court of Appeal, for appellant T. P. (the minor).

Andrea Sheridan Ordin, County Counsel, James M. Owens, Assistant County Counsel, and Aileen Wong, Deputy County Counsel, for Plaintiff and Respondent.

Minor T. P. (born Nov. 2008) appeals from an order of the juvenile court allowing family reunification services with Mother. Mother has not filed a respondent's brief. The Los Angeles County Department of Children and Family Services (DCFS) filed a joinder in appellant's opening brief but subsequently abandoned its appeal. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Appellant came to the attention of DCFS on September 9, 2010, when his one-month-old brother, David Jr., died while in the care of Mother and David Jr.'s father, David Sr. Mother and David Sr. lived together, and appellant's presumed father, Paul P. (Father), was incarcerated.[1]

David Sr. reported that he found David Jr. unresponsive and cold to the touch in his bassinet at 7:00 a.m. on September 9, 2010. David Jr. was found with blood on his nose and a plastic bag covering part of his face. He also had something white on his face, which his father assumed was baby formula. Mother called 911, and David Jr. was transported to the hospital.

The parents explained that there was a plastic bag containing a bottle of shampoo rolled up in the corner of the bassinet. They had placed it in the bassinet several days prior because they wanted to hide it from the other child, appellant. They thought the bassinet was the best place to hide it. A Los Angeles Police Detective stated that the bottle of shampoo was still inside the bag when David Jr. was found, and that David Jr. was swaddled in a blanket and had mittens on his hands while he was sleeping.

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[1] Father is not a party to this appeal.

David Jr. had had colic for two weeks and had difficulty with baby formula and trouble sleeping. Mother reported that they had taken him to Kaiser over the weekend because of his fussiness. The doctor gave her pamphlets and advice on how to soothe babies with colic. She said that, on the night of his death, David Jr. awoke at 10:00 p.m., 11:00 p.m., 11:30 p.m., and 1:00 a.m., before she was able to get him to sleep at 3:00 a.m., which was when he was last seen alive.

DCFS filed a petition under Welfare and Institutions Code section 300, subdivisions (a), (b), (f), (g), and (j).[2] At the detention hearing, the juvenile court found that continuance in Mother's home was contrary to the child's welfare and vested temporary placement and custody with DCFS. However, the court noted that the medical reports indicated the death was accidental. Therefore, unless the death was shown to be intentional, the court considered it to be a tragic accident and that reunification services should eventually be provided. The court gave DCFS discretion to release appellant to any appropriate relative, and appellant was placed in a foster home during the investigation of relatives.

In an October 2010 jurisdiction/disposition report, the caseworker stated that the foster mother reported that appellant "demonstrates some behavioral problems, including hitting others and swearing." DCFS stated that, because the cause of David Jr.'s death was still unknown, it was unable to make a recommendation for adjudication and disposition and so asked for a continuance until the autopsy results were received.

DCFS filed an addendum report on November 19, 2010, which contained a report of an interview of Father. Father was incarcerated when appellant was born and did not contribute to his support.

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

The November 2010 report stated that David Jr. was in Mother's care at the time of his death, and that Mother and David Sr. left the bag containing the shampoo in the bassinet even though "it is common knowledge that a plastic bag is a safety hazard to many children." Mother and David Sr. should have known that they were endangering the baby by leaving the plastic bag in the bassinet, but they did not remove it, "thus establishing a detrimental and fatal environment." DCFS recommended that no family reunification services be provided, citing section 361.5, subdivision (b)(4), which states that reunification services need not be provided where the parent has caused the death of another child through abuse or neglect.

At the February 4, 2011 adjudication hearing, Stephen Scholtz, the coroner, testified that "the cause of death is a sudden unexpected death." Scholtz explained that he had not considered whether the plastic bag caused the death because he thought it was a stiff plastic bag.[3] Scholtz testified that he was not able to rule out suffocation as the cause of death, but that the coroner's office was unable to determine whether the cause of death was natural or accidental. There was no evidence of intentional asphyxiation. The case therefore had been closed as an undetermined manner of death.

