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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

In re N.M., a Person Coming
Under the Juvenile Court Law.

LOS ANGELES COUNTY
DEPARTMENT OF CHILDREN
AND FAMILY SERVICES,

Plaintiff and Respondent,

v.

JOSEPH M.,

Defendant and Appellant.

B284838

(Los Angeles County
Super. Ct. No. DK16544B)

APPEAL from orders of the Superior Court of Los Angeles
County, Philip L. Soto, Judge. Affirmed.

Cristina Gabrielidis, under appointment by the Court of
Appeal, for Defendant and Appellant.

Marcy C. Wickham, County Counsel, R. Keith Davis,
Assistant County Counsel, Sally Son, Deputy County Counsel, for
Plaintiff and Respondent.

Joseph M. (father) appeals from exit orders made when the juvenile court terminated jurisdiction over his daughter N.M. We affirm.

BACKGROUND

In April 2016 the Los Angeles County Department of Children and Family Services (DCFS) filed a petition alleging under Welfare and Institutions Code 300, subdivisions (b) and (j),¹ that R.M. (mother) had three positive toxicology screens for marijuana, and her substance abuse endangered the health and safety of N.M., then two years and eight months old, as well as N.M.'s older sister A.A. and her younger brother D.H.² Mother failed to supervise the children, endangering them all: D.H. swallowed amphetamines in March 2016 (resulting in a positive toxicology screen), and N.M. swallowed six to 10 Tylenol tablets in November 2015. The detention report stated that D.H. had put a plastic bag in his mouth while playing at a park, and when mother took him to urgent care, he tested positive for amphetamines. N.M.'s medical records showed she had ingested baby Tylenol tablets, but all tests came back normal. DCFS had not made contact with father, who was in state prison.

At the detention hearing on April 18, 2016, DCFS submitted father's criminal history reflecting numerous arrests and convictions, most recently a February 2016 conviction for auto theft for which he was serving a 32-month sentence. Mother reported that father was in Wasco State Prison, and the juvenile court found he was N.M.'s alleged father and ordered that he be

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

² N.M.'s half-siblings have different fathers and are not subjects of this appeal.

given notice. The court detained N.M. in foster care, and released the two other children to their respective fathers. The court ordered weekly drug tests and monitored visitation for mother, and ordered no contact or visits for father.

In the jurisdiction/disposition report filed May 23, 2016, mother reported father had been arrested and jailed in the first month of her pregnancy with N.M. Upon father's release in September 2015 (when N.M. was two years old), he and mother resumed their relationship. When father was rearrested four months later in January 2016, the relationship ended. Father had not yet been interviewed. He was not listed on N.M.'s birth certificate.

Father appeared in custody at the jurisdiction hearing. The juvenile court appointed counsel for father and found he was N.M.'s presumed father. As to N.M., the court sustained the section 300, subdivision (b) counts regarding mother's substance abuse and failure to supervise, and placed N.M. in mother's home with family maintenance services and monthly visits by DCFS. Mother had primary custody, and father was to comply with all terms of probation or parole.

The status review report, filed November 18, 2016, stated N.M. was living with mother, first in a residential treatment facility while mother completed an intensive program, and now in a one-bedroom apartment. Mother was looking for work, and had enrolled in an outpatient aftercare program with weekly drug testing and individual and group counseling, as well as a parenting program with N.M. N.M. was happy, well-cared for, and developing appropriately. Father was incarcerated in Arizona. The court had prepared an "in and out order" so father could be present at the hearing.

At the hearing on November 22, with father not present, the court terminated jurisdiction over mother's other two children and maintained jurisdiction over N.M., continuing the hearing to May 23, 2017.

Status review report and hearing, May 23, 2017

DCFS reported that mother completed her outpatient program and had enrolled in an adult education program to learn medical billing. N.M.'s half-brother D.H. was now living with mother, who was taking good care of both children. N.M. was happy, healthy, and active. Father remained incarcerated in Arizona, the court had made no further orders regarding visitation, and N.M. had had no contact with him since his incarceration. DCFS recommended termination of jurisdiction, as mother had been cooperative and fully compliant and had shown her ability to remain sober. DCFS also recommended the court make a family law order giving mother sole legal and physical custody of N.M. with monitored visitation for father.

Father was not present at the hearing on May 23, 2017. Father's counsel argued that a family law order was inappropriate, as the court had never made a detriment finding as to father, who was non-offending. Minor's counsel agreed. Mother's counsel and counsel for DCFS advocated for full legal and physical custody to mother, with weekly two-hour visits for father upon release from incarceration.

The court stated: "This is a family law order just as if we were in family law court. And the mother came in and said, 'I want to have custody order, and I want to have full custody of the child and the father have visits.'" The court continued: "Let me put you in the mindset. I'm sitting in family law court and the mom comes in and says, 'Child's father, presumed father, is in

custody in Arizona. I want to have full legal, physical custody.’

