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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

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

H038644
(Monterey County
Super. Ct. No. J44598)

MONTEREY COUNTY DEPARTMENT
OF SOCIAL AND EMPLOYMENT
SERVICES,

Plaintiff and Respondent,

v.

G.M.,

Defendant and Appellant.

G.M. is the mother of B.A., a now three-year-old girl. She appeals from the juvenile court's orders (1) denying her request under Welfare and Institutions Code section 388¹ to modify prior determinations and (2) terminating her parental rights under section 366.26. She claims that the court abused its discretion in denying her modification request to place B.A. with her maternal grandmother S.M. and then terminating G.M.'s parental rights and finding B.A. suitable for adoption.

We find no errors and will affirm the orders.

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

FACTS AND PROCEDURAL BACKGROUND

B.A. was born with methamphetamine in her system on December 26, 2009, to G.M. and a father whose identity has never been learned. The Monterey County Department of Social and Employment Services (Department) filed a section 300, subdivision (b) (failure to protect) juvenile dependency petition on her behalf, detained her at the hospital, and placed her with a foster mother, C.B.

The Department had taken the same action with B.A.'s sibling C.J. in 2006, when he was two months old, as soon as it learned that he, too, had methamphetamine intoxication at birth.

At the time the events surrounding B.A.'s birth were unfolding, G.M. suggested that B.A. could be placed with G.M.'s mother S.M.

A jurisdiction and disposition report dated January 26, 2010, stated that S.M. had contacted the Department expressing interest in caring for B.A. On January 26, 2010, S.M. met with two social workers and denied that G.M. was living at her home. S.M. was, according to the report, "very vocal in her objections to the Department's plan to offer reunification services to her daughter," although the report does not explain why.

The Department declined to place B.A. with S.M. It found S.M. to be obdurate and unyielding, describing what it viewed as "her adversarial relationship with her daughter; her stated unwillingness to support the reunification process; her adversarial relationship with the Department; and her work schedule[,] which does not permit flexibility to allow her to attend mandatory trainings, participate in . . . clinic appointments, or [provide] transportation [for] her daughter's weekly visits with [B.A.]."

On March 5, 2010, the juvenile court held a jurisdiction and disposition hearing. It found the petition allegations true, declared B.A. a dependent of the court, and ordered reunification services for G.M.

For almost a year and a half, things went reasonably well. Custody of B.A. was returned to G.M. in December of 2010. A status report dated August 31, 2011, noted that

G.M. and B.A. had stable housing, G.M.'s outpatient drug treatment was going well, and G.M.'s finances were reasonably in order. The Department recommended that the juvenile court end its jurisdiction over B.A.

On September 21, 2011, however, the reporting social worker informed the juvenile court that G.M. had admitted relapsing into drug use in recent months. The court held a semiannual review hearing. As a Department summary of that hearing described, the court decided that B.A. could remain in G.M.'s care and ordered family maintenance services. But it warned G.M. that "if the child had to be removed from her care, she would have no additional time for reunification services as she had exceeded the statutory time limit."

Circumstances did not improve. The Department filed a section 387 (supplemental) petition on November 1, 2011. It had received an allegation that G.M. was associating with drug users. She tested positive for methamphetamine and was arrested for violating her probation. On November 8, 2011, B.A. was again placed with her prior foster mother, C.B.

At a jurisdiction and disposition hearing on the section 387 petition, held on January 4, 2012, G.M.'s counsel suggested that it was unclear what efforts the Department had made to contact S.M. in order to evaluate her for potential relative placement. The court asked the Department to undertake that task. The court again declared B.A. a dependent of the court and denied G.M. reunification services on the ground that she had exceeded the statutory time limit for receiving them.

About three months later, in April of 2012, the Department completed an evaluation of S.M. for placement. It had begun work on that evaluation no later than March 9. The evaluation noted that S.M. rented a tiny but orderly home, had worked as a grocery store clerk for more than 25 years, had no criminal record, and declared that she did not use alcohol or narcotics. But the report also described countervailing factors. It noted the existence of a strong bond between B.A. and C.B., the foster mother.

Meanwhile, S.M. wanted to attend college; had a varied work schedule; was focused on her work, church activities, socializing with friends, and visiting her many grandchildren; had to take some five months off from work following a tropical mosquito bite that may have interacted with her childhood rheumatic fever, after which she acquired a fear of germs and people who may be ill; and because of her job she might not be able to attend adoption classes or participate in B.A.'s weekly therapy sessions consistently.

