Filed 9/12/16 In re Andrew P. CA2/7

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

In re ANDREW P., a Person Coming Under the Juvenile Court Law.	B269596 (Los Angeles County Super. Ct. No. CK97690)
LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. ASHLEY R. et al., Defendants and Appellants.	

APPEALS 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 Ashley R.

Jack A. Love, under appointment by the Court of Appeal, for Defendant and Appellant Andrew L.P.

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

Ashley R., the mother of now-four-year-old Andrew P. Jr. (Andrew) appeals the juvenile court's January 7, 2016 order summarily denying her petition pursuant to Welfare and Institutions Code section 388[1] to reinstate family reunification services and/or return Andrew to her custody and terminating her parental rights under section 366.26. Ashley contends the juvenile court erred in denying her section 388 petition without a hearing and in ruling she had failed to establish the parent-child-relationship exception to termination of parental rights (§ 366.26, subd. (c)(1)(B)(i)). Andrew's presumed father, Andrew P. (Father), also filed a notice of appeal from the January 7, 2016 order terminating parental rights but has simply joined Ashley's arguments regarding the purported errors in the court's termination order. (Cal. Rules of Court, rule 8.200(a)(5)). We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

1. *The Initiation of Dependency Proceedings and Removal of Andrew*

The Los Angeles County Department of Children and Family Services (Department) initiated dependency proceedings in February 2013 when Andrew was 11 months old, due to Ashley's abuse of methamphetamine, Ecstasy and marijuana and general neglect of Andrew's basic needs. Ashley was then 17 years old and a dependent of the court living in a licensed group home. An amended petition alleged 17-year-old Father's substance abuse and criminal activities also endangered Andrew.

In June 2013 at a combined jurisdiction and disposition hearing the court sustained the amended section 300 petition, found Andrew a person described by section 300, subdivision (b), declared Andrew a dependent of the court, removed him from Ashley's custody and placed him with his paternal relatives. Ashley and Father were granted family reunification services with monitored visitation and were ordered to participate in individual counseling, parenting classes and substance abuse programs and to submit to random drug testing.

---

1 Statutory references are to this code unless otherwise stated.

2. *Ashley's Compliance with Her Case Plan*

On March 12, 2014, at the contested six-month review hearing (§ 366.26, subd. (e)), the juvenile court found Ashley in compliance with her case plan and ordered continued reunification services for her with discretion to the Department to liberalize her visits. The court found Father was not in compliance with his case plan and terminated his reunification services. The court continued the matter to August 5, 2014 for the permanency review hearing (§ 366.22).

For the initial permanency review hearing in August the Department reported Ashley had tested negative for drugs since January 2014, had visited Andrew regularly and had been very attentive to his needs. As a result of this progress, in July 2014 the Department exercised its discretion to liberalize Ashley's visits to include unmonitored and overnight contact with Andrew. Nonetheless, the Department advised the court it could not recommend returning Andrew to Ashley's custody by the 18-month statutory deadline. Because Ashley had cancelled several meetings with her wraparound services team (other than her therapist) and on many other occasions had refused to cooperate with them, the team had been unable to provide an assessment of Ashley's progress. Under these circumstances, the Department did not feel comfortable recommending Andrew's return to Ashley and concluded it had no choice but to recommend termination of reunification services. Ashley objected, and the court set a contested section 366.22 hearing for November 14, 2014.

3. *The Contested 18-month Permanency Review Hearing and the Court's Order Returning Andrew to Ashley's Custody*

On November 14, 2014 the Department changed its recommendation. The Department told the court Ashley was in full compliance with her case plan and recommended that Andrew be returned to her on the condition she continue actively participating in the court-ordered programs and services. The court agreed with the Department's recommendation and returned Andrew to Ashley's custody. The court continued the matter to May 5, 2015 for a section 364 review hearing.

4. *The Department's Section 387 Petition To Redetain Andrew*

On January 23, 2015, a little more than two months after Andrew was returned to Ashley's custody, the Department filed a supplemental petition pursuant to section 387 to redetain Andrew. The Department alleged Ashley had missed three court-ordered counseling sessions and two random drug tests and her failure to comply with court-ordered programs endangered Andrew's safety. The Department also alleged Ashley had told social workers on December 30, 2014 that she was unable to provide for Andrew's care even with the services she was receiving. The court ordered Andrew detained and placed under the temporary care, custody and supervision of the Department. Ashley was granted twice-weekly monitored visitation.

On March 13, 2015 the juvenile court sustained the supplemental petition, concluding its previous disposition (placement with Ashley under the Department's supervision) had not been effective in protecting Andrew. No additional family reunification services were ordered because Ashley had already received more than two years of services, more than permitted by statute. The court set the matter for a section 366.26 selection and implementation hearing on July 9, 2015. After twice continuing the matter, the court set the contested section 366.26 hearing for January 7, 2016.

