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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

In re K.C., a Person Coming Under the
Juvenile Court Law.

SAN DIEGO COUNTY HEALTH AND
HUMAN SERVICES AGENCY,

Plaintiff and Respondent,

v.

ROBERT C.,

Defendant and Appellant.

D063891

(Super. Ct. No. 506631E)

APPEAL from an order of the Superior Court of San Diego County, Gary M.

Bubis, Judge. Affirmed.

Valerie N. Lankford, under appointment by the Court of Appeal, for Defendant
and Appellant.

Thomas E. Montgomery, County Counsel, John E. Philips, Chief Deputy County
Counsel, and Lisa M. Maldonado, Deputy County Counsel, for Plaintiff and Respondent.

Robert C. appeals the juvenile court's order — made concurrently with terminating dependency jurisdiction — granting joint legal and physical custody of his son, K.C., to the boy's mother, R.S., with primary custody awarded to R.S. Robert contends the order was an abuse of discretion. We affirm.

FACTS

On January 25, 2012, the San Diego County Health and Human Services Agency (Agency) filed a dependency petition on behalf of K.C., alleging he was at substantial risk of harm because R.S. had an extensive history of substance abuse and had tested positive for drugs during the pregnancy. (Welf. & Inst. Code, § 300, subd. (b).)¹ The social worker reported R.S.'s drug history dated back to 1989 and had caused her to lose custody and/or parental rights to several children.

R.S. identified Robert as K.C.'s father, and he was named on the birth certificate. R.S. and Robert were no longer in a relationship.²

¹ Statutory references are to the Welfare and Institutions Code unless otherwise specified.

² R.S. is not a party to this appeal and has not filed briefing in this case. Agency filed the respondent's brief, which was joined by minor's counsel.

Robert, who was unemployed, wanted K.C. to be placed with one of Robert's sisters while he looked for a job. R.S. wanted K.C. placed with her in a drug recovery program. The social worker reported that K.C. would not be safe with either parent and recommended both of them participate in reunification and learn how to coparent the child. Notwithstanding R.S.'s history with substance abuse and the dependency system, the social worker was willing to "go out on a limb" and give her a "final chance."³

In February, R.S. entered Serenity House. She tested positive for cocaine the first day, which was her last positive drug test. Agency ran a background check on Robert's sister and expressed doubt she would qualify for placement. Robert suggested another sister be evaluated. This sister, who did not have a criminal or child welfare history, did qualify for placement. Robert said he would live with this sister and K.C.

In March, R.S. submitted to the allegations in the petition, and the juvenile court made a true finding.

In April, the court held a contested disposition hearing and found by clear and convincing evidence that K.C. would be exposed to substantial risk of harm if returned to R.S.'s care. The court ordered K.C. placed with the father in the maternal aunt's home. The court ordered supervised visitation for R.S. and gave Agency discretion to lift supervision and allow overnight visits.

³ Robert too had a long drug history; however, he had been sober since 2007. His drug history was not an issue in this case.

By summer, Robert, who had obtained a full-time job cleaning ships, was able to get his own apartment. K.C.'s godmother provided child care for K.C. The social worker reported Robert was doing a good job raising K.C.

Meanwhile, R.S. was continuing to live at Serenity House, where she was progressing well in her drug rehabilitation and presented herself as a positive role model for her peers. R.S. also was undergoing therapy and her therapist described her as a "model patient." R.S.'s visits with K.C. also went well, and she transitioned to unsupervised visits. In August, R.S. began having overnight visits with K.C.

Agency recommended continued placement with Robert and services for R.S. Robert set the review hearing for trial and requested termination of jurisdiction. The court referred Robert and R.S. to family court services for mediation.

R.S. wanted to have 51 percent custody of K.C. so she would qualify for housing through the Interfaith Community Services program. R.S. had been receiving 74 hours of visitation per week, up from 48 hours. In order to reach the 51 percent mark, she would have to have visitation increased to approximately 85 hours per week. Agency recommended R.S. receive 51 percent custody of K.C. to enable her and her son to be eligible for housing through the Interfaith Community Services program. Minor's counsel also supported R.S.'s request.

