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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

CESAR G.,
Petitioner,

v.

THE SUPERIOR COURT OF
THE COUNTY OF LOS ANGELES,
Respondent;

LOS ANGELES COUNTY
DEPARTMENT OF CHILDREN AND
FAMILY SERVICES,
Real Party in Interest.

B241254

(Los Angeles County
Super. Ct. No. CK75206)

ORIGINAL PROCEEDING; petition for extraordinary writ. Sherri Sobel,
Juvenile Court Referee. Petition denied.

Danielle Butler Vappie and Charles Benjamin Curley, under appointment by the
Court of Appeal, for Petitioner.

No appearance for Respondent.

John F. Krattli, Acting County Counsel, James M. Owens, Assistant County
Counsel, and Aileen Wong, Deputy County Counsel, for Real Party in Interest.

Diane Coto, under appointment by the Court of Appeal, for Minor.

Cesar G. (Father), father of minor Jessica G., challenges the setting of a permanency planning hearing pursuant to Welfare and Institutions Code section 366.26.¹ Father² contends that the juvenile court abused its discretion by setting the hearing without a prima facie showing of changed circumstances required by section 366.3.³

To the contrary, we find that the record amply demonstrates changed circumstances sufficient for the setting of a permanency planning hearing under section 366.26. Of course, we express no opinion as to what ruling the juvenile court may make at the section 366.26 hearing.

BACKGROUND

Jessica G. (born November 2003) is the daughter of Jennifer R. (Mother) and Father. The record establishes, and no party disputes, that Mother, diagnosed with bipolar disorder and depression, has a long history of illicit drug abuse. On November 4, 2008, the Los Angeles Department of Children and Family Services (DCFS) filed the original petition, alleging neglect by both Father and Mother. Jessica was placed in shelter care.

Now Jessica lives with prospective adoptive parents, Aida R. and Jose R., in whose home she was placed on January 22, 2010.

Jessica suffers from severe developmental delays. When Jessica was assessed by the Buena Park School District at the age of 34 months, she tested at the “very low” rank of less than one percent for overall functioning, with over 99 percent of all same-aged children ranked above her. Jessica demonstrated extreme developmental delays, as follows: visual perception testing placed her on par with a child of 23 months; her performance on fine motor skills testing was the same as a child of 18 months; and her receptive language and expressive language skills performance were at the same level as a child of 14 months.

¹ Undesignated statutory references are to the Welfare and Institutions Code.

² Mother is not a party to the petition.

³ Jessica has joined in the answer of DCFS.

In 2009, Jessica underwent a computed tomography test (CAT scan) as well as electroencephalogram examinations (EEG) after having suffered a possible seizure. In mid-2010, Dr. Habib Ismael, a neurologist at Pomona Valley Hospital Medical Center, diagnosed Jessica with cerebral dysgenesis with polymicrogyria and closed-lip schizencephaly with secondary mental retardation and microcephaly.⁴

In the August 30, 2010 Report prepared for the section 366.26 hearing, Children's Social Worker (CSW) Magdalena Elorriaga states that Aida R. and Jose R. "are proactive in [Jessica's] developmental and health needs. . . . They have demonstrated the ability to ensure her safety and well-being. In addition, the prospective adoptive parents have a vast experience of raising children with special needs and understand the development of children." At that time, Aida R. and Jose R. did not want to formalize a postadoption agreement that would have maintained regular and consistent contact between Jessica and her birth parents and her extended family.

During this period of time, Father remained bonded with Jessica.

On October 28, 2010, the juvenile court (Valerie Lynn Skeba, referee) conducted a contested hearing pursuant to section 366.26. Father testified that he visited Jessica once per week, on Sundays, from about 10:00 or 11:00 in the morning, to about 5:00 or 6:00 in the evening. Father testified that Jessica is "very attached" to him and shows excitement when she first sees him arrive at the home of her foster family. He brought "learning toys" or a book; they played in the park; and then went out to eat. On the visits, he brought paternal grandmother and paternal grandfather and, sometimes, paternal uncle Daniel G. Father testified that, although paternal grandmother and paternal grandfather are divorced from each other, "they're willing to put their differences aside . . . on behalf of my daughter."

