Filed 10/31/12 In re K.S. CS2/7

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

In re K.S. et al., Persons Coming Under the Juvenile Court Law.	B240552 (Los Angeles County Super. Ct. No. CK79483)
LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. TIFFANY S., Defendant and Appellant.	

APPEAL from orders of the Superior Court of Los Angeles County, Margaret S. Henry, Judge. Affirmed.

Aida Aslanian, under appointment by the Court of Appeal, for Defendant and Appellant.

John F. Krattli, County Counsel, James M. Owens, Assistant County Counsel, and Stephen D. Watson, Deputy County Counsel, for Plaintiff and Respondent.

INTRODUCTION

Tiffany S. (Mother) appeals from orders denying her petition for modification of court order (Welf. & Inst. Code,[1] § 388) and terminating her parental rights (§ 366.26) over her twins, K.S. and N.S. Mother contends (1) the court erroneously denied her section 388 petition, (2) the parental relationship exception to termination of parental rights precluded termination of her parental rights, and (3) the court erred to the extent it considered the twins' bond with their caretaker to overcome the beneficial parental exception. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

A. *The Family*

Mother suffers from schizophrenia and bipolar disorder and has been prescribed psychotropic medication. Mother's parental rights over her four older children previously were terminated and all four have been adopted.

Manuel G. (Father), who is not a party to this appeal, is the presumed father of the twins. He and Mother have never been married and are not in a relationship. Father also has mental health issues for which he has been receiving services for a number of years. He has been diagnosed with major depression and takes psychotropic medication. Father's involvement in these dependency proceedings will be set forth only as necessary to give a chronological account of the twins' journey through the dependency system.

During the pendency of these dependency proceedings, K.S. was diagnosed with sickle cell anemia. This disease requires ongoing treatment.

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

B. ***Events Giving Rise to Dependency Proceedings***

On October 19, 2009, when K.S. and her brother N.S., were not even three weeks old, Mother abandoned them at the Compton Fire Department. Along with their clothes, immunization cards and hospital records, Mother left her information, Father's cell phone number and the cell phone number of a maternal aunt. Fire department personnel transported the infants to the hospital and contacted the Department of Children and Family Services (DCFS), which detained the children and placed them in foster care.

On October 20, a county social worker (CSW) interviewed Mother over the telephone. Mother stated she has mental health issues and was not able to care for the children.

On October 21, the CSW spoke to Father over the phone. Father stated that the twins had been with him at his home the day Mother took them to the fire station. Mother did not tell Father that she was going to abandon the twins when she picked them up from Father's home. The CSW also received a call from a licensed clinical social worker who stated that Father had been her client since April 2007. She explained that Father had been diagnosed with depression and was on medication. He was doing well and was interested in caring for the children.

C. ***Section 300 Petition & First Amended Petition***

On October 22, 2009, DCFS filed a petition on behalf of the twins, pursuant to section 300, subdivisions (b) (failure to protect) and (g) (no provision for support), alleging caretaker absence and incapacity. The juvenile court ordered the twins detained in shelter care. That same day, Mother executed a waiver of her right to reunification services. On November 10, Mother called and advised the CSW that she had relocated to Minnesota.

On November 12, DCFS filed a first amended petition, setting forth the additional allegation that Father's history of drug abuse rendered him unable to provide regular care for the children and that his recent use of marijuana laced with cocaine endangered the children (§ 300, subd. (b).) The initial section 300 petition was dismissed.

DCFS recommended that family reunification services be provided to Father and be denied to Mother due to her failure to reunify with her four older children. DCFS advised the court that Mother had moved to Minnesota.

D. *Jurisdiction/Disposition Hearing*

On December 10, 2009, Father waived his rights and submitted the first amended petition on the basis of DCFS reports and documentation. The waiver of reunification services previously executed by Mother was filed with the court.

The juvenile court declared K.S. and N.S. dependent children pursuant to subdivisions (b) and (g) of section 300. Proceeding to disposition, the court removed the twins from parental custody and placed them in the care of DCFS for suitable placement with a relative. It further ordered family reunification services for Father but none for Mother pursuant to section 361.5, subdivision (b)(14). The court ordered monitored visitation for Mother in Southern California. For Father, the court ordered unmonitored visits in placement but monitored visits outside of placement, and it give DCFS discretion to liberalize. DCFS thereafter placed the children with their paternal aunt, Bonnie G.

