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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

In re MADISON E., a Person Coming
Under the Juvenile Court Law.

B239258
(Los Angeles County
Super. Ct. No. CK66266)

LOS ANGELES COUNTY
DEPARTMENT OF CHILDREN AND
FAMILY SERVICES,

Plaintiff and Respondent,

v.

JENNIFER M. et al.,

Defendants and Appellants.

APPEAL from an order of the Superior Court of Los Angeles County.
Marilyn Mordetzky, Juvenile Court Referee. Affirmed.

Janette Freeman Cochran, under appointment by the Court of Appeal, for
Defendants and Appellants.

John F. Krattli, County Counsel, James M. Owens, Assistant County Counsel, and
Emery El Habiby, Deputy County Counsel, for Plaintiff and Respondent.

Jennifer M. (Jennifer) is the maternal grandmother of Madison E. (minor). Matthew M. (Matthew) is married to Jennifer and is the minor's maternal step-grandfather. Jennifer and Matthew (grandparents) appeal the order of the juvenile court terminating their legal guardianship over the minor and returning her to the custody of Tara W. (mother).

We find no error and affirm.

FACTS

In 2004, mother reported to a sheriff's deputy that Matthew had fondled her breasts in 2001, when she was 13 years old. The allegation was substantiated and the Department of Children and Family Services (Department) initiated a dependency case on mother's behalf. The petition stated, inter alia, that mother and Jennifer had so much conflict that mother did not want to return to the home. It also alleged that Jennifer did not have the ability to effectively deal with mother's behavioral issues, which placed her at risk. She was eventually returned to the grandparents and the juvenile court terminated jurisdiction.

In early 2005, when mother was only 17 years old, she gave birth to the minor. Then, in the spring of 2006, mother gave birth to a second baby girl, Alyssa B. (Alyssa)¹ The two girls have different fathers.

In March 2007, mother dropped the minor off with her paternal grandparents (Mr. and Mrs. C.). Mother went to stay with her father in Colorado.² Three weeks later, the Department received a child abuse referral. A social worker went to Mr. and Mrs. C.'s home to investigate. The minor had an infected scratch on her face and a scratch on her back. The home was unkempt and filthy. A few days later, a social worker

¹ We have kept the facts pertaining to Alyssa at a minimum because she is not a subject of this appeal.

² Mother left Alyssa with her paternal grandparents, Mr. and Mrs. B. Alyssa was detained and then released to her father, Brian B. (Brian). Brian was living with Mr. and Mrs. B. at the time.

spoke to mother via telephone. She did not want Jennifer to know about the case because she was controlling and would try to get the minor.

Mother admitted to using drugs.

When the Department discovered that Mr. and Mrs. C. had been convicted of willful cruelty to a child in 1993, it determined that the minor was not safe in their home. The minor was detained.

The Department filed a petition on the minor's behalf pursuant to section 300, subdivision (b) of the Welfare and Institutions Code.³ Count 1 alleged that mother endangered the minor by placing her in the care of Mr. and Mrs. C. when they had a filthy, unsanitary home, and because both Mr. and Mrs. C. had sustained a 1993 conviction for willful cruelty to a child. Count 2 alleged that mother "has a history of substance abuse and is a current abuser of ecstasy, cocaine, methamphetamine, marijuana and alcohol, which renders . . . mother incapable of providing regular care for the" minor. The Department later amended the petition. It contained the same two counts and allegations against mother and added a third count against alleged father, Nathan C. (father). As to father, the petition stated: ". . . [Father] is currently incarcerated due [to] convictions for Lewd and Lascivious Acts w/Child under 14 and Sex with a Minor 3+ Years Younger. Said criminal history endangers [the minor's] physical and emotional health, safety and well-being and places [her] at risk of physical and emotional harm, damage, danger and sexual abuse."⁴

The minor was placed with the grandparents. She visited with mother and Alyssa on weekends.

