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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

In re GAVIN R., a Person Coming Under
the Juvenile Court Law.

SOLANO COUNTY HEALTH &
SOCIAL SERVICES DEPARTMENT,

Plaintiff and Respondent,

v.

NATASHA R.,

Defendant and Appellant.

A132716

(Solano County
Super. Ct. No. J40423)

Appellant Natasha R. (mother) appealed after the juvenile court terminated jurisdiction over her nearly five-year-old son, Gavin R., and awarded physical custody to the minor’s father, Dion P. (father). She argues that the juvenile court applied an incorrect legal standard when it entered judgment. We affirm.

I.
FACTUAL AND PROCEDURAL
BACKGROUND

The procedural and factual background of these proceedings was set forth in a previous appeal of the dispositional order. (*In re Gavin R.* (Sept. 27, 2011, A130860) [nonpub. opn.].) Because the issue presented in this appeal is a narrow one, we briefly summarize the relevant facts.

The minor and his two older half siblings (who are not the subject of this appeal) came to the attention of respondent Solano County Health & Social Services Department (Department) when mother was involuntarily hospitalized for about a week following a suicide attempt in September 2010, and the minor's 13-year-old half sister shortly thereafter disclosed that she had been molested repeatedly by an extended family member who lived in the home. After a juvenile dependency petition was filed in October 2010, father was identified as the minor's father. The juvenile court sustained the allegations as to the minor following a contested jurisdictional hearing on November 4, 2010, and the minor was placed in father's care the following month.

At a contested dispositional hearing held on January 3, 2011,¹ the juvenile court found by clear and convincing evidence that there was a substantial danger to the minor's well-being if the minor were returned to mother's care (Welf. & Inst. Code, § 361, subd. (c)(1)).² The order filed after the dispositional hearing stated that the minor was placed with father pursuant to section 361.2, subdivision (a). That statute provides that when a child is ordered removed pursuant to section 361, the court shall determine if a previously noncustodial parent desires to assume custody, and that the child shall be placed with that parent upon his or her request, unless the court finds that placement would be detrimental to the child. The court also granted family reunification service to mother, and family maintenance services to father.³

Beginning in April, mother transitioned from having supervised visits with the minor to having unsupervised visits with the minor two times per week. Although visits

¹ All further dates refer to the 2011 calendar year.

² All statutory references are to the Welfare and Institutions Code, and all rule references are to the California Rules of Court.

³ Mother appealed following the dispositional order. In our prior, nonpublished opinion, we affirmed the jurisdictional findings that the minor was a child described by section 300, subdivisions (b) (failure to protect) and (j) (abuse of sibling), struck the finding that the minor was a child described by section 300, subdivision (d) (sexual abuse), ordered that the dispositional order be modified to conform with the evidence, and otherwise rejected mother's arguments and affirmed the juvenile court's orders.

with mother reportedly went well, father raised concerns with the minor's therapist that the minor started wetting himself on a daily basis when unsupervised visits with mother first began. Concerns also were raised with the minor's therapist that the minor "randomly talked about his mother's suicide attempt."

In a status review report dated May 24, the Department recommended that the minor remain in the care of father, and that jurisdiction be terminated with custody orders. The social worker reported that mother had been unable to maintain stable housing during the reporting period after the maternal grandparents asked her to leave their home. Father, by contrast, had maintained adequate housing. He was unemployed but was searching for work, and he had family support from the paternal grandmother, who lived across the street from father and the minor. Although there was at one point concern that father may have relapsed into drinking alcohol, an investigation led to a negative drug screen, and no further concerns were reported. The minor was meeting all developmental milestones, staff at his preschool reported that the minor's face lit up when father picked him up from school, and the minor was adjusting well in father's home. Father stated that he wanted to maintain custody of the minor, and raise him into adulthood. He further stated that he had a "good working relationship" with mother, and had no problem arranging visitation with her. Following an in-home risk assessment, the risk level for possible future abuse and neglect to the minor was found to be "low."

In its review report, the Department "commend[ed]" mother for her willingness to participate in services; however, the social worker was concerned about mother's unstable housing situation, and about her recent decision to terminate mental health counseling after less than two months. The Department acknowledged that mother wished to have the minor placed in her custody, "yet she has received at least six months of reunification services and her current circumstances do[] not suggest that she is in a position to meet [the minor's] needs."

At a hearing on June 21, mother's counsel stated that mother wished to contest the Department's recommendation as to the minor, and the juvenile court scheduled a

contested hearing for July 19. The juvenile court characterized the hearing it set as “a contested [section] 364 review and a contested [section] 366.21(e) review.”⁴

Mother was not present at the July 19 hearing, and no party provided testimony. Mother’s attorney argued that the juvenile court should follow the standards set forth in section 366.21, subdivision (e) and that the Department should continue to offer reunification services.

