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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

In re RYAN C. et al., Persons Coming
Under the Juvenile Court Law.

B239890
(Los Angeles County
Super. Ct. No. CK76660)

LOS ANGELES COUNTY
DEPARTMENT OF CHILDREN AND
FAMILY SERVICES,

Plaintiff and Respondent,

v.

MICHELLE C.,

Defendant and Appellant.

APPEAL from an order of the Superior Court of Los Angeles County,
Donna Levin, Juvenile Court Referee. Affirmed.

Joseph T. Tavano, under appointment by the Court of Appeal, for Defendant
and Appellant.

John F. Krattli, Acting County Counsel, James M. Owens, Assistant County
Counsel and Kim Nemoy, Deputy County Counsel for Plaintiff and Respondent.

Appellant Michelle C. (Mother) appeals the juvenile court's termination of parental rights over her children, Ryan C. and Douglas C., under Welfare and Institutions Code section 366.26.¹ Mother contends the court erred in refusing to hold a contested hearing on the termination. Finding no error, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

A. Detention and Jurisdiction

The family came to the attention of the Department of Children and Family Services (DCFS) in March 2009, when Douglas's father, Kevin C., was arrested for kidnapping and attempted murder.² Kevin had driven the family, including Mother, Ryan (8) and Douglas (2), into the mountains, during which time he drank alcohol, struck Mother repeatedly and fired a gun into the passenger seat where she was sitting. Mother and Ryan managed to escape and run away when Kevin briefly stopped the car. Kevin drove off and rolled the car with Douglas still inside. Douglas was transported to a hospital for emergency treatment for lacerations to his chin, ear and knees. Kevin was arrested and found to be in an extremely inebriated condition.

Ryan and Douglas were detained with the C.'s, who had been Mother's foster parents and guardians from the age of 11 to adulthood and whom the children called "grandma" and "grandpa." Ryan and Mother had lived with the C.'s for the first 18 months of his life. The C.'s had already been paying for

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

² In 2002, prior to Mother's marriage to Kevin and Douglas's birth, Mother and Ryan had been the subject of DCFS intervention. DCFS was called because Mother had left Ryan with the family who had been her guardians without provision for his care. As a result of that referral, Mother received voluntary family reunification services for one year. Ryan was not removed from her custody. There were other referrals in 2005, deemed unfounded.

Ryan's private school tuition, school lunches and uniforms and had been attending school meetings because school officials sometimes had difficulty contacting Mother.³

In July 2009, Mother pled no contest to the allegations of the section 300 petition. As amended, the petition alleged that Mother and Kevin "engaged in a violent altercation in the children's presence" during which Kevin "repeatedly struck [Mother's] face and stomach," "brandished a firearm," "held [the] firearm to [Mother's] head," and "fired . . . into a car seat in which [Mother] was seated." The petition also alleged that Kevin endangered Douglas by driving while intoxicated and getting into an accident, that Kevin struck Mother on prior occasions, that he was a current user of methamphetamine, marijuana and alcohol, that he kept methamphetamine and marijuana in the family's home, and that he smoked marijuana in the children's presence. Mother was said to have failed to protect the children from Kevin, to have possessed methamphetamine and marijuana in the family's home, and to have smoked marijuana in the children's presence.⁴

When interviewed prior to the detention and jurisdictional/dispositional hearings, Mother minimized Kevin's assaultive behavior.⁵ She did not deny he

³ At the time, Ryan told the caseworker: "I have always wanted to live with [the C.'s]. It's like heaven to me. They spoil me, but I still have to do my chores."

⁴ An allegation that Mother had inflicted physical abuse on Ryan on one occasion was stricken. Ryan's alleged father, Daryl F., was found to have failed to provide the necessities of life for his child. Mother reported that he had been abusive. Daryl did not participate in the proceedings until the eve of the section 366.26 hearing, when he wrote a letter from prison protesting the adoption. Neither Kevin nor Daryl are parties to this appeal.

