Filed 4/19/17 In re K.C. CA2/7

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

In re K.C., a Person Coming Under the Juvenile Court Law.	B270440 (Los Angeles County Super. Ct. No. DK02646)
LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. ANTOINETTE R., Defendant and Appellant.	

APPEAL from an order of the Superior Court of Los Angeles County, Daniel Zeke Zeidler, Judge. Affirmed.

Law Offices of Vincent W. Davis & Associates and Stephanie M. Davis for Defendant and Appellant.

Mary C. Wickham, County Counsel, Keith Davis, Assistant County Counsel, Julia Roberson, Deputy County Counsel, for Plaintiff and Respondent.

Antoinette R., three-year-old K.C.'s paternal grandmother (the mother of her biological father), appeals from the juvenile court's order denying in substantial part her petition pursuant to Welfare and Institutions Code section 388[1] to have K.C. placed with her or, in the alternative, to permit her to have unmonitored night and weekend visitation with K.C. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

1. *The Dependency Proceedings Prior to Antoinette's Request To Change Court Order*[2]

K.C.'s mother, Kristina C., and K.C. tested positive for methamphetamine immediately after K.C.'s birth in December 2013. On June 2, 2014 the juvenile court sustained a petition filed pursuant to section 300, subdivision (b), alleging Kristina had a history of alcohol and illicit drug abuse and was a current user of methamphetamine, which rendered her incapable of providing regular care for K.C. and her two siblings, Alissa M. and Michael V. The court also sustained the allegation that Kristina had, on prior occasions, been under the influence of

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[1] Statutory references are to this code.

[2] The events preceding Antoinette's petition are described in our opinion conditionally affirming the juvenile court's September 29, 2015 order terminating parental rights to K.C. and identifying adoption as her permanent plan, *In re Michael V.* (2016) 3 Cal.App.5th 225.

methamphetamine while the children were in her care, endangering their physical health and safety.

At the disposition hearing on August 4, 2014 the court declared the children dependents of the court, ordered K.C. and Alissa suitably placed, placed Michael with his paternal great-grandmother[3] and ordered family reunification services for Kristina, including a full drug and alcohol program with testing and aftercare, parenting classes and individual counseling to address case issues. Reunification services were also ordered for Alissa's presumed father, Rudy M., but not for Mario C., who was identified as K.C.'s alleged father.

At the six-month review hearing (§ 366.21, subd. (e)), held on May 18, 2015, the court found that Kristina was only in partial compliance with her case plan and Alissa's father was not in compliance with his case plan. The court ordered family reunification services terminated and set a selection and implementation hearing (§ 366.26) for K.C. and Alissa for September 29, 2015.

The court conducted a contested hearing pursuant to section 366.26 on September 29, 2015. The Department's report stated K.C. and Alissa were living together, as they had been since their initial removal, and their current caregivers wanted to provide the two girls permanency through adoption. The adoption home study for the prospective adoptive parents had been completed in June 2015.

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[3] Michael was subsequently placed in a legal guardianship with his paternal great-grandmother. The court terminated jurisdiction over him in August 2016.

After considering the evidence, including Kristina's testimony seeking to establish the parent-child relationship exception to termination of parental rights, and argument of counsel, the court found by clear and convincing evidence that the return of K.C. and Alissa to their parents would be detrimental and that the children were adoptable. The court also found Kristina had not occupied a parental role in their life and the benefit to the children of permanency through adoption outweighed the benefit of an ongoing relationship with Kristina. Accordingly, the court terminated Kristina's and the two fathers' parental rights and transferred care, custody and control of the children to the Department for adoptive planning and placement.[4]

2. *Determining the Identity of K.C.'s Father*

The materials filed with the juvenile court in December 2013 shortly after K.C.'s birth indicated Kristina was not sure whether Mario or Rudy was the father of K.C. Because neither man had been located, at the detention hearing the court ordered the Los Angeles County Department of Children and Family Services (Department) to conduct due diligence searches to attempt to find them.

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[4] We conditionally affirmed the order terminating parental rights as to K.C. and her sibling in *In re Michael V.*, *supra*, 3 Cal.App.5th 225, concluding the Department had failed to adequately investigate Kristina's claim of Indian ancestry and remanding the matter to allow the Department and the juvenile court to fully comply with the inquiry and notice requirements of the Indian Child Welfare Act of 1978 (25 U.S.C. § 1901 et seq.) and related California law.

