Filed 08/29/17 in re Ava S. CA2/4

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

In re Ava S. et al., Persons Coming Under the Juvenile Court Law.	
LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. WILLIAM S., et al., Defendants and Appellants.	B277901 (Los Angeles County Super. Ct. No. DK16147)

APPEAL from an order of the Superior Court of Los Angeles County, Joshua D. Wayser, Judge. Reversed in part and affirmed in part.

Jesse F. Rodriguez, under appointment by the Court of Appeal, for Defendant and Appellant, William S.

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

Mary C. Wickham, County Counsel, R. Keith Davis, Assistant County Counsel and Sarah Vesecky, County Counsel, for Plaintiff and Respondent.

Appellants Nadia A. (Mother) and William S. (Father), parents of Ava and Hank S., appeal the juvenile court's order limiting their educational rights under Welfare and Institutions Code section 361.[1] Appellants contend the court deprived them of their due process right to a meaningful opportunity to be heard prior to issuing the order. We agree and reverse.

FACTUAL AND PROCEDURAL BACKGROUND

A. *Background Facts*

In March 2016, when Ava was four and Hank was 15 months, the Department of Children and Family Services (DCFS) was alerted that Mother had been hospitalized after exhibiting bizarre behavior, and had tested positive for amphetamines and methamphetamine.[2] Mother told hospital personnel that Father, who had taken the children home, was also using methamphetamine. The children were located, detained and placed with the maternal grandmother.

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

[2] A few weeks earlier, DCFS had received a referral alleging Mother and Father were using methamphetamine. Mother tested negative. Father claimed he was too busy working to test. The referral was closed as inconclusive as to Father and unfounded as to Mother.

Mother acknowledged suffering from bipolar disorder. She claimed her behavior the day she was hospitalized was partly attributable to medication. The hospital had prescribed a new medication, which Mother said was helping control her symptoms better. With respect to the positive drug test, Mother claimed to have used methamphetamine for the first time at a party the day before her hospitalization. Both Mother and Father denied Father used methamphetamine. The paternal relatives with whom Mother, Father, and the children were living denied seeing either of them use drugs. The maternal grandmother said Mother had been abusing prescription medication for a long time. In 2015, when Mother and the children were living with the maternal grandparents, the grandmother found a meth pipe. She told Mother to get help and to drug test as a condition of continuing to live with her. In January 2016, Mother tested positive for methamphetamine and went to live with Father and his relatives. With respect to Father, the maternal grandmother had been told he had used, and sometimes sold, methamphetamine since Mother began dating him in high school.[3]

At the June 2016 jurisdictional hearing, the court found true that Mother had mental and emotional problems, including depression and anxiety, and that she had a history of illicit drug use and was a current user of amphetamines and methamphetamine, which rendered her incapable of providing regular care for the children. The allegations pertaining to Father -- that he had failed to protect the children from Mother -- were stricken. He signed a case plan, agreeing to participate in a

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[3] Father had two 2006 arrests for possession of a controlled substance, but no convictions.

substance abuse program, an anger management program, and drug testing. His visits with the children were to be monitored until he completed four negative drug tests. The court set a hearing on September 1, to consider returning the children to Father.

In July 2016, after one negative test and several missed tests, Father tested positive for amphetamines and methamphetamine.[4] On July 26, 2016, DCFS filed a subsequent petition, alleging Father was abusing amphetamines and methamphetamine.[5] The hearing scheduled for September 1 was redesignated a hearing on the subsequent petition. At the September 1 hearing, discussed further below, the court found true that Father had a history of illicit drug use and was a current user of amphetamines and methamphetamine, which

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[4] Father tested negative later in July, but refused to test on two scheduled days in August, claiming to be too busy with work. There is no evidence in the record of his drug testing after August 2016.

[5] After DCFS filed the subsequent petition, Father sent the caseworker a written statement saying he was not a "'regular'" user of methamphetamine, and had "never been under the influence of any drugs or alcohol while [the] children were in [his] care." Mother said Father's substance use was "infrequent" and "minimal." Father's sister, Kelly S., who lived in the same house, said she had "suspicions" but had not seen either Father or Mother use drugs. The caseworker expressed concern that neither Mother nor the paternal relatives had been forthcoming regarding Father's substance abuse prior to his positive test.

rendered him incapable of providing regular care for and supervision of the children.[6]

In the meantime, Mother enrolled in a substance abuse program and counseling, and drug tested negative on multiple occasions. The program reported she had "'a high prognosis for recovery.'" In June 2016, Mother had made sufficient progress that her visits with the children were liberalized to three-hour unmonitored day visits. In August, Mother informed the caseworker that she intended to move out of the paternal grandparents' home at the beginning of September.

