Filed 3/5/18 In re A.B. CA2/6

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

In re A.V., a Person Coming Under the Juvenile Court Law.	2d Juv. No. B284225 (Super. Ct. No. J070545) (Ventura County)
VENTURA COUNTY HUMAN SERVICES AGENCY, Plaintiff and Respondent, v. D.B., Defendant and Appellant.	

D.B. (mother) appeals the juvenile court's orders denying her petition to reinstate family reunification services (Welf. & Inst. Code, § 388)[1] and terminating parental rights to

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

her daughter, A.V. (§ 366.26.) Mother contends the court abused its discretion by denying her section 388 petition without an evidentiary hearing. We affirm.

FACTS AND PROCEDURAL BACKGROUND

On May 12, 2015, mother admitted to recent opiate use and acknowledged a history of heroin, prescription pill and methadone use. Mother agreed to voluntarily participate in substance abuse services, but treatment was unsuccessful and mother's substance abuse continued to interfere with her ability to care for her four children, including five-year-old A.V.

On June 25, 2015, after mother tested positive for opiates, amphetamine and benzodiazepine, the Ventura County Human Services Agency (HSA) detained A.V. and her three siblings. HSA filed a juvenile dependency petition with respect to A.V. The petition alleged both substance abuse and domestic violence within the home.[2]

The juvenile court sustained the petition and ordered reunification services for mother. The services included participation in a case plan to be developed by HSA and submission to random drug testing. HSA had discretion to liberalize mother's visits with A.V.

A.V. and her siblings were placed with maternal grandparents and mother began working on her case plan. At the six-month review, the social worker recommended that mother's reunification services be continued for another six

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[2] HSA also filed petitions as to A.V.'s siblings, but those petitions are not relevant to this appeal. Ultimately, the juvenile court terminated mother's parental rights to A.V-B.'s younger brother, and her two older siblings were placed in long-term foster care.

months. The social worker reported, however, that mother had been evicted from a sober living program for allegedly stealing items from the home. Mother also had unlawfully entered the grandparents' residence at 4 a.m. and had woken up the children to obtain "warm clothing and food." Mother left the house, but attempted to return several times. Eventually, the grandparents called the police, who escorted mother to the nearest warming shelter for support.

Before the status review hearing on January 11, 2016, HSA changed its position and recommended that mother's reunification services be terminated and that a section 366.26 hearing be scheduled. It cited mother's discharge from her drug rehabilitation program, her failure to appear for three drug tests, missed visits with the children and failure to contact the social worker. Although mother contested the hearing, she failed to appear, and the juvenile court terminated her services. The court set the section 366.26 hearing for November 14, 2016.

Due to concerns regarding the maternal grandparents' care, the children were removed from their home. A.V. was temporarily placed with a maternal aunt.
At the section 366.26 hearing, the social worker reported that A.V. was being placed with the aunt's friend, who is a licensed family therapist and the director of a foster family agency. The juvenile court agreed to continue the hearing until May 1, 2017 to evaluate the success of the new placement.

At the continued section 366.26 hearing, the social worker recommended that parental rights be terminated and that A.V. be freed for adoption by her aunt's friend. Mother contested the recommendation and filed a section 388 petition on June 23, 2017. Mother alleged that since termination of her

reunification services, she had completed a number of voluntary services and asked the juvenile court to reinstate reunification services. Mother alleged she had (1) completed a residential substance abuse treatment program, (2) routinely tested negative for drugs, (3) attended five to seven AA/NA meetings per week while in the program, (4) completed an anger management program, (5) attended counseling, (6) obtained a job and (7) maintained her sobriety since April 4, 2016. She further stated that she was continuing her sobriety in an outpatient substance abuse treatment program where she was testing negative for drugs, attending daily 12-step meetings, engaging in counseling and working with a sponsor.

The juvenile court summarily denied the section 388 petition on June 29, 2017, finding that "the proposed change of order . . . does not promote the best interest of the child."

