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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

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

SAN DIEGO COUNTY HEALTH AND
HUMAN SERVICES AGENCY,

Plaintiff and Respondent,

v.

BOBBY P.,

Defendant and Appellant.

D060809

(Super. Ct. No. J516677A)

APPEAL from a judgment of the Superior Court of San Diego County, David B. Oberholtzer, Judge. Affirmed.

After the juvenile court found Bobby P., the father of 12-year-old T.M., did not receive proper notice at the start of this dependency proceeding—almost five years ago—the court declined to place T.M. with him as the nonoffending, noncustodial parent under

Welfare and Institutions Code, § 361.2, subdivision (a).¹ Bobby appeals, contending there is no substantial evidence placing T.M. with him would have been detrimental to the child. We affirm.

FACTS

T.M.'s mother is Stacy M. Bobby was in contact with T.M. during the first five years of the boy's life.

In May 2007, police went to Stacy's residence to investigate recent narcotics complaints. In addition to Stacy, T.M., T.M.'s younger half brother,² and Stacy's domestic partner lived there. Police found methamphetamines, marijuana and drug paraphernalia; Stacy was under the influence and admitted she recently used methamphetamines. Police arrested Stacy and her partner and transported the two boys to Polinsky Children's Center (PCC).

The San Diego County Health and Human Services Agency (Agency) filed a dependency petition on behalf of T.M. pursuant to section 300, subdivisions (b) and (g). Stacy told the social worker that she did not know Bobby's whereabouts and that his last known address was in Palm Springs. Agency's parent search for Bobby listed no current address for him.

¹ Statutory references are to the Welfare and Institutions Code.

² The younger half brother is not a subject of this appeal.

On July 5, the juvenile court sustained T.M.'s dependency petition under section 300, subdivision (b) and ordered Stacy to participate in the Substance Abuse Recovery Management System program.

T.M. had numerous disruptive behavior problems at PCC and school. T.M. underwent a psychological evaluation, which recommended he be placed in a 24-hour, seven days a week residential facility. The evaluation also showed T.M. was eligible for special education, and an Individualized Education Program was developed.

At the dispositional hearing in December, the court found there was a substantial risk to T.M.'s physical health if he were returned home. The court declared T.M. a dependent child, removed him from parental custody, placed him in a licensed foster home level of care and ordered reunification services for Stacy. When T.M. was placed in an intensive treatment foster care home, the family asked to have him removed because he exhibited aggressive and unsafe behaviors, including throwing tantrums, swearing at the foster mother and destroying his room. T.M. had difficulty managing his anger and assaulted others when he was angry and frustrated. T.M. was placed at Mi Casa - Santa Arminta House group home.

The behavioral problems continued at the group home; on occasions, T.M. hit, punched and bit other residents. However, T.M. responded well to therapy that began in 2008, and by mid-year, Agency wanted to move him to the new Alternatives Herrick Children's Center (Herrick) group home. T.M. was placed there on June 19.

Although there was some assaultive conduct toward staff when he did not get his way, T.M.'s overall behavior seemed to improve at Herrick through the end of 2008.

T.M. was easily redirected when he calmed down and was learning to communicate his needs more effectively with the staff.

In 2009, however, Stacy regressed on her reunification plan, and her visitation changed from unsupervised to supervised. Stacy also missed several visits. T.M. began having intense behavioral problems again. T.M. hit, kicked, scratched and attempted to bite others; he also slammed doors, swore and destroyed property. Additionally, a knife was found hidden in his bedroom.

At the 12-month review hearing in April, the juvenile court suspended Stacy's visits and ordered another planned permanent living arrangement (APPLA) for T.M.

At the postpermanency planning review hearing in October, the court confirmed the licensed group home order for T.M. with a specific goal of a less restrictive foster setting. The court also ordered in-person supervised visits for Stacy.

In April 2010, Agency considered placing T.M. with his maternal great-aunt and maternal great-grandmother, who lived together. The great-aunt wanted to take guardianship of or adopt T.M. T.M.'s overnight visits with his great-aunt and great-grandmother had gone well, and no negative behaviors were reported. The plan was to transition T.M.'s placement from Herrick to his great-aunt's and great-grandmother's residence. T.M. was excited about the plan and said he wanted to live and be with his family.

However, the maternal relatives, including Stacy, began to experience discord and tension, which T.M. noticed during his visits. T.M.'s therapist and the Herrick social worker became concerned with how the negative family dynamics would affect T.M.

The therapist recommended that T.M. be moved to a foster home to give him the opportunity to adjust to a home environment with supportive services. The therapist said that given T.M.'s history of responding badly to stressful environments and personal anxiety levels, it would be better to first move him to a foster home to minimize the possible negative effects of a placement transition. Agency's social worker agreed with the recommendation.³

In May 2010, Bobby, who was living in Altadena in Los Angeles County, contacted the Riverside County Child Welfare Services in an attempt to find T.M. Bobby obtained a phone number for Agency's social worker, whom he called on May 6. Bobby told the social worker that he would like to be considered for placement of T.M. and wanted an attorney appointed for him.

