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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

led
DIVISION FIVE

In re K.W. et al., Persons Coming
Under the Juvenile Court Law.

B297329

(Los Angeles County
Super. Ct. No. DK07890)

LOS ANGELES COUNTY
DEPARTMENT OF CHILDREN
AND FAMILY SERVICES,

Plaintiff and Respondent,

v.

D.M.,

Defendant and Appellant.

APPEAL from an order of the Superior Court of Los Angeles County, Jana M. Seng, Judge. Affirmed.

Gina Zaragoza, under appointment by the Court of Appeal, for Defendant and Appellant.

Office of the County Counsel, Mary C. Wickham, County Counsel, Kristine P. Miles, Assistant County Counsel, and

Stephanie Jo Reagan, Principal Deputy County Counsel, for
Plaintiff and Respondent.

D.M. (Mother) appeals from a juvenile court order terminating her parental rights over her two daughters, K.W. and Ki.W.¹ We consider whether the juvenile court erred in declining to find applicable the parent-child relationship exception to statutory provisions governing the termination of parental rights. We also decide whether Mother can now be heard to complain that the Los Angeles County Department of Children and Family Services (the Department) improperly required visits with her daughters to be monitored during a four-month period.

I. BACKGROUND

A. *Initial Dependency Proceedings*

In October 2014, the Department filed a dependency petition on behalf of K.W., who was less than a month old at the time. The petition alleged, among other things, K.W. was at substantial risk of serious physical harm from episodes of domestic violence between her parents. At the initial detention hearing, the juvenile court ordered K.W. detained. And at the subsequent jurisdiction hearing, neither parent contested the petition's domestic violence allegation. The juvenile court assumed jurisdiction over K.W., ordered family reunification services, and authorized monitored visitation.

Department reporting in advance of the six-month status review hearing opined both parents had made “great progress” and were complying with their respective case plans. The Department recommended the court order K.W. returned to

¹ The girls' father (Father), whose parental rights were also terminated by the same order, is not a party to this appeal.

Mother's custody. The juvenile court adopted that recommendation at the review hearing.

Over the course of the next several months, however, the Department received reports of continuing verbal altercations between the parents, along with two domestic violence incidents. The first of these two occurred at a pharmacy where a verbal dispute escalated to the point that Mother threw a bag of chips at Father; Father also claimed Mother struck him twice in the face with her fist. The second incident also began as a verbal dispute, this time at a gas station, and it escalated to physical violence when Father shattered a car window, grabbed Mother by the neck, and punched her in the face. K.W. and her infant sister Ki.W. were present during this second incident.

In response to the second incident, the Department in March 2016 filed separate dependency petitions on behalf of Ki.W. (under Welfare and Institutions Code section 300²) and K.W. (under section 342). The petitions alleged the parents had a "history of engaging in violent altercations" in the presence of their children and Mother failed to protect the children from substantial risk of serious physical harm. At a detention hearing on the two petitions, the juvenile court ordered both children detained, but allowed the parents monitored visitation. Then, at the subsequent jurisdiction hearing, the juvenile court sustained the petitions, authorized monitored visitation, and prohibited the parents from visiting the children together. The court also granted the Department the discretion to liberalize visitation.

² Undesignated statutory references that follow are to the Welfare and Institutions Code.

B. The Department Unilaterally Requires Visitation to Be Monitored for Roughly Four Months

Over the course of the next year, Mother completed her participation in the court-ordered services. As a consequence, the Department liberalized her visitation to unmonitored visits and, in April 2017, the juvenile court granted one overnight visit per week. The Department, however, did not immediately permit overnight visits because Mother did not have a crib for Ki.W. or a bed for K.W. There is no indication in the appellate record that Mother ever complained to the juvenile court about this delay in permitting overnight visits.

