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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

In re D.E., a Person Coming Under the
Juvenile Court Law.

B257895
(Los Angeles County
Super. Ct. No. CK87633)

LOS ANGELES COUNTY
DEPARTMENT OF CHILDREN AND
FAMILY SERVICES,

Plaintiff and Respondent,

v.

L.S.,

Defendant and Appellant.

APPEAL from an order of the Superior Court of Los Angeles County. Rudolph Diaz, Judge. Reversed with directions.

William Hook, under appointment by the Court of Appeal, for Defendant and Appellant.

Kate M. Chandler, under appointment by the Court of Appeal, for the minor, D.E.

Mark J. Saladino, County Counsel, Dawyn R. Harrison, Assistant County Counsel, Navid Nakhjavani, Deputy County Counsel, for Plaintiff and Respondent.

In the absence of the child's mother and maternal grandmother, without notice to either of them, and without a showing of a change of circumstances or the best interest of the child, the juvenile court granted the speaking motion of the child's attorney to terminate the child's overnight visits with his grandmother. The court summarily denied the grandmother's petition under Welfare and Institutions Code section 388, subdivision (a) to restore the overnight visits.¹ The mother, but not the grandmother, appeals the order refusing to reinstate the overnight visits.

We conclude that the child's mother has standing to appeal. We further conclude that the court should have treated the grandmother's petition as a request under section 385 for reconsideration of the order terminating her overnight visits. We reverse the order denying Grandmother's petition under section 388 and direct the court on remand to treat the petition as a request for reconsideration of its order revoking Grandmother's overnight visits with D.E.

FACTS AND PROCEEDINGS BELOW

In January 2013, the court declared seven-year-old D.E. a dependent child of the court under section 300, subdivision (b), based on its findings that the child's mother L.S. (Mother) abused alcohol, had recently been under the influence of alcohol while caring for D.E. and that the child's home was cockroach infested, contained rotting food and was otherwise "filthy and unsanitary." The court's disposition order placed D.E. in a foster home and granted Mother reunification services and monitored visitation.

The six-month review report by the Department of Children and Family Services (DCFS) noted that D.E. "may have unmonitored visits with [Grandmother] who has live-scanned."

A DCFS report prepared for the 12-month review hearing in January 2014, discussed D.E.'s overnight weekend visits with Grandmother. It stated that the DCFS worker "has observed the 2 bedroom 1 bathroom apartment" and that it is "appropriate."

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

The report further stated that “[D.E.] has his own room with a twin size bed when he visits; there are working smoke detectors, adequate furniture and food in the home. [D.E.] appears to enjoy the visits as reported by [him] and his current caregiver. [D.E.] also spent the Holidays with [Grandmother]. Caregiver has not reported any problems with minor [D.E.] following the visits, and reports he is happy to go and happy to return home.” The report concludes by noting that Grandmother has expressed an interest in adopting D.E., however Grandmother “has prior DCFS history which must be considered.”²

A subsequent report advised the court that this “prior DCFS history” consisted of several unsubstantiated referrals and two “[s]ubstantiated allegations for [e]motional [a]buse and [s]ubstantial [r]isk in 2001,” (13 years prior to the 12-month review hearing).³ There is no evidence in the record that either of these referrals resulted in a dependency petition.

A further report prepared for the 12-month review advised the court that Grandmother’s home had been approved as a residence for D.E.

Grandmother was not given notice of the 12-month review hearing and she was not present. Mother, who was homeless, had been present in court and “out in the lobby all day” but had to leave before the case was called in order to meet with someone who was going to help her find housing. D.E.’s counsel announced that she was waiving D.E.’s appearance “due to his cognitive delays.”

The court set a date for a contested hearing on terminating Mother’s reunification services and discussed a drug referral program with Mother’s counsel. The court then asked, “Anything else?”

The attorney for D.E. responded, “Yes. I’m asking the court to order that the child not have the weekend visits with the maternal grandmother.” Counsel gave as her

² The report erroneously stated that Mother was under a restraining order prohibiting her from having contact with D.E.

³ These allegations did not pertain to D.E. who was born in 2006.

reasons that Grandmother denied Mother had drinking and mental health problems and “has a lengthy child-abuse history with her own children . . . some not substantiated, but some substantiated.” “I am concerned,” counsel stated, “about her both not protecting the child from the mother prior to the court intervention, her attempting to make excuses, and deny that the mother had a problem . . . as well [as] her own lengthy child abuse history, so—” The court interrupted counsel at that point saying: “All right. That is the order of the court.” Mother’s counsel then spoke up and said: “I’d just object, for the record.”