[¶] I would give him notice. You wouldn’t get assigned a terrific lawyer like you in family law court, but he has one here. You are making the points for him, but I don’t have to remove. It’s not a legal removal.” Father’s counsel continued to argue that in dependency court a detriment finding was required for a removal, and no allegations had been filed against father. Mother’s counsel argued that father was still in jail and had had virtually no contact with N.M. for a year. At DCFS’s suggestion (and after mother’s counsel agreed), the court awarded joint legal custody to father and mother. The court then stated: “I recognize we are in dependency court, but at this stage with regards to this child, we are put in the place of a family law court. It’s in the best interest of the child that I give full physical custody—I’ll agree to legal being joint—but full physical custody to mother. A judge in family law would make an order that is in the best interest of the child. That’s what I’m doing. I don’t have to make detriment removal orders as to the father. The fact he was non-custodial is of no consequence since we are not removing from the custodial parent. Remember, 361.2 of the Welfare and Institutions Code is triggered only when I removed from a custodial parent and a non-custodial parent steps up to the plate and says, ‘Hey, I have a right to my child. You must give me back my child unless, Judge, you find it’s detrimental for the child to be released to me.’ [¶] We are not removing from the custodial parent. Custodial parent has custody. And just like in a family law court, if she went down to court and said, ‘I don’t want this guy who is incarcerated who has no contact with my baby to come around and see my child without a monitor involved in this. I’m doing everything. I’m carrying the whole weight and making sure that the child has got

a roof over [its] head, fed[,] cleaned, bathed, gets to day care. Gets to schools, etc., I want to have an order that says he can't just come it and see this child whenever he wants to, wherever he wants to[,] without my say so.' [¶] That's all. That's all she's doing. 'It's the best interest that my child be with me, and I get to decide when, where and how and who is monitoring the visits between the father and this young girl.' [¶] That's it. I don't have to make detriment findings, and I'm not going to make detriment findings for the record. If I'm wrong, you can take me up on that. But that's how I see it. 361.2 does not require that I make those findings as to this father who is incarcerated. Now there doesn't have to be a change of circumstances. All we have to do is make those findings, close with a family law order." The court rejected father's counsel's objection that mother should have filed a section 388 petition alleging a change of circumstances because the original order was home of parents.

The court terminated jurisdiction over N.M., and awarded joint legal custody to mother and father, sole physical custody to mother, and monitored visitation to father. Father filed this timely appeal.

DISCUSSION

Father's sole argument is that the trial court applied the wrong standard in determining N.M.'s best interests.

When the juvenile court terminates its jurisdiction over a dependent child, section 362.4 authorizes the court to make custody and visitation orders that will be transferred to a family court and remain in effect until modified by a subsequent order. (*In re John W.* (1996) 41 Cal.App.4th 961, 970.) Section 302, subdivision (d) states that modification of such an exit order requires a finding of a significant change of circumstances since

the juvenile court issued the order and modification of the order is in the best interests of the child. (*In re Cole Y.* (2015) 233 Cal.App.4th 1444, 1456.)

There are “basic differences between juvenile dependency and family law in custody matters. Each context presents the court with different roles—between determining the best interests of the child—and determining the best interests of the child *as between* two parents. [Citation.] Moreover, the presumption of parental *fitness* ‘that underlies custody law in the family court just does not apply to dependency cases.’” (*In re John W.*, *supra*, 41 Cal.App.4th at pp. 971–972.) “In juvenile dependency proceedings the child is involved in the court proceedings because he or she has been abused or neglected. . . . The issue of the parents’ ability to protect and care for the child is the central issue. . . . [T]he juvenile court, which has been intimately involved in the protection of the child, is best situated to make custody determinations based on the best interests of the child without any preferences or presumptions.” (*In re Jennifer R.* (1993) 14 Cal.App.4th 704, 712.) A family court must limit its focus to the two parents, but “[d]ependency proceedings are not so narrow in focus, and invoke the state’s role as *parens patriae* in evaluating the best interest of the child, even if it means placement with someone other than the parents.” (*In re Nicholas E.* (2015) 236 Cal.App.4th 458, 465.)

Father argues the transcript shows the court used the family law standard (the best interest of the child as between two parents) rather than the dependency law standard (the best interests of the child). We disagree. The court’s statements that it was acting as a family law court did not adopt a family law standard. Instead, the court explained that it was making a

family law order upon termination of jurisdiction, to counter father's argument the court first had to make a finding of detriment and legally remove N.M. from father. The court repeatedly stated it was considering N.M.'s best interests in awarding physical custody to mother, and in requiring that N.M.'s visits with father be monitored. Father was still incarcerated and was a virtual stranger to N.M., who had known him for only four months when N.M. was two years old. Mother had turned her life around since N.M.'s detention, and N.M. was happy and healthy in her care.

Father makes no serious argument that awarding him joint or sole physical custody would be in N.M.'s best interest, and he does not explain why his visitation should not be monitored except to say the court made no finding that he posed a threat to N.M. But the court did find that father was a stranger to N.M., and it is reasonable to order monitored visitation when a young child is confronted with a father she does not know (N.M. will be just 5 years old on father's projected release date). Father appears to argue that we should apply the family court presumption that he is a fit parent, but that presumption does not apply in dependency court. Once circumstances have changed and father has developed a relationship with N.M., he may seek a modified order allowing him liberalized visitation.

Under the "strict best interest standard" required for family law exit orders (*In re John W.*, *supra*, 41 Cal.App.4th at p. 974), the court did not abuse its discretion in its orders awarding sole physical custody to mother and monitored visitation to father.

DISPOSITION

The orders are affirmed.

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EGERTON, J.

We concur:

LAVIN, Acting P. J.

GOODMAN, J.*

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