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

In re ISAIAH M., a Person Coming Under the
Juvenile Court Law.

SACRAMENTO COUNTY DEPARTMENT OF
HEALTH AND HUMAN SERVICES,

Plaintiff and Respondent,

v.

MEGAN M.,

Defendant and Appellant.

C070971

(Super. Ct. No. JD230574)

Megan M., mother of the minor, appeals from orders of the juvenile court terminating her parental rights and denying her petition for modification. (Welf. & Inst. Code,¹ §§ 366.26, 388, 395.) Appellant contends the court erred in terminating parental rights because the evidence showed a substantial parent-child bond, the court did not inquire about guardianship with the paternal grandmother as an alternative to adoption,

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

the evidence did not support the finding the minor was likely to be adopted in a reasonable time, and the juvenile court erred in denying appellant's petition for modification. We affirm.

FACTS

The Sacramento County Department of Health and Human Services (department) filed a petition in March 2010 to remove three-year-old Isaiah M. from parental custody, alleging the minor had serious injuries that he said were inflicted by appellant's boyfriend. Although initially denying the minor was injured, when confronted by photographs, appellant agreed that the minor was bruised. Appellant stated there was no domestic violence in the home, but she would choose the minor over her boyfriend. The minor was placed with relatives. The juvenile court sustained the petition in May 2010.

Appellant participated in services pending the disposition hearing and insisted she was not in contact with the boyfriend. The department made efforts to transition the minor from foster care to his father's care, but the minor was not ready for that change. Due to the abuse he suffered, the minor had trust issues and needed predictability in his life. At disposition, the juvenile court ordered services for both parents.

Appellant continued in services and told the social worker she had severed her relationship with the boyfriend. Visits were going well and the plan was to begin unsupervised visits. An investigation two months later disclosed that appellant, in spite of her assurances, was in a continuing relationship with the boyfriend, who had again physically abused the minor during an unsupervised visit.

In October 2010, the relative caretakers asked for the minor's removal because the chaos of the dependency was affecting their family. The minor was placed in a nonadoptive foster home.

The six-month review report said appellant was continuing to attend some services but had not begun others. Visits were now supervised. The report concluded the parents

had not yet benefitted from services and recommended continued foster placement and services. The juvenile court adopted the recommendations.

The review report in June 2011 recommended further services for appellant and continued foster placement for the minor. The minor had some physical and emotional issues and was in therapy. Placement with the paternal grandmother was being considered. Visits between the minor and appellant were going well. Appellant had again transitioned to unsupervised visits with the understanding that there was to be no contact with the boyfriend. The minor said he wanted to live with appellant. Appellant maintained that she was no longer in a relationship with the boyfriend. The court adopted the social worker's recommendations and set an 18-month review hearing.

Appellant had begun unsupervised visits on June 2, 2011; by the end of the month, the minor's toilet training had regressed and he was having daily accidents. Visits were increased in July 2011 and appellant continued to represent she had no contact with the boyfriend. However, in late July, the minor told his foster mother that the boyfriend would be in the home when he began overnight visits and that appellant and the boyfriend were getting married. The minor continued to report contact with the boyfriend at visits. The minor began refusing to talk with his therapist after having told her that appellant was pregnant.

The report for the 18-month review hearing recommended terminating services and setting a selection and implementation hearing. Appellant had given birth in August 2011 to the minor's half sibling and, while she denied the boyfriend was the father of the child, he insisted that he was. The minor continued to have toileting issues and his therapist was working with him on expressing his feelings. In a joint therapy session with the minor, appellant had to be encouraged to interact with him. Unsupervised visits continued until the social worker verified appellant and the boyfriend were still in a relationship. Visits thereafter were supervised. At the review hearing, the court terminated services and set a selection and implementation hearing.

In February 2010, the department filed a petition to modify the minor's placement from foster care to relative placement with the paternal grandmother. The court granted the modification.

