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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

In re E.H. et al., Persons Coming Under the Juvenile Court Law.	
RIVERSIDE COUNTY DEPARTMENT OF PUBLIC SOCIAL SERVICES, Plaintiff and Respondent, v. M.H., Defendant and Appellant.	E055201 (Super.Ct.No. RIJ119827) OPINION

APPEAL from the Superior Court of Riverside County. Martin Swanson, Judge. (Retired commissioner of the Riverside Super. Ct. assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.) Affirmed.

Liana Serobian, under appointment by the Court of Appeal, for Defendant and Appellant.

Pamela J. Walls, County Counsel, and Anna M. Deckert, Deputy County Counsel, for Plaintiff and Respondent.

I

INTRODUCTION[1]

Mother appeals from a judgment terminating her parental rights involving two children, E.H., born in October 2002, and an infant, N.H., born in March 2010.[2]

Mother argues she was not advised of her right to seek writ review, that the Department of Public Social Services (DPSS) did not provide reasonable reunification services, and that the court abused its discretion in denying her petition for modification, finding the children were adoptable, and not applying the parent-child benefit exception when terminating mother's parental rights. We reject the issues asserted on appeal and affirm the judgment.

II

FACTUAL AND PROCEDURAL BACKGROUND

A. Detention Report

DPSS filed an original dependency petition in May 2010, alleging failure to protect and no provision for support. (§ 300, subds. (b) and (g).) E.H. had severe dental decay. N.H. had been found emaciated, dehydrated, and malnourished. He had to be transported by ambulance to a hospital. N.H. weighed a mere six pounds and mother stated she fed him only twice a day because he refused to eat more often. N.H. lacked

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

[2] Mother also filed a separate petition for writ of habeas corpus (case No. E056168), arguing she received ineffective assistance of counsel because the trial attorney did not challenge the adoption assessment or raise the issue of legal impediments to adoption. We deny the petition by separate order.

strength to nurse from a bottle. N.H. was so severely dehydrated he could not be intubated.

Mother shared a house with her sister, Martha, and Martha's two children, ages 3 and 15. Mother and her two children shared a single bed. The home was unsanitary with trash and debris strewn about, a roach infestation, the odor of urine, dirty dishes, a refrigerator filled with spoiled and rotting food. The backyard had a derelict pool and hot tub that presented a safety hazard for children.

The detention report described mother as having mental health problems and being developmentally delayed. She was vague and highly suggestible. She had received special services in high school and dropped out in the ninth grade. Mother supported herself with public assistance. Mother was evasive and uncertain about what medical care N.H. had received. Mother's description of her own care and feeding of N.H. was inconsistent and contradictory. Mother napped for three hours in the afternoon. Mother relied heavily on her sister, Martha.

Martha was embarrassed about the condition of the house which she blamed on various events. Martha was away from the home working Monday through Friday from 5:00 a.m. until 4:30 p.m. Martha confirmed mother relied on her because she had poor comprehension. But Martha thought mother loved and cared for the children. Both mother and Martha thought N.H. was "skinny" but not in danger.

DPSS recommended a guardian ad litem (GAL) be appointed to assist mother with understanding and making legal decisions. The whereabouts of the two fathers were unknown. The dependency court ordered the children detained and mother to participate

in supervised visits. E.H. was placed with another maternal aunt, R.D., while N.H. remained hospitalized.

B. Jurisdiction/Disposition

In June 2010, N.H.'s weight had increased from six pounds at the time of detention to nine pounds, nine ounces. N.H. had severe acid reflux, causing him to vomit through his nose and mouth. He also had difficulty bottle-feeding. N.H. was placed with a specially-trained caregiver before being placed with R.D. Mother was having supervised visits. Mother rejected the suggestion of relinquishing the children for adoption. DPSS assessed mother as loving her children but lacking the capacity to care for them properly.

On June 29, 2010, the court appointed a GAL for mother and ordered her to submit to a psychological evaluation. The evaluation was conducted on July 30, 2010, but the report was not prepared and submitted to the court until January 2011.

On August 5, 2010, the court sustained the allegations of the dependency petition. The court made orders for visitation and reunification services.

C. Termination of Reunification Services

In February 2011, the children were residing with R.D., the maternal aunt. It was determined in September 2010 that mother could not read or write and she was diagnosed as developmentally delayed. Her short-term memory was faulty. In November 2010, mother was arrested for failing to appear at the criminal hearing on a charge of child endangerment. While incarcerated, she could not remember her sister's phone number and her family could not locate her.

E.H. was in good health and had received dental treatment. He was attending school and not exhibiting any behavioral problems. He enjoyed playing with mother but he did not miss her when she left. N.H. weighed 19.8 pounds and he was continuing to improve. He was very attached to R.D. Both children had bonded with their aunt.