In advance of the 18-month review hearing for K.W. (which also served as the six-month review hearing for Ki.W.), the Department recommended the juvenile court terminate family reunification services as to K.W. The reason for the recommendation was twofold: (1) Mother continued to be in contact with Father and (2) she had “not demonstrated learned or changed behavior to ensure the safety of her daughter despite receiving over 12 months of family reunification services.”³ As the Department explained in a last minute information report, it was “concerned that this continued [contact between] the parents despite their compliance with [previously ordered case plans] can place [K.W. and Ki.W.] at risk of continued domestic violence incidents by the parents who have yet to fully address, learn and

³ After submitting this recommendation, the Department learned there had been a further incident between the parents: Mother “‘bumped’ into” Father while riding a bus, a dispute arose between them, and Father took Mother’s cell phone away from her.

overcome the reason the Department first became involved.” Upon receipt of the last minute information report, the juvenile court restricted Mother’s visitation to monitored visits.

At the combined six- and 18-month review hearing in July 2017, the juvenile court rejected the Department’s recommendation to terminate reunification services. The court continued family reunification services for both children, reinstituted unmonitored visitation for Mother, and ordered overnight visits between Mother and the children once the Department assessed and cleared Mother’s housing. The court also gave the Department the discretion to further liberalize Mother’s visits.

The following month, however, the Department learned of several concerning developments. First, Ki.W. suffered two seizures during an unmonitored visit with Mother and Mother did not seek immediate medical attention or promptly advise the Department about the seizures. Second, a Department social worker noticed a red mark on K.W.’s arm after an unmonitored visit with Mother, and when asked about the mark, K.W. indicated Mother had slapped her arm with an open hand. Third, Mother decided on her own accord to stop taking psychotropic medication prescribed for her Major Depressive Disorder.

In light of these developments, and without immediately returning to juvenile court, the Department discontinued Mother’s unmonitored visits starting in September 2017 and limited her to monitored visits only.⁴ Later, in mid-January

⁴ A Department report states the Department filed a petition on September 8, 2017, seeking to change the prior order for unmonitored visits so as to authorize monitored visitation only.

2018, the Department did file a petition seeking to formally change Mother's visitation from unmonitored to monitored. After receiving the petition, but without ruling on it, the juvenile court reiterated its then-existing order for unmonitored visitation and directed the Department to comply with that order. The Department then withdrew its petition and complied.⁵

During the period from September 2017 to mid-January 2018 when the Department limited Mother to monitored visits despite a court order authorizing unmonitored visitation, there is no indication in the record that Mother brought the Department's noncompliance to the juvenile court's attention.

C. The Juvenile Court Terminates Reunification Services

In advance of the next status review hearing, the Department again recommended the juvenile court terminate reunification services, this time for both children. Although Mother was consistent in her visitation and in compliance with her court-ordered programs, the Department opined Mother continued to exhibit a lack of parenting skills and "d[id] not have

The appellate record, however, includes no such petition filed on that date.

⁵ In a supplemental review report filed the same day the Department withdrew its section 388 petition, the Department advised many of the concerns that had prompted it to limit Mother to monitored visitation had dissipated. Mother had resumed taking her medication, she was participating with her children in Child Interaction Therapy and Child Parent Psychotherapy, and Mother agreed that if the children had a medical emergency she would report it to the Department and take the children for treatment immediately.

control of her children during visits.” The Department found this lack of control troubling because it indicated she had not internalized any parenting skills lessons from reunification programs and because it suggested she “may resort to using physical discipline with the children as [K.W.] alleged in the past during an unmonitored visit.”

During the several months before the status review hearing, which was ultimately held in June 2018, Mother’s visitation was progressively liberalized—for a time. In February 2018, the Department increased the duration of Mother’s unmonitored visits from four hours per visit to eight hours. Later that same month, the juvenile court ordered overnight visits for Mother to begin immediately and gave the Department the discretion to permit multiple overnight visits provided Mother complied with all court orders, including an order directing Father to stay away from Mother’s home. The following month, the Department liberalized Mother’s overnight visits to weekend overnight visits.

But a month and half before the next status review hearing, the juvenile court curtailed Mother’s visitation, limiting her to unmonitored visits at a Department office. The juvenile court imposed this limitation after receiving further information from the Department about multiple instances in which the police had been called to Mother’s home to respond to reports of domestic violence between Mother and Father while the children were present. In the evening of April 17 (and continuing into the morning of April 18), for instance, the police responded to Mother’s home on four occasions. As police reports described it, a recurring pattern had developed between Mother and Father: “[Mother] invites [Father] over when he gets kicked out of his

mother's house. While [Father] is at [Mother's] house, he goes out and gets drunk on alcohol or high on methamphetamine (or both). [Mother] then calls 911 and generates numerous calls for service When [Mother] calls 911, she is extremely dramatic and is hysterical to the communications center dispatcher. When Officers arrive at her apartment, she is composed and demands we (Officers) make [Father] leave. Also, [Mother] wants ZERO prosecution when [Father] allegedly commits an act of vandalism and/or trespassing."

