Filed 9/24/18 A.S. v. Superior Court CA2/5

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

A.S.,

Petitioner,

v.

THE SUPERIOR COURT OF LOS ANGELES COUNTY,

Respondent;

LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES,

Real Party in Interest

No. B288292

(Super. Ct. No. CK71993)

ORIGINAL PROCEEDING; petition for extraordinary writ. Debra L. Losnick, Commissioner. Writ denied.

Los Angeles Dependency Lawyers, Inc., Law Office of Rachel Ewing, Frank Ahn, James Kim, for Petitioner A.S.

No appearance for Respondent.

Mary C. Wickham, County Counsel, R. Keith Davis, Assistant County Counsel, Stephen D. Watson, Deputy County Counsel, for Real Party in Interest Los Angeles County Department of Children and Family Services.

Children's Law Center of Los Angeles, Jennifer McCartney, Joe Barrell, for minor A.H.

I.

INTRODUCTION

A.S. (mother) filed this petition for extraordinary relief after the juvenile court terminated reunification services. She argues the juvenile court abused its discretion in placing her youngest child, A.H., with the child's alleged father's grandparents, i.e., the alleged paternal great-grandparents. Mother believes the child should have been placed with her maternal grandparents who, unlike the relatives of an alleged father, are "relatives" under the statutory scheme.

II.

FACTUAL AND PROCEDURAL BACKGROUND

Mother has four children: T.J. (age 11), S.J. (age 10), A.J. (age 8), and A.H. (age 3). Only A.H. is the subject of this writ proceeding.

On May 25, 2016, the Los Angeles County Department of Children and Family Services (the Department or DCFS) received a referral that mother had hit S.J. Mother admitted she had hit S.J. and A.J. with her hand and a belt because one of them left feces in the toilet.

The Department removed S.J. and A.J., placed them in a 72-hour shelter, and scheduled them to be placed with Non-Related Extended Family Member (NREFM) Yvonne C. T.J. was placed with a maternal aunt, Victoria E. When asked about A.H.'s whereabouts, mother said the child was with her paternal relatives, Beatrice F. and Charles F. The Department contacted Beatrice F., who said A.H. was not with her and that she had last seen the child two or three days earlier. Mother then admitted A.H. was with her, but said she would not give up the child until a relative placement was found. Mother later dropped A.H. off at a DCFS office, and the child was placed with Yvonne C.

On June 1, 2016, the Department filed a Welfare and Institutions Code section 300[1] petition, alleging that mother's inappropriate physical discipline of S.J. and A.J. placed all four children at risk of physical harm. The juvenile court detained the children following a detention hearing held on June 1 and 2, 2016.

On July 18, 2016, mother filed a parentage questionnaire indicating she believed As.H. to be A.H.'s father. Mother noted that As.H. had held himself out openly as the father and had received A.H. in his home. The juvenile court found As.H. to be A.H.'s alleged father.

The juvenile court sustained the section 300 petition on August 23, 2016, and held a disposition hearing on October 13, 2016. It removed the children from parental custody and ordered them suitably placed by DCFS, granted mother monitored visits, ordered reunification services for mother and no reunification services for the alleged fathers.

In a report dated January 12, 2017, DCFS indicated T.J. remained with Victoria E., while S.J., A.J., and A.H. remained with Yvonne C. At the six-month review hearing on January 12, 2017, the court found continued jurisdiction necessary and ordered DCFS to make follow-up efforts to place the children with maternal relatives.

On June 29, 2017, DCFS reported that T.J., S.J., and A.J. were placed with maternal grandparents Daisy F. and

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

Ernest F., while A.H. was placed in the home of paternal great-grandparents, Beatrice F. and Charles F. DCFS noted that Beatrice F. and Charles F. were "very involved" in A.H.'s well-being and the child was thriving in her Apple Valley preschool. Beatrice F. told a DCFS social worker that she communicates daily with mother. S.J. and A.J. both told the social worker they missed their younger sister A.H.

Also on June 29, 2017, the juvenile court held a 12-month review hearing. It granted mother unmonitored visits and ordered DCFS to evaluate and report on whether the children could be placed in mother's home. The order also states: "The order for Suitable Placement dated 10/13/16 . . . remains FFE (Full Force and Effect)." The matter was set for a contested 12-month review hearing on August 23, 2017.

In advance of the contested hearing, DCFS reported mother had been living in a domestic violence shelter in Apple Valley. Although mother reported taking A.H. to school and assisting with the child's daily needs, Beatrice F. denied that mother had done so. Beatrice F. added that she did not believe mother was ready to take care of "all three children." Daisy F. reported that mother had not seen T.J., S.J., and A.J. on a regular basis as she had been in Apple Valley for an unknown length of time. At the contested 12-month review hearing held on August 23, 2017, the juvenile court continued jurisdiction and ordered the children to remain suitably placed.

