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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

In re KENNETH V., a Person Coming
Under the Juvenile Court Law.

B236255
(Los Angeles County
Super. Ct. No. CK82002)

LOS ANGELES COUNTY
DEPARTMENT OF CHILDREN AND
FAMILY SERVICES,

Plaintiff and Respondent,

v.

CYNTHIA V. et al.,

Defendants and Appellants.

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

Maryann M. Milcetic, under appointment by the Court of Appeal, for Defendant
and Appellant Cynthia V.

Roni Keller, under appointment by the Court of Appeal, for Defendant and
Appellant Isabel V.

Andrea Sheridan Ordin, County Counsel, James M. Owens, Assistant County Counsel, Judith A. Luby and Danielle St. Clair, Deputy County Counsel, for Plaintiff and Respondent.

Cynthia V. appeals from an order under Welfare and Institutions Code section 366.26,¹ terminating her parental rights to her son Kenneth and identifying adoption by his foster parents, rather than placement with his grandmother, appellant Isabel V., as his permanent plan.

Mother and Grandmother contend that the court failed to give preferential consideration to placement with Grandmother (§ 361.3). In addition, Mother contends that the juvenile court violated her rights when it denied her request for a contested section 366.26 hearing, and Grandmother contends that the juvenile court deprived her of due process and violated her rights to privacy and association, and erred when it denied her a hearing on her section 388 petition. We affirm.

Background

Kenneth was born in May 2010, and the section 300 petition was filed shortly thereafter, on June 2, 2010. (The petition also addressed his older sister, Z., born in September 2008, who is not the subject of this appeal.) There was, however, earlier history.

In sum: when Z. was born, Mother was living with Grandmother and her husband. The children's father was in Florida. In August 2009, apparently after Father's release from custody on drug charges, Mother and Z. moved to Florida to join him. In September, there was a domestic violence incident between Mother and Father in which Mother sustained bruises and in which Z. was thrown to the ground. The incident

¹ All further statutory references are to that code.

resulted in Father's conviction for battery and in the initiation of dependency proceedings in Florida. Mother and Father took Z. and left Florida while those proceedings were open.

Florida authorities reported this to DCFS. Social workers contacted Grandmother and other maternal relatives, who said that Mother and Z. visited, but that they did not know where they were. Mother actually contacted DCFS during this period, but would not agree to come to DCFS offices so that Z. could be evaluated.

DCFS also learned that Mother had outstanding California warrants for burglary. She was arrested on those warrants in April 2010, and was incarcerated when Kenneth was born. Kenneth was immediately detained.

About the same time, DCFS located Z. at Grandmother's house and took her into protective custody. Social workers learned that Z. had been at Grandmother's house since Mother's arrest.

By then, Father, too, was incarcerated. Both parents remained incarcerated throughout the dependency.

Kenneth and his sister were initially placed together, but that foster family had a long vacation planned, and on June 25, 2010, Kenneth was moved to the home of Ms. R. and Mr. O. for what was intended as respite care.

However, Kenneth manifested a variety of problems. Among other things, he was anxious, hyperactive, hypersensitive to his environment, had feeding issues, and startled easily. He was briefly hospitalized due to rapid breathing and high blood pressure. Experts opined that it would be detrimental to him to be moved again. He remained with the R/O family throughout the remainder of the dependency.

The petition was sustained on September 8, 2010, on allegations concerning the domestic violence, both parents' incarceration, and Father's history of incarceration. Reunification services were ordered.

In late August 2010, Z. was placed with a maternal great-aunt, where she has remained.

Reunification services were terminated on May 24, 2011. At that time, guardianship with the maternal great-aunt was identified as Z.'s permanent plan.

Kenneth's problems persisted throughout the dependency. He showed troubling signs of stress when in a stimulating environment such as a long car trip or exposure to too many people, or when separated from his foster mother. When he was stressed, it could take days for him to settle down. He improved in foster care, but depended on a calm environment and almost constant contact with his foster mother.

Grandmother and other maternal relatives sought to have Kenneth placed with them, but throughout the dependency, social workers, health care professionals treating Kenneth, and other experts observed that he was limited in his ability to cope and highly dependent on his foster mother. They opined that a change in placement would be detrimental. For instance, in November 2010, Kenneth's physical therapist reported that while Kenneth was in his foster mother's arms, he smiled and interacted with the therapist, but that he became distressed when he was physically or visually separated from her.

In August 2011, the court summarily denied Grandmother's section 388 petition seeking to have Kenneth placed with her. On September 20, 2011, Z.'s maternal great-aunt became her guardian, and jurisdiction was terminated as to her. Also on that date, parental rights were terminated as to Kenneth, and adoption by his foster parents was identified as his permanent plan.

Discussion

1. Relative Placement

Both Mother and Grandmother argue that the court failed to follow the mandates of section 361.3. Under that statute, "In any case in which a child is removed from the physical custody of his or her parents pursuant to Section 361, preferential consideration shall be given to a request by a relative of the child for placement of the child with the relative."

