Filed 10/17/13 In re A.A. CA2/1

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

In re A.A., a Person Coming Under the Juvenile Court Law.	B245496 (Los Angeles County Super. Ct. No. CK90263)
LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. C.B., Defendant; A.A., Appellant.	

APPEAL from an order of the Superior Court of Los Angeles County, Margaret S. Henry, Judge. Reversed and remanded.

Kimberly A. Knill, under appointment by the Court of Appeal, for Appellant.

John F. Krattli, County Counsel, James M. Owens, Assistant County Counsel, and Peter Ferrera, Senior Deputy County Counsel, for Plaintiff and Respondent.

Minor A.A. appeals the dependency court's order removing her from the care of her maternal cousin D.K. after D.K. was involved in an altercation with her daughter Sierra D., who also resided in the home with D.K. and D.K.'s three other children. A.A. contends the trial court failed to consider the factors in Welfare & Institutions Code section 361.3, subdivision (a),[1] concerning relative placement before it removed her from D.K.'s home. We agree, and reverse and remand for a hearing to consider these factors.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

A petition filed October 13, 2011 alleged three counts under section 300, subdivision (b) based on C.B.'s (Mother) failure to make appropriate care arrangements for A.A., born in December 2010. Mother, who is a current abuser of PCP, marijuana and alcohol, left A.A. with her maternal great-aunt Sara M., who suffers from congenital heart failure and is unable to care for the child.

On September 14, 2011, DCFS received a referral regarding A.A. The reporting party, Sara, was Mother's former legal guardian. A.A. and Mother were living with Sara. Mother repeatedly left A.A. home alone at night and not return for hours. Sara could not care for A.A. due to Sara's heart condition, which caused shortness of breath and occasional hospitalization. On September 14, 2011, Sara noticed the back door was unlocked and found A.A. asleep on the floor in Mother's room. Sara reported that Mother has anger issues and can be violent, and one time Mother left A.A. unattended on a bed, and A.A. rolled off the bed onto the floor. Mother sometimes left A.A. with Richard M., the child's maternal uncle, who lived in a filthy house in Long Beach.

The social worker interviewed Mother, who denied leaving A.A. alone. Mother planned to move with A.A. to D.K.'s house in Long Beach. Although Mother admitted using marijuana and alcohol, Mother denied doing so while caring for A.A. As a child, Mother had been placed in a group home as a result of a probation violation. Mother and Sara did not get along well, and Sara's landlord had suggested that Mother move out.

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

Sara told the social worker that Mother did not tell anyone she had left the house, and Sara found A.A. on the floor with her bottle.

On September 27, 2011, a second referral for A.A. asserted that Mother had left A.A. with D.K. for two weeks and had not come to pick up the child. Mother had two black eyes from fighting with a gang member. The social worker visited Sara's home and Sara reported that she had asked Mother to vacate the residence within 60 days because Mother had been disrespectful.

On September 28, 2011, the social worker contacted Brenda J., Mother's biological mother. Brenda stated that Mother constantly leaves A.A. unattended, and does not buy food or clothes for A.A. On October 3, 2011, D.K. stated that Mother never moved in with her, had been "out in the streets with gang members, partying and getting into street fights." Mother was affiliated with the 5 Deuce Hoover gang. D.K. did not know how long Mother expected her to care for A.A., nor did she know where Mother was living. D.K. was already caring for four children. Mother had gone to drug test voluntarily on three occasions, but never submitted a sample.

Mother told the social workers she wanted A.A. placed with D.K. However, there was an open emergency room response referral attached to D.K.'s home, with D.K. listed as a suspected perpetrator of physical abuse and general neglect of Sierra. On September 29, 2011, DCFS investigated abuse allegations against D.K. regarding Sierra. Sierra reported that D.K. "busted" her lip and that she suffered scratches on her face. Sierra later denied any injury. Another referral generated in June 2011 stated that allegations of sexual abuse and general neglect were unfounded.

