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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

In re ANTHONY C., A Person
Coming Under the Juvenile Court
Law.

B287955

(Los Angeles County
Super. Ct. No. DK12128)

LOS ANGELES COUNTY
DEPARTMENT OF CHILDREN
AND FAMILY SERVICES,

Plaintiff and Respondent,

v.

RICHARD C., et. al.,

Defendants and Appellants.

APPEAL from orders of the Superior Court of Los Angeles
County, Kristin Byrdsong, Referee. Affirmed.

Nancy O. Flores, under appointment by the Court of
Appeal, for Defendant and Appellant, Richard C.

Michelle L. Jarvis, under appointment by the Court of Appeal, for Defendant and Appellant, Carmen G.

Mary C. Wickham, County Counsel, R. Keith Davis, Assistant County Counsel, and Jessica S. Mitchell, Deputy County Counsel, for Plaintiff and Respondent.

Appellants Richard C. (Father) and Carmen G. (Mother) appeal the order denying Father's petition for modification under Welfare and Institutions Code section 388 and the order terminating parental rights under Welfare and Institutions Code section 366.26.¹ Appellants contend the court abused its discretion in concluding that his requested modification of prior court orders to provide additional reunification services was not in the best interest of their son, Anthony C., and in concluding that the beneficial parental relationship exception to terminating parental rights did not apply. Finding no abuse of discretion or other error, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

A. Detention

In July 2015, Anthony, then 6, was taken into protective custody by the Los Angeles County Sheriff's Department after Father was arrested for assaulting and threatening the paternal grandparents in Anthony's presence.² According to the deputies'

¹ All further statutory references are to the Welfare and Institutions Code.

² At the time of the July incident, the Department of Children and Family Services (DCFS) was investigating

report, Father had threatened to kill the paternal grandparents and had picked up two kitchen knives to back up his threat. The grandmother convinced him to put the knives down, but Father punched the grandfather in the chest, causing him to smash into a door and cut his elbow. Father told the grandfather that if he called the police, Father would burn the house down and “kill everyone.” The grandmother told deputies that Father was a methamphetamine user, who had been violent in the past. Father was charged with assault with a deadly weapon, criminal threats and child endangerment.

Mother was unavailable to care for Anthony, as she had been arrested the day before for possessing brass knuckles. According to the police report for that incident, Father had threatened a rental car employee by pulling the brass knuckles from his pocket, but when the police arrived they were in Mother’s purse. The grandparents stated they were unable to care for Anthony, as they both worked and had no childcare. The boy was detained and placed in foster care.³

Interviewed by the caseworker, Father denied assaulting or threatening the grandfather. He admitting using marijuana every day for medicinal purposes and using methamphetamine every other day. He denied using drugs in front of Anthony. Both Mother and Father denied domestic violence. Anthony reported seeing Father hit Mother and Mother bite Father, and

allegations of domestic violence from February, May and June 2015, and an allegation that both parents were frequently “high.”

³ In September 2015, Anthony was transferred to the foster home where he now resides with his prospective adoptive parents.

said that Father smoked “weed” in his presence. Anthony’s school reported he was frequently absent, and had missed speech therapy, reading and math intervention sessions. He was behind other students of his age, working at a preschool level. He also had problems with impulse control and had been involved in fights on campus. He was suspected of having autism and attention deficit hyperactivity disorder.

B. Reunification Period and Father’s First Section 388 Petition

Interviewed prior to the jurisdictional hearing, Mother said that Father had been using drugs for the prior 18 months. She again denied any domestic violence. However, the caseworker learned she had been arrested for domestic violence in 2010 and 2013. Father, then 32, said he began using marijuana when he was 17 and first tried methamphetamine when he was 21. He claimed to have had periods of sobriety in the past, for approximately a year after he completed a residential substance abuse program and for nine months while he was participating in Narcotics Anonymous. But drinking alcohol and smoking marijuana caused him to relapse and again use methamphetamine. He also claimed to have stopped using methamphetamine for a period after Anthony’s birth. He denied using methamphetamine in the home, but said he sometimes left home for days at a time to engage in a drug binge.

At the September 2015 jurisdictional hearing, Father acceded to jurisdiction based on the following facts, found true by the court: (1) Anthony had been “exposed to a violent confrontation between [Father] and the [paternal grandfather],” in which Father had “grabbed the paternal grandfather,” “struck

the paternal grandfather's chest with [his] fists," "pushed the paternal grandfather against a door," "brandished two knives," and "threatened to burn down the paternal grandparents[]" home"; (2) Father and Mother "have a history of domestic violence and engaging in violent altercations in the presence of the child," including an incident in which Father struck Mother in the stomach; (3) Father "has a history of substance abuse and is a current abuser of methamphetamine and marijuana which renders [Father] incapable of providing regular care for the child" and had been "under the influence of methamphetamine and marijuana, while the child was in [his] care and supervision"; and (4) Father and Mother had "created a detrimental environment by failing to ensure that the child have regular school attendance . . . therefore not allowing the child to participate in the remedial services for required special education services and intervention recommended in his Individualized Education Plan."

