

Filed 8/30/18 In re S.D. CA2/5

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

In re S.D., a Person Coming Under
the Juvenile Court Law.

B286606

(Los Angeles County
Super. Ct. No. DK11315)

LOS ANGELES COUNTY
DEPARTMENT OF CHILDREN
AND FAMILY SERVICES,

Plaintiff and Respondent,

v.

M.F.,

Defendant and Appellant.

APPEAL from orders of the Superior Court of Los Angeles
County, Stephen C. Marpet, Juvenile Court Referee. Dismissed.

Jamie A. Moran, under appointment by the Court of
Appeal, for Defendant and Appellant.

Office of the County Counsel, Mary C. Wickham, County Counsel, R. Keith Davis, Assistant County Counsel, and Stephanie Jo Reagan, Principal Deputy County Counsel, for Plaintiff and Respondent.

M.F. (Mother) appeals the juvenile court's denial of her Welfare and Institutions Code section 388 petition, which asked the juvenile court to reinstate previously terminated services to reunify with her son S.D. Mother contends the juvenile court erred in denying her petition without an evidentiary hearing because she made a prima facie showing of changed circumstances such that reinstituting services would be in S.D.'s best interest. The juvenile court has since terminated Mother's parental rights over S.D., however, and Mother has not appealed that rights termination order. We consider whether there is any effective relief we can provide Mother in light of the unchallenged termination of her parental rights.

I. BACKGROUND

A. *Initial Juvenile Court Proceedings*

Mother has two sons, S.D. and A.L.; they have different fathers. This appeal concerns only S.D.

When the Los Angeles County Department of Children and Family Services (the Department) filed its original dependency petition in May 2015, S.D. was 21 months old and lived with Mother and S.D.'s father, S.M. (Father). The Department's petition alleged, pursuant to Welfare and Institutions Code section 300, subdivision (b)(1),¹ that Mother and Father tested

¹ Undesignated statutory references that follow are to the Welfare and Institutions Code.

positive for methamphetamine and that their substance abuse rendered them incapable of providing regular care for S.D. (and A.L.) and put S.D. (and A.L.) at risk of serious physical harm.

Mother and Father did not contest the petition's allegations, and the juvenile court found S.D. was a dependent child at a jurisdiction and disposition hearing. The juvenile court ordered the Department to provide family reunification services, and monitored visits with S.D., for both parents. Mother's case plan required her to participate in a drug and alcohol program with random weekly testing, individual counseling, and a parenting program.

Mother complied with her case plan and tested clean for several months, but she eventually self-reported a relapse and entered an in-patient treatment program in November 2015. Then, in late August 2016, Mother again tested positive for amphetamine use. The following month, she was hospitalized for alcohol intoxication. Mother thereafter enrolled in another treatment program and, by January 2017, the Department noted she was testing clean and "showed progress."

Meanwhile, S.D. was doing "very well" in the care of his paternal aunt and uncle. He formed a strong attachment to his aunt and referred to her as "mom." The Department reported Mother's visits with S.D. were inconsistent and she was not forming a strong bond with him.

After extending reunification services for Mother on two occasions, the juvenile court held an 18-month review hearing to assess her progress. Department reports filed in advance of the hearing recommended the juvenile court terminate Mother's reunification services. The Department acknowledged there was "no doubt" she loved her son, but the Department emphasized she

had an unhealthy co-dependent relationship with Father and continued to relapse into drug use even after months of intensive services. Thus, in the Department's view, Mother did not appear to have "the skills to remain sober." The juvenile court accepted the Department's recommendation, terminated Mother's reunification services, and scheduled a section 366.26 selection and implementation hearing to consider a permanent plan for S.D., which might require termination of Mother's parental rights.

B. The Section 388 Petition at Issue

The Department identified adoption as S.D.'s preferred permanent plan and recommended Mother's parental rights be terminated. On the day of the scheduled section 366.26 hearing, Mother filed a section 388 petition asking the court to rescind its prior order terminating her family reunification services and to set a hearing to consider returning S.D. to her custody. Mother's petition asserted she had made "substantial progress in substance abuse counseling" and S.D. was "bonded with [her]." Submitted with Mother's petition were various letters of support, "clean" drug test reports, and certificates of completion for several service programs.

