Filed 2/27/18 In re Juliana P. CA2/4

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

In re JULIANA P., a Person Coming Under the Juvenile Court Law.	B282061 (Los Angeles County Super. Ct. No. DK16504)
LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. GILLIAN P., Defendant and Appellant.	

APPEAL from an order of the Superior Court of Los Angeles County, Julie Blackshaw, Judge. Reversed and Remanded with directions.

Jesse McGowan, under appointment by the Court of Appeal, for Defendant and Appellant.

Mary C. Wickham, County Counsel, R. Keith Davis, Assistant County Counsel, and Stephen D. Watson, Deputy County Counsel, for Plaintiff and Respondent.

Mother, Gillian P., appeals from the juvenile court order terminating her parental rights to her then two–year–old daughter, Juliana P. (Welf. & Inst. Code, § 366.26.)[1] Mother contends the trial court erred in prematurely setting a selection and implementation hearing, and in summarily denying her section 388 petition seeking reunification services because, although her whereabouts were unknown at the start of the dependency process and at the time the selection and implementation hearing was set, she appeared in court on the date set for that hearing. Mother claims the court erred, as a matter of law, in prematurely setting the section 366.26 hearing, and abused its discretion by failing later to correct that legal error.

We conclude that the juvenile court erred, and that the order terminating parental rights must be reversed. We will remand the matter to the juvenile court with options as to how the court may proceed.

FACTUAL AND PROCEDURAL BACKGROUND

Detention

On March 24, 2016, Juliana's maternal grandmother (MGM) contacted respondent Los Angeles County Department of Children and Family Services (DCFS) to report that mother had left the then one–year old (Juliana was born in November 2014) at MGM's house on March 12 without any provision for support and had not returned.

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

MGM said mother was irresponsible and careless with her own and Juliana's lives, lacked stable housing, left Juliana with various people, smoked marijuana and drank medicated cough syrup. The identity of Juliana's father was unknown. Another relative told DCFS that mother regularly left Juliana with her or with others, and frequently smelled of marijuana.

On April 14, 2016, after numerous unsuccessful attempts to reach mother, DCFS filed a petition, pursuant to section 300, subdivision (b), alleging that Juliana was at risk of harm as a result of mother's drug use and inability to provide appropriate care and supervision. Juliana was temporarily detained in MGM's care.

Jurisdiction and Disposition

DCFS's combined jurisdiction and disposition report, filed May 26, 2016, informed the court that it had been unsuccessful in its efforts to locate mother, who remained whereabouts unknown. Mother had texted MGM on May 9, saying she planned to pick up Juliana in a few days. MGM had responded that mother could not do so because the court was now involved. This appears to have been the extent of anyone's contact with mother. Relatives told DCFS that mother was in Los Angeles, but said she had no interest in parenting Juliana. Another relative living in the home told DCFS that mother would sneak out of the house in the middle of the night, leaving the baby unattended, and return smelling of marijuana. That relative also said mother was living off of money intended to be for Juliana's benefit (Calworks), had left the

child at the house for "the weekend" about three months earlier and never returned or called to see how the baby was doing. MGM said mother had smoked marijuana during her pregnancy, did not nurture Juliana (e.g., she would not hold the baby during feedings), and had not met the baby's medical needs. At the baby's first checkup–which did not occur until she was 11 months old–Juliana "smelled like weed[,] . . . had cradle cap [and] [h]er skin was blotchy." DCFS recommended that the court declare Juliana a dependent of the court, order her suitably placed, and order that permanent placement services be provided.

At the time of the June 9, 2016 joint jurisdiction and disposition hearing, DCFS's efforts to locate mother remained unsuccessful and her whereabouts remained unknown. DCFS recommended that no reunification services be offered. A declaration of due diligence was attached to the report. The court sustained the petition,[2] declared

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[2] As sustained, the petition states: "[b–1:] On 3/12/16 and on prior occasions, [mother] left [Juliana] in the care of [MGM] and . . . failed to make an appropriate plan for the child's ongoing care and supervision. The mother has failed to return to resume care of the child and the mother's current whereabouts [are] unknown. On prior occasions the mother left the child with unrelated caretakers for extended periods of time. Said conduct and neglect [by] the child's mother and the mother's failure to make an appropriate plan for the child's care and supervision endangers [Juliana's] physical health and safety, placing [her] at risk of suffering serious physical harm, damage and danger.