By the time of the contested review hearing on April 9, 2013, both parents had completed their reunification plans, and Agency supported termination of jurisdiction. The court announced the only issue to address was "exit orders" — the orders that set forth the juvenile court's custody determination as it terminates dependency

jurisdiction and which become part of the family law court file. (See § 362.4; *In re John W.* (1996) 41 Cal.App.4th 961, 970, fn. 13.) In a letter, the housing manager of the Interfaith Community Services program said R.S. and K.C. could move in on April 10 if R.S.'s custody request was granted.⁴ The court determined it would treat R.S.'s request for 51 percent custody of K.C. as a request for a change of the existing order of primary custody to Robert and hold her to a section 388 standard of demonstrating changed circumstances and the best interests of the child.

The social worker testified that both parents were capable and competent. However, R.S.'s only option for housing required her to have primary custody of K.C. The social worker opined it would be detrimental to K.C. if he could not have regular contact with R.S. because she lacked housing.

Robert testified that when K.C. was placed with him, he was told he would have to get a job and his own residence, which he did. Robert said R.S. should be held to the same standard, should have to "get out to do the footwork" like he did, and she should not have it "handed to her on a platter." In his testimony, Robert also acknowledged that K.C. should regularly visit R.S. and have a relationship with her.

Jackie Engel, a client's advocate at the Interfaith Community Services, testified by stipulation that "if joint physical and legal custody with primary residence with Mom were to be ordered, it would satisfy their requirements for housing at the [Interfaith] Community Services, and that this program will in the future assess the custody of Mom

⁴ R.S.'s graduation from Serenity House was scheduled for April 10, the day after the contested review hearing.

with the Minor, and if it is determined that Mom has less time with the Minor than Dad does, they will assess whether Mom is qualified to continue to be in the program."

The court found Robert and R.S. were two functional parents and each was able to take care of K.C. "[I]n other words, if the dad decided to get in a car and drive to South America and never be seen again, I'd have no hesitation placing this child with the mother, and same [with] the mother, if she leaves for South America and never comes back again, the kid is safe with dad." The court concluded there was no longer a protective issue with respect to either parent, and, therefore, joint legal custody and joint physical custody were the appropriate orders. The court found R.S. had met her burden under section 388 of showing a change in circumstances and it was in K.C.'s best interests for the court to issue custody orders providing the parents with joint legal and physical custody.

The court ordered R.S. to have "primary" residential custody of K.C. for the sole purpose of having her obtain housing through Interfaith Community Services because "it is in the best interests of this child to keep his mother sober and help her stay sober." The court added: "And if she stays sober, [she] and the dad are going to get along much better, and if [she] and the dad are going to get along much better, the child is going to

grow up in a much healthier atmosphere, and the child will prosper, and that's the reason why I'm doing this."⁵

The court then terminated jurisdiction.

DISCUSSION

Robert contends granting "primary" physical custody to R.S. at the end of the dependency case was an abuse of discretion. The contention is without merit.

Legal Principles

Central to California's dependency system are two goals: protection of children at risk; and family preservation. In section 202, subdivision (a), "[t]he Legislature has unequivocally declared the purpose of the dependency law is 'to provide for the protection and safety of . . . each minor under the jurisdiction of the juvenile court and to preserve and strengthen the minor's family ties whenever possible, removing the minor from the custody of his or her parents only when necessary for his or her welfare. . . . When removal of a minor is determined by the juvenile court to be necessary, reunification of the minor with his or her family shall be a primary objective. . . .'"