The court ordered Father to participate in individual counseling to address case issues, parenting education for special needs children, an anger management program, a substance abuse program and random drug testing. Mother was ordered to participate in an anger management program, parenting education for special needs children and individual counseling to address case issues.

Prior to the May 2016 review hearing, DCFS reported that Father and Mother were "minimal[ly] compliant" with their case plans. Father had been released from detention in November 2015 and enrolled by the caseworker into a substance abuse treatment program, but there was no evidence he was participating and he had been a "no show" for five out of six scheduled drug tests. Father had not started parenting classes or

therapy, and the caseworker could not confirm he had enrolled in an anger management program. Mother's progress was similarly deficient. Anthony had been engaging in aggressive behavior and was in therapy. He told the caseworker he liked living with his foster parents. DCFS recommended termination of both parents' reunification services. By the time of the hearing, Father claimed to have begun therapy and parenting classes for special needs children and provided proof of enrollment in an anger management program. The court continued reunification services for both parents.

Following the initial review hearing, Father continued to be a "no show" for drug tests and could not provide proof of enrollment in individual therapy, but he was making progress in his anger management program and parenting classes.⁴ Mother was terminated from her individual therapy for nonattendance.

In September 2016, Anthony's foster parents reported he was receiving special education under an IEP (individualized education plan) and doing well. Father and Mother were visiting once a week for 90 minutes each, although each was entitled to three hours. They were not keeping in contact with the caseworker. DCFS again recommended termination of reunification services. Prior to the November 2016 hearing, Mother enrolled in anger management and re-enrolled in individual therapy. The court terminated reunification services for Father, but continued services to the 18-month review hearing for Mother.

In January 2017, Mother reported completing an anger management program, but the program director said he had

⁴ Father later admitted he had avoided drug testing because he was continuing to use methamphetamine.

noticed some “red flags” in her interactions with Father. Mother had ended her individual therapy, believing the therapist to be insufficiently credentialed, and had not located a new therapist. Father reported he had been sober 20 days “and this was the most he ha[d] ever been sober.” Mother acknowledged she had been the financial provider for the family throughout their relationship because “the entire time [F]ather had been under the influence of meth.” The caseworker reported Anthony had been enrolled in intensive coordinated services due to repeated displays of aggression. The foster parents reported their desire to adopt Anthony. They had an approved home study.

In February 2017, Father filed a petition under section 388 to modify prior court orders. He presented evidence that between November 2016 and February 2017, he had completed phase one of a drug treatment program and that he had begun participating in phase two. He was testing negative for drugs and attending 12-step meetings. He had completed the court-ordered parenting classes and anger management program. He was visiting Anthony two to three hours weekly. He asked for reinstatement of reunification services or to have Anthony placed with him. The court set a hearing on the petition and continued the hearing on termination of Mother’s reunification services. DCFS recommended Father’s petition be denied. The caseworker contended that Father “lack[ed] insight into his role as to why Anthony was removed from his care” and stated that Anthony was “stable and thriving” in his current placement with the prospective adoptive parents. Interviewed by the caseworker in April 2017, Mother reported that Father had lapsed and was using methamphetamine. Mother said she had no intention of terminating their relationship and wanted Father to care for

Anthony while she worked to support them. At the April 4, 2017 hearing, Father withdrew his section 388 petition due to his relapse; the court terminated Mother's reunification services and set a section 366.26 hearing, which was continued to October 2017.

C. Additional 388 Petitions and Termination of Parental Rights

On July 21, 2017, Mother filed a section 388 petition. She said she was no longer living with Father and was in full compliance with her case plan. The court set a hearing. Father filed a second section 388 petition on October 3, 2017, again seeking additional reunification services and unmonitored visitation. He claimed to be in full compliance with his case plan. According to the petition, in June 2017, he had resumed a drug treatment program and testing, and had been testing negative other than for trace amounts of THC. The court set a hearing on Father's petition to coincide with the hearing on Mother's petition and the section 366.26 hearing.