The juvenile court acknowledged the love between Jessica and Aida R., but worried that Aida R. might abandon Jessica or prevent Father from visiting Jessica. The

⁴ In non-medical terms, Jessica's brain did not grow properly in utero and, as a result, she is severely developmentally delayed.

juvenile court explained that the only way “to be absolutely certain that those bonds are maintained is to order a legal guardianship. It’s very clear to me that this caretaker loves Jessica. I don’t believe this caretaker is going to turn around and say, you know, ‘If you don’t let me adopt, I don’t want this kid anymore.’ [¶] I think Jessica does look to . . . caretaker as being her parent. But I also think she looks to her father as being her dad. . . . [B]oth the caretaker and the father have gone to extraordinary circumstances to maintain this relationship. And it is a relationship that is worth maintaining. [¶] And I can’t take the chance that something is going to happen to that relationship. We can always reconsider adoption at a later point. We can never reconsider termination of parental rights.”

Jessica appealed from the guardianship order. Jessica’s counsel contended on appeal that the juvenile court should have terminated parental rights and identified adoption as the appropriate permanent plan. Jessica’s counsel asserted that the juvenile court erred in finding that the parent-child relationship exception to termination of parental rights (§ 366.26, subd. (c)(1)(B)(i)) applied to the relationship between Jessica and Father.

Applying a deferential standard of review, we affirmed. (No. B228731.)⁵ We explained that the juvenile court’s finding that Father maintained regular visitation and contact with Jessica was supported by substantial evidence. We afforded the juvenile court’s finding that Jessica would benefit from continuing the relationship with Father a “high degree of . . . deference,” given the “‘juvenile court’s opportunity to observe the witnesses and generally get ‘the feel of the case.’”” (*In re Scott B.* (2010) 188 Cal.App.4th 452, 469.) We determined that the record, as it stood at that time, showed that substantial evidence supported the juvenile court’s factual determination that Father occupied a parental role in Jessica’s life and that “‘severing the natural parent/child relationship would deprive the child of a substantial, positive emotional attachment such

⁵ At the request of DCFS, we take judicial notice of our opinion in case No. B228731. (Evid. Code, § 451, subd. (a).)

that the child would be greatly harmed.” (*In re Derek W.* (1999) 73 Cal.App.4th 823, 827.)

We issued the opinion on November 17, 2011, and, two days later, on November 19, 2010, Letters of Guardianship issued to prospective adoptive parent Aida R.

In his November 2, 2011 Status Review Report, CSW Jorge Gomez states that Jessica meets special education criteria for Mental Retardation and is in special education classes. She is a client of the Regional Center, which funds an in-home behavioral program for Jessica through Counseling Solutions for Families and Children. That program addresses the following behavioral concerns: Jessica engages in disruptive social behaviors “which can occur almost daily in all settings”; she has “[p]roblems with boundary and personal space of others”; she displays hyperactivity and “resistance on a daily basis in all settings when she is not able to get her way”; at times, Jessica “displays aggressive social behaviors in terms of physically hitting and biting others.”

Jessica had a two-week visit with Father and paternal grandmother Graciela G. at their home in mid-July 2011. The visit ended two days early, “because paternal grandmother said she was very tired and had other personal activities to attend to.”

On July 26, 2011, Father and paternal grandmother Graciela G. requested that Jessica be returned to Father’s care. Their plan was that paternal grandmother Graciela G., who is not employed, would watch Jessica in the mornings, while Father, who has a part-time job, would watch Jessica in the afternoons. CSW Gomez states that he “knows that father cannot drive due to suffering from epilepsy attacks which are unpredictable. Mrs. G[., paternal grandmother,] expressed that she also has some other personal things to attend to, and that care of the child demands too much time from every[]one in the house. CSW stated that they can let him know what the plans are for the care of Jessica and then it will be considered. [¶] It was the perception of CSW that Mrs. G[., paternal grandmother,] gets too stressed taking care of Jessica and that this placement might not last long or be in the best interest of child Jessica as permanent placement.”

Father did not attend the April 20, 2012 Individualized Education Program (IEP) meeting, which is conducted on a yearly basis to review Jessica's educational needs and to set goals for Jessica and guidance for her educators.

In the May 2, 2012 Status Review Report, CSW Alejandro Carrillo states that Jessica had overnight weekend visits with Father at his home every other week. She returned to the home of Aida R. "in good spirits and has no behavioral problems after the visits."