A last minute information report filed shortly before the reunification services status hearing stated the Department had safety concerns for the children arising from Mother's "noncompliance by not protecting the children from [Father], by not informing the Department or the Court of her continued contact with [Father], allowing [Father] contact with the children while he is under the influence, and engaging in . . . domestic dispute[s] with [Father] in the presence of the children. Domestic violence between [Mother] and [Father] [is] the issue that brought the family to the attention of the Department . . . and [Mother] and [Father] continue to engage in domestic violence."

At the June 2018 hearing, the juvenile court terminated reunification services as to both children and set a hearing to consider permanency planning and termination of parental rights. The court described Mother's progress toward alleviating or mitigating the causes necessitating the court's jurisdiction over the children as "minimal." Addressing Mother directly, the court stated: "It appears, ma'am, that[] while you have done all of the programs, you have not benefited from the programs, and it appears that for an extended period of time you've been misleading the court and the Department regarding your

continuing contact with [Father] and . . . [the] nature of your continuing relationship with [Father].”

Mother was advised at this hearing of her right to seek extraordinary writ review of the court’s decision to terminate reunification services. She did not seek review.

D. The Juvenile Court Terminates Mother’s Parental Rights

Nine months after reunification services were terminated, the juvenile court held a section 366.26 hearing to consider termination of Mother’s parental rights.⁶ Reports prepared by the Department concerning pertinent developments were admitted in evidence.

According to the Department’s reporting, the children were doing well with their foster parents, who wanted to adopt them. The children had been living with the foster parents since September 2016, had bonded to them, and called them “mommy” and “daddy.” The children were also observed to be happy and comfortable with the foster parents and sought them out for comfort. The Department believed the foster parents had done “everything they can to help the children thrive in their

⁶ The hearing had been continued to allow (a) the Department to investigate allegations of inappropriate discipline by the children’s foster parents, (b) the foster parents to complete parenting classes, and (c) the Department to conduct an updated home study of the foster parents. The Department ultimately concluded the allegations of physical abuse against the foster parents were “[i]nconclusive” and there were “no safety issues in the home and no further risks for any type of physical punishment or personal rights violations.”

environment” and were “willing to make whatever efforts . . . to ensure that [K.W. and Ki.W.] achieve[d] permanency through adoption.” In some contrast, Mother continued to struggle to control the children during her visits, despite years of training and counseling, with the result that “a lot of time is spent reprimanding the girls for misbehaving.” The Department observed that Mother’s visits lacked a “parent/child structured relationship,” which allowed the children to “act out behaviorally.” The children did not exhibit this aggressive behavior with the foster parents.

Mother did not testify at the section 366.26 hearing or present other evidence. Proceeding to argument, Mother’s attorney argued the parent-child relationship exception to termination of parental rights applied because Mother had completed her programs and had been consistent in her visitation (progressing as far as unmonitored overnight visits until Father’s presence at her home compelled a regression to visits at Department offices). Minors’ counsel joined the Department’s attorney in urging the juvenile court to terminate parental rights and find the parent-child relationship exception inapplicable. Minors’ counsel argued that although Mother had remained in constant contact with her children, the children did not view her as a parental figure. Instead, K.W. and Ki.W. looked to the foster parents, with whom they had lived and “thrive[d]” for two and a half years, for parental guidance.