⁵ Mother told officers at the scene that Kevin had attempted to kill her and the boys, and that she suspected he planned to kill her and Ryan when they fled from the car. Ryan also reported that Kevin had threatened to kill him. In an interview with the caseworker, *(Fn. continued on next page.)*

was an alcoholic and had used methamphetamine.⁶ Mother admitted that she had smoked marijuana off and on since she was 18, and promised to quit.

B. Reunification Period

In April and May 2009, prior to disposition, Mother enrolled in a parenting class and domestic violence program and began individual therapy. She regularly tested negative for drugs. Until November 2009, Mother had unfettered visits with the children in the home of the C.'s.

Initially, Mother questioned the need for counseling for either herself or Ryan. In addition, she had reportedly told Ryan that they needed to forgive Kevin and that they would be a family again when Kevin got out of prison. Mrs. C. reported that Mother had visited Kevin several times in jail, accepted collect calls from him, sent him money, attended one of his criminal hearings and told a detective she did not want to press charges against him. By June, however, Mrs. C. expressed the belief that Mother's attitude was changing and she was behaving more responsibly.

At the July 2009 disposition hearing, the court denied Mother's request for unmonitored visitation because Ryan's therapist had advised against it. The case plan required Mother to submit to a series of eight random drug tests, to complete domestic violence and parenting programs, and to undergo individual counseling.⁷

Mother later denied that Kevin had tried to kill her, and claimed the gun went off accidentally. She belatedly admitted that Kevin had threatened one of the children, but could not recall which one.

⁶ A few days prior to the incident which led to the children's detention, Kevin had been arrested when police discovered marijuana, glass pipes and multiple firearms in the family's home. In 2008, he was arrested for public intoxication.

⁷ Mother successfully completed the parenting class in June 2009 and the domestic violence program in November 2009.

In November 2009, Mother submitted a section 388 petition. Supported by her therapist's report, she sought unmonitored visitation.⁸ Ryan's therapist continued to express the opinion that Ryan had not sufficiently recovered from the trauma of the incident with Kevin. The boy's therapist also reported that Mother had asked her to provide a letter stating that Ryan could not testify at Kevin's hearing. The C.'s did not believe Ryan was ready for unmonitored visitation with Mother, as he had nightmares about the incident, spoke of suicide, and seemed angry when the topic of being alone with Mother arose. The caseworker stated that Ryan seemed "confused" about the prospect of being alone with Mother and "pleased" when the caseworker explained that visits would continue to be monitored.⁹

The C.'s complained of power struggles with Mother over making decisions concerning the boys. For example, in October 2009, she had cancelled a therapy appointment for Ryan without consulting the C.'s. During one of Mother's visits, she told Ryan he was not to call Mrs. C. "Grammy" because she was not his "blood family." This caused Ryan to cry and become upset and confused. In March 2010, Mother was talking to Kevin on the phone while at Ryan's baseball

⁸ The court found a prima facie case and scheduled a hearing, but it was continued multiple times and by the time it could be held, the date for the six-month review had arrived. Mother ultimately withdrew the petition.

⁹ In June 2009, Ryan had reported that he wanted to stay with Mrs. C. and that he wanted nothing to do with Kevin. In August, Ryan told the caseworker that Mother had talked about giving Kevin "a second chance," but he did not want to visit Kevin or ever see him again. Ryan reaffirmed his wish to continue living with the C.'s. The caseworker concluded that Ryan did not trust Mother to protect him from Kevin.

game; she put Ryan on the phone with Kevin, causing the boy to feel nervous and scared.¹⁰

At the May 2010 six-month review hearing, the parties agreed to put the matter over for a report from the therapist who had begun seeing Mother and Ryan in joint therapy earlier in the year. In the meantime, Mother was permitted to have unmonitored day visits with Douglas. The court specified that no other adults were to be present and that Mother was to take Douglas to a public place and have no contact with Kevin during the visits.

