Filed 5/1/18 In re N.T. CA2/1

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

In re N.T., a Person Coming Under the Juvenile Court Law.	B284592 (Los Angeles County Super. Ct. No. DK14224)
LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. B.T., Defendant and Appellant.	

APPEAL from an order of the Superior Court of Los Angeles County, Nichelle Blackwell, Commissioner. Affirmed.

Cristina Gabrielidis, under appointment by the Court of Appeal, for Defendant and Appellant.

Mary C. Wickham, County Counsel, R. Keith Davis, Assistant County Counsel, and Sarah Vesecky, Deputy County Counsel, for Plaintiff and Respondent.

Appellant B.T. (Mother) appeals from juvenile court orders denying her petition under Welfare and Institutions Code section 388[1] and terminating her parental rights under section 366.26 with respect to her son, N.T. (born November 2014). Mother maintains that she satisfied her burden under section 388 to establish changed circumstances and best interests to warrant either resumption of reunification services or return of N.T. to her custody, and that the juvenile court therefore erred in denying her petition. She further contends that in the event we reverse the order denying her petition, we must also reverse the order terminating her parental rights. We conclude that Mother has not demonstrated error and therefore affirm both orders.

FACTUAL AND PROCEDURAL BACKGROUND

N.T. was 11 days shy of his first birthday when the Department of Children and Family Services (DCFS) filed the underlying dependency petition.[2] At the time the petition was filed, N.T. was residing with Mother in a residential treatment center. Mother had been arrested for possession of amphetamine and given the option of going to jail or spending six months in the center with her son. DCFS sought removal of N.T. from Mother's custody after staff members indicated their concern about N.T.'s safety while in Mother's care. The petition alleged, under section 300, subdivision (b)(1), that Mother "has mental and emotional problems, including anxiety and previously experiencing auditory hallucinations which periodically render her unable to provide

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[1] Unless otherwise indicated, further statutory references are to the Welfare and Institutions Code.

[2] The petition named H.C. as N.T.'s alleged father. After a paternity test excluded H.C. as N.T.'s biological father, the court dismissed H.C. from the petition. At the section 366.26 hearing, the court terminated the parental rights of N.T.'s unknown father.

regular care of the child." The petition referenced occasions when Mother left N.T. unsupervised, carried him inappropriately, and placed him near hot soup. The petition further alleged that "[t]hese issues may be due to developmental delays, anxiety, or other mental health problems, which place[] [N.T.] at risk of serious physical harm." N.T. was placed in a confidential foster home, where he remained at the time of the section 366.26 hearing. The family had no prior child welfare history. Mother has a criminal arrest history.

At the detention hearing, the court granted Mother monitored visitation and ordered that she be provided with referrals for services.

Trial scheduled for late January was ultimately held in early March 2016. Mother filed a waiver of rights and entered a no contest plea, after which the court sustained the allegations in the petition, declared N.T. a dependent, and removed N.T. from Mother's custody. The court provided Mother with reunification services and monitored visitation of at least three visits a week for up to three hours each visit, with DCFS having discretion to liberalize the visits. Mother was ordered to participate in a full drug and alcohol program with after-care and random or on-demand drug and alcohol testing every other week, developmentally appropriate parenting, mental health counseling, and an assessment pursuant to Evidence Code section 730 and to follow all recommendations, including taking all prescribed medication. The court scheduled a six-month review hearing for August 30.

In April, Mother was referred for random drug and alcohol testing, and with the exception of one negative test, she failed to show up for the testing through July. As of August 2016, Mother had been visiting N.T. without incident and both appeared to enjoy the visits.

At the six-month review hearing, the court found that Mother was in partial compliance with her case plan and ordered

that reunification services be continued. Mother purportedly had been attending Narcotics Anonymous meetings, but failed to submit court cards or sign-in sheets verifying her attendance. Mother had also failed to appear for an Evidence Code section 730 evaluation scheduled for the previous day. The court set a 12-month review hearing for February 28, 2017.

As of February 2017, N.T. remained in his original foster placement and was said to be calling his foster mother "mama." Mother's visits with N.T. had been infrequent; during the visits which Mother *did* attend, however, Mother "displayed appropriate behavior around the child, but has had a few anxious episodes." According to the visitation monitor, N.T. "is sad when the caregiver leaves, but Mother attempts to sooth[e] the child." Although Mother had participated in counseling with her therapist and her psychiatrist, she failed to consistently submit to random drug and alcohol testing. DCFS's adoptions worker identified adoption by N.T.'s current caregiver as the most appropriate permanent plan, and recommended terminating services and scheduling a section 366.26 hearing.

A contested 12-month review hearing was held on April 13, 2017. Mother did not appear. The court terminated Mother's reunification services, scheduled a section 366.26 hearing for August 10, and deemed Mother served "notice in open court" through her counsel. The court ordered Mother's monitored visits to remain in full force and effect pending the hearing.

By letter dated April 16, 2017, the court-appointed Evidence Code section 730 evaluator indicated that she had met with Mother on April 7 and had administered a Minnesota Multiphasic Personality Inventory test. The evaluator indicated that Mother's test score was elevated, which could have been due to the fact that Mother had gone off her medication, as advised by her mental health provider, because she was pregnant. The evaluator

found Mother to be childlike and unrealistic and concluded that an infant would not be safe in her care. The evaluator recommended, however, that Mother be sent to her again after she gives birth and resumes her medication.