County counsel argued that the Department had met its burden at the dispositional hearing to show that there was a substantial risk of detriment to the minor if he were returned to mother’s care, and that there had been no change in circumstances since that hearing. By contrast, father had “amply demonstrated” that he could adequately care for the minor and protect his safety. As for what legal standards governed the hearing, county counsel stated that the juvenile court had discretion under section 361.2 (governing placement with a noncustodial parent) to offer services to father but not to mother, to award custody to father outright, and to terminate jurisdiction. Mother objected to using a “family maintenance review standard” (an apparent reference to section 364) in determining whether to terminate reunification services.

The juvenile court concluded that county counsel’s analysis was correct, adding, “I went through the cases myself and I didn’t see anything that was dispositive on this particular issue. I think that since [section] 366—I think that since, because reunification services are optional in this circumstance in this case, those reunification services were offered, but I think in terms of termination at the six-month review, I can use the standards that are set forth in [section] 364.” The court continued, “In this case there’s no reason to keep the dependency case open any longer in terms of safety issues with respect to Gavin. So, I’m going to terminate jurisdiction and order the custody, legal to both parents, physical and primary residence to [father] and then visitation as the parties

⁴ As set forth in more detail below, “[s]ection 364 applies when the dependency court takes jurisdiction of a child, but does not remove the child from the physical custody of the parent. Section 366.21 supplies the procedures for review hearings at the six-, 12-, and 18-month stages.” (*In re Janee W.* (2006) 140 Cal.App.4th 1444, 1449, fn. 4.)

arrange.” A custody order consistent with the court’s oral pronouncement was filed on July 22, and mother timely appealed.

II. DISCUSSION

Mother’s sole argument on appeal is that the juvenile court applied an incorrect legal standard at the six-month review hearing, and that the case should be remanded to the juvenile court so that the correct standard may be applied at a new hearing. At the July 19 hearing, the juvenile court stated that it could “use the standards that are set forth in [section] 364.” The minute order filed after the hearing likewise states that the July 19 hearing was a “364 family maintenance [review]/contested 6-month review.”

Section 364 applies when a juvenile court determines that jurisdiction pursuant to section 300 is appropriate, but “the child *is not removed from the physical custody of his or her parent . . .*” (§ 364, subd. (a), italics added.) The juvenile court shall terminate its jurisdiction at the six-month review hearing “unless the social worker or his or her department establishes by a preponderance of evidence that the conditions still exist which would justify initial assumption of jurisdiction under Section 300, or that those conditions are likely to exist if supervision is withdrawn.” (§ 364, subd. (c).)

Here, the minor *was* removed from the physical custody of his custodial parent (mother). Therefore, section 364—by its terms and under settled case law—did not apply. (§ 364, subd. (a); *In re Janee W.*, *supra*, 140 Cal.App.4th at pp. 1450-1451; *In re Nicholas H.* (2003) 112 Cal.App.4th 251, 264 [§ 364 does not apply where minor placed with noncustodial parent].) However, although the juvenile court erred in purporting to rely on section 364, it does not follow that the court committed reversible error.

“[I]f the evidence on the appropriate issue was undisputed and supports a finding that there is no need for continued supervision, we may affirm the order terminating jurisdiction.” (*In re Janee W.*, *supra*, 140 Cal.App.4th at p. 1452.) As set forth above, the minor was placed with father pursuant to section 361.2, subdivision (a). Under that section, when the court orders removal of a child from a parent’s home and determines that another parent, with whom the child did not previously reside, is available, it has

three options. First, it may simply terminate jurisdiction and give the other parent legal and physical custody of the child. (§ 361.2, subd. (b)(1).) Second, it may order that the parent assume custody subject to the jurisdiction of the juvenile court, and require that a home visit be conducted within three months if any concerns have been raised by the child’s current caregiver regarding the parent. (§ 361.2, subd. (b)(2).) Third, it may have the other parent assume custody of the child subject to the supervision of the juvenile court and “may order that reunification services be provided to the parent or guardian from whom the child is being removed, or the court may order that services be provided solely to the parent who is assuming physical custody in order to allow that parent to retain later custody without court supervision, or that services be provided to both parents, in which case the court shall determine, at review hearings held pursuant to Section 366, which parent, if either, shall have custody of the child.” (§ 361.2, subd. (b)(3).)

The juvenile court here placed the minor with the previously noncustodial parent, and ordered that services be provided to both parents, pursuant to section 361.2, subdivision (b)(3). It was thus required to determine, “at review hearings *held pursuant to Section 366*, which parent, if either, shall have custody of the child.” (*Ibid.*, italics added.) Section 366.21, subdivision (e) (governing six-month review hearings), in turn, provides in relevant part: “If the child had been placed under court supervision with a previously noncustodial parent pursuant to Section 361.2, the court shall determine whether supervision is still necessary. The court may terminate supervision and transfer permanent custody to that parent, as provided for by paragraph (1) of subdivision (b) of Section 361.2.” (See *In re Nicholas H.*, *supra*, 112 Cal.App.4th at p. 264 [§ 366 et seq. governs proceedings involving minors placed with previously noncustodial parent]; rules 5.708(k)(3) [court may order custody to noncustodial parent and terminate jurisdiction after stating factual basis on the record] & 5.710(b)(2) [court must follow procedures in rule 5.708(k) at six-month review hearing where minor placed with noncustodial parent].) “When deciding whether to terminate jurisdiction, the court must determine whether there is a need for continued supervision, not whether the conditions

that justified taking jurisdiction in the first place still exist, as required under section 364. [Citations.] Even though section 361.2, by its terms, applies when the court first takes jurisdiction of a child, its procedures can be invoked at the six-month and 12-month review hearings” (*In re Janee W.*, *supra*, 140 Cal.App.4th at p. 1451.)