CSW Carrillo further reports that Jessica had eye-muscle surgery⁶ at Loma Linda Hospital on January 11, 2012. When CSW Carrillo asked Father why he did not attend the surgery, Father answered "that he could not remember but maybe it was because he had had a[n epileptic] seizure." CSW Carrillo adds: "Although Father has continued to have consistent contact with Jessica and states that he would like for Jessica to live with him and his family[,] Father has made no effort in being involved in any of Jessica's appointments for her medical or educational needs. On 1/11/12 Jessica had an eye surgery, that although was not life threatening, she was still placed under general anesthesia. Legal guardian [Aida R.] informed him nearly a month prior to the surgery and father still failed to show up to the hospital for the surgery. Legal guardian [Aida R.] stated that she called father and paternal grandmother the morning of the surgery to inform them that Jessica was at the hospital and legal guardian was told by paternal grandmother that she would not be able to make it because she had other personal errands to complete and that she did not know where father was. Legal guardian [Aida R.] stated that father did not see Jessica until about 3 weeks after the surgery.

"Jessica appears to be well adjusted to the home. She walks around the house and interacts with the other minors in the home appropriately. She refers to legal guardian [Aida R.] a[s] mommy. Jessica has shown CSW her room and other rooms. She knows who sleeps in the rooms. Legal guardian [Aida R.] has continued to meet all of Jessica's needs, which include her medical, emotional, educational and physical needs."

⁶ The surgery was most likely to correct Jessica's strabismus.

Aida R. told CSW Carrillo that she wants to adopt Jessica and that she would continue to allow Father to have contact with Jessica.

At the May 2, 2012 hearing, the juvenile court set a permanency planning hearing pursuant to section 366.3.

DISCUSSION

The juvenile court did not abuse its discretion in setting the 366.26 hearing. While the court may decide that adoption is not the best plan for Jessica after holding a new permanency planning and selection hearing, “it [is] certainly justified in taking another look.” (*Sheri T. v. Superior Court* (2008) 166 Cal.App.4th 334, 341.) We note, further, that Father cannot show prejudice from the juvenile court’s decision to hold a new permanency planning selection hearing, because Father will have an opportunity at the hearing to litigate the issues fully. (*Ibid*; see *In re Tamika T.* (2002) 97 Cal.App.4th 1114, 1119–1120.)

Pursuant to section 366.3, the juvenile court had the discretion to vacate the order for legal guardianship entered on October 28, 2010, and to set another permanency planning hearing to determine whether Aida R. should remain Jessica’s legal guardian or whether Aida R. should be allowed to adopt Jessica. Subdivision (c) of section 366.3 provides, in pertinent part: “If, following the establishment of a legal guardianship, the county welfare department becomes aware of changed circumstances that indicate adoption . . . , the department shall so notify the court. The court may vacate its previous order dismissing dependency jurisdiction over the child and order that a hearing be held pursuant to Section 366.26 to determine whether adoption or continued legal guardianship is the most appropriate plan for the child.”

“In as much as the juvenile court is subject to the mandatory preference for adoption over legal guardianship [citation], this policy is only furthered by the fact that section 366.3, subdivision (c), permits the court to more readily hold a new section 366.26 hearing to determine whether adoption or continued guardianship is the most appropriate plan.” (*In re Andrea R.* (1999) 75 Cal.App.4th 1093, 1107.)

We will not reverse the juvenile court's decision to set a hearing pursuant to section 366.26 where, as here, prima facie evidence supports that decision. (*David L. v. Superior Court* (2008) 166 Cal.App.4th 387, 394.) The record provides prima facie evidence that circumstances changed subsequent to the juvenile court's October 28, 2010 hearing order.⁷

Most importantly, prospective adoptive parent Aida R. has agreed to continue to allow Father to have regular and consistent contact with Jessica.⁸ In 2010, Aida R. refused to enter into a formalized agreement. Having determined that Father and Jessica had a parent-child bond and Jessica would benefit from continued contact with Father, and having expressed concern that Aida R. might sever ties between Jessica and Father, the juvenile court concluded that legal guardianship was the only way to maintain the loving relationship between Jessica and Father. At that time, the juvenile court made the right decision. Where the parent-child exception is established, the juvenile court "cannot nevertheless terminate parental rights based upon an unenforceable expectation that the prospective adoptive parents will voluntarily permit future contact between the child and a biological parent, even if substantial evidence supports that expectation. The purpose of the parent-child relationship exception is to protect the parent-child relationship when its continuation is more beneficial to the dependent child than a permanent plan of adoption and, in such case, a court cannot leave the protection of such a relationship dependent upon the hoped for goodwill of the prospective adoptive parents." (*In re C.B.* (2010) 190 Cal.App.4th 102, 128–129.)

