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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

In re S.A., a Person Coming Under the
Juvenile Court Law.

RIVERSIDE COUNTY DEPARTMENT
OF PUBLIC SOCIAL SERVICES,

Plaintiff and Respondent,

v.

M.A.,

Defendant and Appellant.

E054613

(Super.Ct.No. SWJ007791)

OPINION

APPEAL from the Superior Court of Riverside County. Michael J. Rushton,
Judge. Affirmed.

Nicole Williams, under appointment by the Court of Appeal, for Defendant and
Appellant.

Pamela J. Walls, County Counsel, and Anna M. Deckert, Deputy County Counsel,
for Defendant and Appellant.

Appellant M.A. (mother) is the mother of S.A. (the child). The court adjudged the child to be a dependent of the court and ordered mother to participate in reunification services. She failed to participate in her case plan, and the court terminated her services. It then ordered that the child's permanent plan be long-term foster care, with the goal of legal guardianship. On appeal, mother argues that the court violated her due process rights when it denied her request for a contested postpermanency review hearing. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Detention

On October 3, 2007, the Riverside County Department of Public Social Services (the department) filed a juvenile dependency petition, pursuant to Welfare and Institutions Code¹ section 300, on behalf of the child.² She was five years old at the time. An amended petition was later filed. The amended petition alleged that the child came within the provisions of section 300, subdivisions (b) (failure to protect), and (g) (no provision for support). The petition included the allegations that mother had previously received reunification services and family maintenance services with regard to the child, she neglected the health and safety and dental/medical needs of the child, she had a history of substance abuse, she had a criminal history and a history of mental health

¹ All further statutory references will be to the Welfare and Institutions Code, unless otherwise noted.

² On October 27, 2011, this court, on its own motion, ordered the record in case No. E049588 to be incorporated in the record in the instant case (case No. E054613).

problems, and the whereabouts of the child's father were unknown.³ The juvenile court detained the child and placed her in foster care.

Jurisdiction/disposition

In a jurisdiction/disposition report filed on October 22, 2007, the social worker recommended that mother be provided with reunification services. Mother was having supervised visits with the child. Their interactions were appropriate, and they appeared to enjoy their time together.

In an addendum report filed on January 18, 2008, the social worker changed the recommendation to denying reunification services. Mother had informed the social worker that she was not interested in being provided services. The social worker reported that after mother visited the child on November 11, 2007 and November 18, 2007, the child experienced disturbing nightmares. She also struggled in school the day after visits. The foster family reported that mother tended to express anger and resentment when talking with the child, and that she had told the child she wished the child had never been born.

The court held a contested jurisdiction/disposition hearing on April 1, 2008. The court found that the child came within section 300, subdivisions (b) and (g), and adjudged her a dependent of the court. The court ordered reunification services for mother.

³ The child's father is not a party to this appeal.

Six-month Status Review

The social worker filed a six-month status review report on April 29, 2008, and reported that since the last hearing on April 1, 2008, mother had not maintained contact with the department. She was given several referrals, but was still unwilling to participate in services. Nonetheless, the court continued her services at the six-month hearing.

12-month Status Review

In the 12-month status report, the social worker recommended that the court terminate mother's reunification services and set a section 366.26 hearing. The social worker reported that the child had had strange dreams about her mother killing her and the foster mother. The child insisted that she would not want to live with mother again. The child was very happy in her placement and wanted her foster mother to adopt her.

Mother visited the child once or twice a month in the last reporting period. They reportedly appeared to enjoy their time together. However, there were times when mother became confrontational with the social worker and needed to be directed as to how to conduct herself during visits. At one visit, mother told the child she was going to try to get her back. The child became fearful and worried that she would be returned to her mother's care and would not be safe.

