Filed 11/29/12 In re L.J. CA2/5

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

In re L.J., a Person Coming Under the Juvenile Court Law.	B240350 (Los Angeles County Super. Ct. No. CK81252)
LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. H.J. and A.M., Defendants and Appellants.	

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

Roni Keller, under appointment by the Court of Appeal, for Defendant and Appellant A.M.

Mitchell Keiter, under appointment by the Court of Appeal, for Defendant and Appellant H.J.

Office of the County Counsel, John F. Krattli, County Counsel, James M. Owens, Assistant County Counsel, Aileen Wong, Deputy County Counsel, for Respondent.

INTRODUCTION

A.M (mother) and H.J. (father) (collectively, the parents) appeal from the juvenile court's order terminating their parental rights under Welfare and Institutions Code section 366.26.[1] They contend that the juvenile court erred because the juvenile court "pressured her" into accepting adoption, thereby foreclosing on their ability to raise an exception under section 366.26, subdivision (c)(1)(A). We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

On February 19, 2010, the Department of Children and Family Services (Department) filed a detention report stating that on February 5, 2010, the Department received a telephone call from a family member advising that on December 23, 2009, mother and father had been arrested for burglary, and the caller expressed concern about the safety of then one-year-old A.P. and three-year-old L.J. (collectively, the children). The children were in the maternal grandmother's care. On February 16, 2010, the family member advised the Department that the children were present when their parents were arrested. A Los Angeles Police Department detective confirmed that the children were present when their parents were arrested. The children were placed in a foster home.

On February 19, 2010, the Department filed a petition under section 300, subdivisions (b) and (g) alleging that the parents were incarcerated for burglary, unable to make an appropriate plan for the children's ongoing care and supervision, have a history of substance abuse, and were current abusers of illicit drugs. At the February 19, 2010, detention hearing, the juvenile court ordered the children detained, and ordered the Department to investigate the maternal aunt's home for placement of the children. On February 23, 2010, the juvenile court found father to be L.J.'s presumed father.

According to the Department's March 12, 2010, jurisdiction/disposition report, maternal aunt expressed interest in caring for the children, and her criminal background

---

[1] All statutory references are to the Welfare and Institutions Code, unless otherwise indicated.

and home have been accessed and found to be appropriate. In its March 12, 2010, interim review report, the Department recommended that the children be temporarily placed in the care of the maternal aunt. According to the report, the maternal aunt stated that if the parents fail to reunify with the children, she was willing to provide the children with permanency through either adoption or legal guardianship.

On March 12, 2010, the parents submitted waiver of rights forms pleading no contest to the allegations contained in the dependency petition. At the March 12, 2010, pre-trial resolution conference hearing, the juvenile court sustained the petition, as amended, that under section 300, subdivision (b), the parents haves a history of substance abuse and were current abusers of illicit drugs and mother's abuse of illicit drugs places the children at risk of harm, and under subdivision (g) that parents were arrested in the children's presence and the parents are incarcerated and unable to make an appropriate plan for the children's ongoing care and supervision. The juvenile court ordered reunification services for the parents.

The following exchange occurred at the March 12, 2010, hearing: "[Juvenile court:] It's . . . indicated in today's report . . . that the [maternal] aunt said she was willing to provide permanency by either legal guardianship or adoption if the parents do not regain custody of these children. They are three and one [years old]. And I'm looking for an adoptive home for these children. That is not a conversation that is going to happen if there is a problem down the road. These kids are young and I'm looking for permanency. [¶] Is [maternal aunt] under the impression that she's in a position to adopt these children if the parents do not get them back? . . . [Maternal Aunt:] Yes. [Juvenile court:] Okay. Thank you, because the Department has indicated that [maternal aunt's] home study is positive and they want the children placed there." The juvenile court temporarily placed the children with the maternal aunt. On October 20, 2010, the juvenile court found father not to be in compliance with his court-ordered case plan and terminated his reunification services.

