Filed 10/4/16 In re Isabella T. CA2/3

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

In re ISABELLA T., a Person Coming Under the Juvenile Court Law.	B270401
LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. RENEE H., Defendant and Appellant; MICHAEL T., Defendant and Respondent.	(Los Angeles County Super. Ct. No. CK34699)

APPEAL from an order of the Superior Court of Los Angeles County, Amy Pellman, Judge. Reversed and remanded.

Cristina Gabrielidis, under appointment by the Court of Appeal, for Defendant and Appellant.

No appearance for Plaintiff and Respondent.

Emery El Habiby, under appointment by the Court of Appeal, for Defendant and Respondent.

INTRODUCTION

Renee H., mother of newborn Isabella, appeals from the order of the juvenile court terminating its jurisdiction over the child pursuant to Welfare and Institutions Code section 364.[1] She contends that the court denied her due process when it declined her request for a contested evidentiary hearing on the custody and visitation portion of the court's exit orders. The Department of Children and Family Services (the Department) informed this court that it took no position on the appeal. Presumed father Michael T. filed a respondent's brief defending the challenged order. We conclude that the juvenile court prejudicially erred and reverse.

FACTUAL AND PROCEDURAL BACKGROUND

1. *The dependency*

In early February 2015, newborn Isabella was detained from mother after the two tested positive for methamphetamine. Mother and father were no longer in a relationship.

Paternal grandmother Louise is a member of the San Pasqual Band of Mission Indians (the Tribe) and lives on the Tribe's reservation. The Tribe determined that Isabella was eligible for membership as an Indian Child and requested, pursuant to the preference in the Indian Child Welfare Act, 25 U.S.C. § 1901 et seq. (ICWA), that the juvenile court place the child with Louise. By the time she was two months old, Isabella was living with Louise.

Mother immediately enrolled in a drug treatment center's inpatient program where she actively participated, made clear progress, and produced only negative drug test results. By the time of the hearing challenged in this appeal, mother had graduated from her program and moved to a sober living facility. She also had overnight visits with the child at Louise's home.

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[1] All further statutory references are to the Welfare and Institutions Code, unless otherwise noted.

Both parents cooperated with the Department and appeared to care a great deal about Isabella's well-being. They both wanted custody. Father wanted mother to be in Isabella's life.

In March and April 2015, the Director of the Tribal Family Social Services, Karan Kolb, provided the court with two back-to-back declarations. Kolb reported that Isabella was doing well with Louise, whose placement met community standards. The Tribe found the arrangement complied with ICWA. Father maintained his relationship with Isabella and all reports about his visits were positive. He cared for the child appropriately and had Louise's support. Louise reported positive interactions between mother and Isabella.

In her second declaration filed just prior to the jurisdiction and disposition hearing, Kolb opined, contrary to her first declaration, that "[a]ctive efforts have *not* been made by the County of Los Angeles in this case to prevent the removal of an Indian Child" and to provide father with the services necessary to prevent the family's breakup. (Italics added.) Father had immediately sought culturally appropriate services from his Tribe and from Tribal Family Services. Kolb recommended that father be monitored by the Tribal Social Services and receive three months of Tribal Prevention Services. The Tribe requested that father's past history with drugs not be a deciding factor for removal as the Tribe considered father to be non-offending. Instead, Kolb recommended that custody of Isabella be "given immediately to her father." As for mother, Kolb relayed Louise's reports that visits went well and interaction between mother and daughter were "positive." However, Kolb believed that returning Isabella to mother prior to completion of her drug treatment program was ill advised because a premature return could result in serious emotional or physical damage to the child.

The juvenile court declared Isabella a dependent under section 300, subdivision (b), finding true the petition's allegations that Isabella was born with a positive toxicology screen for amphetamine and methamphetamine and that both of her parents have substance abuse histories. The court removed the child from mother's custody and placed her with father under the supervision of the Department on the condition that he

reside with Louise. The court awarded mother supervised visitation with Departmental discretion to allow father to serve as monitor, and unsupervised visits in her placement. The court also gave the Department discretion to allow mother weekend and overnight visits. The court then continued the case for six months for a judicial review pursuant to section 364 to consider terminating its jurisdiction.

