Filed 1/11/17 In re Arianna G. CA2/4

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

In re ARIANNA G., a Person Coming Under the Juvenile Court Law.	B271044 (Los Angeles County Super. Ct. No. CK30550)
LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. ELIZABETH G., Defendant and Appellant.	

APPEAL from an order of the Superior Court for Los Angeles County, D. Zeke Zeidler, Judge. Affirmed.

Law Offices of Vincent W. Davis & Associates and Stephanie M. Davis for Defendant and Appellant.

Mary C. Wickham, County Counsel, R. Keith Davis, Acting Assistant County Counsel, and Stephen D. Watson, Deputy County Counsel, for Plaintiff and Respondent.

Elizabeth G. (mother) appeals from an order of the juvenile court terminating her parental rights to her daughter Arianna G. She contends the juvenile court violated her due process rights by denying her request for a contested permanent plan hearing under Welfare and Institutions Code[1] section 366.26. We conclude that the court did not deny mother due process by requiring her to make an offer of proof and finding that offer insufficient to warrant a contested hearing. Accordingly, we affirm the order terminating parental rights.

BACKGROUND[2]

In May 2014, the Los Angeles County Department of Children and Family Services (the Department) received a referral regarding Arianna. The reporter stated that mother regularly was up to two hours late picking up Arianna from school. Arianna was seven years old at the time of the referral.

The Department conducted an investigation. The social worker assigned to the case (the CSW) spoke with Arianna's godmother, Gina M., former babysitter, Gracia M., and Arianna's maternal grandmother.

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

[2] Because the issue on appeal is a limited one, our focus is on the facts that are relevant to that issue. Also, we do not include any facts regarding Arianna's father because he is not a party to this appeal.

The CSW was told[3] that mother does not feed Arianna, takes her to school late, screams at her, pulls her hair, and calls her names. The CSW also was told that mother had recently been arrested for possession of methamphetamine. The CSW made an unannounced visit to mother's home. She observed that the home was clean and organized, and there did not appear to be any items in the house that could be hazardous to Arianna. Mother did not appear to be under the influence of any substances, and denied that anyone in the home abused any substances. Mother told the CSW that Arianna was at daycare a few houses away, as mother was on her way to work.

On June 13, 2014, the Department received a report that mother had tested positive for methamphetamine on June 11. The CSW went to mother's house to talk to her about her positive drug test. At first, mother attributed the positive test results to diet pills, but later admitted that she took methamphetamine sometimes to keep herself up because she had so many jobs and needed to stay awake. Mother admitted that she had been arrested for drug possession in December 2013, but said the drugs were not hers; she said they belonged to a friend, but she was arrested because they were in her car. Mother also told the CSW that Arianna was currently living with maternal grandmother.

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[3] It is unclear who, as between Gina M. and Gracia M., made some of the statements set forth in the report. In September 2014, Gina M. wrote a letter stating that she did not make any of those statements.

The CSW confirmed with maternal grandmother that Arianna had been living with her since May 31, 2014. In late July, the CSW spoke with maternal grandmother's spouse, who told her that mother had not seen Arianna since Arianna came to live with them. He said that mother had scheduled visits twice, but canceled both visits. Arianna told the CSW that she wanted to stay with her maternal grandmother because mother "is mean, she hits me and yells at me."

The Department filed a petition on August 13, 2014, alleging causes of action under section 300, subdivisions (a) and (b) based upon Mother's physical abuse of Arianna and her history of substance abuse.[4] At the detention hearing held that day, the juvenile court found a prima facie case under section 300, subdivisions (a) and (b), and ordered Arianna detained with maternal grandmother. The court also ordered mother to undergo weekly drug and alcohol testing.

In the jurisdiction/disposition and interim review reports filed on October 21, 2014, the Department reported that it had tried on numerous occasions to arrange visitation for mother and for her to be drug tested, but mother was not cooperative; she did not maintain contact with the Department and did not return the Department's telephone calls. As of the date of the report, mother had not submitted to any drug tests or visited Arianna. The Department also reported that Arianna's babysitter told the dependency investigator that she noticed changes in Arianna's behavior since she was removed from

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[4] The Department later filed a first amended petition to add counts against Arianna's father, which are not at issue in this appeal.

mother's custody; she said that Arianna did not seem as traumatized as she used to be, and was calm and happy.