Bobby made his first court appearance in this case on June 21. Bobby reported on his parentage inquiry form that T.M. had not lived with him, but had been to his residence at various times during the first five years of his life. The juvenile court appointed counsel for Bobby and ordered supervised visits between Bobby and T.M. Subsequent paternity testing confirmed Bobby was T.M.'s father.

³ Eventually, Agency did not recommend placement with the maternal great-aunt and great-grandmother. By the middle of September 2010, T.M. had begun to regress in therapy; the therapist attributed the regression to his overwhelming feelings of anxiety, stress and frustration. The therapist opined that he had internalized the stress resulting from the family discord. It appeared that T.M. did not want to live with the maternal relatives; he curled up in a fetal position on the floor and covered his face with a pillow when asked about his maternal great-aunt.

When T.M. learned about Bobby's involvement in the case, he was very excited even though he did not remember Bobby. When the social worker interviewed T.M. after he had had three visits with Bobby, T.M. reported the visits went well. Bobby fixed T.M.'s bike and they ate lunch together. T.M. said he wanted to have visits with Bobby in Los Angeles and meet his paternal relatives. T.M. wanted Agency to consider Bobby and Bobby's sister for placement.⁴ The staff at Herrick reported T.M.'s visits with Bobby were positive.

On September 30, the court authorized unsupervised visits between Bobby and T.M. and ordered Agency to evaluate Bobby's home for placement. The social worker found the home clean and appropriate.

On November 23, T.M. was placed in a foster home that was one hour closer to Bobby's home. However, Bobby's visits were inconsistent.

On January 21, 2011, Bobby filed a section 388 petition requesting placement. The petition alleged Bobby learned about T.M.'s dependency proceedings "on his own," that he had visited his son and the visits had been appropriate and progressed to unsupervised in Bobby's home. T.M.'s first preference was to live with Bobby. As an alternative to placement, Bobby requested reunification services.

On January 21, the court granted Bobby presumed father status.

On April 24, T.M. began overnight visits with Bobby every other weekend. The visits were consistent.

⁴ Bobby lived with his mother, his sister Evelyn, Evelyn's husband, and their two minor children and one adult child. Bobby had three other sisters who lived nearby.

In May, T.M. underwent a psychological evaluation in which he was diagnosed as having, among other things, an oppositional defiant disorder, a depressive disorder, and a reading disorder. The psychologist described T.M. as a very angry boy who acted out his aggression in destructive ways. His mother had abandoned him and he also felt abandonment from his father who was inconsistent with visits. Further, the psychologist recommended T.M. receive long-term care and a behavioral reinforcement program to reduce his symptoms and destructive behaviors.

On May 26, Agency moved T.M. back to PCC because of extreme aggressive behaviors, property destruction and a recent hospitalization for being a danger to others. The social worker reported T.M. had threatened to kill a fellow student while riding the bus home, had been physically aggressive with the foster mother, threatened to blow up the Boys and Girls Facility, smashed a computer on the ground at school and had been suspended for throwing a computer at his teacher.

On June 8, T.M. was moved to the San Diego Center for Children.

Agency's social worker recommended against placement with Bobby because he had not engaged in any services, there was uncertainty about what took place during Bobby's visits with T.M. and reports that Bobby abused alcohol.⁵ According to the social worker, Bobby had been given a letter outlining services that were available and had been encouraged to enroll in any services offered. But Bobby had not enrolled in any classes. T.M. told his therapist that Bobby drank a lot of beer during his weekend visits.

⁵ Bobby denied drinking alcohol.

When T.M. became angry, he would take the beer cans outside and hit them with a bat. The social worker opined Bobby had little insight into T.M.'s neglect history, which made it difficult to meet the boy's emotional and developmental needs. The social worker opined Bobby was unable to demonstrate empathy, consistency or emotional support for T.M. and appeared unwilling to put his son's needs ahead of his own.

On July 21, the court held a hearing on Bobby's section 388 petition and ruled the first prong of the statute—changed circumstances—had been met. The court found Agency had not provided him with proper notice at the beginning of the case and also had failed to continue to search for him throughout the case.

At the continuation of the hearing on October 17, Agency stipulated that the second prong—best interests of the child—had been met and agreed it was appropriate to have the proceedings revert to the dispositional hearing with Bobby receiving reunification services. The parties then litigated whether T.M. should be placed with Bobby. At the conclusion of the hearing, the court ruled that Agency had met its burden to show by clear and convincing evidence that it would be detrimental to T.M. to place him with Bobby. The court found at that time it would be detrimental for T.M. to be placed in any family home setting. The court ordered placement in a group home level of care and reunification services for Bobby.

DISCUSSION

Bobby contends the juvenile court's order denying placement should be reversed because there was insufficient clear and convincing evidence of detriment to T.M. The contention is without merit.

At the onset, we note there is some disagreement among the parties with the procedural context of the order denying placement. Our review of the record shows that the order was made under section 361.2. At the beginning of the October 17, 2011, hearing, the parties stipulated that Bobby's section 388 petition should be granted to the extent it returned the proceedings to the dispositional stage with Bobby receiving reunification services. The court accepted the stipulation even though it hesitated calling the hearing a dispositional hearing and proceeded to address the placement issue.

