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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION THREE

In re R.L., et al., Persons Coming
Under the Juvenile Court Law.

B279278

LOS ANGELES COUNTY
DEPARTMENT OF CHILDREN
AND FAMILY SERVICES,

Los Angeles County
Super. Ct. No. CK61958

Plaintiff and Respondent,

v.

NAKIA B.,

Defendant and Appellant.

APPEAL from orders of the Superior Court of Los Angeles County, Teresa T. Sullivan, Judge. Affirmed.

William Hook, under appointment by the Court of Appeal, for Defendant and Appellant.

Office of the County Counsel, Mary C. Wickham, County Counsel, R. Keith Davis, Assistant County Counsel, and David Michael Miller, Deputy County Counsel, for Plaintiff and Respondent.

INTRODUCTION

Mother Nakia B. appeals from the dependency court's orders denying her petition under Welfare and Institutions Code¹ section 388, terminating her parental rights under section 366.26, and selecting adoption as the permanent plan for her five-year-old son, R.L., and three-year-old daughter, A.G. Mother's sole argument on appeal is that the court abused its discretion when it denied her section 388 petition after finding that her nascent drug and alcohol recovery efforts did not constitute changed circumstances sufficient to recommend reinstatement of reunification services. Finding no error, we affirm.

FACTS AND PROCEDURAL BACKGROUND

At the time the Los Angeles County Department of Children and Family Services (department) filed the petition, mother had seven children by multiple fathers; the children ranged in age from 22 years to 1 year. The family had a prior history with the department, including one case initiated in 2006 after one of mother's children died at the age of five months while in her care.

This family most recently came to the attention of the department in July 2014, after officers from the Inglewood Police Department took R.L. and A.G. into protective custody following a report by mother's landlord. When the officers responded to the call, they found mother's home in a filthy condition and observed white powder scattered throughout the home on the carpet and

¹ All undesignated section references are to the Welfare and Institutions Code.

stair railings.² R.L. had flea bites covering his neck and face. The officers observed the home had active plumbing problems and no electricity. A leak in the roof was draining into a bucket inside the home and electric cords were hanging from the attic, where mother was using an extension cord to bring power into the home. The department became involved after mother failed to collect her children at the police department.

After the court ordered the children³ to be detained from mother and placed in the home of a relative, the department filed a petition under section 300. On September 17, 2014, at the hearing on jurisdiction, mother pled no contest and the court sustained the following allegations:

“Count b-1: The children, [H.G., R.L., and A.G.]’s mother . . . established a filthy, unsanitary home environment for the children in that on 07/17/2014, the home was flea infested. There were broken water pipes, leaking water and exposed wires. The water and electricity service were turned off and the mother was getting water and electricity from other unsafe sources. A foul odor of mold permeated the kitchen and bathrooms. . . . Such a filthy, unsanitary and hazardous home environment established for the children by the mother . . . endangers the children’s physical health and safety and places the children at risk of physical harm.

² Mother later stated the white powder was an organic flea powder.

³ The petition included allegations relating to three of mother’s other children. The petition also included allegations against several of the fathers, some of which the court sustained. As those allegations are not at issue in this appeal, we do not discuss them further.

“Count b-2: The children, [H.G., R.L., and A.G.]’s mother . . . is a recent user of marijuana, which renders the mother incapable of providing regular care and supervision of the children. On prior occasions in 2014, the mother was under the influence of marijuana while the children were in the mother’s care and supervision. Such drug use by the mother places the children at risk of physical harm.”

At the contested disposition hearing on March 25, 2015, the court found by clear and convincing evidence that the children were at substantial risk of harm in mother’s custody and ordered their removal under section 361, subdivision (c). The court ordered monitored visitation for mother with discretion for the department to liberalize visitation. The court also ordered mother to participate in a full drug/alcohol program with aftercare, random drug and alcohol testing, parenting classes, and individual counseling.

In the department’s September 2015⁴ status review report, the department reported mother was visiting the children “sporadically,” and was not in compliance with the case plan. Previously, mother enrolled in the Asian American Drug Abuse Program (AADAP); she was discharged on November 7, 2014, for “[r]efusal to keep weekly scheduled appointment[s]” and “[r]epeated refusal to comply with the directions of [her] counselor.” At the time of the review hearing on September 24, 2015, mother was not enrolled in a substance abuse program and had recently missed a drug program intake appointment on

⁴ Mother gave birth to another child in September 2015, but refused to disclose the child’s location to the department or allow a social worker to conduct a visit to assess the infant’s health and safety. That child is not a subject of the present appeal.