"[b–2:] . . . [Mother] has a history of illicit drug use and is a current abuser of marijuana which renders [her] incapable of providing [Juliana] with regular care and supervision. On prior occasions the mother was under the influence of marijuana, while the child was in

Juliana a dependent of the court and removed her from parental custody, ordered the child suitably placed,[3] and gave mother monitored visitation once she had contacted DCFS. The court found by clear and convincing evidence that mother's whereabouts were unknown, and ordered no reunification services. (§ 361.5, subd. (b)(1).) Adoption was identified as Juliana's permanent plan, and the court set a selection and implementation hearing (§ 366.26) for December 12, 2016, later continued to April 10, 2017.[4] DCFS was directed to provide notice of the court's order, advisement of rights and an intent to file writ form by mail.

Initial Section 366.26 Proceeding

DCFS's report for the selection and implementation hearing, submitted on November 18, 2016, advised the court that mother's whereabouts remained unknown and she had not contacted the agency.

[her] care and supervision. The mother's substance abuse endangers [Juliana's] physical health and safety, placing the child at risk of suffering serious physical harm, damage and danger."

[3] Around this time DCFS removed Juliana from MGM's home (due to concerns about MGM's criminal history and her ex–boyfriend, a registered sex offender), and placed the child in foster care.

[4] The hearing, initially scheduled for December 6, was continued to December 12, 2016 on the court's own motion because the court was not in session on December 6. This change is not material for purposes of this discussion.

A declaration of due diligence was attached to the report. Juliana's foster parents wanted to adopt her. The agency recommended that parental rights be terminated.

Mother made her first appearance at what was scheduled to have been the December 12, 2016 section 366.26 hearing. Counsel was specially appointed to represent her for the purpose of checking that notice was proper, to make appropriate motions and to review the file to determine whether an "*Ansley*" motion[5] was in order and, if so to ensure that one was timely filed. After mother identified Juliana's father, the section 366.26 hearing was continued to April 10, 2017, to give DCFS an opportunity to notify the father, and for an update on the prospective adoptive parents' incomplete homestudy.[6] No request was made at the December 12, 2016 hearing by or on behalf of mother for reunification services, and DCFS made no effort then or at any point after mother appeared to seek a modification of the disposition orders. Mother was

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[5] In *Ansley v. Superior Court* (1986) 185 Cal.App.3d 477, 481, this Division held that a parent "claiming lack of due process notice of a juvenile dependency petition can challenge the resulting dependency judgment by filing a petition pursuant to section 388 in the same dependency proceedings."

[6] The minute order from the December 12 hearing indicates both that mother was properly notified of that hearing ("Notice of proceedings has been given"), and that she was not ("Notice of [section 366.26] Hearing has not been given . . . to: Mother").

personally served with notice of the section 366.26 hearing set for April 10, 2017.

Mother's Section 388 Petition

On April 10, 2017 mother filed what is commonly called a "section 388 petition" requesting that the court change its earlier order and give her reunification services. In support of her contention that circumstances had changed, mother submitted documents to show she had two two–hour visits with Juliana in 2017 (one in January and one in March), a document from "Wellnessmart MD" indicating she tested "negative on all substances" on April 8, 2017, and a log from "Refuge & Strength Outreach" indicating that she appeared to have attended two parenting classes on April 5 and 7, 2017 (and to have paid for three more).[7] Mother stated that the modification was in order because "it would be in best interest of [Juliana] to be reunified with [her]." Although mother was now represented by counsel, no mention was made regarding the trial court's having inadvertently set the matter for a section 366.26 hearing on December 12, 2016, rather than a six–month review hearing.

