Filed 9/25/12 In re Isabella M. CA2/3

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

In re ISABELLA M. et al., Persons Coming Under the Juvenile Court Law.	B240134
LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. YVONNE G., Defendant and Appellant.	(Los Angeles County Super. Ct. No. CK78428)

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

Neale B. Gold, under appointment by the Court of Appeal, for Defendant and Appellant.

John F. Krattli, County Counsel, James M. Owens, Assistant County Counsel, and William D. Thetford, Principal Deputy County Counsel, for Plaintiff and Respondent.

INTRODUCTION

Yvonne G. appeals from the order of the juvenile court terminating her parental rights to Isabella (9 years old), Lilliana (6 years old), and Jesse (4 years old). She contends the juvenile court erred in requiring her to make an offer of proof and then denying her request for a contested permanency planning hearing. (Welf. & Inst. Code, § 366.26.)[1] Following established case law from this District Court of Appeal, we hold the juvenile court did not deny mother due process when it required her to make an offer of proof and based thereon, denied her a contest of the applicability of the parent-child exception to adoption. (§ 366.26, subd. (c)(1)(B)(i).) Accordingly, the order is affirmed.

FACTUAL AND PROCEDURAL BACKGROUND

1. *The dependency*

This is the second appeal in this dependency. (*DCFS v. Yvonne G.* (Apr. 26, 2011, B227699) [nonpub. opn.].) We refer to the relevant predicate facts contained in our previous opinion: The juvenile court sustained the petition and declared the children dependents of the court under section 300, subdivisions (b) and (j) after father shot and robbed someone while the children were in the parents' care and supervision. The court also found true the allegation that mother has a history of substance abuse and was a current abuser of marijuana and alcohol. The court removed the children from their parents' custody. The children were eventually placed with their maternal grandparents, who were later designated as the prospective adoptive parents. The court also awarded mother monitored visitation with the children.

[1] All further statutory references are to the Welfare and Institutional Code unless otherwise specified.

2. *Mother's contact with the children during the dependency*

Very early in this case, the Department of Children and Family Services (the Department) sent a letter to mother suggesting that she begin to help with the children's meals, laundry, care, and bathing and to be part of Jesse's physical therapy, stating, " '[t]hese are all necessary steps to have your children returned to you.' " (*DCFS v. Yvonne G., supra,* B227699, at [p. 4].) The social worker's letter also stated, " 'At this time it appears you are not taking this detainment [*sic*] very serious[ly] but I can assure you that the court does. The current plan is adoption for the minor children and *it is up to you to change the decision by doing what is necessary in the case plan*.' " (*Ibid*.) The Department also allowed the maternal grandmother to monitor visits to enable mother to help with the children.

Notwithstanding the Department's advice and the arrangement for mother to have liberal contact with the children, mother's contact was always sporadic. Mother promised to visit the children after visiting father in jail, but would not show up. Initially mother visited several times a week, and the children enjoyed the visits. However, mother's visits "tapered off when she started dating someone" and became a once-weekly event when mother found work. The Department reported in April 2010 that mother "has not taken the opportunity to be with her children and participate in their day to day lives and visits remain sporadic and disappointing to the children." During one visit witnessed by the social worker, mother, who did not appear overly excited to see the children, conversed with the grandmother while the children tried to get mother's attention. Meanwhile, Isabella cried for her mother and asked why mother did not come to visit.

By July 2010, mother had limited her own visits to once or twice a week between 6:00 p.m. and 8:00 p.m. And, despite "a lot of promises to show up" there were "a lot of disappoint[ing] no shows." When she did appear, the children begged for her attention. While originally Isabella asked for mother daily, by July 2010, she asked only once a week.

The juvenile court terminated mother's reunification services in July 2010. Her visits continued to be sporadic and became more infrequent. Mother visited the children only twice between December 2010 and February 2011. In late March 2011, the grandmother reported that mother visited the children three more times. Mother's visits were "inconsistent" in the summer of 2011. Despite a promise to visit the children for father's day, mother did not appear and so she had no visits for the entire month of June 2011. Mother visited once in July 2011.

The frequency of mother's visits did improve by February 2012, but the grandmother had to step in because mother sometimes made inappropriate comments.

The children reported being happy in their prospective adoptive home and stated things were " 'good.' " The Department described the children as "flourishing" in the care of their prospective adoptive parents. The Department recommended termination of parental rights.

