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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

In re A.N., a Person Coming Under the
Juvenile Court Law.

B249898
(Los Angeles County
Super. Ct. No. CK81569)

LOS ANGELES COUNTY
DEPARTMENT OF CHILDREN AND
FAMILY SERVICES,

Plaintiff and Respondent,

v.

S.N.,

Defendant and Appellant.

APPEAL from an order of the Superior Court of Los Angeles County, Rudolph A. Diaz, Judge. Affirmed.

Kate M. Chandler, under appointment by the court of Appeal, for Defendant and Appellant.

John F. Krattli, County Counsel, James M. Owens, Assistant County Counsel, and Peter Ferrera, Senior Deputy County Counsel, for Plaintiff and Respondent.

The juvenile court granted guardianship of S.N.'s two children to her mother, and limited S.N. to weekly monitored visitation. She appeals, and we affirm.

BACKGROUND

The Los Angeles Department of Children and Family Services (DCFS) filed a petition on March 22, 2010, alleging that S.N. (Mother) and her husband Randolph L. engaged in violent physical fights in the presence of the children A.N. (then three years old) and Raymond L. (Raymond) (then two years old). DCFS also alleged that Randolph L. was Raymond's father. Mother had left Randolph L. because of domestic violence. Later, while he was incarcerated, Randolph L. put Raymond in the care of another female companion, Danitra Gray, from October to December of 2009. When Raymond was examined afterwards, he had abrasions on his legs, stomach, back and buttock. Further, Mother had a history of substance abuse and currently abused marijuana, and A.N.'s father, Antonio D., had failed to provide for A.N. Mother would not give DCFS the address where she was living with the children.

At the March 22, 2010 detention hearing, Mother appeared, and the court made a tentative finding that Randolph L. was Raymond's presumed father, and found that Antonio D. was A.N.'s alleged father. The court granted Mother's request for a temporary restraining order against Randolph L., and detained the children in shelter care (with monitored visitation for Mother and Randolph L.) under Welfare and Institutions Code¹ section 300, subdivisions (a), (b), and (g). A week later, the court ordered the children placed with the maternal grandmother (MGM) and B.N., Mother's adoptive father.

A jurisdiction/disposition report dated April 8, 2010 reported that Mother confirmed that Randolph L. physically abused her after Raymond was born. Mother claimed she did not know that Randolph L. left Raymond with Gray, and Mother took Raymond to the hospital the day after she saw the abrasions. Randolph L. believed he

¹ All future statutory references are to the Welfare and Institutions Code unless otherwise indicated.

was Raymond's father, but Randolph L. was having a paternity test. Antonio D. stated that he thought Raymond was his son, although he too was having a paternity test. An assessment of the maternal grandparents concluded that their home was appropriate for the children.

A last minute information for the court reported that the social worker who detained the children reported that while she was feeding the children on March 22, 2010, A.N. said, "“Momma's gonna kill the social worker”" and "“my momma's gonna beat up the social worker and put her in jail!”" The foster mother said that Mother had told A.N. to throw things and have tantrums while in her care. Mother denied any such statements.

After reviewing the results of the paternity tests, the court determined that Antonio D., not Randolph L., was Raymond's biological father, but Antonio D. was not A.N.'s father. Neither Antonio D. nor A.N.'s father is a party to this appeal.

At a combined jurisdictional/dispositional hearing on June 24, 2010, the trial court declared the children dependents, sustaining allegations in a first amended petition that Mother "failed to provide ongoing care and supervision of the child Raymond, whom she left in the care of the man who had physically abused and strangled her," and the children had been exposed to domestic violence between Randolph L. and Mother, who had failed to protect the children. (§ 300, subd. (b).) Mother was to participate in random drug testing and individual counseling with a licensed therapist. Mother was granted monitored visitation, with discretion to liberalize.

DCFS reported that during a visit to MGM's home on July 5, 2010, the children appeared to be thriving, with a strong bond to their grandmother. A status review report before the six-month review hearing stated that Mother was not in compliance with court orders, failing to stay in contact with the social worker or visit the children, and "not appear[ing] eager or determined to regain custody of her children." Mother said she was not interested in counseling and would not attend parenting classes. She did not think she would need adoption services, because she believed she would regain custody of the children. MGM was interested in becoming the children's guardian (but not in adoption).