In April of 2012, the Department sent S.M. a letter containing its conclusion that placing B.A. with her would not be in B.A.'s best interests. The Department thought it inadvisable for B.A. to have yet another placement, which would mean four placements in two years, although two would have been with C.B., the foster mother. It questioned whether S.M. could participate in the therapy B.A. needed—sessions in which B.A. was struggling to make headway—because of S.M.'s variable and relatively inflexible work schedule.

On June 7, 2012, G.M. filed the section 388 (modification) petition that forms part of the basis for this appeal, asking the juvenile court to change its order and to order placement with a relative. G.M. alleged the Department had failed to contact S.M. within a reasonable time regarding placement and, substantively, had failed to consider S.M. for placement with sufficient thoroughness and objectivity. G.M. and S.M. both executed declarations stating that they wanted B.A. to be in S.M.'s care.

The Department replied in its papers that on December 1, 2011, Kathryn Richards, one of the social workers on the case, left a voicemail message with S.M. about the possibility of placing B.A. with S.M. S.M. did not call back and later complained to another social worker, Vera Chambers, that no one had contacted her regarding placement.

At a hearing on the section 388 petition, G.M.'s counsel argued that an evidentiary hearing, if allowed, would show that the Department improperly delayed investigating S.M.'s suitability for placing B.A. with her, in violation of statutory requirements, and

that G.M., S.M. and B.A. had been prejudiced by the Department's delay. Counsel for the Department observed that, even if late, the evaluation was completed and concluded that placement with S.M. was not in the child's best interest.

The juvenile court noted that it must receive indications of a "substantial and permanent" change in order to grant a section 388 petition and inquired of G.M.'s counsel what change he meant—the fact that the Department "didn't move right after January 4th[, 2012,] to consider the maternal grandmother [S.M.] or something else?" G.M.'s counsel responded that when B.A. was removed on November 8, 2011, G.M. asked for placement with S.M. and the Department made only one courtesy call to S.M., failing to provide written notice and essentially paying little heed to the idea of placing B.A. with S.M. Counsel argued that the Department's delay in evaluating S.M. was a newly discovered circumstance warranting relief under section 388.

The juvenile court noted that the Department's failure allegedly occurred on November 8, 2011, and the section 388 petition was not filed until June 7, 2012. Counsel responded that the court had asked the social worker to try contacting S.M. again at the hearing on January 4, 2012, but no evaluation began until late February or early March.

The juvenile court decided to proceed with an evidentiary hearing.

Vera Chambers, one of the social workers assigned to the case, testified that G.M. had called her toward the end of January, shortly after her release from prison, to inquire about relative placement with S.M. The social worker contacted S.M. on February 10, 2012. She further testified that, in her view, placing B.A. with S.M. would constitute the fourth move for B.A. and would not be in B.A.'s best interest.

Heather Molitor, the social worker initially assigned to B.A.'s case, testified that although "it's always best to place with families" when feasible, when she met with G.M. in jail on November 8, 2011, she said nothing about placement with S.M. Nor did S.M. ever call her about having B.A. placed in S.M.'s care. At one point Molitor called S.M. to discuss the logistics of retrieving G.M.'s belongings from the facility in which she was

living before her incarceration, and at that time S.M. “never mentioned anything about placement.”

G.M. testified that she signed a voluntary placement document for B.A. in jail. But she thought the placement would be temporary and had asked for B.A. to be placed with S.M. She had made the same request of social worker Kathryn Richards.

S.M. testified that G.M. had called her on the day she was arrested, i.e., November 8, 2011, instructing her to retrieve B.A. from foster care, but she was unable to reach Molitor. Molitor called her on or about November 15, 2011, and said she could not have custody of B.A.

The juvenile court remonstrated with the Department about its lack of speed in evaluating S.M. but found no substantial change in circumstances and noted G.M.’s own delay in filing the section 388 petition, so it denied the petition. On June 13, 2012, it held a section 366.26 hearing. It found B.A. to be generally and specifically adoptable and terminated G.M.’s parental rights.

DISCUSSION

As noted, G.M. claims that the juvenile court abused its discretion in denying her modification request under section 388. She also argues that if we reverse the section 388 order, then the court’s order terminating her parental rights under section 366.26 must also be reversed as a necessary consequence of reversing the section 388 order.

We review a juvenile court’s ruling on a section 388 request for abuse of discretion. (*In re Jasmon O.* (1994) 8 Cal.4th 398, 415-416.) To find an abuse of discretion in a dependency case, the reviewing court must be persuaded that the lower court’s ruling fell outside the bounds of reason. (*In re Stephanie M.* (1994) 7 Cal.4th 295, 318-319.)

