Filed 9/18/17 In re A.H. CA2/6

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

In re A.H., a Person Coming Under the Juvenile Court Law.	2d Juv. No. B281220 (Super. Ct. No. J070758) (Ventura County)
VENTURA COUNTY HUMAN SERVICES AGENCY, Petitioner and Respondent, v. R.H., Appellant.	

R.H., the presumed father of A.H., appeals from a juvenile court order terminating his parental rights and freeing A.H. for adoption. (Welf. & Inst. Code, § 366.26.)[1] Appellant contends that the trial court failed to enforce a visitation order and that the beneficial parent-child relationship exception bars A.H.'s adoption. (§ 366.26, subd. (c)(1)(B)(i).) We affirm.

[1] All statutory references are to the Welfare and Institutions Code.

Procedural History

On November 20, 2015, Ventura County Human Services Agency (HSA) placed 14-month-old A.H. in protective custody following the death of her half-sibling. A.H.'s mother was intoxicated and dropped the half-sibling, causing the baby to suffer a fatal skull fracture. Appellant was in jail at the time and later sentenced to state prison for violent crimes.

HSA filed an amended dependency petition for failure to protect (§ 300, subd. (b)), abuse or neglect causing the death of a half-sibling (§ 300, subd. (f)), no provision for support (§ 300, subd. (g)), and abuse of a sibling (§ 300, subd. (j)). It was alleged that appellant and mother had a history of substance abuse that placed A.H. at substantial risk of serious physical harm. Mother tested positive for methamphetamine when the half-sibling was born and had a long history of substance abuse.

At the jurisdiction disposition hearing, appellant requested and was granted monthly supervised visits at the county jail. A.H. was placed in a foster home and, on February 25, 2016, placed with the maternal grandmother. On March 21, 2016, the trial court sustained the amended petition, bypassed services for mother (§ 361.5, subd. (b)(4) [death of another child through abuse or neglect]), and ordered services for appellant. The trial court warned "you're only entitled to six months of services" and "you need to do really well in the next six months; otherwise I could terminate your services on August 29th. And if I terminate your services, then we'll be looking for a different plan for your daughter, and that plan, . . . because she is so young, is adoption." Appellant said that he understood.

On July 7, 2016, the trial court modified visitation to allow the maternal grandmother to take A.H. to county jail for

supervised visits. In April and May 2016, case aides were unsuccessful in transporting A.H. to scheduled visits because A.H. cried excessively and refused to separate from the grandmother. Visitation was modified so that appellant could see A.H. during non-public visitation hours.

HSA, however, was unable to arrange a visit before appellant was transferred to Wasco State Prison. Appellant appeared with counsel at the six-month review hearing on October 6, 2016 but did not object to the visitation order or request that it be modified. Because A.H. was under three years of age and had not reunified with appellant, the trial court terminated services and set the matter for a section 366.26 permanent placement hearing. (§ 361.5, subd. (a)(1)(B).) Appellant was advised, both orally and in writing, that he would have to file a writ petition to challenge the order terminating services. The trial court warned that the writ forms had to be filed "within seven days of today. It's very important. Seven days of today. Is that clear?" Appellant responded "Yes" and was handed the forms (JV-820 and JV-825) to exercise his right of writ review.

Appellant decided not to file a writ petition and was released from state prison in February 2017, a few days before the section 366.26 hearing. Appellant appeared at the hearing and conceded that he had not completed a substance abuse program and had only three no-contact jail visits before services were terminated. The visits did not go well. A.H. was stressed and cried at each visit. Appellant terminated the visits after 15 minutes and asked the case aide to take A.H. home.

After appellant was transferred to Wasco State Prison in July 2016, appellant did not request further visitation

or ask to see A.H. HSA tried to contact appellant but appellant failed to respond to written inquiries about his prison release date.

HSA reported that A.H. was bonded to the maternal grandmother and that appellant "has not demonstrated a desire to make lifestyle changes . . . to provide [A.H.] with a safe and nurturing home environment." The trial court found that the parent-child beneficial exception to adoption did not apply (§ 366.26, subd. (c)(1)(B)(i)) and terminated parental rights.

Visitation

Appellant claims that the trial court failed to enforce the visitation order and that it denied appellant the opportunity to form a parent-child bond with A.H. Appellant waived his right to appeal by not filing a writ petition for extraordinary relief after the trial court found that reasonable services and visitation had been provided and terminated services. (§ 366.26, subd. (l)(2); *In re Anthony B.* (1999) 72 Cal.App.4th 1017, 1022-1023; *In re Tabitha W.* (2006) 143 Cal.App.4th 811, 817.) The "order is final and binding and may not be attacked on an appeal from a later appealable order. [Citations.]" (*In re Meranda P.* (1997) 56 Cal.App.4th 1143, 1150.) The presumptive rule for children under the age of three on the date of initial removal is that court-ordered services will be terminated after six months if the parent does not participate regularly in court-ordered treatment or avail himself or herself of the services provided. (§ 361.5, subd. (a)(2). Reunification services includes visitation consistent with the well-being of the child, but not when doing so will "jeopardize the safety of the child." (§ 362.1, subd. (a)(1)(A) & (B).) The unique developmental needs of infants and toddlers justifies a greater emphasis on establishing permanency and stability early in the

dependency process where there is a poor prognosis for family reunification. (*Daria D. v. Superior Court* (1998) 61 Cal.App.4th 606, 612.) Such a limitation on services does not violate a parent's due process rights. (*Id.* at pp. 611-612.)

