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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT**

LYDIA A. et al.,

Petitioners,

v.

THE SUPERIOR COURT OF FRESNO
COUNTY,

Respondent;

FRESNO COUNTY DEPARTMENT OF
SOCIAL SERVICES,

Real Party in Interest.

F068372

(Super. Ct. No. 12-300014)

OPINION

THE COURT*

ORIGINAL PROCEEDINGS; petition for extraordinary writ review. W. Kent Hamlin, Judge.

Kevin G. Little, for Petitioners and Appellants.

No appearance for Respondent.

Kevin Briggs, County Counsel, Amy K. Cobb, Deputy County Counsel, for Real Party in Interest.

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* Before Levy, Acting P.J., Kane, J. and Detjen, J.

Two-year-old Henry A. is a juvenile dependent, whom the juvenile court freed for adoption in April 2013. (Welf. & Inst. Code, § 366.26.)¹ Petitioners are relatives of Henry's alleged father.² Collectively, they challenged a May 2013 decision by real party in interest Fresno County Department of Social Services (department) to place Henry in a risk adopt home for adoption, rather than in the home of petitioner Lydia A. Lydia A. is the mother of Henry's alleged father and legal guardian of her seven grandchildren, who are at least Henry's half-siblings.

The department would not place Henry with Lydia A. due in part to the lack of adequate bedroom space in her small home. Respondent Fresno County Superior Court upheld the department's decision as neither arbitrary nor capricious. We will affirm.

PROCEDURAL AND FACTUAL HISTORY

Juvenile dependency proceedings for Henry commenced within days of his birth in January 2012. It appears Henry was exposed, in-utero, to methamphetamine and had some developmental difficulties. In August 2012, the juvenile court terminated reunification efforts and set a December 2012 hearing to select and implement a permanent plan for Henry. Meanwhile, Henry's alleged father did not try to elevate his status to that of Henry's biological parent and did not qualify as the child's presumed father.

In September 2012, department social worker Melissa Hill was assigned as Henry's case manager to assess a permanent plan recommendation for him. The following month, Teresa S., Lydia A.'s adult daughter, contacted Hill requesting visits with Henry and possible relative adoptive placement.

¹ All further statutory references are to the Welfare and Institutions Code unless otherwise indicated.

² An alleged father is a man who may be the father of a child, but whose biological paternity has not been established, or, in the alternative, has not achieved presumed father status. (*In re Zacharia D.* (1993) 6 Cal.4th 435, 449, fn. 15.)

Hill met with Teresa S. and Lydia A. in October 2012. At their meeting, according to Hill, Lydia A. said she had considered seeking placement of Henry in her home but she had seven other children in her care. Lydia A. had been given custody of the children as their legal guardian in October.

According to Lydia A., she always wanted Henry in her care. However, it was her understanding, based on the October meeting, that she was ineligible to have Henry placed with her. Hill told her she did not have enough room in her home and could not have over six children in the home.

Lydia A. and Teresa S. decided at the October meeting that Teresa should seek to adopt Henry. In the meantime, Hill scheduled supervised visits with Henry for Teresa S., Lydia A., and Henry's seven half-siblings. The visits were for one hour, once every two weeks.

There were problems from the outset with Teresa S.'s placement application. In November 2012, Teresa S. withdrew her application for lack of adequate housing. At the December 2012 hearing, the department agreed to give Teresa S. additional time to locate suitable housing. However, she did not complete the necessary steps.

The court eventually conducted its permanency planning hearing in April 2013. The department represented to the court that relative placement would remain an option as a possible adoptive placement. However, if relative placement was not approved, the department would consider a risk adopt home as an alternative. The court terminated the parental rights of then 15-month-old Henry's mother and alleged father, and ordered Henry be placed for adoption.

May 7 Meeting

Following the April 2013 termination order, case manager Hill looked for any family members who might be available and suitable for adoptive placement. Although Lydia A. was technically an alleged relative of Henry, Hill considered Lydia A. and other members of the alleged father's family "extended family," if not relatives to Henry, for

placement purposes. On May 7, 2013, Hill met to discuss this with Lydia A. and Teresa S.

As of the May 7 meeting, Teresa S. had a recent misdemeanor conviction, which, besides other aspects of her past, ultimately disqualified her for placement. Teresa S. was informed of this at the May 7 meeting and withdrew her placement application.