At an October 7, 2011 meeting with the social worker, Mother was advised of the detention hearing scheduled for October 13, 2011. Mother denied using drugs and stated her only concern was lack of housing. At the October 13, 2011 detention hearing, the court ordered A.A. detained, and requested DCFS to look into placement with D.K. A.A. remained in foster care.

The whereabouts of A.A.'s father remained unknown. DCFS interviewed Sara, who stated that Mother was a drug baby and born with cocaine in her system. Mother, who was 19, denied any substance abuse, but admitted to drinking alcohol. Mother claimed she was never drunk around A.A. Both Sara and Brenda believed Mother needed inpatient services to handle her substance abuse problem. D.K.'s LIVE scan did not reveal any criminal history.

On November 3, 2011, the court sustained the allegations of the petition, and ordered reunification services for Mother. On November 10, 2011, the court ordered A.A. placed with D.K. on the condition that A.A. have no contact with Brenda or Sara, and DCFS was to pre-approve substantial contact with anyone over the age of 14 years.

In May 2012, DCFS reported that A.A. had been living with D.K., where A.A.'s care was appropriate. There were no safety threats in the home, which the social worker had visited monthly. Mother advised the social worker that she was arrested for being an accessory to a robbery in December 2011 and released in January 2012. Mother had not tested for drugs, nor had she enrolled in a parenting class or attended therapy. While incarcerated, she was given medication and a diagnosis of depression, but after her release, she stopped taking any medication. Mother had canceled numerous visits with D.K.

At the review hearing held on May 3, 2012, the court terminated reunification services for Mother because she had not been testing, visiting, or taking classes as ordered. The court identified a permanent plan of adoptive placement with D.K., ordered DCFS to prepare an assessment and initiate an adoptive home study, and set the matter for a section 366.26 hearing on August 30, 2012.

DCFS reported that A.A. was standing, walking and waving, and made consistent eye contact with the social worker. A.A. responded well to D.K. D.K. told DCFS she was amenable to facilitating visits with Mother and other maternal family members. D.K., who was single, had four of her own children, ranging in age from eight years to 17 years. The family lived in a two bedroom apartment in Long Beach. The social worker

observed a strong attachment between A.A. and D.K. D.K.'s other children wanted A.A. to be part of their family.

However, DCFS noted that there had been two referrals of domestic disputes between D.K. and Sierra. In one of them, D.K. refused to permit Sierra to "hang out" with her half-sibling in Northridge. D.K. suspected the half-sibling called in the referral, and Sierra denied that D.K. was abusive. DCFS was investigating and the social worker reported that D.K. and Sierra had several physical altercations where law enforcement became involved.

In a July 18, 2012 incident in which police were called, D.K. and Sierra got into a fight. D.K. placed her legs around her Sierra's head and squeezed it with her legs. D.K. slapped her Sierra's face and repeatedly pushed her. D.K. wrapped her arm around Sierra's neck and pushed her out of the house. As a result, Sierra sustained bruised ribs, strained muscles in her back and whiplash. Sierra yelled at D.K., "Eastside bounty hunters Watts blood, if you keep touching me they are going to fuck you up." Sierra put her hand through a glass window and injured herself, but D.K. refused to transport her for medical care. No arrests were made. DCFS had not yet completed its investigation into the incident, and thus recommended that parental rights to A.A. not be terminated.

On July 31, 2012, Sierra told police she had been living in Northridge since the incident, and intended to stay there until she turned 18. Sierra did not want to press charges against D.K. D.K. denied abusing Sierra, and did not want to press charges either. D.K. wanted Sierra to return home.