E. *Six-Month Review Hearing*

At the six-month review hearing held on July 1, 2010, the court found that Father was in compliance with his case plan and ordered K.S. and N.S. placed in his home under DCFS supervision. It also directed DCFS to provide Father with family maintenance services.

F. *DCFS Detains Twins and Files a Section 387 Supplemental Petition*

During a team decision meeting on September 28, 2010, the CSW informed Father, who had missed two random drug tests, that it would detain the children if he missed another drug test. Thereafter, Father contacted the CSW and told her he had missed his drug test on October 8. When the CSW asked Father to submit to an on demand test on October 12, Father stated he would test dirty because he had smoked a

cigarette laced with cocaine two days earlier. Father apologized, said he felt stupid for doing so, and said he needed time to get himself together. Father consented to the removal of his children and their placement with his sister, Bonnie G.

On October 15, DCFS filed a supplemental petition pursuant to section 387, alleging that Father has a history of drug abuse, is a current abuser of cocaine and marijuana and "failed to regularly participate in Juvenile Court ordered random drug testing," thereby endangering his children. The court ordered the children detained with Bonnie G. pending the next hearing.

On November 5, Father waived his rights and submitted on the section 387 petition on the basis of the social worker's report. The court sustained the petition and proceeded to disposition. The court removed the twins from Father's physical custody and placed them in the care, custody and control of DCFS for suitable placement with a relative. The court further ordered DCFS to provide Father with family reunification services, consisting of a drug rehabilitation program with random testing, narcotics anonymous meetings with a sponsor, and individual counseling to address all case issues. The court also ordered Father to comply with all psychotropic medication recommendations and granted Father monitored visitation with DCFS having discretion to liberalize.

G. *Mother's Section 388 Petition*

Also on November 5, 2010, Mother, who had moved back to California, filed a section 388 petition. Therein, she asked that the December 10, 2009 order denying her family reunification services be changed and that the court order DCFS to provide her with such services. Mother claimed that, since June 2010, she had been receiving mental health services and medication through the Department of Mental Health and she recently began a parenting class. Mother urged that the change she requested would benefit her children because they "will have the opportunity to benefit from improved parenting skills and have the opportunity to reunite with a parent." The court scheduled a hearing on Mother's section 388 petition for December 16.

On December 16, the juvenile court granted Mother's section 388 petition, concluding that the children's best interests would be promoted by the proposed change of order. The court ordered DCFS to provide Mother with family reunification services. The court ordered Mother to submit to random drug testing, to attend parent education and individual counseling to address all case issues and to take all prescribed psychotropic medication.

On January 13, 2011, a progress hearing was held, at which the trial court stated, "we've got progress, but we're not there yet." DCFS reported that both parents were participating in court-ordered services. Per Mother's request for increased visitation, the court ordered DCFS to arrange for Mother to visit a minimum of three hours a week.

H. ***18-Month Review Hearing***

In preparation for the 18-month permanency review hearing (§ 366.22), DCFS reported that, on April 20, 2011, Father called the CSW and told her that he relapsed, in that he had smoked another cigarette laced with cocaine. The drug program also called the CSW to advise her that Father had tested positive for cocaine. As a result, DCFS required Father's visits to be supervised.

The CSW reported that she observed N.S. in Bonnie G.'s home and "during his visits at the DCFS office and has noticed that [N.S.] is more comfortable in his home setting. [N.S.] visits with his mother . . . twice a week for an hour and a half and still doesn't smile or run and hug his mother when he sees her; he doesn't show any signs of excitement." With respect to K.S.'s visits with Mother, the CSW noted that K.S. "initially appeared anxious and would refuse to get out of her stroller. Gradually, [she] began interacting with mother as she began to bring toys, books and snacks for the child during the visits. Although [K.S.] appears to feel more comfortable with mother during the most recent visits, [K.S.] does not allow mother to get too close to her. During visits with mother, [K.S.] only approaches mother when receiving treats and spends most of her time exploring the room where the visitation is taking place or playing with her brother [N.S.]"

