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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

In re BRAELYN F., a Person Coming
Under the Juvenile Court Law.

ORANGE COUNTY SOCIAL SERVICES
AGENCY,

Plaintiff and Respondent,

v.

EDWARD W.,

Defendant and Appellant.

G047970

(Super. Ct. No. DP019720)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Jacki C. Brown, Judge. Affirmed.

Linda Rehm, under appointment by the Court of Appeal, for Defendant and Appellant.

Nicholas S. Chrisos, County Counsel, Karen L. Christensen and Aurelio Torre, Deputy County Counsel, for Plaintiff and Respondent.

No appearance for the Minor.

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I. INTRODUCTION

Edward W., maternal grandfather of Braelyn F., appeals from the denial of his petition to have her placed in his own household. Edward's petition presented a tough choice for the trial court. The record shows much to commend Edward as his granddaughter's caretaker. He is a financially stable, retired Marine with a spacious three-bedroom apartment who has successfully adopted and raised a 16-year-old son. In the end though, the trial court concluded that the track record of stability and tranquility established by Braelyn's foster parents over the course of almost two years prior to Edward's petition, plus Edward's reluctance to tell social workers about a number of occasions when he had to call the police because of the mother's psychotic episodes, tipped the balance against any change in placement. The trial court's choice was a reasonable one, and within the parameters of the governing statute, Welfare and Institutions Code section 361.3.¹ Accordingly we affirm the judgment.

II. FACTS

Braelyn was born in March 2010, to her 16-year-old mother B.F. (mother). Mother suffers from mental illness and was involuntarily hospitalized on April 26, 2010 – about six weeks after Braelyn's birth – when she began to throw objects and brandish a knife at her own mother with whom she was living at the time.

Social workers took Braelyn into custody and quickly placed her in an emergency shelter home. By mid-May 2010, the infant was placed in the care of Deanna and John V. Braelyn would remain in their care until March 23, 2012, which is a period of more than 22 months. There is no doubt that the V.'s did an excellent job of caring for Braelyn during this period. They would also resume caretaking Braelyn in late August 2012, and, as far as the record is concerned, remain her caretakers to this day.

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

The circumstances behind the five months plus during which Braelyn was not placed with the V.'s are these: Braelyn was formally declared a dependent of the juvenile court in September 2010.² About 18 months later, in the early spring of 2012, the 12-month review *still* had not been conducted. But mother, for her part, seemed to be making “moderate” progress in coping with her mental illness. Accordingly, the social services agency arranged a “trial visit” which entailed releasing Braelyn to mother’s care on March 23, 2012.

At the time, mother was living in Edward’s apartment, so in effect a return of Braelyn to mother meant that Braelyn would be in Edward’s household. By the time the 12-month review finally took place in mid-June 2012, the parties stipulated that there was “no risk” to the child being returned to her mother, in essence having the court formally ratify what the social services agency had already done back in March. In fact, the parties’ stipulation envisioned Braelyn’s permanent return to mother.

But things did not go as smoothly that summer as hoped. During mother’s and Edward’s tenure with the child, police were called out on no less than three separate occasions, each occurring, significantly enough, on dates *prior* to the mid-June 12-month stipulation which had been so optimistic. (These dates were April 28, May 13, and June 7.) The police calls were all prompted by various violent outbursts on mother’s part. It is undisputed that Edward did *not* inform social workers about these police incidents. He did not want (in his words) to go “behind her back” and undermine her trust in him. The net result was the mid-June stipulation which had been contemplated Braelyn’s permanent return to mother.

However, after yet another psychotic episode around August 21, 2012 – with mother doing lots of screaming and apparently attacking Edward and tearing at his

² The delay apparently can be attributed to father Brandon F.’s statement he might have Choctaw ancestry. The court was able to declare Braelyn a dependent only after it was determined Brandon was not a member of a Choctaw tribe, nor eligible for membership.

shirt – social workers were alerted and took Braelyn back into custody. The social service agency returned Braelyn to Deanna and John V.’s care by August 24. On August 29 the court made an order at a detention hearing formally vesting temporary care and placement of the child with the social services agency. For her part, mother would soon move to Arizona to be with her aunt and uncle.

Procedurally, the new detention resulted in social workers filing a supplemental petition (§ 387) to find Braelyn once again coming within section 300, subdivision (b) which, among other things, allows a court to find a child is within the jurisdiction of the juvenile court because of the failure or inability of a parent to supervise or protect that child due to the parent’s mental illness. As we have noted, Braelyn had *already* been declared a dependent of the juvenile court back in September 2010 and the dependency had never been terminated. So the filing of the supplemental petition created the anomaly that a dispositional hearing – something that usually happens early on in a dependency case – would soon need to take place. Simultaneously with the new supplemental petition, the original dependency proceedings had never gone away, so an 18-month review – with its possibility of a cutoff of all reunification services – was by now long overdue.

