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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

ORLANDO A.,

Petitioner,

v.

THE SUPERIOR COURT OF ALAMEDA
COUNTY,

Respondent;

ALAMEDA COUNTY SOCIAL
SERVICES AGENCY et al.,

Real Parties in Interest.

A142721

(Alameda County Superior
Court Case Nos. SJ11018124 &
SJ11018125)

Petitioner Orlando A., presumed father of an eight-year old son, O.A., and a six-year old daughter, S.A., files a writ petition to set aside the juvenile court’s order setting a hearing, pursuant to Welfare and Institutions Code section 366.26, to adopt a permanent plan for the children.¹ For the reasons stated below, we deny the petition.

FACTUAL AND PROCEDURAL BACKGROUND

On December 19, 2011 the Alameda County Social Services Agency, Children and Family Services, filed a section 300 petition alleging that the minors O.A. and S.A. were at risk of harm, primarily due to the mother’s substance abuse, lack of cooperation with the agency, failure to enroll the older child in kindergarten, the children’s unkempt appearance, and the parents’ prior history in which another child had been detained and

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

ultimately removed from their care, despite their having been provided reunification services. Furthermore, the father was on dialysis and his ability to care for the children was unknown. He was also on long-term methadone treatment. Despite all this, when it filed the original petition, the agency did not recommend that the children be detained. Accordingly, the court did not initially detain them.

In its January 12, 2012 Jurisdiction/Disposition report, the agency, changed its recommendation, recommending that the children be detained and the parents not be provided with reunification services. At that time the parents were separated and the children were not residing with the father. The mother was continuing to use various illegal substances. The father was undergoing dialysis three times per week, for five and one-half hours at a time, and believed that his home was not appropriate for the children. He indicated that he may have been delirious when contacted by a social worker.² He felt that he could care for his children with his mother's help and, furthermore, that his mother could provide a good home for them.

On January 12, 2012 the court removed the children from the home. Five days later the agency filed a first amended petition. With respect to the father, that petition alleged that he attended dialysis three times per week and had been on methadone treatment for ten years, had a past substance abuse problem, and that his current drug use was unknown. He also failed to intervene when the mother hit their young son. Furthermore, his home was unkempt. It was a small one bedroom condominium with no beds for the children; it contained "minimal if any food," it lacked a working stove, and had a broken glass closet door which posed a safety hazard. On January 18, 2012 the court held a detention hearing on the amended petition, at which time it continued the minors' detention. At that time no suitable relatives had been identified to care for the children, so they were placed in foster care. On January 31, 2012 the agency filed an addendum to its January 12 report, which stated in part: "There is no doubt that the mother and father love their children, however, the responsibility that comes with

² The social worker claimed that she had spoken to him about a home visit, a claim he denied.

parenting is not taken into account. It is therefore respectfully recommended that the parents receive No Services as they failed to reunify with their older child . . . who was subsequently adopted and they have not mitigated their parenting problems/substance abuse despite having had services provided to them.” The parents requested a contested hearing.

The agency filed a second addendum on April 16, 2012, reiterating its recommendation that the children be placed out of the home and that reunification services not be provided to the parents. The father visited the children regularly, was on time for those visits, and was cooperative with staff. The mother, on the other hand, missed scheduled visits, was observed to be falling asleep during one visit, was still testing positive for drugs and was generally uncooperative with the visitation supervision process. Accordingly, the agency recommended discontinuing the mother’s visitation.

The children at this time were thriving out of the home. The social worker commented that the older child’s “presentation was so different that [she] initially did not recognize him in the classroom.” He was smiling, working independently, and following the rules with “minimal difficulty.” He had ceased his previous hoarding behavior and had decreased his bedwetting. The younger child also had decreased her bedwetting and was potty trained. She was attending a half-day pre-school and was learning to socialize with her peers. Both children were learning to be respectful to their elders and those in authority. In recommending adoption and that reunification services not be provided to either parent, the addendum stated, in part: “The father also neglected to protect the children from their mother. During the time the children and mother were residing with the father, he neglected to ensure that the children attended school. On the contrary, he has driven the mother to obtain drugs according to the mother. The father is now making some effort to distance himself from the mother as he states he has filed a restraining order against her and he has begun divorce proceedings; yet it is late as the children needed stability for the past few years.”

