Filed 5/1/12 In re C.P. CA2/8

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

In re C.P., a Person Coming Under the Juvenile Court Law.	B235199 (Los Angeles County Super. Ct. No. CK 78026)
LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. I.L., Defendant and Appellant.	

APPEAL from orders 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.

Andrea Sheridan Ordin, County Counsel, James M. Owens, Assistant County Counsel, and William D. Thetford, Deputy County Counsel, for Plaintiff and Respondent.

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Mother appeals from orders of the juvenile court terminating parental rights in her child, C.P., and denying her request for a contested Welfare and Institutions Code section 366.26 hearing.[1] Mother asserts that the court denied her due process when it terminated her parental rights without a contested hearing, and it erred in terminating parental rights before an adoption home study was completed. We disagree and therefore affirm.

FACTS AND PROCEDURAL HISTORY

On July 8, 2009, respondent Department filed a section 300 petition with the juvenile court on behalf of 18-month old C.P. and his half-siblings by different fathers, seven-year-old A.D. and five-year-old B.E.

At the detention hearing held on July 8, 2009, the juvenile court ordered all three children detained from mother and C.P. and A.D. detained from their fathers. B.E. was released to his nonoffending father. C.P. and A.D. were placed with their paternal grandmothers.

At the jurisdiction hearing on August 11, 2009, the juvenile court declared the children dependents of the court under section 300, subdivision (b) (failure to protect), (g) (no provision for support) and (j) (abuse of sibling). The court sustained amended allegations that mother left C.P. and A.D. in the care of their respective paternal grandmothers without making a plan for the children's ongoing care and supervision, that mother and Juan P. had a history of engaging in verbal and physical altercations, and that mother was an abuser of alcohol, conduct that placed the children at risk of physical and emotional harm.

As to C.P., the juvenile court granted mother and Juan P. reunification services and monitored visits. Mother and Juan P. were ordered to attend a Department-approved program of parent education and domestic violence counseling, and to verify

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[1] Only mother, C.P. and the Los Angeles County Department of Children and Family Services (Department) are parties to this appeal. The father of C.P., Juan P., is not a party to the appeal. All further statutory references are to the Welfare and Institutions Code.

a sober, safe and stable lifestyle. In addition, mother was directed to attend an approved alcohol program with random testing.[2]

As of the review hearing on February 9, 2010, mother was expecting a fourth child whose father she believed was Juan P. Although Juan P. had begun his court-ordered programs, he had not been able to complete them because of a lack of funds. Both parents were regularly visiting C.P. At the Department's recommendation, the court granted mother an additional six months of reunification services so she could obtain stable housing, continue to verify a sober and safe lifestyle, and complete all court-ordered services. Juan P. was granted a similar extension so that he could complete his services. The Department considered the family still to be at "high" risk. The court found that mother had made substantial progress in addressing her issues and granted mother unmonitored daytime visits in a public setting.

For a scheduled 12-month permanency planning hearing set for August 10, 2010, the Department reported that C.P. was flourishing in his placement with his paternal grandmother, Mrs. P. In the interim, mother had given birth to a baby girl, J., in May 2010. Mother had moved in with a cousin because she needed assistance with the infant, but she planned to move out to live with her current boyfriend and baby daughter as soon as she was able. Mother had begun to bring her boyfriend to visits with her children, and she appeared to devote less attention to them due to his presence. Juan P. had continued to participate in his court-ordered services. The juvenile court granted Juan P. unmonitored visits with C.P. and leave to reside in his mother's home with the child. At a subsequent hearing in September 2010, the juvenile court granted mother unmonitored visitation with C.P. and A.D., including overnight visits up to two consecutive nights.

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[2] The juvenile court made similar orders concerning A.D. Because B.E. had never resided with mother or Juan P. and his father was nonoffending, the court terminated jurisdiction over B.E. and granted his father sole legal and physical custody.

During the succeeding two months, mother had one overnight visit with C.P. and A.D. However, she dropped the children off five hours late the following day, and the children were returned dirty and hungry. Mother had subsequent day visits with C.P. twice a week for three weeks, but she thereafter failed to show up for scheduled visits and failed to call to cancel.