5. *Ashley's Section 388 Petition for Modification*

On January 7, 2016 Ashley filed a section 388 petition requesting the court to return Andrew to her custody and/or provide her with additional reunification services. Ashley asserted she had completed her court-ordered counseling and parenting classes, had remained sober (despite missing drug tests) for more than one year and had been enrolled in a drug counseling program that included random drug testing since November 5, 2015. Emphasizing that Andrew had been in several different placements since he was initially removed from her custody and that she had been the only constant in his young life, Ashley argued a modification of the court's order terminating reunification services was in Andrew's best interests.

6. *The Court's Summary Denial of Ashley's Section 388 Petition, the Section 366.26 Hearing and Identification of Adoption as Andrew's Permanent Plan*

At the beginning of the contested section 366.26 hearing on January 7, 2016, the court summarily denied Ashley's section 388 petition, ruling the petition on its face demonstrated, at most, changing circumstances, not the requisite changed circumstances, and modification of the court's order terminating reunification services was not in Andrew's best interests. The court then addressed termination of Ashley and Father's parental rights.

The Department reported Ashley's visits with Andrew had been inconsistent since August 2015. She had missed 15 scheduled visits between August 6, 2015 and November 11, 2015. Although Ashley had been admitted to the hospital from December 7, 2015 through December 15, 2015 and was unable to visit Andrew during that time, she did not resume consistent visits with Andrew after her discharge. Rather, she continued to confirm and then cancel scheduled visits with Andrew several more times. Andrew had been at his current placement with his prospective adoptive parents for three months and was thriving in their custody. They wished to adopt him.

Ashley testified at the hearing that she and Andrew had a special parental bond. He had been in several different placements since he was first detained from her custody in February 2013, and she had been the only constant in his life. Andrew was joyful when he was with her and cried each time he had to leave. Ashley had tried very hard to visit Andrew since he was last detained from her custody, but her recent hospitalization for one week in December 2015 had made visits difficult. (She acknowledged on cross-examination that she had missed several visits before she was hospitalized). Ashley argued that, because of the strong and constant bond she and Andrew shared, it would be detrimental to Andrew to terminate her parental rights.

The court found by clear and convincing evidence that it was in Andrew's best interests to be freed for adoption, stating Ashley had not demonstrated the parent-child-relationship exception to termination contained in section 366.26, subdivision (c)(1)(B)(i)

applied. The court stated, "This court has had this case in my court for almost, as counsel indicated, three years. During that period of time, this child was out of your care and custody until, I believe, October of 2014. He was placed back with you, [and], within three months, you were violating court orders, not testing, not doing what you needed to do. . . . [T]his court really has bent over backwards to try to get this child back with you, and it was just unsuccessful." The court terminated Ashley's and Father's parental rights and identified adoption as the permanent plan.

DISCUSSION

1. *The Juvenile Court Did Not Abuse Its Discretion in Summarily Denying Ashley's Section 388 Petition*

a. *Governing law and standard of review*

Section 388 provides for modification of juvenile court orders when the moving party presents new evidence or a change of circumstances and demonstrates modification of the previous order is in the child's best interests. (*In re Stephanie M.* (1994) 7 Cal.4th 295, 317; *In re Jasmon O.* (1994) 8 Cal.4th 398, 415; *In re Y.M.* (2012) 207 Cal.App.4th 892, 919; see Cal. Rules of Court, rule 5.570(e).)[2] To obtain a hearing on a section 388 petition, the parent must make a prima facie showing as to both of these elements. (*In re Brittany K.* (2005) 127 Cal.App.4th 1497, 1504; *In re Justice P.* (2004) 123 Cal.App.4th 181, 188.) The petition should be liberally construed in favor of granting a hearing, but "[t]he 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.* (1999) 77 Cal.App.4th 799, 806; accord, *In re Brittany K.*, at p. 1505.) "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.*, at p. 189.)

---

2 Section 388 provides a parent or other interested party "may, upon grounds of change of circumstance or new evidence, petition the court . . . for a hearing to change, modify, or set aside any order of court previously made. . . . [¶] . . . [¶] . . . If it appears that the best interests of the child . . . may be promoted by the proposed change of order, . . . the court shall order that a hearing be held . . . ."

Even if a parent presents prima facie evidence supporting the allegations contained in the petition, however, "[a] petition [that] 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*. (1999) 70 Cal.App.4th 38, 47; accord, *In re Mary G*. (2007) 151 Cal.App.4th 184, 206.) The parent must also "show that the undoing of the prior order" would be in the child's best interests. (*In re Kimberly F*. (1997) 56 Cal.App.4th 519, 529; accord, *In re Mickel O*. (2011) 197 Cal.App.4th 586, 615.)

