

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

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

In re J.H., et al., Persons Coming Under the
Juvenile Court Law.

FRESNO COUNTY DEPARTMENT OF
SOCIAL SERVICES,

Plaintiff and Respondent,

v.

N.T.,

Defendant and Appellant.

F065946

(Super. Ct. Nos. 12CEJ300195-2,
12CEJ300195-3)

OPINION

THE COURT*

APPEAL from orders of the Superior Court of Fresno County. Mary Dolas,
Commissioner.

Hana B. Balfour, 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.

-ooOoo-

* Before Wiseman, Acting P.J., Levy, J., and Gomes, J.

INTRODUCTION

N.T. (mother) appeals from the juvenile court's order denying her a contested disposition hearing and granting custody of two of her children to H.H., father.¹ The Fresno County Department of Social Services (department) concedes the juvenile court's action was a denial of procedural due process and requests reversal of the juvenile court's order. The parties also argue that there was sufficient evidence at the disposition hearing showing that placement of the children with father would be detrimental to them. We agree with mother and the department that mother was denied her procedural due process rights and, on that basis, reverse the juvenile court's custody orders from the disposition hearing as to father's children and remand for a new hearing.

FACTS AND PROCEEDINGS

On August 14, 2012, a first amended juvenile dependency petition was filed pursuant to Welfare and Institutions Code section 300.² The petition alleged that mother placed her children M.A. (13 years old), J.H. (3 years old), and H.N.H. (2 years old) at risk of suffering serious physical harm and/or illness because mother failed to obtain medical attention for the children's sibling, L.T., who had a skin disorder and passed away in August 2012 at the age of 10 months. Mother failed to provide an explanation as to how L.T.'s skin came to be in such poor condition. H.H. (father) is the presumed father of J.H. and H.N.H.

According to the detention report, L.T. had scabs and open sores all over his body when he passed away. Although there was an autopsy, the cause of death was not

¹ On December 14, 2012, this court issued an order deferring mother's motion to consolidate her appeal with an appeal by the minors. On February 5, 2013, the minors' appeal, case No. F065947, was dismissed as abandoned. The mother's consolidation motion is denied as moot.

² Unless otherwise designated, all statutory references are to the Welfare and Institutions Code.

immediately known. The department did not recommend that father have custody of the children due to his extensive criminal history.

Mother has a criminal history that includes driving under the influence of alcohol or drugs, resisting a police officer, and infractions of the Vehicle Code. Father's criminal history dates back to 1989 and includes convictions for driving under the influence of alcohol or drugs, robbery of an inhabited dwelling, driving with a blood alcohol level of .08 percent or higher and causing death or injury, evading a peace officer and causing death or injury, use of a controlled substance, assault, battery on a peace officer or fireman, resisting a police officer, contempt of court, assault with a deadly weapon, battery resulting in serious bodily injury, possession of a concealed firearm, making a criminal threat, and corporal injury to a spouse/cohabitant.

The children were detained and placed out of mother's home on August 22, 2012. On September 11, 2012, the juvenile court granted father's motion to continue the jurisdiction hearing. Mother's counsel indicated that mother sought a contested jurisdiction hearing. An addendum report filed on September 25, 2012, recommended that J.H. and H.N.H. be placed with their father.

On September 26, 2012, mother waived her rights to a contested jurisdiction hearing, and admitted the allegations in the petition. Counsel for the department sought to have the addendum report withdrawn. Mother's counsel opposed placement of the children with father and supported the department's request to withdraw its recommendation of the children's placement with father. The children's counsel also objected to the recommendation that the children be placed with father based on father's extensive criminal history that dated from 1987 to 2012. The children's counsel also had no objection to the department withdrawing its addendum report.

The department requested that its addendum report for the jurisdiction hearing be withdrawn. The court, however, noted it had received and reviewed the report and had to

trust what the department provided. When the court asked the department's counsel if father's incarcerations or lifestyle had separated him from the children, counsel stated that she did not have enough information at that time to answer the court's question. The court stated that although the department could request to have the report withdrawn, the report had been filed and now belonged to the court.

Mother's counsel explained he thought the department's report would have more information pertinent to father and did not realize this information was not included in the report until the day before the hearing. Mother's counsel noted that the parties could confirm the matter for trial the next week to try to show the connections between father's past criminal conduct and his fitness to have custody of the children. The court, however, noted that mother submitted the matter, the court had taken jurisdiction, and there was "no issue remaining for trial." Mother's counsel stated that addressing the issue of placement was a dispositional issue.

