Filed 10/9/19 In re R.O. CA2/4

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

In re R.O., a Person Coming Under the Juvenile Court Law.	B293522 (Los Angeles County Super. Ct. No. 18CCJP00456A)
LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. K.P., Defendant and Appellant.	

APPEAL from an order of the Superior Court of Los Angeles County. Natalie Stone, Judge. Affirmed.

Roni Keller, under appointment by the Court of Appeal for Defendant and Appellant.

Mary C. Wickham, County Counsel, Kristine P. Miles, Assistant County Counsel, and Kim Nemoy, Deputy County Counsel, for Plaintiff and Respondent.

Mother K.P., who suffers from bipolar disorder, was unable to care for her one-year old son, R.O. Pursuant to Welfare and Institutions Code section 300, subdivision (b),[1] R.O. was declared a dependent of the court and placed with his father E.O. (Father), the noncustodial parent, under section 361.2, subdivision (a). At the six-month review hearing, the dependency court terminated jurisdiction and entered an order granting Father physical and legal custody of R.O. Mother appeals, contending that the dependency court erred in terminating jurisdiction because under section 364 further supervision was necessary and conditions still existed that would justify the assumption of initial jurisdiction. We disagree, finding that under sections 361.2, subdivision (b)(1) and 366.21, subdivision (e)(6), the statutes governing noncustodial parent placements, the court need only consider whether continued supervision is necessary. In this case, no further supervision of R.O. in Father's home was necessary. We affirm.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

1. *Pre-Detention: Voluntary Family Maintenance*

Mother has had bipolar disorder since age six. In early 2016, Mother met Father online, and they developed a romantic relationship. R.O. was born in November 2016. In August 2017, Mother and DCFS entered into a voluntary family maintenance plan. Mother agreed to

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

obtain housing and mental health services, and to enroll in parenting classes and family preservation services.

Father lived with his parents and siblings, and worked a steady job. He had been contributing financially to R.O.'s care, and for a time Mother lived at Father's apartment, although the landlord had told Father there was no room for anyone else to move in. Father had a seven-year-old son with whom he had regular weekend visitation. Father lost custody of his older son after a 2012 conviction for domestic violence. Father does not drink or use drugs, and he denied any domestic violence with Mother.

In November 2017, Mother had moved to a shelter with R.O. On December 29, 2017, DCFS received a referral from the shelter that Mother had been yelling and cursing at one-year old R.O., who stopped breathing and turned blue. Mother claimed to have given him CPR although she admitted she did not know how to do so; she just "blew in [his] face." After R.O. started breathing again, Mother refused to call 911 and instead drove R.O. to the hospital. On her way, she ran out of gas and Father brought her money to buy gas. In spite of these circumstances, Mother did not feel that R.O. was in any danger.

At the hospital, R.O.'s blood test showed the presence of Lithium, the psychotropic drug mother was taking for her bipolar disorder. Although Mother's doctor had advised her not to take Lithium while nursing, Mother admitted to nursing R.O. while taking the medication because nursing made him feel better.

In January 2018, Mother moved to a new shelter. The social worker visited Mother to assess R.O.'s December 2017 trip to the

hospital. The social worker observed a bruise and a scratch under R.O.'s eyes, and blue mark on his buttocks. Mother claimed R.O. fell frequently because he was learning to walk. A worker at the shelter had overheard Mother call R.O. an "ass."

2. *Detention*

On January 17, 2018, DCFS obtained a removal order for R.O.

The petition filed January 23, 2018 alleged two counts of jurisdiction based upon section 300, subdivision (b). The petition alleged Mother's failure to protect R.O. due to her mental and emotional problems, including her bi-polar disorder and post-traumatic stress disorder (PTSD) (count b-1), and her endangerment of R.O. by nursing him against medical advice while she was taking Lithium (count b-2).

At the detention hearing, Father testified he lived with his parents and siblings. Father had a prior conviction for domestic violence in 2012, but had completed his court-ordered probation for that offense. On the social worker's initial visit to Father's home, she found R.O. was in good condition. The social worker had no concern that Father would abuse the child.

The dependency court released R.O. to Father's custody on the condition that Father would remain living with his relatives, Mother would not visit Father's home, and Father would not monitor Mother's visitation with R.O. The court gave Mother monitored visitation for a minimum of six hours per week, and ordered that she refrain from breastfeeding if she was taking Lithium. The court ordered assessment of the paternal aunt as a monitor for visitation, with such visitation to

take place at a neutral location. The court set a jurisdictional hearing for March 7, 2018.

