Filed 7/11/16 In re M.T. CA2/8

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

In re M.T., a Person Coming Under the Juvenile Court Law.	B268043
LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. JOSHUA T., Defendant and Appellant.	(Los Angeles County Super. Ct. No. DK11165)

APPEAL from an order of the Superior Court of Los Angeles County. Stephen Marpet, Commissioner. Reversed in part and affirmed in part.

David A. Hamilton, under appointment by the Court of Appeal, for Defendant and Appellant.

No appearance for Plaintiff and Respondent Los Angeles County Department of Children and Family Services.

Janette Freeman Cochran, under appointment by the Court of Appeal, for minor M.T.

Joshua T. (father) appeals from a juvenile court disposition order purporting to remove then six-year-old M.T. from father's custody pursuant to Welfare and Institutions Code section 361, subdivision (c).[1] Father contends that since he was a noncustodial parent, and he was not named in the dependency petition, the court had no legal basis to "remove" M.T. from him under section 361, subdivision (c). The Los Angeles County Department of Children and Family Services (DCFS) takes no position in this appeal. M.T. has filed a brief arguing the court's finding of detriment was supported by substantial evidence and father was not prejudiced by the removal order, even if issued under the incorrect statutory provision.

We conclude that neither section 361, subdivision (c), nor section 361.2, was the proper statutory basis for an order as to father at disposition. That portion of the disposition order must therefore be reversed.

FACTUAL AND PROCEDURAL BACKGROUND

In light of father's limited argument on appeal, we only briefly summarize the factual background. In May 2015, DCFS detained M.T. and her two younger half-siblings, after mother gave birth to the youngest child and the child tested positive for methamphetamines. Mother told DCFS she had not had contact with father for four years. Mother completed a parentage questionnaire indicating father signed a birth certificate or other paperwork naming him as M.T.'s father, but he was not present at M.T.'s birth, he was not living with mother at the time of conception or birth of M.T., and he had not held himself out as M.T.'s father. Mother later indicated M.T. did not know her stepfather was not her biological father.

When father was eventually located, he told DCFS he intended to request a paternity test. He said he had previously given mother child support in cash, but he had not done so for two or three months. DCFS reported there was a voluntary DCFS case open for one of father's children with another woman, due to domestic violence between father and the child's mother. The social worker for the case reported father had a violent

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

history, smoked marijuana, did not pay the mother of that child any child support, and may not have been visiting the child regularly. Father said he had other children with a "DCFS history," but he had gone to court and "won the case."

In July 2015, father completed a statement regarding parentage indicating he did not know if he was M.T.'s father. He requested blood or DNA testing. In September 2015, the results of the testing revealed father was in fact M.T.'s biological father. A social worker informed father of the results while he was in the intensive care unit of a hospital; he had been stabbed at a gas station. Father said that once he had healed he was " 'okay' with visiting [M.T.]" He told the social worker he did not have a cell phone, was currently unemployed, and was living with his mother. DCFS further reported father had not had visitation or contact with M.T. since her birth. Although father could not yet have monitored visits due to his hospitalization, DCFS reported he was interested in visiting once he was physically capable of doing so.

At the October 2015 jurisdiction and disposition hearing, mother did not contest the petition. The juvenile court sustained a dependency petition alleging mother's drug use endangered her children and placed them at serious risk of physical harm. The court placed M.T. in the home of mother only, on the condition that mother live with the maternal grandmother and the maternal aunt, and that she submit to weekly random drug and alcohol testing.[2]

Counsel for the children asked the court to make findings "detaining" M.T. from father, arguing: "The reason that it's necessary is that he's only an alleged father and she still has not had a single visit." The court found by clear and convincing evidence there was a substantial danger to M.T.'s physical and mental well-being, and no reasonable means to protect her without removal from father. Father's counsel objected, contending father was "non-offending" and there was no clear and convincing evidence father posed a risk to M.T. requiring detention. The court overruled the objection, concluding: "At this time, because of the lack of contact with the father, his failing to support all of those

[2] The other two children were placed "home of parents," which included their father.

issues, I think there is by clear and convincing evidence a substantial danger and I am detaining." The court ordered that father's visits be monitored, in a therapeutic setting.

This appeal followed.