Given the sudden change in what had been the summer’s status quo of Braelyn living with her mother in grandfather Edward’s household, in mid-November 2012 Edward filed a request (pursuant to § 388) to change the placement of Braelyn from the V.’s to himself. He asserted social workers had “abused their discretion by not placing the minor with the maternal grandfather before the Disposition Hearing.” Accordingly, he asked the court to order “that under section 361.3 that it is in the best interest of the minor . . . to be placed back with the maternal grandfather.”

The upshot was that by the time of a hearing on December 10, 2012, there were no less than four discrete matters before the court, consisting of the supplemental petition, Edward’s section 388 motion, a disposition hearing, and a six-month review.

The court first heard testimony on the supplemental petition and sustained it. Braelyn was declared, yet again, as a child coming within the descriptions of a dependent of the juvenile court within the meaning of section 300. The court then determined to hear the dispositional hearing next – centered on whether Braelyn should be removed from mother’s care at all – and then proceed to Edward’s request, which might possibly be moot if the court determined that Braelyn should not be removed from mother’s care.

On January 16, 2013 the court decided mother should not have custody of Braelyn. The next day the court turned its attention to Edward’s section 388 petition.

As alluded to above, the evidence showed that a number of factors supported Edward’s request for placement. He was a financially stable, retired Marine with veterans’ benefits, a pastor, and could provide Braelyn with a spacious three-bedroom apartment.

However, the evidence also showed that Edward was (understandably, we might add) conflicted about his role vis-à-vis both his daughter and granddaughter. He admitted to not reporting to social workers the various incidents when police were called out to his address, saying he “would never have agreed” to “something like” a “role” of “watch dog” for them.

The trial court announced its decision on January 29, 2013. The trial judge clearly had section 361.3 in front of her, and she went through those factors seriatim before announcing her decision. The judge emphasized the contrast between the 22 months of continuity and peace of the placement with Deanna and John V., as against the relative turmoil that had occurred in the period March through August 2012 when Braelyn was in the trial visit with her mother. The V.’s household, said the judge, was the only home Braelyn had ever known “in which police are not regularly called, that people don’t slam doors and yell at one another.” She also noted Edward’s “split loyalties” between his daughter and granddaughter, with the mother’s tendency to become disruptive at home, “screaming and yelling, slamming doors.” Accordingly, the

judge denied Edward's petition and left care of Braelyn with the V's. Edward filed his notice of appeal the very next day.

Also on January 29, the court made orders terminating all reunification services to both parents. It further ordered a section 366.26 hearing be held within 120 days. Neither parent present any issues of their own in this appeal.

III. DISCUSSION

A. *Appealability*

We first must tackle an issue which is actually of more concern to us than to either Edward or the social services agency: Whether we should treat Edward's appeal as a proper appeal, or as a de facto writ petition? The matter is academic to both parties because the social services agency invites us to reach the merits of Edward's case even if his appeal turns out to be technically nonappealable. For us, however, it's a basic jurisdictional matter that must be confronted.

The agency's theory is that since the court terminated reunification services for both parents, and set a section 366.26 hearing at the same hearing in which it denied Edward's petition, Edward is precluded from appealing by virtue of the "writ it or lose it" rule set forth in section 366.26, subdivision (l). (E.g., *Jennifer T. v. Superior Court* (2007) 159 Cal.App.4th 254, 296 ["An order setting a section 366.26 hearing 'is not appealable; direct appellate consideration of the propriety of the setting order may be had only by petition for extraordinary writ review of the order.'"].)

The theory fails because no matter how you analyze the decision denying Edward's petition, it is either an appealable judgment, or an appealable order, and in neither case is it tethered to the setting of a section 366.26 hearing as contemplated by section 366.26, subdivision (l).

First, let's analyze the order the way the trial judge did, essentially as a part of a dispositional judgment under section 360.³ The applicable statute for relative placement, section 361.3, is part of a logical sequence to be followed by juvenile courts laid out in the Welfare and Institutions Code. In simplified form, that sequence goes like this: First, the juvenile court must establish jurisdiction over a child if the child comes within one of the "descriptions" laid out in section 300. Next, if the child comes within one of those descriptions, the court enters a dispositional *judgment* under the authority of section 360. (And "judgment" is the very word the statute uses.) In the process of making the dispositional judgment, the juvenile court must then consider whether the child should be removed from the parent's household given criteria found in section 361. If the child has to be removed, the court must then consider any requests for custody of a parent living outside the household at the time the need for the dependency arose, using criteria found in section 361.2. And finally, if there's no available parent with whom to place the child, the juvenile court should consider placement with a relative, under criteria found in section 361.3.

