Filed 7/27/09 In re S.B. CA2/7

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

In re S.B., a Person Coming Under the Juvenile Court Law.	B210661 (Los Angeles County Super. Ct. No. LK 04718)
LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. M.M., Defendant and Appellant.	

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

Andre F. F. Toscano, under appointment by the Court of Appeal, for Defendant and Appellant.

Raymond G. Fortner, Jr., County Counsel, James M. Owens, Assistant County Counsel, and Jacklyn K. Louie, Senior Deputy County Counsel, for Plaintiff and Respondent.

M.M., the sister of minor S.B.'s foster mother, appeals from the juvenile court's order terminating her co-legal guardianship of S. and granting the Welfare and Institutions Code section[1] 388 petition of M.C., the husband of S.'s foster mother (husband), placing the child under his care.[2] Appellant contends the court abused its discretion when it granted the petition as it did not consider significant issues and evidence. We affirm.

FACTUAL AND PROCEDURAL SYNOPSIS

I. Section 388 Petition

In June 1993, the court placed S. under a legal guardianship with his foster mother.

On May 15, 2007, the Department of Children and Family Services (the Department) filed a section 388 petition requesting the court modify its previous order as the foster mother now wanted to adopt S. The petition stated that 15-year-old S. had been born with a positive toxicology for cocaine, had been under foster mother's care since he was seven days old, and she considered him as her son. During S.'s dependency case, his

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

[2] Ordinarily, such an order is appealable. In the case at bar, the court also set a section 366.26 hearing in the same order. An order setting a section 366.26 hearing is only reviewable by writ. (*Jennifer T. v. Superior Court* (2007) 159 Cal.App.4th 254, 259.) Normally all orders made at the same time as an order setting a section 366.26 hearing, though otherwise appealable, may only be reviewed by writ. However, neither the juvenile court nor the parties recognized the subject order was such an order, and the court did not inform appellant about seeking an extraordinary writ. (See *id*., at pp. 259-260.) Appellant filed her notice of appeal the same day as the order she appealed. Under these circumstances, rather than determining whether the order granting M.C.'s section 388 petition is reviewable only by writ (see *In re Anthony B.* (1999) 72 Cal.App.4th 1017, 1024) and recasting our decision as review from a writ, we review this matter as an appeal.

mother had not wanted to reunify with him. Neither S.'s mother nor father had had any contact with him since his birth in 1992.

On June 14, the court reinstated jurisdiction over S. and granted a hearing on the section 388 petition.

In July, the Department report recommended proceeding with the permanent plan of adoption. At the hearing, the court granted the petition and set a 366.26 hearing to implement that permanent plan.

In November, the Department reported S. had been diagnosed with mild retardation and was receiving special education services at school as well as regional center services. S. referred to his foster mother as his mother and was a good student. Foster mother stated S. should receive counseling services as he became angry for unknown reasons and "shuts down." However, foster mother had suffered a massive heart attack/stroke and been hospitalized for a long time. During foster mother's hospitalization, S. and the other foster children in foster mother's home were cared for by appellant, who lived down the street. Appellant stated she would like to become S.'s co-legal guardian. The report also indicated husband had not been involved with the children's care or the running of the home.

Foster mother likely would adopt S. once she was able to provide the required medical report confirming she was physically able to continue to care for S. Foster mother had appellant's support and assistance in caring for S. and the other children, but the Department had concerns about foster mother's health and the cleanliness of her home. The Department recommended S. remain under the legal guardianship pending further investigation of its concerns. The court ordered individual counseling for S.

II. Co-legal Guardianship

The March 2008 Department report noted foster mother, who was undergoing long term medical treatment, had asked appellant to assist her in caring for the children in her

home. The report noted the husband had minimal involvement in the household, but was involved in S.'s life.

S. was bonded with foster mother and her family. S.'s coordinator at the regional center recommended S. be closely supervised at all times because he was overly friendly with strangers and lacked safety awareness. The coordinator's progress report noted S.'s numerous deficiencies in his self-care, which required foster mother's continuous assistance and verbal prompts. S. could not match proper clothing with the weather and was unable to state the value of coins. S. required constant reminders to properly brush his teeth, bathe, and eat without spillage. S. often had temper tantrums during which he would cry excessively, bang his head, refuse to go to school and mess up his room. The report described the special education services S. was receiving. S. suffered from a learning disability identified by a processing disorder in his cognitive abilities, which required particular support services in the areas of math reasoning and calculation.

