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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT
(Sacramento)

In re Samuel N. et al., Persons Coming
Under the Juvenile Court Law.

SACRAMENTO COUNTY DEPARTMENT OF HEALTH
& HUMAN SERVICES,

Plaintiff and Respondent,

v.

S. M.,

Defendant and Appellant.

C068334

(Super. Ct. Nos.
JD229808, JD229809 &
JD229810)

S. M., mother of the minors, appeals from orders of the juvenile court denying her petition for modification of the minors' placement, terminating parental rights as to two of the minors, and placing the third in long-term foster care. (Welf. & Inst. Code, § 366.26, 388, 395 [further undesignated statutory references are to the Welfare and Institutions Code].)

Appellant limits her argument to the placement of D.L. and contends the court erred in denying her petition for modification because the proposed change was in his best interest. We affirm.

Appellant does not challenge either the placement or the termination of her parental rights as to Samuel N. and Mike N., thereby abandoning those appeals. (*In re Sade C.* (1996) 13 Cal.4th 952, 994.) The appeals as to Samuel N. and Mike N. are dismissed.

FACTS

Two-year-old D. L. was detained in June 2009 due to appellant's substance abuse and placed in foster care with his half-siblings who were also detained. The maternal grandmother was assessed for placement but did not qualify and no other relatives were available for placement. At the initial hearing, appellant was ordered to disclose the identities of any maternal or paternal relatives of the minors. The Department of Health and Human Services (Department) assessed both the maternal grandfather, Andre M., and a family friend, Angela C., for placement. The preferred placement was with Andre M., reserving Angela C. as a backup placement. The maternal great-grandmother, Alice M., did not seek placement at this time although she was available to assist the maternal grandfather. In September 2009, the court ordered all the minors to be placed with Andre M. The court also ordered reunification services for appellant.

The review report filed in February 2010 recommended continued services for appellant. The Department was having problems with Andre M., who had not enrolled the oldest of the half-siblings in school and was not making dental and medical appointments for the minors. This was a particular problem for D.L. because a necessary hernia repair surgery could not be scheduled without a current child health exam on file. As a result, D.L. required emergency hernia repair surgery in January 2010. The surgeon wanted a follow-up appointment in two weeks, but Andre M. did not schedule it. There was no indication of behavioral problems with the minors and Andre M. was willing to be a guardian for them. The review hearing was continued.

In March 2010, the Department filed a supplemental petition (§ 387) to remove the minors from Andre M., alleging he was no longer an appropriate caretaker because he was not maintaining medical and dental appointments or enrolling the half-siblings in school. Andre M. absconded briefly with the minors to prevent removal. The court again ordered appellant to disclose the names of any maternal or paternal relatives of the minors and ordered the Department to evaluate any relative who came forward.

According to the detention report, by late February, the necessary appointments and school enrollment still had not occurred and the decision was made to remove the minors from Andre M. Alice M. did not seek placement of the minors at this time, believing they would be returned to Andre M.'s care. The minors were placed with Angela C., who was also a licensed

foster parent. The Department recommended the minors not be returned to Andre M.

An addendum report reviewed appellant's progress in reunification and recommended termination of services because she failed to engage in the various programs. In April 2010, the court sustained the supplemental petition, removed the minors from Andre M.'s custody, terminated services and set a section 366.26 hearing. The court declined to make a specific placement order with Angela C.

In July 2010, the Department moved the minors from the placement with Angela C. for their safety. D.L. and his older half-sibling reported they were spanked repeatedly and the older half-sibling disclosed that other children in the home coached them to have sexual interactions. Alice M. did not seek placement of the minors at this time.

The report for the section 366.26 hearing stated that the youngest half-sibling was diagnosed with failure to thrive in May 2010, although he had been low in weight prior to being placed with Angela C., and was gaining weight in the current foster home. D.L. was diagnosed with neurofibromatosis in March 2010 and needed checkups every six months. He also had speech delays and was eligible for special services. D.L. and two of his half-siblings showed some aggression when first placed in the new foster home. In Angela C.'s home, D.L. was very aggressive and hard to control. The older half-sibling was acting out sexually. Because there were no pending relative

assessments, the Department requested a continuance for home-finding.