The CSW further reported that "[i]t has been reported by monitors that [K.S.] and mother do not appear to have created a bond with each other. Child only approaches mother when she has a snack to give child or when she brings a toy or book. Child has not been observed to hug mother or give her a kiss. It has been reported that visits . . . appear routine to the child, and she does not display any separation anxiety when leaving visits, rather she appears happy (as reflected in her smile) when she is being picked up by her caregiver at the end of the visit. Mother has been appropriate with [K.S.] during visitation and has tried to engage child by reading books, child play, and singing."

Although acknowledging that Mother had been compliant with her case plan and had engaged in reunification services since July 2010, DCFS was concerned that "it is not sufficient time to demonstrate whether mother will be capable to successfully care for [K.S.] and her medical needs as well as continue to care for her own mental health needs." The CSW reiterated that "[K.S.] does not appear to have formed a bond with mother . . . as displayed by her behavior during visitation. Mother also has an extensive child welfare history that resulted in four of her children being adopted due to her mental health instability which placed those children in a dangerous situation when she is off her medication, which history shows that she has."

The CSW noted that Bonnie G. "has continued to provide excellent supervision and care for [K.S.] and her specialized needs." The CSW further noted that Bonnie G. "provides the most nurturing and stable environment" for K.S. and N.S. The CSW recommended that family reunification services for both parents be terminated and that the matter be set for a selection and implementation hearing.

The 18-month review hearing was held on May 6, 2011. Pursuant to Mother's request for a contest, the court continued the matter to June 3. At the continued hearing, the court stated, "I'm very happy for the mother that she's doing her programs and that she's coming along well, but when we haven't even progressed to unmonitored visits and it doesn't seem that we could, you know, or should at this point, I can't consider return

today. And the kids have now been in the system for 18 months, and need to go to a permanent plan . . . ."

The court noted that the parents progress toward ameliorating the causes necessitating dependency proceedings was "partial." The court terminated family reunification services for Mother and Father, scheduled a section 366.26 hearing for September 30 and directed that visitation orders remain in full, force and effect.[2]

In a report prepared for the section 366.26 hearing, DCFS stated that "[a]ccording to DCFS monitors, the visits between mother and the children are pragmatic. It has been observed that there is no bonding taking place between mother and the children. The children do not go to their mother for comfort or consoling. The children will only approach mother if she has snacks or a toy. There has not been any display of affection between mother and the twins. Mother has recently called the visit short for a variety of reasons, such as they are sick, or she has to go to school. When the visit is over, the children do not cry or appear sad that the visits are over. In fact, mother has on occasion appeared to be relieved that the visits are over."

The section 366.26 hearing was continued first to December 1, 2011 and second to March 29, 2012 to enable DCFS to complete the home study of Bonnie G.'s home.

I. ***Mother's Second Section 388 Petition***

On January 27, 2012, Mother filed another section 388 petition. Therein, she sought to change the court's June 3, 2011 order terminating her family reunification services and setting a section 366.26 hearing. Mother asked the court to return the twins to her custody. Alternatively, she asked the court to reinstate reunification services, take the section 366.26 hearing off calendar and increase visits from the current schedule of one visit every two weeks. Mother maintained that the changes she sought would benefit the children by giving them "the opportunity to reunify with their mother and benefit

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[2] Although Mother filed a notice of intent to file a writ petition and request for record to review order setting the section 366.26 hearing, the writ was non-operative.

from her improved parenting skills." The court ordered a hearing on Mother's section 388 petition to be held on March 1, 2012. On that date the matter was continued to March 29 for a contested hearing.

J. *Contested Section 388 and Section 366.26 Hearings*

On March 29, 2012, following a contested hearing at which Mother testified, the juvenile court denied Mother's section 388 petition concluding that the best interests of the twins would not be promoted by the proposed change of order.

With regard to selection and implementation of a permanent plan pursuant to section 366.26, the court found by clear and convincing evidence that K.S. and N.S. were adoptable. The court further found that it would be detrimental to return them to their parents. The court then terminated Mother's and Father's parental rights, thereby freeing the twins for adoption by Bonnie G.

This appeal by Mother followed.[3]

DISCUSSION

A. *Section 388 Petition*

In her January 27, 2012 section 388 petition, Mother maintained that the juvenile court's June 3, 2011 order terminating her reunification services and scheduling a selection and implementation hearing pursuant to section 366.26 should be changed. Specifically, she asked the court to return the twins to her care. In the alternative, she asked the court to reinstate reunification services, take the section 366.26 hearing off calendar and increase her visitation. The court granted Mother a hearing on her petition but ultimately denied the petition, concluding that the proposed change of order would not promote the children's best interests. Mother challenges this order.

