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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

In re S.P., a Person Coming Under the
Juvenile Court Law.

RIVERSIDE COUNTY DEPARTMENT
OF PUBLIC SOCIAL SERVICES,

Plaintiff and Respondent,

v.

S.N.,

Defendant and Appellant.

E054379 / E056304

(Super.Ct.No. INJ021627)

OPINION

APPEAL from the Superior Court of Riverside County. Lawrence P. Best,
Temporary Judge. (Pursuant to Cal. Const., art. VI, § 21.) Affirmed.

Brent Riggs, under appointment by the Court of Appeal, for Defendant and
Appellant.

Pamela J. Walls, County Counsel, and Anna M. Deckert, Deputy County Counsel,
for Plaintiff and Respondent.

I

INTRODUCTION¹

Father appeals from the juvenile court's orders made pursuant to section 366.21, subdivision (e), and section 362.4. The subject minor is S.P. Appellant was also the father of M.N., who was fatally abused by mother's boyfriend. In these two consolidated appeals, father challenges the orders awarding joint custody of S.P. to both parents—to be shared in alternating weeks—and terminating dependency jurisdiction. After due consideration, we reject father's appeals and affirm the orders and judgment below.

II

FACTUAL AND PROCEDURAL BACKGROUND

At age 17, mother gave birth in December 2005 to S.P., whose biological father is unknown. Father is the presumed father of S.P. Mother dated father for about six years and he was the biological father of M.N., born in December 2008. Mother's third child was born shortly after M.N.'s death in October 2010 and has a different father.

A. Original Dependency

CPS filed an original dependency petition on October 7, 2010, involving S.P. and M.N. The petition alleged serious physical harm, failure to protect, severe physical abuse, no provision for support, and abuse of sibling. (§ 300, subds. (a), (b), (e), (g), and (j).)

On October 5, 2010, M.N. had been transported to the hospital with a life-

¹ All statutory references are to the Welfare and Institutions Code.

threatening head injury. Mother and her boyfriend, “Blackie,” had claimed that M.N. had fallen while playing outside but had continued to play, eat and go to bed until he was discovered nonresponsive and foaming at the mouth. In the alternative, mother and Blackie said M.N. had been injured by a swing. The hospital physicians and the police determined the explanations were inconsistent with M.N.’s injuries. Mother changed her story to say that she had left the children with Blackie while she ran errands. When she returned home about 5:30 p.m., M.N. was on his bed, nonresponsive and foaming at the mouth. Mother believed it was a seizure. Mother was assisted by a neighbor and took M.N. to the hospital.

Father came to the hospital from a softball game and had not seen M.N. for three weeks before the incident. Father had assumed the role of S.P.’s father all her life. Father had been arrested three years earlier in a domestic dispute with mother. Father expressed willingness to protect the children in a safe environment.

At the detention hearing on October 8, 2010, the juvenile court found father was the children’s presumed father. The children were detained from mother but not detained from father who retained physical custody. M.N. died the next day.

Blackie was on parole for weapons charges, having been released from prison in January 2010. Mother reported that he had acted with escalating violence against her.

B. Jurisdiction and Disposition

1. November 2010 Report

Mother gave birth to her third child in October 2010. In November 2010, CPS reported that it had received a referral alleging general neglect by father for coaching S.P.

to say mother feeds her “junk food” and that Blackie had killed her brother. Also, the paternal aunt had spoken harshly to S.P. when she returned to father’s home after a supervised visit with mother. Both parents wanted S.P. returned to them.

In her interview, mother acknowledged that Blackie had been on parole but she did not observe him exhibit problems with anger. They had dated for seven months and he was loving towards her and her children. He babysat occasionally. On the other hand, there were also incidents of domestic violence and yelling with Blackie. Mother could not remember any signs that he was capable of violence. She recounted how, when she came home to find M.N. unresponsive, Blackie told her he had fallen while playing outside. She was afraid to tell the police the truth initially. She broke up with Blackie when she realized he had killed M.N.

Father’s criminal history included felony assault in June 2005 and misdemeanor battery involving mother in July 2008. Mother and father each described their six-year relationship as being marked by domestic disputes. Father did not know the children were being left with Blackie. Father had little interaction with Blackie and he did not suspect any abuse. Father was a high school graduate and worked intermittently in food service, gardening, car washes, and other temporary jobs. Father’s household had been the subject of six police contacts in eight years, suggesting it was discordant and unstable. Father believed mother lied and showed poor judgment. Father continued to display extreme anger toward mother.

