Filed 11/26/19 In re O.R. 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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 O.R. et al., Persons Coming Under the Juvenile Court Law.	B290446 (Los Angeles County Super. Ct. No. DK08188)
LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. R.F., Defendant and Appellant.	

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

Amy Tobin, under appointment by the Court of Appeal, for Defendant and Appellant.

Mary C. Wickham, County Counsel, Kristine P. Miles, Assistant County Counsel, and David Michael Miller, Deputy County Counsel, for Plaintiff and Respondent.

Defendant and appellant, R.F., the children's maternal aunt, appeals from the dependency court's order denying her petition, under Welfare and Institutions Code[1] section 388, seeking placement with her of the children, O.R. (born in 2005), D.W. (born in 2007), and C.W. (born in 2014) in her care. She contends that the dependency court failed to consider all relative placement preference factors in section 361.3 and that the court abused its discretion when it denied her request for placement. As we shall explain, we disagree and therefore affirm.

FACTUAL AND PROCEDURAL HISTORY

The family involved in the appeal includes O.R, D.W., and C.W (the Minors), the Minors' mother, J.W. (Mother), and R.F., the Minors' maternal aunt (appellant), who lives in Arizona.[2] Mother and the Minors had lived in Arizona until 2014. Mother suffered from health problems, which frequently required her hospitalization and rendered her unable to care for the Minors. When Mother was incapacitated, appellant cared for the Minors. Appellant had also previously adopted the Minors' older half-sibling, D.F.[3]

In 2014, Mother and the Minors relocated to California and in November 2014, the Minors came to the attention of the juvenile court when the Department of Children and Family Services (DCFS) filed a section 300 petition pursuant to subdivisions (a)

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

[2] The Minors have different fathers, none of whom are parties to this appeal.

[3] Although D.F. and the Minors have the same Mother, they have never lived together.

and (b), alleging that Mother and C.W.'s father had engaged in acts of domestic violence in front of the Minors. The court released the Minors to Mother, and in January 2015, when the juvenile court sustained the petition, the Minors remained in Mother's care.

A month later, however, they were removed from Mother's custody, and the juvenile court sustained a section 387 petition because Mother had permitted C.W.'s father to have access to the Minors and because Mother had failed to participate in services. Appellant contends that at that time, she requested placement of the Minors in her home in Arizona. Instead, they were placed in the home of the maternal grandfather in Los Angeles County so that Mother could visit them while she was participating in family reunification services.

In February 2016, the Minors were returned to Mother's custody because she was complying with the case plan. Thereafter, in June 2016, DCFS filed a section 342 petition alleging that Mother had failed to provide appropriate medical care for the Minors and had neglected their needs.[4] The court subsequently detained the children from Mother. DCFS contacted the maternal grandfather to ask him to take custody of the children again. The maternal grandfather, however, declined and in turn, recommended the Minors be placed temporarily in the home of family friends who attended his church, Mr. and Mrs. F. (the Caregivers). When appellant learned that the children had been detained from Mother again, she contacted DCFS and requested that they be placed with her. In early August 2016, the juvenile court sustained a section 342 petition, removed the children from Mother's custody, and granted her family reunification services and visitation. The

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[4] O.R. and D.W. suffered from asthma and C.W. has significant food allergies and severe eczema.

juvenile court also ordered an expedited Interstate Compact for the Placement of Children (ICPC) with appellant. In the meantime, the Minors remained placed with the Caregivers, and Mother continued to receive services and visitation.