The court stated that all of the parties had the opportunity to bring up the issue of the children's placement, but no one had brought it up. The court set the matter for a disposition hearing on October 11, 2012. The department's report for the disposition hearing noted mother's concern for the children being placed with father. Father told social workers that he was on misdemeanor probation and was in a 52-week program for batterers. Father's home was suitable for the children. Father began visits with the children on October 5, 2012.

Mother was given a domestic violence index assessment. It was recommended that she participate in a child batterer's treatment program. Father had the same assessment. It was also recommended that father participate in a batterer's program. Father had completed 12 classes by October 2012.

Father's most recent criminal conviction was for misdemeanor infliction of corporal injury on a spouse/cohabitant. Father was currently on probation for this

offense. The department recommended that the children remain in their current placement with a relative and the parents receive reunification services. An addendum report for the disposition hearing did not recommend that the children be placed with their father due to his domestic violence conviction and the fact that he had just recently begun a batterer's program.³

During a scheduled assessment by a social worker in late August 2012, mother reported that in her lifetime she had been physically and sexually abused by her sexual partner or spouse. Mother did not name specific abusers to the social worker. The social worker recommended a psychological assessment of mother. During an evaluation by a social worker, mother revealed that during three previous relationships, she was emotionally and physically abused. The third relationship resulted in three pregnancies, and given the timing, the relationship could have been with father. Mother, however, did not identify the names of the people with whom she had her relationships. During this relationship, the partner hit, pushed, and spit on mother. He also busted her lip. During one incident, the partner "pushed himself in her home" and caused mother's child to fall.

During an assessment with a social worker, father denied having domestic violence issues with mother when they were together. Father admitted he had three children with mother. Father said he did not get along with mother and they argued a lot. Father did have domestic violence issues with his last girlfriend leading to his arrest and conviction of misdemeanor domestic violence.

At the disposition hearing on October 11, 2012, the children's counsel submitted the matter on the report and its recommendation, although counsel thought mother should

³ The original report for the disposition hearing stated that consideration of placement with the non-custodial parent was not applicable. An addendum report for the disposition hearing had a long analysis concerning why the children should not be placed with father even though he was a non-offending parent. The department still recommended liberal visits between the children and father.

have been referred to drug treatment. Mother's counsel stated that mother was objecting to father receiving liberal visitation with the children and would like a trial on that issue and would like to present evidence.⁴ The court stated it had previously ordered liberal visitation for father and did not know if that was an issue for the disposition hearing. The court suggested that counsel should file a section 388 petition via a JV-180 form to seek a change of its order. The court indicated its inclination was to place the children with father after reading the reports on file.

Mother's counsel stated mother also wanted to present evidence on the court's proposed order to place the children with father. The court replied that mother, minor's counsel, and the department were invited by it to provide evidence on this issue many times, but nothing was provided. According to the court, father provided evidence as to his compliance and there was no other evidence before the court.

The court also rejected mother's counsel's request for a trial date. Counsel for the department joined the request of mother's counsel to present evidence and noted that father had only recently started a batterer's program and was on probation for domestic violence.

The court replied that it had already read the department's report and did not "see any reason for the contest" and the parties had submitted on the recommendation of the report. In fact, to that point in the proceedings, only the children's counsel had done so. Mother's counsel noted that she had not submitted on the report "because my request was for a trial." The court stated that counsel's request was for a hearing on the issue of visitation. Counsel stated that was correct, but "[n]ow it's morphing into something else." The court stated that a contest on the issue of visitation was not relevant.

⁴ Mother's counsel was unable to appear at the hearing and mother was represented by stand-in counsel at the disposition hearing.

When the court opined that there was no authority “to not return the children to the father,” the department’s counsel noted that the court felt there was no showing of detriment, but the department believed it had shown detriment to the children due to the father’s unstable criminal lifestyle and recent violent conviction. Counsel for the department noted that this was the first time the department had presented a section 361.2 analysis on the issues involving placement of the children. The court stated it had two prior reports from the department with a section 361.2 analysis. Counsel for the department respectfully submitted that the issue of placement did not arise until disposition.

The juvenile court disagreed, and noted that the original report for the disposition hearing stated that placement with the non-custodial parent was inapplicable. The department’s counsel noted the original report was erroneous and that was why the department wanted to submit the matter on the addendum report. The court rejected this and asked whether it was to presume that everything in the department’s reports were mistakes.

Counsel for the children argued it was a violation of due process for the parties to request a contested hearing and not to receive it. The children’s counsel further believed there was sufficient evidence of detriment in placing the children with father because counsel had discovery indicating that father had brandished a gun at mother. Counsel for the children also requested a contested evidentiary hearing on the issue of placement of the children.

