Filed 3/2/17 In re N.P. CA2/2

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

In re N.P., a Person Coming Under the Juvenile Court Law.	B275331 (Los Angeles County Super. Ct. No. CK96947)
LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. JANIE S., Defendant and Appellant.	

APPEAL from an order of the Superior Court of Los Angeles County. Teresa Sullivan, Judge. Affirmed.

Valerie N. Lankford, under appointment by the Court of Appeal, for Defendant and Appellant.

Mary C. Wickham, County Counsel, R. Keith Davis, Assistant County Counsel, William D. Thetford, Deputy County Counsel, for Plaintiff and Respondent.

Janie S. (Mother) appeals from the dependency court's disposition order, arguing that the court wrongfully ordered her daughter "removed" even though the child did not reside with Mother at the time this matter was initiated. Although we find the dependency court erred, we conclude that Mother forfeited her argument by failing to object in the dependency court, and, in any event, the error was harmless.

BACKGROUND

In November 2015, the Department of Children and Family Services (DCFS) filed a Welfare and Institutions Code section 300 petition[1] alleging that the child, three-year-old N.P., had been physically abused by her father (Father), including being struck by a fly swatter causing bruises and lacerations.

The concurrently filed DCFS detention report noted that the dependency court previously sustained a section 300 petition in June 2013 alleging that, in December 2012, then eight-month-old N.P. was physically abused by Father, that Mother and Father had a history of domestic violence in N.P.'s presence, that Father abused alcohol, and that Mother failed to protect N.P. In connection with that earlier proceeding, Father was ordered to receive various enhancement services and N.P. was released to Mother.

Shortly after N.P. was placed with Mother in 2013, N.P.'s eight-month-old sibling was found dead. Mother apparently placed the baby in an unsafe sleeping position, face-down on top of blankets and a pillow. DCFS filed a section 342 petition and N.P. was ordered detained from Mother's care. Mother and Father were ordered to receive family reunification services. Mother's case plan included a domestic violence program for victims,

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

parenting classes, and individual counseling. In September 2014, N.P. was released to Father over DCFS objection. Jurisdiction was terminated in March 2015, with a custody order giving sole legal and physical custody to Father and monitored visits to Mother.

Based on the events that led to the most recent dependency proceeding in November 2015, Father was arrested for the physical abuse of N.P. N.P. was ordered detained. DCFS removed her from Father's custody and, following hospitalization, placed her in a foster home. At the time of removal, Mother's whereabouts were unknown.

Mother was eventually located and was interviewed in February 2016. She stated she was surprised Father physically abused N.P., though she had heard that Father's girlfriend pushed N.P. When asked why N.P. had previously been placed with Father instead of her, Mother responded that she had completed her case plan except for individual counseling, which Mother claimed was added to the case plan "at the last minute." Mother stated she wanted to now have custody of N.P. rather than just visits with her.

In March 2016, DCFS filed an amended section 300 petition adding counts regarding Mother and Father's history of domestic violence in N.P.'s presence. These counts alleged that Mother failed to protect N.P. and failed to complete court-ordered counseling to address the case issues. The amended petition also added a count regarding the death of N.P.'s younger sibling resulting from Mother's placing the child in a dangerous position and the child's subsequent death.

Mother arrived late to her first monitored visit with N.P., in April 2016. Mother greeted N.P. by saying "Hey fat girl" and scolded her for calling "everybody" "mom." After being redirected, Mother was generally appropriate with N.P.

At the time of the jurisdiction and disposition hearing, on April 12, 2016, Father was incarcerated, having been convicted and given a 180-day sentence for willful harm or injury to a child. Father pled no contest to the dependency court sustaining the amended section 300 petition.

During the jurisdiction phase of the hearing, Mother testified that she completed domestic violence for victims and parenting classes in connection with the prior dependency proceeding. Additionally, after her younger child died, Mother was ordered to complete a psychiatric evaluation and individual counseling for grief and loss. She attended six counseling sessions but did not complete the therapy. She had recently restarted individual counseling, on March 23, 2016.

