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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

In re N.D. et al., Persons
Coming Under the Juvenile
Court Law.

LOS ANGELES COUNTY
DEPARTMENT OF CHILDREN
AND FAMILY SERVICES,

Plaintiff and Respondent,

v.

T.D.,

Defendant and Appellant.

B270979

(Los Angeles County
Super. Ct. No. DK11387)

APPEAL from an order of the Superior Court of Los Angeles County, Julie Fox Blackshaw, Judge. Affirmed.

Ernesto Paz Rey, under appointment by the Court of Appeal, for Defendant and Appellant.

Mary C. Wickham, County Counsel, R. Keith Davis, Assistant County Counsel, and Aileen Wong, Deputy County Counsel, for Plaintiff and Respondent.

INTRODUCTION

Father T.D. appeals from the juvenile court's dispositional order denying placement of his daughter and son in his custody following the court's finding of jurisdiction over the children pursuant to Welfare and Institutions Code¹ section 300. We affirm because substantial evidence supports the court's finding pursuant to section 361.2 that the children would suffer a substantial detriment if placed with Father.

FACTS AND PROCEDURAL BACKGROUND

Prior to the Los Angeles Department of Children and Family Services' (DCFS) involvement in this case, Mother lived with 10-year-old Son (A.D.) and 12-year-old Daughter (N.D.). Father was not regularly involved in the children's lives and had not lived with the children since Daughter was six years old. In 2014, Father moved away from the children to New Jersey, where he lived with his girlfriend and her child.

1. Child Abuse

Mother and the children had seven prior referrals to DCFS, with one of them being substantiated for emotional abuse in 2011. In April and May 2015, DCFS received additional referrals alleging emotional and physical abuse by Mother and Mother's then-boyfriend, Sean. Mother physically fought with Daughter, injuring her. The children stated Mother previously beat them with a belt. Mother also exposed the children to domestic violence, as Sean attacked Mother in front of the children. Daughter had behavioral problems, many school absences, and failing grades. During its investigation, DCFS contacted Father, who confirmed he was the children's biological father and

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

requested counsel to be appointed for him. Father told DCFS that he wanted the children to live with the paternal grandmother.

2. Detention and Jurisdiction

On May 21, 2015, DCFS filed a section 300 petition, alleging that Mother physically abused Daughter and Son, and that Mother and her boyfriend had a history of engaging in violent altercations in the children's presence. The juvenile court subsequently detained the children in the maternal grandmother's home, declared them a sibling group, and ordered monitored visitation for the parents, but Father was not to have visits until he contacted DCFS. On June 9, 2015, the children were placed with their paternal aunt, with whom they had a positive and long-standing relationship. In the paternal aunt's care they enrolled in new schools and began therapy to address issues related to the physical and emotional abuse sustained in Mother's care. Although Father represented to DCFS that he intended to appear at a July 2015 hearing, he did not show.

On July 21, 2015, Mother filed a waiver of rights form, pleading no contest to the allegations of the section 300 petition. The juvenile court sustained jurisdiction over the children pursuant to section 300, subdivisions (b) and (j), finding Mother knowingly, intelligently and voluntarily waived her rights. The juvenile court ordered an Interstate Compact on the Placement of

Children (ICPC)² evaluation for Father's home in New Jersey.

The court set the matter for a disposition hearing.

3. Father's Failure to Seek Custody and Cooperate with DCFS

Although Father stated on the phone in June 2015 to a social worker that he would like the children to live with him, he did not follow up to obtain custody. On September 1 and December 4, 2015, the social worker reported that Father had not contacted her even though she called Father and sent him contact letters to obtain information for the ICPC evaluation. On December 4, 2015, the juvenile court stated it hoped Father would cooperate with the ICPC process. On February 3, 2016, the social worker stated she had been unable to complete the ICPC packet because Father had not provided the information needed. Due to Father's lack of cooperation, the juvenile court had no information to evaluate Father's home for placement.

Based on DCFS's investigation, it appeared that Mother was the children's sole supporter and caretaker. Father saw the children sporadically, occasionally bought them items like shoes, and last visited them in March 2015. Mother received no child support or other assistance from Father even during Mother's 2009 hospitalization after sustaining a gunshot wound to her face. Instead, the maternal grandmother cared for the children during Mother's recovery from the injury. Father also did not know how the children were doing in school. He reported that he

² ICPC is a compact among California and other states to facilitate cooperation in the placement and monitoring of dependent children. (*In re John M.* (2006) 141 Cal.App.4th 1564, 1573 (*John M.*); *In re Suhey G.* (2013) 221 Cal.App.4th 732, 742; see Family Code, §7900 et seq.)

was unaware of Mother's abuse of the children, but knew Mother had an "aggressive nature." Although Father asserted he recently began speaking with the children often, Father did not initiate phone calls to the children. Rather, the paternal aunt encouraged the children to call Father when they were in her care. The paternal aunt noted that Father appeared to be content with her raising the children and had not made efforts to reunify with the children.

