Filed 11/14/18 In re M.F. CA2/7

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 M.F., a Person Coming Under the Juvenile Court Law.	B288200 (Los Angeles County Super. Ct. No. DK17620)
LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. KATRINA K., Defendant and Appellant.	

APPEAL from an order of the Superior Court of Los Angeles County, Robert S. Draper, Judge. Reversed and remanded.

Donna B. Kaiser, under appointment by the Court of Appeal, for Defendant and Appellant.

Mary C. Wickham, County Counsel, Kristine P. Miles, Acting Assistant County Counsel, and Kimberly Roura, Deputy County Counsel for Plaintiff and Respondent.

Mother Katrina K. appeals the termination of her parental rights concerning her son, dependent child M.F. (Minor.) We reverse because the juvenile court improperly denied her request for a contested hearing prior to terminating her parental rights.

FACTUAL AND PROCEDURAL BACKGROUND

In 2016, the juvenile court declared Minor (born in 2014) a dependent child under Welfare and Institutions Code[1] section 300, subdivision (b) and removed him from Mother's custody. We have previously discussed the factual and procedural history of this case in detail. (See, e.g., *In re M.F.* (Nov. 6, 2017, B277535, B280849) [nonpub. opn.]; *In re M.F.* (June 12, 2018, B284879, B287104 [nonpub. opn.]).) We discuss only the facts and events pertinent to the orders challenged in the present appeal.

Mother requested that her appointed counsel be replaced on July 18, 2017, and the juvenile court denied her request without allowing her to explain the basis of her contention that she was receiving inadequate representation and to relate specific instances of counsel's allegedly inadequate performance. (*In re M.F.*, *supra*, B284879, B287104.) While Mother's appeal from that ruling was pending, the court conducted its section 366.21, subdivision (e) review hearing, terminated Mother's reunification services, and set a hearing pursuant to section 366.26 for November 28, 2017. Mother filed a petition for extraordinary relief by writ on September 28, 2017; we dismissed it as inadequate on October 4, 2017. (*In re M.F.*, *supra*, B284879, B287104.)

---

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

At the November 28, 2017, section 366.26 hearing, the juvenile court again refused Mother's request for new appointed counsel without allowing her to explain the basis of her request. The Department of Children and Family Services then requested that the section 366.26 hearing be continued to January 30, 2018, to permit completion of the prospective adoptive parents' home study. Neither Mother's counsel nor Minor's counsel objected to the continuance, and the court continued the hearing as requested. At Mother's request, the court also ordered that DNA testing be performed on prospective adoptive parent D.C., who believed herself to be Minor's paternal aunt, to determine whether she was in fact Minor's biological relative. The juvenile court ordered that the DNA testing results be reported to the court on January 13, 2018, if they were available.

On December 1, 2017, Mother filed a document with the court stating that she intended to waive counsel and to represent herself.

DCFS submitted a last minute information report to the juvenile court on January 11, 2018, advising that the home study of the caregivers had been completed and their home approved. In its status review report filed on January 19, 2018, DCFS informed the court that D.C. had rejected the time, date, and location of the appointment set for her to provide her DNA sample. The social worker had secured an alternative appointment for January 18, 2018, and notified D.C. of the rescheduled appointment.

DCFS later advised the court in a further last minute information for the January 30 hearing that D.C. had been scheduled to provide her DNA sample on January 25, 2018. DCFS wrote, "On 1/30/18 [the social worker] called Labcorp in

order to obtain the DNA test results. Per Labcorp the DNA test results are not yet ready. However, [the social worker] was informed that due to Paternal Aunt being female and the only family member who completed testing, the test results will be 'inconclusive.' Labcorp has recommended that a male on father's side of the family complete the DNA test." Accordingly, DCFS recommended that the court request the paternal grandfather and/or the paternal uncle to undergo DNA testing.

The parties appeared for the continued hearing on January 30, 2018. Mother announced her appearance as a self-represented litigant, but the court refused to let Mother represent herself, stating, "[I]n dependency you do not have the right to represent yourself unless certain requirements are met, including knowledge of what the dependency law is. You do not have that knowledge. You have continually disrupted the court proceedings and I have not complained to you." The court told Mother it would hear from the attorneys and then "allow you to say whatever you want to say." Mother said "No. I have some right," and attempted to object to DCFS's statements and to speak when the court addressed her counsel.

DCFS and Minor's attorney advised the court that they did not believe that any further DNA testing was necessary and that they recommended that Minor be freed for adoption. Mother's attorney told the court that Mother strongly objected to proceeding without a determination that the caregivers were actually Minor's biological relatives and drew the court's attention to DCFS's recommendation in the last minute report submitted that same day asking that the paternal grandfather and/or the paternal uncle undergo DNA testing to conclusively determine the familial relationship, if any.