Lydia A. then requested that the department place Henry with her. At that time, as in October 2012, she lived in a two-bedroom home with her seven grandchildren. The grandchildren ranged in age from 2 to 15 years of age. Lydia A. acknowledged each child did not have his or her own bed. Her two grandsons slept in one bedroom. Her two youngest granddaughters slept in the other bedroom with Lydia A., and slept mostly in her bed. The three older granddaughters slept on a pullout sofa in the living room. Lydia A. spoke of putting a bed in a hallway to accommodate Henry.

A home approval social worker, Shelly Edwards, who worked in the department's licensing unit, also attended the May 7 meeting. She advised Lydia A. that she would not meet regulations for placement due to the size of her home. Hill believed she also told Lydia A. that she "would not have been able to accommodate the number of beds that would have been needed for all of the children." Hill also believed there was a six-child capacity rule for placement purposes and told Lydia A. that she could not have over six children in her home.

Hill learned much later her statement about a capacity limit was a mistake because an exemption could issue for families with over six children in the home. However, for such an exemption, it would still have to be determined that Lydia A. was in fact Henry's paternal grandmother. It was also Hill's understanding there were licensing regulations, which applied to both foster parents and relatives for placement of a dependent child.

Consideration of Other Family Members for Adoption Placement

Once the social workers told Lydia A. at the May 7 meeting that the size of her home would disqualify her for placement, she and Teresa S. asked about the department

placing Henry with Christina S., Teresa's adult daughter. The department assessed Christina S. but decided not to place Henry with her. Following the May 7 meeting, other extended family members came forward and were considered for, but were denied, placement.

On approximately May 15, Hill notified Lydia A. that the department would identify a risk adopt home for Henry. At this point, Henry had been in a temporary foster home for over a year and the child needed permanency. Hill advised she would give strong consideration to a risk adopt family open to post adoptive contact with Lydia A. and her family.

Henry's Adoptive Placement

On June 7, 2013, Hill placed Henry with Mr. and Mrs. M., a risk adopt family, who had an approved adoption home study. The M. family appeared to be most suitable for Henry. They were open to post adoptive contact. They also agreed to and facilitated once-a-month visits starting in July 2013, between Henry, Lydia A., Teresa S. and Henry's half-siblings.

Mr. and Mrs. M. had no other children in their home. Mrs. M. would be a stay-at-home mother, who could focus on Henry. Since placed in the M.'s care, Henry had blossomed. He easily laughed, giggled and babbled when the M. family interacted with him. They provided him with nurturing, engagement, challenge and support. In the time he lived with Mr. and Mrs. M., he had more of a significant bond with them than he had with his former temporary foster parent, who was unwilling to provide him with a permanent home.

Shortly after Henry was placed in their care, Mr. and Mrs. M. recognized that Henry had areas of developmental delay. They were strong advocates for Henry in communicating his needs with the department, Central Valley Regional Center (CVRC), and medical providers. CVRC, in July 2013, identified some significant developmental

delays in Henry and found him eligible for early intervention services. Mr. and Mrs. M. remained committed to adopting Henry.

Lydia A.'s Challenge to Henry's Adoptive Placement

Beginning in the latter part of May 2013, counsel for Lydia A., her seven grandchildren in her care, and Christina S. filed a series of modification petitions under section 388 to prevent Henry's adoption by Mr. and Mrs. M. The attorney claimed Lydia A. was Henry's grandmother and entitled to adoptive placement. In his last petition, filed in late July 2013, he alleged that Lydia A. had moved into a larger, three bedroom home that could accommodate all of the children, including Henry.

The department opposed the petitions, arguing Lydia A. was only Henry's alleged relative and was not entitled to placement. Further, the department pointed out, and counsel for Lydia A. later agreed, the limited issue before the court was whether the department acted in an arbitrary or capricious manner in making the adoptive placement with the M. family.

November 2013 Hearing

The superior court conducted an evidentiary hearing on the modification petitions in November 2013. At the start of the evidentiary hearing, the court bifurcated the question of Henry's paternity from whether the department's placement decision exceeded the bounds of its discretion, such that the court would first decide whether there was an abuse of discretion. The court then heard testimony, most notably from Henry's case manager Hill and Lydia A.

