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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

In re N.J., a Person Coming Under the
Juvenile Court Law.

B237727

LOS ANGELES COUNTY
DEPARTMENT OF CHILDREN AND
FAMILY SERVICES,

(Los Angeles County
Super. Ct. No. CK54338)

Plaintiff and Respondent,

v.

PATRICIA N.,

Defendant and Appellant.

APPEAL from an order of the Superior Court of Los Angeles County. David R. Fields, Judge. Affirmed.

Patricia N., in pro. per., for Defendant and Appellant.

John F. Krattli, Acting County Counsel, James M. Owens, Assistant County Counsel, Aileen Wong, Deputy County Counsel, for Plaintiff and Respondent.

Patricia N. (mother) appeals from a juvenile court order terminating her parental rights over N.J. We affirm the order.¹

FACTUAL AND PROCEDURAL BACKGROUND

N.J. first came to the attention of the Los Angeles County Department of Children and Family Services (DCFS) in January 2004, when she was nine years old. Mother and N.J. were homeless. Mother became upset when N.J. left a bag of mother's possessions on a bus. Mother told N.J., "I don't want you to come with me anymore, I don't want you to live with me anymore, I'm going to leave you at the fire station." Mother took N.J. to a fire station and said she had just found N.J. on the street and did not know her. As mother walked away, a fireman asked N.J. about mother; N.J. identified her as her mother. When the fireman attempted to follow mother, she ran away. Mother was stopped and arrested. She told police she did not care if she was arrested and did not care what they did with N.J. N.J. told DCFS mother had once spanked her with a belt.

N.J. was placed in foster care. In April 2004, the juvenile court sustained a dependency petition and asserted jurisdiction under Welfare and Institutions Code section 300, subdivisions (a) and (b).² The sustained petition included allegations that mother inappropriately disciplined N.J. by striking her with a belt, and mother abandoned N.J. at a fire station without making a plan for her care and supervision. The juvenile court ordered mother to participate in parenting classes, individual counseling, and conjoint counseling with N.J. when appropriate. Mother was to have monitored visits with N.J. Over the next 15 months, mother refused to participate in counseling. She remained homeless. Her visits with N.J. were irregular. At a March 2005 visit, mother used an abusive tone with N.J., which caused N.J. to be "visibly shaken" and made her cry. The monitor ended the visit. At a July 2005 visit, mother "spent most of the time talking about the conspiracy of the Court to take her child." In July 2005, the juvenile court terminated mother's reunification services. In August 2005, N.J. told DCFS she wanted

¹ Although N.J. is now 18 years old, all parties agree this issue is not moot.

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

to visit mother less frequently. In October 2005, the juvenile court selected foster care as the permanent plan. Mother did not appeal any of the above rulings. In January 2006, mother told DCFS she wanted visits at the DCFS office because she suspected people from a homeless shelter were following her to find N.J. and molest her, and that people were “out to get” mother. Mother said she would not carry a cell phone because of the “tracking signal.” N.J. wanted only monitored visits with mother.

In 2006, N.J. began living with her adult brother and his fiancée. Mother had inconsistent contact with N.J. Mother repeatedly told DCFS she felt people were conspiring against her and N.J.’s brother (her son) might be “in on the conspiracy.” She contacted police and accused N.J.’s brother of forcing N.J. to have sex with different men. Mother was living on the street. She refused to stay at a shelter that required her to sign documents relating to her mental health and providing consent to be involuntarily hospitalized if necessary.

In 2007, N.J. continued living with her brother and his fiancée. DCFS reported the arrangement was working out well, but indicated the brother was not yet willing to become N.J.’s legal guardian. Mother visited N.J. every few weeks. At a July 2007 hearing, mother told the court she was satisfied with her visits with N.J. and she wanted them to be monitored. She also told the court she was not mentally ill and she did not think there was “anything mentally crazy of me putting my child in foster care. I’m homeless and I had no way to support her, and I don’t think that’s crazy and everyone is projecting that there’s something wrong with me by [my] doing that [¶] I want it to be understood I don’t appreciate it and I want people to stop saying – I’ve asked the social worker to stop putting it into the reports that this whole case is because I have a mental problem”

In January 2009, mother filed a section 388 petition. The petition appeared to relate to child support assessments and a demand that DCFS stop making “slandering comments” about her. Mother asserted funds had been garnished from her bank account

for child support, causing her financial hardship. Mother also wanted N.J.'s home telephone number, rather than a cell phone.³ The juvenile court denied the petition.