Referring to a section 366.26 hearing as a ".26," Mother's counsel said, "If the court believes that the matter should be set for a .26, the mother is requesting that that matter be set for a contest and that a date—."

The court interrupted, "We are set for a .26. That's today. That's what we're set for today."

After an interjection by Mother, her attorney told the court, "The mother would like to have a full hearing on the .26."

"Well," the court responded, "the—as you know, the law is that the order terminating parental rights is prima facie evidence as long as—so the question today is whether the child is adoptable."

The court then turned to Mother, who presented papers to the court and said she had not received "an answer" on a prior filing she had made, she wanted her transportation funds to be calculated differently, and she had not been given "papers, no nothing to show what the reports are . . . ." The court reviewed the proofs of service for the status review report and the reports for the section 366.26 hearing, determined that they were mailed to Mother's correct address, and told Mother that it did not believe that she did not receive them.

Mother continued to speak, and the court advised her that "we are at the point where we are going to terminate parental rights," so if she had anything more to tell the court, she should do so. Mother demanded "the finding of facts and the conclusion of the law that I did something wrong to my child." She wanted anyone who said that she did anything wrong to come to court. The court said it had reviewed the document that she gave the court and it would be filed.

The juvenile court then began to state findings and orders under section 366.26: "The court finds that notice of the proceedings has been given as required by law. [¶] The court has read and considered and admits into evidence the social worker's reports prepared in this case and makes the following findings and orders: [¶] The court finds that continued jurisdiction is necessary because conditions continue to exist which justified the court taking jurisdiction pursuant to [section] 300. [¶] The court finds by clear and convincing evidence that the child is adoptable. [¶] The court finds it will be detrimental to the child to be returned to the mother."

Mother's attorney broke in: "Your honor, before you proceed—"and Mother interjected, "Objection, Your Honor." Mother's counsel asked, "You're proceeding right now with the .26?"

"I am," said the juvenile court.

Mother's counsel asked, "May I make a brief statement on behalf of the mother?"

"Yes," said the court.

Mother's counsel began, "Okay. The mother does object to having her parental rights—"

The juvenile court interjected: "I haven't finished yet. Is that what you're going to say? That she objects? I understand she objects, okay?" As Mother attempted to address the court, the court said to Mother's counsel, "What else do you want to tell me?"

Mother's counsel said, "That the Mother believes that the reason that she cannot meet any of the exceptions to show that she's been in a relationship with her child that [is] significant has been because the court has made orders that has [*sic*] limited her

ability to visit or to participate in medical appointments or in educational activities."

"All right. Anything further?" the court asked.

"The mother would represent to the court—and the court knows this case, so—."

"I do know this case," the court said.

Mother's counsel continued, "—I'm indicating what—the mother has—Mother has indicated that she has done everything that is possible on her part in order to maintain that relationship and for that reason she is asking that the court not terminate her parental rights because she believes that the bond that exists between her and her child is significant and it would be detrimental to the child to have that bond severed."

"All right," said the court. "With respect to the parental bond exception—." Mother attempted to address the court, asking for a proof of service, and the court and bailiff repeatedly threatened her with removal if she did not stop speaking. She swore she did not receive the papers served, and the court replied, "I don't believe you. So I've looked at you. I don't believe you."

Mother stopped speaking after several more threats to remove her from the courtroom, and the court immediately resumed its section 366.26 findings. The court found that Mother had not maintained regular visitation with the child and had not established a bond with him. The court found that any benefit that Minor would receive from continuing the relationship with Mother was outweighed by the physical and emotional benefits he would receive from adoption, and found that adoption was in his best interest. The court stated that "no exceptions to

adoption apply in this case" and terminated Mother's parental rights.

Mother filed a notice of appeal on January 30, 2018. While we awaited briefing in the instant appeal, we issued our decision in Mother's prior appeals in Case Nos. B284879 and B287104. We concluded that the juvenile court erred in July 2018 when it failed to permit Mother to state the basis for her request for the replacement of her counsel, and we conditionally reversed all orders of the court made on or after July 18, 2017. (*In re M.F.* (Jun. 12, 2018, B284879, B287104).) On remand, the juvenile court conducted a hearing inquiring into the basis for Mother's request for appointment of new counsel on August 27, 2018. The court denied Mother's request for new counsel, reinstating the conditionally reversed orders that included the order terminating parental rights.

DISCUSSION

I. Self-Representation

Mother argues that the juvenile court committed reversible error when it refused to permit her to represent herself at the January 30, 2018 termination hearing.