In August 2010, the court held a status hearing to determine whether unmonitored visits could begin for Ryan.¹¹ Interviewed by the caseworker prior to the hearing, Ryan initially said he was willing to visit Mother without a monitor, but there had to be “conditions” and “rules”; in particular, Mother was not to call Kevin, write to Kevin or see Kevin. Ryan subsequently said he was having second thoughts and did not feel safe with Mother because he did not believe Mother would stay away from Kevin. Ryan further said there were things he did not want to discuss in front of Mother, such as where he wanted to live, because it might hurt her feelings. Ryan said he loved the C.’s, whom he referred to as his grandparents, and wanted to stay with them. He said he did not want to spend more than a night with Mother. DCFS recommended brief unmonitored visits in a public setting, but Ryan’s counsel objected and requested a contested hearing on

¹⁰ Mother later apologized and promised not to “make that mistake again.” However, Ryan subsequently testified that at a later date Mother had again put him on the phone with Kevin.

¹¹ In May 2010, the joint therapist reported that Mother was trying to improve but was insensitive and lacking in insight and empathy for Ryan. In June, the therapist reported progress, but stated that additional therapy was needed before Ryan would feel safe with Mother. Ryan continued to express resistance to the idea of unmonitored visits with Mother.

the matter. Noting that the matter was approaching the date for termination of reunification services, the court ordered overnight visits with Douglas to begin.

On September 30, 2010, DCFS filed a section 388 petition, seeking to change the unmonitored visits with Douglas back to monitored. The petition alleged that Mother had engaged in an altercation with Mrs. C. that ended with Mother slamming the door so violently it caused Douglas to become hysterical. It was further alleged that during her unmonitored visits with Douglas, Mother had been accompanied by a male, later identified as Steven O., who had a criminal history of drug-related crimes and was a current drug user. On one occasion, Mother took Douglas to a party where she drank alcohol and Steven O. may have used drugs. On October 7, 2010, the court issued an interim order directing that Mother's visits with Douglas be monitored, pending the hearing on the petition.

Ryan continued to express doubt that he would be safe in Mother's care. In January 2011, he reported "I love my mom, . . . I don't want to hurt her feelings but the truth is that I don't feel safe when I am with her and I do feel safe here at [the C.'s] home." Specifically, he worried about being hurt by Mother's friends and not being allowed to see the C.'s. Ryan did not wish to continue in joint therapy with Mother. Douglas was observed to be happy and playful in the care of the C.'s. He said he enjoyed visiting Mother and spending time with her. The caseworker, while noting that both boys appeared comfortable around Mother during monitored visits, concluded that Mother "continued to engage in behaviors which are danger[ous] and can put her children [in] danger," such as consuming alcohol during unmonitored visits and allowing unapproved adults to have contact with them. DCFS recommended termination of reunification services.

After a joint therapy session in January 2011, Mother and Ryan were left alone briefly and Mother told Ryan he needed to forgive Kevin. Ryan told Mother

he wanted to stay with the C.'s. Mother said that was not going to happen and that Ryan had to live with her. Ryan became upset and later had trouble sleeping.

C. Termination of Reunification Services

In March 2011, the court held a combined hearing on DCFS's September 2010 section 388 petition and 12-month review hearing. A maternal aunt testified that during an unsupervised visit with Douglas, Mother had taken the aunt, Douglas and Steven O. to a party. Once there, Mother consumed two or three beers and visited with friends, leaving the aunt to watch Douglas.¹² Afterward, Mother drove them all home.

The caseworker testified that Ryan had been upset the day he and Mother were left alone after a joint therapy session, when Mother once again asked him to forgive Kevin. Ryan had also told the caseworker that he did not like going to joint therapy with Mother because Mother and the therapist made him feel guilty about wanting to stay with the C.'s. He seemed relieved when the round of joint therapy sessions ended. Mrs. C. testified that Ryan had nightmares after spending time with Mother.