In July 2009, mother waived her right to counsel and began representing herself. She subsequently filed two section 388 petitions. In one petition, she sought attorney fees and costs. In the other petition, she requested that the court reinstate reunification services. Mother asserted she had not complied with the juvenile court's reunification plan because "counseling is not necessary for abandonment charges," and "the cost to me has been unfair due to Child Support taking all of my money for reimbursement to the county." Mother further asserted she had been falsely accused of child abuse, and there was no evidence to support the finding that mother was "still considered a danger." The juvenile court denied both petitions.

In January 2010, DCFS reported that N.J.'s brother's father-in-law had died, and N.J.'s brother and his wife might have to relocate to Florida. DCFS indicated the brother was working with DCFS to make appropriate placement arrangements for N.J. Mother filed a section 388 petition requesting that the juvenile court terminate jurisdiction and return N.J. to her. For changed circumstances, mother asserted she was "not provided notice" and "did not have ample opportunity to refute" the allegations or "present conflicting evidence," apparently referring to the dependency petition. Mother alleged N.J.'s "caregiver" interfered with visits and was not cooperative. She stated she was the only person in N.J.'s life able to care for her without expecting compensation. The juvenile court denied the petition.

³ Mother's petition also included the following statement: "[N.J.] has no idea what she did when she did not guard that bag with all our important papers in it. She left us open to evil thing [*sic*] that could happen on the street. I'm not paranoid, but I am afr[ai]d that [N.J.] is not for me. She was with me but I am very hurt to think that she was not for me. I worked very hard to provide, care, and protect her and for her to be that careless with something so important it really got to me. I thought she was paying more attention to what I was doing as we went from shelter to shelter. Taking this pressure off me w[i]ll help to see where [N.J.] was back then and where she is now." Five years after the incident that precipitated the dependency, mother was apparently still upset that N.J., who was nine at the time, left a bag on the bus.

In March 2010, DCFS placed N.J. in foster care with an unrelated family. By July 2010, N.J. had not visited with mother for over a year, except at a team decision meeting held to determine her placement following her brother's relocation. N.J. did not want to have visits with mother until she had dealt with the transition to her new foster parents. The foster parents told DCFS they were interested in adopting N.J. or becoming her legal guardians, but N.J., now 16 years old, was not ready to make a decision.

In January 2011, DCFS reported N.J. was doing well in her placement. She was hesitant to have visits with mother. Eventually, N.J. agreed to have visits but she wanted her foster mother to be present. Mother told DCFS she would like to visit N.J. and speak with her on the telephone, "but that it is difficult given that she does not have an income, transportation, or stable housing and often has to report to shelters by the early afternoon in order to secure a bed for the evening."

By July 2011, N.J., now 17 years old, had decided she was willing to be adopted by her foster parents. The juvenile court ordered adoption as the permanent plan and set a section 366.26 hearing. In September 2011, mother filed a section 388 petition asking the court to "vacate [the] adoption application." Mother indicated she wanted to hear N.J.'s testimony on whether she wanted to be adopted, she asserted the foster parents only had a financial interest in N.J., and she claimed the foster parents would eventually abandon N.J. "as well." The juvenile court denied the petition.

At a November 2011 hearing, the juvenile court terminated mother's parental rights. Mother's appeal followed.

DISCUSSION

As we understand her arguments, mother contends on appeal: (1) the trial court erred in terminating her parental rights under section 366.26; and (2) the trial court should terminate dependency jurisdiction and return N.J. to mother's custody.⁴

⁴ Mother is representing herself on appeal. After mother filed her notice of appeal, this court sent her a notice indicating appointed counsel may be available if mother did not have funds to employ counsel. Mother responded by letter stating she wished to proceed in propria persona.

In connection with her second argument, mother asserts the “entire process should have never taken place.” Mother further contends her appointed counsel did not effectively represent her interests. We address each of mother’s contentions below.