At a hearing held on October 21, 2014, the juvenile court ordered the Department to make a written visitation schedule immediately. In a report filed on December 16, 2014, the Department reported that it had tried numerous times since the last hearing to contact mother regarding her availability for visits so it could create the court-ordered visitation schedule, but mother did not respond to any of the Department's telephonic, written, or in-person inquiries. Maternal grandmother also reported that mother had not contacted her to arrange any visits with Arianna. In a Multidisciplinary Assessment Team Summary of Findings Report, the Department noted that mother had seen Arianna only three times since May 2014 -- once in July and twice in August.

The juvenile court sustained the petition in its entirety at the jurisdiction/disposition hearing held on December 23, 2014, declaring Arianna a dependent child of the court under section 300, subdivisions (a) and (b). The court ordered family reunification services for mother and monitored visitation at least once a week for at least one hour. The court also ordered mother to participate in counseling, parenting classes, random alcohol and drug testing, and anger management classes. Mother appealed from the jurisdiction/disposition order, and we affirmed the order in an unpublished opinion. (*In re Arianna G.*, case No. B261544, filed Nov. 24, 2015.)

In the status review report filed on June 23, 2015 for the six-month review hearing, the Department reported that the CSW went to

mother's home on April 27, 2015 after trying unsuccessfully to contact mother by phone several times. The CSW was told that mother no longer lived there. The CSW called mother that same day and left a message that it was very important that mother contact the Department. Mother called two days later, and informed the CSW that she was living at a transitional housing program in Adelanto.[5] After speaking with mother, the Department finalized a visitation schedule for Thursday afternoons.

Mother had her first monitored visit with Arianna on May 21, 2015. After the visit, Arianna's therapist reported that Arianna's behavior was negatively impacted; she began throwing tantrums, talking back, and was being very disruptive. The therapist attended mother's next visit, which took place on June 4. The visit was scheduled to go from 2:30 p.m. to 3:30 p.m. Mother did not arrive until 3:11. Based upon her observations of the visit, the therapist opined that mother seemed to lack parenting skills, as she did not attempt to engage Arianna during the visit and made Arianna feel guilty when she did not respond to mother's requests for things such as hugs. The therapist reported that Arianna did not want to visit with mother, and that the visit disrupted Arianna's behavior and caused her to regress in treatment.

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[5] Mother said that she had been calling the CSW and leaving voicemails, but the CSW reported that she had not received any calls or voicemails from mother until the April 29 call.

Over the next four months, mother attempted to visit with Arianna once, on July 23, 2015. She was not able to see Arianna that day, however, because maternal grandmother did not bring Arianna to the visitation location. Mother told the CSW that she could not consistently make it to the Department's office on the scheduled day, and asked that the visitation be held during weekends. On September 22, 2015, the juvenile court ordered the Department to schedule a Child and Family Team (CFT) meeting regarding mother's request for visitation during weekends. The Department reported to the court on October 6 (the date of the 12-month review hearing) that it had been unable to schedule a CFT because mother said that she was unable to get to the Department's office for the meeting or for visitation. In a status review report, also filed on October 6, the Department informed the court that Arianna's therapist reported that Arianna was doing better and her tantrums had decreased since she had not been having visits with mother. The therapist expressed concern for Arianna's emotional well-being should she be returned to mother's care, because Arianna appeared to be negatively impacted by her visits with mother.

At the October 6, 2015 hearing, the juvenile court ordered the Department to meet with mother regarding her visitation schedule to see if her visits could take place on Sundays, facilitated at an appropriate visitation center. Two days later, the CSW consulted with the liaison for a visitation center in Pasadena regarding weekend visitation; she was told that the center was only open on Saturdays. The CSW called mother several times over the next few weeks and left messages asking mother to call her to discuss visitation, but mother did

not return any of the CSW's calls. The CSW contacted maternal grandmother, who said that mother had not contacted her to try to arrange a visit with Arianna.

Mother failed to appear at the contested 12-month review hearing, held on November 6, 2015. Mother's counsel asked for the matter to be continued, but the juvenile court denied that request. After receiving evidence and hearing argument from the Department and mother, the court terminated family reunification services for mother and scheduled a section 366.26 hearing.