The Arizona Department of Child Safety received the ICPC, contacted appellant in September 2016, and scheduled an inspection of appellant's home for early November 2016. After the inspection, appellant was informed that her home lacked sufficient sleeping arrangements to accommodate the Minors and that she did not have the proper foster care license to have them placed with her. Appellant already had six children[5] living in her home at the time, and her foster care license limited her to eight children in the home. On November 23, 2016, the ICPC administrator for the Arizona Department of Child Safety "[d]enied" the ICPC request. Attached to the ICPC denial was a letter, noting that appellant had stated she planned to move to a larger home with additional bedrooms to meet the foster care license sleeping requirements. The letter concluded that a new ICPC referral could be sent once appellant moved to a larger home.[6]

In January 2017, the juvenile court terminated Mother's family reunification services and set the matter for a permanency placement hearing and appointed the Caregivers as the children's educational rights holders. In mid-March 2017, appellant applied for a waiver from the Arizona Department of Child Safety to allow

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[5] Three of the children living with appellant were her offspring, two additional children in the home were nonrelative foster children that appellant was in the process of adopting, and another child was the Minors' 16-year-old, half-sibling, D.F.

[6] According to appellant, she did not move but instead reconfigured the bedrooms to add more sleeping space in her home.

her to have more than eight children in her home. On April 6, 2017, Mother died. The maternal grandmother sent an email to DCFS and the Minors' counsel, dated April 7, 2017, purportedly authored by Mother, requesting copies of various court orders and information about the case and also stating: Mother's wish that in the event of her death, appellant be permitted to adopt the children.

On April 24, 2017, at appellant's request, the juvenile court ordered a new ICPC for appellant in Arizona. In its May 2017, section 366.26 report, DCFS noted the children had been living in the Caregivers' home since the summer of 2016 and were doing well in their care. Caregivers met all the children's needs and were committed to a plan of legal guardianship. At that time, DCFS supported a new ICPC order for appellant, who was willing to adopt the children.

In July 2017, the Arizona Department of Child Safety approved appellant's request to provide care for more than eight children.

On July 31, 2017, the Arizona Department of Child Safety approved the ICPC regarding appellant's home. At the next scheduled court hearing in August 2017, DCFS filed an updated report informing the juvenile court of the approved ICPC. When DCFS informed the Minors that the ICPC had been approved, the Minors expressed that, although they enjoyed their visits with appellant, they wanted the Caregivers to adopt them. At the hearing on August 30, 2017, the juvenile court ordered DCFS to provide an updated report regarding possible placement of the children with appellant in Arizona and scheduled the next section 366.26 hearing for December 6, 2017.

On October 10, 2017, appellant filed a section 388 petition, requesting placement of the children in her home based on her

approved ICPC,[7] and the juvenile court scheduled a contested hearing on November 13, 2017. DCFS filed a response to the section 388 petition, analyzing the circumstances of appellant's request for placement and recommending that it be denied. DCFS noted that the Minors remained safe and stable in the Caregivers' home and that the Caregivers remained committed to caring for them, and now wished to adopt them. DCFS expressed concern that removing the Minors from the most stable home that they had ever lived in would not be in their best interest. Although DCFS acknowledged that the Minors had a relationship with appellant, they had never lived with her. Furthermore, even though the Minors stated that they would be "okay" to live with appellant, they expressed concern about the number of children already in the aunt's home and that their presence might burden her.

At appellant's request, the court continued the November 13, 2017 hearing to December 2017 to allow appellant to obtain private counsel.

DCFS later reported that at the end of November 2017, O.R. was hospitalized because he had suicidal ideations. O.R. acknowledged that he was sad and missed Mother. He also expressed concern regarding the dependency proceedings, relating his wish to stay with the Caregivers.

On December 6, 2017, the court granted appellant's counsel's request for another continuance of the section 388 hearing to

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[7] The Minors' half-sibling, D.F, whom appellant had adopted, also filed a section 388 petition seeking an order from the court to designate D.F. and the Minors a sibling unit. Appellant also filed a separate de facto parent request. The court denied those requests and those orders are not challenged on appeal.

February 8, 2018. Appellant's ICPC expired on February 2, 2018, no extension was possible, and a new ICPC would have to be initiated for re-approval.

Before the February 8, 2018 section 388 hearing, DCFS filed updated reports with the juvenile court, including a concurrent planning assessment, which noted that the Caregivers supported the Minors maintaining visitation with appellant after the finalization of their adoptions. At the hearing, the juvenile court received various reports and documents offered by the parties, including the email purportedly from Mother indicating her wishes on the Minors' placement.