Three weeks later, mother wrote to the juvenile court that she had had fewer visits than the amount ordered by the court. Mother was "very concerned" that her visitation had been decreased and she worried that father was engaging in parental alienation. Concerned that her parental rights were not being honored, mother requested that the court consider placing Isabella with her.

2. *The section 364 hearing*

In advance of the section 364 hearing, the Department recommended that the juvenile court terminate jurisdiction and grant father sole legal and physical custody and mother unmonitored visitation. The Department saw no child safety concerns and found that both parents were successfully completing their case plans. The "biggest issue" was the distance between mother's and father's residences.

At the scheduled section 364 hearing on October 28, 2015, mother's attorney informed the juvenile court that she was working with father and Isabella's attorney on a custody arrangement and, as it appeared she would need more time, mother requested a "back-up contest[ed hearing] date" on any unresolved custody issues. Asked what those issues were, counsel explained that *mother wanted joint physical custody*. Father stated he was "fine with Mother having every other weekend and week," but noted that joint physical custody could be difficult because father lived in San Diego and mother in Long Beach.

After going off the record, the juvenile court returned with its ruling that "mother will have weekly visitation unmonitored. Father will provide transportation first, third, fifth weekends to Long Beach. Mother will provide transportation to San Diego, in San Diego, on the second and fourth weekends. *We will say Sunday*, but you guys can work it out if you have another day. Okay. And you are going to share holidays . . . . And you

can work out who gets 'odd' and who gets 'even.' " (Italics added.) The court stayed the matter to October 30, 2015 pending receipt of the juvenile custody order.

The ensuing custody order reflected the above plan and delineated a holiday schedule. At the October 30, 2015 hearing for receipt of that order, and for "clarification of orders," mother again asked the juvenile court to set the matter for a contested hearing on custody and visitation. Mother explained that she understood from the previous hearing that she would have full weekend visitation and she wanted joint custody, and she had wanted a contested hearing about liberalized visitation. The court denied her request for an evidentiary hearing on the ground that it was too late for the court to revisit its order. While mother might have been confused, the court believed it had been "very clear" in specifying day visits. The court noted however that it had liberalized mother's visitation, per her request, in that she would see the child more often than before termination of jurisdiction, and father would do the bulk of transportation. Mother voiced her objection and reiterated that on October 28th she had disagreed with the Department's recommendations and had requested an evidentiary hearing to contest them. The court filed its order on October 30, 2015. Mother's appeal followed.

DISCUSSION

Mother contends that the juvenile court violated section 364 and denied her due process when it refused her request to hold a contested review hearing about custody and then made "material changes" to its order without notice.[2]

Under section 364, subdivision (c), "After hearing any evidence presented by the social worker, the parent, the guardian, or the child, the court shall determine whether continued supervision is necessary. 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 . . . ." When the juvenile court terminates jurisdiction, it may fashion exit orders. (*In re Armando L.* (2016) 1 Cal.App.5th 606, 616 (*Armando L.*).) Such orders

[2] As we are reversing the order appealed from, it is unnecessary to address the latter contention concerning changes to the exit order.

include custody and visitation, and remain in effect until they are modified or terminated by the family court. (*Ibid*.; § 362.4.)

While this appeal was pending, the Fifth District Court of Appeal issued its opinion in *Armando L*., *supra*, 1 Cal.App.5th 606. There, the mother repeatedly told the juvenile court that she wanted a contested hearing and opposed the agency's recommendations to terminate jurisdiction and grant the father physical custody of the child, arguing that such a plan was not in the child's best interests. The mother's attorney believed, and the agency agreed, that mother did not have standing to contest the matter at the section 364 hearing. (*Armando L.*, at pp. 613-614.) *Armando L*. held it was error to deny mother an evidentiary hearing on the issues that she attempted to raise related to the court's jurisdiction and exit orders. (*Id*. at pp. 619-620 & 621.) The court explained that section 364 "expressly makes clear the parent, guardian, or child may offer evidence on this question." (*Armando L.*, at pp. 615 & 617-618, citing § 362.4.)

Just as in *Armando L*., mother here repeatedly requested a contested evidentiary hearing on the issues of joint physical custody and overnight visitation, at two hearings, and reiterated her disagreement with the Department's recommendations to the contrary. She also objected when the juvenile court denied her request for a contested hearing. Pursuant to *Armando L*., the juvenile court's denial of an evidentiary hearing on the issues related to the court's jurisdiction and exit orders was error.