Last minute information for the court indicated that due to foster mother's medical conditions and deteriorating health, S.'s adoptive planning had to be discontinued. The Department recommended appellant become S.'s co-legal guardian pending further investigation of her background.

The section 366.26 report noted appellant had been assisting foster mother with the care of S. and the other foster children since foster mother became ill. Appellant was willing to take full care of S. if foster mother passed away. Appellant was motivated to become the co-legal guardian because S. had been part of her family since he was a newborn, and she was committed to care for him until he became self-sufficient. S., who was then 16-years-old, stated he did not mind appellant becoming co-legal guardian, but he did not like it when she made him do all the chores.

On April 24, the court appointed appellant as S.'s co-legal guardian. S. started living in appellant's home in August. Reports indicate that against the wishes of S. and husband, appellant removed S. from his home and moved him into her home.

III. Husband's Section 388 Petition

On July 20 and August 22, husband filed section 388 petitions (one was in Spanish) requesting modification of the court's order placing S. with appellant under legal guardianship. The petition stated S. had expressed a wish to reside with husband because the other children in appellant's home called him the "N" word, and he was not allowed to go anywhere. A maternal uncle who had been ordered to move out of appellant's home was still coming to the house and having access to the children. The petition requested that the court place S. in husband's house and that the Department initiate proceedings for husband to adopt S. The court granted a hearing on the petition.

In the September report, the Department noted foster mother, who remained terminally ill and under heavy medical treatment, had requested appellant assist her with caring for S. and the other children. S. continued to receive services for his personal and educational special needs and had begun counseling in January.

Husband disputed the claim he had been minimally involved in the household and stated he took an active part in the children's lives. S. identified husband as his dad and loved him, S. and husband helped each other, and S. had repeatedly asked the social worker to be returned to husband's home. Husband believed he could provide a better life and education for S. because of the help and assistance he would be receiving from his family. The Department concluded that despite appellant's excellent care of S., it was in his best interest to be returned to husband's home.

At the September 11 hearing, the court appointed counsel to represent appellant. The court stated it had read the Department reports and was ready to rule based on those reports. The court noted S. had been placed almost his entire life with husband and wanted to be returned to husband.

Appellant's counsel noted there were other children in the home under guardianship or adoption. The court asked counsel if she was disputing any of its

statements. Counsel stated she would like the court to consider that S. had mental challenges which placed his (mental) age under 16. The court stated, "I don't see anything to indicate that it is anything other than in [S.'s] best interest to be placed back with [husband]." The court stated that S. should be returned to husband's home immediately and that it was going to terminate both guardianships.

Counsel argued there were issues to be addressed on behalf of her client, and if she could not do so, she was not sure why she had been appointed on that date. Counsel noted appellant had become S.'s co-legal guardian at the request of foster mother and argued foster mother had reasons for appellant to be the guardian rather than husband. Foster mother had given appellant, not husband, the power of attorney to make financial and medical decisions, and counsel was concerned as to why foster mother appointed appellant over her husband. Counsel noted foster mother had disclosed her house was in need of repairs due to illegal work that had been done and felt it might be dangerous for the children or place them at risk.

Counsel stated husband had "kicked out" from his home one child who had been under legal guardianship and another who had been adopted when they turned 18. When husband tried to kick the adopted child out of the house, husband called the police, but the police would not remove the child. Counsel was concerned that S. might suffer the same fate as those two children and also that husband had not worked for approximately 30 years. Counsel pointed out husband did not take care of S. on a daily basis and urged the court to consider her concerns. Counsel noted the adopted child, who was in court, had taken pictures of the house, which was not in a safe condition.

The court stated counsel's concerns were conjecture and it was looking at what was in S.'s best interests. The court stated it would order the Department to investigate the house. The court terminated the legal guardianships of foster mother and appellant, allowed S. to be placed in husband's home and set a section 366.26 hearing to appoint husband as S.'s legal guardian.

Appellant filed a timely notice of appeal from that order and its findings.

DISCUSSION

Appellant contends the juvenile court abused its discretion when it granted husband's section 388 petition, placed S. with husband and terminated the co-legal guardianships of appellant and S.'s foster mother.