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[7] After an evidentiary objection was lodged against these documents, the court admitted in evidence only a single document attached to mother's section 388 petition that reflected her visitation, stating it would accord "it the weight that [was] appropriate."

The Continued Section 366.26 Hearing

Mother appeared at the reconvened selection and implementation hearing on April 10, 2017, represented by counsel. DCFS reported that it had been unable to locate and notify Juliana's father. The section 388 petition was summarily denied after the court announced that mother had failed to demonstrate a significant change of circumstances to warrant a hearing, and had shown that "at best, circumstances are 'changing,' not changed."[8]

After DCFS reports, last minute informations, and evidence of mother's visitation were admitted in evidence, the court proceeded to hear mother's closing argument. Her counsel argued that parental rights should not be terminated as mother had satisfied the beneficial parent–child relationship exception. The court found that evidence that mother had four monitored visits[9] with her daughter over the course of two years was insufficient to warrant a finding that mother played a parental role in Juliana's life, and no sufficient parental bond existed such that it would be detrimental to Juliana to sever that bond. It observed that Juliana had a stable home and had developed a close

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[8] The court's written order, filed April 13, 2017, stated that mother's section 388 petition failed to state new evidence or a change of circumstances, that the proposed change of order would not promote the child's best interest, and reiterated the court's earlier finding that, "at best," mother had shown "circumstances are 'changing,' not changed."

[9] The court was mistaken. Mother had visited Juliana twice. The other two visits were made by MGM in July and August 2016.

bond with her prospective adoptive parents. The court found that mother failed to establish any statutory exception, that there was clear and convincing evidence the child was likely to be adopted, and that it would be detrimental to return the child to parental custody. Parental rights were terminated. This appeal followed.

DISCUSSION

1. *The Juvenile Court Erred in Setting a Premature Selection and Implementation Hearing*

Mother contends the juvenile court erred in prematurely setting a section 366.26 hearing without a prior finding sufficient to support an order to either bypass or terminate reunification services. As a result, mother insists the order terminating parental rights must be reversed. She is correct.

Mother was not present at the combined jurisdiction and disposition hearing on June 9, 2016. At that hearing the court sustained the petition, removed Juliana from mother's custody and found, by clear and convincing evidence in an affidavit of due diligence, that mother's whereabouts were unknown. Accordingly, the court ordered that mother would be offered "no reunification services." The trial court then set a section 366.26 hearing for December 12, 2016, and ordered DCFS to provide writ notice and prepare an assessment plan (§ 361.5, subd. (g)).

The juvenile court erred when it set a selection and implementation hearing with a permanent plan of adoption.[10] The court should have set a six–month review hearing under section 366.21, subdivision (e). (Cal. Rules of Court, rule 5.695(g)(5); *In re Jonathan P.* (2014) 226 Cal.App.4th 1240, 1257 (*Jonathan P.*).)

In subdivisions (b)(1) through (b)(16) of section 361.5 (in effect in 2016),[11] the Legislature enumerated 16 reasons for declining to order reunification services. Except for the reason stated in section 361.5, subdivision (b)(1)–whereabouts unknown–these reasons "describe situations where provision of services is futile or detrimental to the minor, generally where the parent is unable or unwilling to participate in services or where offering services would place the minor at risk of

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[10] Ordinarily failure to challenge an order setting the 366.26 hearing by way of writ would constitute forfeiture of the right to do so on appeal. (§ 366.26, subd. (l)(1)(A); *In re Tabitha W.* (2006) 143 Cal.App.4th 811, 815–817.) As DCFS implicitly and properly concedes, this rule is inapplicable under the circumstances here. (See *In re Aurora P.* (2015) 241 Cal.App.4th 1142, 1164 [a party's silence on a topic properly raised in another's brief may be treated as a concession].) Because she was unrepresented and her whereabouts were unknown at the time the setting order was made, it was not possible for mother to challenge that order by way of writ. (See *Maggie S. v. Superior Court* (2013) 220 Cal.App.4th 662, 671 [permitting collateral attack on order setting § 366.26 hearing based on failure to provide notice of right to seek writ review].)