Prima facie evidence demonstrates that, should she be allowed to adopt Jessica, Aida R. is willing to allow Father to maintain regular visitation with Jessica. At the

⁷ "The language of section 366.3, subdivision (c), supports the prima facie standard, since the county welfare department need only 'notify' the juvenile court of changed circumstances, not prove them. The lower standard is also consistent with the Legislature's preference for adoption because it more 'readily' facilitates consideration of that option. [Citations.]" (*David L. v. Superior Court, supra*, 166 Cal.App.4th at p. 394.)

⁸ The postadoption contact agreement may be formalized in writing. (Fam. Code, § 8616.5.)

permanency planning hearing, the juvenile court will hear testimony and review all the evidence before it to confirm that the parties will agree to such an arrangement and to decide whether Jessica may benefit from it. Such an arrangement could provide the stability of a permanent family with the advantage of Jessica's preserving a relationship with Father and paternal grandparents. "[S]ome adoptive children may benefit from either direct or indirect contact with birth relatives, . . . after being adopted. Postadoption contact agreements are intended to ensure children of an achievable level of continuing contact when contact is beneficial to the children" (Fam. Code, § 8616.5, subd. (a).) The juvenile court retains jurisdiction to enforce a postadoption contact agreement. (Fam. Code, § 8616.5, subd. (f).) "A kinship adoption agreement allows, under certain circumstances, the adoptive parents, the birth relatives, and the child, to enter into an agreement regarding continuing contact and/or visitation between the child and designated birth relatives. The agreement is intended as a tool to promote a relative's interest in adoption. It further seeks to expedite legal permanency for children who cannot return to their parents." (*In re Kimberly S.* (1999) 71 Cal.App.4th 405, 407.)

Additionally, although he has otherwise maintained a regular visitation schedule, Father failed to visit, or in any other way provide support to, Jessica, before, during, or in the weeks after Jessica's eye surgery. The record shows that Father did nothing to help prepare Jessica for surgery, during which general anesthesia was administered. Although Father did not visit Jessica until three weeks after the surgery had taken place, he had no explanation for his three-week absence during the time his daughter was undergoing, and then recovering from, surgery.

Another significant change is the narrowing of the possibility that Jessica could be returned to Father's care on a permanent basis. What was scheduled to be a two-week visit in July 2011 for Jessica with Father and paternal grandmother Graciela G. ended two days early, with paternal grandmother's having explained to CSW Gomez that Jessica's care "demands too much time" from everyone in the family.

We note also that, although this may not reflect a change in Father's behavior over the years, Father did not attend the April 20, 2012 IEP meeting. "An IEP is a

comprehensive statement of a disabled child’s educational needs and the specifically designed instruction and related services that will meet those needs. [Citation.] It is developed by a school official qualified in special education, the child’s teacher, *and the parents*. [Citation.] It guides the school system as to how the child will be educated.” (*In re Carl R.* (2005) 128 Cal.App.4th 1051, 1067, italics added.) “[A]n IEP is reviewed at least annually and revised as necessary.” (*Ibid.*, citing 20 U.S.C. § 1414(d)(4).) The IEP team must include “[o]ne or both of the pupil’s parents, a representative selected by a parent, or both, in accordance with the federal Individuals with Disabilities Education Act (20 U.S.C. Sec. 1400 et seq.).” (Ed. Code, § 56341, subd. (b)(1).) In the IEP meeting, the parent plays an important role as a member of the team—so much so that the Individuals with Disabilities Education Act requires a school district to meet with a parent in order to formulate the IEP. (*County of Los Angeles v. Smith* (1999) 74 Cal.App.4th 500, 509; 20 U.S.C., § 1400 et seq.)

Accordingly, the juvenile court properly set the section 366.26 permanency planning hearing, and Father has not demonstrated any entitlement to relief. Of course, we express no opinion as to what ruling the juvenile court may make at that hearing.

DISPOSITION

The petition is denied.

NOT TO BE PUBLISHED.

CHANNEY, J.

We concur:

MALLANO, P. J.

JOHNSON, J.