"Section 388 permits a parent to petition the court on the basis of a change of circumstances or new evidence for a hearing to change, modify or set aside a previous order in the dependency. The parent bears the burden of showing both a change of circumstance exists and that the proposed change is in the child's best interests." (*In re Casey D.* (1999) 70 Cal.App.4th 38, 47.) "'Whether a previously made order should be modified rests within the dependency court's discretion, and its determination will not be disturbed on appeal unless an abuse of discretion is clearly established.'" (*In re Amber M.* (2002) 103 Cal.App.4th 681, 685.)

Appellant claims the court failed to exercise its discretion because it did not consider significant issues and evidence. (See *Schlumpf v. Superior Court* (1978) 79 Cal.App.3d 892, 901 [A failure "to consider all the evidence is a failure to exercise discretion."]; *Dawnel D. v. Superior Court* (1999) 74 Cal.App.4th 393, 400 disapproved on another point in *Tonya M. v. Superior Court* (2007) 42 Cal.4th 836, 848 [The court abused its discretion by failing to exercise it.].)

In particular, appellant reiterates the points raised by her counsel at the hearing on the section 388 petition: appellant became the co-legal guardian at the request of the foster mother, the foster mother gave appellant, not husband, powers of attorney, S. had significant special needs requiring constant assistance, husband had not been involved in S.'s daily care, and appellant had been assisting with the daily care of S. and the other foster children. Appellant claims she had better insight than husband because husband's petition stated S. did not like to live with appellant because he was not allowed to go

anywhere, but S.'s coordinator stated S. had to be closely supervised at all times, meaning her more restrictive placement conformed to S.'s special needs and was in his best interests. In addition, appellant's counsel stated husband's home was not safe, husband had not worked for 30 years, and S. might suffer the same fate as two other children husband kicked out of the house. Appellant claims husband's long-term commitment to S. was disputed, while her commitment to care for S. for as long as he needed was not controverted.

The points raised by counsel were arguments not evidence. (See *In re Zeth S.* (2003) 31 Cal.4th 396, 414, fn. 7.) When husband objected to counsel's testifying, the court stated it took the argument for what it was worth. Appellant's opinions as to the superiority of her qualifications are just that and the reasons why the foster mother chose to give appellant powers of attorney are unknown. The court did consider the evidence it had before it.

S. had lived in the home of his foster mother and her husband for almost his entire life, they were the only parents he had ever known and he called husband "dad." Despite mild retardation, S. was a good student and was able to articulate his feelings and desires about being returned to husband after being removed from the only home he had ever known against his wishes. At the time of the petition, S. was 16 years old. S. said he loved his father who took care of him, fed him, spent time with him, took him to visit family and let him ride his bicycle. S. said he wanted to continue seeing his aunts, which he believed would occur if he lived with his father, but his aunts would not always let him see his father because they did not like his father. S. did not like it when his aunts talked about husband because he had a bond with the man he considered his father.

Husband referred to S. as his "son." Husband loved his son and wanted what was best for his son. Husband disputed earlier statements he had not participated in the household, asserting he actively cared for the children, which was supported by S.'s statement husband cared for him. The record reflected husband was involved in S.'s life.

S. had issues with appellant; he did not like it that she made him do all the chores even when he had not made the mess and the other children in appellant's home called him a racially derogatory name. S. considered appellant an aunt, not a parent.

The court addressed counsel's concerns about husband's home by ordering the Department to investigate the home. Even if husband had not been involved in S.'s daily care, he certainly was aware of S.'s needs and stated he would be receiving help from his family. Also, the court continued supervision of the case so should husband need assistance in providing for S.'s daily needs, it could address the issue. It was for the court to weigh whether S.'s best interests would be met by leaving him in home where he was unhappy or allowing him to return to the only home he had known. (See *Schlumpf v. Superior Court*, *supra*, 79 Cal.App.3d at p. 901.)

Thus, the record supports the court's finding S.'s best interests would be served by returning S. to husband's home. (See *In re Kimberly F*. (1997) 56 Cal.App.4th 519, 531 [disruption of an existing psychological bond between the child and the current caretaker is an important factor in considering a section 388 petition].) Accordingly, the court did not abuse its discretion when it granted the section 388 petition.

DISPOSITION

The order is affirmed.

WOODS, J.

We concur:

PERLUSS, P. J. **ZELON, J.**