Filed 9/24/12 In re Tristen F. 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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 TRISTEN F., a Person Coming Under the Juvenile Court Law.	2d Juv. No. B239910 (Super. Ct. No. JV40872) (San Luis Obispo County)
SAN LUIS OBISPO COUNTY DEPARTMENT OF SOCIAL SERVICES, Plaintiff and Respondent, v. K.M., Defendant and Appellant.	

K. M., the biological mother of Tristen F., appeals from a juvenile court order terminating her parental rights and freeing Tristen for adoption. (Welf. & Inst. Code, § 366.26.)[1] Appellant claims that she was denied due process because she did not receive actual notice of a section 336.26 hearing date that was continued and set for a contested hearing at appellant's request. We affirm.

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

Facts and Procedural History

On November 16, 2010, San Luis Obispo Department of Social Services (DSS) placed nine-year-old Tristen and his half-sister Scarlett M. (age three) in protective custody after appellant's boyfriend (Ray W.) raped appellant in the family home with the children present. Boyfriend had a history of physically and verbally abusing appellant in front of the children and using corporal punishment to discipline the children. Boyfriend told Tristen that he was going to burn down the house with Tristen and appellant in it.

Appellant had a long history of drug and alcohol abuse, and many contacts with Child Welfare Services which included 15 referrals, 2 voluntary family maintenance cases, and 2 court-ordered family reunification cases. Appellant was receiving services from DSS, tested positive for methamphetamine and marijuana, and admitted using drugs and alcohol the night she was raped.

DSS filed a juvenile dependency petition for failure to protect and support the children. (§ 300, subds. (b) & (g).) At a combined jurisdiction/disposition hearing, the trial court denied reunification services based on appellant's ongoing chronic substance abuse, the failure to comply with prior court-ordered treatment, and appellant's refusal to comply with a drug or alcohol treatment program on at least two prior occasions. (§ 361.5, subd. (b)(13).) The trial court set a June 8, 2011 hearing to free Scarlett for adoption (§ 366.26) and an August 31, 2011 review hearing for Tristen (§ 366.21, subd. (e)).[2]

On May 4, 2011, appellant filed a section 388 petition for services. DSS opposed the petition on the ground the children were living with their maternal aunt who planned to adopt and on the ground that appellant had tested dirty for drugs and not

[2] Tristen's presumed father, Evan C., had not seen Tristen for several years and could not be located.

completed her drug and alcohol plan. The trial court set the matter for a contested section 388/366.26 hearing as to Scarlett, to be heard with Tristen's review hearing.

At the August 31, 2011 hearing, appellant's attorney (T. Klein) was relieved and Attorney Mary Ann Foster was appointed to represent appellant. The trial court continued Tristen's review hearing and, pursuant to appellant's request, reset the section 388/366.26 hearing in Scarlett's case for October 12, 2011.

At the September 8, 2011 review hearing, the trial court terminated services in Tristen's case and set the matter for a December 28, 2011 hearing to free Tristen for adoption. (§ 366.26.) DSS personally served appellant with the section 366.26 hearing notice on October 9, 2011.

Scarlett's Section 366.26 Hearing

At the October 12, 2011 contested section 388/366.26 hearing for Scarlett, DSS reported that Scarlett was adoptable, was living with Tristen and the maternal aunt and uncle, and that the aunt and uncle planned to adopt Tristen and Scarlett together. The trial court denied the section 388 petition and terminated parental rights as to Scarlett.[3] (§ 366.26.)

Tristen's Section 366.26 Hearing

Appellant's attorney appeared at the December 28, 2011 hearing to free Tristen for adoption and set the matter for a January 17, 2012 contested hearing. Counsel stated that January 17, 2012, was the best date for appellant and the matter would not take very long. The trial court reviewed the court file, found that proper notice had been given to the parents, and ordered that "no further notice of the hearing now set for January 17th need be made."

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[3] Appellant appealed from the order terminating parental rights as to Scarlett but abandoned the appeal. (*K.M. v. San Luis Obispo County, Dept. of Soc. Serv.*, Div. 6, B237419.) We dismissed the appeal on March 28, 2012. (*Ibid.*; *In re Phoenix H.* (2009) 47 Cal.4th 835, 844-845.)

Appellant did not appear at the January 17, 2012 hearing but appellant's attorney did. Counsel stated that appellant was ready to proceed, that there were no preliminary issues and no evidence to present, and that appellant was submitting on the section 366.26 report which recommended Tristen's adoption. The report stated that the aunt had talked to appellant at length about future visitation, that Tristen was adoptable, and that Tristen wanted to be adopted by his aunt and uncle and live with his sister.

The trial court found Tristen was adoptable and terminated parental rights.