Testifying in chambers, Ryan stated he was not sure if he wanted unmonitored visits with Mother. He did not believe she lived in a safe place, and he was still afraid she would get back with Kevin. He was glad the joint counseling sessions had ended because he did not feel anyone there was paying attention to what he had to say. He further testified that Mother had taken his

¹² The aunt reported that Steven O. also consumed several beers. She denied telling anyone she believed Steven O. had been using drugs at the party, although she had noticed him go out to the car several times during the party for no apparent reason.

possessions -- a game and a school award certificate -- and said she would not give them back until he came to live with her.

The joint therapist testified that the contentious relationship between the C.'s and Mother caused Ryan "much distress." She confirmed that Ryan did not trust Mother because he did not believe she would break off her relationship with Kevin. However, she believed there was an attachment between them, and that Ryan was conflicted because he loved both Mother and the C.'s. She testified that Ryan could not be returned to Mother as of the date of the hearing, and opined that it might be years before Ryan would be in a position to live with Mother.

Mother testified that she had had no contact with Kevin for a long time and did not intend to reunite with him. She had not yet taken any steps toward divorce. Mother's expert, Dr. Michael Ward, expressed the opinion that further reunification would be in the best interests of Mother and the boys. He saw no reason that Douglas and Mother could not have unmonitored visits and believed that Douglas could safely be returned to Mother's custody. He could not express a similar opinion with respect to Ryan.

Counsel for DCFS asked the court to grant the section 388 petition and allow Mother monitored visitation only. She further urged the court to terminate reunification services. Counsel for the boys joined in DCFS's petition and in requesting that reunification services be terminated. The court granted the section 388 petition and terminated reunification services. The court noted that due to Douglas's age, the case could have ended at the six-month mark, but that it had gone on for two years. During that period, "Mother . . . had every advantage, every opportunity to reunify," but still displayed the same "poor judgment" as she did "the day [the] case came in," failing to demonstrate "the capacity and ability to complete the objectives, implement the treatment plan and provide for the children's safety, protection, physical and emotional health and special needs."

The court set a section 366.26 hearing. In the interim, the court ordered a visitation schedule between Mother and both boys of twice per week, two hours per visit, monitored, for Douglas and once per week for two hours for Ryan. The matter was set for review on July 6 and September 7, 2011. The section 366.26 hearing was set for October 5, 2011.

D. Termination of Parental Rights

In May 2011, after witnessing a confrontation between Mother and Mrs. C., Ryan said it made him uncomfortable when Mother treated Mrs. C. with disrespect. After another visit with Mother, Ryan cried when he returned home because of negative comments Mother had made to him about the C.'s. In June 2011, Ryan stated he preferred to stop visiting Mother. Douglas continued to enjoy the visits. He was affectionate with Mother and sometimes appeared disappointed when it was time for him to go. However, he had begun referring to Mother by her first name, even when she reminded him she was his "mom."

At the review hearing on July 6, the court ordered that Mother's visitation with Ryan cease, concluding that it was emotionally detrimental to Ryan to continue. The monitored visits with Douglas continued, reduced to two times per month for one hour. Mother often arrived late to the visits and occasionally missed one entirely.¹³ Douglas began referring to Mrs. C. as his mother and to Mother as his "other mother." When asked at school where his mother was, he pointed to Mrs. C.

¹³ At this time, just prior to the section 366.26 hearing, DCFS learned that in August 2010, Mother had been arrested on suspicion of being under the influence of a controlled substance. It also received information that she had continued to visit Kevin during his incarceration.

On October 5, 2011, the court continued the section 366.26 hearing to November 30 because the home study had not been completed. On November 30, the court continued the matter to March 7, 2012, because Kevin had not been transported from prison. On March 7, Mother's counsel announced that Mother wanted a contest. The court asked for an offer of proof. Counsel stated: "[Mother] does have an ongoing relationship with [Douglas]. She visits him regularly. Mother has told me on some of those visits that [Ryan] comes up to her and wants to visit. I believe that it is a triable factual issue that the children would benefit from continued contact with [Mother]."