(*Bridget A. v. Superior Court* (2007) 148 Cal.App.4th 285, 301-302.) Section 202 further

⁵ The court specified that R.S. would have physical custody from 9:30 a.m. on Tuesdays to 12:30 p.m. on Fridays, which is 75 hours per week. Robert would have physical custody at all other times, which amounted to 93 hours per week. Obviously, these figures show R.S. was not awarded physical custody of K.C. for 51 percent of the time. Further, the court directed its numerical specification of physical custody be made part of the court file for reference by the family law court in future proceedings, but not reflected in the court minute order. The court remarked: "I don't particularly need [Interfaith] to see this. . . ." The court directed the clerk to prepare a minute order labeling R.S.'s portion of custody as "primary" physical custody to satisfy the eligibility requirement of the Interfaith Community Services.

calls for a liberal interpretation of the provisions of the Welfare and Institutions Code to carry out these goals. (§ 202, subd. (a).)

"In the context of juvenile dependency, weighing the best interests of the dependent child is always the court's paramount concern." (*In re Christopher I.* (2003) 106 Cal.App.4th 533, 550.) Dependency law is designed to provide "juvenile courts with the necessary tools and guidelines, as well as broad discretion, to make appropriate orders regarding dependent children consistent with this foundational principle." (*In re A.J.* (2013) 214 Cal.App.4th 525, 536; see, e.g., § 245.5 ["In addition to all other powers granted by law, the juvenile court may direct all such orders to the parent, parents, or guardian of a minor who is subject to any proceedings under this chapter as the court deems necessary and proper for the best interests of . . . the minor. These orders may concern the care, supervision, custody, conduct, maintenance, and support of the minor. . . ."].)

Section 364 provides for review hearings every six months where a child has been removed from parental custody but is later placed back in the home under court supervision. (§ 364, subd. (a).) At those hearings, the court determines whether continued supervision over the child is necessary. (§ 364, subd. (c); *In re Natasha A.* (1996) 42 Cal.App.4th 28, 35; *In re N.S.* (2002) 97 Cal.App.4th 167, 172.) The court must terminate jurisdiction unless Agency "establishes by a preponderance of the 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); *In re N.S.*, *supra*, at p. 173.)⁶

Under section 364, when a juvenile court terminates jurisdiction over a child, it may make custody and visitation orders that become part of any family court proceeding concerning the same child. (§ 362.4; *In re T.H.* (2010) 190 Cal.App.4th 1119, 1122-1123.) When terminating jurisdiction and making a custody order, the juvenile court must consider the best interests of the child. (*In re John W.*, *supra*, 41 Cal.App.4th at p. 973.)

We "review the juvenile court's decision to terminate dependency jurisdiction and to issue a custody (or 'exit') order pursuant to section 362.4 for abuse of discretion [citation] and may not disturb the order unless the court ' " 'exceeded the limits of legal discretion by making an arbitrary, capricious, or patently absurd determination.' " " " (*Bridget A. v. Superior Court*, *supra*, 148 Cal.App.4th at p. 300, quoting *In re Stephanie M.* (1994) 7 Cal.4th 295, 318.)

At the April 9, 2013 review hearing, there were no longer any protective issues in the case. Both parents had completed their reunification plans and the court found each of them was a functional parent able to take care of K.C. Thus, the essential basis for exercising dependency jurisdiction no longer existed. No one, including Robert, the only appellant (see fn. 2, *ante*), disputes this conclusion or challenges the termination of dependency jurisdiction.

⁶ If the court does not terminate jurisdiction, the matter is continued for six months for another review hearing. (§ 364, subd. (d).)

What is at issue is the portion of the custody order that awarded R.S. "primary" physical custody.⁷ "' Joint physical custody' means that each of the parents shall have significant periods of physical custody. Joint physical custody shall be shared by the parents in such a way so as to assure a child of frequent and continuing contact with both parents" (Fam. Code, § 3004.) We cannot agree with Robert that the juvenile court's decision to award "primary" physical custody of K.C. to R.S. in this case was arbitrary, capricious, or patently absurd.

