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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT

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

FRESNO COUNTY DEPARTMENT OF
SOCIAL SERVICES,

Plaintiff and Respondent,

v.

MICHELLE R.,

Defendant and Appellant.

F062171

(Super. Ct. No. 09CEJ300084)

OPINION

APPEAL from a judgment of the Superior Court of Fresno County. Jane A. Cardoza, Judge.

Karen Elcaness, under appointment by the Court of Appeal, for Defendant and Appellant.

Kevin Briggs, County Counsel, and William G. Smith, Deputy County Counsel, for Plaintiff and Respondent.

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Michelle R. (mother) appeals from the exit order the juvenile court made when terminating jurisdiction over her daughter, T.R. Mother contends that the court prejudicially abused its discretion by (1) granting the father sole legal custody and her only supervised visitation, (2) allowing father to supervise telephone contact between mother and the minor, and (3) allowing father to be “around” alcohol drinkers with the minor. Finding no abuse of discretion, we affirm the order.

BACKGROUND

Thirteen-month-old T.R. came to the attention of child protective services (CPS) in April of 2009 when mother brought her to a police station for help after mother had used methamphetamine. According to mother, she could not give the child to father because of an existing restraining order against him due to ongoing domestic violence.

The Fresno County Department of Children and Family Services (the department) filed a Welfare and Institutions Code section 300¹ petition alleging that mother had a substance abuse problem, mental health issues, and that T.R. was at risk of harm because mother had exposed her to domestic violence from father. The petition alleged that father had also exposed T.R. to substantial risk of physical harm due to domestic violence. The petition also alleged that mother had lost custody of two other children on the East Coast due to juvenile court intervention. In May of 2009, mother attended a mediation with the department and thereafter submitted to the petition on the social worker’s report.

The report prepared in anticipation of jurisdiction stated that father admitted being arrested twice for domestic violence and twice for driving under the influence. He was on probation for a driving under the influence conviction suffered in 2007 and would complete probation in April of 2010. He had a criminal history dating back to 1995. Mother had spent time in prison for conspiracy to manufacture/transport/sell a controlled substance in New Hampshire. She had had contact with law enforcement for domestic

¹All further statutory references are to the Welfare and Institutions Code unless otherwise stated.

violence, mental instability, and narcotic offenses and activity, but she had not been convicted of a crime in California. The substance abuse assessment for father found he “minimized his [a]lcohol use,” and the department recommended that he complete an intensive outpatient substance abuse treatment program.

At the disposition hearing on September 18, 2009, the juvenile court found T.R. to be a person described under section 300, subdivision (b), made her a dependent of the court under section 360, subdivision (d), removed her from the custody of her parents, and placed her in foster care. Services were ordered for both parents,² including parenting classes, domestic violence evaluation and recommended treatment, and drug testing. Mother was to submit to a psychological evaluation to assess her ability to benefit from services.³ Visitation was ordered for both parents; neither was to visit if under the influence of drugs or alcohol. The department was given discretion to allow father unsupervised visitation, which it did beginning in November of 2009.

At the six-month review hearing in March of 2010, the department recommended continued reunification services for both parents, as they were generally compliant with their respective service plans. After father tested positive for alcohol on three separate dates in November and December of 2009, his unsupervised visits were changed to supervised visits. The department recommended that they be returned to unsupervised visits because of father’s subsequent compliance with Alcoholics Anonymous/Narcotics Anonymous (AA/NA) meetings and negative random drug tests. Mother tested positive for methamphetamine, cocaine, and opiates on several occasions, but she also presented a prescription for Vicodin. Her psychological evaluation found that she suffered from

²The department sought to bypass mother’s reunification services under section 361.5, subdivision (b)(10) and (11), but was unable to support its position because it lacked documentation on the cases of mother’s older children.

³Mother had been admitted to a hospital for an “apparent attempted suicide” in April of 2009.

anxiety and posttraumatic stress disorder and depression, but would benefit from continued reunification services.

The juvenile court adopted the recommendation of the department. T.R. was continued in placement in foster care, and mother and father were granted six additional months of reunification services. Father's visits were ordered to be unsupervised, and the department was given discretion to provide mother with unsupervised visitation upon proper notice.