September 14, 2015. Mother had also missed multiple drug tests and was not participating in any of the court-ordered classes or counseling. Over the objection of the department, the court declined to terminate reunification services at the hearing on September 24, 2015.

Prior to the 12-month review hearing, the department advised the court that mother was still not in compliance with any portion of the court's case plan, had not made any substantial effort to address the issues which led to the removal of her children from her care, and recently disclosed a history of depression and sexual addiction for which she had not received any treatment. She also had been avoiding required random drug tests, and appeared for only two of the six required drug tests between August 15 and October 15, 2015. The court again continued reunification services for mother over the department's objection. However, on November 12, 2015, the court found "the extent of progress the mother . . . has made in the last period of review toward alleviating or mitigating the causes necessitating placement in foster care has been minimal."

The department's next report, dated January 22, 2016, indicated mother was still out of compliance with the case plan. Specifically, mother had only recently enrolled in an inpatient drug treatment program, despite being provided with referrals on multiple occasions since 2014. With respect to random drug testing, mother failed to test on three occasions as requested and tested positive for methamphetamine and amphetamine on December 17, 2015. In response to the positive test result, mother claimed she was not using any drugs and the test result must have been caused by an error at the lab. In addition, mother had not been visiting the children on a regular basis.

Finally, mother disclosed to the department that she was pregnant, but refused to identify the father or disclose how far along the pregnancy was. The department also reported that an extended family member had come forward expressing a desire to adopt the children, should they fail to reunify with mother. The department again recommended terminating mother's reunification services.

On January 22, 2016, mother failed to appear at the 18-month review hearing. At one of the fathers' request, the court continued the hearing to January 27, 2016, at which time the court terminated mother's reunification services and set the matter for a permanency planning hearing under section 366.26 to take place on May 25, 2016.

Also on January 22, 2016, mother enrolled in an in-patient drug and alcohol rehabilitation program which offered all the classes and counseling required by the court's case plan. In April 2016, a counselor from the program advised the department that mother completed 80 days of the residential program and had been attending classes. Mother continued to be focused on reunification with her children as her primary motivation to engage in rehabilitation, which the counselor said "is usually a red flag for our counselors because the mother usually lose [sic] motivation for their own future after reunifying with their children." Although successful completion of the residential program required nine to 12 months, mother left the program after 90 days.

In its May 25, 2016 report, the department reported that extended family members who had a significant relationship with R.L. and A.G. since birth were interested in adopting the children. The department recommended terminating mother's

parental rights and setting adoption as the permanent placement goal for the children. Mother subsequently requested a contested hearing, which the court set for July 27, 2016.

On July 18, 2016, mother filed a petition under section 388 seeking reinstatement of her reunification services and an extension of the time to reunify. Mother asserted she was then in full compliance with the case plan, had completed 90 days in a residential treatment program, and was enrolled in an outpatient treatment program.

The court heard mother's section 388 petition and conducted the contested permanency planning hearing on September 12, 2016. Mother testified regarding her rehabilitation efforts and attempts to comply with the case plan. Although she successfully completed parenting and anger management programs, she admitted she failed to complete other mandated programs. She denied that her home had been in an unsafe and unsanitary condition at the outset of the case, and blamed the children's removal on "financial issues." Further, she stated she was not using drugs or alcohol at that time, and "it had nothing to do with [the] kids getting removed from the home." The department and minor's counsel opposed mother's section 388 petition, recommended terminating mother's parental rights, and further recommended adoption as the permanent plan for the children.

With respect to the section 388 petition, the court acknowledged mother's recent attempt to comply with the case plan but observed that over the course of two years she failed to successfully complete a rehabilitation program. The court concluded that mother's repeated, failed attempts to comply with the case plan did not evidence changed circumstances sufficient

to support the section 388 petition. With respect to the permanency hearing, the court noted mother's visitation with the children during the course of the proceedings had been sporadic and remained monitored despite the passage of more than two years. The court concluded mother was provided ample opportunity to reunify with her children but failed to do so. The court terminated mother's parental rights and ordered adoption as the permanent plan.

Mother timely appeals.

DISCUSSION

The court did not err by denying mother's section 388 petition.

Mother argues the court abused its discretion by denying her section 388 petition, which sought reinstatement of reunification services based on changed circumstances. We disagree.

