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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

In re DAVID V. et al., Persons Coming
Under the Juvenile Court Law.

B261238

LOS ANGELES COUNTY
DEPARTMENT OF CHILDREN AND
FAMILY SERVICES,

(Los Angeles County
Super. Ct. No. CK65133)

Plaintiff and Respondent,

v.

MARCELLA Y.,

Defendant and Appellant.

APPEAL from an order of the Superior Court of Los Angeles County. Marilyn Martinez, Juvenile Court Referee. Affirmed.

Anne E. Fragasso, under appointment by the Court of Appeal, for Defendant and Appellant.

Mark J. Saladino, County Counsel, Dawyn R. Harrison, Assistant County Counsel, Navid Nakhjavani, Deputy County Counsel, for Plaintiff and Respondent.

Marcella Y. (mother) appeals from a juvenile court order terminating her parental rights over her two sons, David V. and Raul U. Mother contends the juvenile court violated her right to due process by terminating her parental rights without a contested hearing. We affirm the trial court order.

FACTUAL AND PROCEDURAL BACKGROUND

Although the instant dependency matter began in July 2010, mother had a several-year history with the Los Angeles County Department of Children and Family Services (DCFS). In December 2006, the juvenile court sustained a dependency petition involving three of mother's children—C.Y., A.Y., and David V.—due to domestic violence between mother and David's father, and the father's physical abuse of C.Y. and A.Y.¹ The children were released to mother. She received family maintenance services. In November 2007, the court terminated jurisdiction. Mother received sole physical and legal custody of C.Y., A.Y., and David.

In July 2010, the juvenile court again found mother's three children—A.Y. (then 11 years old), David (then 4 years old), and Raul U. (then 1 year old)—to be persons described by Welfare and Institutions Code section 300, subdivision (b).² The juvenile court sustained a petition containing allegations that Raul's father³ abused alcohol and, despite knowing of his alcohol abuse, mother allowed him unlimited access to the children. The petition alleged father had been under the influence of alcohol while the children were in his care. The court further sustained allegations that father suffered from mental and emotional problems and had engaged in violent conduct at the family's home, all of which endangered the children. The juvenile court released the children to mother, on the condition that father not reside in or visit the family home. Mother received family reunification services. In May 2011, the court terminated dependency

¹ C.Y. is now an adult.

² All further statutory references are to the Welfare and Institutions Code.

³ Raul's father, also named Raul U., was not the father of mother's other children. For purposes of this opinion, we refer to Raul U., Sr. as "father."

jurisdiction, awarding mother full legal and physical custody of the children. The court ordered monitored visits for father.

In April 2012, DCFS learned father was having unmonitored visits at the family's home. The following month, DCFS began providing voluntary family maintenance services to mother. In July 2012, a DCFS social worker arrived at the family home to find father in the home, seemingly living there. At a subsequent DCFS visit, father was at the home, drinking alcohol and exhibiting erratic behavior. A few days later, father had a physical altercation with C.Y., mother's adult daughter. DCFS detained the children. In September 2012, the juvenile court found A.Y., David, and Raul to be persons described by section 300, subdivision (b), based on father's alcohol abuse, his mental problems, which included a diagnosis of schizophrenia with mood swings, father's physical altercation with C.Y., and mother's failure to protect the children.

The children were placed with mother, under DCFS supervision. In February 2013, DCFS removed the children from mother and filed a supplemental petition pursuant to section 387. The supplemental petition alleged that in January 2013, mother placed the children at risk of harm by allowing father to frequent the home and have access to the children. The court had previously ordered father to have only monitored visits in a public setting, with a monitor other than mother. The petition further alleged father had engaged in a physical altercation with an adult relative at the family's home. The petition alleged mother was unable to "safely and protectively control the children's environment," in that father had visited against court orders, and mother's adult daughter and adult nephew used marijuana in the home, in the children's presence, against mother's wishes. DCFS placed the children with a maternal aunt.

In June 2013, the juvenile court sustained the petition as to David and Raul.⁴ The children were removed from mother's custody. Over the next year, mother regularly

⁴ A.Y.'s father was non-custodial and "non-offending." In June 2013, the juvenile court terminated dependency jurisdiction over A.Y. and awarded her father sole physical and legal custody. From this point on we use "the children" to refer only to David and Raul.

visited. But when DCFS changed the children's placement from the maternal aunt to a family friend, mother's visits grew less frequent—between one and three times per month. According to DCFS reports, mother continued to minimize the circumstances that led to dependency jurisdiction, including that father had a problem with alcohol. In November 2013, mother brought her new boyfriend to a visit with the children, despite warnings from her family members that introducing the boyfriend to the children so soon was not a good idea. When the social worker asked if the boyfriend would LiveScan, mother demurred and said their relationship was not that serious. In September 2014, following a contested hearing, the juvenile court terminated mother's reunification services and set a section 366.26 hearing.