The juvenile court found the parent-child relationship exception inapplicable and terminated Mother’s parental rights. The court stated it did not doubt that “Mother loves the girls very much, and . . . has been making a lot of efforts in trying to reunify with the children.” But the court explained its paramount

concern was the best interest of the children and their need for stability, noting they had been with the foster parents “for some[]time now, who have been caring for them and loving them and have provided a nurturing environment for them, even though there w[ere] these allegations of inappropriate physical discipline.” The court emphasized “the issue before the court is whether the children are adoptable, which they are, [and] whether there are any legal exceptions to terminating parental rights” The court found it had “not heard sufficient evidence to find that the exceptions exist. Although Mother has been consistent with her visits, . . . visits aren’t just enough. There has to be sufficient bond with the children to overcome the court’s standards that the children are to be given a more stable home”

II. DISCUSSION

It is too late now for the first of two arguments Mother makes for reversal, i.e., the claim that reversal is warranted because the Department temporarily limited her to monitored visits when there was an order for unmonitored visitation. The Department temporarily restricted Mother’s visitation for roughly a four-month period in late 2017 and the first couple weeks of 2018. The juvenile court held multiple hearings after that time at which Mother could have argued—but did not—that the limits on visitation somehow infected subsequent proceedings. The court also entered at least one order during these hearings (the reunification services termination order) that Mother could have asked this court to review—but again, she did not. The issue is therefore waived now. (See, e.g., *In re A.A.* (2008) 167 Cal.App.4th 1292, 1318 (A.A.).)

Mother's second argument, that the juvenile court erred in concluding she did not prove the parent-child relationship exception to termination of parental rights, is properly before us but meritless. To successfully invoke the exception, Mother needed to show she occupied a truly parental role, rather than just a friendly or loving role, in K.W. and Ki.W.'s lives. The trial court properly concluded on the evidence before it that Mother did not make the requisite showing and the minors' interest in stability and permanence with the foster parents, who had cared for them for the majority of their young lives, necessitated termination of Mother's parental rights.

A. Mother's Visitation-Based Challenge Is Waived

Mother argues "[t]he Department impeded [her] visitation with her daughters which impacted her bond with her children." The Department's requirement that a monitor supervise Mother's visits during September 2017 through mid-January 2018, without seeking an order from the juvenile court authorizing the change, was inappropriate even if well-intentioned. Nevertheless, when advanced as an argument for overturning the parental rights termination order made over a year later, the claim is waived because it was not raised sooner (and it is meritless regardless).

Prior to this appeal, Mother could have challenged the Department's constraints on visitation by either of two avenues. First, and most directly, she could have raised the issue in an extraordinary writ proceeding challenging the juvenile court's June 2018 order terminating reunification services. She did not. Second, she could have filed a section 388 petition with the juvenile court during the four-month period when the

Department was requiring monitored visits, and if the juvenile court for some reason declined to enforce its existing order, she could have appealed that decision. (*In re Christopher H.* (1996) 50 Cal.App.4th 1001, 1010; *In re Natasha A.* (1996) 42 Cal.App.4th 28, 33-34.) Mother did not do that either. Having forgone both of these paths for review and waited to raise the issue in this appeal, the point is now waived. (*Sara M. v. Superior Court* (2005) 36 Cal.4th 998, 1018; *A.A., supra*, 167 Cal.App.4th at p. 1318 [“Preliminarily, we observe that the agency argues appellants have forfeited the right to complain on appeal about the time it took to place the children with their relative caregivers because they should have raised the issue in an earlier appeal or writ. To the extent appellants criticize the agency’s effort at the outset of these proceedings, we agree with the agency”]; *In re Jesse W.* (2001) 93 Cal.App.4th 349, 355 [“A challenge to the most recent order entered in a dependency matter may not challenge prior orders for which the statutory time for filing an appeal has passed.” [Citation.] The rule serves vital policy considerations of promoting finality and reasonable expedition, in a carefully balanced legislative scheme, and preventing late-stage ‘sabotage of the process’ through a parent’s attacks on earlier orders”]; see also *In re S.B.* (2004) 32 Cal.4th 1287, 1293 [to preserve an issue for appeal, a party ordinarily must raise an objection in the trial court].)

Even if not waived, the contention that the four-month monitored visitation restriction somehow requires reversal of the parental rights termination order made over a year later is meritless. At the parental rights termination hearing, Mother presented no evidence to show this monitored visitation period impacted her bond with K.W. and Ki.W.—indeed, she presented

no evidence at all. And all of the evidence presented in the Department's reports was to the contrary: after the period when the Department relegated Mother to monitored visits, Mother progressed from unmonitored four-hour visits, to unmonitored eight-hour visits, to overnight visits, and then to weekend overnight visits. This progress was halted because the Department learned Mother continued to seek contact with Father, which resulted in multiple police calls for service at the home. In other words, if something impacted Mother's bond with her daughters, it was her own willingness to have continued conflicts with Father in the presence of the children, not the Department's earlier temporary restriction to monitored visits.