D.E.’s case worker reported that soon after the 12-month review hearing she was contacted by Grandmother who “expressed her concern and disappointment in not being able to continue having overnight visits with [D.E.]” Grandmother told the worker that D.E.’s visits with her always go well and that while he is there he also visits with his 12-year old half-brother. It concerns Grandmother that D.E. “has been pulled away” from her “when things have gone so well with their visits.” Grandmother informed the worker “that she would like to have her Grandparents Rights and receive legal representation in Court.” The report concludes with the observation that D.E.’s foster parent “has not expressed any concerns regarding day or overnight visits with [Grandmother].”

In April 2014, Grandmother filed a petition under section 388 asking the court to reinstate her overnight weekend visits with D.E. and to direct DCFS to consider her for relative placement of D.E. She cited the DCFS report for the 12-month review hearing in which the agency expressed no safety concerns regarding her unmonitored overnight visits with D.E. On the contrary, she pointed out, DCFS and the foster parent agreed that D.E. enjoyed his visits with her and that no problems arose during or after the visits. Grandmother also stated that resuming D.E.’s overnight weekend visits with her would be in the child’s best interest “because of the close relationship” she and D.E. had enjoyed prior to the court’s order denying those visits.

At the hearing on the petition Mother’s counsel argued on behalf of Grandmother. She pointed out that she hadn’t known D.E.’s attorney was going to ask for a

modification of Grandmother's visitation and that she was caught off-guard by the request. Having spoken to Grandmother and Mother, she was now asking the court to reinstate Grandmother's overnight visits. She noted that DCFS knew about the two referrals involving Grandmother in 2001 but nevertheless found her home currently to be an appropriate residence for D.E. and that overnight visits with Grandmother posed no risk to the child.

The attorney for D.E. opposed the petition. She argued that Grandmother's finding out that the court had cut down her visitation rights without affording her notice and an opportunity to be heard was not a "change of circumstances" that would support a hearing under section 388. Furthermore, the attorney argued, granting Grandmother overnight visits with D.E. would not be in his best interest because (1) there was no evidence that D.E. and Grandmother shared a close relationship; (2) Grandmother's claim that she did not know about Mother's alcoholism and mental illness was not credible; (3) Grandmother had a record of two substantiated referrals for "emotional abuse" and "substantial risk" in 2001; (4) Grandmother could have requested that D.E. be placed with her but did not; and (5) D.E. feels comfortable with his foster parent and there is no need to move him.

The court ruled that it was "summarily" denying Grandmother's "request for placement" and modifying its previous order to prohibit overnight visits, not weekend visits.

Mother filed a timely appeal from the order denying Grandmother's section 388 petition. Grandmother did not appeal.⁴

⁴ While this appeal was pending the court awarded legal guardianship of D.E. to his foster family but did not terminate Mother's parental rights. This order does not affect the issue of Grandmother's visitation but it moots the issue of placement for purposes of this appeal.

DISCUSSION

I. MOTHER HAS STANDING TO APPEAL THE ORDER DENYING GRANDMOTHER'S REQUEST TO REINSTATE THE OVERNIGHT VISITS WITH D.E.

DCFS takes no position on the merits of this appeal but argues, along with the attorney for D.E., that Mother lacks standing to challenge the denial of Grandmother's section 388 petition to restore her overnight visits with D.E. We disagree.

As we observed in *In re Z.S.* (2015) 235 Cal.App.4th 754, 773, a person has standing to appeal from an order of the juvenile court if their "rights or interests are injuriously affected by the decision in an immediate and substantial way, and not as a nominal or remote consequence of the decision." (Quoting *In re K.C.* (2011) 52 Cal.4th 231, 236.) We liberally construe standing to appeal and resolve doubts in favor of standing. (*In re L. Y. L.* (2002) 101 Cal.App.4th 942, 948.)

The decision denying Grandmothers' section 388 petition affected Mother in an immediate and substantial way. Because Mother still has her parental rights she has a legally cognizable interest in whom D.E. visits. D.E.'s visits with his maternal grandmother are of substantial importance to Mother in terms of preserving D.E.'s family relationships (see *In re K.C.*, *supra*, 52 Cal.4th at p. 236) and could have a substantial effect on D.E.'s eventual placement with Grandmother (*In re Esperanza C.* (2008) 165 Cal.App.4th 1042, 1053). Moreover, the strength of the bond between D.E. and his maternal grandmother could have a positive effect on D.E.'s reunification with Mother.

II. THE COURT ERRED IN REVOKING D.E.'S OVERNIGHT VISITS WITH HIS GRANDMOTHER WITHOUT REQUIRING COMPLIANCE WITH SECTION 388, SUBDIVISION (A).

The court erred in revoking Grandmother's overnight visitation without requiring D.E.'s attorney to file a verified petition showing a change of circumstances and why revoking overnight visits would be in D.E.'s best interest as required by section 388, subdivision (a)(1).