The December 2014 section 366.26 report indicated the children were doing well in the caregiver's home. The caregiver wished to adopt them. David, now nine years old, told a social worker he felt he was part of the caregiver's family, did not want to leave, and wanted the caregiver to adopt him. He also indicated he preferred to live with the caregiver because he was afraid at his mother's house and did not feel safe. Raul, now five years old, told the social worker he loved the caregiver, referred to her as "mom," and wanted to continue living with her. Mother and the maternal aunt, however, reportedly blamed David for the anticipated adoption. David told a social worker mother said it was his fault the children were being adopted because David did not choose mother. Since August 2014, David had experienced enuresis and encopresis at home and at school.

Regarding mother, the report concluded: "By May 2014, the mother was reported to be doing her best in attempting to complete the Court ordered activities; however, her efforts were 'a last minute effort.' The mother's visits with her children decreased to one to two visits per month and approximately five phone calls per month. Case records indicate that the mother loves her children; however, at that time, she was unable to provide the safe, secure, and nurturing home environment to allow the children to thrive and develop into the potential the children deserve."

At the section 366.26 hearing, the court indicated it had considered the social worker's report and asked if the parties wished to be heard. Mother's counsel requested that the court not terminate mother's parental rights and argued the beneficial parent-child relationship exception to adoption applied. Mother's counsel argued mother had regular and consistent visits with the children, and those visits were of "good quality." Mother had continued therapy, despite the termination of reunification services. Mother also was seeking services and believed that once the services were in place, she would be more stable and able to provide the children with a safe home.

After counsel for the other parties argued, the court said the indicated ruling was to terminate parental rights and asked if there was anything further. Mother's counsel asked: "Is the court inclined to set a contest based on –" the court responded: "I am not." After further discussion with other counsel, the court stated: "Assuming that [mother's counsel's] statement is an offer of proof, I find that it is insufficient to persuade the court if I set the matter for a contested .26 hearing, that there's any reasonable likelihood that I would be persuaded that it would be detrimental to terminate parental rights." The court explained mother's visits were not always appropriate and mother had blamed the children for the dependency proceedings. The court further noted there was no "evidence that these children have a significant emotional attachment to their mother such that they would suffer detriment if I terminated parental rights. Mother does not occupy a parental role. She is that of visitor." The court also rejected the request that the court order legal guardianship as the permanent plan, noting guardianship does not provide the same permanency and stability as adoption. The court found the children were likely to be adopted and terminated parental rights.

DISCUSSION

I. The Juvenile Court Did Not Err By Failing to Hold a Contested Section 366.26 Hearing

Mother's sole contention on appeal is the juvenile court violated her due process rights by failing to hold a contested hearing pursuant to section 366.26. We reject this argument. To the extent mother's counsel's statements could be deemed a request for a

contested hearing, the juvenile court did not err in construing counsel's statements as an offer of proof, and in denying the request for a contested hearing on the basis of that offer.

Section 366.26 sets forth procedures for hearings terminating parental rights. At the hearing, the court is to review reports provided by the social services agency, and "shall receive other evidence that the parties may present" (§ 366.26, subd. (b).) "[A] parent has a right to 'due process' at the hearing under section 366.26 which results in the actual termination of parental rights." (*In re Jeanette V.* (1998) 68 Cal.App.4th 811, 816.) Still, the "due process right to present evidence is limited to relevant evidence of significant probative value to the issue before the court." (*Id.* at p. 817.)

As an initial matter, the record does not clearly establish mother sought to present evidence at the hearing. At the beginning of the section 366.26 hearing, mother's counsel argued but did not indicate mother wished to testify or call or cross-examine any witnesses.⁵ Only after all counsel had argued and the court gave its indicated ruling did mother's counsel ask if the court was "inclined" to set a contested hearing. Although it is arguable on this record whether mother even sought a contested hearing, we will construe counsel's question as a request to present evidence.

That said, mother's claim on appeal still fails. Under section 366.26, subdivision (c)(1), the juvenile court must terminate parental rights if it finds by clear and convincing evidence it is likely the child will be adopted if parental rights are terminated. However, the court will not terminate parental rights if it determines doing so would be detrimental to the child based on one of several statutory exceptions. (§ 366.26, subd. (c)(1)(B).)

⁵ We note the section 366.21, subdivision (f) hearing, at which the juvenile court terminated mother's reunification services, was a contested hearing. Although the reporter's transcript from this hearing is not included in the record on appeal, the minute order from that hearing indicates mother submitted documentary evidence and "trial" was conducted.

