Filed 5/18/18 J.A. v. Superior Court 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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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

J.A., Petitioner, v. THE SUPERIOR COURT OF LOS ANGELES COUNTY, Respondent; LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES et al., Real Parties in Interest.	B287495 (Los Angeles County Super. Ct. No. DK11865)

ORIGINAL PROCEEDINGS in mandate. Michael E. Whitaker, Judge. Petition granted and remanded with directions.

Law Office of Katherine Anderson for Petitioner.

Dan Szrom and Joseph Barrell for Real Parties in Interest (Minors).

Mary Wickham, County Counsel, R. Keith Davis, Assistant County Counsel and Stephen D. Watson, Deputy County Counsel for Real Party in Interest Los Angeles County Department of Children and Family Services.

No appearance for Respondent.

Petitioner Juan A. (Father), father of four children -- Dylan, Jade, Juan and Stacy R. -- seeks review of the orders made at the review hearing held under Welfare and Institutions Code section 366.25 denying his request for legal custody of the children, terminating reunification services, and setting a hearing to consider termination of parental rights under Welfare and Institutions Code section 366.26.[1] Father, who had been deported to Mexico, wished to have the children live with his brother's family in Southern California once custody reverted to him. We conclude the court's finding that returning the children to the physical custody of Father would create a substantial risk of detriment to the children's safety, protection, or physical or emotional well-being cannot be sustained, as it was based entirely on Father's deportation and the lack of

---

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

recent unmonitored visitation. In their responses to the petition, the Los Angeles County Department of Children and Family Services and the children's counsel now contend that the children would suffer emotional detriment if removed from their successful, long-time placement with their current caregiver. However, as the court made no finding of emotional detriment and the evidence presented below does not support an implied finding of the requisite risk of detriment, we grant the petition and remand for a new hearing.

FACTUAL AND PROCEDURAL BACKGROUND

The Los Angeles County Department of Children and Family Services (DCFS) intervened in June 2015, when Dylan was six, Jade was five, Juan was three and Stacy was two. A caller reported that Mother was using methamphetamine and neglecting the children. Mother denied using drugs, but tested positive for amphetamines and methamphetamine. The children were detained from Mother and placed in the home of her friend, Bertha O. The children were familiar with Bertha, as Mother and the children had stayed with her for several months in 2013 and 2014. The children adapted well to the placement, had a good bond with Bertha, and felt safe in her home. Stacy was assessed as having deficits in verbal capacity and fine motor skills, but they were not significant enough to require services.

At the time of the detention, Father's whereabouts were unknown to DCFS. Shortly thereafter, DCFS learned that Father had been incarcerated since July 2014 for possession of narcotics for sale. He had a projected release date of June 13, 2016, but was on an immigration hold. Interviewed by the caseworker, Father denied knowing of Mother's drug use. He claimed to have had custody of the children on alternate weekends prior to his arrest. He further claimed to have sent Mother one to two hundred dollars "every now and then" prior to his incarceration. Mother reported that Father had had a minimal relationship with the family since Juan's birth in 2011, and virtually no relationship after Stacy's birth in 2013. Jade reported being taken to visit Father after his incarceration.

In August 2015, the court instructed DCFS to evaluate a paternal aunt for placement. In September, DCFS completed assessments of Father's sister, G.R., and brother, Noel A. Their homes had no safety or other issues. However, G. and Noel expressed their intention to separate the children between their two homes, and DCFS was concerned that placing any of the children with G. would have displaced her minor son from his bedroom, requiring him to sleep in the living room. In addition, Mother objected to transferring placement to the paternal relatives, claiming they had not attempted to maintain contact with her and the children after her separation from Father. Accordingly, the caseworker recommended leaving the children with Bertha. At the next hearing, the court identified the children as a

sibling group and instructed DCFS not to remove them from their placement with Bertha without a hearing and order.

