Filed 9/17/13 In re B.G. CA2/3

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

In re B.G., Jr., et al., Persons Coming Under the Juvenile Court Law. _____ LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. MARGARET P., Defendant and Appellant.	B245216 consolidated w/B246042 (Los Angeles County Super. Ct. No. CK87769)

APPEAL from orders of the Superior Court of Los Angeles County, Terry Truong, Juvenile Court Referee. Affirmed.

Ernesto Paz Rey, under appointment by the Court of Appeal, for Defendant and Appellant.

John F. Krattli, County Counsel, James M. Owens, Assistant County Counsel, Jeanette Cauble, Deputy County Counsel for Plaintiff and Respondent.

Margaret P. (mother) appeals from the dependency court's orders of September 4, 2012 denying her petition under Welfare and Institutions Code section 388[1] for an order reinstating reunification services for her children, B.G., Jr. ("son") and S.G. ("daughter") (together, the "children") and December 12, 2012 terminating parental rights. She contends: (1) termination of parental rights violates due process in that the finding of parental unfitness made at the dispositional hearing on July 6, 2011 was not supported by substantial evidence; and (2) denial of her section 388 petition was an abuse of discretion. Respondent contends this court lacks jurisdiction to review the finding of parental unfitness in that mother did not appeal from the July 6, 2011 findings and orders. We conclude we do not have jurisdiction to review the finding and denial of the section 388 petition was not an abuse of discretion. Accordingly, we affirm.

STATEMENT OF FACTS AND PROCEDURE

Son, born in 2007, and daughter, born in 2009, are the children of mother and B.G. (father),[2] who lived together in a long-term relationship. Mother abused methamphetamine. Father abused amphetamine and methamphetamine and had a history of criminal convictions. Mother was not bonded with son, who lived in the home of paternal grandmother for months at a time without mother calling to check on his welfare.

The children were detained from parental custody on May 6, 2011, and a section 300 petition was filed by the Department of Children and Family Services ("Department"). Mother agreed the children should be removed from her custody and placed with paternal grandmother. Mother tested negative for all substances on April 28, 2011.

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1 All further statutory references are to the Welfare and Institutions Code, unless otherwise indicated.

2 Father was found to be the presumed father of the children.

On July 6, 2011, the children were declared dependents of the court based on sustained allegations under section 300, subdivision (b) that father's drug abuse endangered the children. The court found by clear and convincing evidence the children were at substantial risk of physical harm in mother's and father's custody. Custody was taken from the parents and reunification services were ordered. Mother was ordered to participate in six random drug tests, and, if any test was missed or dirty, complete a full drug rehabilitation program. She was awarded unmonitored visits. Father's visits were ordered monitored.

Mother used amphetamine, methamphetamine, and marijuana. Mother did not submit to random drug testing or enroll in a drug rehabilitation program.

Mother visited the children once per month and did not call to check on them. As she and father visited the children together, mother did not take advantage of unmonitored visits. She paid more attention to daughter than to son, and the children were not disturbed when the visits were over. The parents argued during visits, causing the visits to be terminated early. Mother was arrested on September 20, 2011, and released from custody on September 27, 2011. Her visits were ordered to be monitored. Father did not participate in his court-ordered rehabilitation programs and was extremely physically abusive toward mother. Mother did not report the abuse to the police or leave the relationship.

Mother failed to reunify with the children. She did not maintain regular contact with them or participate in a court-ordered program of drug rehabilitation and random testing. Reunification services were terminated on February 8, 2012, and a permanent plan hearing under section 366.26 was set for May 31, 2012.

Following an arrest in February 2012, father was convicted of criminal offenses and sentenced to a year in jail.

Mother did not visit or call the children during the first six months of 2012. She did not inquire about their well-being. She was heavily abusing drugs.

On July 17, 2012, mother enrolled in a drug abuse program.