³ All further statutory references are to the Welfare and Institutions Code unless otherwise indicated.

⁴ The first count of the petition alleged that mother's bad judgment posed a risk of harm to Alyssa. As for the second count, it was identical as to both the minor and Alyssa. The third count only applied to the minor. Alyssa's father, Brian, was not identified as an offending parent.

In July 2007, the juvenile court sustained the amended petition and declared the minor a dependent child. It instructed the Department to provide mother with reunification services.

The minor exhibited delays in language and walking. She was referred to Kaiser Permanente for an evaluation. The evaluator opined that it was important for the minor to remain in a stable home and recommended that the minor be referred to the Regional Center due to developmental delay.

Mother lived with her cousin, Lisa P. (Lisa), in Moorpark. Lisa monitored mother's visits with the minor and reported that mother was attentive and demonstrated appropriate parenting skills. Due to conflicts with Jennifer, mother had difficulty scheduling visits. According to Lisa, Jennifer continually refused to drive the minor to Moorpark for visits. Jennifer became upset when she learned that the Department had liberalized visits to overnight visits at Lisa's home, and also when she learned that the Department was considering making the recommendation that the juvenile court release the minor to mother's custody. Before the overnight visits began, mother left Lisa's home. In Lisa's view, Jennifer manipulated mother into leaving Lisa's home with the hope that mother would return to Palmdale, socialize with her drug friends and relapse into drug use. As for why, Lisa opined that Jennifer feels that she messed up with mother and views the minor as a second chance to get things right. Three witnesses from the family wishing to remain anonymous told a social worker that Jennifer is controlling, manipulative and does not want to let the minor go.

Jennifer complained to the social worker about the drop off day of visits. When the drop off day was worked out to her benefit, Jennifer complained about the drop off time. Once that was worked out, she complained that the Department should allow mother only two weekend visits a month even though that was contrary to the juvenile court's order. When the social worker refused to reduce mother's weekend visits, Jennifer accused the social worker of "never giving me anything. I have rights too." The social worker pointed out that the goal of the case was reunification. In response,

Jennifer stated that she could not believe the Department would consider “giving that baby back to her.”

At a doctor’s appointment for the minor, Jennifer told the doctor that the minor would not be returning to mother. Jennifer told the doctor that Matthew and she were going to adopt the minor. Then Jennifer said that Matthew and she “do not feel it would be safe and good for . . . [the minor’s] well[-]being to return to the mother, who has a history of an unstable living situation and substance abuse.” When asked about this incident, Jennifer said that the doctor must have misunderstood.

During an interview with a social worker, Jennifer said it was not her responsibility to help facilitate visits, and she did not want to transport the minor. She said that mother should get a driver’s license. The social worker reminded Jennifer that as a foster parent, she was obligated to comply with visitation. In response, Jennifer threatened that the minor might have to find a new place to live.

The Department decided it would be inappropriate for mother to live with Jennifer because their ongoing conflict might be detrimental to the minor’s emotional health. As an alternative, mother moved in with her maternal great grandmother, Joan C. (Joan). In a phone call she had with a social worker, Jennifer expressed anger over the Department’s decision to allow Joan to monitor overnight visits. Jennifer said that the Department should have exercised its discretion to allow mother to live with the grandparents. She accused the Department of “interfering with my family. You are stopping me from visiting with my daughter and granddaughter.” The social worker explained that Jennifer could participate in the visits at Joan’s home. Jennifer accused the social worker of “not listening to me. I’m upset and I don’t want to talk to you anymore.” Jennifer hung up on the social worker.

The Department informed Jennifer that her kinship home assessment was denied due to the substantiated referral of sexual abuse against Matthew. As a result, the Department did not consider Jennifer a permanency option.

Mother moved to Colorado to live with her father and get a driver’s license. She did not tell the Department. Also, she failed to produce proof of enrollment in court-

ordered individual counseling and substance abuse counseling. In addition, she missed several drug tests. Due to her noncompliance with the case plan, the juvenile court terminated mother's reunification services.