DISCUSSION

The Removal Order as to Father Must Be Reversed Because Father Neither Had Physical Custody of M.T. Nor Requested Custody

Father contends the juvenile court erred in applying section 361, subdivision (c) to remove M.T. from his custody because he was a noncustodial parent. He asserts there was no substantial evidence to support the removal order because the evidence established M.T. did not reside with him when the dependency proceedings were initiated, thus it was impossible for her to be "removed" from his custody. Father further argues the order was prejudicial because it set in motion the "full statutory scheme" as to father, including reunification services and review hearings. Father argues that "if for some reason" M.T. is removed from mother and placed in foster care, and the court later determines there is no reasonable probability of M.T. returning to either parent within statutory timelines, "the stage is set" for the termination of father's parental rights. In his reply brief, father also argues the court should have applied section 361.2 to determine disposition as to him.

We agree that section 361, subdivision (c) was not the correct statute to apply to father. We disagree with father's contention that the court should have applied section 361.2.

Under section 361, subdivision (c)(1), "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 . . . [t]here 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."

As father points out, and M.T. concedes, this provision did not apply to father because he never had physical custody of M.T. The statute simply did not apply to him. (*In re Abram L.* (2013) 219 Cal.App.4th 452, 460.) Further, father is incorrect that the court will need to hold hearings pursuant to section 366 because of the removal from father. M.T. was placed in mother's physical custody, thus the court will hold hearings pursuant to section 364, to determine whether continued DCFS supervision is necessary. (*In re Gabriel L.* (2009) 172 Cal.App.4th 644, 650.)

Father and M.T. invoke section 361.2 as the statute the juvenile court should have applied at the disposition hearing. Under section 361.2, when the court removes a child pursuant to section 361, it is to 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." (§ 361.2, subd. (a), italics added.)

Here, the juvenile court did not remove M.T. from mother's physical custody, so section 361.2 did not apply. (*In re Dakota J.* (2015) 242 Cal.App.4th 619, 630.) Further, the record does not indicate father desired to assume custody of M.T. or that he ever requested custody. Father had no relationship with M.T. and had not visited her since her birth. Father's only request was for a paternity test; upon learning the results of the testing, he was merely interested in visiting M.T. The juvenile court had no reason to consider placement with father under section 361.2, since there was no indication he desired to assume custody of her. Moreover, the record does not indicate father has been deemed M.T.'s presumed father. "A man's status as biological father based on genetic testing does not entitle him to the rights or status of a presumed father." (*In re P.A.* (2011) 198 Cal.App.4th 974, 980.) Only presumed fathers are entitled to a full panoply of rights under the juvenile dependency laws, including custody under section 361.2. (*In re J.H.* (2011) 198 Cal.App.4th 635, 644.)

There is authority for the proposition that, at some point, a finding of parental unfitness must be made, by clear and convincing evidence, before a *presumed* father's parental rights may be terminated.[3] (*In re T.G.* (2013) 215 Cal.App.4th 1, 13, 18; *In re Z.K.* (2011) 201 Cal.App.4th 51, 66.) Often this first occurs at the disposition hearing, in the form of a removal finding under section 361, subdivision (c), or a finding of detriment under section 361.2 that justifies not placing the child with the previously noncustodial parent. (*In re T.G., supra,* 215 Cal.App.4th at p. 13.) However, in this case, neither statute applied since M.T. had never lived with father and, even if he could have requested custody under section 361.2 without being deemed M.T.'s presumed father, and without removal from mother, he did *not* request custody or otherwise express a desire to assume custody.

We therefore conclude the removal order as to father must be reversed. Although father suggests a new dispositional hearing is required, we disagree. On the record before us, M.T. has not been removed from mother's physical custody, there has been no presumed father finding, father did not request custody of M.T., and he was in agreement with the order allowing him visits with M.T. We see no basis to disturb any other portion of the juvenile court's dispositional order. Should circumstances change—i.e., if M.T. *is* removed from mother, should father be deemed the presumed father, should he seek to gain custody of M.T.—our conclusions in this opinion are without prejudice to the juvenile court making any appropriate findings as to father at that time.

---

[3] When a father is a biological father only, not the presumed father, his parental rights may be terminated on a finding that adoption is in the child's best interest, without a finding of the father's unfitness. (*In re T.G., supra,* 215 Cal.App.4th at p. 18; *In re Jason J.* (2009) 175 Cal.App.4th 922, 933-934.)

DISPOSITION

The order removing M.T. from father's custody is reversed. In all other respects, the disposition order is affirmed.

BIGELOW, P.J.

We concur:

RUBIN, J.

GRIMES, J.