In response, the father filed a declaration indicating that he had initiated divorce proceedings and obtained a restraining order against the mother. He stated he was

participating in a three-month parenting class and provided verification of his enrollment in a methadone treatment program, as well as proof of negative drug tests for heroine since 2008. Responding to that filing, however, the agency in a second amended petition, alleged that the father had tested positive for cocaine or benzodiazepines seven times between October 3, 2011 and April 9, 2012. As a result of this new information the father requested and was granted a continuance to June 12, 2012.

On June 8, 2012 the agency filed a third addendum. The father indicated he was not using drugs on a daily basis. He also claimed that his positive benzodiazepine test was as a result of his taking a prescribed medication, clonidine. However, after consulting with the San Diego Reference Laboratories, the social worker confirmed that the prescription medications the father was taking would not result in a positive benzodiazepine test. The social worker described the father as minimizing his drug use, saying he used less than the children's mother did.

The Addendum Report filed by the agency on June 27, 2012 reflected that the parties reached a negotiated settlement regarding jurisdiction, pursuant to which the court sustained allegations that the father had failed to protect his children. Specifically, the court found that father's medical disability impairs his ability to raise his children because he was in dialysis treatment three times per week from 1:30 p.m. to 5:00 p.m., that he had been on methadone treatment for ten years due to his substance abuse issues, and that he had had five positive tests for cocaine between October 3, 2011 and March 5, 2012. Furthermore, due to abuse of another child, the father's parental rights regarding that child had been terminated.

According to the fourth addendum report, filed June 27, 2012, the parents agreed with the recommendation that they not be offered reunification services. By that time the children's maternal great aunt and uncle had agreed to become the children's legal guardians, with the goal of allowing the parents to assume the children's care in the near future. A pre-placement visit had taken place, which went well. The agency provided the relatives with funds to move to a larger apartment and purchase children's furniture, and the children were already living with their new caretakers.

On June 28, 2012 the court found that the minors' welfare required they be taken from their parents, that the agency had made reasonable efforts to return the children to a safe home, that the parents' progress had been minimal, that a permanent plan of legal guardianship was appropriate, and that the parents would not receive family reunification services. The court scheduled a hearing, pursuant to section 366.26, for October 25, 2012. However, according to the agency's October 12, 2012 report, the children's caregivers developed some reservations about becoming legal guardians, although they remained committed to caring for them. At that time the children had behavioral issues which required weekly individual therapy. They were described as adjusting to a living environment that provided consistency and structure and they were learning about boundaries and how to behave appropriately. In view of the caregivers' reluctance to become guardians, the agency recommended long-term foster care; it also recommended limiting the parents' rights to make educational decisions for the children.

The report also indicated that during this time period only one visit with the father had been scheduled—but that had not occurred. Furthermore, the caregivers informed the agency that the children refused to see their parents. When the social worker asked the older child why he didn't wish to see them, the child responded that his parents do "nasty stuff" in front of him. Asked to elaborate, he replied that they take off their clothes and the father "jumps" his mother while making punching gestures. The child told the social worker that when he got bigger he would beat his parents up. The caregiver reported that the child had also said he would kill his father.

On October 25, 2012 the juvenile court limited the right of the parents to make educational decisions for the children and set a contested section 366.26 hearing for December 4, 2012. At the December 4th hearing the court determined that reasonable services had been provided and ordered a permanent placement with the care providers. It also determined that a legal guardianship was not then in the children's best interests. It referred the parties to mediation and set a status review for May 21, 2013.

In May 2013 the agency recommended that the minors be maintained in long-term foster care with their relatives who had continued to care for them. At both the

May 21, 2013 and then the November 5, 2013 status hearings the court continued the children in the long-term foster care. Beginning on July 13, 2013, the father had his first supervised visit with the children. The father's attendance at these sessions was irregular, missing three scheduled visits in September and October 2013. Nonetheless, the father was described as "very appropriate and loving" during the visits he did attend. The mother, also, began supervised visits with the children, but did not show up regularly for all the visits. The social worker observed that the children appeared to be enjoying the visits with the parents and were adjusting to the father's visits. The caregiver reported that the children seemed to be more anxious before and after the visits; they then became upset and confused when their parents did not regularly attend all the scheduled visits. When asked how they felt about seeing her parents, the girl did not respond. The boy indicated that he really liked seeing them at first, but was very sad when his father did not visit him at one of the scheduled times (which was the child's birthday). Both children, however, stated that they wanted to keep seeing their parents.