In the meantime, a psychologist diagnosed the minor with an autism disorder. As a client of the Regional Center, she began receiving Early Childhood Intervention Services. She progressed significantly. Though she exhibited speech difficulties, she was able to articulate her basic needs as well as feed herself, go to the toilet and get dressed. Mother returned from Colorado and had monitored day visits with the minor in Joan's home. The minor interacted with mother well, and they exhibited a loving relationship. But mother knew that she was not capable of caring for a special needs child.

In September 2008, Jennifer's home was approved for federal foster care funding. An administrative hearing unit found that there was insufficient evidence that Matthew engaged in conduct inimical to the health of mother or the minor. But Jennifer's home still continued to be denied on the county level pursuant to the guidelines set forth in the Adoptions and Safe Families Act (ASFA).

Jennifer filed a motion for de facto parent status. It was granted.

The grandparents requested legal guardianship, and the Department opposed. In its report, it wrote: "Despite the positive aspects of this placement, [the Department] cannot recommend that legal guardianship be granted to the [grandparents] due to the sustained count of sexual abuse against [Matthew]. This is the same issue that prevented the Department from recommending placement and that caused [the ASFA Division] to deny the home. The case record shows that the relationship between [Jennifer] and mother is sufficiently dysfunctional that it could affect the [minor's] emotional health. Attempts were made to address all the issues by offering the grandparents a plan of counseling and education. A [team decision meeting] was held to discuss this option, however the grandparents refused to sign the agreement unless they had a written guarantee that completion of the counseling would result[] in [the ASFA Division] approving the home. This could not be provided. . . ."

Over the Department's objection, the juvenile court granted the grandparents' request for legal guardianship. At the same time, the juvenile court declined to terminate parental rights because the minor was living with relatives who were unwilling or unable to adopt her.

A year later, mother was attempting to complete court-ordered programs. She visited the minor every other weekend with Jennifer as monitor. The Department grew concerned that the ongoing conflicts between mother and Jennifer might impact the quality of mother's visits. As a consequence, the Department recommended that the visits be monitored by a neutral party.

Mother married Cory M. (Cory), a marine stationed at Camp Pendleton, and obtained a job as a receptionist at Super Cuts. As for the minor, she remained a Regional Center client and received in home services four times a week through California Psych Care to address developmental delay/disability. She was successful at socializing and communicating with other children. The minor continued to have visits with her sister, Alyssa.

Mother informed the Department that she wanted custody of the minor. She and her husband, Cory, enrolled in a parenting education class.

On October 11, 2010, an addiction medicine therapist from Kaiser Permanente wrote the following letter: Through counseling and therapy, mother "was able to address some issues including struggles with family, children and addiction. [Mother] made great strides understanding family problems and was able to learn to accept them and work through them without drugs and alcohol. . . . [¶] [Mother] . . . stopped in to say hello with her husband and from an observation, she looks well and no longer struggling with a drug or alcohol addiction."

By 2011, a social worker was monitoring visits. The social worker observed that the visits were productive. Mother demonstrated affection and patience with the minor. The minor responded to mother with hugs, kisses, laughter, smiles and verbal exchanges. She referred to mother as "mom."

Mother filed a section 388 petition. She asked the juvenile court to terminate legal guardianship and return the minor to mother's home. In the alternative, she requested that the juvenile court reinstate reunification services and/or order unmonitored day and overnight visits. As for changed circumstances, the petition averred: "Mother has completed drug rehabilitation with random testing and counseling through Kaiser . . . ; and has completed parenting classes. Mother is residing locally with [Joan], who is approved as a monitor. Mother has had regular and productive visits with [the minor] to the extent allowed by the legal guardian, who has lately been unnecessarily restrictive." To establish why the requested relief would be in the minor's best interests, the petition stated: "Mother has remedied the problems that brought her before the [juvenile court] when she was a very young mother; she has good quality visits with [the minor] to the extent allowed, and [the minor] is strongly bonded with [mother] and wishes greater contact, but the legal guardians are refusing this and have created unnecessary conflict with the mother. Without court intervention, mother and [Joan] will get little or no contact" with the minor.