An addendum report in November 2010 stated that the current foster mother was interested in adopting the minors. However, the oldest half-sibling had to be separated from D.L. and the other two minors due to her extreme sexualized behavior which was beginning to affect their behavior. The report further stated that D.L. was beginning to display similar behaviors and also might need to be separated from the two youngest minors. Due to concerns about the foster mother's ability to deal with the minors' behaviors, the Department needed more time for home-finding, although the plan remained adoption for D.L. and the two youngest minors. The maternal great aunt, Renae M., was being assessed for placement because she requested it, but the social worker had some concerns because she had provided weekend care when the minors were placed with Andre M.

At the section 366.26 hearing in December 2010, the oldest half-sibling was placed in long-term foster care and the matter was continued for D.L. and the younger half-siblings.

An addendum in February 2011 stated D.L.'s behavior continued to put his younger half-siblings at risk and they needed to be separated from him. Both Alice M. and Renae M. had expressed interest in placement. Alice M.'s home was found adequate for the minors, but Renae M.'s home was too small. The Department was concerned because neither came forward to be assessed for placement when the minors were removed from Andre M., although both provided care for the minors on weekends

during this time. They said they did not know the minors' needs were not being met, however, Alice M. said she did take the minors to doctor appointments occasionally. Neither one saw the distinctive café au lait spots, indicative of neurofibromatosis, on two of the minors; they minimized the need for emergency surgery for D.L.; they did not know the youngest half-sibling had been diagnosed with failure to thrive after removal from Andre M.'s care and thought he was now fat although he was still well below average on the growth charts. At visits Renae M. interacted well with the minors while Alice M. frequently sat in a chair and interacted from a distance. Renae M. was consistently better in parenting than Alice M. The Department determined that Renae M. may be an appropriate caregiver for D.L. if she received specific parenting training to deal with his aggression and sexualized behavior, got a larger home, and increased the flexibility of her work schedule. The Department assessed that Alice M. was not an appropriate placement because she cared for the minor on weekends when they were placed with Andre M. who did not meet their needs. The addendum recommended termination of parental rights for the two younger minors and long-term foster care for D.L.

In March 2011, D.L. was moved to a new foster home.

In April 2011, appellant filed a section 388 petition for modification seeking an order placing D.L. with Alice M. because the Department denied placement with Alice M. although her home had been approved in November 2010 and, as a relative, she was entitled to placement consideration pursuant to section 361.3,

subdivision (d). Appellant alleged the modification would be in D.L.'s best interest because Alice M. had known the minor his whole life and was committed to providing permanency for him.

The petition for modification was heard with the section 366.26 hearing. Trial on the issues commenced in April 2011. The social worker's supervisor testified that the issue of placement with Alice M. did not arise before her kinship approval when Renae M. was seeking placement.¹ She discussed placement of D.L. with the social worker who did not think placement with Alice M. was appropriate because there were questions about her ability to care for the minors based on her performance in visits. Further, while Alice M. had no legal responsibility to see that the minors got to medical appointments, she was one of the relatives who said they would help Andre M. care for the minors and yet they were medically neglected. The supervisor testified that the minors had unique needs and in talking with Alice M., it did not seem that she would be able to meet their needs, in part, because of her statements about the minors' needs and behaviors. The supervisor met with Alice M. during the assessment of Renae M. for placement. At that time, Alice M. did not want placement and was willing to be only a temporary caregiver, so the kinship assessment of her home was for visits, not placement. Alice M.

¹ A kinship approval is limited to an assessment of the physical home and does not address the individual's suitability as a caretaker.

asked for placement after the Department did not recommend placing all three minors with Renae M. During the assessment of Alice M. for placement, the Department disclosed all known problems with the minors to her. Alice M. said she had seen no such troubling behaviors in her house and they must be new.