DCFS reported that Sierra had told the social worker that her bruised ribs were from a pool party in Northridge, and she had made up the rest of the story she told police. She said D.K. had locked the door because she thought Sierra would hurt someone. Sierra banged on the window and when it broke she left because D.K. called the police. Sierra stated she exaggerated her report. Mother told DCFS that Sierra was "crazy" and "over-exaggerated." D.K. stated the family was watching television when one of the boys came in and Sierra grabbed him by the hair and pulled him out of the room. Sierra

pushed him and D.K. told Sierra to go outside. Sierra thought D.K. had locked her out. D.K. denied slapping or pushing Sierra.

On August 30, 2012, DCFS detained A.A. and placed her in foster care. D.K. and her family wanted A.A. back. D.K. did not have a criminal record.

On September 5, 2012, DCFS filed a supplemental petition under section 387 based on D.K.'s July 18, 2012 abuse of Sierra. The court ordered A.A. detained, and set the matter for an adjudication hearing September 27, 2012.

On September 21, 2012, D.K. told DCFS she was obtaining a restraining order. On September 20, Sierra had attempted to take her brother's phone, and starting hitting her brother. Police came and handcuffed Sierra and picked up her things. Sierra told the social worker she was not in a gang, and she was no longer living with D.K. D.K. had previously completed parenting and anger management courses, and D.K. stated she would go to parenting class to address the issues with Sierra, and was willing to attend therapy.

DCFS recommended that A.A. not be returned to D.K.'s care.

At the October 4, 2012 hearing, D.K. told the court that she was fairly strict with Sierra, and when Sierra got together with her half-sister on her father's side, she was exposed to more freedom, including frat parties, and acted out in order to get out of the house. The court granted DCFS's request for a continuance to permit it to further assess the case.

DCFS reported that "[g]iven the seriousness of the police report, the evidence depicts lack of judgment and poor parenting decisions on behalf of [D.K.]. Because the child, A.A., was in the home during the time of the altercation, [D.K.] contributed to causing emotional abuse and detriment to the well-being of the child, A.A. With the history of altercations in the home, the home is not an appropriate placement for [the] child. Given the child's age, it is most appropriate for the child to be placed in an adoptive home without [D.K.] being offered reunification services." The department

recommended the count against D.K. be sustained with a section 366.26 hearing to be continued 120 days to permit assessment of adoption by A.A.'s current caregivers.

On October 15, 2012, D.K. obtained a restraining order protecting herself and her family from Sierra.

At the October 25, 2012 hearing, A.A.'s counsel advised the court she would submit on jurisdiction, but requested that the court return A.A. to D.K.'s home, or in the alternative offer D.K. reunification services. A.A. had lived with D.K. most of her life. D.K. had taken steps to make her home as safe for A.A. as possible: she had enrolled in parenting classes and obtained a restraining order against Sierra. Mother's counsel also requested reunification services for D.K., arguing that corrective measures had been taken since the incident in July, and the court needed to find a current risk of harm to A.A. in order to sustain jurisdiction. The court responded that because D.K. was not a parent or legal guardian, the standard was whether the previous disposition had been effective in protecting A.A. DCFS argued the petition should be sustained, stating the parties had been minimizing the events of July 18, 2012 and backpedalling since that time. Further, A.A. as a one-year-old was highly adoptable.

The court found the allegations of the petition to be true, and noted there was no provision for reunification services in this circumstance. The court stated that return to D.K. was not in A.A.'s best interests, and the evidence depicted lack of judgment and poor parenting decisions. The court observed "the caretaker [D.K.] had parenting and anger management [classes] in 2008, and it doesn't seem to have kept the circumstances away. And we have a restraining order in effect, and what's that doing? That's blaming her child [Sierra], and I'm just not seeing that it's going to make—that's in A.A.'s best interest to do anything except pursue another home." The court advanced and vacated the section 366.26 hearing to November 1, 2011, and ordered DCFS to try and find an adoptive home.

