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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

In re C.K. et al., Persons Coming Under the
Juvenile Court Law.

B236046
(Los Angeles County
Super. Ct. No. CK87404)

LOS ANGELES COUNTY
DEPARTMENT OF CHILDREN AND
FAMILY SERVICES,

Plaintiff and Respondent,

v.

C.P.,

Defendant and Appellant.

APPEAL from an order of the Superior Court of Los Angeles County. Valerie L. Skeba, Juvenile Court Referee. Reversed and remanded.

Aida Aslanian, under appointment by the Court of Appeal, for Defendant and Appellant.

No appearance for Plaintiff and Respondent.

* * * * *

We reverse the juvenile court's dispositional order placing mother C.P. and father's three children in foster care because it is not supported by substantial evidence.

BACKGROUND

This dependency proceeding followed a bitter divorce in which father D.K. was awarded physical custody over his and mother's three daughters – C.K. (born March 1998), A.K. (born March 2000) and A.K.2 (born April 2005). Mother and father separated in 2005 and divorced in 2010. Their relationship was contentious, and each alleged the other has psychological problems and has mistreated the children.

1. Family Law Court Awards Father Custody

On February 24, 2011, the family law court awarded mother and father joint legal custody except father was awarded sole legal custody to make educational and medical decisions. After a 60-day trial, father was awarded primary physical custody of the children. Prior to the custody order, C.K. had not visited with father in over eight months, and once placed in his custody she ran away twice. In 2010, father had C.K. admitted to a residential facility.

The family law court denied mother's but granted father's request for a restraining order. Mother and father were ordered not to discuss the custody issues with any of the children or allow anyone else to do so.

A report prepared for the family law court in August 2010 by Eve Lopez, an attorney and forensic psychologist, indicated that C.K. criticized A.K. when she did not agree with C.K. and mother on issues regarding father's conduct. When C.K. called to cancel a visit with father, a social worker concluded that mother asked C.K. to make the call. At that time, A.K. wanted to live with father. C.K. wanted to live with mother and defended mother. C.K. was described as "mimic[ing]" mother and repeating mother's allegations against father. Mother and C.K. were resistant to allowing A.K.2 to visit father. A.K.2 appeared happy when she was with father. Father appeared to have a close relationship with both A.K.2 and A.K.

Lopez had difficulty interviewing mother and concluded mother did not provide reliable information. Lopez found mother showed little "insight" into her actions as

contributing to the girls' current difficulty." At the time, mother refused to go to therapy. Lopez was concerned that mother made disparaging remarks about father in front of the children. Lopez also faulted mother for manipulating C.K. However, Lopez did not find that mother was of risk to the children either physically or psychologically.

2. Juvenile Court Takes Jurisdiction

On April 14, 2011, the Los Angeles County Department of Children and Family Services (DCFS) detained the children, concluding that the children's safety was of immediate concern and could not be assured in the home of either parent. DCFS filed a petition, which, as later amended, provided: mother and father "have for the last year been involved in a very contentious family law dispute which has escalated to the point that significant allegations of physical abuse against the father, and neglect against the mother, have been made. Such conflict places the children . . . at substantial risk of physical and emotional harm and danger." Mother and father pled no contest to the amended petition.

3. Disposition Was Heavily Contested

Prior to the dispositional hearing, DCFS reported that C.K. and A.K. made allegations of physical abuse and alcohol abuse against father, all of which he denied. Mother agreed with the allegations. Father believed that mother coached the children to make allegations against him and sought the intervention of the juvenile court to advance her own agenda.

Mother's relatives sided with her and father's with him. DCFS's assessment of the maternal grandmother indicated that she would "not remain neutral"; and therefore may "prohibit[] father from Family Reunification." DCFS reported that C.K. is "parentified" and influences A.K. and A.K.2. DCFS recommended only monitored visits to prevent the children "from being coached by either parent." DCFS concluded that "[b]oth parents are responsible for contributing [to the] emotional and physical stress" on the children.

In May 2011, DCFS placed C.K. with a family friend who lived in a different area from mother and father, but C.K. refused to go to school because she did not have friends

there. A.K. and A.K.2 had been placed with a different family friend. Mother had been charged with misdemeanors for violating the family law court order, leaving C.K. in a hotel room alone (after C.K. ran away from father), and withholding information on C.K.'s whereabouts from police. Our record does not disclose whether mother was convicted of these crimes.

In August 2011, DCFS reported progress and recommended releasing the children to mother's custody. By that time, all three children had been placed in the care of the same family friend. DCFS reported mother had attended individual therapy and conjoint therapy with the children. Mother had participated in numerous parenting classes, and attended a support group for parents in conflict. Mother's therapist described her as "sincere in her desire to reduce the conflict between herself and her ex-husband." Mother consistently visited the children. DCFS indicated mother made substantial progress. DCFS found mother's home to be safe and appropriate.