The social worker testified that Alice M. identified Andre M. as a backup for her although she was told he neglected the minors. Further, Alice M. asked for all four minors although she was told about the serious sexual acting out of the older minors and the effects on the younger ones, showing a lack of understanding of the dangers to the younger minors. The social worker observed one visit where Alice M. sat in a chair and interacted with the minors from a distance. The foster agency visit supervisor told him this was typical. The social worker noted that the minors were very active and needed a lot of stimulation and questioned whether Alice M. could keep up with them over the long term.

Alice M. testified she wanted placement of all the minors and had helped care for them when they were placed with Andre M. She took Samuel N. to get immunization shots and took D.L. to a pre-operative appointment for surgery. The minors got along well in her care. Alice M. believed that Andre M. was adequately caring for the minors and did not abuse them but did need help. She had no dealings with the Department and would not have known who to call to get him help. She did not ask for placement earlier because she thought the minors would be returned to Andre M. After the minors were removed from Andre

M., she had no visitation privileges and no one told her why. Renae M. began visits, but Alice M. did not know how Renae M. got visits, only that she had to call someone. It was not until she got a packet of information during the home assessment that she had a telephone number to call. No one told her she was doing anything wrong in her visits or told her that she needed to interact with the minors more. She stated she would be willing to adopt the minors because she did not want them to grow up with strangers. She was unaware that the Department was involved until they came to do the home study. Alice M. further testified that during the time she was caring for the minors, someone came to her home to pick them up for a visit. The person called in advance but Alice M. had no idea who it was, although she thought it was a social worker.

When trial resumed, the foster agency social worker who acted as the visit supervisor, testified that Alice M.'s first visit was in December 2010 with the minors and Renae M. The visit supervisor stated that both Alice M. and Renae M. complained about the minors' behavior. There was a second visit in December 2010. Alice M. appeared to be a bit frustrated and called D.L. hard-headed. Alice M. sat in a chair for most of the visit but did engage the minors. The third visit was in January 2011. In this visit, Alice M. sat on the ground interacting with the minors for part of the visit. The fourth visit was in February 2011 and was observed by the social worker. Alice M. sat in a chair most of the visit complaining about the minors' behavior. At the fifth visit in March 2011,

Alice M. sat in a chair and called the minors to her. D.L. was destructive and aggressive but there was no indication Alice M. tried to redirect him. In the most recent visit in April 2011, the minors were more calm and Alice M. was interacting with them. In the visit supervisor's opinion, based on her observations, Alice M. did not have the capability to care for the minors because they needed a lot of attention and redirection. In particular, D.L.'s behaviors required a very skilled person to handle it and it did not appear Alice M. had enough skills to do so. In visits, Alice M. was easily frustrated, complained and did not interact during her time with the minors.

The court provided an extensive ruling, reviewing the history of the case, assessing credibility of witnesses, weighing testimony and discussing the factors in section 361.3, subdivision (a), when determining the best interest of the minor. The court found the Department had followed the law in assessing relatives after the detentions on both the original and the section 387 petitions and when the minors were removed from Angela C. and had made every effort to assess and recommend relative placement. The court stated that the February 2011 report is the first mention of Alice M. after the jurisdiction report and that the Department did an extensive assessment of her as a possible placement.

In ruling on the petition for modification, the court found there had been a change in circumstances and relied on the factors listed in section 361.3 for guidance in assessing the

best interests of the minors.² As to D.L., the court found it was not in his best interest to be placed with his siblings and concluded placing him with Renae M. would meet his needs because she had a positive placement assessment and had demonstrated her ability to care for him. Accordingly, the court denied the petition for modification to place D.L. with Alice M.