The Department recommended that the juvenile court reinstate reunification services and allow unmonitored visits. At the hearing, the juvenile court reinstated reunification services. It also granted mother up to two hours of unmonitored visitation per visit.

Mother attended all scheduled visits.

At a subsequent hearing, the juvenile court granted mother unmonitored day visits and monitored overnight visits every other weekend. She began preparing to gain custody of both Alyssa and the minor. Eventually, mother was granted custody of Alyssa, the younger of the two girls. The social worker reported that mother had matured and gained the confidence needed to raise children. As a result, the social worker recommended that mother be given the opportunity to raise the minor and Alyssa in the same household.

In September 2011, the juvenile court ordered that mother have unmonitored overnight and full weekend visits. The visits went well, and mother and the minor built a

closer bond. The minor was happy and comfortable in the presence of mother and Cory. On more than one occasion, the minor asked if she could stay with mother. By January 2012, a social worker reported that mother was motivated to resolve the issues that resulted in losing custody of the minor. Mother exhibited a great level of maturity. She had gained insight and confidence, and she was emotionally healthy and stable. Mother wanted to raise the minor, and the minor wanted to be raised by mother.

The Department recommended that the juvenile court terminate legal guardianship and return the minor to mother's custody. The juvenile court followed the recommendation and ordered the Department to provide family maintenance services. Also, the juvenile court retained jurisdiction. It entered orders that mother and Jennifer attend counseling together, and that the grandparents have one overnight visit per week as a transition. Mother was ordered to ensure that the minor remain in the same school and that she receive behavioral therapy five times a week from an agency of mother's choice.

This timely appeal followed.

DISCUSSION

I. The Law; Standard of Review.

The parties agree that a juvenile court must focus on the best interests of the child when deciding whether to terminate a legal guardianship and return the child to a parent. (*In re Nicholas H.* (2003) 112 Cal.App.4th 251, 268; *In re Michael D.* (1996) 51 Cal.App.4th 1074, 1087.) When assessing a child's best interests, a juvenile court may consider, among other factors, "the seriousness of the problem leading to the dependency; the strength of relative bonds between the child and both the parent and the caretaker; and the degree to which the problem may be/has been easily removed." (*In re Jacob P.* (2007) 157 Cal.App.4th 819, 832.) We cannot disturb a juvenile court's order terminating legal guardianship and returning a child to a parent unless there is an abuse of discretion. (*Ibid.*) As for a juvenile court's factual findings, they must be credited on appeal if they are supported by substantial evidence. (*In re Richard C.* (1991) 231 Cal.App.3d 1487, 1501.)

II. The Juvenile Court Acted within its Discretion.

The grandparents argue that termination of legal guardianship is not in the minor's best interests because: (1) she is autistic and has specialized medical needs; (2) she has a strong bond with the grandparents; (3) living with the grandparents is all the minor has known; (4) the grandparents can meet her needs and provide stability; and (5) mother cannot provide the minor with stability.

In essence, the grandparents reargue their case and ask us to second guess the juvenile court as well as the Department. We decline.