[11] Section 361.5 has been amended twice since 2016 in ways not significant here. Our discussion is based on statutes in effect at the time of ruling(s) in question.

harm or other detriment." (*In re T.M.* (2009) 175 Cal.App.4th 1166, 1171–1172 (*T.M.*); see 16 Witkin, Summary of Cal. Law (11th ed. 2017) Juvenile Court Law, § 469, pp. 628–629.) "If the court, pursuant to paragraph (2), (3), (4), (5), (6), (7), (8), (9), (10), (11), (12), (13), (14), [(15) or (16)] of subdivision (b) . . . , does not order reunification services, it shall, at the dispositional hearing, . . . determine if a hearing under Section 366.26 shall be set in order to determine whether adoption, guardianship, or long–term foster care . . . is the most appropriate plan for the child." (§ 361.5, subd. (f); *T.M., supra*, 175 Cal.App.4th at pp. 1172–1173.)[12]

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[12] Section 361.5, subdivision (f), in effect in 2016, states: "If the court, pursuant to paragraph (2), (3), (4), (5), (6), (7), (8), (9), (10), (11), (12), (13), (14), (15) or (16) of subdivision (b) or paragraph (1) of subdivision (e), does not order reunification services, it shall, at the dispositional hearing, that shall include a permanency hearing, determine if a hearing under Section 366.26 shall be set in order to determine whether adoption, guardianship, or long–term foster care . . . is the most appropriate plan for the child." It is worth noting that section 361.5 has been amended seven times since *T.M.* was decided. Except for the addition of new bypass provisions, in pertinent part it remains unchanged. The Legislature is deemed to be aware of judicial decisions already in existence and to have enacted or amended a statute in light thereof. (*Estate of McDill* (1975) 14 Cal.3d 831, 839.) "When a statute has been construed by judicial decision, and that construction is not altered by subsequent legislation, it must be presumed that the Legislature is aware of the judicial construction and approves of it. [Citations.]" (*Stavropoulos v. Superior Court* (2006) 141 Cal.App.4th 190, 196.)

Section 361.5, subdivision (b)(1), at issue here, is the sole subdivision not listed in section 361.5, subdivision (f). Section 361.5, subdivision (f) is the provision that authorizes the court to proceed directly to setting the selection and implementation hearing. (*T.M., supra,* 175 Cal.App.4th at p. 1173.) Where a parent is denied reunification services at the disposition hearing because her whereabouts are unknown (§ 361.5, subd. (b)(1)), the purpose for requiring a review hearing, rather than a selection and implementation hearing, is to provide the parent an opportunity to reunify in the event her whereabouts become known within a reasonable time. (*Jonathan P., supra,* 226 Cal.App.4th at pp. 1257–1258.) If the parent's whereabouts become known within six months of the out–of–home placement, the juvenile court shall order that reunification services be provided. (§ 361.5, subd. (d); see *In re T.W.* (2013) 214 Cal.App.4th 1154, 1165 [observing that period for reunification services under § 361.5 begins at the time of disposition].)

The court in *T.M.* reasoned that because section 366.26, subdivision (c)(2)(A),[13] "bars termination of parental rights when the parent has never been offered services," dependency "law requires the [trial] court to find either that services would have been futile or

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[13] Section 366.26, subdivision (c)(2) states: "The court shall not terminate parental rights if: [¶] (A) At each hearing at which the court was required to consider reasonable efforts or services, the court has found that reasonable efforts were not made or that reasonable services were not offered or provided."

detrimental to the minor under any of the relevant subdivisions of section 361.5, with the obvious exception of subdivision (b)(1), or that the agency at least tried to reunite the family by making reasonable efforts or offering services to the parents. (§§ 366.21, subds. (e), (f), 366.22.)" (*T.M., supra*, 175 Cal.App.4th at p. 1173.) If neither finding can be made, the trial court may not terminate parental rights. (*Ibid.*)

Here, a section 366.26 hearing was convened on December 12, 2016, at which mother appeared and identified Juliana's father. The hearing was continued to April 10, and the court proceeded to address other matters. The court did not make a finding, pursuant to section 361.5, subdivision (d), that mother's whereabouts remained unknown at six months (which technically expired Friday, December 9, 2016, one court day before the Monday morning hearing). Presumably no such finding was made because none was necessary; mother's whereabouts had become known, given her appearance in court (with a short grace period).