Mother filed a notice of intent to file a writ petition. Mother's appointed counsel subsequently filed a letter in this court under *Glen C. v. Superior Court* (2000) 78 Cal.App.4th 570, stating that he had reviewed the record and researched potential issues, and was unable to file a writ petition on mother's behalf. Counsel stated that he had informed mother and would make the record available to mother so that she could proceed in propria persona, and requested that mother be given an additional 15 days to prepare the petition. We granted the extension request, but mother did not attempt to file the petition until six weeks after the extended time to file the petition had expired, and we denied her request to file the untimely petition.

The Department filed a report for the section 366.26 hearing in which it summarized mother's contacts with Arianna and the Department's continuing efforts to arrange visits with Arianna for mother, from the filing of the petition to the date of the report, February 19, 2016. The summary showed that the Department had made numerous attempts to contact mother to arrange visitation, but that

mother often failed to respond to those efforts or, when she did, said that she could not make the scheduled visit.[6] It also showed that mother had very few contacts (or attempts to have contact) with Arianna since the petition was filed 18 months earlier: mother sent Arianna presents by mail once, she attempted to speak to Arianna by phone once (although Arianna was not available at that time), and she had two monitored visits and one attempted visit (when maternal grandmother and Arianna did not appear for the scheduled visit).

Before the section 366.26 hearing, counsel for the parties submitted a statement of issues to be tried and evidence to be introduced at the hearing. The only issue identified was whether the section 366.26, subdivision (c)(1)(B)(i) exception (the parental relationship exception) applies. The statement indicated that mother's counsel would be calling mother to testify regarding this issue.

At the section 366.26 hearing held on March 7, 2016, the juvenile court requested an offer of proof, asking mother's counsel, "what would you be showing me to contest regarding regular and consistent visitation and contact by the mother under *In re Tamika T.*?" Mother's counsel stated that mother would testify that she had two visits with Arianna in the previous two weeks, and that she would testify about the nature and quality of those visits as well as her efforts to schedule visits before that time. When asked by the court about the number of visits mother had had in the previous year, mother apparently acknowledged

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[6] In fact, mother failed to answer calls from the CSW or respond to the CSW's letters and voicemails for the first five months after the petition was filed.

that before the most recent visits, she had not seen Arianna since May or June of the previous year, but she contended that was because maternal grandmother stopped bringing Arianna to the visits. The court found that mother's offer of proof failed under *In re Tamika T.*, but it allowed mother to address the court. After hearing from mother, the court ordered that mother's parental rights be terminated.

Mother's appointed counsel immediately filed a notice of appeal from the order terminating mother's parental rights. Two weeks later, mother filed another notice of appeal from the same order, this time represented by retained counsel.

DISCUSSION

In her appellant's opening brief, mother notes that she sought a contested section 366.26 hearing in order to establish that the parental relationship exception applied, which would allow the juvenile court to choose an option other than terminating parental rights upon finding that Arianna was likely to be adopted. She contends that the court violated her due process rights by denying her that contested hearing after finding her offer of proof insufficient.

We were presented with similar arguments in two previous cases, *In re Jeanette V.* (1998) 68 Cal.App.4th 811 (*Jeanette V.*), and *In re Tamika T.* (2002) 97 Cal.App.4th 1114 (*Tamika T.*).

In *Jeanette V.*, the father of the dependent child argued that the juvenile court denied him due process by admitting social worker reports into evidence at the section 366.26 hearing without making the social workers available for cross-examination. We observed that "[o]f

course a parent has a right to 'due process' at the hearing under section 366.26 which results in the actual termination of parental rights." (*Jeanette V.*, *supra*, 68 Cal.App.4th at p. 816.) But we explained that "[d]ue process is a flexible concept which depends upon the circumstances and a balancing of various factors. [Citation.] The due process right to present evidence is limited to relevant evidence of significant probative value to the issue before the court. [Citations.] . . . [T]he trial court may properly request an offer of proof if an entire line of [questioning] appears to the court to be irrelevant to the issue before the court." (*Id.* at p. 817.) We noted that the only issue before the court at the hearing was whether the parental relationship exception applied, and held that, in light of father's counsel's inability to deny that father could not establish a necessary element of that exception, the juvenile court did not err in impliedly finding that cross-examination of the social workers was not required as a matter of due process. (*Ibid.*)

In *Tamika T.*, the mother of the dependent child argued that the juvenile court committed reversible error per se in requiring her to make an offer of proof to determine whether a contested section 366.26 hearing was warranted. (*Tamika T.*, *supra*, 97 Cal.App.4th at p. 1116.) Like the father in *Jeanette V.*, the only issue before the juvenile court was whether the parental relationship exception applied. (*Ibid.*) Given the record before it, the juvenile court was skeptical whether mother could present evidence to establish one of the elements required for the exception to apply, and asked for an offer of proof. (*Id.* at p. 1121.)