Due Process - Notice

Appellant argues that the trial court denied her due process rights by not requiring DSS to give appellant actual notice of the January 17, 2012 contested hearing date. Appellant, however, was personally served with notice for the first hearing date (December 28, 2011) and requested that the matter be set for a contested hearing. Appellant was represented by counsel at the contested hearing and made no claim there was a notice problem, thus forfeiting the issue. (*In re S.B.* (2004) 32 Cal.4th 1287, 1293, superseded by statute on other grounds.) "[A] reviewing court ordinarily will not consider a challenge to a ruling if an objection could have been but was not made in the trial court. [Citations.]" (*Ibid.*; see e.g., *In re Lukas B.* (2000) 79 Cal.App.4th 1145, 1152-1153 [father who failed to argue/object that § 366.26 hearing was not properly noticed, waived issue on appeal].)

Citing *In re Jasmine G.* (2005) 127 Cal.App.4th 1109 (*Jasmine G.*), appellant argues that the trial court, as a matter of due process, should have required that DSS send out a new round of notices for the contested hearing. But in *Jasmine G.* the mother was never served with notice of the original section 366.26 hearing date. (*Id.*, at pp. 1113-1114.) Mother failed to appear and her attorney relied on statements by the Social Services Agency that it did not know mother's whereabouts even though mother was living at the same address. (*Id.*, at p. 1117.) The Court of Appeal concluded that it was "a mistake of constitutional dimension" and declined to apply the waiver/forfeiture rule. (*Id.*, at p. 1115.)

Unlike *Jasmine G.*, appellant was personally served with notice of the first hearing date, conferred with counsel, and requested that counsel set the matter for a January 17, 2012 contested hearing. Counsel appeared on January 17, 2012, stated that appellant had no evidence to present, and submitted on the section 366.26 report. The fair import of the record is that appellant was aware of the court date and decided not to attend the hearing.

"An appellate court ordinarily will not consider challenges based on procedural defects or erroneous rulings where an objection could have been made but was not made in the trial court. [Citation.] . . . The purpose of the forfeiture rule is to encourage parties to bring errors to the attention of the juvenile court so that they may be corrected. [Citation.] Although forfeiture is not automatic, and the appellant court has discretion to excuse a party's failure to properly raise an issue in a timely fashion [citation], in dependency proceedings, where the well-being of the child and stability of placement is of paramount importance, that discretion 'should be exercised rarely and only in cases presenting an important legal issue.' [Citation.]" (*In re Wilford J.* (2005) 131 Cal.App.4th 742, 754.)

Harmless Error

Assuming, arguendo, that the trial court erred in not renoticing the section 366.26 hearing, the error was harmless beyond a reasonable doubt. (*In re Angela C.* (2002) 99 Cal.App.4th 389, 394-395 [applying *Chapman v. California* (1967) 386 U.S. 18 standard of review].) Appellant received actual notice of the original hearing date on a Judicial Council form that stated: "You have the right to be present at the hearing, to present evidence, and to be represented by an attorney. . . . [¶] . . . [¶] The court will proceed with this hearing whether or not you are present."

Appellant chose not to appear at the January 17, 2012 hearing and submitted on the section 366.26 report. The report stated that Tristen was healthy, had made great progress in school, and was bonded to his aunt and uncle, who had known him his whole life. Tristen was thriving in his aunt's home, looked forward to adoption,

and wanted to live with his sister, who had already been placed in the home for adoption. Earlier in the case, appellant wrote to the court that she was still struggling with her substance abuse and that it would be in the children's best interests that they stay with their aunt and uncle. Before the section 366.26 hearing, aunt talked to appellant at length about visiting the children after adoption.

Appellant was aware of the time and place for the hearing, as well as its significance. Three months earlier, appellant appeared at Scarlett's section 366.26 hearing at which the trial court found that it was in Scarlett's best interest to terminate parental rights. The aunt and uncle wanted to adopt and the plan was to adopt Tristen and Scarlett together. There is no evidence that the adoption plan or appellant's inability to parent the children changed in January 2012.

We conclude that the alleged notice defect concerning the January 17, 2012 hearing was harmless beyond a reasonable doubt. The evidence clearly shows that Tristen is adoptable, that appellant is unable to care for the child, and that termination of parental rights would not be detrimental to the child. "Once the [trial] court finds the likelihood of adoption, termination of parental rights is the preferred permanent plan absent proof that termination would be detrimental to the child's best interests. [Citation.]" (*In re Angela C.*, *supra*, 99 Cal.App.4th at pp. 395-396.)

The judgment (order terminating parental rights) is affirmed.

NOT TO BE PUBLISHED.

YEGAN, J.

We concur:

GILBERT, P.J.

PERREN, J.

Richard M. Curtis, Judge

Superior Court County of San Luis Obispo

M. Elizabeth Handy, under appointment by the Court of Appeal, for Defendant and Appellant.

Warren R. Jensen, County Counsel, Leslie H. Kraut, Deputy County Counsel, for Plaintiff and Respondent.