At the September 2015 jurisdictional/dispositional hearing, the court found that the children fell within section 300, subdivision (b) due to Mother's unresolved drug use and Father's incarceration and inability to make appropriate plans to care for the children. In the dispositional portion of the hearing, the court ordered Mother to obtain treatment for drug abuse and verify a sober lifestyle. By June 2016, after several false starts, Mother had completed a treatment program and was consistently testing negative. In August 2016, the court granted Mother unmonitored day visits. The next month, the court ordered overnight visits to commence as soon as Mother secured acceptable housing. However, Mother stopped drug testing in August, and by December her visitation had become erratic. She reportedly had a new boyfriend, and confused the children by referring to him as their father. After that, Mother never got back on track with visitation or testing. In July 2017, the court terminated her reunification services.

During the period when unmonitored visitation with Mother was occurring, Dylan began to behave aggressively toward his siblings and to act out at school, Jade began stealing, and Juan began to push and hit his classmates and use profanity. The children were referred to mental health services. Dylan was diagnosed with a conduct disorder, and received therapy for several months. Bertha attended the sessions, and worked with Dylan on self-monitoring and

developing relaxation skills, communication skills and problem solving abilities. When the therapy ended in December 2017, the therapist commended Bertha for managing Dylan's behavior, helping him to learn coping skills, and giving him and the other children appropriate consequences for misbehavior.[2]

At the September 2015 disposition hearing, the court had ordered parenting classes for Father, and had further ordered that when released from prison, Father was to provide ten clean drug tests. Father completed several programs in prison, including courses on life skills, addiction/substance abuse, restorative parenting, and parents in partnership. He began calling the children monthly, and the children responded well to him. He communicated regularly with the caseworker. In August 2016, after his release from prison, he was deported and began living in Tijuana. In March 2017, he reported having secured housing and a job as a mechanic. Although it took some time for the documentation of the final test to arrive from Mexico, between November 2016 and March 2017, Father completed the requisite ten clean drug tests. Between August 2016 and the final hearing, he maintained telephone contact with the children, sometimes calling as often as two or three times a week, although less often

---

[2] In addition, in September 2017, Dylan received an assessment for an IEP (Individualized Education Plan), but was found not to meet the eligibility criteria for special education.

toward the end of 2017 due to his lack of funds and the children's increasing disinclination to talk on the phone. He had three in-person visits with the children at the Mexican consulate in San Ysidro in September 2016, September 2017 and December 2017, during which he inquired about their daily lives, played with them, and interceded to stop a fight. The children continued to display affection toward him and express their love for him.

At the June 2017 hearing, DCFS recommended continuing reunification services for Father, although some two years had passed since the detention.[3] The court instructed Father and the caseworker to meet "to craft a . . .

---

[3] While generally, dependent minors must either be returned to the physical custody of their parents or the court must terminate reunification services and set a section 366.26 hearing at the 18-month mark (or sooner for a very young child), it has long been held that it is within the juvenile court's discretion "to continue the 18-month review hearing and extend reunification services up to 24 months upon a showing of good cause." (*In re J.E.* (2016) 3 Cal.App.5th 557, 563, 564; see, e.g., *Mark N. v. Superior Court* (1998) 60 Cal.App.4th 996, 1015-1016 [failure to offer or provide reasonable reunification services to parent constitutes ground for continuing reunification period beyond 18 months].) Moreover, in 2009, the Legislature amended certain provisions of the Welfare and Institutions Code to "permit the extension of reunification services up to 24 months to certain parents in substance abuse programs or recently discharged from incarceration or institutionalization." (*In re J.E.*, *supra*, at p. 564; see §§ 361.5, subd. (a)(4), 366.22, subd. (b), 366.25, subd. (a).) The parties stipulated to the court's order extending the reunification period for Father an additional six months.

plan, potential plan for the care and custody of the minor children, should the court order the minor children returned to him." During the meeting, Father indicated that his plan was to place the children in the care of the paternal aunt or uncle whose homes previously had been considered by DCFS. He said he could provide some financial assistance, and intended to have visits with the children in Mexico. When informed that Father's plan would result in the case being closed and no further services or supervision provided, Father stated he "would feel more comfortable with someone continuing to assess the children's safety." After the meeting with Father, the caseworker recommended that the children remain with Bertha because "[i]t appears that the family would be in a financial strain if the children were to be released to the care of [Father]. Father does not appear to be able to provide financially for the children's needs. [G.] stated that her husband . . . worked two jobs and she worked in order to be able to make ends meet. If the children . . . were to be released home of parent to Father . . . it would cause a financial strain on Father and the relatives, which could place the children['s] safety in jeopardy." The court nonetheless instructed DCFS to assess the aunt's and uncle's homes for overnight visits.[4]

---

[4] By this time, the children had begun to refer to Bertha as "aunt" except for the youngest, who called her "mom." They said if they could not be returned to Mother and Father, they would prefer to stay with Bertha. Mother preferred that they remain with Bertha.