Section 388, subdivision (a)(1), provides that a parent of a dependent child "may, upon grounds of change of circumstance or new evidence, petition the court in the same action in which the child was found to be a dependent child of the juvenile court . . . for a hearing to change, modify, or set aside any order of court previously made or to terminate the jurisdiction of the court." To obtain the requested modification, the parent must demonstrate both a change of circumstance or new evidence, and that the proposed change is in the best interests of the child. (Cal. Rules of Court, rule 5.570(d); *In re Casey D.* (1999) 70 Cal.App.4th 38, 47.)

"Section 388 provides an 'escape mechanism' for parents facing termination of their parental rights by allowing the

juvenile court to consider a legitimate change in the parent's circumstances after reunification services have been terminated. [Citation.] This procedural mechanism, viewed in the context of the dependency scheme as a whole, provides the parent due process while accommodating the child's right to stability and permanency. [Citation.] After reunification services have been terminated, it is presumed that continued out-of-home care is in the child's best interests. [Citation.] Section 388 allows a parent to rebut that presumption by demonstrating changed circumstances that would warrant modification of a prior court order. [Citation.]" (*In re Alayah J.* (2017) 9 Cal.App.5th 469, 478 [citing *In re Marilyn H.* (1993) 5 Cal.4th 295, 309].)

A parent bringing a section 388 petition has the burden of proving by a preponderance of the evidence that there is new evidence or changed circumstances that make a change of placement in the child's best interests. (*In re Stephanie M.* (1994) 7 Cal.4th 295, 317; *In re Marcelo B.* (2012) 209 Cal.App.4th 635, 642 (*Marcelo B.*)). Thus, we will not disturb a decision on a section 388 petition unless it represents a clear abuse of discretion. (*In re Jasmon O.* (1994) 8 Cal.4th 398, 415-416; *Marcelo B.*, *supra*, at p. 642.)

Mother contends she established changed circumstances by demonstrating her recent and successful efforts to comply with her case plan. Although mother acknowledges she failed to make any progress in that regard before the court terminated reunification services, she urges that her subsequent efforts demonstrate "she has made substantial progress in resolving her parenting issues." Specifically, she notes that she participated in a residential treatment program for three months, during which time she attended drug and alcohol education classes, relapse

prevention and parenting classes, and self-help groups. She also emphasizes her drug tests were negative during that time.

To support a section 388 petition, the change in circumstances must be substantial. (*In re Heraclio A.* (1996) 42 Cal.App.4th 569, 577.) Here, as the court noted, mother made minimal, if any, progress during the first 18 months of the proceedings. Mother enrolled in four drug and alcohol rehabilitation programs during that time, but either left the program of her own accord or was terminated by the program due to her failure to participate. Mother's subsequent efforts at compliance, though somewhat successful, continued her pattern, inasmuch as she left the most recent residential program after three months, rather than continuing for the required nine to 12 months. At best, these facts establish "changing," not changed, circumstances. (See, e.g., *In re Casey D.*, *supra*, 70 Cal.App.4th at p. 49 [denial of section 388 petition affirmed where mother had been drug-free for five months and had a history of engaging in rehabilitation for short periods when required by the court, then relapsing]; *In re Ernesto R.* (2014) 230 Cal.App.4th 219, 223 [denial of section 388 petition appropriate where parent "has a history of drug relapses, is in the early stages of recovery, and is still addressing a chronic substance abuse problem"].) The trial court did not abuse its discretion by concluding that mother's efforts, while admirable, have not yet ripened into real change. (See *In re Kimberly F.* (1997) 56 Cal.App.4th 519, 531, fn. 9 ["It is the nature of addiction that one must be 'clean' for a much longer period than 120 days to show real reform"]; *In re Clifton B.* (2000) 81 Cal.App.4th 415, 423-424 [200 days of sobriety not enough to demonstrate changed circumstances].)

The court also found that even if there were a change in circumstances, the extension of reunification services for mother would not be in the children's best interest. Specifically, the court noted that mother had not progressed beyond monitored visitation in a public setting during the course of the two years during which the court had jurisdiction over the children. The children were removed from mother at a very young age and were well bonded with extended family members who planned to adopt them. "A petition which alleges merely changing circumstances and would mean delaying 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." (*In re Casey D.*, *supra*, 70 Cal.App.4th at p. 47; see also *In re Marilyn H.*, *supra*, 5 Cal.4th at p. 310 ["Childhood does not wait for the parent to become adequate"].) Under the circumstances present in this case, the court did not abuse its discretion by denying mother's section 388 petition.

DISPOSITION

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

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LAVIN, J.

WE CONCUR:

EDMON, P. J.

JOHNSON (MICHAEL), J.*

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