I. Challenges to the Jurisdiction and Disposition Orders Are Untimely

To the extent mother challenges the juvenile court’s order asserting dependency jurisdiction over N.J., and the court’s disposition order, her appeal is untimely.

The juvenile court issued its jurisdiction and disposition orders on April 19, 2004. Mother did not appeal. “Appellate jurisdiction to review an appealable order is dependent upon a timely notice of appeal.” (*In re Elizabeth G.* (1988) 205 Cal.App.3d 1327, 1331.) To challenge findings or orders made at the disposition hearing or before, an appeal from the disposition had to be filed within 60 days after the order was made, subject to a short extension if the order was made by a referee not acting as a temporary judge. (Cal. Rules of Court, rules 8.400, 8.406(a); *In re Daniel K.* (1998) 61 Cal.App.4th 661, 666-667.) “An appeal from the most recent order in a dependency matter may not challenge earlier orders for which the time for filing an appeal has passed.” (*Sara M. v. Superior Court* (2005) 36 Cal.4th 998, 1018.) Mother cannot now challenge the jurisdiction or disposition orders.

In addition, mother cannot save her claims by characterizing them as ineffective assistance of counsel. As explained in *In re Jane J.* (1999) 74 Cal.App.4th 198, 206, in a dependency case “ ‘an unappealed disposition or postdisposition order is final and binding and may not be attacked on an appeal from a later appealable order. [Citations.]’ [Citation.]” This is sometimes referred to as the “waiver rule.” (*Id.* at pp. 206-207, 208.) Couching a challenge to an order as an ineffective assistance of counsel argument will only excuse an appellant from the waiver rule when there is an “apparent defect that fundamentally undermined the statutory scheme so that she was kept from availing herself of its protections as a whole,” and the defect was not merely error that might have been held reversible had it been timely reviewed. (*Id.* at pp. 208-209.) No such apparent defect is present here.

Mother contends her counsel was ineffective by failing to object to dependency jurisdiction, failing to file a section 388 petition regarding mother's changed circumstances relating to employment, and failing to apprise her of juvenile court hearings between February and August 2004. Some of these claims are directly contradicted by the record, but even if they were not, they do not reveal any error that fundamentally undermined the statutory scheme. Mother had multiple opportunities to file section 388 petitions prior to the termination of parental rights, and she did so. Although mother was not present at the jurisdiction and disposition hearing in April 2004, mother was represented by counsel, there was evidence that notice of the jurisdiction and disposition hearing was proper, and there was little dispute regarding the evidence supporting dependency jurisdiction and removal.⁵ Mother never denied that she attempted to abandon N.J. at the fire station, one of two bases for the court's assertion of dependency jurisdiction. (*In re Ashley B.* (2011) 202 Cal.App.4th 968, 979 [if one jurisdictional finding is supported by substantial evidence, it is immaterial that other findings might be unfounded].) Further, mother never contended N.J. could have safely remained in mother's custody in 2004. In 2005, mother made a successful *Marsden* motion and received new appointed counsel. (*People v. Marsden* (1970) 2 Cal.3d 118.) In 2009, mother waived her right to counsel and represented herself for the remainder of the proceedings.

We see no basis to excuse mother from the waiver rule under the circumstances of this case. She cannot challenge earlier final orders in this case under the guise of asserting ineffective assistance of counsel. Moreover, mother has only offered conclusory assertions of ineffective assistance of counsel without any citations to the

⁵ At the jurisdiction and disposition hearing, mother's counsel informed the court: "It's five minutes to 11. The mother has not shown today. She was here and present [for] the PRC. Language was discussed and negotiated, but she left prior to the hearing and that's why we set it for trial today. She did have an objection to the deletion of some of the words in the amended language, but I have no evidence today to counter the use of those – or the deletion of those words. So I'm going to submit on the state of the evidence and allow the thing to proceed."

record, or explanations of counsel’s alleged failings. There is no evidence that mother’s counsel failed to act in a manner to be expected of reasonably competent attorneys practicing in the field of juvenile dependency law. (*In re Melvin A.* (2000) 82 Cal.App.4th 1243, 1252.)

II. Substantial Evidence Supported the Juvenile Court’s Decision that No Statutory Exceptions to Termination of Parental Rights Applied

As we understand the remainder of mother’s arguments on appeal, she contends the juvenile court should not have terminated her parental rights because the beneficial parent-child relationship exception to termination of parental rights applied.⁶ We find no error.

