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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

In re L.M. et al., Persons Coming Under the Juvenile
Court Law.

C076973

SACRAMENTO COUNTY DEPARTMENT OF
HEALTH AND HUMAN SERVICES,

(Super. Ct. Nos. JD232689 &
JD232690)

Plaintiff and Respondent,

v.

D.M.,

Defendant and Appellant.

D.M., the mother of the minors L.M. and T.S., appeals from the juvenile court’s orders terminating parental rights as to L.M. (Welf. & Inst. Code, §§ 366.26, 395.)¹ Mother contends the juvenile court erred in failing to find the sibling relationship exception to adoption, and the court abused its discretion in failing to find T.S.’s father to be L.M.’s presumed father.

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

We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

In 2012, mother lived with the minors T.S. (born August 2011) and L.M. (born March 2010) and T.S.'s father, I.S., in the maternal grandmother's home. In April 2012, the Sacramento County Department of Health and Human Services (DHHS) received a referral alleging mother was abusing prescription medication and broke into her friend's home to steal while the minors waited outside the house in her car. Mother subsequently told a social worker she had been prescribed Norco for a back injury and was taking 20 pills a day. She said she was an addict but denied using illegal substances. Both children tested positive for opiates at birth, although mother had a prescription for Vicodin when one of the children was born.

DHHS received a second referral in April 2012, this time for mother being under the influence of Xanax, fumbling while changing a diaper, and for being high on prescription drugs daily while taking care of the minors. An emergency social worker responded to the home and found mother asleep while the children slept in another room with the baby monitor turned off. Mother agreed to informal services in May 2012, but was arrested two days later for driving under the influence, child endangerment, and driving with a suspended license. Both minors were in the car, which had collided with two parked vehicles. Mother admitted to the police that she used Norco, Xanax, Klonopin, methadone, and marijuana prior to driving.

In June 2012, mother was arrested for burglary two days after her preliminary drug and alcohol assessment for her treatment program. In July 2012, DHHS received reports of domestic violence perpetrated by I.S. against mother. In August 2012, mother was discharged from her outpatient drug treatment program because she needed a higher level of treatment. Later that month, she was admitted to an inpatient treatment facility but was later discharged for refilling her prescription for pain medication.

DHHS contacted L.M.'s father, S.E., in September 2012. S.E. had never met the child, who he said was conceived during a one night stand. He had submitted a blood test confirming paternity after the child's birth, and a paternity and child support order naming him as the father were in effect. S.E. did not want anything to do with mother or L.M.

DHHS filed a dependency petition in September 2012, alleging jurisdiction over the minors based on mother's substance abuse problems, domestic violence involving I.S., and I.S.'s alcohol abuse problems.

At the September 2012 detention hearing, mother's counsel told the juvenile court that S.E. was not present at L.M.'s birth, did not sign a declaration of paternity, and had never seen the child or provided him with any support. S.E.'s counsel told the court S.E. was interested in setting aside paternity. Counsel for I.S. told the court L.M. lived with I.S. since he was four months old and I.S. was seeking presumed father status regarding L.M. The juvenile court invited the parties to submit points and authorities regarding a motion to set aside a judgment of paternity. The minors were detained and placed with the maternal grandmother.

The October 2012 jurisdiction and disposition report related that S.E. told the social worker he wanted to sign away his parental rights and did not desire reunification services. Mother said that at the height of her addiction, she was taking 100 to 150 pills of opiate based medications a day. She was taking methadone to wean herself from opiates.

Mother and I.S. had been in a relationship for about two and a half years but were now separated. I.S. admitted having two prior convictions for driving under the influence of alcohol. T.S. was I.S.'s only biological child but he held out L.M. as his own and considered him to be his son as well. I.S. visited both minors at the maternal grandmother's home.

At the October 2012 disposition and jurisdiction hearing, the juvenile court found I.S. was T.S.'s adjudicated father and S.E. was L.M.'s adjudicated father. The juvenile court sustained the petition and ordered services for mother and I.S.; S.E. waived services.