On December 3, 2010, C.P.'s sister, J., was removed from mother's care due to domestic violence between mother and her boyfriend. The infant was detained and ordered into shelter care for substantiated allegations of general neglect. Because of these events, mother's visits with C.P. and A.D. reverted to monitored. The child showed an attachment to mother when she was present but returned from visits tired and irritable. In view of mother's long domestic violence history and her failure to benefit from reunification services, the Department concluded it was no longer feasible to continue with such services or to recommend reunifying mother with C.P. and A.D. At this time, both the paternal grandmothers of C.P. and A.D. were committed to adopting their grandsons. C.P.'s grandmother, Mrs. P., had submitted an application for adoption and needed to complete a TB test, submit her divorce decree, undergo an interview, and submit references to complete a home study. The Department requested that the juvenile court terminate reunification services for mother and Juan P., proceed with permanency adoption plans for C.P. and A.D., and set the matters for a section 366.26 permanency planning hearing.

At the permanency review hearing on January 3, 2011, Juan P. indicated his agreement with C.P. remaining with Mrs. P., and the juvenile court ordered his reunification services to be terminated. Mother, however, objected to the Department's recommendation and requested a contested permanency hearing.

For the contested permanency hearing, the Department reported that in light of mother's lengthy domestic violence history and despite receiving reunification services for 19 months and completing a domestic violence program and individual therapy, mother had not demonstrated an ability to avoid abusive relationships. She failed to utilize her support system or services to prevent her becoming involved in

another volatile relationship and had tried to cover up her actions and lifestyle. The Department indicated mother showed no ability to become independent without a male partner, nor was she able to provide a safe and stable environment for her children. The Department therefore recommended that the juvenile court terminate mother's reunification services and proceed with permanency adoption plans for C.P. and A.D.

The juvenile court held a contested permanency hearing for C.P. and A.D. on March 10, 2011. Although the court found mother was in substantial compliance with her plan, it concluded she had not made substantial progress sufficient to persuade the court that the children would not be at risk if returned to her custody. Therefore, it terminated mother's reunification services as to C.P. and A.D. and set their matters for a permanency planning hearing.

For the permanency planning hearing, the Department reported that C.P., now age three, was adoptable and his grandmother Mrs. P. was fully committed to adopting him.[3] C.P. had lived in Mrs. P.'s home since July 2009. However, a home study was still in process. Mrs. P. was willing to maintain in contact with C.P.'s birth parents as long as the visits were monitored and his safety was not in issue.

In June 2011, mother filed a section 388 petition as to C.P. and A.D., asking for a change in the orders terminating reunification services and return of custody of the children to mother. Mother asserted that she had continued to make progress with her individual counseling, was in full compliance with her case plan and could verify she has been single for many months, and thus, could protect her children from domestic violence. The juvenile court denied the section 388 petitions, finding that mother had not cited any new evidence or a change in circumstances and the proposed change of order did not promote the best interests of the children. The court ruled: "Recently, on 3/10/11, the cour[t] sustained sibling petition. Mother has significant issues of

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[3] A.D.'s grandmother was no longer interested in adoption but preferred a legal guardianship.

anger management and domestic violence to address. Her visits for [A.D.] and [C.P.], as a result, were changed from unmonitored to monitored."

The juvenile court conducted a further section 366.26 permanency planning hearing on July 18, 2011. As to A.D., no objection being raised, the court appointed A.D.'s paternal grandmother permanent legal guardian, allowed appropriate monitored visitation by the parents, and terminated its jurisdiction over him. As to C.P., mother's counsel requested a contested hearing. She indicated that the Department was seeking a continuance because a home study for C.P. had yet to be approved and that mother had a significant bond with C.P. and C.P. had a significant bond with mother.

In response to the juvenile court's request for an offer of proof, mother's counsel stated: "My client does indicate that she has had consistent contact with the child. And the visits go very well. Not only does my client have a relationship and a bond with this child, this child has one with mother. And it would be a detrimental situation if their relationship would have to end . . . . [¶] He calls out to her. He is very sad after visits . . . . And he goes running to her as he is glad at every single visit. She indicates to me that he is strongly bonded with her . . . . [¶] And, further, my client has continued her counseling, individual counseling, to address these issues. [¶] As the court may remember, we had a contested . . . [¶] . . . hearing because of a domestic violence incident. And my client maintains that she is single. She is not in any relationship. And she is making progress . . . . And I believe she has reunification with the child's sibling [J.]; that it would be in this child's best interests that he have an opportunity to be a family with my client and his sibling."