On July 30, 2010, mother had been evaluated by a psychologist who concluded mother would not benefit from reunification services because of her low level of functioning. Her full scale IQ was 56, "the low end of the mild mentally retarded (MMR) range." Mother had never worked and lived on disability payments. Mother did not appreciate the seriousness of N.H.'s condition. The psychologist suggested the children have R.D. as their responsible caretaker. In September 2010, mother had been discharged from therapy because of her cognitive limitations. Mother had been discharged from parenting programs because she could not understand instructions or assignments. During her visits with the children, mother could not make decisions about their care.

DPSS concluded that mother's significant developmental delays prevented her from meeting any of her children's needs. The children would be at risk for abuse or neglect if returned to her care. R.D. was willing to adopt both children, an arrangement that would allow mother to continue to have a relationship with them.

In April 2011, DPSS reported that mother's criminal charges would be dismissed if mother participated in services from the Inland Regional Center (IRC) for two years.

The court conducted a combined contested review hearing and a status review hearing on June 9, 2011. Mother was receiving some services from IRC. The social

worker, Betinna Harding, testified that mother could not receive reunification services because of her cognitive limitations. The hearing was continued to allow DPSS to investigate additional services for mother. DPSS reported that the Department of Mental Health could not offer any services. IRC had provided mother with a referral for parenting education but could not state mother would benefit from the program. DPSS continued to assert mother could not benefit from reunification services and could not care for the children independently.

On July 20, 2011, the court found that the reunification services provided by DPSS had been reasonable and terminated services, setting the matter for the permanency planning hearing. The court did not advise mother orally of her right to file a writ petition although it is mentioned in the minute order. Mother's counsel announced that mother intended to file a section 388 petition.

D. Section 366.26 Selection and Implementation

In November 2011, DPSS reported that E.H. and N.H. had special needs and medical issues requiring special attention in their current placement. E.H. was being referred to counseling for behavioral issues. He was lagging behind at school and needed tutoring and speech therapy. N.H. had balance issues and a lazy eye requiring treatment. The children were attached to their maternal aunt and she wanted to adopt them while permitting mother to have appropriate visitation.

The prospective adoptive parents were the maternal aunt, R.D., and her adult daughter, the children's maternal cousin. R.D was born in 1963. Since she began caring for the children, she was working occasionally as a driver. R.D. was in the process of

filing for divorce. The maternal cousin was 22 years old, unmarried with no children, and employed as a dental assistant. The prospective co-parents could provide a stable home and income for the children. The prospective co-parents were fully committed to adopting the children and understood the legal and financial responsibilities. They also agreed to facilitate post-adoption contact with mother. The children were functioning well and E.H. expressed enthusiasm for the adoption.

E. Request to Change Order

On November 29 and 30, 2011, mother filed two requests to change order, form JV-180, asking the court to vacate the section 366.26 order and reinstate reunification services including unsupervised overnight and weekend visits. As changed circumstances, mother said she had "completed a parenting class dated 9/29/2011 with out [*sic*] the assistance of DPSS, showing that mother is able and capable to complete her caseplan. She continues to consistantly [*sic*] visit her children and is involved in their daily routines during these visits. She is actively involved in Inland regional Center caseplan." Mother also asserted the children would benefit because they are "extremely bonded" and E.H. regarded his mother as his caregiver and would like to return home to her. Mother had shown "that she can complete the caseplan as shown by her parenting certificate and can parent her children."

At the contested section 366.26 hearing, the dependency court summarily denied mother's petitions for modification. The court found the children adoptable and terminated parental rights.

III

RIGHT TO SEEK WRIT REVIEW AND REASONABLENESS OF SERVICES

It is not disputed that, on July 20, 2010, the dependency court found that reunification services had been reasonable, terminated services, and set a permanency planning hearing but the court failed to advise mother of her right to seek writ review. Under these circumstances the appellate court may review the setting order. (*In re Harmony B.* (2005) 125 Cal.App.4th 831, 838-839.) Respondent counters that mother failed to object to the evidence supporting a conclusion there were no available services and therefore acquiesced in the dependency court's findings. (*In re Dakota S.* (2000) 85 Cal.App.4th 494, 502.)

On June 9, 2011, the court made a preliminary finding that reunification services had been reasonable but it continued the hearing to allow DPSS to investigate additional services for mother through IRC or the Department of Mental Health. Ultimately, on July 20, 2011, the court concluded no other services were available to mother. Mother did not renew her objections to the reasonableness of the services provided by DPSS. Therefore, mother cannot challenge the order setting the section 366.26 hearing based on the reasonableness of the services. (*In re Lorenzo C.* (1997) 54 Cal.App.4th 1330, 1338-1339.)

Furthermore, we conclude the trial court's finding that DPSS provided reasonable reunification services is supported by substantial evidence. (*Tracy J. v. Superior Court* (2012) 202 Cal.App.4th 1415, 1424.)