On August 10, 2017, the date scheduled for the section 366.26 hearing, Mother filed a petition for modification under section 388. She asked the court to modify its order terminating reunification services by either reinstating services or returning N.T. to her care. Mother alleged that she had "substantially complied with her case plan by enrolling and consistently participating in a drug treatment program that includes random testing and individual therapy." Attached to her petition was a letter from her treatment center indicating that her treatment plan consisted of education group therapy three times a week, process group therapy three times a week, relapse prevention group therapy once a week, stress reduction/relaxation group therapy once a week, symptom management group therapy once a week, random and ongoing drug screens throughout treatment, multifamily group therapy once a week, and individual therapy one hour a week. Mother asserted that she is bonded to N.T., and has demonstrated an ability to maintain sobriety and address her case issues through counseling in order to care for N.T.

After hearing argument, the court denied the petition, finding no change in circumstances and no showing that N.T.'s best interests would be served by the requested modification. The court then found by clear and convincing evidence that it was likely that N.T. will be adopted, that N.T.'s return to Mother's custody would be detrimental to his well-being, and that there was no exception to terminating parental rights. The court designated N.T.'s foster mother as his prospective adoptive parent.

Mother filed her notice of appeal the same day.

DISCUSSION

Section 388 allows a parent in a dependency proceeding to petition the juvenile court to change, modify, or set aside any previous order, including an order terminating reunification services. The parent must show by a preponderance of the evidence that (1) there is new evidence or a change of circumstance, and (2) the proposed modification would be in the "best interests" of the child. (§ 388; *In re Stephanie M.* (1994) 7 Cal.4th 295, 320; *In re Matthew P.* (1999) 71 Cal.App.4th 841, 849.) Following termination of reunification services, "the parents' interest in the care, custody and companionship of the child are no longer paramount. Rather, at this point 'the focus shifts to the needs of the child for permanency and stability.' " (*In re Stephanie M., supra,* 7 Cal.4th at p. 317.) At this stage of the proceedings, a court hearing a section 388 petition "must recognize this shift of focus in determining the ultimate question before it, that is, the best interests of the child." (*Ibid;* accord, *In re Marilyn H.* (1993) 5 Cal.4th 295, 309-310.)

A section 388 petition, particularly one that is filed the same day as a scheduled section 366.26 hearing, is essentially a parent's last chance to prevent the termination of his or her parental rights. (*In re Kimberly F.* (1997) 56 Cal.App.4th 519, 530.) As such, section 388 serves as an " 'escape mechanism' when parents complete a reformation in the short, final period after the termination of reunification services but before the actual termination of parental rights." (*Id.* at p. 528.) In ruling on such a petition, the juvenile court considers the following factors: "[T]he seriousness of the reason for the dependency and the reason the problem was not overcome; the relative strength of the parent-child and child-caretaker bonds and the length of time the child has been in the system; and the nature of the change in circumstance, the

ease by which the change could be achieved, and the reason the change was not made sooner." (*In re Aaliyah R.* (2006) 136 Cal.App.4th 437, 446-447.)

The denial of a section 388 petition is committed to the sound discretion of the trial court and will not be disturbed on appeal unless the parent establishes an abuse of discretion. (*In re Casey D.* (1999) 70 Cal.App.4th 38, 47.) This discretion, however, "is not a capricious or arbitrary discretion, but an impartial discretion, guided and controlled in its exercise by fixed legal principles. It is not a mental discretion, to be exercised *ex gratia*, but a legal discretion, to be exercised in conformity with the spirit of the law and in a manner to subserve and not to impede or defeat the ends of substantial justice.' [Citations.]" (*In re Robert L.* (1993) 21 Cal.App.4th 1057, 1066.)

In denying the petition, the court found that Mother had not established either prong of the statute. It determined that Mother's circumstances were "changing," but that it was "a little late in the program." More importantly, however, the court found that Mother had not shown it would be in N.T.'s best interests to delay permanence in an adoptive home. The court noted that Mother had not had a single visit with N.T. during the past six months.

On appeal, Mother insists that her circumstances "were not merely changing, but had changed." We disagree. Although Mother may have completed an inpatient treatment program, she had not yet completed her outpatient program. Moreover, she misconstrues the comments made by her Evidence Code section 730 evaluator; even if, as she asserts, the evaluator did *not* conclude that she was *permanently* unfit to care for a child, the evaluator *did* conclude that an infant would not be safe with her *at that time*. Furthermore, Mother's petition was silent as to *how* she was benefiting from her programs. Indeed, merely attending sessions is

not enough to demonstrate that changes are taking place. Moreover, even if Mother was making an effort to improve her life, she had not visited with N.T. for approximately six months.

Nonetheless, even if we were to view Mother's circumstances as "changed," rather than "changing," she failed to demonstrate that N.T.'s best interests would be served by granting the requested relief. Indeed, " '[i]t is not enough for a parent to show *just* a genuine change of circumstances under the statute. The parent must show that the undoing of the prior order would be in the best interests of the child. [Citation.]' [Citation.] The fact that the parent 'makes relatively last-minute (albeit genuine) changes' does not automatically tip the scale in the parent's favor. [Citation.]" (*In re D.R.* (2011) 193 Cal.App.4th 1494, 1512.)

Mother faults the court for concluding that she made no showing of a bond between N.T. and her, pointing to evidence that they were bonded "at the outset of [the] dependency." Although she might be right about that, she made an insufficient showing that they were bonded at the time of the section 388 hearing. It is reasonable to infer that any bond with such a young child that might have existed in the past had dissipated during the recent six months during which Mother had not visited her child. As for N.T.'s interest in having a relationship with an unborn sibling, that alone cannot override the showing that Mother's circumstances had not changed enough to merit either placement with her or a longer reunification period.

We therefore find no abuse of discretion in the denial of Mother's section 388 petition. And, in light of our conclusion, we need not address Mother's contention that reversal of the order denying her petition requires reversal of the order terminating her parental rights.

DISPOSITION

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

NOT TO BE PUBLISHED.

ROTHSCHILD, P. J.

We concur:

CHANEY, J.

JOHNSON, J.