Under questioning by the court, Mrs. P. stated that mother and C.P. visited "[e]very time she calls to let me know that she wants to see the boy," about every two weeks for about two hours over the last few months. She informed the court that when C.P. sees his mother, "He acts like a baby that he is. But after we leave, he is calm." Mrs. P. indicated she sometimes called mother so C.P. could speak with her. C.P. called Mrs. P. "grandmother" and called mother "momma." However, Mrs. P. stated it was she who provided for all of C.P.'s needs every day.

After hearing the offer of proof and from Mrs. P., the court stated: "I am not inclined to set this matter for contested hearing. While [C.P.] knows who his mother is, she is a visitor. And we all know that even visitation every single day does not generally meet the burden of being in a position to persuade the court that the child will suffer detriment if parental rights are severed. There may be a relationship. But the court must [weigh] and balance the continuum of the relationship. [¶] It is the grandmother who is the full-time caretaker. The mother is the visitor and doesn't occupy a parental role."

Mother offered stipulated testimony that she visited with C.P. once a week for approximately two hours and she called him about once a week in the middle of the week.

The juvenile court found that C.P. visited with mother on a fairly regular basis, sometimes once a week and sometimes once every other week. While C.P. called her "mother" and Mrs. P. "grandmother," the court determined "that is not an indication that he does have such a significant, positive, emotional attachment with his mother such that he would be greatly harmed if the parental relationship was severed. [¶] Visitation in and of itself is insufficient to persuade the court that the child would reap such a benefit that the preference for adoption is outweighed. [¶] This child's basic and daily needs are provided every day, day in and day out, by his paternal grandmother. His mother is a visitor. They go to the park. They might have a good time, but I do not have evidence that this playful, enjoyable visitation relationship is sufficient to deprive this child of the permanency of adoption. He may enjoy a friendly or familiar relationship with his mother, but that is insufficient." The court found the offer of proof insufficient to create a reasonable likelihood that it would be persuaded not to terminate parental rights.

The court also found, by clear and convincing evidence, it was likely that C.P. would be adopted, saying, "He has been cared for by his paternal grandmother for a substantial period of time. He does not have any special needs which would pose a barrier to him becoming adopted. And whatever are his needs, they're well-known to

[Mrs. P.], who has been meeting his needs on a daily basis and providing very appropriately for him." The court found it unnecessary to have a completed approved home study in order to terminate parental rights. The court therefore ordered parental rights over C.P. to be terminated and that the Department continue to provide permanent placement services until the final order of adoption is granted.

Mother timely appealed from the order terminating parental rights and the denial of her request for a contested hearing.

DISCUSSION

1. Mother's Offer of Proof Was Insufficient to Entitle her to a Contested Hearing

Mother contends the juvenile court's failure to grant her a hearing on the parental exception to adoption was a violation of her right to due process. She asserts her offer of proof was sufficient to trigger her due process right to a contested hearing. We disagree.

Section 366.26, subdivision (c)(1)(B)(i) provides for a parental relationship exception to termination of parental rights. Under this exception, the court may choose an alternative to adoption if it finds compelling reason for determining that termination of parental rights would be detrimental to the child because "[t]he 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)(i).) To establish this exception, a parent must prove there is a parent-child relationship such that the relationship "promotes 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.* (1994) 27 Cal.App.4th 567, 575.) It is the parent's burden to show that such exceptional circumstances exist. (*Id.* at p. 574.) The exception applies only when the court finds that regular visits and contact between parent and child have continued or developed "a significant, positive, emotional attachment from child to parent." (*Id.* at p. 575.) The court must examine the exception on a case-by-case basis weighing variables such as "[t]he age of the child, the portion of the child's life spent

in the parent's custody, the 'positive' or 'negative' effect of interaction between parent and child, and the child's particular needs." (*Id.* at pp. 575-576.)