The caseworker revisited Father's brother Noel and his wife, Veronica C.[5] The couple had a spare bedroom and bathroom for the children, as their adult daughter was moving out to attend college. They planned to have Veronica's mother, who lived with them, provide child care. In addition, their home was around the corner from a school with an afterschool program. Noel, who owned his own auto repair shop, and Veronica, a nurse, said they would be financially responsible for the children if Father was unable to provide. They expressed willingness to transport the children to Mexico to visit Father. However, the couple expressed concern about obtaining medical care for the children if they did not qualify for Medi-Cal, and were unsure how to go about obtaining educational rights and medical authority. In August 2017, DCFS began arranging day visits between the couple and the children. In November, the caseworker reported they missed two day-visits due to a family emergency. That same month, overnight visits began. The visits were to be weekly, but several visits were cancelled due to family illnesses. The only concern about the visits was that Stacy said Veronica had once made fun of the way she was dressed. Noel and Veronica were also provided specific days and times to call the children, but they did not always do so.

---

[5] The caseworker also revisited G.'s home. The caseworker recommended the children not be placed with G. and her family based on the financial burden it would place on them.

In March 2017, DCFS had recommended that a home study be conducted by Mexico's child protective services agency (Desarollo Integral de la Familia (DIF)) to permit the children to visit Father in Mexico, and asked the court for monetary assistance to pay for the children's passports. The court issued the order, but DCFS was unable to obtain the funds and secure passports for the children until January 2018, shortly before the final review hearing. The DIF home study was not received until the end of 2017. The study stated that after his deportation, Father was supported by a brother living in Tijuana until he found a job. Father worked in Tijuana as a mechanic, and sold bricks and food on the weekends. Father had a girlfriend, who was willing to help care for the children. The combined income of Father and his girlfriend exceeded their expenses. The study stated the two-home compound in which they lived was "in good conditions of hygiene" and "well kept." It met the requirements of livability set forth by the World Health Organization, including lights, water, sanitary facilities, and space for the children to exercise and play. It had a separate bedroom for the children and multiple kitchens and bathrooms. The study concluded that Father had sufficient economic solvency to cover the children's basic needs were they to be returned to him in Mexico.

In its final report, DCFS recommended that the children remain with Bertha "as [Father] is unable to be financially responsible for the children due to his status and living in Mexico." The caseworker claimed that the DIF

home study failed to address Father's progress in mitigating the causes that brought the family to the attention of DCFS or his ability to provide for the children financially. The report stated: "The home study is not clear that if the children were to be returned to Father and should the children be sent to Mexico to live with Father, he will be able to provide for the safety and well-being of the children."

At the January 2018 review hearing, DCFS's counsel argued that it would be detrimental to the children to be returned to Father's legal custody because he could not be totally financially responsible for them were they to remain in the United States. In addition, Father had had no unmonitored contact with the children since the case began. Counsel further observed that the children had never lived in Mexico and did not want to live in Mexico, but noted that if legal custody were transferred to Father, he might "have a change of heart" and seek to have them returned to him there. The children's counsel joined, observing that Father had been deported due to having been involved in drug sales, and that the lack of visitation was the result of his own criminal behavior. Counsel also contended that Dylan had special needs, and that it was not clear if Father was aware of those needs or how to address them. Mother's counsel joined with DCFS and the children's counsel.

