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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

In re A.V., et al., Persons Coming Under
the Juvenile Court Law.

SAN BERNARDINO COUNTY
CHILDREN AND FAMILY SERVICES,
Plaintiff and Respondent;

v.

I.V.,
Defendant and Appellant.

E054426

(Super.Ct.Nos. J239114 & J239115)

OPINION

APPEAL from the Superior Court of San Bernardino County. Gregory S. Tavill,
Judge. Affirmed.

Jesse McGowan, under appointment by the Court of Appeal, for Defendant and
Appellant.

Jean-Rene Basle, County Counsel, and Kristina M. Robb, Deputy County
Counsel, for Plaintiff and Respondent.

Brent Riggs, under appointment by the Court of Appeal, for minors.

INTRODUCTION

Appellant I.V. (father), formerly the custodial parent of minors K.V. and A.V., appeals the disposition orders of the juvenile court placing them with M.S. (mother) and transferring the case to Contra Costa County. We will affirm.

FACTS AND PROCEDURAL HISTORY¹

Brothers K.V. and A.V. were born, respectively, in 2003 and 2005. A.V. had a cleft lip and palate which hindered his speech development and required multiple reconstructive surgeries; otherwise, the boys were generally healthy. On May 24, 2011, they were taken into protective custody by San Bernardino County Children and Family Services (CFS) when father was arrested after his parole officer discovered methamphetamine in the home.

On July 8, 2011, CFS filed Welfare and Institution Code section 300² amended petitions (the petitions)³ on behalf of the children. The petitions alleged that mother knew or should have known that father had a substance abuse problem that placed the children at risk and had failed to protect them (B-1); that father had a substance abuse problem which interfered with his ability to care for the children (B-2 on the petition for

¹ The facts are compiled from four CFS reports written by social worker Veronica Haro (Haro) and from testimony at a three-day contested jurisdiction/disposition hearing held August 11, 12, and 30, 2011.

² All further statutory references are to the Welfare and Institutions Code unless otherwise indicated.

³ Allegations B-2 and B-3 are listed in reverse order on the petitions for the two boys. Otherwise, their content is identical.

K.V. and B-3 on the petition for A.V.); that mother's ability to parent was unknown (B-3 on the petition for K.V. and B-2 on the petition for A.V.); that mother had a substance abuse problem which interfered with her ability to parent (B-4); that mother's whereabouts were unknown (G-5); and that father had been incarcerated on charges of drug possession, leaving the children with no provision for support (G-6). K.V. and A.V. were placed together in foster care while a search for mother and an evaluation of the paternal grandmother, Maria R. (Maria), for possible placement was initiated.

In the three months after the children were removed, Haro submitted five reports to the court: a detention report on May 26, 2011; a jurisdiction/disposition (J/D) report on June 14, 2011; a first amended detention report and a first addendum to the J/D report, both on July 8, 2011; and a second addendum to the J/D report on August 9, 2011. From the reports and their attachments, and from testimony in a contested J/D hearing held over three days in August 2011, the following facts emerged.

Family

Both parents have extensive drug-use and criminal histories and grandparents from both sides, despite having significant problems of their own, have been caring for the children for much of their young lives.

Father

Father is an undocumented immigrant who was brought to the United States from Columbia when he was eight years old. He never became a citizen, but graduated from high school, attended college and trade school, and was employed by the California Department of Transportation (Caltrans) for a number of years. Father's criminal history

includes multiple convictions for driving without a license (Veh. Code, §§ 12500 & 14601.2) and driving under the influence (Veh. Code, § 23152); and one conviction for assault with a deadly weapon (Pen. Code, § 245). Incarcerated from 2008 until 2010 for the deadly weapon conviction, he was on parole at the time of the current arrest. Father gave Haro the mother's name and said that she lived in Sacramento, but did not provide any other information about her whereabouts.⁴ He wanted the children to be placed with the paternal grandmother, Maria R. (Maria), who had been helping him care for them.

Because of his immigration status, there was an ongoing possibility that father could be deported, a problem he had faced before. In September 2009, near the end of his term of incarceration for the deadly weapon conviction, he was the subject of a deportation hearing. At that time, maternal grandmother Cynthia B. (Cynthia) had written a letter to the immigration court on his behalf, detailing A.V.'s medical and surgical problems and the children's need for father's care. In the letter, Cynthia described father as "a very responsible person" and "an asset to the united states [*sic*]." She said that mother was not caring for the children "Either because she is unwilling, incapable, or not there." In Cynthia's view, "They [were] without a mom." Based partly on Cynthia's letter and A.V.'s medical issues, the immigration court had permitted father to stay in the country.