DISCUSSION

A.A. argues the dependency court erred in sustaining the section 387 petition without applying the statutory criteria of section 361.3 to determine whether placement with D.K., a relative, was appropriate. She argues that there is insufficient evidence to support removal of A.A. from D.K.'s custody. DCFS contends A.A. waived the issue by failing to raise it; contends the statutory criteria only apply to the adjudication phase of the petition, and need not be considered at disposition; and in any event, even applying the criteria to the facts of this case, the dependency court did not err. We disagree.

"An order changing or modifying a previous order by removing a child from the physical custody of a parent, guardian, relative, or friend and directing placement in a foster home . . . shall be made only after noticed hearing upon a supplemental petition." (§ 387, subd. (a).) Thus, before parental rights are terminated, DCFS cannot move a child from a court-ordered relative placement to a foster placement without filing a supplemental petition and obtaining a dispositional order on the petition. (§ 387, subd. (a); *In re H.G.* (2006) 146 Cal.App.4th 1, 10–11; *In re A.O.* (2004) 120 Cal.App.4th 1054, 1060; Cal. Rules of Court, rule 5.560, subd. (c).) Section 387 petitions are used "when there are facts which indicate that a previous disposition is not appropriate." (*In re Jessica C.* (2001) 93 Cal.App.4th 1027, 1035.) The section 387 petition "shall contain a concise statement of facts sufficient to support the conclusion that the previous disposition has not been effective in the rehabilitation or protection of the child or, in the case of a placement with a relative, sufficient to show that the placement is not appropriate in view of the criteria in Section 361.3." (§ 387, subd. (b).)

During the adjudicatory phase of the hearing on a supplemental petition, DCFS has the burden of proof by a preponderance of the evidence. (*In re H.G.*, *supra*, 146 Cal.App.4th at p. 11.) The court must decide whether the factual allegations of the petitions are true and, if so, whether "the previous disposition has . . . been effective in the rehabilitation or protection of the child or, in the case of a placement with a relative, [whether] the placement is not appropriate in view of the criteria in Section 361.3."

(§387, subd. (b); Cal. Rules of Court, rule 5.565(e); *In re H.G.*, at pp. 11–12; see *In re A.O.* (2010) 185 Cal.App.4th 103, 110.)

If DCFS meets its burden of proof during the adjudicatory phase, the case proceeds to the dispositional phase. (*In re H.G.*, *supra*, 146 Cal.App.4th at pp. 12, 17–18; *In re A.O.*, *supra*, 185 Cal.App.4th at p. 110.) During that phase, the court determines whether there is a need to remove the child from the current placement. (*In re H.G.*, at pp. 12, 17–18; *In re Javier G.* (2006) 137 Cal.App.4th 453, 460–462.) In doing so, the court "follows the procedures for dispositional hearings to determine whether removal is appropriate." (*In re Miguel E.* (2004) 120 Cal.App.4th 521, 542; Cal. Rules of Court, rule 5.565(e)(2).) In the case of an existing relative placement, the determination whether to remove the child is based on the risk of harm to the child if he or she remained in that placement. (*In re H.G.*, at p. 18.) The court must conduct a dispositional hearing, and errs if it does not consider all of the criteria set forth in section 361.3. (*Id.* at pp. 16–17.) DCFS has the burden of proof on that issue by a preponderance of the evidence. (*In re A.O.*, *supra*, 120 Cal.App.4th at p. 1061.)

We review the dependency court's findings at the adjudicatory and dispositional phases of the section 387 hearing for substantial evidence. (*In re H.G.*, *supra*, 146 Cal.App.4th at pp. 12–13; *In re A.O.*, *supra*, 120 Cal.App.4th at p. 1064.) "We review the evidence in the light most favorable to the trial court's determinations, resolve all evidentiary conflicts in favor of the prevailing party, and indulge in all reasonable inferences to uphold the trial court's findings. [Citation.] We do not reweigh the evidence, evaluate the credibility of witnesses, or resolve evidentiary conflicts. [Citation.] The burden is on the party or parties challenging the findings and orders of the trial court to show there is no evidence of a substantial nature to support the finding or order. [Citation.]" (*In re H.G.*, at pp. 12–13.)