The assessment for the selection and implementation hearing stated appellant had monthly supervised visits and called the minor daily. Appellant often had little interaction with the minor in visits although her interaction with him improved when the visits were videotaped. The minor was placed with the paternal grandmother who was interested in adoption. The social worker had discussed other permanency options with the paternal grandmother, however she was committed to adoption. The assessment concluded the minor was likely to be adopted in a reasonable time because he was young, healthy, developmentally and educationally on track and had no behavioral issues. The minor continued to say he wanted to live with appellant.

Prior to the selection and implementation hearing, appellant filed a petition for modification, seeking return of the minor to her care or additional service. She argued, as changed circumstances, that the boyfriend was ordered to do services in the half sibling's case, had completed some services, and was participating in others. Appellant alleged she had recognized the importance of being straightforward and honest with the department. Appellant alleged the proposed change was in the minor's best interest because she maintained daily contact with the minor, he wanted to live with her, and he would have access to his half sibling.

In an addendum report, the department opposed the modification insisting circumstances had not changed and the proposed modification was not in the minor's best interest. The department pointed to the fact that appellant's boyfriend was the minor's abuser and the minor continued to maintain that he was injured by the boyfriend. The department also emphasized that appellant had previously insisted she was choosing the minor over the boyfriend but did not do so. Further, the boyfriend is the father of the half sibling who was removed from appellant's care based on the minor's injuries, appellant's

dishonesty, and her minimization of the minor's abuse. The minor was currently placed with the paternal grandmother and the department recommended that daily telephone calls from appellant should be reduced to decrease the minor's confusion about where he would be living. The addendum concluded that appellant was not offered services in the half sibling's case and had not considered the impact on the minor of living with the boyfriend. Moreover, the petition did not establish a compelling reason to delay permanency for the minor.

The court denied the request for testimony and accepted the offer of proof set forth in the petition for modification. The court found the minor still feared the boyfriend and that, even if the boyfriend changed his behavior, it did not justify delaying permanency for the minor. The court stated that, even if circumstances were changed, the modification was not in the minor's best interests although the minor wanted to live with appellant because he also was afraid of the boyfriend and appellant continued to choose the boyfriend over the minor. The court denied the petition for modification.

At the selection and implementation hearing, the family service worker who had supervised visits testified the minor appeared to be happy and excited when she picked him up for visits. She said that sometimes appellant interacted with the minor and sometimes she did not, simply allowing him to play with toys and come to her. The minor did show affection toward appellant at visits.

Appellant also testified. She described a recent visit and her weekly telephone calls with the minor. The minor asked her about coming home and asked about the boyfriend. Appellant said that visits went well and in the two or three visits which included the half sibling, the minor seemed to have a good relationship with her.

In ruling, the court agreed with the department that the minor was generally adoptable and likely to be adopted in a reasonable time. In assessing the benefit exception to termination of parental rights, the juvenile court found appellant had regular visits but the relationship was not a parent-child relationship. As to the sibling exception,

the court found the minor and his sibling were not raised together and had no common experiences or bonds and termination would not interfere with the sibling relationship. The court adopted the recommended findings and orders and terminated parental rights, selecting a permanent plan of adoption.

DISCUSSION

I

Petition For Modification

Appellant contends the court erred in denying her petition for modification because the minor was bonded to appellant and wanted to live with her and because appellant had previously participated in services.

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.² “The parent requesting the change of order has the burden of establishing that the change is justified. [Citation.] The standard of proof is 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.)

² 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 the court previously made or to terminate the jurisdiction of the court. . . . [¶] . . . [¶] 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 hearing be held”

The best interests of the child are of paramount consideration when the petition is brought after termination of reunification services. (*In re Stephanie M.*, *supra*, 7 Cal.4th at p. 317.) In assessing the best interests of the child, the juvenile court looks not to the parent's interests in reunification but to the needs of the child for permanence and stability. (*Ibid.*; *In re Marilyn H.* (1993) 5 Cal.4th 295, 309.) In assessing best interests, the court may consider "(1) the seriousness of the problems which led to the dependency, and the reason for any continuation of that problem; (2) the strength of relative bonds between the dependent children to both parent and caretakers; and (3) the degree to which the problem may be easily removed or ameliorated, and the degree to which it actually has been." (*In re Kimberly F.* (1997) 56 Cal.App.4th 519, 531-532.)