Father's counsel asked that custody be transferred to Father. She argued that he had completed his reunification plan and that his country of residence should have no bearing on the court's decision. Counsel further contended

that Father had made an appropriate plan for the children -- to remain in the United States with his brother and his family. She explained that Father was concerned about maintaining his relationship with his children if they remained with Bertha, but knew his brother would allow them to visit him in Mexico. Counsel presented to the court written authorizations to allow Noel to obtain medical care for the children and to enroll them in school. She pointed out that the DIF had assessed and approved Father's home, and had concluded he would be able to support the children in Mexico. Finally, counsel stressed that Father had a fundamental right to parent his own children, and to decide where and with whom they would live.

The court found that return of the children to the custody of Father would create a substantial risk of detriment to their safety, protection or physical or emotional well-being. On the record, the court gave the following reasons for its finding: "It is Father's doing that caused him to be incarcerated, then deported to his country of origin, . . . which caused the break in his ability to have regular contact with the minor children either in-person or telephonically or [by] other electronic means and the fact that Father never moved beyond monitored visits with the minor children. [¶] I believe the Department has exercised reasonable efforts for . . . Father to have contact with the minor children following his deportation from the United States. [¶] But it is based on Father' own conduct which caused him to have more challenges in terms of his contact with the minor children.

. . . [T]hat's primarily the reason I'm finding that at this point in time, there is detriment with respect to return to [Father]." The court further stated: "I don't put much weight on Father's financial position or his home status in Mexico; because that's not what he is arguing in this matter, for the children to reside with him [there]."

Reunification services were terminated, and the court set a section 366.26 hearing for May 2018. Father filed a notice of intention to file a writ petition. After receipt of his petition, this court issued an order to show cause and temporary stay order, directing the parties to show cause why the relief requested in the petition should not be granted and staying the section 366.26 hearing. DCFS answered the petition, and the children's counsel filed a separate opposition.

DISCUSSION

At every review hearing, the juvenile court is required to order the return of the minors to the physical custody of their parents unless it finds that such return "would create a substantial risk of detriment to the safety, protection, or physical or emotional well-being of the child[ren]." (§§ 366.21, subd. (e)(1) [6-month review], subd. (f)(1) [12-month review], 366.22, subd. (a)(1) [18-month review], 366.25, subd. (a)(1) [24-month review].) At every stage, the burden is on the agency to establish such detriment by a preponderance of the evidence. (§ 366.25, subd. (a)(1); *In re Yvonne W.* (2008) 165 Cal.App.4th 1394, 1400 (*Yvonne W.*).)

The statutes require the court to specify the factual basis for a finding of detriment. (§§ 366.21, subd. (e)(2), subd. (f)(2), 366.22, subd. (a)(2), 366.25, subd. (a)(2).)

"Because the dependency scheme is based on the law's strong preference for maintaining family relationships whenever possible, . . . [¶] . . . the risk of detriment must be substantial, such that returning a child to parental custody represents some danger to the child's physical or emotional well-being." (*Yvonne W., supra,* 165 Cal.App.4th at p. 1400, quoting *David B. v. Superior Court* (2004) 123 Cal.App.4th 768, 788.) "The standard for showing detriment is 'a fairly high one. It cannot mean merely that the parent in question is less than ideal, did not benefit from the reunification services as much as we might have hoped, or seems less capable than an available foster parent or other family member.'" (*Yvonne W.*, *supra*, at p. 1400.) Until services are terminated at the final review hearing, "reunification is the goal and [a parent] is entitled to every presumption in favor of having [his child] released to his custody." (*David B. v. Superior Court*, *supra*, at p. 788; see *In re Marilyn H.* (1993) 5 Cal.4th 295, 310 ["[U]p until the time the section 366.26 hearing is set, the parent's interest in reunification is given precedence over the child's need for stability and permanency"].)[6]

---

[6] Citing *In re A.O.* (2010) 185 Cal.App.4th 103, the children's counsel suggests Father lacked authority to designate the children's future placement. That case is inapposite, however, as it involved a determination of jurisdiction following a father's
(*Fn. continued on the next page.*)

We review the record for substantial evidence to support the court's findings that the minors would be at substantial risk of detriment if returned to the parent's custody. (*Yvonne W.*, *supra*, 165 Cal.App.4th at p. 1400.) In so doing, we draw all reasonable inferences in support of the findings, and resolve all conflicts in the evidence in support of the juvenile court's order. (*Id.* at pp. 1400-1401.) "'Substantial evidence' means evidence that is reasonable, credible and of solid value; it must actually be substantial proof of the essentials that the law requires in a particular case. [Citation.]" (*Id.* at p. 1401.)