At the same time DCFS reported mother's progress, DCFS reported that father had cancelled several visits because of work-related conflicts. Father drank wine during a monitored visit and was told that drinking during a visit was improper. DCFS indicated that father was not cooperative with DCFS.

Dr. Michael Maloney evaluated mother, father, and the children. Dr. Maloney found that neither mother nor father suffered from any emotional or mental disturbance. He noted that each parent made negative statements about the other. C.K. expressed negative feelings towards father and a desire to live with mother. C.K. was amenable to conjoint therapy with father. A.K. reported a positive relationship with both parents but stated she "heard" father physically abused C.K. Dr. Maloney concluded that the parents' negative statements had a "deleterious effect on the minors, especially 13 year old C.K. . . ." Dr. Maloney concluded that the children "should remain in the care of a person or persons other than the natural parents. They should reside . . . in a neutral setting where they would not be exposed to the negative influence of either parent." Dr. Maloney opined that "[i]f the current negativity between parents continues, it will clearly have a negative impact on all three children."

Therapist Dilyse Diaz found that the children endured trauma, damaging to their mental health and emotional well-being. The numerous moves in foster care contributed “to the instability and trauma they are currently experiencing. During each therapy session, all three of the children have expressed a desire to return living with mother immediately.” Both C.K. and A.K. “have expressed a desperate plea to cease living in Foster placement.” The children preferred to live with mother. Mother encouraged the children to allow a therapist to help improve their relationship with father. Diaz concluded the children’s stories about father “appear un-coached and completely authentic to the events they say have occurred.”

At the hearing on disposition, Diaz testified that the children would be at risk if placed with father, but would not be at risk if placed with mother. Diaz developed a plan with the goal of the children having healthy and stable relationships with both father and mother. According to Diaz, mother had complied with the plan. The children appeared comfortable with mother and wanted to live with her. Diaz concluded that A.K.2 was “traumatized” and has been overwhelmed by “the events.” Diaz described mother as having progressed and developing insight into improving the situation. Diaz was aware that father had concerns about mother’s interaction with the children.

A social worker testified that mother had been very cooperative, involved, and consistent with her visitation. Mother was appropriate and very loving during her visits. Mother was participating in the services called for by her case plan. The social worker stated that mother showed insight into the issues that brought her into the system. She did not believe mother posed any risk to the children. The social worker heard mother tell the children that she hoped they had a relationship with father and never heard mother try to turn the children against father. Father had not visited as regularly as mother.

Mother requested custody of all three children and father requested custody of A.K. and A.K.2. The children’s attorney argued that the children could not be protected if placed with father. Counsel for the children argued that the children were suffering harm from being separated from each other, their home, their school, and their familiar surroundings.

4. Juvenile Court Orders Children Placed in Foster Care

The court initially found that the children were adequately protected by the family law court and terminated jurisdiction. The court concluded that the family law court had “a very good read on the case.” The juvenile court indicated that the case should return to family law court with the same custody arrangements ordered by the family law court.

But the court subsequently changed its dispositional order. In changing its order, the court relied on Dr. Maloney’s conclusion that a neutral setting would be appropriate for the children because they would not be subject to the negative influences of either parent. The court found it necessary to place the children in foster care, because the parents and extended family were not neutral. The court found by clear and convincing evidence removal from the parents’ custody was necessary to avoid a substantial danger to the children’s physical or mental health. The court ordered C.K. placed with her sisters only if DCFS could ensure that she would not be left alone with her sisters.

Mother and father appealed from the dispositional order, but father abandoned his appeal and is not a party. DCFS has taken no position on appeal.

DISCUSSION

1. The Juvenile Court Lacked Sufficient Evidence to Find the Children Would Suffer Substantial Danger if Placed in Mother’s Custody

Mother challenges the juvenile court’s finding that the children needed to be placed in foster care. “[I]n dependency proceedings the burden of proof is substantially greater at the dispositional phase than it is at the jurisdictional phase if the minor is to be removed from his or her home. [Citations.] [¶] This heightened burden of proof is appropriate in light of the constitutionally protected rights of parents to the care, custody and management of the children. [Citation.] [¶] “Parenting is a fundamental right, and accordingly, is disturbed only in extreme cases of persons acting in a fashion incompatible with parenthood.’ [Citation.] ‘In furtherance of these principles, the courts have imposed a standard of clear and convincing proof of parental inability to provide proper care for the child and resulting detriment to the child if it remains with the parent,

before custody can be awarded to a nonparent.’ [Citation.]” [Citation.]’ [Citation.]” (*In re Isayah C.* (2004) 118 Cal.App.4th 684, 694.)

The presumption is that the children will be returned to parental custody. (*In re Marilyn H.* (1993) 5 Cal.4th 295, 308.) “[T]he burden is on the state to prove by clear and convincing evidence, that removal of the child from the parent’s custody is necessary.” (*Ibid.*) Thus, the court may remove the children only if the presumption is rebutted by clear and convincing evidence.