Appellant testified at the section 388 hearing. She described her involvement in the Minor's lives before they moved to California in 2014 and related Mother's wishes regarding their adoption. Appellant also described her efforts to obtain the ICPC. She recognized, however, that as early as August 2017, the Minors expressed their desire to stay with the Caregivers. The Minors' 16-year-old, half-sibling, D.F., also testified, telling the court that he wanted the Minors to move to Arizona with him and appellant. The maternal grandfather testified that although he recommended the children be placed in the Caregivers' home temporarily, he supported the Minors' adoption by appellant.

Appellant's counsel requested the Minors be placed with appellant pursuant to section 361.3, subdivision (b). The Minors' counsel, joined by DCFS, relied on the factors outlined in section 361.3, subdivision (a) to argue against removing the children from Caregivers' home. Specifically, the Minors' counsel noted the Minors' desire to be adopted by Caregivers, and the strong bonds they had developed in the nearly one and one-half years they lived with the Caregivers. Counsel argued

that it would be in their best interest to allow the Caregivers to adopt them.

The juvenile court denied the section 388 petition and the request for placement. The juvenile court observed that it had ordered an expedited ICPC at the disposition in August 2016, shortly after appellant requested it and that the ICPC was denied in November 2016. A new ICPC was resubmitted approximately six months later in May 2017 and approved on July 29, 2017. By the time the ICPC was approved, however, the Minors had been in their placement with the Caregivers for more than a year. The court further observed that C.W. was a baby when he was placed in the home of the Caregivers, and it would be detrimental to his well-being to be uprooted from the Caregivers. The court found that O.R.'s hospitalization in November 2017, disclosed his emotional and mental vulnerability and his concerns about being removed from the Caregivers' home. Also, the court acknowledged the relationship and involvement that appellant had in the Minors' lives and her commitment and desire to adopt them. The court also recognized the Minors' wishes regarding their placement, which in the court's view, showed that they were bonded with the Caregivers. The court found the Minors needed to maintain their stability, and it would not be in their best interest to move them to the home of appellant. In denying appellant's section 388 petition and section 361.3 placement request, the juvenile court also ordered a referral for assistance to draft a postadoption agreement where the Minors could continue visitation with the maternal relatives.

Appellant timely filed a notice of appeal.

DISCUSSION

Appellant contends reversal of the dependency court's order denying her section 388 petition[8] is required because the court failed to comply with section 361.3 when it denied her request to have the Minors placed in her home. Her claim consists of two arguments: First, the court failed to consider all of the section 361.3 relative placement preference factors; and, second, in the alternative, the court abused its discretion in applying them. As we explain, we disagree with both contentions.

If a child is removed from his or her parents' physical custody, relatives of the child shall receive preferential consideration when considering where to place the child. The statute sets forth a nonexhaustive list of factors to be considered in determining whether placement with the relative is appropriate. (§ 361.3, subd. (a)(1)–(8).) Among the factors the court must consider are the child's best interests, the wishes of the various parties, including the children, and the duration and nature of the relationship between the child and the relative, the moral character of the relative and whether the relative can meet the needs of the child by providing for a safe and stable child placement. (§ 361.3, subd. (a)(1)–(8).) " 'Preferential consideration' means that the relative seeking placement shall be the first placement to be considered and investigated." (*Id.,* subd. (c)(1).) The preference

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[8] The dependency court considered appellant's request for placement under section 361.3, denying it, and separately denied the section 388 petition, finding that modifying the placement order would not serve the Minors' best interests. Appellant's arguments here, however, focus on the application of section 361.3; appellant makes no distinct argument about the court's order denying the section 388 petition.

applies at the dispositional hearing and, after that time, "whenever a new placement of the child must be made." (*Id.*, subd. (d).)