According to the Department's January 19, 2011, concurrent planning assessment reports, the maternal aunt expressed an interest in adopting [the children] and providing

them with a permanent and stable home environment, and she was made aware of her financial and legal rights and responsibilities regarding adoption. According to the Department's August 8, 2011, status review report, mother stated that father was recently sentenced to incarceration in state prison for 32 years. At the September 12, 2011, 18 month review hearing, mother testified that she was convicted of burglary and sentenced to 88 months of imprisonment. The juvenile court found mother to be in partial compliance with her case plan and terminated her reunification services.

On January 9, 2012, the Department filed a "366.26 WIC report" [Welfare and Institutions Code report] stating that the children had been living with the maternal aunt for two years, and the parents remain incarcerated in state prison and have not had any parenting roles with the children in two years. In December 2011, the maternal aunt submitted all of the required adoption home study paperwork, and "there appears to be no barriers to approving [the maternal aunt's] adoption home study. The report states that the maternal aunt "understands her responsibilities in terms of adoption" and is aware that once the children's adoption finalizes in the juvenile court, she will become the legal parent of the children. According to the report, the maternal aunt is committed to adopting and raising the children, and she "is only interested in adoption, as it is the most permanent plan for" the children.

On February 27, 2012, the Department filed a last minute information for the court stating that on January 6, 2012, the maternal aunt's adoption home study was approved. At the February 27, 2012, permanency planning hearing, the juvenile court found by compelling evidence that the children were adoptable and there are no exceptions, and terminated the parental rights. The maternal aunt was designated as the prospective adoptive parent of the children.

DISCUSSION

Section 366.26(c)(1)(A) provides that the juvenile court is to terminate parental rights in favor of a permanent plan of adoption, unless, "The child is living with a relative who is unable or unwilling to adopt the child because of circumstances that do not include an unwillingness to accept legal or financial responsibility for the child, but who is willing and capable of providing the child with a stable and permanent environment through legal guardianship, and the removal of the child from the custody of his or her relative would be detrimental to the emotional well-being of the child." This provision was enacted "'to prevent case workers and judges, who may not fully appreciate why a relative caregiver may not want to adopt the child . . . from pressuring the relative caregiver to adopt the child' . . . ." (*In re K.H.* (2011) 201 Cal.App.4th 406, 418.) The parents contend that prior to March 12, 2010, the maternal aunt stated that if reunification with the parents was not possible, she would provide the children with permanency through either adoption or legal guardianship, but at the March 12, 2010, hearing, the juvenile court "pressured her" into accepting adoption, and thereafter the Department reported that she was only interested in adoption, thus foreclosing the parents' ability to raise an exception under section 366.26, subdivision (c)(1)(A).

The Department contends that the parents forfeited their claim on appeal because, as mother concedes, the issue of whether the maternal aunt was pressured into accepting adoption as opposed to guardianship—and whether the parents ability to raise the section 366.26, subdivision (c)(1)(A) exception was therefore foreclosed—was never raised before the juvenile court. We agree.

"When a party does not raise an argument [before the trial court], he may not do so on appeal." (*People v. Clark* (1993) 5 Cal.4th 950, 988, fn. 13, disapproved on other grounds as stated in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.) "'A party is not permitted to change his position and adopt a new and different theory on appeal. To permit him to do so would not only be unfair to the trial court, but manifestly unjust to the opposing litigant.' [Citation.]" (*Expansion Pointe Properties Limited Partnership v. Procopio, Cory, Hargreaves & Savitch, LLP* (2007) 152 Cal.App.4th 42, 54-55; *In re*

Michael L. (1985) 39 Cal.3d 81, 88 ["Objections not presented to the trial court cannot be raised for the first time on appeal"]; *In re Christopher B.* (1996) 43 Cal.App.4th 551, 558.) "The reason for this rule is that '[i]t is both unfair and inefficient to permit a claim of error on appeal that, if timely brought to the attention of the trial court, could have been easily corrected or avoided.' (*People v. Vera* (1997) 15 Cal.4th 269, 276 [62 Cal.Rptr.2d 754, 934 P.2d 1279] (*Vera*); see [*People v.*] *Saunders* [(1993)] 5 Cal.4th [580,] 590.) '[T]he forfeiture rule ensures that the opposing party is given an opportunity to address the objection, and it prevents a party from engaging in gamesmanship by choosing not to object, awaiting the outcome, and then claiming error.' (*People v. Kennedy* (2005) 36 Cal.4th 595, 612 [31 Cal.Rptr.3d 160, 115 P.3d 472].)" (*People v. French* (2008) 43 Cal.4th 36, 46.)