When interviewed, S.P., age four, said her mother gave her “junk food” and her father gave her “good food.” She said her paternal aunt was mean to her and her paternal

grandfather was nice. She said Blackie had choked her brother, kicked him in the head, and killed him. She preferred to live with her mother.

In November 2010, the social worker recommended striking the allegation of severe physical abuse (§ 300, subd. (e)(1)) because M.N.'s death was an isolated incident and mother could not reasonably have known that Blackie would abuse the children. The police had also decided not to charge mother because she had not been at home when the abuse occurred. The Riverside County Department of Public Social Services (DPSS) recommended S.P. be placed with mother because she was the primary caregiver and father had tried to undermine reunification and interfere with mother's visitation.

2. December 2010 and January 2011 Proceedings

In December 2010, DPSS filed an addendum report with the information that two people, Jimmy and Vicki, who had lived with mother in July 2010, had observed Blackie use profanity with the children and slap M.N. in the face. They said Blackie was abusive toward the children daily. Although the two witnesses had informed mother, she told them Blackie was allowed to discipline the children. Subsequently the maternal grandmother's friend, Raymond, beat up Jimmy, causing a skull fracture. Mother vehemently denied knowing about any abuse of the children. Based on the new information, DPSS recommended S.P. continued to be placed with father and mother be denied reunification services.

In the January 2011 addendum, DPSS reported that Vicki and Jimmy had been afraid to appear as witnesses in December 2010. Mother accused Vicki and Jimmy of drinking heavily and using drugs and trying to retaliate against her. Raymond admitted

beating up Jimmy. When contacted, Vicki and Jimmy said Raymond had assaulted Jimmy again and the police were investigating. DPSS changed its conclusion that mother did not know about Blackie's abusiveness toward the children. DPSS recommended father have custody of S.P. and mother be denied services.

At the contested jurisdictional hearing on January 31, 2011, DPSS again changed its recommendation for mother to receive reunification services. Father made a long statement to the court, blaming mother for M.N.'s death and asking to have sole custody of S.P. The court found the allegations a-1, b-1, b-2, b-3, g-1, and j-1 in the amended petition were true. The petition was sustained and S.P. was adjudged a dependent of the court. The court granted father physical custody and family maintenance services. Mother was granted reunification services and visitation.

C. The Section 366.21, Subdivision (e) Review Hearing

In the July 2011 status review report, DPSS recommended that mother receive family maintenance services because she had completed her case plan and had engaged in frequent and successful visitation. DPSS also recommended father should continue to receive family maintenance services because he had completed his case plan and S.P. had been in his care since October 5, 2010. DPSS recommended the parents share custody of S.P. according to an agreement with a court-appointed mediator.

Mother was living with the father of her third child and working full time at a department store. Mother was receiving counseling and having weekly visitation with S.P. Father was living with his father and sister and attending therapy. He was working as available and supervising S.P.'s education. S.P. was healthy and well-adjusted except

for symptoms of trauma related to her brother's death.

On July 28, 2011, the court found "without question that the mother is not a risk to the child with unsupervised visitation." The court ordered 30 days of unsupervised daytime visitation to be followed by unsupervised overnight visitation.

On August 18, 2011, the court ordered the parents to share joint physical and legal custody and ordered the matter to mediation. Father appealed.

On September 12, 2011, after mediation failed, the court ordered the parents to share custody by alternating weeks.

D. The 12-Month Hearing²

In January 2012, DPSS recommended the parents continue to share custody and the dependency be terminated with both parents sharing custody by alternating weeks.

On March 7, 2012, the court granted the parents joint physical and legal custody to be shared by alternating weeks. The dependency petition was terminated. (§ 362.4.)

III

THE SIX-MONTH REVIEW HEARING

Father seeks to reverse the juvenile court's order at the six-month-review hearing on July 28, 2011, granting the parents joint physical custody and family maintenance services. Father relies on sections 361 and 361.2, subdivisions (b)(3) and (c), to argue the court did not make the proper findings and should have awarded sole custody to father.