⁴ Although mother and maternal grandmother believed father had withheld this information from the social worker, it is not clear that at the time of the children's removal father knew mother's whereabouts since it appears she was living in a rented room in Sacramento.

Mother

Like father, mother is a long-time drug user with a criminal history. Her past crimes include burglary and petty theft, as well as convictions for marijuana possession (Health & Saf. Code, § 11357), driving without a license (Veh. Code, § 12500), and battery (Pen. Code, § 242). At the time the children were removed from father, she was on probation for the battery and there were a number of outstanding warrants for her arrest in San Bernardino County. She had left the family home in 2007, and had not been involved in the day-to-day care of the children for several years. She had seen them twice in the year before their removal: once when she had to appear in court in San Bernardino regarding a warrant, and once when father took them to Northern California for an Easter visit with maternal grandmother. Mother told Haro she had not visited the children more often “because of her financial condition” but said she had “frequent” telephone contact with them. According to father, she only called them once every other month.

About a month after their removal, mother learned from a neighbor that CFS had taken the children into protective custody. On June 28, 2011, she and her parents drove down from Sacramento in hopes of obtaining custody. In an interview with Haro at the Victorville office, mother admitted her history of drug use, but told the social worker that she had quit using methamphetamines “last summer” and had recently stopped smoking marijuana. Mother said that she had last used methamphetamine right after the children

left Sacramento to move with father. During the course of the dependency proceedings, she twice tested positive for marijuana: on July 11 and on August 12, 2011.⁵

When mother and the maternal grandparents came, the social worker observed that the children were “overwhelmed with joy to visit with their family.”

Maternal Grandmother

Like father and mother, maternal grandmother Cynthia B. (Cynthia) also has a history of drug-use and criminal behavior. She admitted to using marijuana and methamphetamine in the past, but “Not long . . . probably about five, six years.” In 1986 and 1995 Cynthia had been convicted for writing bad checks “due to drug use” and had served a prison term and time in a local jail related to these offenses. She claimed she had last used methamphetamine in June 2007 and believed that a report of a dirty test in 2008 could not have been correct. According to a July 24, 2009, Social Security Administration review of her claim for supplemental benefits, Cynthia began using alcohol and obtaining psychiatric treatment in her teens. Self-reported and continuing symptoms included depression, difficulty focusing and concentrating, forgetting to take her medications or to watch the stove while she was cooking, difficulty sleeping and handling stress, and fear of going out in public. In April 2009, her treating therapist noted that, despite her maintenance on psychotropic medications, Cynthia experienced auditory hallucinations twice per week and exhibited paranoia. The reviewer concluded

⁵ The concentration of marijuana in her urine tests essentially doubled between the two dates: from 164 ng/ml to [greater than] 300 ng/ml. Mother said that she had a medical marijuana card because she had migraine headaches and to help her sleep.

that Cynthia was disabled within the meaning of the relevant section of the Social Security Act, “independent of substance abuse” and awarded her benefits. Cynthia completed a number of drug abuse treatment programs in 2009 and 2010. She believed that neither her past drug use nor current mental illness would interfere with her ability to help care for the children.

Cynthia had never permitted mother to live with her before now because she was trying to get her own life together and “you know, you don’t take people in that are not stable while you’re trying to get that way.” She had allowed mother to move in recently because she believed she had seen a change in her daughter. A maternal great-grandmother, Dolores B., lives with Cynthia.

Maternal Grandfather

While father was in prison from 2008 until 2010, K.V. and A.V. lived with their maternal grandfather, Andrew S. (Andrew) in Sacramento. Andrew had been treated for throat cancer, but when he finished chemotherapy, and “after he got the feeding tube out,” he had traveled to Southern California to help the parents care for the children. In 2008 he took the boys to northern California where Cynthia, who lived about 40 minutes away, was able to assist him by arranging medical appointments. For about a month, mother had come to Andrew’s house twice a week for “a few hours” and helped care for the children by getting them enrolled in school and in daycare, and by taking them to the park. If the children were placed with mother in Cynthia’s home, Andrew said, he was available on a daily basis to make sure they were well cared for. He said that he and his

ex-wife had an amicable relationship and he would go to her home every day if necessary to help care for the children.

Paternal Grandmother

Maria works as a nursing assistant at Downy Hospital, where she has been employed for 15 years; her schedule consists of three mid-week 12-hour shifts. Until their removal, Maria lived in father's home and helped him care for the children from Friday through Monday every week. When Haro was picking up the children at the sheriff's office in Phelan on the day father was arrested, Maria appeared and said she had been notified by their school that they had been detained. However, because she had a record of stealing from Wal-Mart in 2000, Maria required a criminal exemption in order to qualify for relative placement and the children were placed in foster care pending a Relative Assessment Unit (RAU) investigation.