At the 12-month review hearing held June 9, 2010, the department recommended the continuation of reunification services for both parents, that mother's unsupervised visits occur only at the inpatient substance abuse treatment center she was in, and that the department be allowed to institute liberal visitation between T.R. and mother and father.

Mother and father both consistently and regularly visited T.R., who remained in foster care. Mother "remained a constant fixture in her daughter's life," exhibited appropriate parenting skills and age-appropriate expectations, was very attentive to her daughter's needs, referred to T.R. in loving terms, and showed "incredible self-insight." Despite relapses in her substance abuse objective, mother successfully completed a parenting program, a victim-based domestic violence treatment program, and continued with random drug testing and individual therapy, both inside and outside her treatment program. Father successfully completed a parenting class, intensive outpatient substance abuse and batterer's treatment, and continued to attend weekly AA/NA meetings and random drug test.

The juvenile court found that it would be detrimental to return T.R. to the custody of her parents and ordered that she remain a court dependent in her current placement and that reunification services to both mother and father be continued. Unsupervised visitation at mother's treatment facility was continued. Liberal visitation with father would begin after the department visited father's home and cleared everyone who lived there.

In September of 2010, mother left the grounds of her inpatient treatment facility without permission, and a few days after that she engaged in an altercation with another resident. She was then discharged from the program. Supervised visitation was ordered for mother.

The 18-month-review hearing in January of 2011 was heard only as to father as mother requested a contested hearing. The department recommended that father begin family maintenance services since he had met his service objectives and was able to maintain housing and full-time employment over the past year. The department had “growing concerns” about mother’s “instability emotionally and otherwise,” and her behavior led the department to believe that she did not possess “the capacity to safely and appropriately parent [T.R.]” She was unable to complete any of the five substance abuse programs she attended, she was no longer random drug testing, and she was living in a motel. The juvenile court ordered placement of T.R. with father under a plan of family maintenance.

At the contested 18-month review hearing for mother on March 18, 2011, the department recommended that father be given sole custody of T.R. and that mother be given supervised visits once a week. The department had originally recommended joint legal custody in its report of March 11, 2011, but made the change in recommendation at the hearing.

At the hearing, a substance abuse specialist, Clyde Gosser, testified that mother could find “good recovery” in NA/AA meetings and working with a sponsor. Mother attempted to introduce a drug assessment from Central California Recovery, which Gosser identified as coming from that agency. The juvenile court sustained objections of father’s counsel and county counsel to Gosser’s testimony about the recommendation in the assessment on grounds of lack of foundation and relevance.

The current case social worker for mother testified that mother’s visits were changed from unsupervised to supervised due to her discharge from the treatment center in September 2010. The department had no information that mother had used drugs,

although she was dropped from a testing program due to consistent no-shows. Supervised visits were also ordered due to “emotional outbursts” on mother’s part, although the last such outburst occurred in late November or early December of 2010. The social worker no longer had concerns about these “outbursts” and mother had been doing “okay” during visitations. T.R.’s reaction to mother had improved and she invited and included mother in activities.

Mother testified in her own behalf. Her 2009 and 2010 AA/NA attendance slips were admitted into evidence. The slips stopped at February 17, 2011, but mother testified that she had been attending meetings since then and had a sponsor. She attributed her emotional “outbursts” to doctor prescribed medication. She had changed doctors in January of 2011 and he adjusted the dosage of the medication. Mother testified that she had not drug tested because she could not afford the \$2 copay for each test, and the department declined to provide her with a free test facility. Mother was currently enrolled in relapse prevention, mental health counseling, and she had completed a domestic violence victim program.

Mother believed she was ready for unsupervised visitation with T.R. Although father allowed her to call T.R. more than once a week, half the time he did not answer the telephone and said he didn’t need to because he could do whatever he wanted with T.R. living with him. Mother believed that without unsupervised visits, father would prevent any contact.