An April 2013 report related that mother continued to fail in drug treatment by testing positive and/or missing required meetings. She had pending criminal cases from hitting the parked car and from burglarizing her friend's house. The minors were doing well in the maternal grandmother's home. I.S. was in compliance with drug court and was participating in a parenting program. His twice weekly visits with the minors were positive and appropriate.

Mother entered an inpatient treatment program in March 2013. Thereafter, she attempted to move to another treatment program by lying to her counselor. She was discharged from the program in May 2013 after testing positive for opiates.

The October 2013 report stated both mother and the maternal grandmother agreed it would be "devastating to split the boys up" and therefore agreed that both children should be placed with I.S. I.S. graduated from dependency drug court in August 2013. He started unsupervised visits with the minors in May 2013.

In October 2013, the juvenile court continued the 12-month hearing so that I.S.'s counsel could research and file a motion for I.S. to achieve paternity over L.M. At the continued hearing, the juvenile court terminated mother's services as to both minors and continued services for I.S. I.S.'s counsel informed the juvenile court there were problems with I.S. getting paternity for L.M. due to the previous judgment of child support against S.E., but counsel was "continuing to research the issue of whether or not [I.S.] can establish parentage over [L.M.]." Counsel also told the court that S.E. would have to file a motion to overturn the prior judgment of paternity.

The 18-month report recommended returning T.S. to his father I.S. I.S. had a well furnished two-bedroom home with room for the minors. He successfully completed his

case plan and had consistent visits with both minors, including overnight visits on Saturdays. The report noted that T.S. lived with L.M. his entire life, and that “[t]hey are very close and the bond is evident in their interactions together.” The report also noted that the minors “are very attached to the maternal grandmother” and I.S. agreed that consistent visits with her were in the minors’ best interests. The parties initially agreed on the minors being with I.S. on four consecutive nights and with the maternal grandmother on the remaining three. However, the adoptions social worker was not happy with this arrangement given I.S.’s criminal history, which would prevent him from passing the kinship placement or adoption assessment.

According to the February 2014 selection and implementation report, L.M. lived in the maternal grandmother’s house since his birth. He had a strong relationship with the maternal grandmother and goes to her to get his needs met. The maternal grandmother was interested in adopting L.M. and had been cleared for criminal records and past child welfare referrals. She assured DHHS that L.M. would continue to have contact with I.S. Although I.S. expressed interest in having L.M. placed with him, his criminal record prevented him passing an adoption home study and therefore he could not adopt L.M.

Mother filed petitions for modification (§ 388) regarding each child in April 2014. She sought the minors’ return or the reinstatement of reunification services based on her completing various classes and the minors’ interest in maintaining a bond with her.

At the combined section 366.26 and section 388 hearing in July 2014, mother presented testimony from a psychiatrist and from herself in support of the section 388 petitions. Regarding the minors’ placement, mother testified that L.M. did not understand why he was not allowed to go to his “daddy’s” house when his brother went there. According to mother, “[t]he bond they have now will be broken if they grow apart I want them to be together.” Mother’s counsel argued that the parent/child bond exception to adoption applied to this case.

The juvenile court denied the section 388 petitions and terminated parental rights as to L.M.

DISCUSSION

I. Sibling Relationship Exception

Mother contends the juvenile court erred in failing to find the sibling relationship exception to adoption.

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.]’ [Citation.] If the court finds the child is adoptable, it *must* terminate parental rights absent circumstances under which it would be detrimental to the child. [Citation.]” (*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 Cristella C.* (1992) 6 Cal.App.4th 1363, 1372-1373.)

Termination of parental rights is detrimental to the child when “[t]here would be substantial interference with a child’s sibling relationship, taking into consideration the nature and extent of the relationship, including, but not limited to, whether the child was raised with a sibling in the same home, whether the child shared significant common experiences or has existing close and strong bonds with a sibling, and whether ongoing contact is in the child’s best interest, including the child’s long-term emotional interest, as compared to the benefit of legal permanence through adoption.” (§ 366.26, subd. (c)(1)(B)(v).)