DCFS and minor's counsel both argued that the counts alleged in the amended section 300 petition should be sustained, stating that little had changed since the prior dependency proceedings were terminated with Mother being given monitored visitation rather than custody of N.P. Additionally, they pointed out how no evidence was presented showing that Mother addressed the issues associated with the baby's death. Mother's counsel argued that there was no current risk because there was no evidence Mother was involved in further domestic violence after the previous case was closed.

The dependency court sustained the petition, finding that the death of the infant sibling posed a risk to four-year-old N.P. if she were under the care of Mother. The court also noted how Mother was absent during the beginning of the current proceeding and was absent from N.P.'s life for a substantial period of time.

As for disposition, Mother's counsel requested a home-of-parent order for Mother, arguing there was no clear and convincing evidence she was a

current risk to N.P. The dependency court declared N.P. a dependent of the court and found, "by clear and convincing evidence, pursuant to 361(c) as well as 362(a), that there is a substantial danger if this child is returned home to her physical health, safety, protection, [and] physical and emotional well-being. There are no reasonable means by which her physical health can be protected without removing her from the parents' physical custody. I order the child removed from the father with whom she resided at the time the petition was filed, and the child is also being removed from the mother pursuant to 362(a) as this court is making a reasonable custody order regarding the safety of the child."

Mother was ordered to receive reunification services consisting of a domestic violence support group, conjoint counseling with N.P., hands-on parenting classes, and individual counseling. She was to have monitored visits. Mother's counsel did not object to the disposition orders.

Mother timely appealed.

DISCUSSION

Mother contends that reversal is required because the dependency court ordered "removal" of N.P. from Mother's custody even though N.P. did not reside with Mother. Mother further argues that the dependency court was required to consider her home-of-parent request under section 361.2, pertaining to placement of a child with a noncustodial parent, and the court's failure to explicitly apply this section necessitates reversal.

Section 361, subdivision (c), applies to "removal" of a dependent child It states, in pertinent part: "A dependent child shall not be taken from the physical custody of his or her parents . . . with whom the child resides at the time the petition was initiated, unless the juvenile court finds clear and convincing evidence . . . : [¶] (1) There is or would be a substantial danger to

the physical health, safety, protection, or physical or emotional well-being of the minor if the minor were returned home, and there are no reasonable means by which the minor's physical health can be protected without removing the minor from the minor's parent's . . . physical custody." (§ 361, subd. (c).) Section 361.2, subdivision (a), applies to noncustodial parents who request custody, and provides: "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."

Mother is correct that the dependency court could not technically "remove" N.P. from her custody since N.P. did not reside with Mother at the time this matter commenced. (See *In re Dakota J.* (2015) 242 Cal.App.4th 619, 627 ["the Legislature has only authorized removal of a child from the physical custody of the parent(s) '*with whom the child resides at the time the petition was initiated*.' (§ 361, subd. (c), italics added)"]; *In re Julien H.* (2016) 3 Cal.App.5th 1084,1089 [accord].) We find that Mother forfeited this argument, however, by failing to object to the court's dispositional orders. (*In re T.G.* (2015) 242 Cal.App.4th 976, 984 [failure to object to disposition orders results in forfeiture of related arguments].) The purpose of the rule requiring specific objections to dependency court orders "is to encourage parties to bring errors to the attention of the trial court, so that they may be corrected." (*In re S.B.* (2004) 32 Cal.4th 1287, 1293.) "If the order was in fact erroneous, and the court is persuaded by the reason advanced by the objecting party, the court has the opportunity to correct the error. The unfairness to the trial court and the opposing side if appellate counsel is permitted to invent the grounds for the objection is manifest." (*In re E.A.* (2012) 209 Cal.App.4th 787, 790 [explaining basis for forfeiture after only general objections made].)