We review the dependency court's order under the abuse of discretion standard. (*In re Sabrina H.* (2007) 149 Cal.App.4th 1403, 1420–1421.) Section 361.3 does not create an evidentiary presumption in favor of placement with a relative. Instead, it assures that the relative is the first to be considered when determining which placement is in the child's best interests. (*Alicia B. v. Superior Court* (2004) 116 Cal.App.4th 856, 863.) "The linchpin of a section 361.3 analysis is whether placement with a relative is in the best interests of the minor." (*Id.* at pp. 862-863.) In short, the child's best interests may trump a relative's placement request under section 361.3. (*In re Lauren R.* (2007) 148 Cal.App.4th 841, 855.)

A. *The Dependency Court Considered Section 361.3*

Appellant argues that the court failed to apply the relative placement preference factors in section 361.3 based on the court's failure to expressly refer to the statute in its decision, and because DCFS did not submit a report expressly evaluating the factors.

In our view, the record establishes that the juvenile court considered evidence and arguments applying the section 361.3 factors. The court complied with the statutory mandate to give preferential consideration to appellant's request for placement by holding an evidentiary hearing on the request at which the court considered the testimony of appellant and other maternal relatives, Mother's wishes for the Minors' placement, and the maternal family's ongoing commitment and involvement in Minors' lives. At the hearing, the court noted that it had also considered the history of the case and received other evidence pertaining to the mandated factors, including DCFS's written report responding to appellant's

section 388 petition that included an analysis of appellant's placement request. In addition, counsel for appellant and the minor's lawyer both specifically referred to the section 361.3 factors in their respective arguments during the hearing. And in reaching its decision on the placement request, the court addressed some of the enumerated factors. Specifically, the court referred to the Minors' wishes to remain with the Caregivers, and the children's best interests, including their fragile emotional and mental health, their medical needs, and a concern for the risk to their well-being if the court ordered them moved. The court reflected on the Minors' need for stability and their bond with the Caregivers over the nearly 18 months they had been placed in their home. The court also acknowledged that appellant had been a "force in their life for good" and that the maternal relatives had maintained a connection to them.

Thus, the court did address, either expressly or implicitly, all placement factors relevant in this case. The court discussed the interests and the needs of the Minors, including their psychological, medical, emotional requirements; the court described the wishes of the parties involved; and the court implicitly referred to the factors relating to appellant's moral character and relationship with them, when it reflected on the appellant's positive and involvement in the Minors' lives. The record does not support the appellant's claim that the court failed to address and apply the section 361.3 placement factors implicated in this case.

B. *The Court Did Not Abuse Its Discretion When It Denied Appellant's Placement Request*

Appellant alternatively argues that the juvenile court abused its discretion in denying her placement request. Appellant also complains DCFS failed to exercise due diligence in handling her request for placement.

Contrary to appellant's arguments, the efforts to assess appellant for placement were not unreasonable. In July 2016, shortly after the Minors were detained from Mother for the second time, the appellant contacted DCFS to request the Minors be placed with her in Arizona. DCFS promptly recommended that the court order the ICPC, and on August 9, 2016, when the court removed the Minors from Mother's custody at the disposition hearing, the court also ordered an expedited ICPC with appellant. The Arizona social services agency contacted appellant in mid-September 2016 and scheduled the home visit for early November. Nothing about the timing of the first ICPC reflects a lack of due diligence on the part of DCFS or the court.

The assessment of appellant's home stalled, however, through no apparent fault of DCFS, when the Arizona social services agency denied appellant's ICPC in November and closed the case because appellant did not have the proper foster care license and because the sleeping arrangements at her home were inadequate. After that, it took appellant approximately six months to correct those circumstances. When she returned to the juvenile court in mid-April 2017, the court promptly ordered a new ICPC, which the Arizona social service agency approved in late July 2017. We cannot characterize DCFS's conduct in processing the second ICPC as lacking in due diligence.

By the time the approved ICPC was submitted to the court at the next review hearing in August 2017, reunification services had been terminated, and a section 366.26 hearing had been set. Appellant then waited until October 2017 to file her section 388 petition, and then she sought several continuances that postponed the court's consideration until February 2018—at which point the Minors had been residing with the Caregivers for almost 18 months. Nothing in the record supports the contention that DCFS or the court were not diligent in their efforts to qualify appellant for placement.