There is a “heavy burden” on the parent opposing adoption under the sibling exception. (*In re Daniel H.* (2002) 99 Cal.App.4th 804, 813.) “To show a substantial

interference with a sibling relationship the parent must show the existence of a significant sibling relationship, the severance of which would be detrimental to the child. Many siblings have a relationship with each other, but would not suffer detriment if that relationship ended. If the relationship is not sufficiently significant to cause detriment on termination, there is no substantial interference with that relationship.” (*In re L.Y.L.* (2002) 101 Cal.App.4th 942, 952, fn. omitted.)

The legislative author of the sibling exception envisioned that its applicability would “ ‘likely be rare.’ [Citation.]” (*In re L.Y.L., supra*, 101 Cal.App.4th at p. 950.) This language from the legislative history has been interpreted to mean “that the child’s relationship with his or her siblings would rarely be sufficiently strong to outweigh the benefits of adoption.” (*Ibid.*)

DHHS asserts mother forfeited the contention by failing to raise it with the juvenile court. Mother claims two instances show she raised the sibling relationship exception in juvenile court, her testimony at the section 388 and section 366.26 hearing that the minors’ “bond they have now will be broken if they grow up apart, and I do not want my children to grow apart. I want them to be together,” and counsel’s statement at the hearing, “[a]nd although I don’t necessarily believe I addressed that as an exception to the .26 -- I’m kind of winging off here because I think it does apply -- that it could be in these children’s best interests to be able to have a relationship with each other through the mother as the parent.” Assuming these statements preserve the issue on appeal, we find that mother has not carried her burden of establishing the exception.

There is some evidence of a bond between the minors, statements to that effect by mother and the maternal grandmother and a social worker’s observation that the two minors are bonded to each other and would suffer if separated. However, while the minors’ lived together their entire lives, they were still comparatively young, being three and nearly four years old at the time of the July 2014 section 366.26 hearing. Balanced against this was the clear harm to L.M. if the sibling bond exception was applied.

Placing him with I.S. would separate him from the maternal grandmother, the most consistent parental figure in his life and a person with whom he was closely bonded. Applying the exception would also deprive L.M. of permanency, as he would have to be placed with I.S., who could not adopt him because he could not complete the home study due to his criminal record. In this context, a few bare statements in the record showing a bond between the siblings does not satisfy the heavy burden of establishing the sibling bond exception.

II. Family Code Section 7612, Subdivision (d)

Mother contends it was an abuse of discretion for the juvenile court not to apply recent changes to Family Code section 7612 to find I.S. was L.M.'s presumed father.

Presumed father status is the most advantageous to a father in the dependency system. Only a presumed father is entitled to reunification services under section 361.5, subdivision (a), and custody of the minor pursuant to section 361.2. (*In re Jerry P.* (2002) 95 Cal.App.4th 793, 801.) Presumed fatherhood, for purposes of dependency actions, refers to a situation in which a father comes forward promptly and demonstrates a complete commitment to his parental responsibilities. (*Id.* at pp. 801-802.) It is the burden of the father to prove by a preponderance of the evidence that he is a presumed father. (*Glen C. v. Superior Court* (2000) 78 Cal.App.4th 570, 585-586.) Family Code section 7612, subdivision (d), expressly provides that the presumption "is rebutted by a judgment establishing parentage of the child by another person."

I.S. held L.M. out to be his child, he lived with the boy for much of his life, and the minor referred to I.S. as his father. However, pursuant to Family Code section 7612, subdivision (d), the judgment of paternity against L.M.'s birth father, S.E., rebuts the presumption of paternity for I.S. It is for this reason that I.S.'s counsel told the juvenile court she was looking into ways to set aside S.E.'s judgment of paternity. There is no record of S.E.'s paternity being set aside and I.S. never formally sought presumed father status as to L.M. Since neither of L.M.'s parents completed their services and no

exception to adoption existed, parental rights as to L.M. were terminated. Since I.S. was not L.M.'s presumed father and he could not complete the adoption home study due to his criminal record, L.M. was placed with his maternal grandmother with a permanent plan of adoption.