Mother and Grandmother argue that the court did not consider Grandmother or the maternal relatives; that the foster family was given support which was not extended to Grandmother, making it more difficult for her to care for Kenneth; that Grandmother's visits were too limited; that DCFS and the experts were biased in favor of the foster family; and that DCFS provided the court with little information about Grandmother. They argue that DCFS was biased against Grandmother because she did not inform them when Z. was left in her care, but argue that the bias was unfounded, citing the evidence that Grandmother had encouraged Mother to call DCFS and had informed Mother's criminal defense lawyer of DCFS's involvement.

Mother and Grandmother conclude that the court abused its discretion by failing to give Grandmother preferential consideration at Kenneth's birth, and thereafter. (*In re Robert L.* (1993) 21 Cal.App.4th 1057, 1067, superseded by statute on another ground as stated in *Cesar V. v. Superior Court* (2001) 91 Cal.App.4th 1023, 1032.) They contend that this abuse of discretion mandates reversal of the orders at the section 366.26 hearing and on the section 388 petition, and mandates an order that Kenneth be placed with Grandmother.

Appellants are correct that at the outset DCFS was opposed to placement with Grandmother, given that she did not inform them of Z.'s whereabouts after the parents were incarcerated, although she knew that DCFS needed to know. The juvenile court concurred, noting, in June 2010, that "Until we have a thorough investigation of this matter, I don't feel that I can place with the grandmother either."

It is also true, however, that at that point and thereafter, the court directed DCFS to talk to Grandmother and to consider any appropriate relative. Grandmother and maternal great-aunts were evaluated for placement at several points during the dependency. Those placements did not come about for several reasons. For instance, in July 2010, due to Kenneth's problems and need for consistent full time care, the maternal great-aunt agreed that he should stay with his foster family for a time. Later, DCFS was concerned that Grandmother's work schedule would not allow her to transport Kenneth to his many

medical appointments, and that her busy home (she had a foster child, and also shared her home with her parents) would be too stimulating for him.

Visits with Grandmother were ordered, too, beginning in December 2010 and the length of the visits was increased in March 2011. In August 2011, Kenneth's attorney correctly summarized the state of affairs: visits with Grandmother had been increased in the hope that Kenneth would develop a bond with her, but despite the fact that Grandmother had been appropriate and consistent in visits, that had not happened. He still had a great deal of physical and emotional difficulties, and the visits made his symptoms worse.

Notably, Kenneth's attorney made those comments during a hearing on DCFS's section 388 motion to end Grandmother's visits. The court granted the motion, but asked that the therapist be consulted to see if there was a way in which the visits could be continued in a way which was less traumatic to Kenneth, and also asked the therapist to talk to Grandmother, as well as the foster mother, to get Grandmother's perspective on Kenneth and the visits, which did not always match the foster mother's.

We thus cannot agree that no deference, assistance, or support for relative placement was demonstrated in this case. Nor do we see the kind of social engineering which courts have rightfully deplored, or an unthinking and unfair governmental allegiance to a foster family over a biological family. (See *In re Kimberly F.* (1997) 56 Cal.App.4th 519, 529; *In re Cheryl E.* (1984) 161 Cal.App.3d 587, 607.)

Instead, the juvenile court had before it evidence which establishes that its choice of placement for Kenneth was well within its discretion. That evidence was that his serious and special problems meant that any change of placement would have been detrimental to him, and that it was in his best interest to have his bond with his foster mother remain intact.

Mother and Grandmother cite the evidence that Grandmother completed advanced foster parent training programs, that she and her husband completed a program for grandparents as parents and were described by the social worker who directed the

program as well prepared to take care of Kenneth, had an acceptable home, had attended some of his medical appointments, and that by May of 2011 Grandmother had arranged for a leave from her job so that she could care for Kenneth, and was willing to stop working completely if that was required. They also cite the fact that much of the evidence concerning Kenneth's condition was from the foster mother.

All that is true, as is the fact that, as the juvenile court found, Grandmother was unswerving in her attempts to gain custody of Kenneth and in her expression of love for him. However, given the other evidence, none of that evidence renders the juvenile court's choice an abuse of discretion.

2. Grandmother's due process argument

Grandmother argues that her rights to due process, privacy, and association were violated when the court excluded her from the May 24, 2011 review hearing at which reunification services were terminated. She contends that this was error, but does not advance any argument in support of her implied contention that a finding of such error could lead us to grant the relieve she seeks, reversal of the order terminating parental rights. We thus do not further consider the issue.

3. Grandmother's section 388 petition

On August 1, 2011, Grandmother filed a section 388 petition, asking for an order transitioning Kenneth to her care. The petition recounted her readiness to care for Kenneth and asserted that DCFS had resisted meaningful visits, relationship development, and transition to Grandmother's home and had preferred the foster family, and also asserting that it would serve Kenneth's long term best interest to provide Grandmother with the services and support now supplied only to the foster family. The court denied the petition without a hearing.