We think the judge's characterization of Edward's petition was correct. *Functionally*, Edward was really making a request for relative placement in the context of a need to make a dispositional judgment in the wake of the supplemental petition. There was nothing in what Edward requested that touched on the propriety of whether reunification services should have been discontinued or not. For example, in theory, the trial court could have chosen (a) not to have terminated reunification services for mother but changed the placement of Braelyn to Edward, or (b) terminated reunification services for mother and changed the placement of Braelyn to Edward. After all, Braelyn had to be

³ The judge characterized Edward's petition as "actually a request for the court to review placement," and proceeded to analyze the matter under section 361.3.

The minute order of January 29 states that "Court denies maternal grandfather motion filed under 388 which was actually 363.1" The reference to "section 363.1" was obviously a transpositional typo from 361.3. There is no section 363.1 in the Welfare and Institutions Code.

placed with *somebody*, regardless of whether the court scheduled a section 366.26 hearing or not.

Edward's request for relative placement thus walked, looked and quacked like the request for relative placement *in the context of making a dispositional judgment*, which it really was. And, of course, there is no doubt that a dispositional judgment is appealable. (See *In re Adam D.* (2010) 183 Cal.App.4th 1250, 1260-1261 [treating orders made by juvenile court as the "equivalent" of an order for informal supervision under section 360, subdivision (b) and therefore holding appeal attacking jurisdictional finding was appealable as an order entered at the dispositional hearing]; *In re Daniel K.* (1998) 61 Cal.App.4th 661, 668 [collecting authorities stating the dispositional order and all subsequent orders except for those setting section 366.26 hearings are appealable under section 395]; *In re Sheila B.* (1993) 19 Cal.App.4th 187, 196 [noting that the "dispositional order is the adjudication of dependency and is the first appealable order in the dependency process"].)

However, even if we were to dispense with functional equivalents and simply take Edward's petition at face value – as a section 388 modification petition – there is no doubt it is appealable as well. Our Supreme Court has clearly stated that orders denying grandparents' section 388 petitions are appealable. (See *In re K.C.* (2011) 52 Cal.4th 231, 235-236 ["Orders denying petitions under section 388 to modify prior orders of the juvenile court, such as the grandparents' petition in this case to modify the dependent child's placement, are appealable under section 395. Section 395 expressly provides that any order subsequent to the judgment under section 300 declaring a child to be a dependent "may be appealed as an order after judgment.""].) And we have already said about the need to place Braelyn somewhere, regardless of whether a section 366.26 hearing was scheduled, applies just as much if Edward's appeal is considered as coming from the denial of a section 388 petition. Again there is no necessary link between a modification motion and an order setting a section 366.26 hearing.

As between the two ways of analyzing the case, though, we think treating it as an appeal from a dispositional judgment to be the better course under the general rule that the law respects substance over form. (E.g., *In re Andrew L.* (2011) 192 Cal.App.4th 683, 690.) In context, Edward’s petition seems to fit more an informal relative request for placement prior to making a dispositional judgment than it does a section 388 petition seeking to change a previous court order. The last court order simply vested the social services agency with *discretion* to place Braelyn, and Edward’s own papers argued the agency, as distinct from the court, had abused its discretion in not placing her with him sometime after August. Accordingly, the caption to this option says it is an appeal from a “judgment,” not “order.” We now turn to the merits.

B. *The Merits*

The trial judge was doing Edward a favor in recognizing that his petition was functionally an informal request for relative placement in the context of a making a broader dispositional judgment, because the governing statute, section 361.3, provides that such a request is entitled to “preferential consideration.” (§ 361.3, subd. (a) [“preferential consideration shall be given to a request by a relative of the child for placement of the child with the relative”].)

However, at this point we must stop and recognize the limited scope of that word “preferential.” The statute itself defines “preferential” only in terms of place in line to be “considered and investigated.” (§ 361.3, subd. (c)(1).) Putting a relative at the head of the line does *not* create an evidentiary presumption in favor of that relative. (*In re Antonio G.* (2007) 159 Cal.App.4th 369, 376 [“Preferential consideration ‘does not create an evidentiary presumption in favor of a relative, but merely places the relative at the head of the line when the court is determining which placement is in the child’s best interests.’”].) We remain mindful that the abuse of discretion standard applies to *our* review of the trial court’s decision. As long as the decision was reasonable under the circumstances, it must be affirmed. (See *In re Robert L.* (1993) 21 Cal.App.4th 1057,

1067 [“We are persuaded that the abuse of discretion standard should be applied to the review on appeal of the juvenile court’s determination regarding relative placement pursuant to section 361.3. Such a determination, like decisions in custody cases, involves primarily factual matters and a judgment whether the ruling rests on a reasonable basis.”].)