In February 2018, Mother came to Father's house in the middle of the night, began yelling and would not leave until Father called the police. In March 2018, after the incident, Mother sent a threatening text message to Father's mother asking her not to mention her "meltdown" to DCFS and threatening to send ICE to the family's apartment. Later that month, Mother was arrested for domestic violence after she got in an altercation with Father and was ordered to take domestic violence classes and stay away from Father. In April 2018, as a result of Mother's behavior, Father obtained a restraining order against Mother.

3. *Jurisdiction*

DCFS reported that Mother had told the social worker that she did not take her medication while pregnant with R.O. because she did not want to harm him. Mother resumed her Lithium when she felt it was time to stop breastfeeding. Mother wanted to breastfeed R.O. because he was difficult and screamed, and breastfeeding calmed him. Mother admitted that she jokingly called R.O. a "little asshole" after he escaped from the dining area at the shelter.

Mother pled no contest to the petition, and the court sustained the petition as amended, finding the jurisdictional allegation of count b-1 true. The dependency court found release to Mother would be contrary to R.O.'s welfare. The court ordered PCIT therapy (parent child interaction therapy), mental health counseling, and individual

counseling, and ordered that Mother take all prescribed medication. The court set the six-month review hearing for September 5, 2018.

On May 1, 2018, the court appointed an expert to evaluate Mother pursuant to Evidence Code section 730.

On August 27, 2018, DCFS reported that in June 2018, Father enrolled in a Reflective Parenting Program, designed to educate Father about R.O.'s temperament and behaviors and to increase Father's confidence and parenting skills. Father and R.O. were attending dyadic therapy together and were doing well. In April, Mother was prescribed new medication, Invega, and received her first dose in August 2018.

DCFS's August 13, 2018 status review report stated that R.O. was doing well with Father. Mother was renting a room from a friend, but denied DCFS access to her room. Mother reported she stopped taking Lithium in December 2017 and currently only took Invega.

Dr. Sara Hough completed Mother's section 730 report on August 31, 2018. Mother related to Dr. Hough that she was raised in and out of foster care and molested by her father at age 16. Mother left high school without obtaining a diploma and worked at fast food restaurants and retail stores. She quit her last job because she was not getting enough hours, and receives SSI because of her mental health diagnosis.

Regarding the December 2017 hospital visit, Mother asserted that she consulted with a nurse who told her to stop taking Lithium three days before nursing, which she did, but R.O. tested positive for Lithium anyway. For the past year, Mother had been intermittently compliant with her medications, but recently had started new medication and was seeing a mental health professional and obtaining individual therapy.

Mother disclosed that her relationship with Father was tumultuous, and she was very disappointed when he broke off the relationship after R.O.'s birth. Mother acknowledged verbal altercations with Father, but claimed that the March 2018 incident, which involved physical violence and led to her arrest, was an isolated occurrence. Mother denied any alcohol or drug use.

Dr. Hough reported that Mother was looking forward to regaining custody of R.O. and was open about her illness and the need to show stability and compliance. However, Dr. Hough found Mother minimized some of her actions that led to the removal of her son. Dr. Hough observed that Mother's compliance with mental health treatment was limited, and therefore Dr. Hough recommended that Mother show consistency in compliance with all mental health intervention for at least six to eight months before the court should consider liberalized visitation.

4. *Six-Month Review Hearing; Termination of Jurisdiction*

DCFS's last-minute information for the September 5, 2018 review hearing reported that Mother's therapist had told DCFS that Mother continued to display symptoms of bipolar disorder and PTSD, but Mother had demonstrated a decrease in impulsive behaviors. Mother was visiting with R.O., but would often spend visitation time on the phone with her friends and video chat.

DCFS's services log indicated that Father's home was very clean. Father changed R.O.'s diaper and told the social worker that their

therapy was going well. Mother had been inconsistent with her medication and her mood swings had returned.

At the six-month review hearing, Mother requested that the matter be set for a contested hearing. The court set the matter for October 15, 2018, and requested updates on Mother's progress.

At the continued six-month review hearing, the court stated, "[t]oday we're here for the contested 364 review hearing."[2] Mother requested that the case remain open, or in the alternative, that she be awarded joint physical custody of R.O.

Mother testified that she has bipolar disorder and anxiety and depression, and admitted her bipolar disorder causes mood swings, impulsive behavior, and a short temper. Mother had started therapy in November 2017. She realized she could not "treat it on [her] own," because the "struggle every day" became harder and harder, and her impulse issues became overwhelming. As a result, in January 2018, she began to take Lithium. Mother admitted breastfeeding while on Lithium. She was currently taking Invega with a monthly injection of Sustena.