Mother contends that the judgment of paternity as to S.E. was not a bar to I.S. also establishing paternity. She relies on recent changes to Family Code section 7612, which renumbered former subdivision (c) as subdivision (d) and enacted a new subdivision (c), which reads: "In an appropriate action, a court may find that more than two persons with a claim to parentage under this division are parents if the court finds that recognizing only two parents would be detrimental to the child. In determining detriment to the child, the court shall consider all relevant factors, including, but not limited to, the harm of removing the child from a stable placement with a parent who has fulfilled the child's physical needs and the child's psychological needs for care and affection, and who has assumed that role for a substantial period of time. A finding of detriment to the child does not require a finding of unfitness of any of the parents or persons with a claim to parentage." According to mother, I.S. should have been granted presumed father status as it was "the best logical scenario, as recognized by all parties."

At the February 2014 18-month review hearing, I.S.'s counsel informed the court that she would be filing a written motion at the request of county counsel to have I.S. recognized as L.M.'s father under the changes in the law allowing a child to have more than two legal parents. No such motion was filed by I.S. or by mother or any other party.² The failure to file an appropriate action to establish paternity for I.S. with respect

² A child's mother may file an action to establish paternity under Family Code section 7611. (Fam. Code, § 7630, subd. (a)(1).) Mother therefore has standing to raise this issue on appeal, but she also had standing to make the motion in the juvenile court.

to L.M. forfeits mother's contention on appeal. (*In re S.B.* (2004) 32 Cal.4th 1287, 1293; *In re Dakota H.* (2005) 132 Cal.App.4th 212, 221-222.)

Anticipating our ruling, mother contends counsel was ineffective for failing to file an action to have I.S. declared a presumed father under the new law. We conclude that mother has failed to show that her counsel provided ineffective assistance of counsel. Further, assuming mother can raise the issue of ineffective assistance of I.S.'s trial counsel, we find mother cannot establish her burden of showing ineffective assistance.³

To establish ineffective assistance of counsel, a defendant must show (1) counsel's performance was below an objective standard of reasonableness under prevailing professional norms, and (2) the deficient performance prejudiced defendant. (*Strickland v. Washington* (1984) 466 U.S. 668, 688, 691-692 [80 L.Ed.2d 674]; *People v. Ledesma* (1987) 43 Cal.3d 171, 216-217.) “ ‘Surmounting *Strickland*'s high bar is never an easy task.’ ” (*Harrington v. Richter* (2011) 562 U.S. 86, ___ [178 L.Ed.2d 624, 642], quoting *Padilla v. Kentucky* (2010) 559 U.S. 356, ___ [176 L.Ed.2d 284, 297].) “If the record ‘sheds no light on why counsel acted or failed to act in the manner challenged,’ an appellate claim of ineffective assistance of counsel must be rejected ‘unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation.’ [Citation.]” (*People v. Ledesma* (2006) 39 Cal.4th 641, 746.) Ordinarily, the proper recourse to raise an ineffective assistance of counsel claim is by a petition for writ of habeas corpus, rather than by direct appeal. (*In re Darlice C.* (2003) 105 Cal.App.4th 459, 463.)

³ Although a parent's right to effective assistance of counsel in dependency proceedings is personal (*In re S.A.* (2010) 182 Cal.App.4th 1128, 1134), nonetheless “ ‘[w]here the interests of two parties interweave, either party has standing to litigate issues that have a[n] impact upon the related interests.’ ” [Citation.]” (*Ibid.*) Since mother could file an action to declare I.S. a presumed father, her and I.S.'s interests interweave on this matter, giving her standing to raise the ineffective assistance of I.S.'s counsel.

The record contains insufficient evidence to determine why I.S.'s counsel did not file an action pursuant to the changes in Family Code section 7612. This is not a case where there is no satisfactory explanation for counsel's failure to act. For example, it is possible that I.S. had a change of heart about getting presumed father status as to L.M. He could have determined that he lacked the resources to be a parent to both children or that L.M.'s close bond with the maternal grandmother warranted keeping him with her. Since we do not know why counsel decided not to file the paternity action, mother's contention fails. To the extent that mother argues her own counsel was ineffective, her claim fails for the same reason.

DISPOSITION

The juvenile court's orders are affirmed.

MURRAY, J.

We concur:

BLEASE, Acting P. J.

NICHOLSON, J.