Prior to the disposition hearing, the children informed DCFS that they did not want to live with Father in New Jersey. Daughter stated that she would be willing to live with Father only if he lived in Los Angeles. Son stated that even if Father lived in Los Angeles, he still preferred to live with his paternal aunt.

4. The Court Denied Father Custody

At the February 3, 2016 disposition hearing, Father appeared by telephone. The juvenile court admitted the DCFS reports detailing the facts provided above. Father's counsel wanted to take Father's testimony over the telephone but the court did not allow the testimony because it could not judge Father's credibility and demeanor.

Father's counsel argued that it would not be detrimental to place the children with Father. Mother, DCFS and counsel for the children opposed Father taking custody of the children.

The court found that Father's request for custody fell under section 361.2, and that there would be a substantial detriment to the children if placed with Father. The court explained:

"I do know that an I.C.P.C. does not -- is not required [for] placement with [Father], but it is a good tool

“Back in July of 2015, I did order an I.C.P.C. of [Father’s] home in New Jersey and that was in the anticipation of possibly releasing the children to him. But since that time, [Father] has not visited the children, he has not cooperated with the I.C.P.C., he has not shown any interest whatsoever in trying to develop a relationship with these children. There are occasional phone calls. But from what I understand from the social worker’s report, the children call him. They are not initiated by [Father].

“[Father] may have a plan, which is being stated by his counsel right now for the children’s care, but we have -- the court has been willing since July of 2015 to understand what [Father’s] plan was for these children. And I have no information. Whatever the proposal is by [Father] today, it is too little and too late to show that he has an adequate commitment to the children.

“I will permit unmonitored visits, and I think the idea of the children having a visit in New Jersey is a wonderful idea. And, frankly, that could have happened earlier had [Father] attempted to show that kind of interest in his children.

“So they are very well situated now. They are doing well. They are getting the services they need here, and I find there would be substantial detriment if they were . . . placed with [Father] at this time.”

Father appeals the dispositional order.

DISCUSSION

Father argues that the court erred in deciding not to place the children in his custody. He asserts that the court’s detriment finding was not supported by substantial evidence.

“Section 361.2 establishes the procedures a court must follow for placing a dependent child following removal from the

custodial parent pursuant to section 361. [Citation.] When a court orders removal of a minor under section 361, the court first must determine whether there is a parent who wants to assume custody who was not residing with the minor at the time the events that brought the minor within the provisions of section 300 occurred.” (*In re Z.K.* (2011) 201 Cal.App.4th 51, 70.) 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.” (§ 361.2, subd. (a).)

The detriment finding must be based on clear and convincing evidence. (*In re Isayah C.* (2004) 118 Cal.App.4th 684, 700.) The juvenile court must “make a finding either in writing or on the record of the basis for its determination” (§ 361.2, subd. (c).) “We review the record in the light most favorable to the court’s order to determine whether there is substantial evidence from which a reasonable trier of fact could find clear and convincing evidence . . . that the children would suffer such detriment.” (*In re Luke M.* (2003) 107 Cal.App.4th 1412, 1426.)

Here, there was substantial evidence that placement with Father would be detrimental to the children. Father exhibited an overall lack of interest in parenting the children. Father never provided significant financial support to the children and was not involved in their daily lives, even when Mother was seriously injured with a gunshot wound. Father did not know how the children were doing in school and claimed ignorance of the abuse they sustained in Mother’s home despite acknowledging Mother’s aggression. Father did not initiate phone calls to the children; rather, the children called him.

Father's indifference about raising the children manifested throughout this DCFS case, when the court and DCFS attempted to engage him. Despite DCFS's repeated attempts to contact and obtain information from Father, he did not make any efforts to maintain contact with DCFS or have the children placed with him. Father simply did not return DCFS's calls, respond to the correspondence sent to him from DCFS regarding the children, or provide the information requested for the ICPC evaluation. Due to Father's lack of cooperation, the juvenile court had no information to evaluate Father's home for placement and assess his parental competency. Father made no efforts to reunify with the children until almost nine months into this dependency case, when his attorney requested custody at the jurisdiction and disposition hearing.

The children have been physically and emotionally abused. To address their needs, DCFS and their paternal aunt ensure that they receive therapy and services in Los Angeles. Father did not show interest in parenting the children or create a plan to address these specific needs. He put no effort into obtaining custody of them, and merely made a perfunctory request at the disposition hearing to transplant them across the country without showing how he would address their significant emotional and mental, and basic physical needs. We also note the children informed DCFS that they did not want to live with Father in New Jersey.

Based on the foregoing, we conclude that the trial court's finding of detriment is supported by substantial evidence that the children would suffer emotional and possible physical detriment if placed with Father.