We review a juvenile court's summary denial of a section 388 petition for abuse of discretion (*In re Aaron R.* (2005) 130 Cal.App.4th 697, 705) and find none.

Grandmother cites the rules that if the petition presents any evidence that a hearing would promote the best interests of the child, the court will order the hearing, that the parent need only make a prima facie showing to trigger the right to a full hearing, and that a section 388 petition is to be liberally construed in favor of its sufficiency. (*In re Aljamie D.* (2000) 84 Cal.App.4th 424, 431; *In re Hashem H.* (1996) 45 Cal.App.4th 1791, 1798-1799.)

All of that is so. It is also true that under section 388, a hearing need only be held if it appears that the best interests of the child may be promoted by the proposed change of order. Thus, the court need not order a hearing if this element is absent from the showing made by the petition. (*In re Zachary G.* (1999) 77 Cal.App.4th 799, 806.) Further, in determining whether the petition makes the necessary showing, the court may consider the entire factual and procedural history of the case. (*In re Justice P.* (2004) 123 Cal.App.4th 181, 189.)

Here, the entire factual history of the case included evidence that Kenneth's special problems meant that he needed to remain with his foster mother. Further, given that increased visits did not result in Kenneth forming a bond to Grandmother, we can see no evidence that a transition to Grandmother's care was possible. The petition asserted that Kenneth responded well to Grandmother and bonded to her when allowed sufficient contact, but that was not the state of the evidence. We thus cannot say that the court abused its discretion when it impliedly found that the petition did not set forth a prima facie showing that Kenneth's best interest would be promoted by order sought.

4. Mother's contention concerning the section 366.26 hearing

When the section 366.26 hearing was called, Mother asked that the matter be set for a contested hearing. The court asked for an offer of proof. (*In re Tamika T.* (2002) 97 Cal.App.4th 1114, 1122.) Mother argued that the sibling exception (§ 366.26, subd. (c)(1)(B)(v)) might apply, but the court found that she did not have standing to raise that issue. Mother then argued that she was opposed to the termination of parental

rights, and that a family member could care for Kenneth. As to that, the court ruled that mother could not establish that she had a bond with Kenneth and had acted as a mother to him, apparently referring to the statutory exception to adoption which applies when a parent has maintained regular visitation and contact with the child and the child would benefit from continuing the relationship. (§ 366.26, subd. (c)(1)(B)(i).) The court denied the request for a contested hearing. Mother argues that in so ruling, the court denied her due process rights.

Mother is correct that the court erred when it found that she did not have standing to raise the sibling exception. (See *In re L.Y.L.* (2002) 101 Cal.App.4th 942, 948–951.) We further agree that the court seems to have misunderstood Mother's second contention, which was not that she had maintained contact with Kenneth, but that another permanent plan, placement with Grandmother, was in Kenneth's best interest. As DCFS agrees, the court could have considered placement issues. We do not, however, see any reversible error.

On appeal, Mother does not argue that she could have presented evidence that the sibling exception applied, and we see nothing in the record which suggests that it would have. Kenneth and Z. saw each other during some visits, but the statute requires that the court consider "whether ongoing contact is in the child's best interest, including the child's long-term emotional interest, as compared to the benefit of legal permanence through adoption." (§ 366.26, subd. (c)(1)(B)(v).) It is inconceivable that the court could have made that finding here.

Mother does argue that she could have presented evidence on placement with Grandmother's home. She argues that her due process rights were violated, given the importance of her interest in presenting evidence in favor of relative placement, what she sees as the small burden of a short hearing, and what she sees as a great risk of error, given that in her view DCFS did not provide the court with full information about Grandmother. (*In re Malinda S.* (1990) 51 Cal.3d 368, superseded by statute on another ground as stated in *In re Lucero L.* (2000) 22 Cal.4th 1227, 1240–1242.)

However, due process does not mandate a contested permanency planning hearing. Rather, the dependency court may require an offer of proof of sufficient evidence to establish the existence of one of the statutory exceptions to termination of parental rights. (*In re Tamika T.*, *supra*, 97 Cal.App.4th at p. 1122.)

At a hearing under section 366.26, the court is required to select and implement a permanent plan for a dependent child. Where there is no probability of reunification with a parent, adoption is the preferred permanent plan. The parent then has the burden to show termination would be detrimental to the minor under one of four specified exceptions. The availability of a relative for placement is not one of those exceptions.

Disposition

The orders under sections 388 and 366.26 are affirmed.

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ARMSTRONG, J.

I concur:

TURNER, P. J.

MOSK, J., Concurring

I concur.

Whether we review the denial of the section 388 petition under the abuse of discretion standard of review or de novo standard of review, I agree with the result.

MOSK, J.