B. *Facts Pertinent to Transfer of Educational Rights*

At the time of the detention, Mother, Father, and the children were living in Santa Clarita. The maternal grandparents had lived in Santa Clarita for many years and were living there when the children were detained, but moved to Ventura sometime thereafter. Ava, who was four at the time of the detention in March 2016, was scheduled to begin school in the summer of 2016. Mother and Father wanted her to attend school near their home; the grandparents preferred that she attend school in Ventura. The caseworker informed the parties that Ava's "school of origin" was where her parents lived and that Mother and Father had the right to choose the school she

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[6] At the hearing on the subsequent petition, Father refused to answer when asked when he last used methamphetamine, whether he believed the July 2016 positive test was in error, or to identify the drug in his possession when he was arrested in 2006.

attended, as they held educational rights.[7] On August 10, Ava began kindergarten in Santa Clarita. That same month, Mother and Father asked DCFS to consider moving the children from the grandparents and placing them with Father's sister, Kelly.

On August 15, 2016, an attorney hired by the maternal grandparents filed a "walk-on" motion, asking the court to determine who was responsible for transporting Ava to the Santa Clarita school under the Education Code, and to ensure DCFS left custody of the children with the grandparents by issuing a

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[7] The term "school of origin" comes from Education Code section 48850 et seq., a series of statutory provisions intended to "ensure that all pupils in foster care and those who are homeless . . . have a meaningful opportunity to meet the challenging state pupil academic achievement standards to which all pupils are held." (Ed. Code, § 48850, subd. (a).) To achieve the goals of the provisions, "educators, county placing agencies, care providers, advocates, and the juvenile courts" are to "work together" to, among other things, "maintain stable school placements" for those pupils. (*Ibid.*) Section 48853 provides that a pupil placed in a foster family home "shall attend programs operated by the local educational agency," with certain exceptions, including where "[t]he pupil is entitled to remain in his or her school of origin pursuant to [section 48853.5, subdivision (e)(1)]," or where "[t]he parent or guardian, or other person holding the right to make educational decisions for the pupil . . . determines that it is in the best interests of the pupil to be placed in another educational program." (Ed. Code, § 48853, subd. (a)(1) & (3).) Section 48853.5, subdivision (f)(1) provides: "At the initial detention or placement, or any subsequent change in placement of a foster child, the local educational agency serving the foster child shall allow the foster child to continue his or her education in the school of origin for the duration of the academic school year." The statutory provisions do not define "school of origin."

"Do Not Remove" order.[8] The moving papers described the Santa Clarita school as Ava's "school or origin" and did not ask the court to order her moved to a different school or terminate the parents' education rights. The court scheduled a hearing on the motion for August 30, 2016, two days before the September 1 hearing already on calendar.

On August 30, 2016, DCFS filed an ex parte application, asking the court to issue an order permitting Ava to attend school in Ventura and to make the finding that she had no "school of origin." DCFS interviewed Ava's teacher, who said it was not in a four-year-old's best interest to have a long commute. Ava's pediatrician provided a letter stating that the lengthy commute to and from school was "unacceptable and overly stressful" for her.[9] Asked about school, Ava had said: "I don't like it, it's just

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[8] The moving papers contended the caseworker had threatened to remove the children from the grandparents' custody if they did not assist with transporting the children to and from school. The caseworker reported the grandparents had said that rather than transport Ava, they would prefer the children be placed elsewhere.

[9] The pediatrician based this on his understanding that Ava was being awakened at 5:00 a.m. in order to be transported to a drop off point in Ventura by 6:00 a.m., and then was driven "another 1 1/2 hour[s]" to school. He also understood that although school got out at 1:30 p.m., the commute caused the girl to be away from the grandparents' home until 5:00 p.m. The doctor's assumption as to the time Ava was awakened may have been mistaken. At the hearing, Father's counsel said it was the parents who were waking up at 5:00 a.m., in order to pick Ava up at 7:00. The doctor's assumption that the commute to the Santa Clarita school was an hour and a half was incorrect according to

too long. Too much stuff to do. I have to get up, walk, get in line, sit down. It's just too long." The report stated DCFS opposed transferring custody to Kelly because the caseworker was convinced she was unduly "aligned with the parents" and "would not be able to establish boundaries with the parents, especially [Father]." The caseworker was particularly concerned about Kelly's trustworthiness because when initially interviewed, she had denied any safety concerns and denied that either parent used drugs. At the same time, however, DCFS opposed issuance of a "Do Not Remove" order, in case the placement needed to be reassessed at a later date. The report stated: "While the Department aims to keep children with family, if parents and maternal grandparents continue to engage in . . . daily disputes[,] the Department will be looking to assess a neutral placement for the children to avoid further emotional distress on the children."