The juvenile court concluded that there was no evidence that the death was intentional and so dismissed the allegation under section 300, subdivision (a). The

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[3] When Scholtz performed the autopsy, he did not know that the plastic bag had been found stuck to the baby's face.

court sustained the allegations under subdivisions (b) and (f), regarding failure to protect and the death of another child, and dismissed the remaining allegations.[4]

DCFS filed an interim review report dated April 19, 2011. The foster mother reported that Mother called regularly to check on appellant. A caseworker reported that, in a monitored visit on December 17, 2010, Mother was calm and patient with appellant, brought him toys, and played with him. DCFS recommended no family reunification services be given to Mother because of David Jr.'s death, but it did recommend family reunification services for Father, despite his continued participation in a "criminal lifestyle" and a "gang-banging lifestyle."

Prior to the May 2011 disposition hearing, Mother submitted a progress letter indicating that she had been attending individual counseling once or twice a week for two months, as well as a certificate of completion of a 20-week parenting class. She testified that she had been learning how to discipline appellant and how to deal with his feelings and her own feelings.

Mother testified that she had been visiting appellant once a week, or when the foster mother was able to make it. The foster mother lived in Palmdale, so Mother took a 6:30 a.m. train in order to be at a McDonald's for the 10:00 a.m. appointment. Mother stated that she sometimes did not visit because she did not have a bus pass or money for the train, but DCFS had given her bus tokens and bus passes.

Mother testified about what she had learned in her parenting course and that she felt a mother-son bond with him. DCFS had given Mother referrals for

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[4] On February 25, 2011, DCFS filed a section 342 petition, alleging failure to protect and no provision for support by Father, under subdivisions (b) and (g). The juvenile court sustained the allegations.

counseling, but she chose a program from the telephone book. DCFS was unable to verify the credentials of the therapist Mother went to.

Following a hearing, the court took the matter under submission to decide whether to allow Mother reunification services. After reviewing the reports, the testimony, and Mother's participation in treatment, the court decided to order reunification services.

The court noted that, although there was no evidence David Jr.'s death was intentional, the circumstances were suspicious. Nonetheless, the court reasoned that the primary concern in all the reports was Mother's lack of parenting skills, evidenced by her lack of empathy for appellant and lack of appropriate interactions with him. The court therefore expressed its hope that continued parenting classes would help and ordered her to participate in individual counseling. The court ordered family reunification services to both parents and ordered Mother to participate in an interactive parenting class, and ordered that her individual counseling be with a DCFS-approved therapist. Appellant filed a timely notice of appeal.

DISCUSSION

Appellant contends that the juvenile court abused its discretion by ordering family reunification services for Mother because Mother failed to establish that reunification services are in appellant's best interests.

"'On appeal, the "substantial evidence" test is the appropriate standard of review for both the jurisdictional and dispositional findings. [Citations.] The term "substantial evidence" means such relevant evidence as a reasonable mind would accept as adequate to support a conclusion; it is evidence which is reasonable in nature, credible, and of solid value. [Citation.]' [Citation.] 'In making this

determination, all conflicts are to be resolved in favor of the prevailing party, and issues of fact and credibility are questions for the trier of fact. [Citation.] In dependency proceedings, a trial court's determination will not be disturbed unless it exceeds the bounds of reason. [Citation.]' [Citation.]" (*In re E.B.* (2010) 184 Cal.App.4th 568, 574-575.) We conclude that the trial court's determination did not exceed the bounds of reason and therefore affirm.

"Section 361.5, subdivision (a) explicitly directs the juvenile court to order child welfare services for the child and the child's parents whenever a child is removed from a parent's custody. 'This requirement implements the law's strong preference for maintaining the family relationship if at all possible. [Citation.]' [Citation.] Limited exceptions to this rule are listed in section 361.5, subdivision (b)." (*In re Ethan N.* (2004) 122 Cal.App.4th 55, 63-64 (*Ethan N.*).)

As pertinent here, section 361.5, subdivision (b)(4), states that "[r]eunification services need not be provided . . . when the court finds, by clear and convincing evidence, . . . [¶] [t]hat the parent or guardian of the child has caused the death of another child through abuse or neglect." "The court shall not order reunification for a parent or guardian described in paragraph . . . (4) . . . of subdivision (b) unless the court finds, by clear and convincing evidence, that reunification is in the best interest of the child." (§ 361.5, subd. (c).) We "cannot reverse the juvenile court's determination, reflected in the dispositional order, of what would best serve the child's interest, absent an abuse of discretion. [Citation.]" (*Ethan N.*, *supra*, 122 Cal.App.4th at pp. 64-65.)