On September 4, 2012, mother filed a section 388 petition asking the court to reinstate reunification services, vacate the setting of the section 366.26 hearing, and grant her unmonitored visitation, on the ground that she was sober, participating in a drug treatment program, and visiting, and the children would benefit from the requested orders because they were bonded to her. She stated she was delayed in complying with the reunification orders by a medical issue and because she was homeless. Mother presented evidence she was hospitalized for four days in June 2012. She was going to lose her right kidney. She had one visit for two hours in August and one visit for one hour in September 2012. She had two 1-hour visits in October. She declined more visits, citing health and distance concerns. As of October 2, 2012, mother had completed eight of 24 individual sessions, nine of 24 educational groups, and eighteen out of 24 twelve-step meetings. She missed a random drug test on September 21, 2012. She revealed to the court that, when the children were detained in May 2011, she was addicted to methamphetamine, getting high, and endangering her children, but she did not realize it at the time. She denied father committed domestic violence against her.

The Department determined the children were "highly adoptable."

On October 29, 2012, the court denied mother's section 388 petition.[3] The court found mother's circumstances were changing but had not changed and the children's best interest would not be served by granting additional reunification services.

On December 12, 2012, the court terminated parental rights.[4] Mother had had only eight 1-hour monitored visits in 2011 and nine in 2012. The court found by clear and convincing evidence the children were adoptable and it would be detrimental to return them to the parents.

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[3] Mother appealed the order.

[4] Mother appealed the order. The appeals from the denial of the section 388 petition and the order terminating parental rights were consolidated on January 30, 2013.

DISCUSSION

1. *We have no jurisdiction to review the detriment finding.*

Mother contends termination of her parental rights violates due process because substantial evidence does not support the finding that return of the children to her custody would be detrimental. (See *In re P.A.* (2007) 155 Cal.App.4th 1197, 1211-1212 [before parental rights may be terminated, due process requires a finding by clear and convincing evidence that return of the child to parental custody would be detrimental to the child].) This finding was made by a referee at the July 6, 2011 dispositional hearing in support of the order removing the children from her custody. We conclude mother's attack on the finding comes too late. We have no jurisdiction to consider it.

The court of appeal lacks jurisdiction to review an order unless the order was timely appealed. (*Hollister Convalescent Hosp., Inc. v. Rico* (1975) 15 Cal.3d 660, 674 ["when [a] notice [of appeal] has not in fact been filed within the relevant jurisdictional period . . . the appellate court . . . lacks all power to consider the appeal on its merits and must dismiss"].) (Accord, *In re S.B.* (2009) 46 Cal.4th 529, 531-532; *Adoption of Kelsey S.* (1992) 1 Cal.4th 816, 852 [when "the time for an appeal [has] passed, . . . there can be no direct attack on the judgment"]; *Adoption of Alexander S.* (1988) 44 Cal.3d 857, 864 [when a party fails to file a notice of appeal from a judgment, the Court of Appeal "never gain[s] jurisdiction to address the . . . judgment . . ."].) "[A]ppellate jurisdiction is dependent upon the filing of a timely notice of appeal. [Citations.] 'An appeal from the most recent order entered in a dependency matter may not challenge prior orders, for which the statutory time for filing an appeal has passed.' [Citations.]" (*In re Megan B.* (1991) 235 Cal.App.3d 942, 950.)

Mother did not file a notice of appeal from the finding and order, which became final 70 days after July 6, 2011. (Cal. Rules of Court, rules 8.406(a), 5.540(c).) Her appeal from the subsequent order terminating parental rights does not vest this court with jurisdiction to review the prior order, from which no appeal was taken and for which the statutory time for filing an appeal has passed. Therefore, we are without jurisdiction

to address the contention that the order terminating parental rights should be reversed on the ground the prior finding of detriment was not supported by substantial evidence.

2. *Denial of the section 388 petition was not an abuse of discretion.*

Mother contends the dependency court abused its discretion in denying her section 388 petition in that substantial evidence supported granting the petition. We disagree with the contention.