Section 361.3, subdivision (a) provides, in any case where a child is removed from the physical custody of his or her parents, that "preferential consideration shall be given to a request by a relative of the child for placement of the child with the relative."

"Preferential consideration" means that "the relative seeking placement shall be the first placement to be considered and investigated." (§ 361.3, subd. (c)(1).) Relatives desiring placement shall be assessed according to the factors enumerated in subdivision (a). (§ 361.3, subd. (a).)[2] These include the best interest of the child, the wishes of the parent, the good moral character of the relative, the nature and duration of the relationship between the relative and the child, and the relative's ability to provide a secure and stable environment. (*Ibid*.) Although all the statutory factors are important, the "linchpin" is always the best interest of the child. (See *In re Robert L*. (1993) 21 Cal.App.4th 1057, 1068.) A decision under section 361.3 regarding placement with a relative is reviewed for abuse of discretion. (*In re Stephanie M.* (1994) 7 Cal.4th 295, 319–320.)

Here, unlike *In re H.G.*, *supra*, 146 Cal.App.4th 1, the court did conduct a dispositional hearing, and A.A. did not contest jurisdiction. Nonetheless, we follow *In re H.G.* and conclude the section 361.3 factors are also relevant at the disposition phase and

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[2] Those factors are: "(1) The best interest of the child, including special physical, psychological, educational, medical, or emotional needs. [¶] (2) The wishes of the parent, the relative, and child, if appropriate. [¶] (3) The provisions of Part 6 (commencing with Section 7950) of Division 12 of the Family Code regarding relative placement. [¶] (4) Placement of siblings and half siblings in the same home, if that placement is found to be in the best interest of each of the children as provided in Section 16002. [¶] (5) The good moral character of the relative and any other adult living in the home, including whether any individual residing in the home has a prior history of violent criminal acts or has been responsible for acts of child abuse or neglect. [¶] (6) The nature and duration of the relationship between the child and the relative, and the relative's desire to care for, and to provide legal permanency for, the child if reunification is unsuccessful. [¶] (7) The ability of the relative to do the following: [¶] (A) Provide a safe, secure, and stable environment for the child. [¶] (B) Exercise proper and effective care and control of the child. [¶] (C) Provide a home and the necessities of life for the child. [¶] (D) Protect the child from his or her parents. [¶] (E) Facilitate court-ordered reunification efforts with the parents. [¶] (F) Facilitate visitation with the child's other relatives. [¶] (G) Facilitate implementation of all elements of the case plan. [¶] (H) Provide legal permanence for the child if reunification fails. [¶] However, any finding made with respect to the factor considered pursuant to this subparagraph and pursuant to subparagraph (G) shall not be the sole basis for precluding preferential placement with a relative. [¶] (I) Arrange for appropriate and safe child care, as necessary. [¶] (8) The safety of the relative's home."

we agree with A.A. that the dependency court failed to apply the factors set forth in section 361.3 to determine whether the placement remained appropriate given D.K.'s altercation with Sierra. At most, the court only considered that there had been an episode between D.K. and her now adult daughter. The court did not consider the ongoing relationship A.A. had with D.K. and the other siblings in the household, the disruption a new placement would have on the child, D.K.'s capacity to provide a stable home and facilitate appropriate visitation with other members of A.A.'s family, and D.K.'s lack of a criminal record. We therefore remand the matter for a hearing at which the court should all of the factors set forth in section 361.3, subdivision (a).

DISPOSITION

The order of the superior court is reversed and remanded for the court to consider the statutory facts of Welfare and Institutions Code section 361.3 in determining whether A.A. should be removed from D.K.'s home.

NOT TO BE PUBLISHED.

JOHNSON, J.

We concur:

MALLANO, P. J.

ROTHSCHILD, J.