On August 30, 2016, the court held a hearing. Although the hearing had been set as a result of the grandparents' attorney's walk-on motion, that attorney did not appear, and the court agreed with Father's counsel that the grandparents lacked standing to pursue the motion.[10] There was no dispute that the

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the parties. The grandparents' moving papers said the distance between their home and the school was 45 miles, and that travel time was just over an hour each way. DCFS's report said the distance was 41 miles and the travel time was 50 minutes each way. The doctor may also have been mistaken as to the reason for Ava's late return to her grandparents' home. Mother said that after school, she and Kelly spent an hour with Ava helping her with homework before driving her back to Ventura.

[10] See *In re Miguel E.* (2004) 120 Cal.App.4th 521, 538-539 [grandparents who had not achieved or applied for de facto

court should nonetheless address the placement and school choice issues raised in DCFS's ex parte application. Counsel for the children informed the court that she had advised the grandparents against the move to Ventura, as it would interfere with the children's reunification with the parents. Counsel contended that as the holders of the educational rights, the parents had the right to enroll Ava in the school they deemed appropriate. She expressed disappointment with the grandparents for not taking the children's interest in reunification or the commute to the Santa Clarita school into account when they decided to move to Ventura. She argued in support of placing the children with Kelly. Father's counsel argued that a change in placement would make Ava's life easier, and observed that the grandparents' decision to move also had an impact on visitation. The court interrupted Father's counsel to say: "Maybe they [Mother and Father] should have thought about that before . . . smoking methamphetamine." When counsel reminded the court that the proceedings were in the reunification stage, the court ordered him to "stop speaking." The court then directed a comment to the children's attorney, attributing to her an argument she had not made: "I'm shocked by your argument. This is a five year old who has never been to school. So the home school argument isn't flying with me."[11] The court spoke for some time, making clear its view that Ava should

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parent status had no standing to appeal order removing three minors from their custody].)

[11] As discussed, the contention that the Santa Clarita school was Ava's "school of origin" had been made by the caseworker and the grandparents' attorney.

not be awakened "at 5:00 [a.m.]" to be driven "80 miles," that Mother and Father had no right to argue Ava's "best interest" because they had "brought this on [themselves]" by "their own conduct," and that the grandparents were in no way to blame.[12] The court also stated that the decision to enroll Ava in school in Santa Clarita was evidence of "bad parenting" and "poor judgment," and would have an impact on the court's determination whether the parents were "making progress on their case plan." The children's counsel suggested the reason for the grandparents' move was an issue that should be examined. The court changed the subject, stating that her recommendation that the children be placed with their paternal aunt, Kelly, was "ridiculous." Counsel for the children and counsel for Father attempted to clarify that it was the parents, not Ava, who woke up at 5:00 a.m. The court repeated "it's ridiculous" without addressing the factual dispute. Father's counsel attempted to discuss Education Code section 48853.5. The court interrupted him, stating it was "outrageous" to suggest Ava had a school of origin and that the court was "flabbergasted" that counsel believed sending Ava to school in Santa Clarita might be appropriate.

Near the end of the hearing, after making clear its view that Ava should not be commuting to school from Ventura to Santa Clarita and that the children should not be moved from the grandparents' home to Kelly's home, the court stated: "I will continue the matter" and "I'm putting everyone on notice that I'm considering limiting [education] rights." A few moments later,

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[12] The court mistakenly stated it had "made [the] finding[]" that Father was using methamphetamine, although the hearing on the subsequent petition had not yet taken place.

the court concluded the hearing by stating: "I am allowing the child to go to school [near] the grandmother's house. . . . We can address it further [at the September 1 hearing]."

The September 1, 2016 hearing began with a discussion of the issues to be addressed. Counsel for DCFS stated they were there for a hearing on the subsequent petition and "the walk-on." The court responded: "On 8-30 we had the walk-on. I looked at the minute order. It should reflect but does not -- the court under 361 is changing it to court limits parents[']education rights; educational rights transferred to maternal grandmother. That is effective as of August 30th." Counsel for the children protested she had not heard the court make such an order, but had heard the court say it was trailing the issue. Counsel asked for "second call" to "make a record." The court said, "I will make a record," rejected the request for a second call, and announced that the sole issue was the subsequent petition. After the hearing on the petition and the court's ruling on it, the court reiterated: "I am making a finding as I said before that [the grandmother] will be holding the rights over [education]." The children's counsel stated the ruling was over her objection and again asked for an opportunity to "make a record." The court rejected her request, stating she had "lost all credibility with the court" for arguing that the children should be placed with Kelly, and concluding "I don't need a record from you." The court's September 1 order stated: "It appearing to the Court that through inadvertence and clerical error the minute order of 08/30/16 in the above entitled action does not properly reflect the Court's order, said minute order is ordered corrected nunc pro tunc as of 08/30/16 as follows: court limits parents' educational rights; education rights

transferred to mat[ernal] grandmother." Mother and Father appealed.