The court then considered the best interests of the two youngest half-siblings as it related to placement with Alice M. The court noted that the family had not suggested Alice M. for placement. She had relatively few visits with the minors and was passive in seeking both placement and visitation and ensuring the minors' safety, lacking either skill or motivation to determine the agency involved. The court noted that lack of action was acceptable if the family could solve the problems, but this family could not. Alice M. did not seek placement at any of the placement changes although she was on notice at several points that all was not well and was apparently only assessed as a backup to Renae M. The minors all need attention and monitoring due to their history of neglect from the parents

² Section 361.3, subdivision (a)(1-8) lists factors for the court to consider in determining whether placement with a relative is appropriate. The factors include, but are not limited to: best interest of the child; wishes of the parent; placement of siblings; the good moral character of the relative including prior violent criminal or child abuse or neglect history; nature of the relationship with the child; ability to provide a safe, stable environment, exercise proper care of the child, protect the child from the parents, facilitate visitation and provide legal permanence; and the safety of the home as assessed after an in-home inspection.

and Andre M. but Alice M. still did not see that his care was inadequate. The court doubted that Alice M. would see the minors' needs and act on them. Further, her ability to meet the minors' needs was an open question. The court believed she was not objective about Andre M.'s ability to care for the minors and would use him for child care. Moreover, while Alice M. was willing to adopt, it was primarily to prevent a stranger from adopting. The court could not be certain Alice M. would protect the minors, in part, because she intended to use family members as caretakers and did not question their unsuitability. It was not clear Alice M. could deal with day to day parenting and behavioral issues. Thus, while Alice M. was a caring grandparent and not a bad person, the minors needed a person who wanted to parent and embrace the responsibility, not one reluctant to come forward. The court concluded the evidence did not show the proposed change was in the minors' best interests and denied the petition for modification as to the two younger minors.

The court selected a permanent plan of adoption for the two younger minors and terminated parental rights. As to D.L., the court adopted the recommended findings and orders, placing the minor in long-term foster care and observing that reunification services had been terminated. Initially, the court ordered placement with the current caregiver and authorized placement with Renae M. with a specific goal of adoption. The Department's counsel noted that Renae M. had not stepped forward to do a kinship evaluation yet and the court modified its order

to strike authorization for placement with her. The court suggested that the Department keep an open mind about placement of D.L. with Alice M. because with visitation and services, she could become an appropriate placement, noting that the same issues applied to D.L. as to the other minors.

DISCUSSION

I

We first deal with respondent's procedural challenges to the appeal. Respondent argues appellant lacks standing to appeal the denial of her section 388 petition for modification and that the appeal is moot.

Respondent argues extensively that appellant lacks standing to appeal the juvenile court's ruling and therefore seeks dismissal of the appeal. Respondent also briefly argues mootness as grounds for dismissal. Appellant argues to the contrary in her reply brief, and also argues forfeiture of any claim regarding standing. Because we find mother's substantive claims without merit, we need not reach and decide the issues of standing and mootness. As we explain, even if we assume without deciding that mother has standing to appeal the juvenile court's orders, and further assume that her appeal is not moot, we affirm the orders of the juvenile court as to D. L.

II

Appellant contends the court abused its discretion in finding the proposed placement change was not in D.L.'s best interest.

A parent may bring a petition for modification of any order of the juvenile court pursuant to section 388 based on new evidence or a showing of changed circumstances.³ "The parent requesting the change of order has the burden of establishing that the change is justified. [Citation.] The standard of proof is a preponderance of the evidence. [Citation.]" (*In re Michael B.* (1992) 8 Cal.App.4th 1698, 1703.) Determination of a petition to modify is committed to the sound discretion of the juvenile court and, absent a showing of a clear abuse of discretion, the decision of the juvenile court must be upheld. (*In re Stephanie M.* (1994) 7 Cal.4th 295, 318-319; *In re Robert L.* (1993) 21 Cal.App.4th 1057, 1067.) The best interest of the child is of paramount consideration when the petition is brought after termination of reunification services. (*In re Stephanie M., supra*, 7 Cal.4th at p. 317.)