Mother relies on several cases involving parents with disabilities, including *Tracy J.*, in which the appellate court held that reasonable services were not provided to developmentally disabled parents because the parents had been allowed only restricted visitation rights: "We emphasize that harm to a child cannot be presumed from the mere fact a parent is developmentally disabled. The Agency may not limit a developmentally disabled parent's visitation in the absence of evidence showing the parent's behavior has jeopardized or will jeopardize the child's safety, and it cannot impede the progression of visitation services to a parent solely out of concerns about the parent's mental health status." (*Tracy J. v. Superior Court*, *supra*, 202 Cal.App.4th at p. 1419.) The gist of mother's argument is that DPSS did not provide her with reunification services tailored to her particular requirements.

Our review of the record, however, demonstrates mother received reasonable services. DPSS began providing services as soon as the children were detained in May 2010. Mother was also represented by a GAL and received a psychological evaluation. Mother continued to receive therapy and parenting services until the providers discharged her because she was not able to benefit from those programs. Mother was discharged after a psychologist concluded mother's cognitive impairments prevented her from parenting her children adequately. Even so, mother continued to have visitation and DPSS undertook further investigation of mental health and IRC services. Finally, in July 2011, more than a year after detention, the court decided services had been reasonable.

The present case differs from *Tracy J.*, in that mother's behavior had jeopardized her children's safety, nearly killing N.H. Furthermore, the psychological evaluation in

Tracy J. was conducted before the parents had participated in services, whereas here, mother received services before and after the evaluation but mother never successfully established her competency as a parent. In our view, substantial evidence demonstrated that reasonable services were provided to mother.

IV

SECTION 388 PETITION

We review the summary denial of a section 388 petition for abuse of discretion:

"Section 388 provides, in relevant part, '(a) Any parent or other person having an interest in a child who is a dependent child of the juvenile court . . . 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. The petition shall . . . set forth in concise language any change of circumstance or new evidence which are alleged to require the change of order or termination of jurisdiction. [¶] . . . [¶] (c) If it appears that the best interests of the child *may* be promoted by the proposed change of order, . . . , the court *shall* order that a hearing be held and shall give prior notice, . . .' (Italics added.)

"A petition under this section must be liberally construed in favor of its sufficiency. (Cal. Rules of Court, rule 1432(a).) Thus, if the petition presents *any* evidence that a hearing would promote the best interests of the child, the court must order the hearing. (*In re Aljamie D.* (2000) 84 Cal.App.4th 424, 431-432.) The court may deny the application ex parte only if the petition fails to state a change of circumstance or

new evidence that even *might* require a change of order or termination of jurisdiction. (Cal. Rules of Court, rule 1432(b); *In re Aljamie D., supra*, 84 Cal.App.4th at pp. 431-432.)" (*In re Angel B.* (2002) 97 Cal.App.4th 454, 460-461; *In re Anthony W.* (2001) 87 Cal.App.4th 246, 250.)

The petitioner has the burden of showing a change of circumstances and establishing a child's best interests. (*In re Michael B.* (1992) 8 Cal.App.4th 1698, 1703.) Mother has not succeeded here. Mother argues she demonstrated changed circumstances because she had completed a 10-class parenting program and was receiving some other IRC services. But mother did not additionally show that she could benefit meaningfully from attending a parenting program. Fundamentally, mother lacked the ability to parent her children. Her circumstances were essentially unchanged, meaning the placement and visitation orders were in the best interests of the children. (*In Chantal S.* (1996) 13 Cal.4th 196, 201.)

V

ADOPTABILITY

Mother maintains the children are not adoptable because they have special needs and because they are a sibling set with E.H. being older and harder to place. Mother also focuses on the difficulties of a joint adoption by the aunt and her daughter and the uncertainty of the aunt's marital situation.

A juvenile court's finding on adoptability is reviewed for substantial evidence. (*In re Asia L.* (2003) 107 Cal.App.4th 498, 509-510.) Here the record demonstrates the

children are generally adoptable by the maternal aunt and cousin or by other prospective parents. (*In re G.M.* (2010) 181 Cal.App.4th 552, 564.)

E.H. was in good health and improving in school. E.H. may have displayed some behavioral problems but those were being addressed with therapy. N.H. had recovered from the early abuse and was developmentally on target. His minor medical problems were treatable. The boys were strongly attached to one another and their aunt. The proposed adoption would allow mother to have a safe ongoing relationship with her children. Nothing about the boys' situation deemed them to be unadoptable by their aunt and cousin or other adoptive parents.

There is also no legal impediment to the adoption posed by the aunt's marriage because the aunt is in the process of obtaining a divorce. The joint adoption by the aunt and cousin was fully supported by the record, which reflects the women's understanding of and commitment to adopting the boys. (*In re Valerie W.* (2008) 162 Cal.App.4th 1, 16.) A joint adoption by the aunt and her daughter is not legally prohibited and, in this case, offers both mother and children the most favorable proposed adoption.

VI

DISPOSITION

We affirm the judgment.

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CODRINGTON
J.

We concur:

RAMIREZ
P. J.

RICHLI
J.