On February 17, 2011, DCFS reported that according to MGM, Mother visited with the children for four to five hours once a week in a neutral location, and the visits were going well. In May, DCFS reported that mother had enrolled in an outpatient drug education program in early February, and had been attending three group sessions a week, with negative results in her random drug testing. Mother's individual counseling, however, had not been provided by a licensed therapist, and her visits with the children, while positive, were sporadic. In August, DCFS reported that Mother visited regularly and had completed parenting classes, and it "does appear that she is working to get her life in order to facilitate reunification." In September 2011, DCFS stated that visitation continued to go well, although Mother could be difficult to deal with in arranging the visits. Transportation was available and DCFS would work with any schedule that Mother and MGM decided upon, but because of Mother's "inability" to supply DCFS with an address, visits could not yet be unmonitored or overnight. Mother had an intake appointment for individual counseling for depression and anger in mid-September. Mother had promised to give DCFS her address, but had failed to follow through; DCFS required the address to ensure the safety of the children. Although Mother had complied with court orders, DCFS recommended terminating family reunification services and appointing MGM as the children's guardian, and repeated that recommendation in October.

In a last minute information on November 28, 2011, DCFS reported that despite queries from DCFS, Mother had not provided her current address, and had told DCFS on November 15 that she was about to move into a homeless shelter. Another report on January 24, 2012 stated that Mother asked for visits at the Lancaster DCFS office, and that she was employed doing in-home support services. MGM stated that she would like legal guardianship of the children, and was concerned about Mother's "inappropriate conversation with the children." Mother had not shown up for her individual counseling for depression and anger. The Lancaster visits had not occurred because Mother would not cooperate with MGM and DCFS. Mother had missed a visit for Raymond's birthday and had shown "instability in providing [DCFS] with an address and a working phone

number.” In March 2012, DCFS reported that A.N. told the social worker that she was very upset because Mother had yelled, cursed and argued with her about MGM’s husband, telling A.N. not to call him “Pa Pa” because he was not Mother’s biological father. Raymond had been scheduled for eye surgery but did not make the appointment because although Mother said she wanted to be present, her phone number was nonworking and she had not contacted the department with a new number.

Mother’s aunt told the social worker that she was concerned about a possible return of the children to Mother because she saw Mother using marijuana and alcohol in December 2011 and January 2012. When the social worker called to arrange visitation for Mother, she said she did not have money to catch the train, and it was her “personal business” whether she was working. Mother put her “Parent advocate” on the phone, who said DCFS was always violating the rights of parents. The advocate gave the social worker her name, and the social worker gave her his supervisor’s phone number. Mother did not attend the arranged visit, and did not contact DCFS to reschedule.

At a contested 18-month review hearing on March 1, 2012, Mother testified that the problem with her visitation was her longstanding conflicts with her mother. B.N. was her stepfather, so she had told A.N. not to call him grandfather. She did not curse at her children. She would prefer that the children be removed and placed into foster care so she could have better visitation. Her phone had been disconnected and the number had changed around three times. She admitted that she had not attended a domestic violence program.

When the hearing resumed on March 29, 2012, five-year-old A.N. testified in chambers that Mother whispered to her outside of court that Mother’s aunt lied about Mother. While she testified, A.N. was curled up in a ball hiding her face in her legs. A.N. testified that Mother was sweet to her because Mother loved her, but also said, “My mom gives me whoopings.” Mother sometimes had a temper with MGM, which made A.N. sad, and it also made her sad that MGM and her aunt got angry with Mother.

At a further continuation on April 20, 2012, Mother’s aunt testified that Mother had lived with her twice in the past year. She had seen Mother drink alcohol in

September 2011, and smoke marijuana twice and drink alcohol three times from November 2011 to January 2012, including after Mother finished her program. In September, Mother had slammed the door in her face and said in the children's presence, "I don't want these bitches here," with A.N. crying and telling Mother to stop being mean. In January 2012, Mother had taken A.N. and Raymond into a room and shut the door. A.N. came out crying, saying that Mother had been mean and said that MGM was doing things she should not do, so the children would soon be back with Mother and would never see MGM again. The court continued the hearing and ordered drug and alcohol testing for Mother.