Here, the court found changed circumstances due to the need to move the minors and the resulting separation of D.L. from his

³ Section 388 provides, in part: "Any parent . . . may, upon grounds of change of circumstance or new evidence, petition the court in the same action in which the child was found to be a dependent child of the juvenile court . . . for a hearing to change, modify, or set aside any order of court previously made or to terminate the jurisdiction of the court. . . . [¶] (d) If it appears that the best interests of the child may be promoted by the proposed change of order, recognition of a sibling relationship, termination of jurisdiction, or clear and convincing evidence supports revocation or termination of court-ordered reunification services, the court shall order that a hearing be held"

half-siblings as well as D.L.'s potential placement with Renae M. rather than remaining in the current foster placement.

Initially, the court denied the petition for modification and authorized the Department to place D.L. with Renae M. However, after the Department reminded the court that Renae M. had not even applied for the kinship evaluation, the court struck that authorization and, noting that the same concerns about placement of the younger minors with Alice M. were present for D.L., left D.L. in the custody of the Department for placement. This effectively denied appellant's petition for modification for failing to establish the proposed change was in D.L.'s best interest. No one objected to the truncated ruling or asked for a more complete statement by the court thereby forfeiting any irregularity. (See *People v. Morris* (1991) 53 Cal.3d 152, 195 [objection forfeited by failure to press for a ruling]; *People v. Obie* (1974) 41 Cal.App.3d 744, 750 [same].) In any case, "[w]e uphold judgments if they are correct for any reason, 'regardless of the correctness of the grounds upon which the court reached its conclusion.' [Citation.] 'It is judicial action and not judicial reasoning which is the subject of review' [Citation.]" (*United Pacific Ins. Co. v. Hanover Ins. Co.* (1990) 217 Cal.App.3d 925, 933, fn. omitted.)

The evidence showed that Alice M. did not come forward until very late in the proceedings and the parents did not suggest her as a possible placement when given the opportunity to do so. She assisted Andre M. in caring for the minors yet saw no evidence of inadequate care although the youngest half-

sibling was diagnosed as failure to thrive after being in their care. She did not take any initiative in determining which governmental agency was responsible for D.L. or in securing visitation with him even when Renae M. was visiting. It was not until her home was assessed that Alice M. made an effort to become personally involved. Once visits began, instead of focusing on the minors, actively interacting with them and making efforts to control their behavior, Alice M. sat in a chair and called the minors to her or interacted from a distance, complaining about their behavior.⁴ She minimized the severity of D.L.'s behaviors, and did not show she was capable of handling his issues. Alice M.'s lack of skills and demonstrated passivity did not serve D.L.'s best interest. D.L. needed an able parent who could see and meet his needs and provide structure and stability to help him deal with his behavioral issues. The juvenile court did not abuse its discretion in denying the petition for modification.

Appellant contends the court blended the best interest analysis of section 388 with the determination of whether Alice M. was an appropriate placement pursuant to section 361.3. The court did not blend the analyses. In making its ruling, the court clearly stated that it was using the list of factors in

⁴ It appears from the record that the minors did not have serious behavioral problems until placed with Angela C., where they were repeatedly physically and sexually abused. There is no evidence Alice M. was aware of these conditions or their effect on the minors' behaviors until she began visits.

section 361.3 as a guideline in assessing best interest under section 388. The court did not require appellant to establish any of the factors. The factors were, at most, a framework for the court to organize the evidence.

Insofar as appellant argues the court did not independently review the Department's decision not to place D.L. with Alice M., that decision is separate from appellant's section 388 petition. The Department's decision affects only Alice M.'s interests and she did not challenge it. (*Cesar V. v. Superior Court* (2001) 91 Cal.App.4th 1023, 1028 [paternal grandmother challenged the agency's denial of placement at a permanency hearing].) Nonetheless, it is clear from the record that the court permitted extensive questioning on the issue and, in fact, reviewed the Department's decision. In denying the petition for modification, the court necessarily also found that the Department did not abuse its discretion in denying the placement.

DISPOSITION

The orders of the juvenile court as to D.L. are affirmed. The appeals as to Samuel N. and Mike N. are dismissed.

BLEASE, Acting P. J.

We concur:

HULL, J.

DUARTE, J.