Mother stated that even if the case closed, she intended to continue taking her medication because the medication helped her. She believed her impulses were under control, and she felt calm. She recalled that before she started taking medication, she was short-

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[2] The minute order of the September 5, 2018 hearing indicates the matter was on calendar for a "364 Judicial Review Hearing." As discussed *infra*, the matter properly was a section 366 review hearing, because R.O. was placed with Father, the noncustodial parent.

tempered with R.O. and very impatient. Further, she had started therapy in August and had attended about eight or nine sessions. She intended to continue her therapy and understood that if she did not address her mental health issues, she could do something she would regret. She also understood that R.O.'s safety came first. Currently, Mother was avoiding stressors and thinking before she reacted to anything. She understood that she would have bipolar disorder for the rest of her life. Mother had attended 12 parenting classes, completing her requirement.

Mother admitted being arrested for domestic violence in March 2018. She stated that she was driving with Father and became frightened because he was driving erratically. She slapped him, telling him to stop. As a result of the episode, Mother had participated in domestic violence classes, and stated she understood how domestic violence in the home could affect her child.

Mother had been visiting R.O. three times a week. She played with him, practiced the alphabet, and read to him. They watched movies together, and sometimes went to the park and played on the slide and monkey bars, and R.O. would play with other children. A social worker monitored the visits.

Mother requested that the dependency court keep the case open for another six months, or in the alternative, close the case with a joint custody arrangement. Although she was unable to participate in PCIT because R.O. was too young, Mother had completed her parenting classes. Mother argued that she had been attending therapy, and the therapist believed Mother's depression and anxiety were exacerbated

because R.O. did not live with her. Mother asserted her symptoms had improved and she was taking her medication consistently, and she acknowledged the necessity of therapy. R.O. enjoyed being with her. Mother argued she was in substantial compliance with her case plan, and by giving her another six months, the dependency court would permit her to prove that she was successfully able to reunify with R.O.

Father requested that the case be closed and requested sole legal and physical custody. In August 2018, the section 730 evaluation recommended that Mother show consistent compliance with her mental health regimen for six to eight months before liberalization of visitation. Father argued that the case should be closed because there was no currently existing threat to R.O. If Mother was compliant with her treatment, she could later go to Family Law court and seek modification of the custody arrangement.

DCFS pointed out that although Mother was attempting compliance with her program and had acquired new insight into her behavior, Mother still needed to show consistency and compliance for at least another six to eight months. Mother by her own admission had been on her new medication only since August, and had expressed distaste for having to depend on medication.

The court praised Mother for her efforts, but observed that the question before it was whether there was a current risk to R.O. given that he was in Father's care. Given that there was no risk, the court found the case should be terminated. The court noted that the evidence suggested Mother had not been totally consistent with her medication until August of 2018, and the section 730 examination revealed that

Mother needed at least another six to eight months of consistent mental health intervention and treatment. "We have not had that at this time. So Mother needs to continue with her progress and her consistency until it's just a habit and this is not just a short-lived effort any longer."

The dependency court awarded sole physical custody to Father and, "given the restraining order between the parents and the recent episode of domestic violence, I'm also providing for sole legal custody to the Father." Mother was given monitored visitation three times a week, with R.O.'s paternal grandmother or aunt to monitor visitation.

DISCUSSION

Mother argues that insufficient evidence supports the dependency court's decision at the six-month review hearing to terminate jurisdiction under section 364 and award sole physical and legal custody of R.O. to Father. Instead, she contends the dependency court should have continued supervision as she was participating in recommended services. DCFS asserts that these proceedings are governed by section 366.21, subdivision (e)(6) because they involve the placement of the child with a noncustodial parent, and that under that section, the dependency court did not abuse its discretion because R.O. was thriving in his placement with Father.

With respect to placement with the non-custodial parent, as explained in *In re Maya L.* (2014) 232 Cal.App.4th 81 (*Maya L.*), once the dependency court has assumed jurisdiction over a child, it must hold a disposition hearing to determine an appropriate placement for the child. (§ 362, subd. (b).) If the dependency court determines that

there is substantial risk of physical or emotional harm if the child is left in parental custody, section 361.2 requires that the court determine if there is a parent with whom the child was not residing at the time of the events precipitating the dependency proceedings could be placed. (§ 361.2, subd. (a).) If such a noncustodial parent exists, the court must place the child with that parent unless doing so would be detrimental to the physical and emotional well-being of the child. (*In re Maya L., supra*, 232 Cal.App.4th at p. 97.)