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3 Father agreed with the plan of adoption by his sister, Bonnie G.

As observed in *In re A.A.* (2012) 203 Cal.App.4th 597 at pages 611-612, "[a] juvenile court order may be changed, modified or set aside under section 388 if the petitioner establishes by a preponderance of the evidence that (1) new evidence or changed circumstances exist and (2) the proposed change would promote the best interests of the child. [Citation.] The parent bears the burden to show both a legitimate change of circumstances and that undoing the prior order would be in the best interest of the child. [Citation.] Generally, the petitioner must show by a preponderance of the evidence that the child's welfare requires the modification sought. [Citation.]

"Not every change in circumstance can justify modification of a prior order. [Citation.] The change in circumstances must relate to the purpose of the order and be such that the modification of the prior order is appropriate. [Citation.] In other words, the problem that initially brought the child within the dependency system must be removed or ameliorated. [Citations.] The change in circumstances or new evidence must be of such significant nature that it requires a setting aside or modification of the challenged order. [Citations.]

"In evaluating whether the petitioner has met his or her burden to show changed circumstances, the trial court should consider (1) the seriousness of the problem which led to the dependency, and the reason for any continuation of that problem; (2) the strength of relative bonds between the dependent children to both parent and caretakers; and (3) the degree to which the problem may be easily removed or ameliorated, and the degree to which it actually has been. [Citation.] The petition is addressed to the sound discretion of the juvenile court, and its decision will not be overturned on appeal in the absence of a clear abuse of discretion. [Citations.]"

After the juvenile court terminated Mother's family reunification services on June 3, 2011, Mother attended church services, obtained a large single apartment with the help of a social worker from L.A. Family Housing, continued to receive mental health services from the Department of Mental Health and expanded her support network. Most significantly, however, Mother had not taken her schizophrenia medication for one year. Understandably, this caused DCFS and the twins' attorneys to be alarmed since Mother's

psychoses had played a part in the termination of her parental rights over her four older children and caused her to abandon K.S. and N.S. in 2009. The absence of a letter or report from Mother's psychiatrist addressing her need or lack of need for psychotropic medications was commented upon by counsel and the court.

The court acknowledged that Mother was "making progress." It further noted that the circumstances were "changing" but Mother was not "there yet in terms of change. And I don't think it's in the best interest of the children because they have been with this caretaker for so long, and they are really bonded. And we're here for the best interest of the children. And it seems to be in the best interest of the children to remain as placed." Mother has failed to demonstrate that the juvenile court abused its discretion in so ruling. (*In re A.A.*, *supra*, 203 Cal.App.4th at p. 613.)

B. *Parent-Child Relationship Exception*

Mother challenges the termination of her parental rights. She claims that she established the parent-child relationship exception to termination. We disagree.

Adoption is the presumptive permanent plan when an adoptable child is not returned to parental custody. (*In re Jasmine D.* (2000) 78 Cal.App.4th 1339, 1350.) A parent can prevent termination of his or her parental rights by establishing one of the statutory exceptions to termination set forth in section 366.26, subdivision (c)(1)(B). (*In re Aaliyah R.* (2006) 136 Cal.App.4th 437, 449 [the parent asserting an exception to adoption has the burden of proving by a preponderance of evidence that the exception applies].)

In this case, Mother asserted the parent-child relationship exception which provides that once a child is found to be adoptable, parental rights must be terminated unless the court finds that termination would be detrimental to the child because "[t]he parents . . . have maintained regular visitation and contact with the child and the child would benefit from continuing the relationship." (§ 366.26, subd. (c)(1)(B)(i).) To establish this exception, the parent must prove that "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." (*In re Autumn H.* (1994) 27 Cal.App.4th 567, 575.)