During the time father was in prison on the assault with a deadly weapon charge, Maria had relinquished her power of attorney over the children to Andrew so that she could use the money she earned to help father with his legal costs and to finish construction on his house. During the dependency, Maria visited the children weekly and called them almost every day. If they were placed with her, she planned to quit her job to take care of them full time. Maria also proposed to have her own mother, the children's paternal great grandmother, live with her and the children. She insisted that she would not allow father to live in the home.

Additional Information from the Contested Hearing:

The first two days of the contested J/D hearing took place on August 11 and August 12, 2012. Haro, mother, father, and the three grandparents testified to the facts as outlined above. Mother wanted the children placed with her and Cynthia, with whom she said she had been living for “three months, four months.” Father told the court that he was contesting the probation violation and had a hearing scheduled for August 26, 2011. In the meantime, he wanted the children placed with his mother.

Haro testified that the children were bonded with all three adults—Cynthia, mother, and Maria—and were happy to see them during visits. In addition, the social worker explained the reasoning behind CFS’s most recent recommendation: that the children be placed with mother in Cynthia’s home, rather than with Maria in father’s home as originally planned. Father, a current methamphetamine addict, was incarcerated and in danger of deportation. Maria did not hold her son accountable for his actions and the social worker feared that if he were released, she would allow him to return to the home.

Haro acknowledged that mother had not enrolled in any recommended remedial services—substance abuse treatment, counseling, or parenting—but said that mother had “actively found” a drug treatment program. Because mother said she would be willing to stop smoking marijuana, the social worker had not assessed whether the “serious medical condition” for which the drug had allegedly been prescribed would interfere with her ability to care for the children. Haro thought that it was alright for mother to use marijuana when she was taking care of the children so long as she did not smoke it in

front of them. The social worker knew that Cynthia had a history of drug abuse and mental illness, but was not aware that she had been in prison. Because CFS was seeking to reunify the children with mother, no RAU assessment had been ordered for Cynthia or for maternal great-grandmother Dolores B., even though they would be living in the home and have access to the children.

Haro conceded that she was concerned that mother had been untruthful about her current use of marijuana and about placing the children with a grandmother who had drug use and mental health issues. The social worker agreed that Maria had no history of drug use⁶ and had been visiting the children weekly. But, in Haro's view, the concern that Maria might allow father to return to the home if he were released from prison overrode the present dangers of placing the children with mother in Cynthia's home. If the children were placed with mother, Haro felt confident that a social worker in Contra Costa County would provide adequate follow-up.

Jurisdiction:

After listening to closing argument from all counsel at the end of the second day of the contested J/D, August 12, 2011, the court found true all the allegations in the section 300 petitions except those relating to mother's absence and unknown ability to

⁶ In answer to a question from father's counsel, Haro said she was unsure about whether Maria might also have a history of mental illness: "I think I made an attachment where there was a concern for her that was written, like a disability of sort for the paternal grandmother." We are unable to find any such attachment in the record. However, there is an extensive attachment to the second addendum to the J/D report about the maternal grandmother's mental illness problems, and it may be that the social worker misspoke.

parent,⁷ but deferred a decision regarding disposition to August 30, 2011. The court ordered mother to drug test immediately and indicated that it would want to know at the next hearing whether she had entered parenting and substance abuse treatment programs and whether she had destroyed her medical marijuana card. The court would also want to know, from Cynthia, whether all marijuana had been removed from the house.

Disposition:

At the disposition hearing two weeks later, on August 30, 2011, counsel for father continued to advocate for placement with Maria, pointing out that mother had not enrolled in drug treatment until just four days before the hearing. In addition, the paternal grandmother had attended A.V.'s surgery, while neither Cynthia nor mother had. Minors' counsel joined father's comments and, fearing that the children would not be safe with her, argued against placement with mother. Attorneys for CFS and mother both emphasized that mother had enrolled in parenting classes and a drug treatment program as soon as she could and said she had stopped using marijuana and had destroyed her card. Cynthia averred that there was no marijuana in the house.