In advance of an 18-month review hearing, DCFS filed a report on November 15, 2017, noting that A.H. remained placed with Beatrice F. and Charles F., while T.J., S.J., and A.J. lived with Daisy F. and Ernest F. Both Beatrice F. and Daisy F. believed mother was not capable of caring for all of the children at this stage in her life. Beatrice F., who is referred to as both "maternal great grandmother" and "paternal great grandmother" in the report, said she intended to adopt A.H. because she wanted A.H. to receive a free education through Charles F.'s veteran benefits. A.H.'s school continued to report that A.H. is "energetic, talkative, and bright." A.H. was described as an "ideal student" who often assists by making new children feel comfortable and by putting toys away. A social worker observed A.H. to be sociable, helpful, and talkative for her age. On December 4, 2017, the date scheduled for the 18-month review hearing, the juvenile court continued the matter for a contested review hearing on February 15, 2018.

In reports filed just before the February 15, 2018 contested 18-month review hearing, DCFS reported mother had been arrested for shoplifting on December 22, 2017, and remained in jail until January 19, 2018. At the hearing, mother argued for the return of all her children to her custody, contending that DCFS had failed to meet its burden to show a substantial risk of harm to the children if returned. The juvenile court found mother was not in compliance with her case plan, terminated reunification services, ordered that the children receive permanent

placement services, and set a section 366.26 hearing for June 14, 2018.

Mother filed this petition for extraordinary writ on June 1, 2018, arguing the juvenile court abused its discretion in allowing A.H. to be placed with Beatrice F. and Charles F., who, as relatives of an alleged father, are considered non-relatives under the statutory scheme. We granted a stay of the June 14, 2018 section 366.26 hearing and issued an order to show cause. We now deny the petition.

III.

DISCUSSION

A. Standard of Review

Section 366.22, provides that within 18 months after a dependent child was originally removed from the physical custody of her parent, a permanency review hearing must occur to review the child's status. At the hearing, "the court shall order the return of the child to the physical custody of his or her parent . . . unless the court finds, by a preponderance of the evidence, that the return of the child to his or her parent . . . would create a substantial risk of detriment to the safety, protection, or physical or emotional well-being of the child." (§ 366.22, subd. (a)(1).) We review the juvenile court's detriment finding for substantial evidence. (*Angela S. v. Superior Court* (1995) 36 Cal.App.4th

758, 763.) This means, among other things, that we must uphold the decision of the juvenile court even if substantial evidence might also support a different conclusion. (*In re Charlotte V.* (2016) 6 Cal.App.5th 51, 57 [under substantial evidence analysis "'[m]ere support for a contrary conclusion is not enough to defeat the finding"']).

B. Jurisdiction

In dependency proceedings, disposition orders and "all subsequent orders are directly appealable" without limitation, except for orders setting a 366.26 hearing, which are reviewed by extraordinary writ. (*In re S.B.* (2009) 46 Cal.4th 529, 531–532; *In re Meranda P.* (1997) 56 Cal.App.4th 1143, 1150.) ""'[A]n unappealed disposition or postdisposition order is final and binding and may not be attacked on an appeal from a later appealable order.' [Citation.]' [Citation.]" (*In re S.B.*, *supra*, 45 Cal.4th at p. 532.)

"[A] notice of appeal must be filed within 60 days after the rendition of the judgment or the making of the order being appealed." (Cal. Rules of Court, rule 8.406(a)(1); see also *In re Alyssa H.* (1994) 22 Cal.App.4th 1249, 1253–1254.) "[O]nce the deadline expires, the appellate court has no power to entertain the appeal." (*Van Beurden Ins. Services, Inc. v. Customized Worldwide Weather Ins. Agency, Inc.* (1997) 15 Cal.4th 51, 56.) The prohibition is jurisdictional and acts as an absolute bar to this court's ability to consider

the appeal. (*Adoption of Reed H.* (2016) 3 Cal.App.5th 76, 82.)

DCFS notes A.H. has been placed by the agency with Beatrice F. and Charles F. since at least June 29, 2017, when the placement was first reported to the juvenile court. After receiving that report, the juvenile court held a contested 12-month review hearing on August 23, 2017, and, according to DCFS, ordered that A.H. remain in the placement. DCFS argues that to challenge the placement with Beatrice F. and Charles F., mother was required to file her notice of appeal within 60 days of the August order, or by October 23, 2017.