On February 28, 2014 the court ordered DNA testing to determine whether Mario or Rudy was K.C.'s biological father. As of March 18, 2014 when the initial jurisdiction/disposition report was filed, both Mario and Rudy were identified as alleged fathers of K.C. Mario's whereabouts were still unknown.

On July 15, 2014, based on DNA testing, the court found that Rudy was not K.C.'s biological father and identified Mario alone as the child's alleged father. As of the August 4, 2014 disposition hearing Mario's whereabouts remained unknown.

In a status review report filed on February 2, 2015, the Department's social worker stated she had been contacted by Antoinette, Mario's mother, on October 24, 2014. According to the social worker Antoinette was aware there were suspicions K.C. was her granddaughter. Antoinette reported Mario was currently living in Kentucky and explained she had been estranged from her son for some years. Several weeks later Antoinette provided contact information for Mario, and Department personnel were able to speak to him by telephone. After initially denying he was K.C.'s father, Mario agreed to submit to DNA testing. On February 2, 2015 the court again ordered DNA testing of Mario.

Shortly thereafter, appointed counsel for Mario filed a petition pursuant to section 388 asking that the court vacate all disposition findings and orders with respect to K.C. to permit Mario to fully participate in the proceedings. Counsel alleged the Department's due diligence search had used the wrong birth date for Mario and, as a result, was materially deficient. On March 19, 2015, the date originally scheduled for the six-month review hearing, the court continued the review hearing to May 18, 2015 and set a hearing on Mario's petition for the same day.

DNA testing completed in early April 2015 established that Mario was K.C.'s biological father. According to the status review report filed April 22, 2015, now that it had been determined K.C. was his daughter, Mario had expressed an interest in having her placed in his home in Kentucky. However, the Department reported Mario appeared to have a substance abuse history, including a recent incident involving possession of a controlled substance without a prescription. The Department recommended that Mario be granted family reunification services including a complete substance abuse treatment program. On April 22, 2015 the court formally found Mario was K.C.'s biological father.

Mario appeared via court call on May 18, 2015 and was represented by counsel at the hearing.[5] The court granted Mario's section 388 petition, set aside its previous disposition findings, and conducted a new contested disposition hearing as to K.C. After considering the evidence introduced at the initial disposition hearing and the various reports and materials submitted in the case since that time, the court again concluded removal of K.C. was appropriate and exercised its discretion not to provide reunification services to Mario. (See § 361.5, subd. (a) ["the juvenile court may order services for the child and the biological father, if the court determines that the services will benefit the child"].) Mario did not participate in the selection and

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[5] The minute order from the May 18, 2015 hearing, part of the record in *In re Michael V.*, *supra*, 3 Cal.App.5th 225, states K.C.'s paternal grandparents and a paternal aunt were present.

implementation hearing on September 29, 2015 at which his parental rights to K.C. were terminated.[6]

3. *Antoinette's Placement Request*

On November 17, 2015, more than six weeks after the court had terminated her son's parental rights to K.C., Antoinette filed a request to change order pursuant to section 388. The petition asked the court, in effect, to remove K.C. from the home of her prospective adoptive parents, where she had been living with her sister since she was a newborn, and to enter a new order for relative placement with her paternal grandmother or, in the alternative, to grant Antoinette unmonitored night and weekend visitation. In her supporting papers, Antoinette explained, "Petitioner was unaware of the very existence of [K.C.] until relatively late in these juvenile dependency proceedings and due to this, Petitioner was not involved with the placement process when the relative placement preference would still be of statutory import to the Court. Since Petitioner became aware of the existence of her granddaughter, Petitioner has been constantly working towards the goal of having [K.C.] placed with her."

The court granted the petition in part, directing the Department to assess Antoinette for unmonitored visits and to facilitate visits as appropriate. However, the court summarily denied Antoinette's remaining requests, noting the late stage of the case and finding the petition did not state new evidence or a change of circumstances and the proposed change would not promote the best interest of the child.

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[6] The minute order and reporter's transcript, also part of the record in *In re Michael V.*, *supra*, 3 Cal.App.5th 225, reflect that K.C.'s paternal grandparents were present at the hearing.

Antoinette filed a timely notice of appeal.