The best interests of a child is a "complex idea." (*In re Kimberly F.* (1997) 56 Cal.App.4th 519, 530 (*Kimberly F.*) [discussing best interests in the context of a section 388 petition].) A "one-dimensional 'better household' test is not dispositive" and many factors must be considered. (*Ibid.*) "Most of the time such factors will fall along a continuum, one extreme of which is the notion that just because a parent makes relatively last-minute (albeit genuine) changes he or she is entitled to return of the child, the other is the obvious attractiveness of insuring that the child remains with highly functional caretakers. Neither extreme can be dispositive. In the middle are a number of factors which may be derived from the existing dependency statutes themselves, and which drive a case in one direction or another." (*Ibid.*)

Typically, a court begins by examining "the seriousness of the reason for the dependency in the first place." (*Kimberly F.*, *supra*, 56 Cal.App.4th at p. 530.) Here, mother's immaturity, lack of judgment and drug abuse led to the dependency. There is no evidence that mother ever harmed the minor, so this problem is not as egregious as physical or sexual abuse or intractable as severe mental illness. Nonetheless, mother's behavior certainly placed the minor at risk of harm. On a continuum, the problem was serious enough to warrant intervention by the Department and courts. The flip side of the coin is that a court must also examine the degree to which the problem may be easily removed, and the degree to which it actually has been. (*Id.* at p. 532.) Though it took mother several years to address her problems, she finally decided to do so. She finished her court-ordered programs. As well, she matured, gained confidence and insight, and

became emotionally healthy and stable. Thus, there is substantial evidence that she resolved the issues that made her unfit to parent.

Next, a court should take a close look at the relative bonds of the child to both the parent and caretakers. (*Kimberly F.*, *supra*, 56 Cal.App.4th at p. 530.) The evidence shows that there is a strong bond between mother and the minor. The minor is happy and affectionate when she is with mother, and the minor expressed a desire to stay with mother. Visitation evolved into unmonitored visits over full weekends, and the visits went well. As for the grandparents, we infer that the minor has a bond with them. After all, minor was in their custody for about five years. But there is no indication in the appellate record that the minor was so bonded to them that she would suffer detriment if legal guardianship was terminated. For example, she did not exhibit separation anxiety during her unmonitored visits with mother.

There are a few other considerations that deserve attention. The record establishes that Jennifer tried to interfere with the minor's visitation and bonding with mother. This suggests that the minor's best interests would not be served by remaining in the grandparents' custody. After the juvenile court reinstated reunification services, the focus of the case was reunifying mother with the minor. The grandparents expressed and exhibited antipathy toward that goal. Furthermore, the grandparents were never approved as adoptive parents. Thus, they could not provide the minor with a permanent placement. The inference is that mother provides the minor with the best chance for emotional as well as legal stability. Too, mother regained custody of Alyssa. Inferentially, it would be in the minor's best interests to be raised in mother's home so that the minor has an opportunity to bond with her sibling. Finally, the juvenile court retained jurisdiction to ensure a smooth transition; it ordered mother to keep the minor in the same school and take her to behavioral therapy five times a week; and it ordered that the grandparents have an overnight visit once a week. Thus, the juvenile court took precautions so that the minor will receive the best care possible.

We easily conclude that there was substantial evidence that terminating legal guardianship and returning the minor to mother's custody was in the minor's best

interests. That evidence was bolstered by the Department's recommendation that the minor be returned to mother's home.

On this record, there was no abuse of discretion.

Arguing to the contrary, the grandparents advert to a letter from the minor's school psychologist. This letter is the lynchpin of their appeal. The psychologist wrote that Jennifer knows how to structure the minor's home environment and implement home routines that prevent the minor from shutting down, screaming, falling to the ground and becoming nonresponsive. According to the psychologist, "[w]ithdrawn, defiant, and nonresponsive behavior is typical of a child with Autism when any routines are changed. The consistency of routines and a high level of structure are essential for [the minor's] ongoing progress, both in the home and school setting. Otherwise, a simple change in routine can result in major regression of behaviors and skills that [the minor] has obtained. It is crucial that [the minor] remains in a home environment that provides the above conditions. ¶¶ I am impressed by the knowledge that [Jennifer] has in addressing the needs of a handicapped child, and her being able to resolve related behavior issues that may occur. [Jennifer] possesses strong parent skills that are acquired only after much parent training and reading of pertinent literature related to the handicap of Autism. [Jennifer's] expertise in handling [the minor] has prevented [the minor] from becoming withdrawn, defiant, and nonresponsive."