At most, the court granted R.S. one additional hour per week of physical custody. (See fn. 5, *ante*.) However, by labeling R.S.'s physical custody of K.C. as "primary" physical custody, the court made it possible for her to secure transitional housing for her and K.C. At that point in time, there were no other housing options for R.S. The court reasoned that joint physical custody (see Fam. Code, § 3004) was in K.C.'s best interests because both parents were able to take care of him. We cannot fault this reasoning. There were no longer any protective issues in this case. No one disputed that it would benefit K.C. to have a child-parent relationship with both Robert and R.S. The social worker testified it would be detrimental to K.C. if he could not have regular contact with R.S. because she lacked housing. Under these circumstances, it was in K.C.'s best interests to bestow the label "primary" to R.S.'s physical custody to satisfy Interfaith Community Services' "primary residence" requirement, thus making it possible for K.C.

⁷ The court's grant of joint legal custody is not being contested. "' Joint legal custody' means that both parents shall share the right and the responsibility to make the decisions relating to the health, education and welfare of a child." (Fam. Code, § 3003.)

to have two fully involved, functional parents who were able to care for and nurture him. We recognize the use of the label "primary custody" was not numerically accurate because the mother had less than 50 percent custody, and we do not condone the court's conduct in creating confusion in the court minutes. (See fn. 5, *ante*.) Nonetheless, the stipulated testimony from Interfaith Community Services was far from clear as to exactly what was required for the mother to secure housing, and a designation of primary custody is not dependent upon a numerical majority of custody hours.

Moreover, the guiding principle in custody determinations — as it is in all dependency law — is the minor's best interest. Permitting K.C. to leave dependency court with both parents having joint physical as well as joint legal custody under these circumstances plainly falls within this broad-ranging authority of the juvenile court. (§ 245.5; see *In re Carmen M.* (2006) 141 Cal.App.4th 478, 486 [juvenile law provisions have been broadly interpreted to authorize wide variety of remedial orders intended to protect the safety and well-being of dependent children]; *In re Jose M.* (1988) 206 Cal.App.3d 1098, 1103-1104 [juvenile court has broad discretion to determine what would best serve dependent child's interests and enter appropriate orders to protect the child].) There was no abuse of discretion.

Our conclusion is bolstered by the analogous discretionary designation of one parent as the "primary caretaker" of the child in family law joint custody cases. (See Fam. Code, § 3086 ["[i]n making an order of joint physical custody or joint legal custody, the court may specify one parent as the primary caretaker of the child and one home as the primary home of the child, for the purposes of determining eligibility for public

assistance"].) There is no statutory numerical requirement attached to the "primary caretaker" designation; it is merely a tool in assessing eligibility for public assistance programs. (See Hogoboom & King, Cal. Practice Guide, Family Law (The Rutter Group 2013) ¶ 7:361, pp. 7-149, 7-150.) Similarly, here it appears the juvenile court labeled R.S.'s custody "primary" to enable her to secure transitional housing through a charitable service agency.

We also note the custody portion of the exit order with its time sharing arrangement was in keeping with core principles and policies of family law, which include assuring the health, safety and welfare of the child, and assuring the child has frequent and continuing contact with both parents. (Fam. Code, § 3020, subs. (a), (b).)⁸ Similarly, the court's best interest analysis was akin to the type of analysis a family law court would make in fashioning an initial custody determination between two fit parents. (See *In re Marriage of Burgess* (1996) 13 Cal.4th 25, 31, citing Fam. Code, § 3040, subd. (b).)

To the extent that Robert maintains housing should not have been "handed to her [R.S.] on a platter," we cannot find error. He has not pointed to any specific negative effects to him caused by the court's "primary" label regarding R.S.'s physical custody of K.C. In short, Robert has not established a "miscarriage of justice." (*In re Celine R.*

⁸ Family Code section 3020, subdivision (b) reads: "The Legislature finds and declares that it is the public policy of this state to assure minor children frequent and continuing contact with both parents after the parents have separated or dissolved their marriage, and to encourage parents to share the rights and responsibilities of child rearing in order to effect this policy, except where the contact would not be in the best interest of the child, as provided in [Family Code] [s]ection 3011."