The juvenile court continued the section 366.26 hearing because Father was not present (he was incarcerated and could not be brought to court that day). With regard to Mother's section 388 petition, the court stated: "I'm going to grant it for a hearing finding there is, at this time, a sufficient change of circumstance. . . . I'm setting it for a hearing on the 388." The

court also issued a written order, using the Judicial Council-approved form.²

The Department submitted a report several days prior to the hearing on Mother's petition. It discussed, among other things, Mother's progress in overcoming substance abuse and the relative strength of S.D.'s bonds with Mother and his caregivers. None of Mother's recent drug tests was positive for drug use, but she had been a no-show on two occasions and had provided a diluted sample on a third. According to the Department's report, S.D. told one of his caregivers that there were times when Mother was "not present" during visits and that, at other times, a required monitor was not present. S.D. told a social worker that his paternal aunt was his "mama" and, when asked if he knew who M.F. was, said, "Oh she's my mama [M.F.'s first name]." He said he wanted "to stay here with mommy [paternal aunt's first name]" and "did not appear to be conflicted with his answer."

The court considered Mother's section 388 petition at a hearing in August 2017, noting at the outset it had read and considered the petition materials as well as a Department report recommending the court deny section 388 relief. Mother's attorney argued Mother had been sober for 11 months and her missed drug tests were the result of miscommunications. Counsel asserted Mother had consistently visited S.D. and disputed the contrary statements attributed to S.D. in the

² The form lists two options relevant to setting a hearing. The first, which the court completed, orders "a hearing on whether the court should grant or deny an evidentiary hearing." The second, which was left blank, "orders a hearing on the form JV-180 request because the best interest of the child may be promoted by the request."

Department's report. Mother's attorney also told the juvenile court that if "the court wishes to hear from [Mother] about any of the issues[,] . . . she is willing to testify or participate in a dialogue with the court should the court want it."

The juvenile court denied Mother's section 388 petition, explaining the reasons for its ruling as follows: "[T]he Department has indicated exactly what the problem is, is that [S.D.] has been out of [Mother's] care and custody since May of [2015] That's a long time. Two years, three months been living with these caretakers who he thinks are his parents. At this point, I'm hesitant even to find that you have a substantial change of circumstance but even so [it's] just not in this child's best interest at this time, maybe a year ago it would have been different but this is—you've been in drug programs since the case came in and out of drug programs, testing dirty, hospitalized for alcohol problems, and, yes, you've been 11 months clean but this child needs permanence. [¶] And, at this point, I'm finding that it's not in this child's best interest to grant the 388" Having denied the section 388 petition, the court reminded the parties of the upcoming section 366.26 hearing to consider, among other things, termination of Mother's (and Father's) parental rights.

*C. This Appeal and the Subsequent Termination of
Mother's Parental Rights*

The same day the juvenile court denied Mother's section 388 petition, Mother noticed this appeal from the court's order. The following month, the juvenile court terminated Mother and Father's parental rights over S.D. According to a minute order for that hearing, which we have judicially noticed, the court found Mother had not maintained regular visitation and had not

established a bond with S.D. Mother did not appeal the parental rights termination order.

II. DISCUSSION

Mother contends the juvenile court abused its discretion by denying her section 388 petition without an evidentiary hearing. The challenged juvenile court ruling appears to be within the proper bounds of the court's discretion, but even if we agreed that an evidentiary hearing on the merits was warranted and that the juvenile court did not hold such a hearing, Mother's decision not to challenge the later order terminating her parental rights means we can no longer afford her any practical relief from the ruling on her section 388 petition. The appeal is therefore moot, and we respectfully decline to exercise our discretion to decide the moot issue Mother raises because it is not one that is likely to recur while evading appellate review.

A. *Mother's Appeal is Moot*

"As a general rule, it is a court's duty to decide ""actual controversies by a judgment which can be carried into effect, and not to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it."" [Citation.] An appellate court will dismiss an appeal when an event occurs that renders it impossible for the court to grant effective relief." (*In re N.S.* (2016) 245 Cal.App.4th 53, 58-59.) "[T]he critical factor in considering whether a dependency appeal is moot is whether the appellate court can provide any effective relief if it finds reversible error." (*Id.* at p. 60.)