DISCUSSION

1. *Section 388 and the Standard of Review*

Section 388 provides for modification of juvenile court orders when the moving party presents new evidence or a change of circumstances and demonstrates modification of the previous order is in the child's best interests. (*In re Stephanie M.* (1994) 7 Cal.4th 295, 317 (*Stephanie M.*); *In re Y.M.* (2012) 207 Cal.App.4th 892, 919; see Cal. Rules of Court, rule 5.570(e).)[7] To obtain a hearing on a section 388 petition, the parent or other moving party must make a prima facie showing as to both of these elements. (*In re Marcelo B.* (2012) 209 Cal.App.4th 635, 642; *In re Brittany K.* (2005) 127 Cal.App.4th 1497, 1504; *In re Justice P.* (2004) 123 Cal.App.4th 181, 188.) The petition should be liberally construed in favor of granting a hearing, but "'[t]he prima facie requirement is not met unless the facts alleged, if supported by evidence given credit at the hearing, would sustain a favorable decision on the petition.'" (*In re Jackson W.* (2010) 184 Cal.App.4th 247, 257-258; accord, *In re Brittany K.*, at p. 1505; *In re Zachary G.* (1999) 77 Cal.App.4th 799, 806.) "In determining whether the petition makes the necessary showing, the court may consider the entire factual and procedural history of the case." (*In re Justice P.*, at p. 189.)

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[7] Section 388 provides a parent or other interested party "may, upon grounds of change of circumstance or new evidence, petition the court . . . for a hearing to change, modify, or set aside any order of court previously made. . . . [¶] . . . [¶] . . . If it appears that the best interests of the child . . . may be promoted by the proposed change of order, . . . the court shall order that a hearing be held . . . ."

We review the summary denial of a section 388 petition for abuse of discretion. (*In re A.S.* (2009) 180 Cal.App.4th 351, 358; *In re C.J.W.* (2007) 157 Cal.App.4th 1075, 1079; *In re Brittany K., supra,* 127 Cal.App.4th at p. 1505.) We overturn the juvenile court's exercise of that discretion only in the rare case when the court has made an arbitrary, capricious or "patently absurd" determination. (*Stephanie M.*, *supra*, 7 Cal.4th at p. 318.)

2. *Section 361.3 and the Relative Placement Preference*

Section 361.3 establishes a legislative preference that a dependent child removed from parental custody be placed with a qualified relative if such a placement has been requested and is otherwise appropriate. Section 361.3, subdivision (a), provides, "In any case in which a child is removed from the physical custody of his or her parents pursuant to Section 361, preferential consideration shall be given to a request by a relative of the child for placement of the child with the relative . . . ." Subdivision (c)(1) defines "preferential consideration" to mean "the relative seeking placement shall be the first placement to be considered and investigated." Subdivision (c)(2) defines "relative" to include an adult who is "related to the child by blood, adoption, or affinity, within the fifth degree of kinship . . . . However, only the following relatives shall be given preferential consideration for placement of the child: an adult who is a grandparent, aunt, uncle, or sibling."

Section 361.3, subdivision (a)(1)-(8), enumerates a wide variety of factors to be considered by the county social worker and the juvenile court in determining whether placement with a relative is appropriate, beginning with "[t]he best interest of the

child . . . ."[8] As the Supreme Court emphasized in *Stephanie M.*, *supra*, 7 Cal.4th at page 321, the juvenile court "is not to presume that a child should be placed with a relative, but is to determine whether such a placement is *appropriate*, taking into account the suitability of the relative's home and the best interest of the child." (See *In re R.T.* (2015) 232 Cal.App.4th 1284, 1295 (*R.T.*); *In re Joseph T.* (2008) 163 Cal.App.4th 787, 798 ["[t]he relative placement preference, however, is not a relative placement guarantee"].) Nonetheless, "[t]he correct application of the

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[8] These factors include, "(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 . . . . [¶] (5) The good moral character of the relative and any other adult living in the home . . . . [¶] (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)(i) Provide legal permanence for the child if reunification fails. [¶] . . . [¶] (I) Arrange for appropriate and safe child care, as necessary. [¶] (8)(A) The safety of the relative's home. . . ." (§ 361.3, subd. (a)(1)-(8).)

relative placement preference places the relative 'at the head of the line when the court is determining which placement is in the child's best interest.'" (*Cesar V. v. Superior Court* (2001) 91 Cal.App.4th 1023, 1033.)