County counsel, minor’s counsel, and father’s counsel all asked that the juvenile court adopt the department’s recommendations as its findings and orders on the 18-month review and exit orders. Father objected to certain parts of the order: (1) to paragraph 2.03, because it allowed “unsupervised, telephonic contact between mother and the minor”; (2) to paragraph 4.05, which stated that when the child was with the parent, that parent was not to associate with anyone using alcohol, and was therefore unduly restrictive; and (3) to paragraph 6.02, which he wished to amend to include, in addition to completion of a drug treatment program, mother’s “[p]roof of a pattern of sobriety of

some months' duration" and "proof of successful mental health treatment beyond" medication before being allowed to move for a change in custody or visitation. Mother objected to the change recommended in paragraph 4.05, to allow father to associate with alcohol users while T.R. was in his care.

In response to mother's request for joint legal custody, the juvenile court stated that it was "not inclined" to order it. The juvenile court found that the department had offered reasonable services designed to assist mother in overcoming the problems which led to the initial and continued removal of the child, and terminated reunification services as to her. The court ordered supervised telephone contact with T.R. on Friday evenings between 5:00 and 6:00 p.m., supervised by father. The court ordered paragraph 4.05 amended: from refraining from being around others "using" alcohol to "abusing" alcohol. The court ordered paragraph 6.02 amended to state that satisfactory compliance was conditioned upon mother showing a period of sobriety. The court ordered supervised visits to take place at an agency for an hour once a week.

Father was ordered to have sole legal and physical custody of T.R. under sections 304, 361.2, and 362.4. Dependency was terminated under section 364, subdivision (c).

DISCUSSION

I. Standard of Review

"[T]he juvenile court has broad discretion to make custody orders when it terminates jurisdiction in a dependency case (§ 362.4)" (*In re Nicholas H.* (2003) 112 Cal.App.4th 251, 265, fn. 4.) We review the juvenile court's order for abuse of discretion. (*In re Tamneisha S.* (1997) 58 Cal.App.4th 798, 806.) A juvenile court abuses its discretion "by making an arbitrary, capricious or patently absurd determination." [Citations.] (*Ibid.*)

Protective orders after termination of the juvenile court's jurisdiction are authorized by section 362.4, which provides in relevant part, that "[w]hen the juvenile court terminates its jurisdiction over a minor who has been adjudged a dependent child of the juvenile court prior to the minor's attainment of the age of 18 years, ... the juvenile

court on its own motion, may issue ... an order determining the custody of, or visitation with, the child.” “The standard which governs all determinations in dependency proceedings is to protect the welfare and best interests of the child.” (*In re Elizabeth M.* (1991) 232 Cal.App.3d 553, 569, abrogated on other grounds in *In re Tabitha W.* (2006) 143 Cal.App.4th 811, 817.) Thus, when making an exit order pursuant to section 362.4, the standard that guides the juvenile court is the best interests of the child. (*In re John W.* (1996) 41 Cal.App.4th 961, 973; *In re Jennifer R.* (1993) 14 Cal.App.4th 704, 712.)

II. Sole Legal Custody

Mother contends first that the juvenile court abused its discretion in granting father sole legal custody of T.R. because “the court did not articulate the findings upon which it based its order,” and that the findings cannot be implied from the evidence. We find no abuse of discretion.

Under the Family Code, “‘Sole legal custody’ means that one parent shall have the right and the responsibility to make the decisions relating to the health, education, and welfare of a child.” (Fam. Code, § 3006.) An exit order determining custody must be made “in the context of the peculiar facts of the case before the court.” (*In re John W.*, *supra*, 41 Cal.App.4th at p. 965.)

Here the evidence clearly supports the juvenile court’s decision to grant father sole legal custody of T.R. The child was originally brought to the attention of the department in April of 2009 when mother brought her to a police station, unable to care for her due to mother’s drug use. Almost two years later, her inability to complete any of the five substance abuse programs she had attended, her lack of participation in random drug testing, and her volatile behavior solidified the department’s opinion that she “did not possess the capacity to safely and appropriately parent her daughter.” At the time of the 18-month review hearing in March of 2011, mother had still not completed a drug treatment program, although she was currently enrolled and in compliance with such a program. Mother’s continuing drug addiction, her volatile behavior, and her failed attempts at rehabilitation support the juvenile court’s determination that her participation

in making important decisions about T.R.'s welfare would not be in T.R.'s best interests. Mother has not cited any evidence that supports her apparent claim that she is capable of sharing legal custody or that joint legal custody would be in T.R.'s best interests.