The unacknowledged physical abuse of the minor which also impacted his emotional stability and led to his removal from the home was an extremely serious problem. Worse, despite extensive services, appellant continued to maintain and conceal a relationship with the abuser who again inflicted physical abuse on the minor during unsupervised visits. Appellant's continued protestations that she was choosing the minor over his abuser and had recognized the importance of honesty with the department were belied by her actions. The minor had some bond to appellant but she did not display a strong reciprocal commitment to him. Appellant had participated in services but had not benefitted from them and was denied services in the half sibling's case. The minor needed security, predictability, and a safe loving environment. Granting the petition for modification would not have furthered the minor's interests and the juvenile court properly denied it.

II

Adoptability Of Minor

Appellant argues there was insufficient evidence the minor was likely to be adopted in a reasonable time.

“If the court determines, based on the assessment . . . and any other relevant evidence, by a clear and convincing standard, that it is likely the child will be adopted, the court shall terminate parental rights and order the child placed for adoption.” (§ 366.26, subd. (c)(1).)

Determination of whether a child is likely to be adopted focuses first upon the characteristics of the child. (*In re Sarah M.* (1994) 22 Cal.App.4th 1642, 1649.) The existence or suitability of the prospective adoptive family, if any, is not relevant to this issue. (*Ibid.*; *In re Scott M.* (1993) 13 Cal.App.4th 839, 844.) “[T]here must be convincing evidence of the likelihood that the adoption will take place within a reasonable time.” (*In re Brian P.* (2002) 99 Cal.App.4th 616, 624.) The fact that a prospective adoptive family is willing to adopt the minor is evidence that the minor is likely to be adopted by that family or some other family in a reasonable time. (*In re Lukas B.* (2000) 79 Cal.App.4th 1145, 1154.)

The assessment for the selection and implementation hearing stated the minor was young, healthy, and developmentally and educationally on track. He was described as friendly and attractive with no behavioral issues. He was in therapy and his toileting issues had resolved. The paternal grandmother wanted to adopt him. Ample evidence supported the juvenile court’s finding the minor was likely to be adopted in a reasonable time.

Appellant cites the “numerous placements,” the minor’s brief bullying behaviors in foster care, his age, and the fact that the minor wanted to live with appellant, not the paternal grandmother.

The minor was initially placed with a maternal cousin who asked to have him removed due to funding issues and appellant’s behavior, which created chaos in the family, not due to any characteristic of the minor. The next placement was a nonadoptive placement with a foster family. The final placement was with the paternal grandmother. When the minor was placed with the foster family there was a child in the home and the

minor did well with the other child and they continued to have contact after that child left. Later, a second child was placed in the home briefly and some negative behaviors appeared but there is no evidence the minor's behavior caused the second child's removal and the behaviors were dealt with in therapy. By the time of the selection and implementation hearing, the minor was in school and having no behavioral difficulties. The minor was just five years old at the time of the selection and implementation hearing. While not an infant, the minor was still quite young and the adoption assessment did not consider his age to be a barrier to his being adopted. The minor consistently said he wanted to live with appellant and, nine months before the court placed the minor with the paternal grandmother, he had said he did not want to live there, but, after placement occurred he was making a good transition to the paternal grandmother's home and was bonding with her. None of these circumstances singly or together undermine the court's finding the minor was likely to be adopted in a reasonable time by the paternal grandmother or someone else.

III

Termination Of Parental Rights

Appellant first contends that the juvenile court erred in terminating parental rights because there was evidence of a beneficial parent-child relationship.

