Filed 7/17/15 In re T.C. CA2/4

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

In re T.C. et al., Persons Coming Under the Juvenile Court Law. LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. T.C., Defendant and Appellant, I.J., Appellant.	B256784 (Los Angeles County Super. Ct. No. LK02175)

APPEALS from an order of the Superior Court of Los Angeles County, Tony J. Richardson, Judge. Affirmed and remanded with directions.

Kate M. Chandler, under appointment by the Court of Appeal, for Defendant and Appellant T.C.

Catherine C. Czar, under appointment by the Court of Appeal, for Appellant I.J.

Mark J. Saladino, County Counsel, Dawyn R. Harrison, Assistant County Counsel, and William D. Thetford, Principal Deputy County Counsel, for Plaintiff and Respondent.

After a contested jurisdictional hearing, the juvenile court sustained dependency petitions filed on behalf of dependent minors I.J. and T.C. based on their mother's mental health and substance abuse problems. (Welf. & Inst. Code, § 300.)[1] Mother does not challenge those findings and is not a party to these appeals by I.J. and T.C.'s father.[2]

T.C.'s father contends he is a nonoffending custodial parent as a result of the dismissal of sexual abuse allegations at the jurisdictional hearing. In her appeal, I.J. challenges the dismissal of those sexual abuse allegations. In his appeal, T.C.'s father challenges T.C.'s removal from his physical custody in violation of section 361, subdivision (c), and seeks to reverse the requirement that he attend a substance abuse program.

We conclude the evidence is insufficient to support a finding that the alleged sexual abuse occurred as a matter of law. The dismissal of those allegations is affirmed. T.C.'s father is entitled to a new dispositional hearing, and we remand with directions for further proceedings.

FACTUAL AND PROCEDURAL BACKGROUND

Because the present appeals are limited to the striking of sexual abuse allegations and removal of T.C. from his father's physical custody, our discussion of the facts is focused on those issues.

In January 2014, I.J., who was 15 years old, and T.C., who was 6 years old, were living with their mother in a homeless shelter. I.J. was hospitalized for a psychotic breakdown. The Los Angeles County Department of Children and Family Services (Department) filed a section 300 petition on her behalf. The petition alleged in relevant part that before being hospitalized, I.J. had been moving from place to place with her mother, whose mental health and drug abuse problems were interfering with her ability to find housing and meet I.J.'s mental health needs.

---

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

[2] Both father and son share the same first and last names.

I.J. told a social worker that during her mother's incarceration when I.J. was 12 years old, I.J. and T.C. were staying with T.C.'s father, who "made her lay down on the bed next to him . . . and he touched her in her private area."

Based on I.J.'s statements, the Department added a sexual abuse allegation to her amended petition, and filed an additional petition on behalf of T.C. Both petitions contained similar allegations. They alleged that the children's health and safety were endangered by their mother's mental health and drug abuse problems, and the alleged molestation of I.J. by T.C.'s father when I.J. was 12 years old.

At a combined jurisdictional and dispositional hearing for both children, the Department's reports were admitted into evidence in support of both petitions. The reports included I.J.'s extrajudicial statements concerning the alleged sexual abuse by T.C.'s father, as well as T.C.'s father's extrajudicial denials of the sexual abuse allegations.

At the jurisdictional hearing, I.J. testified that her statements regarding the alleged molestation by T.C.'s father were true. She testified that she reported the molestation to her mother in November 2013; her mother confronted T.C.'s father with her allegations, which he denied; she began receiving sexual abuse therapy in 2014; she was prescribed psychotropic medications in 2005 and 2013; she was hospitalized in January 2014 for hallucinating and talking to herself; and she continued to have visual and auditory hallucinations.

I.J. testified that she had reported the molestation by T.C.'s father and a male cousin to police, but had recanted her allegations during the same interview. I.J. explained that her allegations were true, but she falsely recanted them because she "needed to get out of the situation of being confronted."

T.C.'s father testified that T.C. and I.J. had been living with him during their mother's incarceration, and that I.J. had accused a friend's son of touching her inappropriately.

Milton Brown, a director at Aviva Family Children Services, testified that I.J. had accused male staff members of touching female residents and a female staff member. When Brown investigated I.J.'s allegations, everyone involved denied the allegations.

The juvenile court found that I.J.'s testimony concerning the sexual abuse incident was credible, and that it was possible she was molested by T.C.'s father or someone else. The court believed that something had caused I.J. to become "hyper-vigilant" and view certain incidents as "sexual abuse of others."

"[B]ased on the totality of the circumstances," the court concluded the sexual abuse allegations had not been proven by a preponderance of the evidence: "[I.J.'s] testimony, her descriptive accounting of what she stated happened, it all is credible, and it seems to be honest. But there are enough atmospherics here not the least of which includes the incident that allegedly took place at Aviva with staff members which Mr. Brown indicates had been investigated and also the new allegation . . . regarding a gentleman, . . . the mother's counselor . . . , and she admitted that she had not made that allegation. . . . Those atmospherics and some of [the arguments of father's counsel] counter what the Department has attempted to prove today."