We review the summary denial of a section 388 petition for abuse of discretion. (*In re A.S.* (2009) 180 Cal.App.4th 351, 358; *In re Brittany K.*, *supra*, 127 Cal.App.4th at p. 1505.) We may disturb the juvenile court's exercise of that discretion only in the rare case when the court has made an arbitrary, capricious or "patently absurd" determination. (*In re Stephanie M.*, *supra*, 7 Cal.4th at p. 318.)

b. *The summary denial of Ashley's section 388 petition was justified*

The only new evidence provided in Ashley's section 388 petition was that she had enrolled two months earlier and was successfully participating in a drug treatment program. While this was certainly a positive development, two months of treatment following Andrew's redetention was a far cry from a sustained recovery. At most, the petition demonstrated a prima facie case of changing, not changed, circumstances. The court did not abuse its discretion in summarily denying Ashley's section 388 petition. (*In re Casey D.*, *supra*, 70 Cal.App.4th at p. 47.)

2. *The Juvenile Court Did Not Err in Ruling Ashley Had Failed To Establish the Parent-child-relationship Exception to Termination of Parental Rights*

a. *Governing law and standard of review*

Section 366.26 governs the juvenile court's selection and implementation of a permanent plan for a dependent child. The express purpose of a section 366.26 hearing is "to provide stable, permanent homes" for dependent children. (§ 366.26, subd. (b).) Once the court has decided to end parent-child reunification services, the legislative

preference is for adoption. (§ 366.26, subd. (b)(1); *In re S.B.* (2009) 46 Cal.4th 529, 532 ["[i]f adoption is likely, the court is required to terminate parental rights, unless specified circumstances compel a finding that termination would be detrimental to the child"]; *In re Celine R.* (2003) 31 Cal.4th 45, 53 ["[I]f the child is adoptable . . . adoption is the norm. Indeed, the court must order adoption and its necessary consequence, termination of parental rights, unless one of the specified circumstances provides a compelling reason for finding that termination of parental rights would be detrimental to the child."]; see *In re Marilyn H.* (1993) 5 Cal.4th 295, 307 [once reunification efforts have been found unsuccessful, the state has a "compelling" interest in "providing stable, permanent homes for children who have been removed from parental custody," and the court then must "concentrate its efforts . . . on the child's placement and well-being, rather than on a parent's challenge to a custody order"]; see also *In re Noah G.* (2016) 247 Cal.App.4th 1292, 1299-1300; *In re G.B.* (2014) 227 Cal.App.4th 1147, 1163.)

Section 366.26 requires the juvenile court to conduct a two-part inquiry at the selection and implementation hearing. First, it determines whether there is clear and convincing evidence the child is likely to be adopted within a reasonable time. (*Cynthia D. v. Superior Court* (1993) 5 Cal.4th 242, 249-250; *In re D.M.* (2012) 205 Cal.App.4th 283, 290.) Then, if the court finds by clear and convincing evidence the child is likely to be adopted, the statute mandates judicial termination of parental rights unless the parent opposing termination can demonstrate one of the enumerated statutory exceptions applies. (§ 366.26, subd. (c)(1)(A) & (B); see *Cynthia D.*, at pp. 250, 259 [when child adoptable and declining to apply one of the statutory exceptions would not cause detriment to the child, the decision to terminate parental rights is relatively automatic].)

One of the statutory exceptions to termination is contained in section 366.26, subdivision (c)(1)(B)(i), which permits the court to order some other permanent plan if "[t]he parents have maintained regular visitation and contact with the child and the child would benefit from continuing the relationship." The "benefit" prong of the exception requires the parent to prove he or she has maintained regular visitation and his or her

relationship with the child "'promotes the well-being of the child to such a degree as to outweigh the well-being the child would gain in a permanent home with new, adoptive parents.'" (*In re Marcelo B.* (2012) 209 Cal.App.4th 635, 643; accord, *In re Amber M.* (2002) 103 Cal.App.4th 681, 689; see *In re Autumn H.* (1994) 27 Cal.App.4th 567, 575 ["[t]he court balances the strength and quality of the natural parent-child relationship in a tenuous placement against the security and the sense of belonging a new family would confer"].)

A showing the child derives some benefit from the relationship is not a sufficient ground to depart from the statutory preference for adoption. (See *In re Angel B.* (2002) 97 Cal.App.4th 454, 466 ["[a] biological parent who has failed to reunify with an adoptable child may not derail an adoption merely by showing the child would derive *some* benefit from continuing a relationship maintained during periods of visitation with the parent"].) No matter how loving and frequent the contact, and notwithstanding the existence of an "'emotional bond'" with the child, "'the parents must show that they occupy "a parental role" in the child's life.'" (*In re K.P.* (2012) 203 Cal.App.4th 614, 621; *In re I.W.* (2009) 180 Cal.App.4th 1517, 1527.) Factors to consider include "'"[t]he age of the child, the portion of the child's life spent in the parent's custody, the 'positive' or 'negative' effect of interaction between parent and child, and the child's particular needs."'" (*In re Marcelo B., supra,* 209 Cal.App.4th at p. 643.)