On June 20 and 21, MGM testified that Mother had asked her to care for the children in March 2010, had not requested a visit since April, and had called only once. MGM married B.N. when Mother was 10 months old, and A.N. became upset when Mother told her she could not call B.N. "Paw-Paw." The DCFS social worker testified that Mother did not provide her changing phone numbers or current address to the Department, telling him that she was homeless. The social worker had tried to contact Mother to give her bus passes for transportation, but she did not follow up. Mother's visitation had been sporadic throughout the case, although MGM had been helpful and agreed to drive the children from Palmdale to Los Angeles so Mother could see them. When Raymond needed eye surgery, Mother did not follow up so that her presence could be arranged. She later told the social worker she had requested that her presence be required at all medical appointments "so that way I have to be present and I knew I wasn't going to be present so the surgery wouldn't take place."

The parties stipulated that Mother would have testified if called that she had suffered a miscarriage in April 2012 and was depressed afterward, explaining her failure to visit or contact the children thereafter. She had called MGM's home to talk to the children, but there was no answer. She had also attended an intake for counseling, and had her first individual appointment in July 2012.

The court terminated family reunification services on July 12, 2012, and set a section 366.26 hearing to select a permanent plan for the children. The court found that

Mother was not in compliance with the case plan in spite of ample opportunity (including failing to complete individual counseling), and was a difficult person: “[I]n the end, I don’t find her sufficiently motivated to take the responsibility of parenting her children.” MGM had been a proper caregiver.

In its section 366.26 report on November 8, 2012, DCFS reported that both children were doing well with MGM, the prospective guardian, and her husband of 28 years B.N., whom MGM wanted to be her co-legal guardian. During an interview on October 19, 2012, the children told the social worker that B.N. gave them “whoopings on their butt with a belt.” A.N. had seen Raymond “get whooped,” and both children said it hurt. The social worker did not see any marks on the children, who said they liked living with MGM and B.N. When the social worker asked MGM and B.N. about what discipline they used, they responded that they used time outs, but also used an open hand to hit the children on the buttock, but not a belt. MGM was visibly upset and shaken. The case was under investigation.

Mother had stated in September 2012 that she had no concerns with MGM being the legal guardian as long as Mother could continue to visit the children; she later wavered but was relieved the children would not be adopted. Mother stated she did not get along with MGM and could not stand B.N., although she had no safety concerns. Mother had been calling the children weekly, but had not visited since July 2012.

At the first section 366.26 hearing on November 8, 2012, Mother was not present, but her counsel stated that Mother had told DCFS that she had been subject to similar physical discipline when she was living at home with B.N. The court ordered a report of the investigation. A supplemental report dated January 10, 2013 quoted the investigation’s finding that the allegation of abuse was inconclusive, as the statements given to the investigator and to the social worker were inconsistent, no marks or bruises were found on the children, and the family was counseled about spanking. B.N. stated that he used physical discipline (an open hand, not an object) but would not do so in the future. The social worker assigned to investigate stated that the children did not disclose

any abuse or neglect, and there were no child safety concerns. DCFS recommended that MGM and B.N. be appointed the legal guardians of the children.

At the continued hearing on January 10, Mother's counsel asked that A.N. be brought to court to testify, so he could cross-examine her regarding the discipline with a belt. The court denied the request as "just a fishing expedition," and declined to order A.N. to court. At a continued hearing on February 8, 2013 MGM and B.N. stated they were willing to act as the legal guardians of the children; Mother's counsel declined to take any testimony from them. The interim review report on the same date stated that Raymond and A.N. denied any abuse, spanking, or neglect, and MGM stated that she and B.N. used "timeout," and not spanking, to discipline the children.

At a further continued hearing on March 19, 2013, Mother's counsel asked the court to admit the results of a hair-follicle drug test that Mother had taken. The court sustained the children's attorney's objection to the test because it had not been taken by a properly trained person. DCFS argued that Mother had not complied with the individual counseling order, and her visitation had been sporadic and often inappropriate, so that visits should not be unmonitored. Counsel for the children agreed that guardianship should be awarded to MGM and B.N. Nothing had come of the investigation of the physical discipline, Mother had asked for the placement with MGM at the start of the case, and Mother had tried to get the children to sabotage the guardianship in favor of foster care by strangers. Mother's counsel repeated his request that A.N. be brought to testify regarding the physical discipline. Mother opposed the guardianship because the investigation had not been properly handled. She wanted the children to stay where they were until she could get custody, but not to fear "whippings" by B.N. She had been testing clean, and wanted unmonitored visits. DCFS replied that the children were not afraid of B.N., and mother had shown no new information that would justify unmonitored visitation.