The juvenile court held a contested section 366.26 hearing on July 27, 2017. It found by clear and convincing evidence that A.V. is adoptable and terminated mother's parental rights. Mother appeals.

DISCUSSION

Mother contends the juvenile court abused its discretion by summarily denying her section 388 petition to reinstate family reunification services. She claims she was entitled to an evidentiary hearing. We disagree.

"A juvenile court order may be changed, modified or set aside under section 388 if the petitioner establishes by a preponderance of the evidence that (1) new evidence or changed circumstances exist and (2) the proposed change would promote the best interests of the child. [Citation.] A parent need only make a prima facie showing of these elements to trigger the right

to a hearing on a section 388 petition and the petition should be liberally construed in favor of granting a hearing to consider the parent's request. . . . [¶] However, if the liberally construed allegations of the petition do not make a prima facie showing of changed circumstances and that the proposed change would promote the best interests of the child, the court need not order a hearing on the petition." (*In re Zachary G.* (1999) 77 Cal.App.4th 799, 806.)

"The prima facie requirement is not met unless the facts alleged, if supported by evidence given credit at the hearing, would sustain a favorable decision on the petition." (*In re Zachary G.*, *supra*, 77 Cal.App.4th at p. 806.) The juvenile court should consider the entire factual and procedural history of the case in determining whether the petition makes the necessary showing. (*In re Justice P.* (2004) 123 Cal.App.4th 181, 189.) An appellate court will not disturb the juvenile court's decision to deny an evidentiary hearing on a section 388 petition absent an affirmative showing by the appellant that the court exceeded the limits of legal discretion by making an arbitrary, capricious or patently absurd determination. (*In re Mary G.* (2007) 151 Cal.App.4th 184, 205.)

HSA concedes the juvenile court did not base its denial of the section 388 petition upon mother's failure to make a prima facie showing of changed circumstances. Indeed, "[o]n the surface, mother presented impressive accomplishments in her section 388 petition to satisfy the first prong of the test." Rather, HSA asserts the petition was properly denied without an evidentiary hearing because mother failed to show that reinstatement of reunification services would be in A.V.'s best interests.

Parent and child share a fundamental interest in reuniting up to the point at which reunification efforts cease. (*In re R.H.* (2009) 170 Cal.App.4th 678, 697, disapproved on another ground in *John v. Superior Court* (2016) 63 Cal.4th 91, 98-100.) By the time a 366.26 hearing is scheduled, the interests of the parent and the child have diverged. (*Cynthia D. v. Superior Court* (1993) 5 Cal.4th 242, 254.) The juvenile court's focus shifts from family reunification toward promoting the child's needs for permanency and stability. (*In re Marilyn H.* (1993) 5 Cal.4th 295, 309; *In re Angel B.* (2002) 97 Cal.App.4th 454, 464 ["After the termination of reunification services, a parent's interest in the care, custody and companionship of the child is no longer paramount"].) In fact, there is a rebuttable presumption that continued foster care is in the child's best interests. (*Angel B.*, at p. 464.) Such presumption applies with even greater strength when adoption is the permanent plan. (*Ibid.*) "A court hearing a motion for change of placement at this stage of the proceedings must recognize this shift of focus in determining the ultimate question before it, that is, the best interests of the child." (*In re Stephanie M.* (1994) 7 Cal.4th 295, 317; *In re Edward H.* (1996) 43 Cal.App.4th 584, 594.)

Mother's reunification services were terminated on March 7, 2016. Mother did not file her section 388 petition until June 23, 2017, more than 15 months after termination of services, and just a month before the continued section 366.26 hearing. A.V., who had been living with relatives since June 2015, was successfully placed with her prospective adoptive mother in November 2016. In April 2017, the prospective adoptive mother, a licensed family therapist, reported that "[o]ver the course of the past 6 months, [A.V.] has adjusted very well and

is becoming more bonded to me and her new home. She states that she is happy living with me and expresses excitement/interest in being adopted by me or has at times said that she already is adopted." The prospective adoptive mother further noted that "[b]esides talking about adoption, [A.V.] frequently asks about events far into the future such as high school or college and asks where she will be at that time. It is my belief that [A.V.] wants stability, routine, and permanence in her life. In my opinion it would be harmful to [her] to have any more placement changes, as she has been through so many up to this point."