In an addendum report, the social worker reported that she received a letter from a psychologist who had evaluated the child. The child had informed him that she was molested on numerous occasions by her older brother and mother. The psychologist recommended that all visits and contact by mother be suspended until an investigation by

the department could be completed. The child informed the psychologist that she was in great fear of her mother and brother. The court, however, ordered that supervised visitation continue, but that they be conducted at the department's office in Hemet or Temecula. Visits continued and were appropriate.

At a 12-month review hearing on April 2, 2009, the court granted mother another six months of reunification services.

18-month Status Review

In a report filed on September 17, 2009, the social worker reported that mother was unemployed. She resided in Borrego Springs, but refused to disclose any information regarding her residence or circumstances.

The social worker reported that mother had ample opportunity to complete her case plan, but she had not shown any interest in complying, except for visitation. The social worker recommended that visitation be reduced to one time a month.

The social worker continued to recommend that reunification services be terminated and a section 366.26 hearing be set. The child's adult sister wanted to adopt her and was in the process of having her Interstate Compact on the Placement of Children (ICPC) application approved with the State of Washington.

In an addendum report, the social worker reported that mother was arrested on August 30, 2009, and was expected to be incarcerated until November 8, 2009.

At the hearing on October 27, 2009, the court terminated mother's reunification services and reduced her visitation to one visit a month. The court found that adoption was the appropriate permanent plan and scheduled a section 366.26 hearing for February

24, 2010. The court also ordered that the child be placed with her sister in Washington upon the approval of the ICPC. The parties stipulated to having the postpermanency review on the same date as the section 366.26 hearing.

Section 366.26 and Section 366.3

In a section 366.26 report filed on February 9, 2010, the social worker reported that mother was visiting the child monthly. Mother acted appropriately during the visits; however, the child had a negative reaction to the visits, often having nightmares about being sexually abused.

On February 24, 2010, the section 366.26 hearing was continued to June 24, 2010, to await the ICPC approval. The child's sister decided she could not adopt the child, but her in-laws came forward to adopt the child. They were also in Washington. The court set the section 366.3 postpermanency hearing for August 25, 2010.

In a section 366.3 review report filed on August 13, 2010, the social worker stated that mother's current whereabouts were unknown. The last time the social worker spoke with her, mother confirmed that the department should use her post office box address to correspond with her. Mother was homeless and did not disclose any other information regarding her circumstances. The social worker reported that mother had only visited the child twice in the past six months.

In an addendum report, the social worker reported that the child did not wish to be adopted by her sister or her sister's in-laws, because her sister's husband was "very mean to her." Her sister's family concluded that it would be best to cease the ICPC process. The child wanted to stay with her current foster mother, and the foster mother said she

would like to take legal guardianship of the child. However, the foster mother's circumstances subsequently changed, as she had begun taking care of relatives who were ill. The foster mother felt that she was no longer able to become the child's legal guardian. Nonetheless, she wanted her relationship with the child to continue. Thus, the department recommended a permanent planned living arrangement.

In a status review report filed on February 9, 2011, the social worker reported that mother had only spoken with the child on the phone three times in the past six months. During those calls, she argued with the child, told her she was lying, and used profanity. The social worker therefore recommended that future calls be monitored by the foster parent.

At a combined section 366.26 and 366.3 hearing on February 24, 2011, mother was present. The court established a planned permanent living arrangement in the current foster home, with a specific goal of legal guardianship. The court also ordered phone calls to be monitored, as recommended. In addition, the court set the next permanency planning review hearing date for August 23, 2011, and ordered mother to appear on that date. Mother also filed a change of mailing address form with the court, indicating her new address.

Postpermanency Review

On or about July 29, 2011, the department mailed a notice of the August 23, 2011 review hearing to mother at the address she had submitted. The notice indicated the social worker was recommending that there be "[n]o change in orders, services, placement, custody, or status."