On April 18, 2014 the agency submitted a status review report for the post-permanency plan review, pursuant to section 366.3, which governs orders adopting a permanent adoption plan. The report reflected the children's steady progress since November 2013. Reports from teachers, caregivers and therapists all indicated the children were improving both at home and at school. It described the children as "blossoming" under the care of their relatives. "The caregivers continue to demonstrate an extraordinary commitment to [the children] and their efforts are yielding dividends that can be seen in the progress that the children are demonstrating at both home and school." The social worker recognized a "deeply encouraging" transformation in the children, who were now very respectful towards their caregivers, were making good progress socially and academically, and were participating in weekly individual therapy. The caregivers felt ready "to pursue legal guardianship" and the agency recommended that the court so order.

On April 29, 2014, at the third post-permanency review hearing, the father requested a contested hearing. The court, however, declined the father's request and set

the matter for a section 366.26 hearing on August 7, 2014. On May 5, 2014 the father filed Notices of Intent to File Writ Petition. As a result of a problem in the superior court clerk's office, however, the notices were not properly processed. Therefore, the superior court continued the section 366.26 hearing to October 20, 2014 to rectify the situation and allow the father to file a writ petition in this court, challenging the juvenile court's order setting the 366.26 hearing. On September 5, 2014, however, in conjunction with granting a motion to augment the record, we stayed the October 20 hearing.

After receiving the father's petition on September 25, 2014, we issued an order to show cause. The agency filed its opposition on October 10, 2014; on October 17, 2014 the parties waived their right to oral argument in this court.

DISCUSSION

Both parties agree that, under the circumstances where the delay is not attributable to the father, we should hear this petition. We agree. Consequently, we exercise our discretion pursuant to California Rules of Court, rule 8.450(d) to extend the deadline for filing the petition in this case through September 25, 2014 and we will determine the petition on its merits.

The father's first argument is he did not receive adequate notice of the agency's proposed modification that the great aunt and uncle become the children's legal guardians. He was not notified of the recommended change from maintaining foster care to the setting of a hearing to terminate his parental rights until one day before the hearing.³ Furthermore, the notice, inaccurately informed him that the agency was not recommending any changes to the court's prior orders. Because of this, he contends, he was deprived of the "opportunity to properly assess, investigate, and respond to the agency's recommendation."

Although we recognize the defect in the notice, we do not believe that the father should reasonably have been so surprised by the changed recommendation that he was deprived of the opportunity to investigate the possibility that the children's caretakers

³ The hearing was held on April 29, 2014. The hearing was noticed on or about April 10, 2014.

would adopt them. As far back as June 12, 2012, the agency reported that the relatives “are willing to commit to adopting the children in the event that the children cannot be with their parents.” On June 27, 2012 the agency reported that “the maternal relatives at this time are committed to becoming the children’s legal guardianship [sic]. . . .” By October 25, 2012, however, the plan had changed because “the caregivers have some reservations about being the legal guardian for [the children].” Nonetheless, the agency intended to pursue that option with them. “Should the caregivers be ready and willing to pursue legal guardianship, the Agency will at that time request that a 366.26 hearing be set to establish legal guardianship.” The agency’s May 21, 2013 Status Review Report documents the caregivers continuing hesitancy to pursue legal guardianship because of the “intensity of the children’s behavioral problems.” The agency indicated its commitment to finding appropriate support services for the children and the caregivers and again stated, “The undersigned will also continue to discuss the possibility of legal permanence during the next reporting period.” By November 2013, the caregivers’ resistance to legal guardianship was waning, but they were concerned about losing the support services that had been provided. The social worker wrote, “The undersigned has been gradually building a team of support for the caregivers that will continue to be available to them even after dependency has been dismissed. . . . The undersigned will revisit establishment of guardianship with the caregivers during the next reporting period.” Given this history, the father cannot credibly claim that the changed recommendation was truly a surprise.