The court denied the requests for a contested disposition hearing and described mother’s request for a hearing as limited to the issue of father’s visitation of the children. The court criticized the department for what the court characterized as the department’s repeated failure to present evidence on whether it was suitable for the children to be placed with father. Mother’s counsel noted mother was objecting to the court proceeding

with the disposition hearing. The court placed the older child, M.A., with his family relative/caregiver.⁵ The court ordered that J.H. and H.N.H. be placed with their father.

DISCUSSION

At the September 26, 2012 hearing, mother, the department, and children's counsel apparently thought that they had reserved the question of father's visitation and whether placement of the children with him would be detrimental to the children, but the juvenile court completely denied the parties an evidentiary hearing on these issues. Mother and the department argue that their due process rights to a contested hearing were violated by the juvenile court. We agree with the parties and will reverse the juvenile court's dispositional custody orders as to J.H. and H.N.H.

Parents in a dependency proceeding have due process rights similar to parties in civil proceedings. (*In re Malinda S.* (1990) 51 Cal.3d 368, 383 [superseded by statute on another point in *In re Lucero L.* (2000) 22 Cal.4th 1227, 1240-1242].) Although due process in dependency proceedings is a flexible concept that depends on the circumstances, due process generally requires that parents be given the right to present evidence, to cross-examine adversarial witnesses, and for counsel to be provided the opportunity to argue the merits of an issue. (*In re Lesly G.* (2008) 162 Cal.App.4th 904, 914-915 (*Lesly G.*)) Where proceedings occur in which these procedures are denied, the juvenile court's orders must be reversed. (*In re Hunter W.* (2011) 200 Cal.App.4th 1454, 1465; *Lesly G.*, *supra*, at pp. 915-916.)

California Rules of Court, rule 5.690(b) states that at the disposition hearing, “[t]he court must receive in evidence and consider the social study, a guardianship assessment, the report of any CASA volunteer, the case plan, and any relevant evidence

⁵ The parties are not challenging the placement of the older child, M.A., with a relative. Our focus on appeal is not on this disposition order, but on the issues involving father's custody and/or visitation of J.H. and H.N.H.

offered by the petitioner, the child, or the parent or guardian.” Here, the department changed its recommendation on the placement of the children with father just prior to the jurisdiction hearing on September 26, 2012. Although mother waived her rights to a contested jurisdiction hearing and admitted the allegations in the petition, she never waived her right to a contested disposition hearing. Indeed, during the jurisdiction hearing, mother’s counsel reserved the right to challenge the placement of the children with father.

The juvenile court did not afford mother the opportunity to present evidence concerning the issue of father’s visitation of the children. When it became clear at the disposition hearing that the court was granting father custody of the children, the court further prevented mother, the department, or the children to present evidence relevant to the risk of detriment in such a placement. This constituted a denial of procedural due process to mother and to any other party who sought to present evidence at the hearing. The proper time and venue to resolve the issues, if any, concerning father’s liberal visitation and/or custody of J.H. and H.N.H. was through a contested disposition hearing.⁶

Because this case must be remanded for an evidentiary hearing on all of the issues involving custody, we do not reach the issue also raised by the parties concerning the sufficiency of evidence to support the juvenile court’s custody orders as to J.H. and H.N.H. Because there was no evidentiary hearing, there is no reasonable or rational way for us to anticipate what the evidence in a contested hearing may have shown.

We note that in mother’s psychological evaluation there was a reference that all of mother’s partners had abused her physically, sexually, and emotionally. Arguably, father

⁶ The juvenile court was incorrect when it suggested during the disposition hearing that mother’s counsel needed to file a section 388 petition to change the court’s custody orders.

was one of mother's abusers, but he was not specifically named in the social worker's report. The children's counsel made reference to discovery she had indicating that father had allegedly pointed a gun at mother. If either or both of these events are true, depending on the circumstances, placing the children with father could potentially be detrimental to them.

The juvenile court was concerned that the department had failed to show father's criminal conduct or lifestyle had any connection to his family relationships with mother or the children, or was relevant to the risk to the children of detriment. Mother and the other parties should have the opportunity in a contested hearing to present all relevant evidence on these matters.

DISPOSITION

The juvenile court's disposition orders as to J.H. and H.N.H. are reversed and the matter is remanded for a new disposition hearing on all issues relevant to father's liberal visitation and/or custody of the children. The parties have stipulated by letter pursuant to California Rules of Court, rule 8.272(c)(1) to the immediate issuance of remittitur. We therefore issue our remittitur to the juvenile court forthwith.