Under section 366.26, subdivision (c)(1), the juvenile court must terminate parental rights if it finds by clear and convincing evidence it is likely the child will be adopted if parental rights are terminated. However, the court will not terminate parental rights if it determines doing so would be detrimental to the child based on one of several statutory exceptions. (§ 366.26, subd. (c)(1)(B).) The party challenging termination of parental rights bears the burden of proving that one or more of the statutory exceptions applies. (*In re C.F.* (2011) 193 Cal.App.4th 549, 553 (*C.F.*); *In re I.W.* (2009) 180 Cal.App.4th 1517, 1527.)

We review the juvenile court’s findings under section 366.26, subdivision (c)(1)(B) for substantial evidence. (*C.F.*, *supra*, 193 Cal.App.4th at p. 553; *In re Christopher L.* (2006) 143 Cal.App.4th 1326, 1333-1334.) “‘On review of the sufficiency of the evidence, we presume in favor of the order, considering the evidence in the light most favorable to the prevailing party, giving the prevailing party the benefit of every reasonable inference and resolving all conflicts in support of the order.’”

⁶ For example, mother states she feels “it is better for N.J. to be with [her]”; that the prolonged separation has caused N.J. shame and embarrassment; that mother is “the best person to mentor [N.J.] at this transition point in her life from adolescent to adulthood”; and the juvenile court “ha[d] no grounds to terminate my parental rights based upon their reasoning below: . . . amount of visits and quality of our contact has been very little.”

[Citation.]” (*C.F., supra*, at p. 553.) “Because a parent’s claim to . . . an exception [to termination of parental rights] is evaluated in light of the Legislature’s preference for adoption, it is only in exceptional circumstances that a court will choose a permanent plan other than adoption.” (*In re Scott B.* (2010) 188 Cal.App.4th 452, 469.)

To establish the beneficial parent-child relationship exception, mother had to prove termination of parental rights would be detrimental to N.J. because (1) mother maintained regular visitation and contact with N.J., and (2) N.J. would benefit from continuing her relationship with mother. (§ 366.26, subd. (c)(1)(B)(i).) Substantial evidence supported the juvenile court’s determination that this exception did not apply. Mother did not maintain regular visitation and contact with N.J. There were long periods during which mother did not visit N.J. at all, and there was evidence that mother did not contact DCFS during those periods to attempt to schedule a visit. Beginning in 2005, N.J. told DCFS she wanted only monitored visits with mother. By the time of the section 366.26 hearing, N.J. was ambivalent about having visits with mother, and was only willing to visit mother with her foster mother present. Moreover, N.J. was 17 years old and clearly expressed her desire to be adopted. This evidence supported a juvenile court finding that termination of parental rights would not be detrimental to N.J. The trial court properly concluded the beneficial parent-child relationship exception to termination of parental rights did not apply.

III. The Juvenile Court Did Not Err in Denying Mother’s Section 388 Petition

Finally, to the extent mother argues the juvenile court improperly denied her September 2011 section 388 petition, we find no error. “A juvenile court order may be changed, modified or set aside under section 388 if the petitioner establishes by a preponderance of the evidence that (1) new evidence or changed circumstances exist and (2) the proposed change would promote the best interests of the child.” (*In re Zachary G.* (1999) 77 Cal.App.4th 799, 806.) “The petition is addressed to the sound discretion of the juvenile court, and its decision will not be overturned on appeal in the absence of a clear abuse of discretion.” (*In re A.A.* (2012) 203 Cal.App.4th 597, 612; see also *In re Brittany K.* (2005) 127 Cal.App.4th 1497, 1505.)

Mother's section 388 petition did not identify any changed circumstances that would warrant the termination of jurisdiction or would provide a legal basis not to terminate mother's parental rights. Instead, mother contended there was no emergency necessitating that N.J. be adopted and that adoption would not be in N.J.'s best interests. This was not a proper basis for a change in juvenile court orders under section 388. The trial court did not abuse its discretion in summarily denying the petition without a hearing.

DISPOSITION

The juvenile court order is affirmed.

BIGELOW, P. J.

We concur:

RUBIN, J.

SORTINO, J.*

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.