Father contends, without any legal support, that the issue on appeal has not been forfeited because it was the Department's burden to prove adoptability. Regardless of whether it was the Department's burden to establish adoptability, the parents cannot remain silent for approximately two years, without objection, while the children are placed with the maternal aunt and the adoption process proceeds.

Mother contends that the issue on appeal has not been forfeited because it is a pure question of law to be decided on undisputed facts. Mother relies upon *In Re P.C.* (2006) 137 Cal.App.4th 279, 287 the "right to challenge the constitutionality of the statute is not forfeited on appeal"]; *People v. Butler* (1980) 105 Cal.App.3d 585 [no forfeiture because the question was the legal effect of the termination of the defendant's probationary period based on Penal Code section 1203.4 entitling a criminal defendant who has been granted probation to petition to have his record expunged after the period of probation has terminated]; *Ward v. Taggart* (1959) 51 Cal.2d 736, 742 [the plaintiffs' contention that the defendant was an involuntary trustee for the benefit of the plaintiffs was not forfeited because it was undisputed that the defendant made fraudulent misrepresentations about the funds paid to him]; *Ghirardo v. Antonioli* (1994) 8 Cal.4th 791, 799 [the issue of [w]hen a section 366.26 hearing is not set, [whether the juvenile court has] the discretion at the 12-month review to terminate reunification services to one parent while at the same

time continuing services to the other parent until the 18-month review date is not forfeited because it is a pure question of law].

Mother's cases are distinguishable. Here, mother requests that we reverse the juvenile court's section 366.26 order terminating the parental rights and direct the trial court to hold a hearing to inquire of the maternal aunt "as to whether selection and implementation of the permanent plan of legal guardian is preferred to termination of parental rights and the permanent plan of adoption." By mother's own admission, mother's assertion involves the factual circumstances of whether the maternal aunt was coerced into selecting adoption over guardianship, and this contention was not put in issue before the trial court. "The general rule confining the parties upon appeal to the theory advanced below is based on the rationale that the opposing party should not be required to defend for the first time on appeal against a new theory that 'contemplates a factual situation the consequences of which are open to controversy and were not put in issue or presented at the trial.' [Citation.]" (*Ward v. Taggart, supra,* 51 Cal.2d at p. 742.)

Even if the parents did not forfeit their claim on appeal, the juvenile court did not err. Section 366.26(c)(1)(A) provides that the juvenile court is to terminate parental rights in favor of a permanent plan of adoption, unless, "a relative [caregiver] . . . is unable or unwilling to adopt the child[ren] . . . ."

The record reflects that before the March 12, 2010, hearing, the maternal aunt was interested in adoption, as well as guardianship. At the March 12, 2010, hearing, the juvenile court was not pressuring the maternal aunt to be willing to adopt the children because she was already willing to do so, and there is no evidence in the record that maternal aunt believed she was being pressured by the juvenile court. At the March 12, 2010, hearing, the juvenile court asked the maternal aunt whether she was "in a position to adopt these children if the parents do not get them back," and the maternal aunt responded, "Yes."

While mother's reunification services were still pending, the maternal aunt expressed an interest in adopting the children, and she had been made aware of her

financial and legal rights and responsibilities regarding adoption. The Department reported that the maternal aunt was committed to adopting the children, and that she was "only interested in adoption, as it is the most permanent plan for" the children. According to the Department, the maternal aunt understood her responsibilities in terms of adoption, and was aware that upon the juvenile court's approval, she would become the legal parent of the children.

In December 2011, the maternal aunt submitted all of the required adoption home study paperwork, and her adoption home study was approved on January 6, 2012. At no time did the maternal aunt, or anyone else, object that she was being pressured into adopting the children.

DISPOSITION

The juvenile court's order is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

MOSK, J.

We concur:

TURNER, P. J.

ARMSTRONG, J.