Section 388 provides for modification of an order of the dependency court when the moving party presents evidence of changed circumstances and demonstrates the requested modification is in the child's best interests. (*In re Stephanie M.* (1994) 7 Cal.4th 295, 317.) "In determining whether the petition makes the necessary showing, the court may consider the entire factual and procedural history of the case." (*In re Justice P.* (2004) 123 Cal.App.4th 181, 189.) When a section 388 petition is filed after family reunification services have been terminated, the dependency court's overriding concern is the child's best interests. (*In re Stephanie M., supra,* at p. 317.) The parent's interests in the care, custody and companionship of the child are no longer paramount, and the focus shifts to the needs of the child for permanency and stability. (*Ibid*.)

The dependency court's determination as to whether an order should be modified pursuant to section 388 is reviewed for abuse of discretion. (*In re Stephanie M., supra,* 7 Cal.4th at p. 318.) We may disturb the dependency court's exercise of its discretion only in the rare case when the court has made an arbitrary, capricious or "patently absurd" determination. (*Ibid*.) We do not inquire whether substantial evidence would have supported a different order, reweigh the evidence or substitute our judgment for that of the dependency court. (*Id.* at pp. 318-319.) There is no abuse of discretion where substantial evidence supports the order.[5] (*In re Daniel C. H.* (1990) 220 Cal.App.3d 814, 839.)

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[5] In determining whether an order is supported by substantial evidence, "we look to see if substantial evidence, contradicted or uncontradicted, supports [it]. [Citation.]

Substantial evidence supports the finding circumstances had not changed such that reinstating reunification services and delaying permanency was in the children's best interest. When reunification services were terminated, mother was not participating in a treatment program and was unrehabilitated. Her visits were infrequent, inconsistent, and brief. When her section 388 petition was heard, she was participating in treatment, but had not completed a program and it was unknown whether she would become rehabilitated. Her visits continued to be infrequent, inconsistent, and brief. The children were not upset when the visits were over. The children had been in out-of-home care for 17 months and were highly adoptable. This is substantial evidence supporting the finding circumstances had not changed such that the change of order was in the children's best interest. Mother reargues the evidence and asks us to reweigh it. That is not our role. (*In re Matthew S., supra*, 201 Cal.App.3d at p. 321.) As substantial evidence supports the finding, denial of the section 388 petition was not an abuse of discretion.

In re Hunter S. (2006) 142 Cal.App.4th 1497, cited by mother, which reversed an order denying a parent's section 388 petition to vacate the order setting a section 366.26 hearing and reinstate reunification services, is inapposite. The court held that, where the mother had been deprived of visitation because of the dependency court's failure and refusal for three years to enforce the visitation order, it was an abuse of discretion to deny the petition on the ground of lack of contact or a current bond. (*In re Hunter S., supra*, at pp. 1506-1508.) "By virtue of the court's persistent failure or refusal to enforce its visitation order, Charmaine was denied any chance to demonstrate the bond she once held with her son might be salvageable. By failing to rectify its errors and grant

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In making this determination, we draw all reasonable inferences from the evidence to support the findings and orders of the dependency court; we review the record in the light most favorable to the court's determinations; and we note that issues of fact and credibility are the province of the trial court. [Citation.]" (*In re Heather A.* (1996) 52 Cal.App.4th 183, 193.) "We do not reweigh the evidence or exercise independent judgment, but merely determine if there are sufficient facts to support the findings of the trial court." (*In re Matthew S.* (1988) 201 Cal.App.3d 315, 321.) Thus, the pertinent inquiry is whether substantial evidence supports the finding, not whether a contrary finding might have been made. *(In re Dakota H.* (2005) 132 Cal.App.4th 212, 228.)

the section 388 petition, the court deprived Charmaine of crucial benefits and protections of the dependency scheme, essentially ensuring the termination of parental rights." (*Id*. at p. 1508.) Unlike the facts in *In re Hunter S.*, the lack of a bond and insufficiency of contact in this case was not due to a failure by the court to enforce its visitation orders. It was due to mother's failure to take advantage of the visitation she was offered. The opinion in *In re Hunter S.* has no bearing on this case.

DISPOSITION

The orders are affirmed.

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KLEIN, P. J.

We concur:

CROSKEY, J.

KITCHING, J.