3. *The section 366.26 hearing*

At the beginning of the hearing, mother's attorney asked for a contest, stating, "[t]he mother indicates that she is visiting with the children weekly and that they are bonded to her." The court assumed mother would be involved in the children's lives, given they were living with the maternal grandparents and asked whether any of mother's visits had been unmonitored. When mother responded in the negative, the court explained that if visits were supervised, mother could not meet her burden under section 366.26 to show she had become active in the children's lives and had assumed a parental role. The court elaborated that the reports contained nothing to show that mother could meet her burden. The exception to adoption would not be met merely because the visitation monitor might have allowed mother to read a story or give the children a bath. The court explained, a friend or any relative can come once a week and assist the grandmother in caring for the children. That would not make the friend a parent. After denying mother's request for a contested hearing on the parent-child exception to adoption, the juvenile court terminated mother's parental rights. Mother appealed.

CONTENTIONS

Mother contends she was entitled to a contested hearing as a matter of law and so the juvenile court erred in requiring her to make an offer of proof. She argues further that her offer of proof was sufficient in any event to merit a contested hearing.

DISCUSSION

At the permanency planning hearing, the juvenile court must order one of three dispositional alternatives, adoption, guardianship, or long-term foster care. (*In re S.B.* (2008) 164 Cal.App.4th 289, 296-297.) The Legislature has declared a strong preference for adoption over the alternative plans if the dependent child is adoptable. (*Id*. at p. 297.) The statute directs, if the court finds that the child is adoptable, "the court shall terminate parental rights unless" the court "finds a compelling reason for determining that termination would be detrimental to the child due to" one of the six delineated exceptions. (§ 366.26, subd. (c)(1) & (c)(1)(B).) Only if a compelling reason for applying an exception appears may the court select a plan other than adoption.

The exception to adoption on which mother relied is that found in section 366.26, subdivision (c)(1)(B)(i), the so-called parent-child relationship exception. Mother bore the burden to show application of this exception. (*In re Megan S.* (2002) 104 Cal.App.4th 247, 251.)

Toward that end, mother contends first that she has a due process right to a contested hearing on the applicability of this exception and should not have been required to make an offer of proof.

This question has already been decided adversely to mother by *In re Tamika T.* (2002) 97 Cal.App.4th 1114, which is on point. There, the juvenile court required the mother to make an offer of proof to demonstrate the existence of the parent-child relationship exception, and then denied her request for a contest because she could not point to any evidence to support the exception. (*Id*. at p. 1119.) Another division of this appellate district affirmed, holding that the juvenile court does not deny due process when it requires a parent to make an offer of proof before it decides to conduct a

contested hearing on the question of whether the parent can carry her burden to establish a statutory exception to termination. (*Id*. at p. 1116.)

The *Tamika T*. court explained, " 'Of course a parent has a right to "due process" at the hearing under section 366.26 which results in the actual termination of parental rights. This requires, in particular circumstances, a "meaningful opportunity to cross-examine and controvert the contents of the report." [Citations.] But due process is not synonymous with full-fledged cross-examination rights. [Citation.] *Due process is a flexible concept which depends upon the circumstances and a balancing of various factors*. [Citation.] *The due process right to present evidence is limited to relevant evidence of significant probative value to the issue before the court*. [Citations.] Even where cross-examination is involved, the trial court may properly request an offer of proof if an entire line of cross-examination appears to the court to be irrelevant to the issue before the court. [Citations.]' [Citation.]" (*In re Tamika T., supra*, 97 Cal.App.4th at p. 1120, quoting from *In re Jeanette V.* (1998) 68 Cal.App.4th 811, 816-817.)

"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 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." (*In re Tamika T., supra*, 97 Cal.App.4th at p. 1122.)

According to *Tamika T*., the juvenile court here did not deny mother due process by requiring she make an offer of proof on the applicability of the parent-child relationship exception to adoption. *In re James Q*. (2000) 81 Cal.App.4th 255, relied on by mother is inapposite as it involved a six-month review hearing, which is held before the reunification period expires, where the parent does not carry the burden of proof.

Mother argues alternatively that her offer of proof was sufficient to merit a contested hearing and so the juvenile court erred in denying her request.

"A proper offer of proof gives the trial court an opportunity to determine if, in fact, there really is a contested issue of fact." (*In re Tamika T., supra,* 97 Cal.App.4th at p. 1124.) To adequately protect a parent's rights, "[t]he 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." (*Ibid.*) " 'An offer of proof must consist of material that is admissible, it must be specific in indicating the purpose of the testimony, the name of the witness and the content of the answer to be elicited.' [Citation.]" (*In re Mark C.* (1992) 7 Cal.App.4th 433, 445.)