The evidence shows that appellant terminated visitation and failed to participate in services due to behavior problems. After appellant was transferred to Wasco State Prison, he sent a note to A.H.'s caregivers, thanking them for taking care of A.H. Appellant did not ask to see A.H. but did visit A.H. at an August 2016 court hearing. Appellant argues that the trial court refused to enforce the visitation order and that HSA failed to honor the visitation order. None of that is supported by the record. "It is not this court's function to play guessing games about evidence not in the record . . . ." (*Steve J. v. Superior Court* (1995) 35 Cal.App.4th 798, 813.)

It is settled that visitation must be provided to an incarcerated parent unless it is detrimental to the child. (*In re Dylan T.* (1998) 65 Cal.App.4th 765, 773.) Here, the trial court granted appellant's request for jail visitation. Appellant complains that he "did not get his visitation," but that was appellant's doing. In March 2016, appellant terminated visitation and asked the case aide to take A.H. home. The trial court modified visitation to make it less stressful, but appellant dropped the matter after he was transferred to state prison.

Appellant argues that the lack of visitation undermined his due process right to file a section 388 petition to reinstate services and bond with the child. These claims were waived and may not be raised for the first time on appeal. (*In re Christopher B.* (1996) 43 Cal.App.4th 551, 558.) Constitutional objections must be interposed before the trial judge in order to

preserve the issue for appeal. (*People v. Marchand* (2002) 98 Cal.App.4th 1056, 1060.) Dependency proceedings are subject to the same rule. (*In re S.B.* (2004) 32 Cal.4th 1287, 1293.) After reasonable services and visitation are provided and services terminated, the child's need for a safe and permanent placement outweighs the parent's in preserving a tenuous relationship with the child. (*In re Dakota H.* (2005) 132 Cal.App.4th 212, 223.) Appellant makes no showing that visitation was denied or that he lacked the opportunity to exercise visitation after he transferred to state prison. We accordingly reject the argument that appellant's due process rights were violated.

Beneficial Relationship Exception

Appellant contends that the trial court erred in finding that the parent-child beneficial relationship exception to adoption does not apply. (§ 366.26, subd. (c)(1)(B)(i).) We review for substantial evidence and determine whether the trial court abused its discretion. (*In re Bailey J.* (2010) 189 Cal.App.4th 1308, 1314-1315.) "Because a parent's claim to such an exception is evaluated in light of the Legislature's preference for adoption, it is only in exceptional circumstances that a court will choose a permanent plan other than adoption. [Citation.]" (*In re Scott B.* (2010) 188 Cal.App.4th 452, 469.)

To establish the parent-child relationship exception, appellant must show he maintained regular contact and visitation, and that A.H. would benefit from continuing the relationship. (§ 366.26, subd. (c)(1)(B)(i); *In re Autumn H.* (1994) 27 Cal.App.4th 567, 575.) "To overcome the statutory preference for adoption, the parent must prove he or she occupies a parental role in the child's life, resulting in a significant, positive emotional attachment of the child to the parent. [Citations.]

'Obviously, the only way a parent has any hope of satisfying this statutory exception is if [he or] she maintains regular contact with her child.' [Citation.]" (*In re Valerie A.* (2007) 152 Cal.App.4th 987, 1007.)

During the dependency proceeding, appellant was either in jail or prison, and had three no-contact, 15-minute visits with A.H. Appellant said he "didn't want [A.H.] to break down in front of me" and terminated the visits. Appellant explained that A.H. "got taken away once. [HSA] is coming and picking her up, taking her to come visit me and she's afraid they're going to take her from where she is right now." HSA reported that A.H. began to cry inconsolably at each visit. "Visits with [appellant] did not take place in April, May, and June of 2016 due to [A.H.'s] extreme fear and refusal to separate from her relative care provider."

Based on A.H.'s age and appellant's unresolved substance abuse problem and minimal contact with the child, the trial court reasonably concluded that the benefits of continuing the parent-child relationship did not outweigh the permanency and stability of an adoptive placement that A.H. so badly needs. (*In re Angel B.* (2002) 97 Cal.App.4th 454, 468.) It is "a 'quintessentially' discretionary decision" but in this case not a close call. (*In re Bailey J.*, *supra*, 189 Cal.App.4th at p. 1315.) Childhood is fleeting and does not "wait until the[] parents grow up." (*In re Rikki D.* (1991) 227 Cal.App.3d 1624, 1632, disapproved on other grounds in *In re Jesusa V.* (2004) 32 Cal.4th 588, 624.)

Disposition

The judgment (order terminating parental rights and selecting adoption as the permanent plan) is affirmed.

NOT TO BE PUBLISHED.

YEGAN, J.

We concur:

GILBERT, P. J.

TANGEMAN, J.

Tari L. Cody, Judge

Superior Court County of Ventura

Elizabeth Klippi, under appointment by the Court of Appeal, for Appellant.

Leroy Smith, County Counsel, Martha J. Wolter, Assistant County Counsel, for Petitioner and Respondent.