DISCUSSION

Section 361 provides that "[i]n all cases in which a minor is adjudged a dependent child of the court on the ground that the minor is a person described by Section 300, the court may limit the control to be exercised over the dependent child" by his or her parent or guardian, including "the right of the parent or guardian to make educational . . . decisions for the child," as long as the limitations imposed do not "exceed those necessary to protect the child." (§ 361, subd. (a).) Appellants contend the court violated their due process rights by limiting their educational rights over the children without a hearing. We agree.

Preliminarily, we address respondent's contention that appellants forfeited their right to raise this issue by failing to object at the September 1 hearing. "Failure to make a futile objection or argument does not constitute waiver [or forfeiture]." (*M.T. v. Superior Court* (2009) 178 Cal.App.4th 1170, 1177.) At the beginning of the hearing, the court made clear that it considered the matter of educational rights closed, despite both counsel for DCFS and counsel for the children reminding the court that the matter had been left open for further hearing.[13] In addition, the court twice refused the request by counsel for the

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[13] Respondent concedes "the juvenile court was mistaken on September 1, 2016, that it had limited the parents' education rights on August 30, 2016." (See *In re Michael D.* (1981) 116 Cal.App.3d 237, 245-246 ["A nunc pro tunc order may not be made for the purpose of declaring that something was done which was not done."].)

children to argue the matter on the record, berating her for arguments she had previously made and stating "I don't need a record from you." Observing the court's response to the objections voiced by counsel for the children, the attorneys representing Mother and Father reasonably could have concluded not only that any further objection would have been futile, but that their credibility and future ability to advocate on behalf of their clients would be damaged by pressing the issue. Accordingly, we conclude the issue was not forfeited and turn to the merits.

"Early United States Supreme Court cases established that parents possess a liberty interest, protected by the due process clause, in directing the education of their children." (*Jonathan L. v. Superior Court* (2008) 165 Cal.App.4th 1074, 1102, citing *Prince v. Massachusetts* (1944) 321 U.S. 158, 166, *Pierce v. Society of Sisters* (1925) 268 U.S. 510, 534-535, *Meyer v. Nebraska* (1923) 262 U.S. 390, 399.) Before being deprived of a fundamental liberty interest in the care, custody and control of their children, "a parent must be afforded adequate notice and a meaningful opportunity to be heard." (*In re Axsana S.* (2000) 78 Cal.App.4th 262, 269, disapproved in part on another ground in *In re Jesusa V.* (2004) 32 Cal.4th 588; accord, *In re James Q.* (2000) 81 Cal.App.4th 255, 263 ["A hearing denotes an opportunity to be heard."].) A meaningful opportunity to be heard includes a party's "'right to testify and otherwise submit evidence, cross-examine adverse witnesses, and argue his [or her] case.'" (*In re Josiah S.* (2002) 102 Cal.App.4th 403, 417, quoting *In re Kelly D.* (2000) 82 Cal.App.4th 433, 440.) The parties were provided notice by the court that the hearing on September 1 would address the potential limitation of educational rights. But

on the day of the hearing, the parties were afforded no opportunity to present evidence or even argue the merits. The court's mistaken belief that it already had decided who should hold education rights deprived the parents, as well as the children, of their due process right to be heard. The order limiting and transferring educational rights therefore, must be reversed and the matter remanded for a hearing on whether, based on the current circumstances of the case, the right to make educational choices for the children should be transferred to the grandmother or remain with the parents.[14]

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[14] Respondent contends that the order limiting educational rights was not an "abuse of discretion." As the court mistakenly believed it already had resolved the educational rights issue at the August 30 hearing, it failed to exercise any meaningful discretion at the September 1 hearing. (See *In re Marriage of Gray* (2007) 155 Cal.App.4th 504, 515 ["A trial court's failure to exercise discretion is itself an abuse of discretion."].)

Respondent also contends the juvenile court's decision to place Ava in a Ventura school stands regardless of the outcome of this appeal, observing that Father specifically asks for reversal of the order limiting education rights "'aside from the specific order that Ava attend school in Ventura,'" and that Mother "only challenges the juvenile court's September 1, 2016, order." At the August 30 hearing, after saying it was "allowing [Ava] to go to school [near] the grandmother's house," the court stated: "We can address it further [at the September 1 hearing]." Thus, the matter remained open for debate at the September 1 hearing, along with any other matters pertaining to educational rights the parties were entitled to address. On remand, the court will be entitled to take into account all that has transpired since then.

DISPOSITION

The court's order of September 1, 2016 is reversed to the extent it limits appellants' educational rights and transfers the educational rights to the maternal grandmother or purports to correct "nunc pro tunc" the August 30, 2016 order. In all other respects the order is affirmed. The matter is remanded for further proceedings consistent with the views expressed in this opinion.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

MANELLA, J.

We concur:

EPSTEIN, P. J.

COLLINS, J.