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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

In re MANUEL M.,

a Person Coming Under the Juvenile Court Law.

B249328
(Los Angeles County
Super. Ct. No. CK80155)

LOS ANGELES COUNTY DEPARTMENT
OF CHILDREN AND FAMILY SERVICES,

Plaintiff and Respondent,

v.

YOLANDA M.,

Defendant and Appellant.

APPEAL from orders of the Superior Court of Los Angeles County,
Donna Levin, Referee. Affirmed.

Julie E. Braden, under appointment by the Court of Appeal, for Defendant
and Appellant.

John F. Krattli, County Counsel, James M. Owens, Assistant County
Counsel, and Kimberly A. Roura, Associate County Counsel, for Plaintiff and
Respondent.

Mother Yolanda M. appeals from the juvenile court's orders denying her request for a contested hearing under Welfare and Institutions Code section 366.26¹ and terminating her parental rights over her eight-year-old son Manuel. We affirm.

BACKGROUND

In March 2010, the juvenile court sustained a section 300 petition filed by the Los Angeles County Department of Children and Family Services (DCFS) alleging that Manuel (then 5) and his sister Monique (then 8)² were at risk based on, inter alia, domestic violence between Mother and the children's father (Father).³ The court removed the children from Father's custody, and gave custody to Mother, who was then living in a shelter. The court ordered Mother to attend domestic violence and individual counseling, and granted a permanent restraining order protecting Mother and the children from Father.

Following reports of Monique's severe mental and emotional problems, Monique was detained, and Mother admitted the allegations of a supplemental petition as to her in August 2010. By that time, Mother and Manuel were living at their sixth shelter. However, in December 2010, they moved in with Father, in violation of court orders. The parents engaged in domestic violence in Manuel's presence (including Father telling Manuel that he was going to kill Mother). Manuel stopped attending school and Mother stopped attending counseling. In January 2011, the court ordered Manuel detained from Mother, and granted her

¹ All undesignated section references are to the Welfare and Institutions Code.

² Monique is not a party to this appeal.

³ Father also is not a party to this appeal.

monitored visitation three times a week. By April 2011, when the court sustained a supplemental petition as to Manuel, Mother was visiting him one day each week at a neutral location arranged with the foster parents. The court removed Manuel from Mother's custody and ordered reunification services for Mother, with monitored visitation three times a week, parenting class, and individual and domestic violence counseling.

Although by August 2011 Mother had secured housing in a three-bedroom unit and enrolled in domestic violence counseling and a parenting class, she soon resumed her relationship with Father. By December 2011, she only sporadically attended domestic violence and parenting counseling, and did not return to individual counseling. In February 2012, Manuel's foster mother reported that Mother was visiting Manuel only every other week.

On March 12, 2012, Father assaulted Mother, striking her on the head. She was able to escape, but when she returned to her home she discovered that it had been severely damaged. She called the police, who had to forcibly remove Father from the residence using rubber bullets and a taser. On May 4, 2012, at a contested hearing, the court terminated Mother's reunification services as to Manuel, and scheduled a section 366.26 hearing.

On May 18, 2012, Manuel was placed with prospective adoptive parents, Mr. and Mrs. T. His therapist reported that he suffered from adjustment disorder with depressed mood, and would continue to suffer symptoms until he achieved permanency. By August 2012, he was happy with the T's, called them "mommy and daddy," and had begun to excel in school. His therapist reported that the placement "seem[ed] to be a good fit." Manuel continued to show attachment to Mother. He said that he would like to be adopted by the T's if he could not reunify with Mother, but asked if Mother could live with them after the adoption.

By June 2012, Mother had resumed contact with Father, and by August 2012 was living with him. On August 8, 2012, Mother informed DCFS that she had checked herself into a mental health center for severe depression. She missed a visit with Manuel that day, causing him to become extremely upset for the next three to four days. His therapist reported that when Mother missed visits, Manuel feared something bad might have happened to her. According to Mother, she had lost her Section 8 housing because Father was taking her mail. She moved in with Father, but he threw her out “with nothing.” She stopped taking her medication, felt suicidal, and checked herself into a hospital. Mother’s mental health case manager reported that Mother had attempted suicide by jumping in front of a train, and was hospitalized for 17 days, then transferred to another facility from which she was discharged on October 11, 2012. Mother then moved into a homeless shelter.

In the meantime, on August 24, 2012, the court reduced Mother’s visitation to one monitored visit of one hour per month. In October 2012, DCFS reported that Manuel was happy living with the T’s, was doing well in school, and his emotional outbursts had decreased.

In December 2012, Mother filed a section 388 petition seeking reinstatement of reunification services. The court set the matter for the same date as the section 366.26 hearing. For the hearing, DCFS reported that Manuel was bonded to the T’s and had been named Student of the Month at his elementary school. Since August 2012, Mother had visited Manuel only once (on November 1, 2012), though she had telephone conversations with him four times in September, three times in October, and twice in November.

