Filed 1/10/18 In re Jo. M. CA2/5

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

In re JO. M. et al., Persons Coming Under the Juvenile Court Law.	B279622 (Los Angeles County Super. Ct. No. CK70512)
LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. J. A., Defendant and Appellant.	

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

Christopher R. Booth, under appointment by the Court of Appeal, for Defendant and Appellant.

Mary C. Wickham, County Counsel, R. Keith Davis, Assistant County Counsel, Tracey F. Dodds, Principal Deputy County Counsel, for Plaintiff and Respondent.

This family—mother C.M., father J.A., and their four children, Jo. M., Ju. M., S.M. and K.M.—has a long and disheartening history with the juvenile justice system. The three eldest children, born in 2005, 2006, and 2007, were initially brought into the dependency system in 2007 as a result of the parents' domestic violence, neglect, mother's drug abuse and father's alcohol abuse. (Welf. and Inst. Code, § 300, subds. (a), (b).)[1] The youngest child, K.M., was born in 2008, during pendency of the initial juvenile court proceedings, and he was declared a dependent as well. At the time, J.A. was deemed the presumed father of the two eldest children, Jo. M. and Ju. M., but not as to S.M. or K.M. Jurisdiction was terminated in December 2009 with family law "exit orders" granting mother full legal and physical custody of the children.

Amended petitions were sustained in January 2011 as to all four children after mother physically abused their older half-sister (now an adult) and abused alcohol to the point she could not provide regular care for her children. By then, mother and father, who had never married, were living apart and father's whereabouts were unknown. The juvenile court sustained a section 300, subdivision (g) count based on father's abandonment. Father had no contact with the children after 2009. In October

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

2011, he was deported to his home country, Mexico. He currently resides in his parents' home in the state of Yucatan.

At various times, mother gained custody of one or more of the children under continued DCFS supervision, but they were always returned to foster care. Family reunification services for her were terminated and reinstated on more than one occasion.

Jo. M. and Ju. M. were placed in one foster home. Jo. M. has been diagnosed with autism; Ju. M. has Down Syndrome. The younger siblings, S.M. and K.M., were together in another foster home. S.M. is developmentally delayed. At various times, adoption has been the stated permanent plan for the younger two children, but no prospective adoptive home has ever been identified.

In May 2014, DCFS initiated a new section 300 petition as to Jo. M. and a subsequent petition under section 387 for Ju. M. A current address for father in Mexico was located, and Hague Convention protocol was implemented to provide him with notice of the proceedings. Counsel was appointed for father in December 2015. Through his attorney, he immediately began efforts to reunite with the children and assume custody of them in Mexico. Father began regular telephone contact with children.

He filed a section 388 petition, contending his due process rights had been violated when he was not given notice of the most recent petitions filed for Jo. M. and Ju. M. At the May 20, 2016 hearing, the juvenile court granted father's petition. Because father was a nonoffending, noncustodial parent at the time the current dependency proceedings were initiated, the juvenile court did not void the jurisdictional findings, which were based on mother's conduct placing the children at substantial risk. Rather, it "cured [the due process violation] by unraveling the

proceedings to the disposition. So, therefore, we will schedule a new disposition hearing."

By this time, the four children ranged in age from seven to 11. Father sought to be declared S.M.'s presumed father. He had been incarcerated when she was born and was not included on her birth certificate. He did live with her briefly before the initial dependency proceedings. He wanted to be declared K.M.'s presumed father as well, but had never lived with the youngest child. As a first step, paternity tests were ordered for him and K.M. The juvenile court ordered DCFS to "contact D.I.F. [Integral Department of the Family] [in Mexico] to do an assessment; essentially, a home study, just an overall evaluation. [¶] I believe there are previous [domestic violence] issues in this case, so that should all be explored in terms of the father's current status."

The disposition hearing for father was continued several times as a result of various delays associated with obtaining father's paternity test, passports for the children so they could visit him in Mexico, and a translation of the D.I.F. report. Counsel for father and DCFS blamed each other for the delays. DCFS's section 366.26 motion for permanency planning for the children and mother's section 388 motion to reinstate reunification services were also continued.