"It has often been noted that '[f]amily preservation, with the attendant reunification plan and reunification services, is the first priority when child dependency proceedings are commenced.' [Citation.]" (*Ethan N.*, *supra*, 122 Cal.App.4th at p. 65.) However, where, as here, subdivision (b)(4) applies, "'the

general rule favoring reunification is replaced by a legislative assumption that offering services would be an unwise use of governmental resources. [Citation.]' Subdivision (b)(4) of section 361.5 evidences the Legislature's recognition that some situations are so extreme as to require extraordinary caution in recognizing and giving weight to the usually desirable objective of family preservation. As noted in *In re Alexis M.* (1997) 54 Cal.App.4th 848, 850–851, when child abuse results in the death of a child, such abuse 'is simply too shocking to ignore' in determining whether the offending parent should be offered services aimed at reunification with a surviving child." (*Ibid.*)

Appellant relies on *Ethan N.*, in which the appellate court held that the juvenile court abused its discretion in granting reunification services to the mother. However, the facts of *Ethan N.* are quite different from those presented here. In *Ethan N.*, there was extensive evidence that the child who died had been abused. The section 300 petition alleged the child died as the result of his mother's neglect, "'in that [he] . . . sustained injuries consisting of an obstruction of the esophagus, a contusion to the lower portion of the head, a contusion to the lower back, a burn on the buttocks, anal penetration, six broken ribs, and evidence of six prior broken ribs.'" (*Ethan N.*, *supra*, 122 Cal.App.4th at p. 59.) In addition, the mother had received extensive services for her three other children and numerous referrals for abuse and neglect of those children. There was evidence of methamphetamine use, spousal abuse, and physical abuse of the other children.

Unlike *Ethan N.*, there was no substantial evidence that David Jr.'s death was intentional and no evidence that he had ever been abused. The circumstances of David Jr.'s death are nothing like the horrifying circumstances of the child's death in *Ethan N.* Nor was there any evidence here of abuse or neglect of appellant, or of spousal abuse or drug use. In contrast to the "numerous referrals"

regarding abuse and neglect of other children in *Ethan N.*, the referral after David Jr.'s death was Mother's first referral to DCFS. (*Ethan N.*, *supra*, 122 Cal.App.4th at p. 60.) Moreover, the minor in *Ethan N.* had been "detained within days of his birth and thereafter remained with the same caretaker, a relative who was ready and willing to provide long-term care." (*Id.* at p. 67.) By contrast, appellant was not detained until he was nearly two years old.

In deciding to grant reunification services, the juvenile court here reasoned that the primary concern in the reports on Mother was her lack of parenting skills. This finding is supported by the record. The DCFS reports indicated that Mother was 19 years old when David Jr. died, and that she did not seem to be aware of the dangers of having a plastic bag tucked into the side of the bassinet.

The court in *Ethan N.* identified several factors to be considered in determining whether reunification services are in the child's best interest. These include "a parent's current efforts and fitness as well as the parent's history" and the gravity of the problem that led to the dependency. (*Ethan N.*, *supra*, 122 Cal.App.4th at p. 66.) In addition, the court may consider "[t]he 'strength of relative bonds between' the dependent child and '*both* parent and caretakers.'" (*Id.* at p. 67.)

The record indicates that Mother is making efforts to learn how to be a better parent. Her history also supports the juvenile court's grant of reunification services because this was her first referral to DCFS, and there is no evidence in the record of abuse of other children, domestic abuse, or any other factors that would place appellant at risk. (Compare *In re William B.* (2008) 163 Cal.App.4th 1220, 1228 [holding that the juvenile court abused its discretion in offering reunification services by failing to consider the children's need for stability and continuity, where the children had been removed from both parents' custody three times and

from the mother's custody an additional time]; *Deborah S. v. Superior Court* (1996) 43 Cal.App.4th 741, 744-748 [affirming the denial of reunification services and reciting a litany of injuries and abuses inflicted non-accidentally on the child].) The gravity of the problem that led to the dependency also supports the juvenile court's decision because, unlike *Ethan N.* and *Deborah S.*, where the abuse clearly was intentional and extensive, this case involved a death whose cause the coroner was unable to determine and no other evidence of abuse.

The juvenile court did not abuse its discretion in ordering reunification services for Mother.

DISPOSITION

The order appealed from is affirmed.

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WILLHITE, J.

We concur:

EPSTEIN, P. J.

SUZUKAWA, J.