As of February 25, 2013, Mother was still residing in a homeless shelter. She had not visited Manuel since the November 1, 2012 visit. She told DCFS that

she had had no contact with Father since she was admitted to the hospital. She stated that she finally realized that she was better off without him and that she had put Manuel in danger by going back with Father. Mother was looking into housing programs that would accommodate her children. She was seeing a psychiatrist to get medication, but was not participating in any therapy. Mother explained her lack of in-person visits as the result of not having money for transportation, and her sporadic telephone contact as the result of her phone frequently being missing.

Manuel told DCFS that he felt “good” about living with the T’s. When asked if he wanted to visit Mother, he said yes, and also wanted to see Father. Manuel said that he would like to live with the T’s, but also would like to live with Mother. He stated that “[t]he court said I can’t go back to my mom. I think she’s trying really hard.”

On February 25, 2013, the court conducted a joint hearing on Mother’s section 388 petition and the section 366.26 disposition. In support of the section 388 petition, Mother testified that she had last seen Father six months ago and was now maintaining a separate residence. She was taking psychotropic medication and seeing a psychiatrist to regulate that medication. She had visited Manuel last “Friday,” and before that had seen him “in December . . . or . . . the end of November.” She explained that “it is really hard . . . because I have transportation problems, but they bring him to me. But during the last few weeks or month, I have been very busy trying to get . . . housing and everything.” She later admitted that she had not visited Manuel in December, January, or February. Mother was requesting unmonitored visits and a reinstatement of reunification services, and promised to comply with all court orders.

Mother’s counsel argued that Mother had been frustrated in her attempts to visit Manuel and Monique and have a meaningful relationship with them since

reunification services were terminated, because she did not have funds for transportation. However, Mother was determined to remain separated from Father, to take her medication, and to make a home for Manuel and Monique.

Manuel's counsel argued against granting the petition, pointing out that Mother had a consistent history of returning to Father and had failed to protect Manuel from domestic violence. Counsel characterized Mother's recent efforts as being "a little too late." Counsel for DCFS joined in opposing the petition.

The trial court denied the petition. It noted that the case had been pending for approximately two-and-a-half years, that Mother had failed to complete her case plan, and that she had not visited Manuel or Monique since November. Because the children were in need of permanence, it was not in their best interest to grant the section 388 petition.

Turning to the section 366.26 hearing as to Manuel, Mother's counsel stated that Mother "wishes to contest the nature of the relationship between [her] and the child being such that it would be detrimental to terminate parental rights." This was an implicit reference to the exception to termination of parental rights under section 366.26, subdivision (c)(1)(B)(i). The court noted that although the issue in the section 388 petition was "slightly different," the petition asked for a "return to mother" and "further family reunification services. . . . The Mother has not visited on a regular basis and . . . has not had unmonitored visitation in a long time. . . . And as to Manuel, he is in a good pre-adoptive home." Nonetheless, the court offered to hear any showing as to why the section 366.26 hearing should be contested.

Mother's counsel asked to examine Manuel. The court responded that Manuel was under 12 years of age, and his feelings were really "not relevant . . . and he is, in the report, stating that he likes the home he's in." Mother's counsel

noted that Manuel also said that he liked having contact with Mother. The court responded: “The only relevance would be if Mother can show that the bond is such that he should have a continuing relationship with the mother. I don’t have anything in the reports to show that, and all I have is disappointment in the mother in her not showing up for visits. . . . I agree he does say at some point [he likes contact with Mother], . . . but he did actually say that he wants to stay in the family he is with and he likes it there and he has a good home. So Manuel’s bond with the mother is not strong enough to say ‘I would rather be with Mom than these people.’ He’s not saying that. The mother can’t show that she has a bond with Manuel. He hasn’t been in her home for a couple of years now, and she has not had unmonitored visitation with him.” The court then denied the request for a contested section 366.26 hearing. The court terminated Mother’s parental rights, made adoption the permanent plan, and designated the T’s as the prospective adoptive parents.

DISCUSSION

Mother contends that the court erred in denying her a contested section 366.26 hearing as to Manuel. We disagree.