Parents in dependency proceedings have a statutory right to self-representation. (*In re A.M.* (2008) 164 Cal.App.4th 914, 923.) A parent who is unable to afford counsel and whose child has been placed in out-of-home care is entitled be represented by counsel "unless the court finds that the parent or guardian has made a knowing and intelligent waiver of counsel . . . ." (§ 317, subd. (b).) A parent may waive counsel at any point in the dependency proceedings (*In re Angel W.* (2001) 93 Cal.App.4th 1074, 1083), but a juvenile court has discretion to deny a parent's request for self-representation "when it is reasonably probable

that granting the request would impair the child's right to a prompt resolution of custody status *or* unduly disrupt the proceedings." (*In re A.M.*, at pp. 925-926.)

The juvenile court did not abuse its discretion in refusing to permit Mother to represent herself at the January 30, 2018 hearing. The court stated that Mother had "continually disrupted the proceedings," and the record supports this characterization. Over the course of the dependency proceedings, Mother interrupted court hearings with regularity, raised issues not pertinent to the matters pending before the court, and frequently attempted to relitigate already-decided issues. Mother's conduct throughout the litigation supports the court's conclusion that it was reasonably probable that granting her request to represent herself would unduly disrupt the proceedings.

II. Denial of Contested Hearing

At a hearing under section 366.26, the court must select and implement a permanent plan for a dependent child. Where there is no probability of reunification with a parent, adoption is the preferred permanent plan. (*In re Derek W.* (1999) 73 Cal.App.4th 823, 826.) To implement adoption as the permanent plan, the juvenile court must find, by clear and convincing evidence, that the minor is likely to be adopted if parental rights are terminated. (§ 366.26, subd. (c)(1).) Then, in the absence of evidence that termination of parental rights would be detrimental to the child under statutorily-specified exceptions (§ 366.26, subd. (c)(1)(A)-(B)), the juvenile court "shall terminate parental rights." (§ 366.26, subd. (c)(1).) One of the statutory exceptions to termination is contained in section 366.26, subdivision (c)(1)(B)(i), which permits the court to order some

other permanent plan if "[t]he parents have maintained regular visitation and contact with the child and the child would benefit from continuing the relationship."

DCFS bears the burden of proving that a minor is adoptable. (*In re A.A.* (2008) 167 Cal.App.4th 1292, 1317.) The parent has the burden of proving that any exception applies. (*In re I.W.* (2009) 180 Cal.App.4th 1517, 1527.)

Mother argues that the juvenile court erred and violated her due process rights by refusing her request for a contested section 366.26 hearing, effectively precluding her from challenging the evidence to support the court's finding of adoptability or establishing that the parental bond exception to adoption applied. We agree.

"It is axiomatic that due process guarantees apply to dependency proceedings. [Citations.]" (*Ingrid E. v. Superior Court* (1999) 75 Cal.App.4th 751, 756-757.) "The essence of due process is fairness in the procedure employed; a meaningful hearing, one including the right to confront and cross-examine witnesses, is an essential aspect of that procedure. [Citation.]" (*Id.* at p. 757.) Thus, a parent has a due process right to examine DCFS's witnesses to test whether the agency has met its burden of proof to establish that a child is adoptable. (*In re Thomas R.* (2006) 145 Cal.App.4th 726, 734.) On issues as to which a parent has the burden of proof, such as the existence of an exception to termination of parental rights, parents have statutory and due process rights to present relevant evidence of significant probative value to the issue before the court. (§ 366.26, subd. (b) [at termination hearing, the court "shall receive other evidence that the parties may present" before making findings and orders]; *In re Tamika T.* (2002) 97 Cal.App.4th 1114, 1121-1122 [due

process]; *In re Grace P.* (2017) 8 Cal.App.5th 605, p. 612 [same].) A juvenile court may require an offer of proof before conducting a contested section 366.26 hearing on issues where the parent has the burden of proof. (*Thomas R.*, at p. 732; see *Tamika T.*, at p. 1121-1122 [court may require offer of proof before giving mother a contested hearing on parent-child bond exception].)

Through counsel Mother expressly requested a contested hearing. To the extent that she wished to challenge DCFS's evidence that Minor was adoptable, she was entitled to a contested hearing. To the extent that she wanted to present evidence that one or more of the exceptions to the termination of parental rights applied, the court erred when it refused her a contested hearing without ascertaining whether the evidence she wished to present was relevant and had significant probative value. The court's complete refusal of a contested hearing violated Mother's statutory and due process rights.