Here, in making the offer of proof, mother's attorney stated: "[t]he mother indicates that she is visiting with the children weekly and that they are bonded to her." Counsel stated further, "[t]he case law does look at the kinds of visitation the court ordered in the context of what the parent has. I do believe that it is a triable issue especially considering that she's visiting weekly and [the caretaker] is her mother. Whether or not she can overcome that it would be a benefit to the children not [to] terminate the parental rights." This offer of proof is redundant, conclusory, and lacks the necessary specificity to warrant a contested hearing.

To satisfy her burden under the parent-child exception to adoption, mother must demonstrate both that (1) "[t]he [parent has] maintained regular visitation and contact with the child and [that (2)] the child would benefit from continuing the relationship." (§ 366.26, subd. (c)(1)(B)(i).) Toward that end, mother was obligated to "prove . . . she occupies a parental role in the child's life resulting in a significant, positive emotional attachment of the child to the parent. [Citations.]" (*In re B.D.* (2008) 159 Cal.App.4th 1218, 1234.) "Such a relationship 'arises from day-to-day-interaction, companionship and shared experiences." (*In re Elizabeth M.* (1997) 52 Cal.App.4th 318, 324.) However "[t]he juvenile court may reject the parent's claim simply by finding that the relationship maintained during visitation does not benefit the child significantly enough to outweigh

the strong preference for adoption." (*In re Jasmine D.* (2000) 78 Cal.App.4th 1339, 1350.)

Mother's offer of proof was that she was visiting the children on a weekly basis. Yet, such offer is redundant in that the record already demonstrates frequency of mother's visits and whether a parent-child bond still exists. Even were this offer true, it does not rise to the necessary day-to-day interaction contemplated by the exception. Moreover, the offer lacked the necessary specificity because mother did not offer to present facts addressing the quality of visits, i.e., whether during visitation mother had engaged in the " 'day-to-day-interaction, companionship and shared experiences' " such that she "occup[ied] a parental role" for these children. (*In re Elizabeth M., supra,* 52 Cal.App.4th at p. 324.) Mother offered no specific, admissible evidence that she took the Department's advice to visit daily to help with parenting tasks. Finally, mother asserted that it was a triable issue "[w]hether or not [mother] can overcome that it would be a benefit to the children not [to] terminate the parental rights." With respect to the second element of the parent-child relationship exception, namely that the child would benefit from continuing the relationship, (§ 366.26, subd. (c)(1)(B)(i)), such an offer of proof is conclusory and not probative of the issue, as it merely restates the proposition of law mother had the burden to prove. In short, mother has failed to demonstrate with the necessary specificity that she could have presented admissible, relevant evidence of significant probative value to prove applicability of the parent-child exception to adoption so as to avert the termination of her parental rights.

"If the trial court finds the offer of proof insufficient and declines to hold a contested hearing, the issue is preserved for appeal so that a reviewing court can determine error and assess prejudice. [Citation.]" (*In re Tamika T., supra,* 97 Cal.App.4th at p. 1124.) Given the record before us, we conclude, beyond a reasonable doubt, that no different result would have obtained had mother's request for a contested hearing been granted. In colloquy with the juvenile court, mother's counsel admitted that visits were never liberalized beyond monitored, and so mother could never prove she maintained a parental role in the children's lives. Thus, the juvenile court here

would never have applied the parent-child exception to adoption and ordered a permanent plan other than adoption. Accordingly, even were we to utilize the most stringent test of prejudice applicable to a denial of due process, any juvenile-court error was harmless beyond a reasonable doubt and so remand for a contested hearing would constitute an idle act. (*Andrea L. v. Superior Court* (1998) 64 Cal.App.4th 1377, 1387-1388.)[2]

[2] Mother also argues that the juvenile court erred in considering the grandparents' willingness to allow mother to visit the children when it decided whether to terminate her parental rights. As we read the record, however, the court did not consider that fact in connection with its decision to terminate mother's parental rights, but in connection with its conclusion that mother's visits with the children had not progressed beyond supervised visits.

DISPOSITION

The order is affirmed.

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ALDRICH, J.

We concur:

CROSKEY, Acting P. J.

KITCHING, J.