There is no dispute mother did not file a notice of appeal by then, and that her notice of intent to file a petition for extraordinary writ was not filed until February 16, 2018. However, we disagree with DCFS' characterization of the juvenile court's August 23, 2017 order. Following the contested hearing on that day, the juvenile court simply ordered that "[t]he order for Suitable Placement dated 10/13/16 . . . remains FFE (Full Force and Effect)." Such an order vests the Department with discretion to select a suitable placement, and to change that placement when it deems advisable. (*In re Cynthia C.* (1997) 58 Cal.App.4th 1479, 1481.) Although at the time of the August 23, 2017 order A.H. had been placed by DCFS with Beatrice F. and Charles F., at no time before or after that hearing did the juvenile court directly order that placement. As there was no order other than for "Suitable Placement," the 60-day

deadline to appeal placement with Beatrice F. and Charles F. was not triggered. (See *id.* at p. 1488 [social service agency's removal of a child from her placement pursuant to a standing suitable placement order did not trigger 60-day period to appeal, because there was no removal order by the court].) The writ was timely filed and we have jurisdiction to decide the matter raised by mother.

C. Forfeiture

"A parent's failure to raise an issue in the juvenile court prevents him or her from presenting the issue to the appellate court." (*In re Elijah V.* (2005) 127 Cal.App.4th 576, 582; accord, *In re Sheena K.* (2007) 40 Cal.4th 875, 880–881 [even constitutional rights may be forfeited ""by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it."" [Citations.]"]; *In re S.B.*, *supra*, 32 Cal.4th at p. 1293 ["a reviewing court ordinarily will not consider a challenge to a ruling if an objection could have been but was not made in the trial court"]; *In re Dakota H.* (2005) 132 Cal.App.4th 212, 221 [a "party forfeits the right to claim error as grounds for reversal on appeal when he or she fails to raise the objection in the trial court"].)

Mother concedes she did not object to A.H.'s placement with Beatrice F. and Charles F. in the juvenile court. Rather, she urges us to exercise our discretion to review the

placement anyway because it raises a pure question of law and involves an important legal issue. We decline to do so.

"Although an appellate court's discretion to consider forfeited claims extends to dependency cases [citations], the discretion must be exercised with special care in such matters," where "considerations such as permanency and stability are of paramount importance." (*In re S.B.*, *supra*, 32 Cal.4th at p. 1293.)

These principles are at the forefront in this case. A.H. has been placed by DCFS with Beatrice F. and Charles F. since at least June 29, 2017. Had mother objected at that point, or in any of the several hearings subsequently held in the juvenile court, the court could have evaluated her concerns and, if appropriate, ordered A.H. placed elsewhere before she deepened her bond with Beatrice F. and Charles F. and adjusted to her preschool in Apple Valley. But because mother remained silent, three-year-old A.H. has now spent a significant portion of her life living with Beatrice F. and Charles F. DCFS reports that Beatrice F. has been "very involved" in the child's well-being and "readily advocates" for her. Under the care of her alleged paternal great-grandparents, A.H. has thrived in her Apple Valley preschool. The school reports that A.H. is "vibrant, talkative, . . . intelligent," and describes her as "the ideal student to have in a classroom." Excusing mother's forfeiture at this late juncture raises the spectre of disruption and instability that could have been avoided had mother acted promptly. For this reason, forfeiture is

excused "rarely and only in cases presenting an important legal issue." (*In re S.B.*, *supra*, 32 Cal.4th at p. 1293.)

Contrary to mother's suggestion, the legal principles raised by her petition are not in question. In determining where to place a child removed from the physical custody of her parents, preferential consideration is given to relatives, and a "relative" means "an adult who is related to the child by blood, adoption, or affinity within the fifth degree of kinship." (§ 361.3, subds. (a), (c)(2).) However, placement with a relative is neither required nor guaranteed. (§ 16519.5, subd. (c)(6).) A child may be placed with a "nonrelative extended family member" (NREFM), i.e., "an adult caregiver who has an established familial relationship with a relative of the child . . . or a familial or mentoring relationship with the child." (§ 362.7.) A NREFM "may include relatives of the child, teachers, medical professionals, clergy, neighbors, and family friends." (*Ibid.*)

Mother's petition goes to whether the juvenile court abused its discretion in permitting A.H. to be placed with Beatrice F. and Charles F., who are variously described by DCFS as materal great-grandparents or paternal great-grandparents, i.e., either relatives or NREFMs. It involves a straightforward application of the statutory scheme and the factors to be considered in determining placement. (§ 361.3, subd. (a); *In re A.K.* (2017) 12 Cal.App.5th 492, 498; *In re Joshua A.* (2015) 239 Cal.App.4th 208, 218.) As such, it does not raise an "important legal issue" that warrants our consideration in spite of mother's forfeiture. (Compare *In re*

S.B., *supra*, 32 Cal.4th at pp. 1293–1294 [the forfeited issue involved interpretation of a statute and had divided the courts of appeal]; *In re M.R.* (2005) 132 Cal.App.4th 269, 272 [the forfeiture was excused in order to clarify a recent statutory amendment].)

IV.

DISPOSITION

The petition for extraordinary writ is denied. The stay of the section 366.26 hearing is vacated.

MOOR, J.

We concur:

BAKER, Acting P. J.

JASKOL, J. *

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* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.