Father asserts that because he appeared by telephone at the disposition hearing and requested custody, the court should have placed the children in his care. Yet, the Supreme Court clarified that, even where there is no showing of detriment, a parent cannot automatically obtain custody simply by requesting it. (*In re Zacharia D.* (1993) 6 Cal.4th 435, 454 (*Zacharia*)). The noncustodial parent seeking custody under section 361.2 must establish parental competence to receive custody. (*Ibid.*) In *Zacharia*, the Court of Appeal erroneously concluded that absent a showing of detriment, the child must automatically be placed with the noncustodial parent under section 361.2. (*Ibid.*) Reversing, the Supreme Court explained: “Under the Court of Appeal’s rationale, whenever a biological father comes forward, his child must be automatically placed with him absent a finding of detriment. This presumptive right to custody elevates the rights of a biological father above the child’s interest in stability and permanency, and defeats the Legislature’s careful balance of interests reflected in the time frame of the dependency laws.” (*Ibid.*) After making no efforts to work with DCFS and show his parental competence, Father cannot obtain custody merely by asserting that he wants it at the eleventh hour. The juvenile court properly balanced the children’s interest and father’s rights in denying the request.

Citing *John M.*, Father argues that this evidence relied on by the trial court was insufficient to support a finding of detriment. In *John M.*, the 13-year-old child was removed from his mother, who physically abused him; his 10-month-old half sister was also removed. (*John M., supra*, 141 Cal.App.4th at pp. 1567, 1570.) The child’s father lived in Tennessee, and “had been in contact with [the child] for one year after a four-year

hiatus.” (*Id.* at p. 1568.) The court found that this absence was not the father’s fault. (*Id.* at p. 1571.) The child told a social worker he did not want to live with his father because he “lived in the country,” and wanted to live with his aunt. (*Id.* at p. 1570.) The juvenile court found it would be detrimental to place the child with his father “based . . . on [the child]’s wishes, his need for services, his relationship with [his infant half-sister] and members of his extended family in San Diego, his lack of relationship with [his father], the paucity of information about [the father], and [his mother’s] reunification plan.” (*Ibid.*)

The Court of Appeal reversed, noting the child’s wishes about placement were “unclear.” (*John M.*, *supra*, 141 Cal.App.4th at p. 1570.) The social worker did not ask the child what he meant by his statement about his father living in the country, “could not see his facial expression during the conversation, and [the child]’s aunt was in the room while they spoke.” (*Ibid.*) The social worker also testified the child “had never told her that he did not want to live with [his father].” (*Ibid.*) In addition, Court of Appeal’s decision in *John M.* was largely driven by the fact that the social services agency overseeing the minor had been lax in investigating the father as a potential placement. (*Id.* at pp. 1568, 1572-1573.) The Court of Appeal explained: “Despite the court’s statement early in this case that [the father]’s home was to be evaluated, the Agency unilaterally decided that this was unnecessary, reasoning that [the child] did not want to live with [the father].” (*Id.* at p. 1572-1573.) Accordingly, the court held the Agency had failed to prove detriment. (*Id.* at p. 1571.)

Unlike *John M.*, Father's lack of involvement in the children's lives was Father's fault. Father moved away from the children to New Jersey. Father did not make efforts to call them and historically provided no support or care for the children. Father did not appear for the hearing he said he would attend and did not make efforts to visit the children during this case. Also, the children's desire not to live with Father in New Jersey was explicit. Additionally, Father chose not to cooperate with DCFS and provide information to assess his home for placement via ICPC. Although " 'compliance with the ICPC is not required for placement with an out-of-state parent,' " (*In re Z.K.*, *supra*, 201 Cal.App.4th at p. 66) "nothing in the ICPC prevents the use of an ICPC evaluation as a means of gathering information before placing a child with such a parent." (*John M.*, *supra*, 141 Cal.App.4th at p. 1572; see also Cal. Rules of Court, rule 5.616(g) [the juvenile court has discretion to use the ICPC as necessary to ensure the child's safety and well-being in placing the child with an out-of-state parent].) Father has failed to participate in the children's lives and in this dependency case, effectively denying the court an opportunity to assess the safety of his home. (Cf. *In re Patrick S.* (2013) 218 Cal.App.4th 1254, 1263 [The Court of Appeal concluded that the child's desire not to live with the father and lack of an established relationship with the father was not substantial evidence of detriment, where "[t]he record leaves no doubt that [the father] is a competent, caring and stable parent" as the father paid monthly child support for years, searched for his son, attended all dependency hearings when he learned of his son's whereabouts, immediately came forward and requested placement, and visited and contacted him regularly.])

In sum, the juvenile court's decision is supported by substantial evidence regarding Father's lack of interest in parenting and addressing the children's needs, and failure to provide the court information to assess him and his home for placement.

DISPOSITION

We affirm the court's dispositional order denying Father custody of the children.

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GOSWAMI, J.*

We concur:

EDMON, P. J.

ALDRICH, J.

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