When the court found the offer was insufficient to establish the element in question, the court denied her request for a contested hearing. (*Id.* at p. 1119.) In response to the mother's argument that her due process right to present evidence at a section 366.26 hearing could not be put to the test of an offer of proof, we stated: "Because due process is, as we noted in *In re Jeanette V.*, *supra*, 68 Cal.App.4th 811, a flexible concept dependent on the circumstances, the court can require an offer of proof to insure that before limited judicial and attorney resources are committed to a hearing on the issue, mother had evidence of significant probative value. If due process does not permit a parent to introduce irrelevant evidence, due process does not require a court to hold a contested hearing if it is not convinced the parent will present relevant evidence of the issue he or she seeks to contest." (*Id.* at p. 1122.)

In the present case, as in *Jeanette V.* and *Tamika T.*, the only issue before the juvenile court at the section 366.26 hearing was whether the parental relationship exception applied. To establish that the exception applies, a parent must show that he or she has "maintained regular visitation and contact with the child and the child would benefit from continuing the relationship." (§ 366.26, subd. (c)(1)(B)(i).) There is no question that mother did not maintain regular visitation or contact with Arianna during the pendency of the case, even if the two visits mother referred to in her offer of proof were considered -- in 19 months, she mailed one package, attempted one phone call (but did not follow up and call back when Arianna would be available), visited four times, and attempted to visit one additional time. Thus, as in *Jeanette V.* and *Tamika T.*, the juvenile court did not deny mother

due process by denying her request for a contested hearing insofar as she sought to testify about her two recent visits, since those visits could not overcome the evidence that mother had failed to maintain regular visitation and contact with Arianna.

Mother argues, however, that the juvenile court denied her due process by not allowing her to testify about the other component of her offer of proof -- that her attempts to visit with Arianna were thwarted by maternal grandmother, who stopped bringing Arianna for visits. She also contends the court was aware that the Department "was not making any attempt to accommodate [mother's] tremendously demanding work and school schedules," and failed to enforce its orders to the Department to make a viable visitation schedule, and argues that by denying her a contested hearing, she was prevented from showing how the Department also thwarted her visitation.

The problem with mother's argument is that it comes too late, and by the wrong procedure. In essence, mother's contention that she was denied visitation is an argument that she was not provided reasonable reunification services. But before the juvenile court terminated reunification services at the 12-month review hearing, it was required to, and did, make a finding that reasonable services had been provided. (See *Cynthia D. v. Superior Court* (1993) 5 Cal.4th 242, 249 [before terminating reunification services at the 12-month review hearing and setting the matter for a section 366.26 hearing, "the court must determine by clear and convincing evidence that reasonable reunification services have been provided or offered to the parents"].) Mother was not entitled to challenge this finding at the section 366.26

hearing. (*Cynthia D. v. Superior Court*, *supra*, 5 Cal.4th at p. 250 ["'the decisions made at the review hearing regarding reunification are not subject to relitigation at the [section 366.26] hearing. This hearing determines only the type of permanent home [for the child]'"].) Instead, if she wished to challenge it, she had to do so either by timely filing a writ petition in this court under section 366.26, subdivision (l) from the order terminating her reunification services and setting a section 366.26 hearing, or by filing a petition in the juvenile court under section 388, seeking a change in the order based upon new evidence or changed circumstances. (See *In re Marilyn H.* (1993) 5 Cal.4th 295, 309 [once reunification services are terminated, the reunification issue may be revived only if the parent proves changed circumstances pursuant to section 388].)

As noted, although mother filed a notice of intent to file a writ petition following the 12-month review hearing, she did not timely file her petition in this court; moreover, she did not file a section 388 petition in the juvenile court. Since these were the only procedures by which mother could challenge the juvenile court's finding that she received reasonable services, but she failed to avail herself of them, we conclude the juvenile court did not deny her due process by precluding her from raising the issue at a contested section 366.26 hearing.

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DISPOSITION

The order terminating mother's parental rights is affirmed.

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WILLHITE, J.

We concur:

EPSTEIN, P. J.

MANELLA, J.