In determining whether the parent-child relationship exception applies, the juvenile court must consider "[t]he age of the child, the portion of the child's life spent in the parent's custody, the 'positive' or 'negative' effect of interaction between parent and child, and the child's particular needs." (*In re Autumn H.*, *supra*, 27 Cal.App.4th at p. 576.) In addition, the court must "engage in a balancing test, juxtaposing the quality of the relationship and the detriment involved in terminating it against the potential benefit of an adoptive family." (*In re Cliffton B.* (2000) 81 Cal.App.4th 415, 424-425.) "That showing will be difficult to make . . . where the parents have essentially never had custody of the child nor advanced beyond supervised visitation. The difficulty is due to the factual circumstances of the parents failing to reunify and establish a parental, rather than caretaker or friendly visitor relationship with the child." (*In re Casey D.* (1999) 70 Cal.App.4th 38, 51.)

On appeal, the trial court's determination as to whether a beneficial parent-child relationship exists is reviewed under the substantial evidence standard. The juvenile court's determination as to whether such a relationship compels the conclusion that termination of parental rights would be detrimental to the child is a discretionary one reviewed under the abuse of discretion standard. (*In re K.P.* (2012) 203 Cal.App.4th 614, 622.)

In this case, Mother cared for the children for less than three weeks before abandoning them at the fire station. She initially waived her rights to family reunification services, moved to Minnesota and had very little contact with her children during the first seven months of their lives. After the court granted Mother's first section 388 petition

and ordered DCFS to provide her with family reunification services, Mother consistently visited with the twins. At first, the twins showed no excitement or signs of bonding with Mother. As visits continued, the children appeared comfortable with Mother.[4]

While Mother unquestionably loves the twins and tried in earnest to reunify with them during the six months of services she received, we agree with DCFS that her contact with the twins during the second year of their lives amounted only to "frequent and loving contact." (*In re Beatrice M.* (1994) 29 Cal.App.4th 1411, 1418.) As observed in *In re Jason E.* (1997) 53 Cal.App.4th 1540, "[f]or [the parent-child relationship] exception to apply, it must be shown that there exists 'a significant, positive, emotional attachment from child to parent' and that relationship of the parent to the minor is one of parent and child rather than one of being a friendly visitor or friendly nonparent relative such as an [aunt]." (*Id*. at p. 1548.) In this case, the evidence portrays Mother as a "friendly visitor" who had "frequent and loving contact" with the twins. While Mother brought them snacks, books and toys and interacted with them, she failed to present any evidence that her relationship with the twins was so significant that its termination would cause them detriment. Mother never provided for the children financially, and she never progressed from supervised to unsupervised visits. Despite K.S.'s fragile medical condition resulting from her sickle cell disease, Mother only attend four of K.S.'s numerous medical appointments and was unfamiliar with the names of K.S.'s medications. In addition, Mother had no contact with the children between visits.

Bonnie G., on the other hand, was the one constant in the twins' lives and wanted to adopt them. She and the twins shared a very close bond. Indeed, it was Bonnie G. who occupied the parental role in the twins' lives by providing them with a stable and loving home.

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[4] In a December 1, 2011 status review report, DCFS stated that "[a]ccording to the caregiver, on the day of visits the children do not cry anymore when" she drops them off. When she returns to pick up the children, "they run to her and appear happy to see her."

We conclude that Mother failed to prove that her relationship with K.S. and N.S. promotes their well-being to such a degree as to outweigh the well-being they would gain in a permanent home with an adoptive parent. (*In re Autumn H., supra,* 27 Cal.App.4th at p. 575.) As such, we have no basis on which to disturb the juvenile court's order terminating Mother's parental rights. (*In re K.P., supra,* 203 Cal.App.4th at p. 622.)

C. *Caregiver Bond*

Finally, Mother contends that the juvenile court erred to the extent that it considered the children's bond with Bonnie G. to overcome the parent-child relationship exception. Mother correctly cites *In re S.B.* (2008) 164 Cal.App.4th 289 and *In re Brandon C.* (1999) 71 Cal.App.4th 1530 for the proposition that a parent is not required to prove that her children had a "primary attachment" to her. The juvenile court did not require her to do so, however. It simply concluded that despite Mother's consistent visitation, adoption, rather than preservation of the parent-child relationship, was in the twins' best interests. That the court considered the children's bond with Bonnie G. as one factor in the equation is not a basis for reversing the order terminating Mother's parental rights.

DISPOSITION

The orders are affirmed.

JACKSON, J.

We concur:

PERLUSS, P. J. WOODS, J.