Using a reasonableness standard, it is hard to see any abuse of discretion here. There is no doubt the trial judge actually considered, to the degree they were applicable, the list of factors set out in section 361.3. She went through those factors on the record, almost one by one.⁴ To recount her findings: The best interest factor (§ 361.3, subd. (a)(1)) favored leaving Braelyn with the V.’s, who offered “security and stability” as distinct from the turmoil ensuing after the March to August trial visit. The mother’s wishes (§ 361.3, subd. (a)(2)) were inconsequential, because at various times she had both supported and objected to placement with Edward; in the judge’s phrase, mother has been “consistently inconsistent.” No siblings were involved (§ 361.3, subd. (a)(4)). While Edward had established his good moral character (§ 361.3, subd. (a)(5)),

⁴ For convenience sake we will list the factors set out subdivision (a) of section 361.3 here:
“(1) The best interest of the child, including special physical, psychological, educational, medical, or emotional needs.
“(2) The wishes of the parent, the relative, and child, if appropriate.
“(3) The provisions of Part 6 (commencing with Section 7950) of Division 12 of the Family Code regarding relative placement.
“(4) Placement of siblings and half siblings in the same home, if that placement is found to be in the best interest of each of the children as provided in Section 16002.
“(5) The good moral character of the relative and any other adult living in the home, including whether any individual residing in the home has a prior history of violent criminal acts or has been responsible for acts of child abuse or neglect.
“(6) The nature and duration of the relationship between the child and the relative, and the relative’s desire to care for, and to provide legal permanency for, the child if reunification is unsuccessful.
“(7) The ability of the relative to do the following:
“(A) Provide a safe, secure, and stable environment for the child.
“(B) Exercise proper and effective care and control of the child.
“(C) Provide a home and the necessities of life for the child.
“(D) Protect the child from his or her parents.
“(E) Facilitate court-ordered reunification efforts with the parents.
“(F) Facilitate visitation with the child’s other relatives.
“(G) Facilitate implementation of all elements of the case plan.
“(H) Provide legal permanence for the child if reunification fails.”

the duration of his relationship (§ 361.3, subd. (a)(6)) was not as strong as that of the V.'s, since Braelyn had only been in his home for a few months, while Braelyn had been with the V.'s almost her entire life.

Turning to Edward's ability to provide in various ways for the child (§ 361.3, subd. (a)(7)), the trial judge zeroed in on Edward's "split loyalties between protecting the infant and protecting his daughter." The court noted that the baby had not done well in mother's care, and in fact had returned from her care mimicking "the very behavior of instability" that mother had exhibited in her psychotic episodes. Overall, the judge noted Braelyn has known "only one home in which police are not regularly called," and concluded that placement with Edward as distinct from the V.'s was not in Braelyn's best interests.

While we also recognize Edward's overall good moral character, success with his adoptive son, and his clear ability, *by himself*, to provide for Braelyn, it was not unreasonable for the trial court to emphasize the danger that Edward might not be able to isolate Braelyn from the harmful influences posed by mother. We simply cannot ignore the fact that Edward did not tell social workers of psychotic episodes that were disruptive enough to require the police to be called out. We would add, in this regard, that his silence seriously distorted the way the social services agency viewed the case back in June 2012 and artificially prolonged the "trial" visit. We doubt, for example, that on June 14, 2012, the social services agency would have been willing to stipulate to an order ratifying Braelyn's return to mother's care if it had known that just the week before, on June 7, mother's behavior had warranted a visit from the local constabulary.

Nor can we say the judge was unreasonable in finding Braelyn's best interests would not be served by placement with Edward. *Unlike the usual case resulting in a dispositional judgment*, this case involved a long status quo of 22 months in which the child was *already* thriving in foster care, contrasted with a disastrous trial visit. The sharp contrast between the V.'s success and the turmoil during the period when Braelyn

was in Edward's household (even if all the turmoil came from the mother) readily shows the court's decision to be reasonable.

IV. DISPOSITION

The dispositional judgment, in which grandfather Edward's request for relative placement under section 361.3, was denied is hereby affirmed.

BEDSWORTH, J.

WE CONCUR:

O'LEARY, P. J.

MOORE, J.