When a parent is deprived of a due process right, we must consider whether the error was harmless beyond a reasonable doubt. (*Thomas R.*, *supra*, 145 Cal.App.4th at p. 734.) Here, the error cannot be deemed harmless beyond a reasonable doubt because without Mother having the opportunity to describe the nature of her contest, we cannot say what, if any, evidence of adoptability she would have challenged or what evidence as to an exception to adoption she would have presented. We can discern, from the limited argument her counsel was permitted to make in the middle of the court's declaration of its factual findings, that at a minimum Mother contended that the parent-child bond exception applied.[2] The denial of a contested hearing prevented

---

[2] Mother's counsel was permitted only two sentences of argument before the juvenile court terminated her parental

Mother from adducing any evidence she may have had that this exception applied. (See *In re J.S.* (2017) 10 Cal.App.5th 1071, 1079-1081 [court's refusal to permit mother to present evidence concerning sibling relationships precluded her from establishing sibling relationship exception, requiring new section 366.26 hearing].) Mother's counsel represented at oral argument that Mother could also have challenged DCFS's evidence of adoptability. The court's refusal to grant her request for a contested hearing prevented Mother from testing whether DCFS had met its burden of proof on this issue.

Based on *Andrea L. v. Superior Court* (1998) 64 Cal.App.4th 1377 at page 1387, DCFS argues that the denial of a contested hearing without an offer of proof was harmless beyond a reasonable doubt and that remand would be an idle act because the evidence demonstrated that Minor was adoptable and that no exception to termination of parental rights applied. Thus, DCFS argues that no different outcome would have resulted if Mother had received a contested hearing. *Andrea L.* is inapposite. In

---

rights. DCFS argues that the first of those two sentences was a concession that Mother could not establish that the parent-child exception applied, as her attorney stated that Mother contended that she was wrongfully denied access to her child to more fully participate in her parental role and that this deprivation prevented her from presenting evidence demonstrating the parent-child relationship. While Mother's counsel did mention an inability to "meet any of the exceptions" in this first sentence, in his next sentence he asserted the existence of that bond and the applicability of the parent-child bond exception. Given the near-total lack of opportunity to argue on the termination of parental rights, we decline to resolve the ambiguity in Mother's counsel's truncated argument by treating the first sentence as a concession and disregarding the second sentence.

Andrea L., the mother did not seek to cross-examine the author of the reports before the court, and therefore there was no issue regarding her right to test the evidence presented by DCFS. (*Ibid.*) The mother sought only to produce her own evidence in support of her request for a contested permanency planning hearing. (*Ibid.*) The court requested an offer of proof from the mother and accepted her offer of proof as true, but nonetheless denied her a contested hearing because her evidence, even when accepted as true, was insufficient to warrant return of the children to her or an extension of family reunification services. (*Ibid.*) Here, not only do we understand from Mother's appellate counsel that Mother could have challenged DCFS's evidence of adoptability, but also the court did not obtain an offer of proof as to Mother's evidence on exceptions to the termination of parental rights, and it is therefore impossible to conclude that the denial of a contested hearing was harmless beyond a reasonable doubt.

As for DCFS's argument that the result would have been the same even if a contested hearing had been held because the evidence demonstrated that Minor was adoptable and the parent-child exception did not apply, that contention is based on the state of the record after only one party, DCFS, was permitted to present evidence. Mother was both unable to contest the sufficiency of the evidence contained in the reports and to produce evidence on her own behalf. We decline to speculate that Mother could not have challenged the sufficiency of evidence she was not given the opportunity to contest or that she had no evidence to present when she was not permitted to present any.

We have already found that Mother visited Minor regularly (*In re M.F.*, *supra*, B284879, B287104), and the record shows that Mother traveled to Northern California from Southern California

to visit Minor seven more times during the period after the hearing where reunification services were terminated and before the section 366.26 hearing.[3] DCFS argues that even if Mother had received a contested hearing, the quantity and nature of Mother's visits would not be sufficient to establish the parent-child bond exception. This argument demonstrates exactly why a hearing was necessary. To assess whether Mother could establish the exception, the juvenile court had to hear the evidence and then decide whether the evidence established regular visitation and a parental bond. Only then could the juvenile court make informed rulings on the critically important issues raised at a hearing to terminate parental rights. The complete denial of a contested hearing was highly prejudicial to Mother.

The order terminating parental rights must be reversed and the matter remanded for a new section 366.26 hearing.[4]

DISPOSITION

The order terminating Mother's parental rights is reversed and the matter remanded to the juvenile court with instructions to conduct a new hearing under Welfare and Institutions Code

---

[3] Mother made an eighth trip to Northern California to see Minor, but a miscommunication regarding the date of the visit resulted in the visit not taking place.

[4] Mother argues in the alternative that it was error for the court to conduct a section 366.26 hearing without DNA testing to conclusively determine whether the caretakers were biologically related to the child. In light of our conclusion that the order terminating parental rights must be reversed we need not address this argument.

section 366.26 in accordance with the principles set forth in this opinion.

Until the new section 366.26 hearing is held, M.F.'s placement shall not be changed without a further court hearing on the issue of placement.

ZELON, J.

We concur:

PERLUSS, P. J.

SEGAL, J.