Father counters that this case was governed by section 361.2, not section 364. Under section 361.2, he argues, the juvenile court was not obligated to grant mother an evidentiary hearing on the exit orders. Father is wrong. Section 361.2 applies when a child is placed with a noncustodial parent (*id*., subd. (a)),[3] whereas section 364 applies

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[3] Section 361.2 reads in relevant part, "When a court orders removal of a child pursuant to Section 361, the court 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. If that parent requests custody, the court shall place the child with the parent unless it finds that placement with that parent would be detrimental to the safety, protection, or physical or emotional well-being of the child."

when the dependent child "*is not removed from the physical custody of his or her parent*." (§ 364, subd. (a), italics added.) The minute order from the adjudication and disposition hearing here is ambiguous as it could be read to apply to one or both parents.[4] However, father asserts in his appellate brief, and mother concurs, that the court "removed Isabella from *the mother's* custody" only. (Italics added.) Thus, by father's own admission, the child was "*not removed from the physical custody of* his or her parent, [i.e., father]" (just as the Tribe had requested), with the result that section 364, not section 361.2, governed the hearings on October 28 and 30, 2015. (§ 364, subd. (a), italics added.)

Turning to prejudice, *Armando L*. rejected the agency's argument that any error was harmless. The court stated: "Due process includes the right to be heard, adduce testimony from witnesses, and to cross-examine and confront witnesses. [Citation.] These procedures were not followed in this section 364 hearing. We are left to guess as to what evidence mother may have presented, an impossible task without a record based on an evidentiary hearing. We are a court of review, not a tribunal of speculation." (*Armando L*., *supra,* 1 Cal.App.5th at pp. 620-621.)

Likewise here, in fixing visitation, the juvenile court balances the rights of the parent with the best interests of the child. (*In re R.R.* (2010) 187 Cal.App.4th 1264, 1284.) The record indicates that mother had made significant progress in her treatment

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[4] The removal statute requires that the court find by clear and convincing evidence that there is or would be a substantial danger to the physical health, safety, protection, or physical or emotional well-being of the child if the child were returned home, and there are no reasonable means by which the child's physical health can be protected without removing the child from his or her "parent's . . . physical custody." (§ 361, subd. (c)(1).) The statute also requires the court to make a "determination as to whether reasonable efforts were made to prevent or to eliminate the need for removal." (*Id*., subd. (d).) The preprinted, standard-form minute order reads: "By clear and convincing evidence pursuant to WIC 361(c): Substantial danger exists to the physical health of minor(s) and/or minor(s) is suffering severe emotional damage, and there is no reasonable means to protect without removal from *parent's* . . . physical custody. [¶] Reasonable efforts have been made to prevent or eliminate the need for removal of the minor from the home of *parent(s*)/legal guardian(s)." (Italics added.)

plan but was not getting her full court-ordered visitation. Mother had a due process right to be heard and present testimony. Although we are unable to discern, without an evidentiary hearing, how the court would have balanced these important interests and rights (*Armando L.*, *supra*, 1 Cal.App.5th at pp. 620-621), on the undeveloped facts, we consider it probable that the result would have been different had a hearing been held. Although the court could have required an offer of proof before deciding whether to hold an evidentiary hearing (*In re A.B.* (2014) 230 Cal.App.4th 1420, 1439), it never asked mother for one. Nor did the court give mother an opportunity to make an offer. Immediately after going off the record, the court summarily issued the challenged exit order. In refusing to accept evidence relevant to custody and visitation, the court risked issuing an uninformed order that could fail to serve Isabella's best interests. (*In re Michael W.* (1997) 54 Cal.App.4th 190, 196.) Also, "we presume some prejudice from the simple fact that a family law court will naturally defer to a recent order of the dependency court concerning custody and visitation" and will "hesitate to second-guess the juvenile court judge." (*Ibid.*) Accordingly, the juvenile court prejudicially erred in denying mother's request to hold an evidentiary, section 364 hearing.

DISPOSITION

The order of the juvenile court dated October 30, 2015 dismissing dependency jurisdiction is reversed. The case is remanded for a contested section 364 evidentiary hearing.

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ALDRICH, J.

We concur:

EDMON, P. J.

LAVIN, J.