We review a failure to give notice in a dependency proceeding under a harmless error standard. (*In re A.D.* (2011) 196 Cal.App.4th 1319, 1325–1326 [discussing *In re James F.* (2008) 42 Cal.4th 901, 915 caution against importing a structural error analysis, developed in criminal cases, into the juvenile dependency context].) The father argues against modifying the placement plan to establish a legal guardianship. There will be an opportunity for him to litigate this issue at the section 366.26 hearing. Moreover, we see no likelihood that if the notice had been given earlier and was error-free, that the father would have obtained a more favorable result at this stage of the proceedings.

Consequently, we shall not disturb the juvenile court's ruling because of any deficiencies in the notice.

The father argues that he repeatedly requested, but was improperly denied, the opportunity to have a contested hearing. Father concedes, however, that the juvenile court may condition a contested hearing on an adequate offer of proof. (See *M.T. v. Superior Court* (2009) 178 Cal.App.4th 1170, 1180–1181.) Here, the agency promptly requested an offer of proof when the father first requested a contested hearing.⁴ The only substantive response was that the father did not wish to “have his children in a guardianship.” Presumably recognizing the inadequacy of this response, he now argues that because he did not receive adequate notice of the agency's changed recommendation, he should be excused from any requirement to have presented a more detailed offer of proof. This argument ignores that the issue of establishing a guardianship had been raised in this case approximately two years earlier, thereby providing him with adequate time to identify and investigate this issue. Furthermore, he still does not identify any valid reason not to hold the section 366.26 hearing.

The agency relies on *Sheri T.* (2008) 166 Cal.App.4th 334 in arguing that the juvenile court did not err in setting the section 366.26 hearing despite the father's objection and request for a contested hearing. In that case a three-year old child was removed from her parents and initially placed with her maternal grandparents. (*Sheri T.*, *supra*, at pp. 336–338.) Due to serious health problems with the maternal grandmother, however, the child was subsequently placed with her paternal grandparents. (*Id.* at p. 338.) However, the paternal grandfather developed a health problem; the maternal grandmother's health apparently stabilized, and she and her husband, then, wanted to adopt the child. (*Id.* at p. 339.) At the review hearing, the mother objected to a new permanent plan selection hearing and requested a contested hearing. (*Ibid.*) She argued

⁴ The fact that counsel, rather than the court, requested the offer of proof is irrelevant since the father was given an opportunity to make a full offer of proof. Regardless of who requested the offer of proof, the issue before the court was whether there was evidence of a factual basis to consider refraining from holding the hearing.

that just six months earlier the parties had stipulated that the child had a beneficial relationship with her mother and the fact that now the maternal grandparents wanted to adopt was not a sufficient reason to change course. The juvenile court, however, denied the request for a contested hearing and set a permanent selection hearing. (*Ibid.*) The court reviewed the salient points of law including that a child in long-term foster care is to have a status review every six months and a new permanent plan selection hearing every 12 months, unless holding such a hearing would not be in the child's best interests. Additionally, there is a preference for adoption rather than long-term foster care. (*Id.* at pp. 340–341.) Thus, when there are changed circumstances the court is obligated to hold a permanent plan selection hearing, unless the parent is able to show that there is a compelling interest not to. (*Id.* at p. 341.)

Here, the caretakers new-found willingness to adopt the children is a sufficiently strong changed circumstance, so as to necessitate the prompt setting of a permanent selection plan hearing. The father has failed to demonstrate that there is a compelling reason not to do so. Thus, the juvenile court did not err in setting the section 366.26 hearing.

Finally, like the mother in *Sheri T.*, the father is not prejudiced by the court's setting a section 366.26 hearing as he will have a full opportunity to litigate the proposed termination of his parental rights at that time. (*Sheri T.*, *supra*, 166 Cal.App.4th at p. 341.)

DISPOSITION

For the above-stated reasons, we deny the petition for an extraordinary writ. The stay issued by this court on September 5, 2014 is dissolved. Because of the delays stemming from the lower court's error in processing the notice of intent and in order to expedite final resolution of this case, our decision is immediately final as to this court. (Cal. Rules of Court, rules 8.452(i), 8.490(b)(2)(A).)

McGuinness, P.J.

We concur:

Pollak, J.

Jenkins, J.