The juvenile court must give effect to this statutory mandate not only through the initial disposition hearing but also thereafter whenever a new placement of the child is necessary. (§ 361.3, subd. (d); *In re K.L.* (2016) 248 Cal.App.4th 52, 65-66; see *R.T.*, *supra*, 232 Cal.App.4th at p. 1300.) In addition, several courts of appeal, including a divided panel from Division One of this court, have held, at least through the reunification period, when a relative voluntarily comes forward and requests placement, the court and the social worker are obligated to evaluate that relative for a possible placement even if no new placement is otherwise required. (*In re Isabella G.* (2016) 246 Cal.App.4th 708, 721, 723 (*Isabella G.*); *In re Joseph T.*, *supra*, 163 Cal.App.4th at p. 793; see *R.T.*, at p. 1300 ["[i]t is presently unsettled whether a relative is entitled to preference when requested late in the proceedings, when the child is in a stable placement following the dispositional hearing and termination of reunification services"].)

However, no court has applied the section 361.3 relative preference after parental rights have been terminated, adoption has been identified as the child's permanent plan and the child resides in a stable preadoptive placement: "It is well established that the relative placement preference found in section 361.3 does not apply after parental rights have been terminated and the child has been freed for adoption." (*Cesar V. v. Superior Court*, *supra*, 91 Cal.App.4th at p. 1031; see *In re K.L.*, *supra*, 248 Cal.App.4th at p. 66 ["[t]he section 361.3 relative placement

preference does not apply where, as here, the social services agency is seeking an adoptive placement for a dependent child for whom the court has selected adoption as the permanent placement goal"]; *In re Lauren R.* (2007) 148 Cal.App.4th 841, 854-856 [reversing order moving dependent child from de facto parent's home to her maternal aunt's; § 361.3 preference did not apply after adoption had been identified as the child's permanent plan]; see also *In re M.M.* (2015) 235 Cal.App.4th 54, 63 [reunification services terminated and adoption identified as permanent plan; "the relative placement preference did not apply at this stage in the proceedings"].)

3. *The Juvenile Court Did Not Abuse Its Discretion in Summarily Denying Antoinette's Section 388 Petition*

In her section 388 petition Antoinette conceded she had only limited contact with K.C. and acknowledged, because of the status of the case (post-termination of reunification services and parental rights), the relative placement preference was no longer of "statutory import" and "placement in her care at this point of the proceedings may prove problematic." Nonetheless, in her brief in this court Antoinette argues under *R.T.*, *supra*, 232 Cal.App.4th 1284 and *Isabella G.*, *supra*, 246 Cal.App.4th 708, the court was required to hold a relative placement preference hearing and, accordingly, the summary denial of her petition was reversible error. Neither case supports Antoinette's argument or suggests it would be proper to apply the section 361.3 relative preference following termination of parental rights, at least under the circumstances of this case.

In *R.T.*, *supra*, 232 Cal.App.4th 1284 two of the child's paternal aunts had requested, as had the child's father, that the infant, born exposed to methamphetamine, be placed with one of

them when he was only two weeks old. The child welfare agency told the aunts it preferred to keep the infant where he had originally been placed when removed from his parents (the home of the father's ex-girlfriend where the infant's teenage brother lived) and subsequently acknowledged it never considered the paternal aunts for placement. (*Id.* at p. 1293.) At disposition the juvenile court denied the parents reunification services because they had failed to unite with their older son (then almost 18 years old) and scheduled a section 366.26 selection and implementation hearing, identifying placement with the current caregivers as the child's permanent plan. One of the paternal aunts testified at the hearing that the agency had discouraged her request for placement, but she remained interested in assuming custody of the child and adopting him.

Several months later, but before the section 366.26 hearing, one paternal aunt and her husband moved pursuant to section 388 to set aside the disposition order for failure to apply the section 361.3 statutory preference for placement with a relative. Nearly a year later, following a series of evidentiary hearings, the court denied the motion, ruling the relative preference did not apply. (*R.T.*, *supra*, 232 Cal.App.4th at p. 1294.) Several months thereafter, at the continued section 366.26 hearing the court terminated parental rights and ordered the child placed for adoption. (*R.T.,* at pp. 1294-1295.)