A parent has a right to due process at the section 366.26 permanency planning hearing. (*In re Jeanette V.* (1998) 68 Cal.App.4th 811, 816.) But due process is a flexible concept that depends on the circumstances and a balancing of various factors. (*Id.* at p. 817.) A parent's right to present evidence at such a hearing "is limited to relevant evidence of significant probative value to the issue before the court." (*Ibid.*) The issue before the court is whether "'[t]he parents . . . have maintained regular visitation and contact with the minor *and* the minor would benefit from continuing the relationship.'" (*Ibid.*) The juvenile court may properly request an offer of proof before granting a parent a contested section 366.26 hearing. (*In re Jeanette V.*, *supra,* at p. 817; see also *In re Tamika T.* (2002) 97 Cal.App.4th 1114, 1116, 1122.)

Here, mother asserts that her offer of proof was sufficient to trigger her due process right to a contested hearing given C.P.'s attachment to mother, her consistent visitation and mother's bond to him. However, frequent and loving contact alone is insufficient to establish the necessary parent-child relationship. (*In re Beatrice M.* (1994) 29 Cal.App.4th 1411, 1418-1419.) Mother's offer of proof failed to show she occupied a parental role in the child's life. (*Ibid.*) Although C.P. called Mrs. P. "grandmother" and called mother "momma," it was Mrs. P. who provided for C.P.'s daily needs, and she had done so even before C.P. was taken into care when he was 18 months old. C.P. had spent more than half his life with Mrs. P., in a stable and caring environment. Even if C.P. ran to mother at every visit and acted "'like a baby that he is'" when he saw her, he was calm when visits ended, an indication that while C.P. knew who mother was, she remained merely a visitor in his life. At the time of the section 366.26 hearing, mother's visits had reverted to monitored and they were limited to outings in public parks.

The juvenile court properly determined that mother's offer of proof was insufficient to show C.P. would suffer detriment from termination of parental rights.

2. The Juvenile Court Properly Terminated Parental Rights Without a Completed and Approved Home Study

Mother contends that the juvenile court erred in terminating parental rights before the home study was completed, mandating reversal. We disagree.

We initially note that mother concedes there is no requirement that an adoptive home study be completed before a court can terminate parental rights. However, mother asserts that the best practice would be to wait for a home study, rather than rely on speculation that a home study will be approved, before terminating parental rights.

The law does not mandate a completed and approved home study before a juvenile court may terminate parental rights. "The question before the juvenile court [is] whether the child [is] likely to be adopted within a reasonable time, not whether any particular adoptive parents [are] suitable." (*In re Marina S.* (2005) 132 Cal.App.4th 158, 166.) Questions regarding the suitability of the prospective adoptive family are irrelevant to the issue whether a minor is likely to be adopted. Were it not so, "many [section 366.26] hearings would degenerate into subjective attacks on all prospective adoptive families in efforts to avoid termination of parental rights. Such a result is not envisioned by the statutory scheme. Rather, the question of a family's suitability to adopt is an issue which is reserved for the subsequent adoption proceeding." (*In re Scott M.* (1993) 13 Cal.App.4th 839, 844.)

The juvenile court is required to terminate parental rights if it determines the child is likely to be adopted and no exception is applicable. (§ 366.26, subd. (c)(1)(A) & (B).) Indeed, that the child has not yet been placed in a pre-adoptive home or with a relative or foster family who is prepared to adopt the child is not a basis for the court to conclude the child will not likely be adopted. (§ 366.26, subd. (c)(1).)

Here, it is not disputed, and the juvenile court found by clear and convincing evidence, that C.P. likely will be adopted. The court noted that C.P. had no special needs that would pose a barrier to his becoming adopted. And the court properly articulated that it is not necessary for the court to have a completed approved home study in order to terminate parental rights. Moreover, the court appropriately directed

the Department to continue to provide permanent placement services until the final order of adoption is granted. The court thus did not err in proceeding with termination of parental rights in the absence of a completed approved home study. (*In re Marina S.*, *supra*, 132 Cal.App.4th at pp. 165-166.)

DISPOSITION

The orders are affirmed.

FLIER, J.

WE CONCUR:

BIGELOW, P. J.

GRIMES, J.