We reject father's argument based on the same analysis and grounds as this court

² Additional facts about the 12-month hearing are set forth in section IV.

used in *In re A.A.* (2012) 203 Cal.App.4th 597, 604: 1) forfeiture of the issue because father did not request custody at the disposition hearing in January 2011 based on sections 361 and 361.2; and 2) inapplicability of the statute because father was not a nonoffending, noncustodial parent and the juvenile court had previously removed custody from him based on a finding of detriment, precluding any consideration for placement pursuant to section 361.2.

Section 361.2, subdivision (a), provides in part that 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. The section goes on to provide that 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. (§ 361.2, subd. (a).)

The term “custody” as used in section 361.2, refers to the parent’s right to make decisions pertaining to the child and to have legal possession of the child. “Placement” refers to the address where the child shall live during the dependency proceeding. Thus, under section 361.2, subdivision (a), the court examines whether it would be detrimental to place a child temporarily with the nonoffending noncustodial parent; under subdivision (b), the court decides whether that placement should be permanent and whether the court’s jurisdiction should be terminated. (*In re A.A.*, *supra*, 203 Cal.App.4th at p. 605.)

“It is the noncustodial parent’s request for custody that triggers application of

section 361.2, subdivision (a); where the noncustodial parent makes no such request, the statute is not applicable. [Citations.] Failure to object to noncompliance with section 361.2 in the lower court results in forfeiture. [Citation.]” (*In re A.A., supra*, 203 Cal.App.4th at pp. 605-606.) Here father did not raise the issue of placement pursuant to section 361.2 and therefore he forfeited the issue.

Furthermore, father was not a nonoffending parent within the meaning of sections 361, subdivision (c), and 361.2. Even if the issue is not deemed forfeited, we would not find error because father was the subject of a jurisdictional finding under section 300, subdivision (b)(3), meaning he was not a nonoffending parent within the meaning of section 361, subdivision (c). Under section 361.2, subdivision (a), a finding of detriment precludes placement of a dependent minor with a noncustodial parent: “Reading section 361.2 in light of section 361, subdivision (c), the parent must be *both* a nonoffending *and* noncustodial parent in order to be entitled for consideration under section 361.2, that is, the parent must retain the right to physical custody, and must not have been the subject of a previous detriment finding and removal.” (*In re A.A., supra*, 203 Cal.App.4th at p. 608.) Father did not and cannot rely on section 361.2 to challenge the juvenile court granting joint custody to father and mother.

We also reject father’s challenge to the extent he argues the juvenile court failed to specify a factual basis for its conclusion that return to mother would not be detrimental to the child’s safety, protection, and well-being as required by section 366.21, subdivision (e). In July and August 2011, the court reviewed the record and expressly found mother no longer posed a risk to S.P. in spite of father’s rigorous objections and protestations and

his insistence that mother should be criminally prosecuted.

IV

INEFFECTIVE ASSISTANCE OF COUNSEL

A. *The Hearing on Section 366.21, Subdivision (f)*

DPSS filed a status review report in January 2012. At that time, mother was employed and was living in section 8 housing with her younger child and that child's father. Father was still living with his family and supervising S.P.'s education and therapy. S.P. was happy, doing well in school, and adapting to the plan of alternate weeks living with her parents. Parents had completed courses in parenting, therapy, and anger management.

On February 1, 2012, the court granted father's request to appoint new counsel. Father initially asked to represent himself but then agreed to have Krista Lupica appointed. The court granted Lupica's request for a continuance.

At the 12-month hearing on March 7, 2012, father asked again to represent himself and indicated he planned to file a section 388 petition. During the *Marsden*³ hearing, Lupica represented to the court that father was seeking to relitigate the case and she could not legally file what father wanted her to file. Lupica explained that father did not understand the distinction between criminal and dependency law and, additionally, "I have told [father] I can't set a hearing for the termination of jurisdiction. I did explain to him about the Welfare and Institutions Code, that it does not even allow me as

³ *People v Marsden* (1970) 2 Cal.3d 118.

representing a parent to object to that. But he wants me to set a hearing. I do believe there has been a breakdown in communication at this point.” Lupica added that she could represent father for the purpose of terminating jurisdiction, “except that he wants to set a hearing. I’m not sure if that’s even possible to set a contested review. That is what he would like, and he would like to relitigate the case, which I don’t feel is appropriate or even legal at this point.” The court denied father’s request to represent himself and made a finding that “any deterioration in the relationship has been caused by the willfully recalcitrant and defiant attitude of [father], and there is no reason why for this hearing Ms. Lupica cannot continue to effectively represent [father].”