Section 388, subdivision (a)(1) states in relevant part: "Any parent or other persons having an interest in a child who is a dependent child of the juvenile court . . . or

the child himself or herself . . . may, upon grounds of change of circumstance or new evidence, petition the court . . . for a hearing to change, modify, or set aside any order of court previously made or to terminate the jurisdiction of the court. The petition shall be verified and . . . shall set forth in concise language any change of circumstance or new evidence that is alleged to require the change of order or termination of jurisdiction.”

The court’s error in not proceeding under section 388 was prejudicial because the attorney for D.E. did not satisfy the requirements of that section with a verified petition showing a change of circumstances and why the elimination of overnight visits would be in the best interest of the minor. The evidence that D.E.’s attorney presented at the 12-month review hearing had been available since the inception of the case and was known to DCFS when Grandmother’s overnight visits began. Furthermore, neither the referral for emotional abuse in 2001 or Grandmother’s questioning Mother’s alcoholism and mental illness have any bearing on the suitability of D.E.’s overnight visits with Grandmother which D.E., DCFS and the foster parents all believed were going well.

III. THE COURT ERRED IN FAILING TO SET ASIDE ITS ORDER REVOKING D.E.’S OVERNIGHT VISITS WITH HIS GRANDMOTHER.

After the court revoked D.E.’s overnight visitation, Grandmother filed a verified petition under section 388 asking the court to “allow unmonitored visits for the child with [Grandmother] as previously occurred.” The petition pointed out that “[t]here were no safety concerns noted by DCFS” and that “DCFS noted how the child enjoyed the visits with [Grandmother] and caregiver noted no problems with the child after [Grandmother’s] visits.” The petition also stated that an order reinstating overnight visits “would be in the best interest of the child because of the close relationship child and [Grandmother] previously shared on a continuous basis prior to the Court order . . . when the Court stopped [Grandmother’s] visits with the child.” Grandmother concluded her petition by noting that: “No detriment was ever shown to child from [Grandmother]. In fact, DCFS reported how much child enjoyed visits.”

At oral argument on the petition Mother's counsel argued on behalf of Grandmother. She reminded the court that the request to cut off the overnight visits came "at the very end of the day" and stated: "I didn't know [D.E.'s attorney] was going to ask for that" and "I didn't have time to adequately respond." Counsel further noted that the visits with Grandmother had been going well according to D.E., the foster parents and the DCFS, the referrals D.E.'s attorney cited were from the "early 2000's," only one was substantiated, and that there was no evidence of any risk to D.E. from the overnight visits.

The court denied Grandmother's petition to restore her overnight visits with D.E. on the ground that she had not shown a change in circumstances.

Technically, the court may have been correct in finding that there had not been a change in circumstances in the four months since the court made its erroneous order halting D.E.'s overnight visits with Grandmother.

We need not decide that question because the court should have recognized from Grandmother's verified petition and her counsel's representations that its order revoking overnight visits was erroneously granted and should be vacated under statutory power conferred on the court by section 385.

Section 385 provides that: "Any order made by the court in the case of any person subject to its jurisdiction may at any time be changed, modified, or set aside, as the judge deems meet and proper, subject to such procedural requirements as are imposed by this article."

Addressing the juvenile court's statutory authority to correct an erroneous order the court in *Nickolas F. v. Superior Court* (2006) 144 Cal.App.4th 92, 110 explained: "[R]equiring that a party file a petition under section 388 before the court may modify the order, or worse, requiring that the parties comply with the erroneous order, would constitute a waste of time and resources. [Citation.] We conclude that in dependency proceedings, when the court recognizes that a previous order was erroneously,

inadvertently or improvidently granted, it is not necessary that a party file a section 388 petition in order to provide the court with the authority to modify that order.”

Here, the request by D.E.’s attorney to terminate overnight visits was improvidently granted because (1) it was not presented in the form of a verified petition with prior notice and a meaningful opportunity to be heard as required by section 388 and (2) the request was not based on a change of circumstances and there was no showing of how D.E. would benefit from this change in his visitation routine. The order should have been vacated under section 385.

DISPOSITION

The order denying Grandmother’s petition under section 388 is reversed. On remand the court shall treat the petition as a request for reconsideration of its order revoking Grandmother’s overnight visits with D.E. and shall reconsider the request by D.E.’s attorney for that order in accordance with the procedural requirements of section 388 taking into account any subsequent events that are relevant to the issue of Grandmother’s overnight visitation.

NOT TO BE PUBLISHED.

ROTHSCHILD, P. J.

We concur:

JOHNSON, J.

BENDIX, J. *

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