The juvenile court concurred with this assessment at the section 366.26 hearing. It stated: "[A.V.] would benefit . . . greatly . . . by being adopted. And the reasons are she has been moved around several times even during this case, and I think she's traumatized by it. She now has a strong bond with a prospective adoptive parent and that parent's significant other. When asked where she would want to live if she had a wish, she did state somewhere very cold, but she also included people that did not include mother. She has bad memories about things that happened while she was living with her mother. Mom has not acted in a parental role with [A.V.] for a very long time, certainly not since this case was filed. And even before this case there is evidence that [m]other was not fulfilling at least a healthy parental role."

In addition, by the time the section 388 petition was filed, A.V. had been out of mother's care for two years. The record reflects that mother's interactions with A.V. during those two years were not particularly positive. A.V. appeared nervous before and after her monthly visits with mother and was

somewhat shy and submissive during the visits. After one visit, A.V. said, "I love my mom, but I feel sorry for her." In between visits, A.V. did not mention mother and did not want to speak with her on the telephone unless persuaded to do so by the prospective adoptive mother.

To assess whether the trial court erred by summarily denying the section 388 petition, mother urges us to apply the factors articulated in *In re Kimberly F.* (1997) 56 Cal.App.4th 519 (*Kimberly F.*). These include "(1) the seriousness of the problem which led to the dependency, and the reason for any continuation of that problem; (2) the strength of relative bonds between the dependent child[] to both parent and caretakers; and (3) the degree to which the problem may be easily removed or ameliorated, and the degree to which it actually has been." (*Id.* at p. 532, italics omitted.) *Kimberly F.* has been criticized, however, for failing to "take into account" the shift in focus to permanency and stability after termination of reunification services. (*In re J.C.* (2014) 226 Cal.App.4th 503, 527.)

In any event, the *Kimberly F.* factors do not favor mother. The dependency was due to long-term serious substance abuse and domestic violence within the home. The substance abuse challenge was not easily overcome, as evidenced by mother's relapses, and mother has not addressed the domestic violence issues. As previously discussed, A.V. has a strong bond with her prospective adoptive mother, and it is undisputed that mother's relationship with A.V. has deteriorated because of their lack of time together. Moreover, unlike *Kimberly F.*, the present case is not simply a "dirty house" case. (*Kimberly F.*, *supra*, 56 Cal.App.4th at p. 532.) "A dirty house does not pose as

intractable a problem as a parent's drug ingestion . . . for a child's 'best interests.'" (*Ibid.*)

Based on the record before us, we conclude the juvenile court did not abuse its discretion in finding that mother failed to make a prima facie showing that further reunification services, and the accompanying delay in adoption of a permanent plan, were in A.V.'s best interests. "[D]elaying the selection of a permanent home for a child to see if a parent, who has repeatedly failed to reunify with the child, might be able to reunify at some future point, does not promote stability for the child or the child's best interests. [Citation.] "'[C]hildhood does not wait for the parent to become adequate.'" (*In re Casey D.* (1999) 70 Cal.App.4th 38, 47.)

DISPOSITION

The orders denying mother's section 388 petition and terminating her parental rights to A.V. are affirmed.

NOT TO BE PUBLISHED.

PERREN, J.

We concur:

GILBERT, P. J.

YEGAN, J.

Tari L. Cody, Judge
Superior Court County of Ventura

Jacques Alexander Love, under appointment by the Court of Appeal, for Defendant and Appellant.

Leroy Smith, County Counsel, and Joseph J. Randazzo, Assistant County Counsel, for Plaintiff and Respondent.