After ascertaining that Mother's visits with Douglas were limited to twice a month, monitored, and that she had not been visiting Ryan at all, the court stated: "[Mother] must show more than the fact that she just visits. She must show that she has been in a parental role with the children, that she's acted as a parent to the child[ren]. It is not enough that [Mother] has just visited the child[ren]. She must show a benefit to the child[ren] to not have [their] visits terminated, and I don't believe that Mother can do so by just showing that she has visited and that the visits go well. And so I am denying her request for a [contested 366].26 hearing. She has not made an appropriate showing or offer of proof." The court further stated that Mother had, in any event, been visiting only Douglas and "ha[d] not had a visit with Ryan in years." Referring specifically to Douglas, the court further stated: "Those people sitting in the back [referring to the C.'s] have acted as his parents for most of his life. That's who he knows as his parents, not [Mother] She has merely had visitation and not always good visitation with this child. ¶¶ We have had many hearings on her visitation. We have had many contests on her behalf. Although it might be beneficial to [Mother], [she] cannot show that it is beneficial to the child to continue this relationship."

Finding “by clear and convincing evidence” that “the children are adoptable,” that it would be “detrimental to the children to be returned to the[ir] parents,” and that “no exception to adoption applies in this case,” the court ordered parental rights terminated. This appeal followed.

DISCUSSION

At a section 366.26 hearing, the court may order one of three alternatives for the children -- adoption, guardianship or long-term foster care. (§ 366.26, subd. (b).) If a child is adoptable, there is a strong preference for adoption over the other alternatives. (*Id.*, subd. (c)(1); *San Diego County Dept. of Social Services v. Superior Court* (1996) 13 Cal.4th 882, 888.) Here, there was no dispute that the children were likely to be adopted, if parental rights were terminated. Accordingly, the burden was on Mother to demonstrate that termination of parental rights would be detrimental to the children under one of the exceptions listed in section 366.26, subdivision (c)(1). (*In re T.S.* (2009) 175 Cal.App.4th 1031, 1039.) Mother contends that she sought to establish the exception contained in section 366.26, subdivision (c)(1)(B)(i), which provides an exception to termination of parental rights where “[t]he parents have maintained regular visitation and contact with the child and the child would benefit from continuing the relationship,” and that the court was obliged to hold a full evidentiary hearing. For the reasons discussed below, we disagree.

In general, parents have a due process right to present evidence and cross-examine witnesses at section 366.26 hearings. (See, e.g., *In re Josiah S.* (2002) 102 Cal.App.4th 403, 417-418; *In re Kelly D.* (2000) 82 Cal.App.4th 433, 439-440.) However, “[the] right to ‘due process’ at the hearing under section 366.26” is “a flexible concept which depends upon the circumstances and a balancing of various factors.” (*In re Jeanette V.* (1998) 68 Cal.App.4th 811, 816-817.) “The

due process right to present evidence is limited to relevant evidence of significant probative value to the issue before the court.” (*Id.* at p. 817.) “The state’s strong interest in prompt and efficient trials permits the nonarbitrary exclusion of evidence [citation], such as when the presentation of the evidence will ‘necessitate undue consumption of time.’” (*Maricela C. v. Superior Court* (1998) 66 Cal.App.4th 1138, 1146-1147, quoting Evid. Code, § 352.) Even where a parent’s representations are “true” and “could have been substantiated at an evidentiary hearing,” if they are insufficient to meet the parent’s burden, the court does not err in refusing to expend time and resources on a full hearing. (*Maricela C., supra*, at p. 1147.) “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.” (*In re Tamika T.* (2002) 97 Cal.App.4th 1114, 1122 (*Tamika*).) “A proper offer of proof gives the trial court an opportunity to determine if, in fact, there really is a contested issue of fact.” (*Id.* at p. 1124.) Accordingly, “[t]he offer of proof must be specific, setting forth the actual evidence to be produced, not merely the facts or issues to be addressed and argued.” (*Ibid.*)

Mother’s request for a contested section 366.26 hearing came three years after proceedings were initiated in this matter and one year after termination of reunification services. Although the hearing had been set and continued several times, this was the first time the desire for contest had been mentioned. In accordance with *Tamika*, the court requested an offer of proof. Counsel stated that she would prove that Mother had an ongoing relationship with Douglas due to their regular visits and that Ryan had indicated a desire to re-start visitation.