When a nonoffending, noncustodial parent requests custody of a minor who has been removed from the home, "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." (§ 361.2, subd. (a).) "If no detriment exists, the court orders placement of the child with that parent." (*In re Austin P.* (2004) 118 Cal.App.4th 1124, 1132.) A detriment finding must be made by clear and convincing evidence. (*In re Luke M.* (2003) 107 Cal.App.4th 1412, 1426.)

Detriment under section 361.2 is not necessarily related to parental conduct. (*In re Luke M.*, *supra*, 107 Cal.App.4th at p. 1425.) "[S]ection 361.2, which governs *placement* after the child has been made a dependent of the court and removal from the custodial parent has already occurred, conspicuously does *not* require that the court find the noncustodial parent might fail to protect the child or that there are no reasonable means to protect the child in the noncustodial parent's home in order to deny the noncustodial parent's request for placement. Instead, section 361.2 simply instructs the court to consider whether placement with the noncustodial parent would be 'detrimental to the

safety, protection, or physical or emotional well-being of the child.' A detriment evaluation requires that the court weigh all relevant factors to determine if the child will suffer net harm." (*Ibid.*)

"We review the record in the light most favorable to the court's order to determine whether there is substantial evidence from which a reasonable trier of fact could find clear and convincing evidence that the children would suffer such detriment. [Citations.] Clear and convincing evidence requires a high probability, such that the evidence is so clear as to leave no substantial doubt." (*In re Luke M., supra*, 107 Cal.App.4th at p. 1426.)

The juvenile court made it clear that its detriment finding under section 361.2 was based on T.M.'s substantial needs and not on Bobby's shortcomings as a parent. "The bottom line is, [T.M.] is nowhere near a place where he can go into a home, anybody's home," the court noted "It's just not time yet" to place T.M. in a family home.

A review of T.M.'s tortured history in this case amply supports this conclusion.

When this case began nearly five years ago, T.M., then seven years old, had assumed a parentified role for his younger brother in a home environment marked by drug abuse and domestic violence. Brought into the system, T.M. immediately showed aggressive and violent behaviors at PCC and at an intensive treatment foster care home. T.M. was far too much to handle for the specially trained foster care parents, and he was transferred to Mi Casa - Santa Armenta House group home. T.M. acted out aggressively and violently there as well, but his behavior improved after he began therapy. T.M.'s next stop was at Herrick, where his improved behavior continued for a time, but then

regressed after his mother missed visits. The court terminated Stacy's services after 12 months and selected APPLA as T.M.'s permanent plan.

By 2010, there was hope of placing T.M. with maternal relatives, but family discord, among other things, prevented this from happening. (See fn. 3, *ante*.)

Bobby's entrance into the case in 2010 appeared to be a promising development as T.M. was enthusiastic about visiting with his father. Bobby became T.M.'s first choice for placement. But Bobby's visits became inconsistent, and T.M. told his therapist that Bobby drank during much of the visits.

In 2011, Agency moved T.M. back to PCC after he had threatened to kill a fellow student while riding the bus home, threatened to blow up the Boys and Girls Facility, smashed a computer on the ground at school and been suspended for throwing a computer at his teacher. T.M. was hospitalized for being a danger to others.

It cannot be disputed that T.M.'s mental health, emotional and educational challenges are extraordinary. He has displayed periods of extreme aggression and violence, followed by behavioral improvement, followed by regression to the aggressive and violent conduct. T.M. also has shown a pattern of doing better in the more structured living arrangements than in his foster home placements. A psychological evaluation completed a year ago shows that T.M. needs more long-term care and a behavioral reinforcement program to reduce his symptoms and destructive behaviors.

In short, there was substantial evidence under the clear and convincing evidence standard of proof that as of the October 17, 2011, hearing, it would have been detrimental to place T.M. in any family home, including Bobby's. T.M. was not ready for such a

placement; he needed more specialized treatment before such a placement would not be harmful to his safety and well-being. In making placement orders for dependent children, the juvenile court must rule in their best interests. (*In re Nicholas H.* (2003) 112 Cal.App.4th 251, 267-268.) The court's focus should be on the child's well-being. (*In re Luke M., supra*, 107 Cal.App.4th at p. 1423.)

Because "detriment" has no clear-cut meaning, courts making placement decisions must have flexibility based on facts unique to each child. (See *In re B.G.* (1974) 11 Cal.3d 679, 698; *Guardianship of Zachary H.* (1999) 73 Cal.App.4th 51, 66.)

Bobby's reliance on this court's decision in *In re John M.* (2006) 141 Cal.App.4th 1564 is misplaced. That case did not involve an almost five-year dependency case in the postpermanency stage with a documented history of placement failures caused by the child's mental health and emotional problems.

DISPOSITION

The judgment is affirmed.

HALLER, Acting P. J.

WE CONCUR:

MCDONALD, J.

O'ROURKE, J.