To establish the beneficial parent-child relationship exception, mother had to prove termination of parental rights would be detrimental to the children because 1) mother maintained regular visitation and contact with them, and 2) the children would benefit from continuing their relationship with her. (§ 366.26, subd. (c)(1)(B)(i).) “ ‘Sporadic visitation is insufficient to satisfy the first prong . . .’ of the exception. [Citation.] Satisfying the second prong requires the parent to prove that ‘severing the natural parent-child relationship would deprive the child of a *substantial*, positive emotional attachment such that the child would be *greatly* harmed. [Citations.] A biological parent who has failed to reunify with an adoptable child may not derail an adoption merely by showing the child would derive *some* benefit from continuing a relationship maintained during periods of visitation with the parent.’ [Citation.] Evidence that a parent has maintained ‘ ‘frequent and loving contact’ is not sufficient to establish the existence of a beneficial parental relationship.’ [Citation.]” (*In re Marcelo B.* (2012) 209 Cal.App.4th 635, 643.)

“Because a parent’s claim to . . . an exception [to termination of parental rights] is evaluated in light of the Legislature’s preference for adoption, it is only in exceptional circumstances that a court will choose a permanent plan other than adoption. [Citation.]” (*In re Scott B.* (2010) 188 Cal.App.4th 452, 469.) The party challenging termination of parental rights bears the burden of proving that one or more of the statutory exceptions applies. (*In re C.F.* (2011) 193 Cal.App.4th 549, 553; *In re I.W.* (2009) 180 Cal.App.4th 1517, 1527.)

The juvenile court deemed mother’s counsel’s argument to be an offer of proof.⁶ A court may properly require an offer of proof to determine whether a contested section 366.26 hearing is warranted. As explained in *In re Tamika T.* (2002) 97 Cal.App.4th 1114 (*Tamika T.*), “Because due process is . . . a flexible concept dependent on the circumstances, the court can require an offer of proof to insure that before limited judicial

⁶ Mother neither objected to the juvenile court’s characterization of counsel’s argument as an offer of proof, nor sought to augment or amend the offer.

and attorney resources are committed to a hearing on the issue, mother had evidence of significant probative value. If due process does not permit a parent to introduce irrelevant evidence, due process does not require a court to hold a contested hearing if it is not convinced the parent will present relevant evidence on the issue he or she seeks to contest. The trial court can therefore exercise its power to request an offer of proof to clearly identify the contested issue(s) so it can determine whether a parent's representation is sufficient to warrant a hearing involving presentation of evidence and confrontation and cross-examination of witnesses. . . . We therefore conclude it does not violate due process for a trial court to require an offer of proof before conducting a contested hearing on one of the statutory exceptions to termination of parental rights.” (*Id.* at p. 1122.)

Mother's right to due process was not violated by the court's consideration of an offer of proof to determine whether to conduct a contested hearing. Further, the juvenile court did not abuse its discretion in finding mother's offer of proof insufficient to warrant a contested hearing. (*Ingrid E. v. Superior Court* (1999) 75 Cal.App.4th 751, 759.) An offer of proof “must be specific, setting forth the actual evidence to be produced, not merely the facts or issues to be addressed and argued.” (*Tamika T.*, *supra*, 97 Cal.App.4th at p. 1124.) Mother offered only conclusory statements that terminating her parental rights would be detrimental to the children. (See *id.* at p. 1121.) She did not identify or describe any evidence she would proffer if given the opportunity to do so. Mother's offer of proof did not indicate she would provide evidence regarding visitation different from what was in the DCFS reports. The offer also did not describe any evidence that would characterize the relationship between mother and the children, allowing the court to determine whether that relationship was sufficient for the court to apply the beneficial parent-child relationship exception.

On appeal, mother argues the existence of factual disputes in the evidence, the court's alleged misreading of the record, and mother's only “inadvertent” neglect of the children, all indicated mother should have had the opportunity to be heard. Yet, at the section 366.26 hearing, mother's offer of proof did not indicate she would testify; that she

would cross-examine the social workers about alleged inaccuracies in the reports; or that she would offer any evidence that could prove terminating her parental rights would be detrimental to the children. “The juvenile court does not have a sua sponte duty to determine whether an exception to adoption applies. [Citations.] The party claiming an exception to adoption has the burden of proof to establish by a preponderance of the evidence that the exception applies.” (*In re Rachel M.* (2003) 113 Cal.App.4th 1289, 1295.) As it was mother’s burden to prove the applicability of the exception, the court could properly exercise its power to request or consider an offer of proof to “clearly identify the contested issue(s) so it can determine whether a parent’s representation is sufficient to warrant a hearing involving presentation of evidence and confrontation and cross-examination of witnesses.” (*Tamika T.*, at p. 1122.) Based on the record before it, and the lack of any indication from mother about what evidence she would seek to offer at a contested hearing, the juvenile court acted within its discretion when it denied mother’s request for a contested hearing, and did not violate mother’s right to due process.⁷

DISPOSITION

The juvenile court order is affirmed.

BIGELOW, P.J.

We concur:

GRIMES, J.

OHTA, J.*

⁷ Mother does not contend the evidence was insufficient to support the juvenile court order terminating her parental rights.

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