After again listening to all counsel, and to an extended statement from father, the court placed the children with mother on condition she stay sober and live with maternal

⁷ Although the court found the allegations regarding mother's whereabouts and ability to parent not true, it found allegations of substance abuse which interfered with their ability to parent true as to both parents. The court appears to have used A.V.'s petition in making its findings. There are handwritten notes on that petition which, assuming they were written by the court, suggest that it may have intended to modify the substance abuse allegation as to mother from "has a substance abuse problem" to "has a history of [a] substance abuse problem"

grandmother. The court ordered family maintenance services for mother, reunification services for father, unlimited and unsupervised visitation for the maternal grandfather, visitation once a week for paternal grandmother, and supervised visits for father upon his release from custody. The case was transferred to Contra Costa County and review dates set for September 6, 2011, October 28, 2011, and March 1, 2012.

DISCUSSION

On appeal, father makes two principal arguments: (1) that the juvenile court erred by placing the children with mother in Contra Costa County because there was substantial evidence that living with her posed significant risks of physical and emotional harm; and (2) that the court also erred by not ensuring that CFS make a timely and proper relative assessment of Maria.

CFS replies that, as a non-custodial parent requesting custody, and absent an explicit finding of detriment, mother stood first in line for placement consideration. Her past and current drug use, extended absences from the family, and poor record of child care are, in CFS's view, "insufficient to support a finding of detriment." Additionally, CFS maintains that Cynthia's history of drug use and ongoing mental illness issues have little or no relevance to her present ability to help care for the children. "Father's contentions [regarding Cynthia] are completely without merit." We disagree with CFS on both points but, as we shall explain, conclude that the standard of review by which we are bound defeats father's claims.

Standard of Review

We review a juvenile court's placement orders for abuse of discretion. (*Alicia B. v. Superior Court* (2004) 116 Cal.App.4th 856, 863.) "Broad deference must be shown to the trial judge. The reviewing court should interfere only "if we find that under all the evidence, viewed most favorably in support of the trial court's action, no judge could reasonably have made the order that he did." [Citations.]' [Citation.]" (*In re Robert L.* (1993) 21 Cal.App.4th 1057, 1067.)

Placement with a Non-custodial Parent

"Section 361.2 establishes the procedures a court must follow for placing a dependent child following removal from the custodial parent pursuant to section 361. [Citation.]" (*In re Marquis D.* (1995) 38 Cal.App.4th 1813, 1820, fns. omitted.) Under section 361.2, the first thing the juvenile court must do is determine whether there is a parent who wants to assume custody who was not residing with the minor at the time the events that brought the minor within the provisions of section 300 occurred. (§ 361.2, subd. (a).) "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." (*Ibid.*, italics added.) If the court chooses not to place the child with the non-custodial parent, it must make the required detriment finding by clear and convincing evidence. (*In re Isayah C.* (2004) 118 Cal.App.4th 684, 700.) "Thus, it is the party opposing placement who has the burden to show by clear and convincing evidence that the child will be harmed if the noncustodial parent is given custody. Clear and convincing evidence is evidence that establishes a

high probability and leaves no substantial doubt. [Citation.]” (*In re Karla C.* (2010) 186 Cal.App.4th 1236, 1243 (*In re Karla C.*)) Clear and convincing evidence must be “““sufficiently strong to command the unhesitating assent of every reasonable mind. [Citation.]” [Citation.]’ [Citation.]” (*Ibid.*)

Once the non-custodial parent comes forward and requests placement, if the court places the child with that parent, it may either: (1) order that the parent become legal and physical custodian of the child and terminate jurisdiction; (2) order that the parent assume custody subject to the jurisdiction of the court; or (3) order that the parent assume custody subject to the supervision of the juvenile court with services provided to either one or both of the parents, subject to further review hearings. (§ 361.2, subd. (b)(1-3).)

Here, it appears that the court chose the third option available to it under subdivision (b) once the threshold requirement of subdivision (a) had been met. Apparently—perhaps in part because of her infrequent attempts at communication—it took mother some time to realize that her children had been taken into protective custody. But when she finally discovered their absence, she and her parents promptly drove down from Sacramento in hopes of obtaining custody. Thus, there was a non-custodial parent who was requesting custody of K.V. and A.V.

Father insists that in order to qualify for placement, mother was also required to be a “non-offending” as well as a “non-custodial” parent. Since the court found true some of the allegations against mother contained in the petitions filed in the current case, father argues that she cannot be characterized as “non-offending.” The two cases father cites in support of his position are not apt. Neither dealt directly with the question of whether a

non-custodial parent must also be a non-offending one. *In re Karla C.* dealt with a trial court's duty to consider evidence regarding its continuing jurisdiction and enforcement of its orders when a child is placed with a non-custodial parent outside the United States. (*In re Karla C, supra*, 186 Cal.App.4th at pp. 1270-1271.) The court in *In re Austin P.* (2004) 118 Cal.App.4th 1124, determined that, while a non-custodial parent requesting custody under section 361.2 is asking for sole physical and legal custody, a court placing a child with such a parent may grant the parent temporary placement only if it has determined there is no risk of detriment. The court may not, however, grant sole physical and legal custody until it has determined that there is no need for continuing court supervision. (*Id.* at pp. 1134-1135.) Here, the court transferred the case to Contra Costa County with a set of follow-up review dates, ensuring that court supervision would continue. Mother was not granted permanent placement or sole physical and legal custody.