However, once mother's whereabouts became known, the trial court should have determined her entitlement, if any, to reunification services. (§ 361.5, subd. (d).) Alternatively, the court could have conducted a hearing to determine if any other exceptions under section 361.5, subdivision (f), to the provision of services applied. The trial court did not find the provision of reunification services to mother would be futile or detrimental to Juliana under any "bypass" provision (§ 361.5, subds. (b)(2)–(16)). Nor did the court find that DCFS made reasonable efforts to reunite the family, or offer services. Because the

court failed to make the prerequisite finding or findings, it lacked a sufficient statutory basis to justify terminating parental rights and its options at the section 366.26 hearing were limited to guardianship or long–term foster care. (*T.M., supra*, 175 Cal.App.4th at p. 1173.)

The court's error in proceeding from a disposition hearing directly to a section 366.26 hearing with a permanent plan of adoption and terminating mother's parental rights was not harmless. Mother never had an opportunity to reunify, nor was she given an opportunity to challenge a request to deny her services under any bypass provision of section 361.5, subdivisions (b)(2)–(16) that would support termination of parental rights. (*T.M., supra*, 175 Cal.App.4th at p. 1171.) The issue is not whether mother would have made progress toward reunification if she had been provided with the remaining months of reunification services available once her whereabouts became known; the issue is whether the trial court had the statutory authority to terminate parental rights in this case. It did not.[14]

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[14] DCFS urges us to find that, because the section 366.26 hearing was not conducted until April 10, 2017, this action progressed in accordance with the timeframes provided by the statutory scheme when a parent has been denied reunification services because her whereabouts are unknown and fails to make her whereabouts known within a reasonable time. (§§ 361.5, subds. (b)(1), (d), 366.21, subd. (e)(5).) Section 366.21, subdivision (e)(5), on which DCFS relies, applies in cases where "the child was removed initially under *subdivision (g) of Section 300* and the court finds by clear and convincing evidence that the whereabouts of the parent are still unknown, or the parent has

The remaining issue to resolve is the appropriate remedy. The order terminating parental rights must be reversed and remand is required. On remand, the trial court may follow one of three courses of action. First, as in *T.M.*, the court may conduct a new section 366.26 hearing, limiting the permanent plan choices exclusively to guardianship or long–term foster care. (*T.M., supra*, 175 Cal.App.4th at p. 1173.) If the court does not adopt this course, it must do choose one of the following two options.

Second, the court may conduct a hearing to determine whether the provision of services would be futile or detrimental to Juliana under any provision of section 361.5, subdivision (b), other than subdivision (b)(1). If such an exception to the provision of reunification services applies, the court shall reinstate the order terminating parental rights.

Third, if neither of the other options is adopted, the court shall order that mother be provided reunification services.[15] At the time her

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failed to contact and visit the child, the court may schedule a hearing pursuant to Section 366.26 within 120 days." (Italics added.)

Section 300, subdivision (g) provides for the removal of a child who "has been left without any provision for support . . . , [or] the whereabouts of the parent are unknown, and reasonable efforts to locate the parent have been unsuccessful." Although it appears there were grounds to do so, Juliana's removal, and the court's assertion of jurisdiction in this matter, was *not premised on subdivision (g)*, but *solely on subdivision (b)* of section 300.