Here, whether we review the juvenile court’s finding for substantial evidence or abuse of discretion the order placing the children in foster care must be reversed. (See *In re Isayah C.*, *supra*, 118 Cal.App.4th at pp. 694-695 [applying substantial evidence standard of review]; but see *In re Gabriel L.* (2009) 172 Cal.App.4th 644, 652 [applying abuse of discretion standard of review].) There was no evidence that mother posed a substantial danger to the children’s physical health or mental well-being. There was no evidence mother physically abused the children or that the children were at risk of physical abuse in mother’s care. The children were not afraid of mother and wanted to live with her, which was the recommendation of therapist Diaz and DCFS. Although there was evidence that mother made disparaging remarks about father, there was no evidence those remarks affected the children’s mental well-being substantially enough to warrant placement in foster care. Even Lopez, who was critical of mother, concluded that the children were not likely to suffer harm if they were placed in her care.

At most, the evidence showed that the children may have been exposed to disparaging remarks about father if placed in mother’s care. Dr. Maloney’s conclusion, on which the juvenile court heavily relied, was that the children should be placed in a neutral home because the parents made negative remarks about each other. That evidence is insufficient to combat the presumption that a child will be placed in his or her parent’s care because it does not show the children were likely to suffer substantial danger from being placed in mother’s home. In short, no evidence supported the finding that the children were at risk of substantial danger if placed in mother’s care.

The evidence also does not show that no reasonable alternative existed to removing the children from mother's custody. Moreover, mother had complied with the case plan, attended individual therapy, attended numerous parenting classes, and, according to her therapist, had developed insight into her situation. No contrary evidence was presented. At the dispositional hearing, it was undisputed that mother encouraged the children to develop a better relationship with father.

2. The Juvenile Court Must Order a New Disposition

Mother argues that under Welfare and Institutions Code section 361.2, the juvenile court was required to place the children in her custody.¹ Section 361.2, subdivision (a) provides: "When a court orders removal of a child pursuant to Section 361, the court shall first determine whether there is a parent of the child, with whom the child was not residing at the time that the events or conditions arose that brought the child within the provisions of Section 300, who desires to assume custody of the child. If that parent requests custody, the court shall place the child with the parent unless it finds that placement with that parent would be detrimental to the safety, protection, or physical or emotional well-being of the child."

Under section 361.2, *if* the court ordered removal from father pursuant to section 361, it was required to place the children in mother's care unless such placement posed a risk to the children.² (See *In re Z.K.* (2011) 201 Cal.App.4th 51, 70.) However, no juvenile court findings support removal from father and we cannot speculate that the court would conclude father posed a risk to the children. The record suggests that the juvenile court credited father, because it stated that the family law court had a "good read" on the family and initially ordered the children returned to father's custody. Thus, mother cannot show that placement of the children in her care is mandated by

¹ All undesignated statutory citations are to the Welfare and Institutions Code.

² Section 361.2 does not require a parent to be nonoffending. (*In re I.A.* (2011) 201 Cal.App.4th 1484, 1494.)

section 361.2. Instead, the court must first determine whether the children should be removed from father.³

Finally, no evidence supports mother's argument that the juvenile court was punitive against her because she manipulated the system to spend more time with the children. To the extent the juvenile court was concerned with mother's efforts to manipulate a family law case because she was unhappy with the family law court's order, that concern was justified.⁴ "The family court, rather than the juvenile court, is the proper forum for adjudicating child custody disputes. [Citation.] 'The juvenile courts must not become a battleground by which family law war is waged by other means.' [Citation.] 'If indeed there is ever a place for it, the place for a custody battle is in the family law courts. There the battle will not consume public resources which are better directed to children who typically do not have the luxury of two functional parents fighting for custody' [Citation.]" (*In re Alexandria M.* (2007) 156 Cal.App.4th 1088, 1096.) The court's initial order terminating dependency jurisdiction was consistent with this bedrock principle that custody disputes belong in family not juvenile court. Mother's belief that the family law trial was "going badly" does not justify changing the forum for the custody litigation. (See fn. 4, *ante.*)

³ We express no opinion regarding whether the children should be placed in father's custody or mother's custody. We also express no opinion regarding whether the children should be placed together.

⁴ Mother admitted making a child abuse referral. She stated that the family law trial "was going badly." "Mother stated the judge in family law refuse[s] to admit notes from the minor's therapist. Mother stated she wanted their case removed from family law into dependency court because she feels she would be treated fairly." The petition arose after the children refused to return to father's custody.

DISPOSITION

The juvenile court's dispositional order is reversed. The case is remanded to the juvenile court for further proceedings consistent with this opinion.

FLIER, J.

We concur:

BIGELOW, P. J.

GRIMES, J.