Sufficient evidence supports the juvenile court's determination that it is in T.R.'s best interests that father have sole legal custody. The juvenile court's order does not, however, forever bar mother from sharing legal custody of T.R. If the circumstances that caused the juvenile court to award father sole legal custody change, mother may seek joint legal custody. (§ 362.4; *In re Jennifer R.*, *supra*, 14 Cal.App.4th at pp. 712, 714.)

III. Supervised Visitation and Telephone Contact

Mother next argues that the juvenile court abused its discretion when it reduced her supervised visits to one hour per week, down from two hours per week, and when it authorized father to supervise telephone contact between her and the minor. We find no abuse of discretion.

As a result of the proceedings, a new visitation order was issued restricting mother's visits to supervised visits one hour a week and granting her once a week telephone contact with T.R., monitored by father. The visitation order challenged by mother was made as part of the juvenile court's exit order pursuant to section 362.4, when the court terminated jurisdiction and dismissed the dependency case. Despite mother's claim to the contrary, section 362.4 does not require a finding of detriment to deny visitation in the exit orders. The Legislature knows how to require the juvenile court to make an express finding of detriment, and it did not do so.

Here, the record supports the juvenile court's decision to limit contact between mother and T.R. to one hour a week and to weekly telephone contact supervised by father. Mother cites the department's 12-month review report which states that mother consistently and regularly visited T.R., that she exhibited appropriate parenting skills, age-appropriate expectations, and was very attentive to T.R., and the social worker's testimony at the 18-month review in which she stated that visits were going well.

But the juvenile court also had before it the report prepared for the March 11, 2011, hearing which disclosed that mother began unsupervised visits with T.R. in April of 2010, but returned to supervised visits after her relapse. In June of 2010, mother was again granted unsupervised visits but returned to supervised visits when she was discharged from the substance abuse treatment facility. Supervised visits were arranged at another treatment facility but terminated due to mother's "too explosive" behavior, which placed the staff at risk. Mother was said to be very argumentative, yelled, cussed and made numerous complaints about the staff. She was unsatisfied with the terms of the visits, claiming that the 10:00 a.m. start time was too late, but when changed to 9:00 a.m., said they were too early. Mother had become very angry when told that using a knife with a three-year-old to carve a pumpkin was not appropriate.

Supervised visits were then arranged at the next treatment facility, but mother again displayed explosive behavior, which resulted in the first visit being cancelled. Mother's supervised visits had to be relocated to another facility due to concerns for staff safety. The report prepared in anticipation of the March 2011 hearing recommended that mother's visits remain supervised and be reduced to two times per month "[d]ue to [mother's] unpredictable pattern of behavior."

Under these circumstances, we cannot say the juvenile court abused its discretion in limiting mother's visitation in the exit orders.

Nor can we say that the trial court abused its discretion in authorizing father to supervise telephone communication between mother and T.R. The exit order provides, in relevant part,

"The mother shall have supervised telephone communication with the child every Friday between 5 p.m. and 6 p.m. These telephone communications shall be supervised by the father."

Mother argues that the order was an abuse of discretion in that it effectively gave father "veto power" over mother's rights to telephone visitation. At the hearing, father's counsel wanted the court to "understand" that "[t]here's times when [the minor] walks away from the phone." The court replied "Understood." Mother claims this exchange

was an indication that the court order allowed father to determine whether the telephone visitation would in fact occur. She cites to *In re T.H.* (2010) 190 Cal.App.4th 1119, 1123, for the proposition that a visitation order may not give one parent the power to determine whether visitation will occur at all.

But in *In re T.H.*, the visitation order at issue stated that visitation would occur only upon “agreement of the parents.” (*In re T.H.*, *supra*, 190 Cal.App.4th at p. 1123.) This, the appellate court found, was “more than simply a delegation of the authority to set the ‘time, place and manner’ of the visitation—it effectively delegates to [one parent] the power to determine whether visitation will occur at all.” (*Ibid.*)

This is not the case here. The order specifically states that mother “shall have supervised telephone communication with the child every Friday between 5 p.m. and 6 p.m.” The order does not give father the power to determine whether visitation will occur. Father’s counsel’s statement that T.R. might not always have the patience to remain on the line for that length of time is simply a reality when dealing with a three year old.