Here, county counsel essentially requested that the juvenile court follow the standard set forth in section 366.21, subdivision (e) when she argued that father had “amply demonstrated that he can care for the child,” that there were “no protection issues for this child,” and that mother was not an appropriate placement for the minor. The juvenile court stated that county counsel’s analysis was correct and that there was “no reason to keep the dependency case open any longer in terms of safety issues with respect to Gavin.” There was ample, and virtually uncontradicted, evidence in the record to support the finding that placement with father without continuing supervision was appropriate, and mother does not argue to the contrary. The order terminating jurisdiction thus was proper under sections 361.2 and 366.21, subdivision (e). (*In re Janee W.*, *supra*, 140 Cal.App.4th at p. 1453.)

To further illustrate that reversal is not warranted in these circumstances, we note that it is unclear whether the juvenile court’s reference to section 364 related to its decision to terminate jurisdiction generally or to the narrow issue of whether to terminate reunification services. Mother had argued below that, pursuant to the portion of section 366.21, subdivision (e) governing minors placed *in foster care*, the court could terminate reunification services only if the Department had provided reasonable services. The court disagreed, stating that “because reunification services [we]re optional . . . , those reunification services were offered, but I think in terms of termination at the six-month review, I can use the standards that are set forth in [section] 364.” Although the juvenile court cited an inapplicable statute in denying further services (§ 364), the court was correct that even if reunification services are offered to the previously custodial parent, failure to provide adequate reunification services to that parent does not prevent the court from terminating jurisdiction under section 361.2. (*In re Janee W.*, *supra*,

140 Cal.App.4th at pp. 1454-1455 [portions of section 366.21 applicable to children in foster care not applicable to minors placed with previously noncustodial parent].)

Apparently recognizing that her argument below was erroneous, mother stresses for the first time on appeal that whereas section 364, subdivision (c) provides that the court “shall” terminate jurisdiction unless the social services agency establishes certain facts, section 366.21, subdivision (e) does not mandate dismissal, instead providing that the court “may” terminate jurisdiction. She reasons that the juvenile court concluded that “it had no choice but to dismiss the case and grant permanent custody to father,” instead of choosing other possible options. (E.g., rule 5.708(k)(1)-(2) [at review hearing regarding minor placed with noncustodial parent, court may continue supervision and reunification services].) To the contrary, county counsel argued that it was “*within the court’s discretion* to assess the situation, determine whether or not there’s safety issues with regard to the child, and to terminate jurisdiction *if appropriate*.” (Italics added.) The juvenile court stated that counsel’s analysis was “correct,” an indication that it understood that the decision whether to terminate jurisdiction was discretionary.

Citing *In re Nicholas H.*, *supra*, 112 Cal.App.4th 251, mother argues that the juvenile court’s conclusion that father was qualified to have custody of the minor did not preclude an additional finding that mother also was qualified to have custody, or that she could have become so qualified with the benefit of additional reunification services. (*Id.* at p. 267 [finding that supervision of in-home placement no longer required comparable to finding that minor can safely be returned to the home of removal].) “When making a custody determination in any dependency case, the court’s focus and primary consideration must always be the best interests of the child. [Citations.] Furthermore, the court is not restrained by ‘any preferences or presumptions.’ [Citation.] Thus, for example, a finding that neither parent poses any danger to the child does not mean that both are equally entitled to half custody, since joint physical custody may not be in the child’s best interests for a variety of reasons. [Citation.] By the same token, a finding that the parent from whom custody was removed no longer poses a risk of detriment or that the parent whose custody has been subject to supervision no longer requires

supervision is relevant to, but not necessarily determinative of, the best interests of the child.” (*Id.* at p. 268.)

Here, the Department summarized in its May 24 review report all the reasons that awarding physical custody to father was in the minor’s best interests, such as the fact that father had stable housing whereas mother did not, the fact that father had the support of extended family members whereas mother did not, and the fact that the minor was thriving in father’s care. The report also stressed the reasons that placement with mother was inappropriate, such as the fact that mother had terminated mental health services, and the fact that she was not in a position to meet the minor’s needs despite having received reunification services. Abundant evidence supports a finding that the minor’s best interests were served by awarding physical custody to father, and mother does not argue to the contrary. Reversal therefore is inappropriate.

III.
DISPOSITION

The juvenile court’s order is affirmed.

Sepulveda, J.*

We concur:

Ruvolo, P. J.

Rivera, J.

* Retired Associate Justice of the Court of Appeal, First Appellate District, Division 4, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.