The Court of Appeal reversed, holding the agency and the court had failed to properly apply the statutory preference for placing a dependent child with a relative. (*R.T.*, *supra*, 232 Cal.App.4th at p. 1295.) Emphasizing that the motion had been "filed early in the dependency process, before a permanent planning hearing, when R.T. was only four months old" (*id.* at

p. 1300), and that "the relatives invoked the preference *before* the dispositional hearing" (*ibid.*), the court held the juvenile court had "erred in deeming relative preference under section 361.3 inapplicable to postdisposition proceedings." (*Ibid.*)

Similarly, in *Isabella G.*, *supra*, 246 Cal.App.4th 708, the Court of Appeal rejected the child protective services agency's argument that section 361.3 did not apply because the paternal grandparents' section 388 request for placement was made after the reunification period had ended and no new placement was necessary at that time. The court held, "when a relative requests placement of the child prior to the disposition hearing, and the Agency 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" even if reunification services are no longer being provided the parents. (*Isabella G.*, at p. 712.) The court expressly declined to consider whether the same rule would apply if the relative's formal request to the court for placement did not occur until after the section 366.26 hearing had been held. (*Isabella G.*, at p. 712, fn. 3.)

The facts in the case at bar are nothing like those presented in *R.T.* and *Isabella G.* As discussed, Antoinette first made contact with the Department regarding K.C. in October 2014, but there is no indication she expressed any interest in having her granddaughter—if Mario proved to be the child's biological father—placed with her. Indeed, at the six-month review hearing in May 2015, Mario, now identified as K.C.'s biological father, requested placement of K.C. with him. Although Antoinette attended that hearing, there again is no suggestion she requested placement of K.C. with her at that time, either to the court or the Department. Finally, Antoinette was

also present at the selection and implementation hearing in late September 2015. The record is once more silent regarding any request for placement.

To be sure, in her petition Antoinette alleged that "[a]t one point" in 2015 she was told by the Department "her home may be assessed for placement," but the supporting papers fail to specify when that purported discussion took place. Antoinette's decision to finally request a hearing on relative placement in November 2015, well after reunification services had been terminated (May 18, 2015), and her son's parental rights were terminated and adoption identified as K.C.'s permanent plan (September 29, 2015) was far too late to trigger any rights under section 361.3. Accordingly, under well-established case law the juvenile court did not err in summarily denying the section 388 petition, rather than conducting a section 361.3 placement hearing.

Moreover, under the general principles governing section 388 petitions to modify prior court orders, the juvenile court acted well within its discretion in concluding Antoinette had failed to make even a prima facie showing the proposed change in placement would be in K.C.'s best interest.[9] As the

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[9] We are mindful that, if the section 361.3 relative preference did apply, the juvenile court's placement decision should be made according to the criteria set forth in that statute, not the more general best interest standard of section 388. (See *Isabella G.*, *supra*, 246 Cal.App.4th at p. 722, fn. 11 ["[A] relative seeking placement of the child is entitled to file a petition under section 388 to trigger a relative placement assessment and/or request a hearing under section 361.3. However, in determining whether the child should be placed with the relative, the juvenile court should not substitute the generalized best interest showing

Supreme Court explained in *Stephanie M.*, *supra*, 7 Cal.4th at page 321, when discussing an earlier Court of Appeal decision regarding section 361.3, "[R]egardless of the relative placement preference, the fundamental duty of the court is to assure the best interests of the child, whose bond with a foster parent may require that placement with a relative be rejected." Here, Antoinette asserted nothing more than her biological link to the child to satisfy the best interest prong of section 388. That is not enough. (See *In re Jackson W.*, *supra*, 184 Cal.App.4th at p. 260 ["'[t]he presumption favoring natural parents by itself does not satisfy the best interests prong of section 388'"]; accord, *In re Justice P.*, *supra*, 123 Cal.App.4th at p. 192.) In contrast to K.C.'s lack of relationship with Antoinette, who admittedly had only limited contact with the child, K.C. was strongly bonded to her caregivers/prospective adoptive parents and had been living in their home with her sister, Alissa, since shortly after her birth. The juvenile court reasonably concluded it was in K.C.'s best interest to proceed without further delay toward permanency with the only family she had known.

DISPOSITION

The juvenile court's order is affirmed.

PERLUSS, P. J.

We concur:

ZELON, J. SEGAL, J.

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required under section 388 for its independent assessment of the relevant statutory criteria under section 361.3."].)