More pertinent is this court's recent decision in *In re A.A.* (2012) 203 Cal.App.4th 597, holding that in order to be considered for placement under section 361.2 a non-custodial parent need only ask for custody and be "non-offending" in the sense that he or she must not have been the subject of a previous finding of detriment. (*Id.* at pp. 608-609. See also *In re V.F.* (2007) 157 Cal.App.4th 962, 969-970 & fn.4., overruled by statute on a different point as stated in *In re Adrianna P.* (2008) 166 Cal.App.4th 44, 58.) While mother appeared to have left her sons in the care of others—father, maternal grandmother and grandfather, paternal grandmother—for long periods of time in the past, there was no evidence that a court had ever removed the children from her under a

finding of detriment. Thus, however offensive her behavior, she was not offending in a way that would have caused her to lose the benefit of section 361.2. In any case, as we have said, there is no evidence here that the court intended to grant mother sole physical and legal custody of K.V. and A.V.

Evaluation of Paternal Grandmother

Father's second argument is that CFS failed to properly and promptly evaluate Maria for placement and that its failure to do so prejudiced the outcome such that reversal is required. This argument relies on a series of speculations about what the court would have done at different points in the case and about the nature of such a putative placement. Had CFS diligently evaluated her, father suggests, "The children would likely have been placed with Maria long before the disposition hearing." Thereafter, he continues, the court would probably have been reluctant to disrupt a "stable" relative placement, especially considering that mother had not cared for the children for several years and in view of the potential for emotional damage to the children if they were separated from Maria. Because of these possibilities, father believes the placement order must be reversed and a new hearing held to assess Maria more favorably.

Our decision regarding father's first argument renders his second essentially moot, and we address it, in the interest of completeness, only briefly. In addition to the statutory right articulated in section 361.2, a non-custodial parent has a constitutionally protected interest in assuming physical custody of a child that has been removed from a custodial parent pursuant to section 300. (*In re Karla C.*, *supra*, 186 Cal.App.4th at p. 1243.) There is no such constitutional right for a grandparent. Similarly, as we have

stated, the relevant statute *requires* a court to place a child who has been removed from a custodial parent pursuant to section 300 with a non-custodial parent who comes forward and requests custody, and who has not previously been the subject of a finding of detriment. (§ 361.2, subd. (a); *In re A.A.*, *supra*, 203 Cal.App.4th at p. 608.) There is no parallel statute requiring placement with a grandparent or allowing a grandparent to displace a non-custodial parent under these circumstances.

SUMMARY

We agree with CFS that under section 361.2 a non-custodial parent seeking custody takes precedence over other placement alternatives, but not with its arguments regarding the lack of risk inherent in a placement with mother. There is little doubt that her substance abuse, criminal record, and lack of participation in the lives of her children—not to mention the presence of a maternal grandmother with a similar history and a disabling mental illness in the home—would together have supported a finding of a serious risk of detriment to the children. But it is also true that there was a significant risk to placing them with Maria insofar as she was likely to permit father, an admitted methamphetamine user, to return to the home if he was released from prison. The court thus had to choose the least among three evils: it could place the children with mother, or with Maria, or leave them in foster care. After receiving some assurance that mother was trying to address her problems, it chose to place them with her under continued court supervision. We cannot say that it made a decision that no judge could reasonably have

made.⁸ (*In re Robert L.*, *supra*, 21 Cal.App.4th at p. 1067.) Therefore, we do not find that the trial court abused its discretion.

DISPOSITION

The judgment is affirmed.

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CODRINGTON
J.

We concur:

McKINSTER
Acting P. J.

MILLER
J.

⁸ Minors’ appellate counsel states that it would have been appropriate for the court to place the children with Maria and notes that “mother is experiencing problems in the household.” But counsel also notes that “the boys are enrolled in school where they are attending and doing reasonably well. They enjoy living with their maternal grandmother and maternal great-grandmother . . . [and] the assigned social worker is conscientious, and on top of the issues” Since “the die [has been] cast,” counsel now believes that it is in the children’s best interest to remain in Contra Costa County. It is not clear from this statement whether mother remains in the home.