Besides the evidence summarized above, Lydia A. testified she and her grandchildren moved, in early August 2013, to a home with three big bedrooms. The new home was huge in comparison to her former home. She acknowledged she did not have beds for all the children in her former home. However, she had beds for all the children in her new home.

She “figured that if [she] wanted to get Henry [she] needed a bigger place because [her] other house was too small ...” Lydia A. claimed no one from the department suggested she find a bigger place in which to live. Still, after Hill told her, in October 2012, she had too many children and not enough room for Henry, Lydia A. said she looked for a larger home “almost right away,” but did not move until August 2013.

In closing arguments, counsel for petitioners argued case manager Hill’s mistake in telling Lydia A. there was a capacity maximum for placement was a classic case of abuse of discretion. Her counsel further argued that the regulations for foster homes were inapplicable to placement with a relative. Also, in counsel’s view, it was too late for the department to claim Lydia A. was not Henry’s relative because it had previously treated her as such.

County counsel for the department argued Lydia A. had not established the department’s placement decision was patently absurd. According to county counsel, Lydia A. was not a relative and the department acted in good faith to work with her and her family regarding placement. County counsel argued that there were certain minimum standards to be met and the department could determine that placement of Henry with Lydia A. or her other relatives would be inappropriate.

Henry’s counsel argued it had not been shown that the department abused its discretion given Lydia A.’s status of essentially an alleged grandparent.

Unable to find anything arbitrary or capricious about the department’s decision to place Henry with Mr. and Mrs. M., the court denied the petitions before it.

DISCUSSION

Once parental rights were terminated, the department, as an adoptive agency, had “exclusive” custody, control and supervision of Henry. (§ 366.26, subd. (j); Fam. Code, § 8704.) This exclusive authority included the “discretion” to place Henry for adoption. (§ 366.26, subd. (j).) The superior court retained jurisdiction over Henry to ensure the expeditious completion of his adoption and determine the “appropriateness of[] the

placement.” (§ 366.3.) The superior court was limited to reviewing, however, whether the department abused its discretion in placing Henry and determining the placement, once made, remained appropriate. Absent a showing the department’s placement decision was patently absurd or unquestionably not in Henry’s best interests, the court could not interfere and disapprove of the placement. (*Department of Social Services v. Superior Court* (1997) 58 Cal.App.4th 721, 724-725.)

In this writ proceeding, counsel for the petitioners reiterates his earlier arguments to the superior court. He contends the department abused its placement discretion because Lydia A. was Henry’s paternal grandmother and therefore entitled to preferential placement consideration without having to meet foster care licensing regulations, specifically capacity limits. We disagree.

When a court orders a dependent child removed from parental custody, “preferential consideration” is given to the child’s relatives for placement purposes. (§§ 361.2, subd. (e)(2) & 361.3.) Pertinent to this appeal, a relative is an adult who is related to a child by blood and is the child’s grandparent, aunt, uncle or sibling. (§ 361.3, subd. (a) & (c)(2).) “Preferential consideration” means the relative requesting placement shall be the first placement to be considered and investigated. (§ 361.3, subd. (c)(1).) Preferential consideration for placement with a requesting relative also applies whenever a new placement for a dependent child must be made. (§ 361.3, subd. (d).) There is case authority, however, for the proposition that the preferential consideration for relative placement, found in section 361.3, does not apply after parental rights are terminated and a child is freed for adoption. (*In re Lauren R.* (2007) 148 Cal.App.4th 841, 855; *Cesar V. v. Superior Court* (2001) 91 Cal.App.4th 1023, 1031; cf. Fam. Code, § 8714.5.)

The foregoing authorities arguably spell the death knell for counsel’s arguments that Lydia A. was Henry’s grandmother and entitled to preferential consideration in May 2013. However, we need not resolve Lydia A.’s relationship to Henry or whether preferential consideration of relatives applies post termination to resolve petitioner’s

claim that the department abused its discretion. This is due to the fact that the department did consider Lydia A. and other relatives of Henry's alleged father for adoptive placement after the court terminated parental rights and before considering and placing Henry with Mr. and Mrs. M. Assuming arguendo that Lydia A. was Henry's relative and entitled to post-termination preferred placement consideration, the balance of counsel's argument ultimately fails for the reasons that follow.