As held in *In re Tamika T.* (2002) 97 Cal.App.4th 1114, 1122 (*Tamika T.*), the juvenile court may properly request an offer of proof before permitting a contested section 366.26 hearing based on one of the statutory exceptions to termination of parental rights: “Because due process is . . . a flexible concept dependent on the circumstances, the court can require an offer of proof to insure that before limited judicial and attorney resources are committed to a hearing on the issue, mother had evidence of significant probative value. If due process does not permit a parent to introduce irrelevant evidence, due process does not require a

court to hold a contested hearing if it is not convinced the parent will present relevant evidence on the issue he or she seeks to contest. The trial court can therefore exercise its power to request an offer of proof to clearly identify the contested issue(s) so it can determine whether a parent's representation is sufficient to warrant a hearing involving presentation of evidence and confrontation and cross-examination of witnesses. . . . We therefore conclude it does not violate due process for a trial court to require an offer of proof before conducting a contested hearing on one of the statutory exceptions to termination of parental rights.” (*Tamika T.*, *supra*, 97 Cal.App.4th at p. 1122.)

Here, as in *Tamika T.*, Mother requested a contested hearing so as to litigate the exception to parental rights found in section 366.26, subdivision (c)(1)(B)(i). That exception requires the parent to show that he or she “ha[s] maintained regular visitation and contact with the child and the child would benefit from continuing the relationship.” The parent must show that the nature of the relationship “‘promotes the well-being of the child to such a degree as to outweigh the well-being the child would gain in a permanent home with new, adoptive parents. In other words, the court balances the strength and quality of the natural parent/child relationship in a tenuous placement against the security and the sense of belonging a new family would confer. If severing the natural parent/child relationship would deprive the child of a substantial, positive emotional attachment such that the child would be greatly harmed, the preference for adoption is overcome and the natural parent’s rights are not terminated.’ [Citation.] [¶] The parent must do more than demonstrate ‘frequent and loving contact[,]’ [citation], an emotional bond with the child, or that parent and child find their visits pleasant. [Citation.] Instead, the parent must show that he or she occupies a ‘parental role’ in the child’s life.” (*In re Derek W.* (1999) 73 Cal.App.4th 823, 827.)

The juvenile court properly asked Mother's counsel for an offer of proof, noting that at the immediately preceding hearing on the section 388 petition Mother failed to "show[] any basis in order to have a contested .26 . . . but I am willing to have it now." In response, Mother's counsel requested to examine Manuel, because he had said that he "like[d] having the contact with his mother." But as the court stated, Manuel also wanted to continue living with the T's, and there was nothing to suggest that Mother could show the kind of bond required to sustain the section 366.26, subdivision (c)(1)(B)(i) exception. Moreover, Mother could not show regular visitation. The court was correct. Manuel's equivocation – wanting to remain with the T's while at the same time remaining with Mother – was insufficient to show that Mother and Manuel's relationship was such as to outweigh the well-being Manuel would gain in a permanent home with the T's. In any event, it was undisputed below that Mother could not meet the requirement of showing regular visitation. Thus, the court did not err in denying Mother a contested hearing.

Mother contends that the court was required to hear Manuel's testimony to determine whether the sibling exception of section 366.26, subdivision (c)(1)(B)(v) applied.⁴ Mother failed to raise this issue below, and it is therefore forfeited. (*In re Erik P.* (2002) 104 Cal.App.4th 395, 403 [failure to raise sibling exception at section 366.26 hearing forfeits the issue].) Mother contends that DCFS failed to

⁴ Section 366.26, subdivision (c)(1)(B)(v) provides an exception to termination of parental rights when "[t]here would be substantial interference with a child's sibling relationship, taking into consideration the nature and extent of the relationship, including, but not limited to, whether the child was raised with a sibling in the same home, whether the child shared significant common experiences or has existing close and strong bonds with a sibling, and 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."

perform an adequate evaluation of the sibling relationship as required by section 361.5, subdivision (g)(1)(B).⁵ She asserts that this is a question of law that can be raised for the first time on appeal. She is wrong. The failure to object to the adequacy of the report under section 361.5 forfeits the issue on appeal. (*In re Erik P.*, *supra*, 104 Cal.App.4th at p. 399; *In re Crystal J.* (1993) 12 Cal.App.4th 407, 411-412.) In any event, the DCFS reports complied with section 361.5, subdivision (g)(1)(B), by reporting on Manuel and Monique’s joint visits and their enjoyment of them.

DISPOSITION

The orders are affirmed.

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WILLHITE, J.

We concur:

EPSTEIN, P. J.

SUZUKAWA, J.

⁵ Section 361.5, subdivision (g)(1)(B) provides in relevant part: “Whenever a court orders that a hearing shall be held pursuant to Section 366.26, . . . it shall direct the agency supervising the child and the county adoption agency, or the State Department of Social Services when it is acting as an adoption agency, to prepare an assessment that shall include: [¶] . . . [¶] (B) A review of the amount of and nature of any contact between the child and his or her parents and other members of his or her extended family since the time of placement. Although the extended family of each child shall be reviewed on a case-by-case basis, ‘extended family’ for the purpose of this subparagraph shall include, but not be limited to, the child’s siblings, grandparents, aunts, and uncles.”