In their responses to the petition, DCFS and the children's counsel contend the children's bond with Bertha justified a finding that return of the children, whether to Father's or Noel's physical custody, would pose a substantial risk of detriment to their emotional well-being. They point to the evidence that Bertha had had custody of the children since the beginning of the proceeding, that the children felt bonded with her and expressed their desire to remain with her, and that she made every effort to attend to their needs,

---

incarceration, not a statutory determination relevant to a section 366.25 review hearing. At the review hearing, the court is required to return a child to a parent, unless doing so will subject the child to "a substantial risk" of detriment. We discern no express or implied prohibition on a court's ability to consider credible evidence of the practical consequences of returning a child to a parent's custody including, in this case, evidence that the children will reside with their uncle.

including addressing behavioral and developmental issues. The children's counsel also contends that only Bertha has the knowledge and experience to deal with Dylan's special behavioral needs.

We do not question the success of the children's placement with Bertha. But the determination required by the statutory provisions governing review hearings -- that returning a child to his or her parent would be detrimental to the child -- cannot be based solely on the existence of a successful or beneficial relationship with the foster parents or other temporary caregiver. (See, e.g., *In re Jasmon O.* (1994) 8 Cal.4th 398, 418 (*Jasmon O.*) ["[T]he existence of a successful relationship between a foster child and foster parent cannot be the sole basis for terminating parental rights or depriving the natural parent of custody in a dependency proceeding"]; *In re Rodrigo S.* (1990) 225 Cal.App.3d 1179, 1187 [evidence that child would suffer loss of "highly successful foster care placement" standing alone insufficient to support finding of detriment]; *In re Kristin W.* (1990) 222 Cal.App.3d 234, 252-253 [finding of detriment and order terminating reunification services not supported by finding that children were "'happy and satisfied'" outside father's custody].) Nevertheless, multiple appellate courts -- including our Supreme Court -- have recognized that where severance of the relationship between the children and a caregiver would lead to serious emotional disturbance, or where the parent is unequipped to handle the special needs of the child, a finding of detriment may be warranted. (See,

e.g., *Jasmon O.*, *supra*, at pp. 416-418 [minor developed severe anxiety disorder and depression when court attempted to transfer custody from foster parents to father, as attested to by multiple psychologists]; *Constance K. v. Superior Court* (1998) 61 Cal.App.4th 689, 704-705, 708 (*Constance K.*) [detriment found where mental health professionals concluded mother would be unable to cope with return of minor children]; *In re Dustin R.* (1997) 54 Cal.App.4th 1131, 1136, 1141-1142 [finding of detriment supported, where children were delayed cognitively and exhibited aggressive and regressive behavior, and psychologist reported parents had limited awareness of children's emotional and physical needs].)

The factors a court may consider in determining whether changing custody would create a substantial risk of emotional detriment include those outlined in *Constance K.*: "whether changing custody will be detrimental because severing a positive loving relationship with the foster family will cause serious, long-term emotional harm [citations]; properly supported psychological evaluations which indicate return to a parent would be detrimental to a minor [citations]; whether the natural parent maintains relationships with persons whose presence will be detrimental to the ward [citation]; instability in terms of management of a home [citation]; difficulties a minor has in dealing with others such as stepparents [citations]; limited awareness by a parent of the emotional and physical needs of a child [citation]; failure of a minor to have lived with the

natural parent for long periods of time [citation]; and the manner in which the parent has conducted himself or herself in relation to a minor in the past. [Citations.]" (*Constance K.*, *supra*, 61 Cal.App.4th at pp. 704-705.)