In essence, what the grandparents suggest is that moving the minor will exacerbate her autism disorder, and that they are the only caretakers who are capable of meeting the minor's needs. The problem with this suggestion is that there is no evidence that changing homes will be detrimental to the minor as long as the new home can meet her needs. Nor is there any evidence establishing that mother lacks the ability to provide the minor with sufficient care. In fact, based on mother's maturation, marriage and the success of the unmonitored visits with the minor, the inference from the record is that mother is up to the challenge.

In their reply brief, the grandparents argue that Family Code section 3041 establishes that it is not in the best interests of the minor to be removed from their

custody and returned to mother's home. This argument was waived because the grandparents did not raise it below (*Santantonio v. Westinghouse Broadcasting Co.* (1994) 25 Cal.App.4th 102, 113) or in their opening brief (*Wurzl v. Holloway* (1996) 46 Cal.App.4th 1740, 1754, fn. 1).

Regardless, this argument lacks merit.

Family Code section 3041 does not apply to dependency cases. Instead, it applies to probate guardianships. “The differences between probate guardianships and dependency proceedings are significant. [Citation.] Probate guardianships are not initiated by the state, but by private parties, typically family members. They do not entail proof of specific statutory grounds demonstrating substantial risk of harm to the child, as is required in dependency proceedings. [Citations.] Unlike dependency cases, they are not regularly supervised by the court and a social services agency. No governmental entity is a party to the proceedings. It is the family members and the guardians who determine, with court approval, whether a guardianship is established, and thereafter whether parent and child will be reunited, or the guardianship continued, or an adoption sought under [Probate Code] section 1516.5.” (*Guardianship of Vaughn* (2012) 207 Cal.App.4th 1055, 1069 (*Vaughn*)).

Family Code section 3041, subdivisions (a) and (b) establish that before granting “custody to a nonparent over parental objection, the [probate] court must find “clear and convincing evidence” that [(1)] “granting custody to a parent would be detrimental to the child and that [(2)] granting custody to the nonparent is required to serve the best interest of the child.” [Citation.]” (*Vaughn, supra*, 207 Cal.App.4th at pp. 1069–1070.) As defined in Family Code section 3041, subdivision (c), the detriment to a child “includes the harm of removal from a stable placement of a child with a person who has assumed, on a day-to-day basis, the role of his or her parent, fulfilling both the child’s physical needs and the child’s psychological needs for care and affection, and who has assumed that role for a substantial period of time. A finding of detriment does not require any finding of unfitness of the parents.” [Citation.]” (*Ibid.*) If the probate court finds that a person has provided the type of stable placement just described, “this finding shall

constitute a finding that the custody is in the best interest of the child and that parental custody would be detrimental to the child absent a showing by a preponderance of the evidence to the contrary.” (Fam. Code, § 3041, subd. (d).)

Family Code section 3041, subdivision (c) ““is a codification of the de facto parent doctrine, which grants standing [in dependency actions] to persons who . . . have come to function as parent to a child, even though not the child’s natural parent. [Citation.]’ [Citation.] The doctrine recognizes the interest a person acquires ‘in time’ in the care and custody of a child by raising the child in his own home. [Citation.]” (*Vaughn, supra*, 207 Cal.App.4th at p. 1072.)

Jennifer’s motion for de facto parent status was granted, and the grandparents provided the minor with a home for almost five years. As a result, they contend that there is a presumption that it will not be in the minor’s best interests to be removed from their home. We disagree. A presumption might apply if this case involved a probate guardianship, but it does not. This is a dependency proceeding which was closely supervised and analyzed by the Department and the juvenile court. Different policies and statutes are at play.

DISPOSITION

The order is affirmed.

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_____, J.
ASHMANN-GERST

We concur:

_____, P. J.
BOREN

_____, J.
DOI TODD