The court sustained the petitions for both children based on the allegations of mother's mental health and substance abuse problems, which are not challenged on appeal. The court then addressed placement issues. As to I.J.'s placement, which is not at issue, the court found under the clear and convincing evidence standard of section 361, subdivision (c) that returning I.J. to mother would create a substantial danger of harm to her physical health, safety, protection, or physical or emotional well being. Given the lack of suitable alternatives, I.J. was removed from mother's custody and placed under the Department's supervision for suitable placement. Mother was granted reunification services and monitored visits.

In its jurisdiction/disposition report, the Department had recommended placing T.C. with mother, and granting T.C.'s father monitored visitation and family reunification services. According to the report, T.C.'s father was arrested in August 2013 for using a stun gun on mother and mother's sister during an argument at which both children were

present. The Department recommended that father be required to enroll in a sex offender treatment program and individual counseling to address sex abuse, domestic violence, and anger management issues.

Because the sexual abuse allegation had been dismissed at the conclusion of the jurisdictional hearing, T.C.'s father had become a nonoffending parent under the petition. His attorney argued that since he was a nonoffending parent, the Department was required to establish a basis for removing T.C. from father's custody, which it had not done. In light of T.C.'s father's nonoffending status, mother's counsel sought to reinstate the parents' shared custody arrangement based on a family law order: T.C. would resume living with mother during the week, and with father on weekends.

The juvenile court refused to return T.C. to father's physical custody: "I am not going to permit father at this time to revert back to the family law order as there are circumstances in this case which are nonetheless despite the court's rulings today very concerning. And this family is going through this experience in a way that I would be concerned about the impact it's having on this now seven-year-old."

The juvenile court adopted the Department's proposed placement plan and placed T.C. in mother's care, and granted mother family preservation and family maintenance services with respect to T.C. It granted father supervised visits with T.C. three times per week, for three hours per visit. It ordered father to participate in programs and individual counseling to address case issues.[3]

I.J. and T.C.'s father timely appealed from the jurisdictional and dispositional order.

---

[3] The Department recommended that father enroll in a drug and alcohol program with on demand testing. Counsel for T.C. requested that father enroll in an alcohol program. Father objected that the petition did not contain an allegation of alcohol or substance abuse by father. Father indicated that he was amenable to testing, and would enroll in a program if his test results showed there was a problem.

DISCUSSION

I

I.J. challenges as erroneous the juvenile court's dismissal of the sexual abuse allegations based on unspecified "atmospherics." She argues that notwithstanding her mental health issues, recent hallucinations, and disputed allegations of sexual abuse involving other males, there was sufficient uncontroverted evidence that she was molested by T.C.'s father. She contends that "[h]er recantation to a police officer is easily explained as the result of pressure from the officer and her mother. . . ."

I.J.'s testimony regarding the sexual abuse allegations was contradicted by father's extrajudicial statements, which were admitted into evidence through the Department's reports. The parties had an opportunity to cross-examine father about his extrajudicial denials of the molestation allegations, but did not do so.

"Here, as in many dependency cases, the case posed evidentiary conflicts. And, as is common in many dependency cases, this case obligated the juvenile court to make highly subjective evaluations about competing, not necessarily conflicting, evidence." (*In re I.W.* (2009) 180 Cal.App.4th 1517, 1528.) Where "the issue on appeal turns on a failure of proof at trial, the question for a reviewing court becomes whether the evidence compels a finding in favor of the appellant as a matter of law. [Citations.]" (*Ibid.*)

In light of father's denials of the allegations, I.J.'s continuing auditory and visual hallucinations, and I.J.'s recantation of sexual abuse allegations, we cannot say the evidence compels a finding, as a matter of law, that the allegations are true. In order to reverse the dismissal of those allegations, we would have to reweigh the evidence, which is not a proper function of this court.

II

T.C.'s father challenges the juvenile court's refusal to return T.C. to his physical custody. He contends that as a nonoffending custodial parent, he is presumptively entitled to custody in the absence of findings under section 361, subdivision (c) to justify T.C.'s removal. We conclude father is correct.

Section 361, subdivision (c) provides in relevant part that "[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 of any of the following circumstances listed in paragraph[s] (1) to (5), inclusive." Those circumstances are: (1) returning the child to father would create a substantial danger to the child's physical health, safety, protection, or physical or emotional well-being; (2) father is unwilling to have physical custody of the child; (3) the child is suffering severe emotional damage, and the only reasonable means of protecting him is removal from father's custody; (4) the child's sibling has been sexually abused or is at substantial risk of being sexually abused by a parent, guardian, or member of his or her household, or other person known to his or her parent, and there are no reasonable means to protect the child without removing him from his father, or the child does not wish to return to his father; or (5) the child has been left without any provision for his support. (§ 361, subd. (c).)