We do not doubt that lack of significant parental contact, particularly where a child is very young or mentally or emotionally fragile, may support a finding that return to the parent would be so detrimental to the child as to pose a substantial risk of emotional damage. (Cf. *In re Gladys L.* (2006) 141 Cal.App.4th 845 [where noncustodial nonoffending father appeared at detention hearing but disappeared for the three years thereafter, court remanded for finding of unfitness or detriment under appropriate standard]; *In re Brian R.* (1991) 2 Cal.App.4th 904, 914-915 [where, by the time of the final review hearing, father had not lived with his three-year old child for two years, psychologist's testimony that child was at risk of developing a personality disorder if returned to father supported finding of detriment].) However, such finding must be supported by the evidence presented, and the court must specify the evidence on which it relied. (§ 366.25, subd. (a)(2).) Here, the court gave as its sole reason for the finding of detriment that Father never moved beyond monitored visits with the children, noting that it was "Father's doing" that he had been incarcerated and deported. The court made no reference to the children's physical or emotional well-being,

and identified no type of detriment the children were at risk of suffering if returned to Father's custody.[7]

Although it was Father's own criminal conduct that resulted in his incarceration and deportation, the record reflects the existence of a relationship with the children despite the minimal recent face-to-face contact. Father lived with the three older children when they were younger. There was evidence he had spent weekends with all the children prior to his incarceration in 2014, and that one or more of them visited him in prison. During the proceeding, he called them regularly and appeared at the in-person visits at the consulate whenever they were arranged by DCFS.

---

[7] Neither DCFS nor the children's counsel asked the court to make a finding of emotional or physical detriment likely to result from removing the children from Bertha's custody. In response to the petition, the children's counsel cites various factors that militate against placing the children with either Father or their uncle. These include Dylan's behavioral issues, which counsel suggests are ongoing, but which DCFS represents have been resolved. However, the court made no mention of Dylan's or any of the other children's needs, and we cannot infer on this record that such considerations played a part in its decision. Similarly, both DCFS and the children's counsel note the relative lack of time the children have spent with their uncle and his wife, but the court made no reference to that fact. Finally, the children's counsel contends that at the section 366.25 hearing, Father "was in the same position as he was at the time of the children's detention." The record does not support that assertion. Father was at liberty, was gainfully employed, had complied with the court's orders, and had made every effort to maintain contact with his children.

The caseworkers' reports confirmed that all the children knew who he was, expressed love for him and enjoyed the contact they had. There was no obstacle to unmonitored visitation identified other than the children's lack of passports. On this evidence, the lack of recent unmonitored visitation alone could not support a finding that the children would suffer detriment if returned to Father's custody. The court's orders denying his request for custody, terminating reunification services and setting a section 366.26 hearing must be reversed.

Although we reverse the court's order, we do not direct the court to transfer custody to Father after remand. "[W]hen an appellate court reverses a prior order of the [juvenile] court on a record that may be ancient history to a dependent child, the [juvenile] court must implement the final appellate directive in view of the family's current circumstances and any development in the dependency proceedings that may have occurred during the pendency of the appeal." (*In re Anna S.* (2010) 180 Cal.App.4th 1489, 1501.) Accordingly, we remand the matter with directions to the juvenile court to conduct a new section 366.25 hearing, focusing on the factors identified in *Constance K.* and other cases relevant to the risk of detriment. We emphasize that on remand, the court is free to consider evidence already in the record and any additional evidence relevant to determining whether returning the children to the custody of their Father will create a substantial risk of detriment. This includes the special needs of Dylan or any of the other

children, Father's awareness of such needs and ability to ensure they are addressed, the time the children have been separated from Father, the consequences of that separation on the bond between Father and the children, the impact of removing the children from Bertha's care, and the consequences of returning them to Father, including but not limited to his plans to place them with their uncle. We leave to the juvenile court to determine the appropriate result "'in light of our reversal, the grounds on which it was based, and the current state of affairs in [the] family.'" (*In re Anna S.*, *supra*, at p. 1501.)

DISPOSITION

The petition is granted. Let a peremptory writ of mandate issue directing respondent superior court to set aside its orders of January 4, 2018 denying Father's request for custody, terminating reunification services, and setting a section 366.26 hearing, and to hold a new section 366.25 hearing as set forth above.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

MANELLA, J.

We concur:

EPSTEIN, P. J.

COLLINS, J.