In a postpermanency status review report filed on August 10, 2011, the social worker changed its recommendation to having all contact between mother and the child terminated. The social worker reported that visits were held on February 5, 2011, April 7, 2011, and June 6, 2011, and that mother was verbally aggressive with the foster mother. She also continued to curse in her conversations with the child and the foster mother. Numerous phone calls had to be terminated due to her inappropriate language and what she communicated. During the last phone conversation, mother told the child that the court would be returning her to mother's custody at the next hearing, that she had met with the child's father, that he was a terrible person, and that he was using drugs. Mother started cursing and told the child not to tell anyone what she was telling her. The child became very frightened, and the foster mother terminated the call. The child stated that she did not want to see or talk to mother "for a long time." The social worker opined that visitation and telephone contact by mother was detrimental to the child and caused her great anxiety. The social worker added that the child had continued contact with mother because of her concern for mother. However, the contact had "a very negative effect on [the child.]" A copy of the report was sent by certified mail to mother.

The court held the postpermanency hearing on August 23, 2011. Mother was not present, but was represented by counsel. Mother's counsel informed the court that mother contacted her and said she was not able to make it to the hearing because she was out of town. Counsel advised mother that the department was seeking to terminate her visits with the child. Mother's counsel informed the court of the following: "She asked that I set it contested, so I would be asking for the child to be present." Counsel then

stated that she was not sure if the department was monitoring the visits, but if someone from the department or the foster family was doing so, counsel asked the department to “produce that person as well.”

The court responded that it was not sure what right mother had to a contested hearing on this issue. Counsel for the child asserted that they were not in reunification proceedings and that the child had a number of “failed almost adoptions.” The child’s counsel asked the court to simply make the order. County counsel added that the child herself was requesting not to see mother. The child’s counsel suggested that the court could “make it with [the child’s] consent since it [was] post reunification.”

County counsel then informed the court that the review report was mailed to mother, that mother had had contact with her attorney, and that the hearing was set for that date. The following colloquy occurred:

“[Mother’s counsel]: And I have a right to set it for contest.

“The Court: I don’t know that you actually do. It’s a .3 hearing. The mother had a right to be here today. She chose not to appear today. Today is the date set for the hearing. The Department gave all parties ample notice of their intent to terminate services [*sic*] today. ¶ If you have anything to offer on your client’s behalf, I’m happy to hear it.

“[Mother’s counsel]: As I indicated, my client just requested that I set the matter and ask that the Court not terminate her visits with the child.

“The Court: All right. At this point in time, the Court will reduce the mother’s visits to one visit a year, two hours, to be supervised by [the department]. That will be

upon the minor's consent. [¶] I am not totally terminating all visits, although under the totality of the circumstances and based on the mother's behavior, including her cursing, her intimidation, her false promises to the child, the child's desire to have no contact with the mother, I believe the Court would be within its rights in terminating all visitation. [¶] However, I'm going to allow some avenue for a relationship to be in place. However, I don't want this little girl to have to deal with the issue of whether or not she wants to visit every month, so one time a year. That year will begin today. Okay."

Mother's counsel objected for the record, and the court noted the objection. The court confirmed the order.

ANALYSIS

The Court Did Not Violate Mother's Due Process Rights

Mother contends that the court improperly denied her request for a contested 366.3 hearing on the issue of the department's recommendation to terminate visitation. She claims that the court's denial deprived her of the opportunity to meaningfully participate at the hearing, since she had no opportunity to call witnesses, such as the child and the people who monitored the visits, and no opportunity to cross-examine the social worker. We conclude that the court properly denied mother's request.

Mother primarily relies upon *In re Kelly D.* (2000) 82 Cal.App.4th 433 (*Kelly D.*) in support of her claim. However, *Kelly D.* is distinguishable. That case involved three children who were adjudged dependents of the court and placed in foster care. The juvenile court set the permanent plan as long-term foster care. (*Id.* at p. 435.) The children's father had weekly supervised visits on a regular basis. However, at one point,

the social worker noted in a report that the father was having difficulty handling the children during visits, and that he discussed inappropriate matters with them.