G.M. argues that the juvenile court wrongly applied section 388 by asking only about whether circumstances had changed and not also considering whether she had

presented new evidence that the Department had acted slowly in considering her mother S.M. as a suitable person with whom to place B.A.

Subdivision (a)(1) of section 388 provides in pertinent 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 . . . for a hearing to change, modify, or set aside any order of court previously made or to terminate the jurisdiction of the court.”

Thus, a juvenile court may consider not just a change in circumstances, but also new evidence. “[A] petition pursuant to section 388 remains an available mechanism by which to modify the juvenile court’s previous orders, given some sufficiently compelling new evidence or change of circumstances.” (*Renée J. v. Superior Court* (2001) 26 Cal.4th 735, 750.) In general, section 388 is “broad in scope.” (*In re A.C.* (2010) 186 Cal.App.4th 976, 978.)

As noted, G.M. argues that the juvenile court applied section 388 too narrowly, failing to consider her presentation in court as relating to newly discovered evidence as well as a change in circumstances. “A discretionary order based on the application of improper criteria or incorrect legal assumptions is not an exercise of informed discretion and is subject to reversal even though there may be substantial evidence to support that order.” (*F.T. v. L.J.* (2011) 194 Cal.App.4th 1, 26, italics deleted.)

G.M.’s reading of the juvenile court’s action is, however, too narrow. It is true that in a memorandum accompanying her section 388 petition G.M. stated that “a change in circumstance *or* new evidence now requires a change in previous Orders” (Emphasis in original.) Thus, the scope of G.M.’s request charged the court with considering any new evidence. It is also true that the court mentioned the changed circumstances question and did not expressly mention the new evidence question. But the court commented on the latter consideration when it summarized the following evidence: “[S.M.] originally asked for placement after [B.A.’s] birth and was denied

placement. She did not appeal the decision and has not requested placement since [B.A.'s] most recent removal [¶] There was no contradictory evidence provided to the Court at that time [i.e., of the most recent removal, which was November 8, 2011], and it was not until this [section 388] petition was filed almost six months later that the issue has come before the court.” The last portion of these remarks is directed to the question whether the proffered evidence was newly discovered, even if the court did not use those words. The court’s awareness of the issue is evinced by its question earlier during the proceeding, when it asked counsel for G.M., “why didn’t you file something [in] mid-March?” This colloquy makes clear that the court heard and considered G.M.’s concerns regarding the timing of the Department’s evaluation of S.M. for placement, and it questioned whether the evidence could be considered newly discovered. Thus, we see no basis to reverse the court’s section 388 determination.

Underlying G.M.’s section 388 claim are assertions that (1) the Department’s stated reasons for refusing to place B.A. with G.M. were pretextual or are unsupported by substantial evidence and (2) the juvenile court erred by relying in part on the Department’s prior refusal, in 2010, to place B.A. with S.M.

On the first point, G.M. argues that only two homes were involved: that of the foster mother, C.B., and her own. But B.A. had already had three separate living arrangements in her short life and would have faced a fourth. G.M. also argues that the Department could not have erroneously refused to house B.A. with S.M. and then use that prior error to justify refusing the arrangement now. The original denial, however, was supported by information about S.M.’s difficult personality (*ante*, p. 2). G.M. also disputes the Department’s and the juvenile court’s conclusion that S.M. would not be the appropriate person to parent B.A. and attend to her special needs, but provides no convincing rationale for overturning the court’s determinations regarding the Department’s evaluations of S.M.

As to the second point, as noted *ante*, page 2, one reason the Department declined to place B.A. with S.M. in 2010 was that S.M. did not support reunification of G.M. with B.A. G.M. argues that because this consideration no longer exists, the juvenile court was wrong to rely on the Department's 2010 opinion. That consideration was, however, only one of many. In general, a juvenile court should consider the entire record before it and take history into account in deciding cases, which is what the juvenile court appropriately did here. Thus, these arguments fail to advance G.M.'s cause.

Nor is there any reason to disturb the juvenile court's determination that B.A. should be freed for adoption and G.M.'s parental rights terminated. First, G.M. rests her section 366.26 claim on a predicate that we will be reversing the court's section 388 determination, which we are not. Second, no independent reason appears in the record to overturn the section 366.26 decision.