B. Termination of Parental Rights Was Not Error

"The section 366.26 hearing is a critical late stage in a dependency proceeding. The child has been under juvenile court jurisdiction for an extended period following the dispositional order, and the court has held one or more review hearings to consider a return to parental custody. (See § 366.21.) At the section 366.26 hearing, the focus shifts away from family reunification and toward the selection and implementation of a permanent plan for the child. . . . If adoption is likely, the court is required to terminate parental rights, unless specified circumstances compel a finding that termination would be detrimental to the child. (§ 366.26(c)(1); *In re Celine R.* (2003) 31 Cal.4th 45, 53[].)" (*In re S.B.* (2009) 46 Cal.4th 529, 532, fn. omitted.)

One of these specified statutory circumstances is the parent-child relationship exception to termination of parental rights. In the parlance of the statute, the juvenile court "shall

terminate parental rights unless . . . [¶] . . . [¶] (B) 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); see generally *In re Breanna S.* (2017) 8 Cal.App.5th 636, 645-648.)

Mother bears the burden of proving the parent-child exception applies. (*In re K.P.* (2012) 203 Cal.App.4th 614, 621 (*K.P.*); *In re Angel B.* (2002) 97 Cal.App.4th 454, 466 [“To overcome the preference for adoption and avoid termination of the natural parent’s rights, the parent must show 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”] (*Angel B.*)). A parent facing termination of parental rights must do more than show his or her children would receive some benefit from continuing a relationship maintained during periods of visitation. (*Angel B.*, *supra*, at p. 466.) Even if the parent-child contact has been loving and frequent, and notwithstanding the existence of an emotional bond with the child, a parent must show he or she occupies “a parental role in the children’s lives.” (*In re Noah G.* (2016) 247 Cal.App.4th 1292, 1300; accord, *K.P.*, *supra*, 203 Cal.App.4th at p. 621.)

We review the trial court’s decision using the “composite” standard of review discussed in *K.P.*, *supra*, 203 Cal.App.4th at p. 622, considering factors such as the 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 the parent and child, and the child’s particular needs. (*In re Jason J.* (2009) 175

Cal.App.4th 922, 937-938; *Angel B.*, *supra*, 97 Cal.App.4th at p. 467.)

Substantial evidence supports the juvenile court's conclusion that Mother did not have the requisite parental role in her children's lives. When the juvenile court terminated Mother's parental rights, K.W. and Ki.W. were still quite young, four and three years old respectively. For most of their lives, they had been in foster care, and in fact, for two and a half consecutive years, the sisters had lived together with the foster parents who provided them a domestic-violence-free environment in which they were doing well. Mother did not present any evidence at the parental rights termination hearing concerning the quality of any emotional attachment her daughters had to her, much less evidence they would be greatly harmed if their relationship were severed. This meant the evidence before the court was chiefly to be found in the Department's reports, and those reports revealed the girls continued to lack a structured, parental relationship with Mother.⁷

The juvenile court did not doubt that Mother loved K.W. and Ki.W., nor do we. But loving and frequent contact between a parent is not the touchstone of the parent-child relationship

⁷ Mother continued to struggle to control the children during visits, despite months of training and counseling, and often had to resort to bribing them with sugary snacks. There is little if any indication in the record that Mother was involved in customary parental responsibilities involving the children's care and learning. And all the while, of course, Mother continued to have contact with Father—a decision, given the parents' history of domestic violence, that is the antithesis of a parental decision properly focused on the welfare of K.W. and Ki.W.

exception. The existence of a true parental role is, and the foster parents, whom the girls called “mommy” and “daddy,” occupied that role—not Mother. There was no error in terminating parental rights.

DISPOSITION

The juvenile court’s order is affirmed.

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BAKER, J.

We concur:

RUBIN, P. J.

MOOR, J.