The hearing on the pending motions was conducted on November 29, 2016. Test results for K.M. established a 99.99 percent probability of paternity.[2] At the beginning of the

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[2] Despite the overwhelming percentage in favor of a paternity finding, the last minute information report dated October 28, 2016, was underwhelming in its support for the likelihood of paternity, stating, "the alleged father . . . cannot be

hearing, the juvenile court announced the DCFS recommendation was to take the permanency planning hearing off calendar, reinstate reunification services for mother, and maintain the children in foster care, "but . . . for disposition [as to father] . . . continue to try to facilitate visitation with the father in Mexico." DCFS's counsel concurred, noting his client "wants to have as many options as possible with these children. In case either one of the three doesn't work out, there's some sort of alternative, whether that be with the father in Mexico, with foster placement here, or perhaps, eventually, . . . return to the home of the mother."

All counsel agreed to the stipulation proposed by father's attorney: "If the father were called to the stand and sworn, he would testify that he absolutely wants all of his children placed in his custody in Mexico; that he will do what he can to make sure that the mother would get visits at least once a month; that the children will be able to call the mother, and the mother can call the children as often as she wants; that he does have Skype, and that he could use Skype so the children can have, you know, continual contact with the mother; and he will totally cooperate, as he has been doing in every way, with the Department and any orders that the Department does have."

The D.I.F. report, translated into English, was also received in evidence. No live testimony was taken. Father participated in the hearing by telephone. Counsel proceeded to argument.

Father's counsel began her argument by asking the juvenile court to set an order to show cause hearing to address

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excluded as the biological father of the child, [K.M.], since they share genetic markers."

what she described as DCFS's "never follow[ing] [the juvenile court's] orders." Specifically, she mentioned delays in translating the D.I.F. report and funding authorizations and passports for the children's visit to Mexico. She asked for the children's immediate placement with father after "a seven-day stay. That's fine. They can be sent on the eighth day."

Mother's counsel opposed placement with father. In addition to interfering with her reunification, counsel argued the children had no relationship with father and they would be sent "into an entirely different country." Minors' counsel, while she did not "have any problem with [the children] visiting . . . father to maybe reconnect," agreed with mother and opposed their placement with father. She was especially concerned about Ju. M., who has Down Syndrome and was not verbal.

The argument by DCFS's counsel against placement with father was as follows: "Your Honor, the Department does take into consideration the needs and desires of the children in these cases. I would think that if the Department didn't care, the easiest thing in the world to do would be to ask that this court simply send these children out of the country so that DCFS could wipe its hands of the case and move on." Counsel added that sending the children to another state was a far cry from sending them to "the Yucatan peninsula in Mexico. I mean, this is a completely different cultural, linguistic experience for these children. We don't even know whether these children are fluent enough in Spanish to be able to get along in Mexico, to go to school in Mexico without interruption in their academic careers.[3]

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3 The children were placed in Spanish-speaking foster homes and mother and father were always assisted by Spanish language interpreters.

[¶] I mean, this is not something that the Department would say should never happen. I think the Department would be in favor of some sort of visit to be arranged between the children and their father to see if the children would like to go live with their father. And if the children agree that this is something that they wanted to do, then I think it's something that perhaps the Department could get behind at that time. [¶] But right now, I think it's incredibly premature, because what, essentially, [father's counsel] is asking the court to do is send the children to Mexico and then see after that point whether there is clear and convincing evidence of a detriment to the physical and emotional safety of the child. And it seems that that was not the intent of the case law in this area."

The juvenile court denied father's request for placement, finding "clear and convincing evidence that it would be detrimental to send the children to Mexico now for placement with the father. That is something that can be reconsidered after the children have had, hopefully, an extended visit there in the near future." The minute order stated, "Father is nonoffending. The court finds that it would be detrimental to the physical or emotional health of the minors to send them to Mexico for placement with the father."

On the record, the juvenile court provided more detail in support of its ruling, noting in particular Ju. M.'s special needs, reunification services had just been reinstated for mother, it would be "very abrupt and ill-considered to make a placement order now that [the children] should be shipped off to a brand new country when they have not laid eyes on their father for many, many years," and D.I.F. apparently did not receive

"information about everything that had gone on here between the mother . . . and the father."

Father timely appealed from the dispositional order.

DISCUSSION

Section 361.2, subdivision (a) provides in part, "(a) 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."