With regard to dispositions in juvenile dependency cases, the best interest of the child controls. (*In re Fernando M.* (2006) 138 Cal.App.4th 529, 534.) Adoption is the preferred alternative. (§ 366.26, subd. (b).) As stated in *In re Josue G.*, “ ‘The permanent plan preferred by the Legislature is adoption. [Citation.]’ [Citation.] ‘ ‘The Legislature has decreed . . . that guardianship is not in the best interests of children who cannot be returned to their parents. These children can be afforded the best possible opportunity to get on with the task of growing up by placing them in the most permanent plan and secure alternative that can be afforded them.’ ’ ” (*In re Josue G.* (2003) 106 Cal.App.4th 725, 732.)

“[U]ntil the time the section 366.26 hearing is set, the parent's interest in reunification is given precedence over the child's need for stability and permanency.” (*In re Marilyn H.* (1993) 5 Cal.4th 295, 310.) However, “[o]nce reunification services are ordered terminated, the focus shifts to the needs of the child for permanency and stability.” (*Id.* at p. 309.) “Adoption must be selected as the permanent plan for an adoptable child and parental rights terminated unless the court finds ‘a compelling reason

for determining that termination would be detrimental to the child due to one or more of the following circumstances: [¶] (i) 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).) ‘[T]he burden is on the party seeking to establish the existence of one of the section 366.26, subdivision (c)(1) exceptions to produce that evidence.’ [Citation.]” (*In re Bailey J.* (2010) 189 Cal.App.4th 1308, 1314.)

The record in this case does not establish the existence of a beneficial parental relationship that would provide a compelling reason to overcome the preference for adoption. As noted in other cases, “[i]f severing the natural parent/child relationship would deprive the child of a substantial, positive emotional attachment such that the child would be greatly harmed, the preference for adoption is overcome and the natural parent’s rights are not terminated.” (*In re Autumn H.* (1994) 27 Cal.App.4th 567, 575.) “The factors to be considered when looking for whether a relationship is important and beneficial are: (1) the age of the child, (2) the portion of the child’s life spent in the parent’s custody, (3) the positive or negative effect of interaction between the parent and the child, and (4) the child’s particular needs.” (*In re Bailey J., supra*, 189 Cal.App.4th at p. 1315.) To qualify for the exception, appellant had to do “more than demonstrate ‘frequent and loving contact’ [citation], an emotional bond with the child, or that [she] and [her] child find their visits pleasant. [Citation.] Rather, [she] must show that [she] occup[ies] ‘a parental role’ in the child’s life.” (*In re Andrea R.* (1999) 75 Cal.App.4th 1093, 1108.) The parent-child relationship 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 re Autumn H., supra*, at p. 575.)

Not only does the record fail to show that B.A. would be “greatly harmed” (*In re Autumn H., supra*, 27 Cal.App.4th at p. 575) by terminating G.M.’s parental rights, but all of the evidence is that B.A.’s ties to her mother were tenuous, marked at times by G.M.’s need to attend to the consequences of her substance abuse problem. There are two

aspects to the foregoing. The first aspect is chronological: B.A. had been separated from G.M. for substantial periods of time. Between B.A.'s birth in December of 2009 and December of 2010, B.A. was not in her mother's care. She then stayed with her mother for about 11 months, but was then removed for urgent reasons. The second aspect is affectational: B.A. was bonded to her foster mother, C.B., and in March, 2012, after the turmoil in B.A.'s life had had its effects, a visit with G.M. was not notably successful.² From all that appears, G.M. did not occupy a parental role in B.A.'s life. (*In re Andrea R.*, *supra*, 75 Cal.App.4th at p. 1108.)

² Social worker Chambers described the visit in an April 11, 2012, report. "On March 19, 2012, the biological mother had a supervised visit with the child and the foster mother was present in the room. The foster mother sat quietly in a corner on the floor in the room. The child was observed to be confused, nervous, fidgety by tugging on her clothes, gave the biological mother long stares, and asked the foster mother several times 'who is this?' The foster mother repeated that it is 'mommy [G.M.]'. The foster mother also gave the child positive reinforcements (not push[ing]) to interact with [G.M.].

"However, the child refused to be physically close to the biological mother and, instead, kept herself close to the foster mother. She also walked around the room keeping her distance from the mother and seemingly found it hard to settle down. She did not let the mother touch her and the mother did not push herself on the child. [G.M.] had bought the child a doll and they took the doll out of the box together, but she mainly played with the baby doll independently with some interaction with the foster mother."

CONCLUSION

The orders are affirmed.

Márquez, J.

WE CONCUR:

Elia, Acting P. J.

Bamattre-Manoukian, J.