The court granted the guardianship, finding by clear and convincing evidence that the children were not adoptable and guardianship was in their best interests. Visitation was to remain monitored.

DISCUSSION

Mother appeals from the guardianship order, arguing that the juvenile court did not protect the children's best interests when it refused to order A.N. to testify at the section 366.26 hearing. Mother has an uphill climb, as we review for abuse of discretion both the court's decision regarding whether to require testimony and its guardianship order. (*In re Tamneisha S.* (1997) 58 Cal.App.4th 798, 806; *In re Jennifer J.* (1992) 8 Cal.App.4th 1080, 1088, 1089.) Mother's challenge to the order that her visitation be monitored also requires her to demonstrate that the court's order was an abuse of discretion. (*Los Angeles County Dept. of Children & Family Services v. Superior Court* (2006) 145 Cal.App.4th 692, 699, fn. 6.)

At a section 366.26 hearing, after reviewing the reports and other evidence, the court is to make findings and orders providing a stable and permanent home for the children. (§ 366.26, subd. (b).) One option of six, and third in the order of preference, is to "[a]ppoint a relative or relatives with whom the child is currently residing as legal guardian or guardians for the child, and order that letters of guardianship issue." (§ 366.26, subd. (b)(3).) In making its findings and orders, subdivision (h)(1) provides that "the court shall consider the wishes of the child and shall act in the best interests of the child." (*Id.* at subd. (h)(1); *In re Joshua G.* (2005) 129 Cal.App.4th 189, 201.) Subdivision (h)(2) provides that "the child shall be present in court if the child or the child's counsel so requests or the court so orders."

While parents in a dependency proceeding have a due process right to call and examine witnesses, the statutory presumption is that the child will not be present. (*In re Jennifer J.*, *supra*, 8 Cal.App.4th at p. 1085.) Even when the parents request it, the court is not required to take in-court or in-chambers testimony from the child; the court may exclude the testimony if it is irrelevant to the issues before the court, or where it is contrary to the child's best interest. (*In re Juan H.* (1992) 11 Cal.App.4th 169, 172–173; *In re Amber M.* (2002) 103 Cal.App.4th 681, 687; Evid. Code, § 350.) The juvenile court had the discretion to refuse to require A.N. to be present and testify, where A.N. and her counsel did not request it.

The investigation concluded that the allegations of abusive discipline were inconclusive. Although Mother argues that the investigation was not thorough, she does not specify what about the investigation was incomplete. The court was within its discretion in refusing to compel the cross-examination of A.N., now six years old, who had already testified in chambers curled up in a ball and hiding her face. The court in this case stated that Mother's counsel was on a "fishing expedition," and we agree that Mother has not shown how compelling A.N. to testify would clarify the inconsistent statements regarding physical discipline. Further, the trial court was capable of ascertaining the children's wishes regarding guardianship from their repeated statements in the record that they were happy in the home of MGM and B.N. The court was within its discretion to refuse to order A.N. to testify.

Further, the requirement that Mother's visitation continue to be monitored was not outside the bounds of reason. (*In re Stephanie M.* (1994) 7 Cal.4th 295, 318–319.) Mother was consistently out of compliance with the case plan, never completing individual counseling, and visiting and calling the children only sporadically. Mother used marijuana and alcohol, and repeatedly attempted to interfere with the children's placement by turning them against MGM. Before A.N. testified, Mother whispered in the child's ear that Mother's aunt was lying. Mother failed to attend Raymond's planned eye surgery, apparently in an effort to block it. She refused to give her address and was frequently unreachable by telephone, failing to give DCFS her changing phone numbers. Given Mother's violation of the case plan and her unreliability, it was within the court's discretion to require that visitation continue to be monitored, as it had been throughout the three years of the case.

DISPOSITION

The judgment is affirmed.
NOT TO BE PUBLISHED.

JOHNSON, J.

We concur:

ROTHSCHILD, Acting P. J.

MILLER, J.*

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