(2003) 31 Cal.4th 45, 60, quoting Cal. Const., art. VI, § 13.) Along these lines, it is important to note two things. First, throughout the proceedings Robert has acted as a competent and loving parent and that he did so considerably earlier than R.S. No one disputes this fact. Second, the allocation of more time to R.S. was not a result of Robert doing something wrong. Nonetheless, the focus of the court below, as well as at the appellate level, must be on the child's best interest, not on achieving equal or fair treatment vis-à-vis the parents. "[T]he question [properly] presented to the trial court is the best interest of the child[], not fairness to [Robert]." (*In re Marriage of Bryant* (2001) 91 Cal.App.4th 789, 794, disapproved on another ground in *In re Marriage of LaMusga* (2004) 32 Cal.4th 1072, 1099-1100.)

As pointed out in our recitation of the facts, the juvenile court ruled that because R.S. was seeking to modify custody, it would apply a section 388 analysis. Because the bulk of the parties' briefing centers on this issue, we shall assume without deciding for purposes of this appeal that the court did not err in choosing this approach.⁹

Robert contends the court abused its discretion in awarding R.S. primary custody of K.C. and there was insufficient evidence that her circumstances had changed to the point it was in the child's best interests to do so. The contention is without merit.

Section 388 allows the juvenile court to modify an order if a parent establishes, by a preponderance of the evidence, that there are changed circumstances or new evidence and the proposed change would promote the child's best interests. (*In re Zachary G.*

⁹ We note this approach placed the burden of proof on R.S.

(1999) 77 Cal.App.4th 799, 806.) The juvenile court may consider the entire factual and procedural history of the case in considering a section 388 petition. (*In re Jamika W.* (1997) 54 Cal.App.4th 1446, 1450-1451.)

Rulings on section 388 motions are reviewed on appeal for abuse of discretion. (*In re Stephanie M., supra*, 7 Cal.4th at p. 318.) "The appropriate test for abuse of discretion is whether the trial court exceeded the bounds of reason. When two or more inferences can reasonably be deduced from the facts, the reviewing court has no authority to substitute its decision for that of the trial court." [Citations.] (*Id.* at pp. 318-319.) We will not reverse unless the court has exceeded the bounds of reason by making an "arbitrary, capricious, or patently absurd determination." (*Id.* at p. 318.)

Robert argues that R.S. had not shown changed circumstances, but merely changing circumstances. (See *In re Casey D.* (1999) 70 Cal.App.4th 38, 49.) We disagree. By the April 9, 2013 review hearing, R.S. had completed her case plan, and had become a functional parent who was able to care for and nurture K.C. The protective issues in the case had been eliminated. The court so found and this finding was supported by substantial evidence supplied by Agency.

We also conclude the change in custody order was in the best interests of K.C., satisfying the second prong of section 388. (*In re Casey D., supra*, 70 Cal.App.4th at p. 47.) The child's best interests are the paramount concern of the juvenile dependency system. This concern underlies the system's primary goals of child safety and well-being, preservation of the natural family and timely permanency stability for a dependent child. (*In re William B.* (2008) 163 Cal.App.4th 1220, 1227.) The court's order, by allowing

R.S. to obtain housing, made it possible for K.C. to have two fully involved, functional parents who are able to care for and nurture him. The order was undeniably in K.C.'s best interests. The court's broad discretion in determining a minor's best interests will not be reversed on appeal unless the party challenging it has clearly established an abuse of discretion, that is, has shown the court made an arbitrary, capricious or patently absurd determination. (*In re Stephanie M.*, *supra*, 7 Cal.4th at p. 318.) There was no abuse of discretion.

DISPOSITION

The order is affirmed.

HALLER, Acting P. J.

WE CONCUR:

McINTYRE, J.

IRION, J.