In sum, mother has not established that the juvenile court abused its discretion by authorizing father to supervise telephone contact between mother and the minor in the exit orders.

The court exercised its discretion, guided by the best interests of the minor, in determining how often to permit visitation and in ordering father to supervise telephone contact. (§ 362.4; *In re John W.*, *supra*, 41 Cal.App.4th at p. 973; *In re Jennifer R.*, *supra*, 14 Cal.App.4th at p. 712; *In re Roger S.* (1992) 4 Cal.App.4th 25, 30-31.)

IV. Father Allowed to be Around Alcohol Drinkers in Minor’s Presence

Mother next contends that the juvenile court abused its discretion when the exit order allowed father to be “around” alcohol drinkers with T.R. We find no abuse of discretion.

The original recommended exit order would have disallowed either parent from being in the presence of anyone who was using alcohol or illicit drugs when T.R. was in his or her care:

“When the child is in the care of either parent, that parent shall not associate with anyone using alcohol or using illicit drugs. It is the responsibility of each parent to provide the child with a drug free and sober environment. A violation of this provision may be considered a change of circumstance.”

At the review hearing, father’s counsel argued that this order was “a little tough” on father, who could not control the behavior of others. The court mediator suggested substituting “abusing” for “using” alcohol. The court ordered the amendment over mother’s counsel’s objection.

According to mother, father’s past history of under the influence arrests, convictions, and probation did not make him “a likely candidate to distinguish ‘using’ from ‘abusing.’” But at the time of the order, the juvenile court had before it a significant amount of evidence that father had done very well in his reunification services.

According to the social worker’s report, father had been able to meet “all of his case plan objectives,” which included mental health assessment and treatment, parenting class, batterer’s treatment, substance abuse treatment and random drug testing. He had maintained his sobriety and, for the past year, maintained permanent housing and full-time employment, “while still meeting the needs of [T.R.]” As of March of 2011, father submitted to 103 of a possible 104 random drug tests and had tested clean for all substances since December 9, 2009. He consistently attended weekly AA/NA meetings, where he was an active participant at each meeting and a facilitator at one meeting per week.

The social worker also found father’s relationship with T.R. to be appropriate. Father began weekly visits with T.R. in July of 2010, but by the time of the January 2011 status review report, T.R. was staying with father at his house six nights per week.

According to the foster parent, father was always timely and consistent with the visits, appropriately met T.R.'s needs, and made necessary adjustments when needed.

Mother's contention that the juvenile court abused its discretion in allowing father to have the minor "around" people drinking alcohol fails because the juvenile court had before it substantial evidence that, as of March 2011, father had taken all of his obligations under the case plan seriously and successfully completed the services offered. Mother has failed to establish that this particular order constitutes an abuse of discretion.

V. Prejudice

Finally, mother argues that the exit order was prejudicial because of the probable difficulty in any attempt on her part to modify the order in the future. She also contends that T.R. was prejudiced because the order abrogated the minor's bond with mother and was not in her best interests. We disagree.

Relying on *In re Michael W.* (1997) 54 Cal.App.4th 190, 196, mother argues that she was prejudiced because any attempts on her part to modify the order in family law court in the future will be unduly difficult. As stated in *In re Michael W.*,

“[W]e presume some prejudice from the simple fact that a family law court will naturally defer to a recent order of the dependency court concerning custody and visitation.... Since the orders made by a juvenile court at a section 364 hearing are necessarily made while dependency jurisdiction continues, it follows logically that a family law court would defer to those orders and hesitate to second-guess the juvenile court judge, at least absent something more than the ordinary showing of changed circumstances.” (*Id.* at p. 196.)

First, we agree with respondent that, lacking any demonstrated error in making the exit order, any discussion regarding future prejudice is premature. Second, we also agree with respondent that *In re Michael W.* is inapposite. In that case, the exit order awarding physical and legal custody to father with monitored visits to mother was made after twice denying mother an evidentiary hearing. (*In re Michael W.*, *supra*, 54 Cal.App.4th at p. 197.) Here, no such error occurred as mother had a full hearing on the proposed terms of the exit order.

DISPOSITION

The judgment is affirmed.

DAWSON, J.

WE CONCUR:

LEVY, Acting P.J.

DETJEN, J.