In this case, the burden was on DCFS to prove, by clear and convincing evidence, that placement with father would be detrimental to the children. (*In re John M.* (2006) 141 Cal.App.4th 1564, 1569 (*John M.*).) Our task on appeal is to determine whether substantial evidence supports the detriment finding: "[The clear and convincing standard] "is not a standard for appellate review . . . . The sufficiency of evidence to establish a given fact, where the law requires proof of the fact to be clear and convincing, is primarily a question for the trial court to determine, and if there is substantial evidence to support its conclusion, the determination is not open to review on appeal. [Citations.] [Citation.] Thus, on appeal from a judgment required to be based upon clear and convincing evidence, the clear and convincing test disappears . . . [and] the usual rule of conflicting evidence is applied, giving full effect to the

respondent's evidence, however slight, and disregarding the appellant's evidence, however strong." (*In re J.S.* (2014) 228 Cal.App.4th 1483, 1493, internal quotation marks omitted.)

The evidence presented by DCFS was not so strong as the evidence presented by father. But giving that slighter evidence "full effect" while disregarding father's stronger evidence—as we must—we conclude substantial evidence supports the trial court's finding of detriment. We reach this conclusion recognizing that DCFS, although it had many months to evaluate thoroughly father and father's home and community, should have been prepared at the disposition hearing to provide more answers than it did.[4]

At the time of the disposition hearing, the three eldest children had not been in their father's physical presence for many years; the youngest had never seen him in person. Father and the children regularly communicated via video visits, but there was no information that social workers or the foster parents ever participated in the calls in order to gauge the children's interactions with him. The children had never met their paternal grandparents, with whom father resides; and there was no information in the record that the paternal grandparents ever joined in the children's video visits.[5]

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[4] There is no information in the record, for example, as to whether these children—all born in the United States to a father (and perhaps a mother) who are Mexican citizens—are entitled to dual citizenship.

[5] We recognize the Court of Appeal in *John M, supra,* 141 Cal.App.4th 1564 rejected several of the juvenile court's stated reasons for concluding placement with the father would be

We are not unsympathetic to the frustrations expressed by father's counsel at the lengthy delay. After all the years these children have spent in the dependency system, no permanent plan has ever been realized for any of the children. We take judicial notice of the juvenile court minutes for the May 30, June 20, June 23, and November 28, 2017 hearings. The next hearing is scheduled for January 22, 2018. The June 23, 2017 minutes indicate the children had been authorized for a three-week visit with father in Mexico and mother was not in compliance with her case plan and was restricted to monitored visits. At the November 28, 2017 hearing, a contested permanency hearing for father was scheduled for January 22, 2018.

The dispositional order here, while appealable, appears to have been treated more as a continuance so additional information concerning placement with father could be obtained. (See, e.g., *John M., supra,* 141 Cal.App.4th at p. 1572.) DCFS now has had more than one year since the disposition hearing to comply with the juvenile court's orders concerning the children's potential placement with father. As the *John M.* court held, "Because [the father] is a parent, the appropriate investigation is

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detrimental to the children. But we are not obligated to adopt all of the juvenile court's remarks; we review the court's ruling, not its rationale. (*Mayer v. C.W. Driver* (2002) 98 Cal.App.4th 48, 64.) The current record in this case includes facts that significantly differ from those in *John M.* and provide substantial evidence for the challenged dispositional order. This case involves not one child, but four children—three of whom have special needs. It appears the four children themselves have not all resided together in one home for years, if ever. Unlike the noncustodial parent in *John M.,* father does have a criminal record and earlier dependency proceedings were terminated with exit orders that denied him legal and physical custody.

a basic one, less rigorous than the investigation necessary for placement with a [nonrelative or] more distant relative such as a cousin. While [the father's] geographical distance from [Los Angeles] necessitates a greater effort to garner information, it should not subject him to greater scrutiny. The depth of investigation should be determined by the fact that he is [the] parent, not that he lives in [Mexico]. (*Id.* at p. 1573.)

DISPOSITION

The order is affirmed.

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DUNNING, J.*

We concur:

KRIEGLER, Acting P. J.

BAKER, J.

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* Judge of the Superior Court of the County of Orange, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.