Furthermore, there were reports of negative behavior by the children before and after visits. (*Ibid.*) In the report, the social worker concluded that visits with the father would “more than likely become reduced,” but did not recommend a change in the frequency of visits. (*Id.* at p. 436.) At the status review hearing that same month, counsel for the Human Services Department (HSD) proposed a reduction in visits between the father and the children, from weekly to monthly visits. Father’s counsel opposed the reduction in visitation and asked for a contested hearing on the issue. (*Ibid.*) Father’s counsel argued that because the social worker’s report did not request a change in the frequency of visitation, father had no notice of the proposed reduction. (*Ibid.*) The juvenile court opined that there was no right to a contested hearing on the issue, and approved the reduction in visits. (*Ibid.*)

The juvenile court’s denial was reversed on appeal. The appellate court pointed out that section 366.3, subdivision (e), expressly entitles the parents to “notice of and participation in” the review hearing. (*Kelly D., supra*, 82 Cal.App.4th at p. 438.)⁴ The court found that “[n]otice’ of that hearing must include notice to the parent of any proposed departmental modifications to existing juvenile court orders.” (*Ibid.*)

Additionally, participation in the hearing included the “essential aspect of . . . the

⁴ Section 366.3 has since been amended. Now, subdivision (f), not (e), provides in relevant part that “the parent or parents of the child are entitled to receive notice of, and participate in, those hearings.”

reasonable expectation that parents could challenge departmental proposals.” (*Ibid.*) The court remanded the matter for the juvenile court to “conduct *another* review hearing” pursuant to section 366.3. (*Id.* at p. 440, italics added.) The court specifically stated that, if HSD was seeking a modification of visitation, it was required to provide notice to the father a reasonable time in advance of the rescheduled hearing. The court further noted that the father would have the right to testify, submit evidence, cross-examine adverse witnesses, and argue his case, at the hearing. (*Ibid.*)

The case at hand is factually distinguishable from *Kelly D.*, supra, 82 Cal.App.4th 433, in significant ways. In *Kelly D.*, the father sought a contested hearing on the issue of the frequency of his visitation because he did not have prior notice of HSD’s intention to seek a reduction in visitation at the hearing. (*Id.* at pp. 436-437, 439.) The appellate court essentially remanded the matter for the juvenile court to conduct another review hearing, in order to allow the father a chance to have advanced notice of the proposed change, and to argue his case. (*Id.* at p. 440.)

In contrast, here, the social worker did provide prior notice of her recommendation to terminate visitation, in the postpermanency status review report filed on August 10, 2011. A copy of this report was sent by certified mail to mother. At the review hearing on August 23, 2011, the juvenile court correctly noted, “It’s a .3 hearing. The mother had a right to be here today. She chose not to appear today. Today is the date set for the hearing. *The Department gave all parties ample notice [of its] intent to terminate [visitation] today.*” (Italics added.) The court then gave mother the chance to “participate” in the hearing, as required by section 366.3. The court expressly stated to

mother's counsel, "If you have anything to offer on your client's behalf, I'm happy to hear it." Thus, mother had notice of the proposed modification in the visitation order, her counsel appeared on her behalf at the hearing, and the court gave her an opportunity to present evidence and argue her case. Furthermore, in view of the distinguishable circumstances in *Kelly D.*, that case does not stand for mother's proposition that section 366.3 gives her the simple right to demand a contested hearing. (See *Kelly D.*, *supra*, 82 Cal.App.4th at p. 440.)

Mother emphasizes that she is *not* contending on appeal that she had no notice of the social worker's recommendation to terminate visitation. Instead, she makes a number of other claims, none of which show that the court erred in denying her request for a contested hearing. First, she asserts that "it is unclear whether [she] actually received a copy of the report," which contained the social worker's recommendation to terminate visitation, since she was transient during the most recent reporting period. However, the record indicates that the status review report, as well as notice of the hearing, were sent to the address that mother listed on a "Notification of Mailing Address" form she filed with the court.