Although we have discretion to excuse the forfeiture, we should do so "'rarely and only in cases presenting an important legal issue.'" (*In re T.G., supra,* 242 Cal.App.4th 976, 984.) We decline to do so here. Mother's argument that N.P. was improperly "removed" from her custody since N.P. did not reside with her was an issue that could have been specifically identified by objection and easily corrected by the dependency court. If the problem were identified, the dependency court could have conducted the functionally equivalent analysis of whether to place N.P. with Mother under section 361.2, subdivision (a). (Compare § 361, subd. (c)(1) [requiring court to determine whether failure to remove would cause "substantial danger to the physical health, safety, protection, or physical or emotional well-being of the minor"] with § 361.2, subd. (a) [requiring court to determine if placement with the parent "would be detrimental to the safety, protection, or physical or emotional well-being of the child"].)[2]

Even if we were to consider Mother's argument, however, reversal would not be warranted because any error was harmless. (See *In re Julien H., supra,* 3 Cal.App.5th 1084, 1089 ["reversal is unwarranted unless the error resulted in prejudice"].) In addition to considering section 361, subdivision (c), the dependency court referenced section 362, subdivision (a),[3]

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[2] Clear and convincing evidence is the standard applied by the dependency court when dispositional orders displace a parent's custodial rights, including under section 361.2, subdivision (a). (*In re Anthony Q.* (2016) 5 Cal.App.5th 336, 354, fn. 11.)

[3] Section 362, subdivision (a), provides: "If a child is adjudged a dependent child of the court on the ground that the child is a person described by Section 300, the court may make any and all reasonable orders for the care, supervision, custody, conduct, maintenance, and support of the child, including medical treatment, subject to further order of the court."

when declining to place N.P. with Mother. "[T]he dependency court has the power under section 361, subdivision (a) and section 362, subdivision (a) to limit the access of a parent with whom the child does not reside and thus effectively remove the child from the noncustodial parent." (*In re Julien H., supra,* 3 Cal.App.5th at p. 1090.) Thus, the dependency court had general authority under these statutes to decline to place N.P. with Mother.

Furthermore, the dependency court's failure to specifically reference section 361.2, subdivision (a), although error, does not compel reversal. *In re D'Anthony D.* (2014) 230 Cal.App.4th 292, 303-304, found that the dependency court's application of section 361 instead of section 361.2 to a noncustodial parent was harmless error: "the [dependency] court found 'by clear and convincing evidence' that the requested placement with father posed 'a substantial danger to the children's health.' In view of this evidence, and the court's express finding under section 361, we cannot say it is 'reasonably probable' that the court would have made a different finding had it considered whether the placement would be detrimental to the children's safety or physical well-being under section 361.2." (*D'Anthony D.,* at p. 304; see also *In re Anthony Q.*, *supra*, 5 Cal.App.5th 336, 339 [dependency court's erroneous application of § 361, subd. (c) to noncustodial parent was harmless error]; *In re Julien H., supra,* 3 Cal.App.5th 1084, 1090 [accord].)

Likewise, the dependency court here found, by "clear and convincing evidence," a substantial danger to N.P.'s "physical health, safety, protection, [and] physical and emotional well-being" if she were placed in Mother's custody. There is no likelihood the court would have determined section 361.2 compelled a different conclusion.

Finally, substantial evidence supported the dependency court's decision not to place N.P. with Mother. (See *In re John M.* (2012) 212 Cal.App.4th

1117, 1126 [disposition orders pertaining to custody are reviewed for substantial evidence].) Although only three years old when the initial section 300 petition was filed in this matter, N.P. had already been through a prior dependency proceeding due to Mother's failure to protect her from domestic violence. "A removal order is proper if based on proof of parental inability to provide proper care for the child and proof of a potential detriment to the child if he or she remains with the parent. [Citation.] 'The parent need not be dangerous and the minor need not have been actually harmed before removal is appropriate. The focus of the statute is on averting harm to the child.'" (*In re N.M.* (2011) 197 Cal.App.4th 159, 169-170.) Furthermore, as found by the dependency court, the death of N.P.'s younger sibling, plus Mother's failure to complete her previous case plan and her absence from N.P.'s life, supported the conclusion that there would be substantial danger to N.P.'s physical health, safety, protection, and physical and emotional well-being if she were placed with Mother.

DISPOSITION

The April 12, 2016, order is affirmed.

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GOODMAN, J.*

We concur:

ASHMANN-GERST, Acting P.J. HOFFSTADT, J.

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* Retired judge of the Los Angeles Superior Court assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.