The record is uncontroverted that when the petition was filed, the parents had a shared custody arrangement pursuant to a family law order: T.C. was living with his mother during the week and with his father on weekends. Both parents sought to return to that arrangement at the disposition hearing.

The juvenile court denied their request, citing "circumstances in this case which are nonetheless despite the court's rulings today very concerning." Because the court did not expressly identify the "circumstances" that were "very concerning," which is not the correct standard under subdivision (c) of section 361, we are unable to determine whether it was referring to the sexual molestation allegation that was dismissed, or to some other problem, such as father's purported alcohol abuse or domestic violence against mother (including the purported stun gun incident).

Father contends the court's refusal to return T.J. to his custody was erroneous. He argues that as a nonoffending custodial parent, he is entitled to custody unless the juvenile court finds *by clear and convincing evidence* that one of the circumstances in subdivision (c) of section 361 exists.

The Department agrees that father is a nonoffending parent under the petition, but denies that he is a custodial parent. This assertion, raised for the first time on appeal, is not persuasive. The Department's position below was that the parents had a joint custody arrangement pursuant to a family law order. In seeking a warrant for T.C.'s removal, the Department listed the addresses of both parents, and stated in a supporting affidavit that "there is a family law order giving them joint custody and the child goes one week between each parent." In its May 1, 2014 jurisdiction/disposition report, the Department also referred to the parents' joint custody of T.C.

Once the sexual abuse allegations were dismissed, father's status as a nonoffending custodial parent entitled him to custody of T.C. absent findings, based on clear and convincing evidence, of at least one of the enumerated circumstances in section 361, subdivision (c). The juvenile court's refusal to return T.C. to father's custody in the absence of such a finding was error.

Our conclusion is compelled by constitutional due process. Section 361, subdivision (c) requires a finding by *clear and convincing evidence* of one of the disqualifying factors before the child may be removed from a nonoffending custodial parent. Removing T.C. from father's custody in the absence of such a finding based on a clear and convincing evidence standard "has serious constitutional ramifications, because 'the trial court's decision at the dispositional stage is critical to all further proceedings.' [Citation.]" (*In re D'Anthony D.* (2014) 230 Cal.App.4th 292, 301.) As the court in *D'Anthony D.* pointed out, "'[a]t all later review hearings, the court may deny return of the child to the parent's physical custody based on a finding supported only by a preponderance of the evidence that return would create a substantial risk of detriment to the child's physical or emotional well-being.' [Citations.] Thus, '[i]f a preponderance of the evidence standard of proof is applied to deny initial placement, [a nonoffending custodial parent] may have his or her parental rights terminated without the question of possible detriment engendered by that parent ever being subjected to a heightened level of scrutiny.' [Citations.] . . . ." (*Ibid.*)

We therefore remand the matter for a new dispositional hearing at which father is entitled to shared custody of T.C. unless one of the circumstances listed in section 361, subdivision (c) is proven by clear and convincing evidence.

III

Father contends the juvenile court abused its discretion in ordering him to enroll in a substance abuse program. He argues that a substance abuse program is not necessary because T.C.'s removal was not causally related to his purported substance abuse problem.

"The juvenile court has wide latitude in making orders necessary for the well-being of a minor. By statute, the court may make 'all reasonable orders for the care, supervision, custody, conduct, maintenance, and support of the child . . . .' (§ 362, subd. (a).) However, the same statute limits such orders to those that are designed to eliminate the conditions that brought the minor to the attention of the court. (§ 362, subd. [(d)].)" (*In re Jasmin C.* (2003) 106 Cal.App.4th 177, 180.)

T.C. was found to be a dependent child based on his *mother's* mental health and drug abuse problems; there was no allegation in the petition that father's purported problems with drugs or alcohol were a contributing factor. (See *In re Jasmin C.*, *supra*, 106 Cal.App.4th at pp. 180–182.) The "Last Minute Information for the Court" contained statements by T.C. regarding his father's use of alcohol, which he said made his dad act "mean." Based on T.C.'s statements, which did not mention a drug abuse problem, the Department requested that father attend a drug and alcohol program with on-demand testing. The record lacks substantial evidence to support the implied finding that father's attendance in a drug and alcohol program is reasonably necessary to "eliminate those conditions that led to the court's finding that the child is a person described by Section 300" (§ 362, subd. (d)). We therefore direct that the requirement of a drug and alcohol program be stricken, but the court may revisit the issue if it is provided with additional evidence.

DISPOSITION

As to T.C., the matter is remanded for a new dispositional hearing conducted in accordance with the views set forth in this opinion. The court is directed to strike the requirement that T.C.'s father enroll in a substance abuse program, without prejudice to revisiting the issue if there is additional evidence. In all other respects, the order is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

EPSTEIN, P. J.

We concur:

WILLHITE, J.

MANELLA, J.