At the selection and implementation hearing held pursuant to section 366.26, a juvenile court must choose one of the several “ ‘possible alternative permanent plans for a minor child. . . . *The permanent plan preferred by the Legislature is adoption.*” [Citation.]’ [Citations.] If the court finds the child is adoptable, it *must* terminate parental rights absent circumstances under which it would be detrimental to the child.” (*In re Ronell A.* (1996) 44 Cal.App.4th 1352, 1368.) There are only limited circumstances which permit the court to find a “compelling reason for determining that termination [of parental rights] would be detrimental to the child.” (§ 366.26, subd. (c)(1)(B).) The party claiming the exception has the burden of establishing the

existence of any circumstances which constitute an exception to termination of parental rights. (*In re Melvin A.* (2000) 82 Cal.App.4th 1243, 1252; Evid. Code, § 500.)

Termination of parental rights may be detrimental to the minor when: “The parents have maintained regular visitation and contact with the child and the child would benefit from continuing the relationship.” (§ 366.26, subd. (c)(1)(B)(i).) However, the benefit to the child must promote “the well-being of the child to such a degree as to outweigh the well-being the child would gain in a permanent home with new, adoptive parents. In other words, the court balances the strength and quality of the natural parent/child relationship in a tenuous placement against the security and the sense of belonging a new family would confer.” (*In re Autumn H.* (1994) 27 Cal.App.4th, 567, 575.) Even frequent and loving contact is not sufficient to establish this benefit absent a significant positive emotional attachment between parent and child. (*In re Beatrice M.* (1994) 29 Cal.App.4th 1411, 1418-1419; *In re Teneka W.* (1995) 37 Cal.App.4th 721, 728-729.)

The strongest evidence of the relationship between appellant and the minor is his continued desire to live with appellant and the positive supervised visits. However, appellant’s level of interaction in the visits was indifferent and, when visits were unsupervised, she was unconcerned about leaving the minor with the abusive boyfriend despite reports that the minor was afraid of him. Appellant continued to make choices which put her needs and desires ahead of protecting and nurturing the minor. Further, due to the abuse, both physically and emotionally, which the minor suffered while in appellant’s care, this very young child had trust issues and needed predictability in his life. Only adoption could provide the level of security and stability the minor needed. Appellant failed to establish that benefit to the minor of continued contact with her promoted “the well-being of the child to such a degree as to outweigh the well-being the child would gain in a permanent” home. (*In re Autumn H., supra*, 27 Cal.App.4th at p. 575.) The juvenile court correctly determined the benefit exception did not apply.

Appellant next asserts the orders terminating parental rights must be reversed because all permanent placement options other than adoption were foreclosed.

The Legislature has identified several alternative permanent plans including adoption, tribal customary adoption, guardianship with a relative caretaker or a nonrelative, and long-term foster care. (§ 366.26, subd. (b) (1-6).) Adoption provides the greatest permanence for a dependent child, and if the child is likely to be adopted, then the juvenile court shall terminate parental rights unless termination would be detrimental to the minor. (§ 366.26, subd. (c)(1).)

Detriment may be established in several ways. (§ 366.26, subd. (c)(1)(A) & (B).) One of these is when there is a relative caretaker who is unable or unwilling to adopt but is still capable of providing a stable environment through guardianship when removal of the child from the custody of the relative would be detrimental to the emotional well-being of the child. (§ 366.26, subd. (c)(1)(A).)

Appellant recognizes the issue of relative guardianship was not raised in the trial court but argues forfeiture does not apply because the question is one of law. We disagree. Because the issue was not presented in the juvenile court, we cannot assume that the facts which appear in the record were undisputed or even complete. This can be demonstrated by examination of a single factor, i.e., that removal of the child from the custody of the paternal grandmother would be detrimental to the emotional well-being of the child. The only evidence in the record is that of the child doing well in the placement and beginning to bond with the paternal grandmother. Without more, it would be a speculative and an unjustified leap to conclude that removal from this budding relationship would be detrimental to the emotional well-being of the child. The issue has been forfeited for failure to raise it in the juvenile court. (*In re Christopher B.* (1996) 43 Cal.App.4th 551, 558.)

In any case, the record reflects that the social worker did discuss various permanency options with the paternal grandmother and the paternal grandmother was clear that she wanted to adopt the minor. No error appears.

DISPOSITION

The orders of the juvenile court are affirmed.

ROBIE, J.

We concur:

BLEASE, Acting P. J.

DUARTE, J.