Establishing these facts as true would not have met Mother’s burden. To establish the exception contained in section 366.26, subdivision (c)(1)(B)(i), “the

parents must do more than demonstrate ‘frequent and loving contact’ [citation], an emotional bond with the child, or that the parents and child find their visits pleasant. [Citation.] Rather, the parents must show that they occupy ‘a parental role’ in the child’s life.” (*In re Andrea R.* (1999) 75 Cal.App.4th 1093, 1108-1109, quoting *In re Beatrice M.* (1994) 29 Cal.App.4th 1411, 1418-1419 and citing § 366.26, former subd. (c)(1)(A).) The court must find that the parent-child 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,” and that severing the relationship “would deprive the child of a substantial, positive emotional attachment such that the child would be greatly harmed.” (*In re Autumn H.* (1994) 27 Cal.App.4th 567, 575.) “‘Because a section 366.26 hearing occurs only after the court has repeatedly found the parent unable to meet the child’s needs, it is only in an extraordinary case that preservation of the parent’s rights will prevail over the Legislature’s preference for adoptive placement.’” (*In re T.S., supra*, 175 Cal.App.4th at p. 1039, quoting *In re Jasmine D.* (2000) 78 Cal.App.4th 1339, 1350.)

The boys had been detained from Mother in 2009, when Douglas was two and Ryan was eight. For a few months thereafter, Mother was with them on a daily basis in the C.’s home. However, once that arrangement ended, she ceased having a parental role with respect to either child, except for the four-month period in 2010 when she had unmonitored and overnight visitation with Douglas. Mother had never had unmonitored visits with Ryan. Despite the best efforts of three separate therapists, Ryan never overcame the trauma suffered when Mother put him in a position to be threatened and nearly killed by Kevin. Ryan did not feel safe with Mother, and Mother’s continued insistence that Ryan forgive Kevin and maintain a relationship with him, coupled with her denigration of the family with whom Ryan had found refuge, prevented Ryan from progressing beyond his

understandable fear. By the time of the section 366.26 hearing, Mother and Ryan had not visited for eight months. Consequently, the regular visitation and contact prong of the exception had not been met, and continuance of the parent-child relationship could not have been sufficiently beneficial to Ryan to overcome the adoption preference. Mother's last-minute evidence that Ryan wanted to resume monitored visitation, even if true, would not have changed the outcome.

Mother's relationship with Douglas, who was too young to recall the events that had led to his hospitalization and had traumatized his brother, was better. However, at the time of the section 366.26 hearing, it was undisputed that Mother's visits with Douglas consisted of two hours a month, monitored. Proof of day-to-day contact is not an absolute requirement of the section 366.26, subdivision (c)(1)(B)(i) exception, but the type of relationship necessary to support it is "a relationship characteristically arising from day-to-day interaction, companionship and shared experiences." (*In re Casey D.* (1999) 70 Cal.App.4th 38, 51.) Consequently, a parent's failure to progress beyond monitored visitation is a significant factor militating against a finding that the exception applies, particularly where the child was very young when detained. (*Ibid.*; *In re Andrea R.*, *supra*, 75 Cal.App.4th at p. 1109.)

Mother sought to present evidence concerning her visitation and relationship with Douglas. The court was well aware of the relationship between the two, having presided over the case for three years. From the beginning, the reports described Mother's pleasant and appropriate interactions with Douglas, his affection for Mother and his occasional sadness when visits ended. However, Douglas was very young when detained, and Mother had not occupied a parental role over him for half his life. He was content and thriving in the home of the C.'s, whom he regarded as his parents. Further evidence of the visitation and

interactions between Douglas and Mother would not have sufficed to overcome the adoption preference. The court did not err in finding the offer of proof insufficient.

DISPOSITION

The order terminating parental rights is affirmed.

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MANELLA, J.

We concur:

WILLHITE, Acting P. J.

SUZUKAWA, J.