[15] If the court has not chosen the first option and has not made a finding of futility or detriment under section 361.5, it must choose the third course of action.

whereabouts became known, mother had several months left of potential eligibility for services. Because Juliana was under three years of age on the date of her initial removal, mother would have been entitled to court–ordered services for six months from the date of the dispositional hearing, but a maximum of 12 months from the date Juliana entered foster care as that term is defined in section 361.49.[16] (§ 361.5, subd. (a)(1)(B).) The jurisdictional hearing took place on June 9, 2016. Six months from that date is December 6, 2016 (the "dark" date from which the court had continued the hearing to December 12, 2016). Juliana was initially removed from mother's physical custody on or about March 24, 2016. Juliana entered foster care on or about May 24, 2016. Thus, when mother appeared on December 12, 2016, mother had until May 24, 2017, or just over 23 weeks remaining in the 12–month reunification period. If reunification services are in order, the court shall require DCFS to provide mother with reunification services with Juliana for the appropriate amount of time remaining.

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[16] Section 361.49 states: "a child shall be deemed to have entered foster care on the earlier of the date of the jurisdictional hearing . . . or the date that is 60 days after the date on which the child was initially removed from the physical custody of his or her parent."

Further, "[n]otwithstanding the presumptive 12–month limitation, services can be extended up to 18 months 'after the date the child was originally removed from physical custody of his or her parent . . . .' (§ 361.5, subd. (a)(3).)" (*In re T.W., supra,* 214 Cal.App.4th at p. 1165.)

2. *The Court Erred in Summarily Denying the Section 388 Petition*

Mother argues the trial court erred in denying her section 388 petition because it was required to reconsider the provision of reunification services.

A section 388 petition must be construed liberally in favor of its sufficiency (Cal. Rules of Court, rule 5.570(a)), and a hearing must be granted if the petition: (1) makes a prima facie showing of changed circumstances that warrant a change or modification of prior orders, and (2) the proposed change would be in the child's best interests. (§ 388; *In re Marilyn H.* (1993) 5 Cal.4th 295, 310; *In re Angel B.* (2002) 97 Cal.App.4th 454, 461, 463–464 (*Angel B.*).) We review a summary denial of a section 388 petition for abuse of discretion. (*Angel B., supra*, 97 Cal.App.4th at p. 460.)

Relying on *In re R.T.* (2015) 232 Cal.App.4th 1284 (*R.T.*), mother argues she made a prima facie showing because her section 388 petition was a request for the court to apply the correct legal standard. In that case, after *R.T.* was removed from his parents' custody, the agency ignored requests made by the parents that same day that the child be placed with either of two aunts who were immediately identified, and the court subsequently denied one of the aunt's section 388 petition seeking a relative placement. (*Id.* at pp. 1293–1294.) The appellate court found error, and held that the error was not harmless because the child might well have been placed with these relatives. (*Id.* at p. 1300.)

Here, mother argues that, as in *R.T.,* her section 388 petition was nothing more than a request that the court correct its earlier legal

mistake. Mother's petition was not filed until the very day of the continued section 366.26 hearing, and at a time she was represented by appointed counsel. The petition does not mention the court's error in setting a section 366.26 hearing, does not claim that mother's whereabouts became known within six months of the disposition hearing, and nowhere asks the court to "follow the law." No such request is clear on the face of mother's petition. Nevertheless, liberally construing the petition, we agree with mother that where, as here, reunification services were not offered solely because a parent's whereabouts are unknown, common sense dictates that the parent's presence constitutes a change of circumstances and/or new evidence sufficient to make a prima facie showing that the prior order should be revisited. Accordingly, the court, having not recognized its error, understandably, but regrettably, misunderstood the petition's purpose, as to which at least an evidentiary hearing was in order.

DISPOSITION

The order terminating parental rights is reversed. The matter is remanded to the trial court with directions to: (1) conduct a new section 366.26 hearing limiting the permanent plan choices to guardianship or foster care; (2) conduct a hearing to determine whether a valid exception to providing reunification services exists under section 361.5, subdivision (b); or (3) order DCFS to provide mother with reunification services.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

WILLHITE, J.

We concur:

EPSTEIN, P. J.

COLLINS, J.