Mother next points out that, even if she did receive a copy of the report, the notice of the hearing reflected that there would be no changes in any of the court's orders. She then claims that "a layperson receiving this type of notice and report would certainly be on notice regarding the Department's *recommendation*, but would not necessarily be on notice that such an *order* based upon the recommendation would in fact be made at the August 23, 2011 hearing and/or that court date would be the only opportunity to contest

any adverse order recommendations.” Mother argues that “[j]ust because a case is set on calendar for a ‘hearing,’ this does not necessarily mean that the matter is automatically set for a *contest*.” She asserts that the record shows her trial counsel was not aware that the August 23, 2011 hearing was the date when any issues were to be contested, and her counsel was not prepared to proceed on her behalf.⁵ She also states that August 23, 2011, was the first time her counsel requested that certain individuals be made available for testimony, and that “[t]his [was] certainly reasonable given that [the department] only filed its most recent report less than two weeks beforehand.” Mother cites *Kelly D.* again and concludes that, by failing to set the matter for contest on the issue of visitation, the court “deprived” her of an opportunity to “participate” in the hearing.

Mother’s claims are meritless. The record indicates that she received reasonable advance notice of the proposed modification of the visitation order. Moreover, her counsel advised her that the department was seeking to terminate her visits with the child. Therefore, mother knew that visitation would be an issue at the hearing, yet chose not to attend. Furthermore, her counsel knew of the department’s recommendation, and could have reasonably expected to have to challenge the recommendation at the hearing. (*Kelly D., supra*, 82 Cal.App.4th at p. 438.) Nonetheless, the record shows that mother’s counsel waited until the hearing to request the appearance of witnesses, and she was simply unprepared to argue the matter when the court gave her the opportunity.

⁵ Mother specifically states that she is not raising an argument of ineffective assistance of counsel.

We note mother's additional argument that the court's invitation to her counsel to present evidence on her behalf was "tantamount to a request for an offer of proof" as a "condition of setting the proposed visitation order for a contest." However, when read in context, it is clear that the court was not requiring her to make an offer of proof to support the request for a contested hearing. The court stated that it did not think mother had a right to set the matter for contest, and noted that mother had a right to be at the 366.3 hearing that day, but chose not to appear. The court then found that the department had given ample notice of its intent to request the termination of visits, and stated, "If you have anything to offer on your client's behalf, I'm happy to hear it." Thus, the court denied the request for a contested hearing, and *then* gave mother's counsel an opportunity to present evidence.

We conclude that the court did not deprive mother of an opportunity to participate in the hearing. The court had previously ordered her to appear at the hearing. She was also sent notice of the hearing, as well as notice of the social worker's recommendation to terminate visitation. Nonetheless, mother chose not to appear, apparently assuming that she was entitled to a contested hearing. Moreover, she was represented by counsel at the hearing and had the opportunity to participate. The court properly denied her request for a contested hearing.⁶

⁶ In light of our conclusion the court did not err in denying mother's request for a contested hearing, it is unnecessary to address mother's final argument that the alleged error was prejudicial.

Finally, we note that when the court invited mother’s counsel to offer any evidence, she stated that mother “just requested that [she] set the matter and ask that the Court not terminate her visits with the child.” The court actually complied with mother’s request and did not terminate her visits. Citing mother’s cursing, intimidation, and false promises to the child, as well as the child’s desire to have no contact with mother, the court stated that it could terminate all visits; however, in the interest of “allow[ing] some avenue for a relationship to be in place,” the court declined to do so, and reduced mother’s visits to one visit a year, upon the child’s consent.

DISPOSITION

The judgment is affirmed.

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HOLLENHORST
Acting P. J.

We concur:

RICHLI
J.

KING
J.