The parent has the burden of proving the statutory exception applies. (*In re I.W., supra,* 180 Cal.App.4th at p. 1527; *In re Derek W.* (1999) 73 Cal.App.4th 823, 826.) The court's decision a parent has not satisfied this burden may be based on either or both of two component determinations—whether a beneficial parental relationship exists and whether the existence of that relationship constitutes "a compelling reason for determining that termination would be detrimental to the child." (§ 366.26, subd. (c)(1)(B); see *In re K.P., supra,* 203 Cal.App.4th at p. 622; *In re Bailey J.* (2010) 189 Cal.App.4th 1308, 1314.) When the juvenile court finds the parent has not established the existence of the requisite beneficial relationship, our review is limited to determining whether the evidence compels a finding in favor of the parent on this issue as

a matter of law. (*In re I.W., supra,* 180 Cal.App.4th at pp. 1527-1528.)[3] When the juvenile court concludes the benefit to the child derived from preserving parental rights is not sufficiently compelling to outweigh the benefit achieved by the permanency of adoption, we review that determination for abuse of discretion. (*In re K.P.*, at pp. 621-622; *In re Bailey J.*, at pp. 1314-1315.)

b. *The evidence does not compel a finding as a matter of law that Ashley's bond with Andrew rose to the level of a parental relationship; and, even if it did, Ashley has not demonstrated the bond she shared with Andrew outweighed the benefits achieved by the permanency of adoption*

Ashley contends the Department's report in July 2015 that Andrew felt happy and comfortable in her care and "[m]other and child appear to have a bond with one another" compelled a finding as a matter of law that she and Andrew shared a parent/child relationship. It does not. Andrew had been removed from Ashley's care and custody for nearly three of his four years of life. Ashley's visits with Andrew were loving and appropriate, but the court found their emotional bond did not rise to the level of a parental relationship. Nothing in the evidence Ashley cites, or in this record as a whole, compels a different conclusion as a matter of law. (*In re K.P.*, *supra*, 203 Cal.App.4th at p. 621 [emotional bond not enough to establish parental relationship]; *In re I.W., supra,* 180 Cal.App.4th at p. 1527 [same].)

Even if Ashley could establish a parental bond, however, she has not demonstrated that termination of her parental rights would be detrimental to Andrew.

---

3 Because the juvenile court's factual determinations are generally reviewed for substantial evidence, it has often been posited a challenge to a finding that no beneficial relationship exists is similarly reviewed for substantial evidence. (See, e.g., *In re Bailey J., supra,* 189 Cal.App.4th at p. 1314; *In re Jasmine D.* (2000) 78 Cal.App.4th 1339, 1351.) The parent's failure to carry his or her burden of proof on this point, however, is properly reviewed, as in all failure-of-proof cases, for whether the evidence compels a finding in favor of the appellant as a matter of law. (*In re Aurora P.* (2015) 241 Cal.App.4th 1142, 1157; see *In re I.W., supra,* 180 Cal.App.4th at pp. 1527-1528 ["where the issue on appeal turns on a failure of proof at trial, the question for a reviewing court becomes whether the evidence compels a finding in favor of the appellant as a matter of law"]; *Almanor Lakeside Villas Owners Assn. v. Carson* (2016) 246 Cal.App.4th 761, 769 [same].)

Although Ashley again emphasizes she has been the only constant figure in Andrew's young life, this argument ignores her own inconsistent behavior, including her last-minute cancellations of numerous visits with him after she had confirmed them. The court acknowledged that Ashley loved Andrew and Andrew enjoyed spending time with her, but determined that the emotional bond Ashley shared with Andrew was not sufficiently compelling to outweigh the benefits to him of the permanency of adoption. Ashley has not demonstrated the court's finding on this point was an abuse of its discretion.[4]

DISPOSITION

The juvenile court's January 7, 2016 order is affirmed.

PERLUSS, P. J.

We concur:

ZELON, J.

SEGAL, J.

---

[4] Father joined Ashley's arguments, correctly observing that, if the order terminating Ashley's parental rights were reversed, the order terminating his parental rights would also have to be reversed even though there was no separate or independent error pertaining to him. (*In re Mary G.*, *supra*, 151 Cal.App.4th at p. 208; *In re DeJohn* (2000) 84 Cal.App.4th 100, 110; Cal. Rules of Court, rule 5.725(a)(2) [court may not terminate rights of only one parent unless that parent is the only surviving parent or unless rights of other parent have already been terminated or the other parent has relinquished custody of the child to the welfare department].) Our affirmance of the juvenile court's order disposes of Father's appeal.