The court conducted the 12-month review hearing. DPSS repeated its recommendation that dependency be terminated and parents share custody. At father’s request, Lupica asked the court to set a contested hearing. Mother’s counsel also asked the court to terminate dependency jurisdiction and to order the joint custody to continue. Neither party asked for further services. Father’s counsel informed the court of father’s assertion that mother and S.P. had not been participating in therapy but the court found that both parents had complied with their case plan and did not need services. The conditions justifying jurisdiction had ceased to exist. The court placed S.P. in the joint care and custody of the parents to be shared by alternating weeks. Dependency was terminated.

B. Analysis

Father asserts that he received ineffective assistance of counsel (IAC) because his lawyer did not advocate father’s position that dependency jurisdiction was still justified

by mother's conduct and that she was not complying with her case plan. Presumably, these issues were to be the subject of his section 388 petition although the proposed petition is not part of the record on appeal. There are sound reasons to reject father's contentions.

First, as respondent argues, father's IAC claim should be presented by writ rather than on direct appeal. (*In re Darlice C.* (2003) 105 Cal.App.4th 459, 463.)

Notwithstanding this procedural obstacle, father's claim lacks merit. Although father maintains his lawyer did not understand she could object to the termination of jurisdiction and to the joint custody order, the record demonstrates father's lawyer requested a contested hearing even though she was not certain the court could grant her request. The record also demonstrates the court was well aware that father objected to mother sharing custody of S.P. because father still blamed mother for M.N.'s death and disputed that she could ever be a suitable parent.

Instead, the record establishes that, in spite of father's strong views to the contrary, the juvenile court did not have grounds to continue to exert jurisdiction over S.P. (§§ 300, subd. (b); 300.2; 364, subd. (c); 366.21, subd. (e); and Cal. Rules of Court, rule 5.710(b).) The parents had complied with reunification and maintenance services and accomplished successful visitation and joint custody between October 2010 and March 2012. Because the goal of reunification had been achieved, no continued dependency supervision was warranted.

We also reject father's repetition in this second appeal of his arguments from the first appeal about sections 361 and 361.2. In view of our conclusion that sections 361

and 361.2 do not apply, father's arguments are redundant and superfluous. Furthermore, any error in failing to make an express finding of detriment under section 366.21, subdivision (e), was harmless. (*In re Jason L.* (1990) 222 Cal.App.3d 1206, 1218.) In any event, such a finding was actually made when the court determined at the six-month hearing that mother did not pose a risk to S.P.

Based on the foregoing, father cannot show he suffered any prejudicial error from the proceedings on March 7, 2012.

V

SELF-REPRESENTATION

Father claims it was abuse of discretion to deny his request to represent himself: "Under section 317, subdivision (b), the juvenile court must appoint counsel for an indigent parent unless the court finds the parent has made a knowing and intelligent waiver of counsel. (See *In re A.M.* (2008) 164 Cal.App.4th 914, 928.) A parent in a dependency proceeding may knowingly and intelligently waive the right to counsel after proper advisement by the juvenile court, and may also choose to be represented by retained counsel. [Citations.] The state will only interfere with an individual's choice of legal representation when that choice 'will result in significant prejudice' to the individual 'or in a disruption of the orderly processes of justice unreasonable under the circumstances of the particular case.' (*People v. Crovedi* (1966) 65 Cal.2d 199, 208.)" (*In re Jackson W.* (2010) 184 Cal.App.4th 247, 256.) The record is manifest with evidence that to allow father to represent himself would have caused significant prejudice

to mother and to S.P. and would have resulted in further unreasonable delay and disruption.

Father was understandably bitter and angry about M.N.'s death. Throughout the proceedings, he was uncompromising in his opposition to mother having any relationship with S.P. Father was contemptuous of the dependency process and uncooperative with reunification efforts by mother. Because father was demonstrably not capable of representing himself without causing prejudice and delay, he was not prejudiced by the court's refusal to allow him to engage in self-representation.

VI

DISPOSITION

We affirm the court's orders and judgments under sections 366.21, subdivision (e), and 362.4.

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CODRINGTON

J.

We concur:

HOLLENHORST

Acting P. J.

RICHLI

J.