Appellant's reliance on *In re R.T.* (2015) 232 Cal.App.4th 1284 and *In re Isabella G.* (2016) 246 Cal.App.4th 708 to support her contention that the juvenile court abused its discretion because of the dilatoriness of DCFS is also misplaced. *In re R.T.* involved the willful refusal by the child protective services agency to consider relatives for placement, unreasonable delay by the juvenile court in deciding the relatives' motion seeking placement, and the juvenile court's legally incorrect conclusion that section 361.3 did not apply because the dispositional phase of the case had passed. (*In re R.T., supra,* 232 Cal.App.4th at pp. 1292, 1296–1297, 1300.) The appellate court reversed, concluding that the agency and the court erred in considering the placement request. (*Id.* at p. 1300.) No similar errors occurred in this case.

In re Isabella G. is similarly distinguishable. There the social services agency repeatedly ignored and then delayed the grandparents' numerous requests to have their grandchild placed with them during the proceedings. (*In re Isabella G.*, *supra*, 246 Cal.App.4th at pp. 712–715.) Finally, at the time of the section 366.26 hearing, the grandparents filed a section 388 petition seeking the child's placement with them. (*Ibid.*) The

juvenile court denied the petition, concluding that the relative placement preference did not apply because reunification services had been terminated, and the best interest of the child would be served by adoption by the nonrelative extended family member, to whom she had substantial emotional ties. (*Id.* at p. 717.) The appellate court reversed, holding that the grandparents were entitled to full consideration for placement under section 361.3. (*Id.* at pp. 719–723.) The court explained that "when a relative requests placement of the child prior to the dispositional hearing, and the [a]gency does not timely complete a relative home assessment as required by law, the relative requesting placement is entitled to a hearing under section 361.3 without having to file a section 388 petition." (*Id.* at p. 712.)

As the trial court noted here, however, the facts in *In re Isabella* are distinguishable. Unlike the agency in *In re Isabella G.*, which did not attempt to evaluate the grandparents' home for placement, in this case, DCFS's conduct to process the appellant's placement request and to obtain the ICPC was not unreasonable. There is no question that the passage of time impacted the decision the court was required to make in this case and made that decision more difficult. Unlike the postponement of the consideration of the relatives' request for placement in *In re R.T.* and *In re Isabella G.,* however, the decision here was not unfairly delayed by inaction or malfeasance on the part of DCFS or the juvenile court, nor was it made under an improper standard.

Further, we reject appellant's argument that, on the facts, the court abused its discretion in not placing the children with her. In determining whether placement with a relative is appropriate, the primary consideration is the best interest of the child, including special physical, psychological, educational, medical, or emotional

needs. Here, the juvenile court's findings were adequately supported by the record before it. All parties acknowledged that the Caregivers met the social, emotional, and stability needs of the Minors. The Minors were thriving in the Caregivers' home for several years and expressed a preference that the Caregivers adopt them. The Caregivers promptly sought appropriate medical and psychological support when O.R. developed mental health problems. The Minors' maternal grandparents lived nearby and belonged to the same church community as the Caregivers. And the Caregivers expressed a willingness to facilitate the Minors' ongoing contacts with the maternal relatives.

Admittedly, certain factors also favored placement with appellant, including the wishes of their Mother, and the desires of other maternal relatives, and appellant's familial connection with and prior support of the Minors. But with factors weighing on both sides, we cannot conclude the juvenile court's decision to retain the Minors with the Caregivers was arbitrary or beyond the bounds of reason. The relative placement preference is not a guarantee. The record in this case supports the court's finding that the children continue their placement with Caregivers.

DISPOSITION

The court's order is affirmed.

NOT TO BE PUBLISHED.

ROTHSCHILD, P. J.

We concur:

CHANEY, J.

WEINGART, J.*

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