When the child is placed with the noncustodial parent, the dependency court can either terminate jurisdiction with a custody order in favor of the noncustodial parent, or retain jurisdiction and order services for one or both parents. (§ 361.2, subd. (b)(2).) Reunification services may be provided to the parent from whom the child is being removed. (§ 361.2, subd. (b)(3).) When the court places a child with a nonoffending noncustodial parent under section 361.2, the court is authorized to "[o]rder that the parent become legal and physical custodian of the child." (§ 361.2, subd. (b)(1).) If a court so orders, it "[must] then terminate its jurisdiction over the child." (*Ibid.*; *In re K.B.* (2015) 239 Cal.App.4th 972, 981.)

Where a child has been declared a dependent of the juvenile court and placed under court supervision, the status of the child must be reviewed every six months. (*Bridget A. v. Superior Court* (2007) 148 Cal.App.4th 285, 303.) The standards applicable at the six-month review hearing differ depending on the child's placement.

Section 364 governs where the child has not been removed from the physical custody of the parent or guardian. At a section 364 six-

month review hearing, the court is required to "determine whether continued supervision is necessary." (§ 364, subd. (c).) Termination of jurisdiction is required "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." (*Ibid.*)

Section 366.21, subdivision (e)(6) governs where the child has been removed from the custody of the parent, and placed with a noncustodial parent pursuant to section 361.2. That section provides that "[i]f the child had been placed under court supervision with a previously noncustodial parent pursuant to Section 361.2, the court shall determine whether supervision is still necessary. The court may terminate supervision and transfer permanent custody to that parent, as provided for by paragraph (1) of subdivision (b) of Section 361.2." (§ 366.21, subd. (e)(6).)

The standards under these two statutes, sections 364 and 366.21, subdivision (e), are similar. In both instances, the court must "determine whether continued supervision is necessary." (§ 364, subd. (c).) However, for a child placed with a noncustodial parent under section 361.2, subdivision (a), in contrast to the requirement of section 364, the dependency court need not consider whether """the conditions still exist which would justify initial assumption of jurisdiction under Section 300."""" (*In re Maya L., supra,* 232 Cal.App.4th at p. 99; *In re Janee W.* (2006) 140 Cal.App.4th 1444, 1451 [when deciding whether to terminate jurisdiction over a child placed with a noncustodial parent,

the court must determine whether there is a need for continued supervision, not whether the conditions that justified taking jurisdiction in the first place still exist, as required under section 364].)

Therefore, Mother's reliance on section 364 is misplaced because that statute is inapplicable when, as here, a child has been removed from one parent and placed with the other under section 361.2, subdivision (a). (*In re Maya L., supra,* 232 Cal.App.4th at p. 100; *In re Nicholas H.* (2003) 112 Cal.App.4th 251, 264 (*Nicholas H.*); *In re Janee W., supra*, 140 Cal.App.4th at p. 1451.) Thus, section 361.2, subdivision (b)(3) directs that when a child is placed with a noncustodial parent and both parents are ordered to participate in services, review hearings must be "held pursuant to section 366." (*Nicholas H., supra*, 112 Cal.App.4th at p. 264.)

Section 366 by its terms applies to children in foster care. However, its use in the context of section 361.2, subdivision (a) placements is to ensure dependent children placed with a noncustodial parent receive expeditious review of their cases. (*Nicholas H., supra,* 112 Cal.App.4th at p. 265.) Section 366 directs that at a six-month review hearing, the continued necessity of placement is to be considered. (§ 366, subd. (a)(1)(A).)

We review the dependency court's custody determinations for abuse of discretion, while its factual findings are reviewed for substantial evidence. (*In re Maya L., supra,* 232 Cal.App.4th at p. 102.)

Applying these standards here, we need only consider whether continued dependency supervision of R.O. is still necessary. Father was employed and the home was clean. Father and R.O. were progressing

in joint therapy and Father had taken parenting classes. There was no evidence that Father needed further court supervision for domestic violence issues, and Father had not been ordered to participate in any such services. Given these circumstances of R.O.'s placement with Father, there were no facts necessitating a pending case.

Thus, any error in the dependency court's reference to section 364, rather than the applicable statutes, is harmless. The consideration for a noncustodial placement is a lesser requirement, and does not require a consideration of whether the conditions that led to the initial placement still exist. (See *In re Maya L., supra*, 232 Cal.App.4th at p. 101 [error harmless where court applied standards of section 366.21, subdivision (e) and 361.2, subdivision (b)(1) although it purported to apply section 364].*)*

As a result, Mother's arguments based upon section 364 regarding her continuing progress and assertion that the conditions still exist justifying initial jurisdiction, are of no avail. We observe that although Mother had been making good progress with her mental health, Dr. Hough's report established Mother needed additional time to show consistency with her mental health regime.

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DISPOSITION

The order of the superior court is affirmed.

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WILLHITE, J.

We concur:

MANELLA, P. J.

CURREY, J.