Mother's appeal is indistinguishable from the appeal in *In re Jessica K.* (2000) 79 Cal.App.4th 1313 (*Jessica K.*), where this court considered whether a parent who appealed an order summarily denying her section 388 petition but did not appeal an order terminating her parental rights could obtain effective relief on appeal. (*Id.* at p. 1315.) The court determined she could not: "An order of the dependency court terminating parental rights may be modified only by a timely direct appeal from the order. [Citation.] It is not subject to collateral attack, such as by petition for writ of habeas corpus. [Citation.]" (*Id.* at p. 1316.) In reaching its conclusion, the *Jessica K.* court cited section 366.26, subdivision (i), which now provides, in pertinent part, that "[a]ny order of the court permanently terminating parental rights under this section shall be conclusive and binding upon the child, upon the parent or parents and, upon all other persons who have been served with citation by publication or otherwise as provided in this chapter. After making the order, the juvenile court shall have no power to set aside, change, or modify it, except as provided in paragraph (2), but nothing in this section shall be construed to limit the right to appeal the order."³ (§ 366.26, subd. (i)(1).) Because the juvenile court in *Jessica K.* could not modify or vacate the order terminating parental rights, this court concluded that "[n]o effective relief may be afforded [appellant] even were we to find her appeal of the denial of the section 388 petition meritorious." (*Jessica K., supra*, at pp. 1316-1317.)

³ The current statutory language as quoted differs slightly from the language quoted in *Jessica K.* because of later-enacted statutory amendments. As relevant here, the substance of the statute remains the same.

Apparently conceding the holding in *Jessica K.* would apply equally here, Mother argues we should nonetheless exercise our discretion to resolve the issues presented in this appeal. For reasons we next discuss, we decline.

B. There Is No Reason to Exercise Our Discretion to Decide the Merits of the Appeal

We have discretion to resolve appeals that are “technically moot if they present important questions affecting the public interest that are capable of repetition yet evade review. [Citation.]” (*In re J.P.* (2017) 14 Cal.App.5th 616, 623; accord, *People v. DeLeon* (2017) 3 Cal.5th 640, 646 [noting discretion to resolve issues raised by moot appeal when “issue ‘is likely to recur, might otherwise evade appellate review, and is of continuing public interest’”]; *In re David B.* (2017) 12 Cal.App.5th 633, 654 [cataloguing “nuanced variation[s] in . . . articulations of when an appellate court may proceed to decide an otherwise moot appeal,” but emphasizing the “common thread . . . that doing so is appropriate only if a ruling on the merits will affect future proceedings between the parties or will have some precedential consequence in future litigation generally”].)

Here, there is no reason the issues raised in Mother’s appeal should evade review in future cases. As explained in *Jessica K.*, Mother had more than one avenue to seek review of the juvenile court’s determination of her petition. Most obviously, she “might have appealed from the order terminating her parental rights simply to preserve her right to appeal the denial of her section 388 petition.” (*Jessica K.*, *supra*, 79 Cal.App.4th at p. 1317.) Alternatively, she “also might have filed, prior to the date scheduled for the parental rights termination

hearing, a petition for an extraordinary writ as to the summary denial, asserting that appeal was not an adequate remedy.”

(*Ibid.*)

Discretionary review is also inappropriate here because our resolution of the issues raised in this appeal would have little “precedential consequence.” Mother’s contention that she made a *prima facie* showing under section 388 that the juvenile court should have changed its order terminating reunification services is highly fact-specific. (See *In re David B.*, *supra*, 12 Cal.App.5th at p. 654 [“We see no basis for exercising discretion to address the fact-specific questions whether David B. was described by section 300, and whether the juvenile court’s determination on that point is supported by substantial evidence”].) Similarly, the Department’s contention that the hearing in this case was actually an evidentiary hearing turns on case-specific factual issues including, for example, how to construe the court’s written orders and statements on the record, whether Mother had an opportunity to present evidence, and what additional evidence Mother might have presented.

DISPOSITION

Mother's appeal is dismissed.

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BAKER, Acting P. J.

We concur:

MOOR, J.

KIN, J.*

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.