It is true that relatives are exempt from the licensing requirements under the Community Care Facilities Act for placement purposes, including the capacity limit of six children in a home. (Health & Saf. Code, § 1505, subd. (l)(1); see also Cal. Code Regs., tit. 22, §§ 80007, subd. (a)(9) & 89228, subd. (a)(2).) Nevertheless, the fact that case manager Hill mistakenly told Lydia A. that the capacity limit applied to her home does not amount to the department's abuse of discretion or entitle Lydia A. to relief. By Lydia A.'s own testimony, this misstatement did not deter her; rather she looked for a larger home "almost right away" after her October 2012 meeting with Hill. Unfortunately, for Lydia A., she did not find her larger home until after the department placed Henry with Mr. and Mrs. M.

However, the standards used to determine the suitability or appropriateness of the relative's home are the same standards set forth in the regulations for licensing foster family homes. (See §§ 309, subd. (d)(1); 361.3, subd. (a)(8); 361.45, subd. (b).) There are "Core Requirements for Caregivers, Relatives, and Nonrelative Extended Family Members" spelled out in Division 6, Chapter 9.5, Article 3 of Title 22 of the California Code of Regulations. These regulations did apply to Lydia A.

These core requirements include California Code of Regulations, title 22, section 89387, which states, in relevant part, the caregiver shall provide bedrooms in the home which shall meet, at a minimum, the following requirements unless a "Documented Alternative Plan" is approved:

“(1) No more than two children shall share a bedroom. ¶ ... ¶ (3) Except for infants, children shall not share a bedroom with an adult. ¶ ... ¶ (4) No room commonly used for other purposes shall be used as a bedroom. ¶ ... ¶ [and] (7) The caregiver shall provide each ‘child’ with an individual bed...” (Cal. Code Regs., tit. 22, § 89387, subd. (a)(1), (3), (4) & (7).)

Furthermore, each of these core requirements applies to “all bedrooms used by all children residing in the home, including children who are members of the caregiver’s family, guardianship children . . . and children in care.” (Cal. Code Regs., tit. 22, § 89387, subd. (a)(11).)

Counsel acknowledges there is “a presumptive limit of two children per bedroom,” as set forth in California Code of Regulations, title 22, section 89387. Still, he overlooks the other requirements quoted above and their application to all bedrooms used by all children residing in the home. He also argues that the ability to formulate a Documented Alternative Plan means the two-children-to-a-bedroom requirement is “obviously not absolute.” However, the best that Lydia A. could envision as an alternative plan was to place a bed in the hallway, which was also impermissible under the regulation. (Cal. Code. Regs., tit. 22, § 89387, subd. (a)(4).) The fact that the department did not offer a Documented Alternate Plan as an option for Lydia A. was neither arbitrary nor capricious, given the other bedroom-related requirements she could not meet.

Further, counsel takes exception to the superior court’s remarks in finding the department’s placement decision was neither arbitrary nor capricious. In so doing, he ignores the rule of law that as a reviewing court, we analyze the superior court’s decision, not its rationale. (*Davey v. Southern Pacific Co.* (1897) 116 Cal. 325, 329.)

In conclusion, the superior court’s finding that the department did not abuse its discretion with its placement decision for Henry is supported by substantial evidence. (*Department of Social Services v. Superior Court, supra*, 58 Cal.App.4th at p. 742.) Our discussion above has focused on the narrow legal arguments of petitioners’ counsel. However, the entire record of the department’s efforts to give preferential consideration to Lydia A. and her relatives, starting in October 2012, and through mid-May 2013, and

its ultimate decision to place Henry with Mr. and Mrs. M. equally establishes the department's action was neither arbitrary nor capricious.

A Final Note

We wish to observe, as did the superior court, our decision upholding the department's action is not a statement that somehow Lydia A. is less than a good grandmother or a concerned family member. Henry is a fortunate child to have so many adults interested in and willing to make a commitment to his well-being. However, the legal burden for Lydia A. and the other petitioners to successfully challenge the department's decision was considerable. They had to establish the department's placement decision was patently absurd or unquestionably not in Henry's best interests (*Department of Social Services v. Superior Court, supra*, 58 Cal.App.4th at p. 725) and this they could not do.

DISPOSITION

The petition for extraordinary writ filed on December 19, 2013, is denied. This decision is final forthwith as to this court.