The August 2017 section 366.26 report stated that Anthony had "thrived in out of home care," that the majority of DCFS's concerns about him, including limited speech and disruptive, violent and impulsive behaviors, had been eradicated, and that he had benefitted from participation in mental health services. The caseworker believed Mother and Father "still lack[ed] insight into their role in the family situation." For example, they "continue[d] to deny that there was any violence between them or by [Father] toward [the paternal grandfather]." They had "not taken any interest in maintaining contact with school staff and service providers in regard to Anthony's needs, progress and

participation in services.” On the other hand, the foster parents had paid “close attention” to Anthony’s “many special needs.” DCFS recommended termination of parental rights and adoption by the current caregivers.

Prior to the joint hearing on the section 388 petitions and section 366.26 hearing, Father told the caseworker he had been sober since May 29, “the longest period of sobriety since he started using illicit drugs when he was 14 years old,” and was committed to staying sober. He claimed he had acquired better tools for maintaining sobriety. He attributed all of the family’s problems to his drug use, downplaying the role of domestic violence. Mother and Father continued to visit Anthony weekly for 1-1/2 hours each. The caseworker observed one of Father’s visits and reported that Father “demonstrate[d] adequate parenting skills,” “engage[d] with [Anthony] through age appropriate play,” and was “emotionally present and actively responsive to Anthony’s needs.” Anthony “consistently enjoy[ed] visitation with [F]ather.”

In a last minute information for the court, the caseworker reported that Father had consistently tested negative for all substances. Mother and Father had had an all-day monitored visit with Anthony, which went well. The caseworker concluded that interaction between Anthony and his parents “has some incidental value”; however, the caseworker believed Anthony had developed a “significant bond” with his foster parents, and that he “deserve[d] to grow up in a stable, calm, loving and nurturing environment in which he can continue to thrive.”

At the January 26, 2018 hearing, Father testified he had been sober since May 2017. He had completed a 30-day inpatient program and enrolled in an outpatient program. He was about to

graduate from the outpatient program. He attended a 12-step program three times a week. He completed two parenting classes. He visited Anthony weekly. Their visits involved playing, interacting and discussions about school. He brought his son items that he needed, such as clothing and shoes.

Anthony's counsel argued the parents' section 388 petitions should be denied, as the matter had been pending two and a half years, and Anthony deserved permanency. Counsel pointed out that the parents could not meet Anthony's special needs and that although Father's sobriety was commendable, he did not enroll in a program or reveal the extent of his drug problem until after his reunification services were terminated. Counsel for DCFS joined in the argument. The court denied the section 388 petitions. Although the court agreed there had been a change of circumstances with respect to Father's commitment to sobriety, the court found it was not in Anthony's best interest to grant the petition.

Turning to the section 366.26 issues, counsel for Mother and Father argued the parental bond exception to termination of parental rights applied, and that Anthony would benefit from continuing the relationship. Anthony's counsel agreed with DCFS's recommendation that parental rights be terminated. He observed that Anthony had said he wanted to be adopted and live with his foster parents forever, that visitation had not been consistent during the early stages of the proceeding, and that Mother and Father had not acted in a parental role. Counsel for DCFS joined in those arguments.

The court terminated parental rights. The court found by clear and convincing evidence that returning Anthony to his parents would be detrimental to him, that he was adoptable and

that the parental bond exception to termination had not been established. It specifically found that any benefit accruing to the child from his relationship with his parents was outweighed by the physical and emotional benefit he would receive through the permanence and stability of adoption, and that adoption was in Anthony's best interest. Father and Mother appealed.

DISCUSSION

Father, joined by Mother, contends the court abused its discretion in denying his October 2017 section 388 petition. Father, again joined by Mother, further contends the court erred in finding the parental benefit exception to termination of parental rights did not apply. For the reasons discussed, we disagree.

A. Denial of Father's Second Section 388 Petition

Under section 388, a parent or other interested person may petition the court to change, modify or set aside a previous order on the grounds of changed circumstances or new evidence. (§ 388, subd. (a).) "The petitioner has the burden to show a change of circumstances or new evidence and [that] the proposed modification is in the child's best interests" or that "the child's welfare requires the modification sought." (*In re B.D.* (2008) 159 Cal.App.4th 1218, 1228; see Cal. Rules of Court, rule 5.570(i).) Appellate courts review the grant or denial of a petition for modification for abuse of discretion. (*In re B.D.*, *supra*, at p. 1228.)

The changed circumstances requirement of section 388 "must be viewed in the context of the dependency proceedings as a whole. [Citation.]" (*In re Marilyn H.* (1993) 5 Cal.4th 295,

307.) “The fact that the parent ‘makes relatively last-minute (albeit genuine) changes’ does not automatically tip the scale in the parent’s favor.” (*In re D.R.* (2011) 193 Cal.App.4th 1494, 1512, quoting *In re Kimberly F.* (1997) 56 Cal.App.4th 519, 530.) “In evaluating whether the petitioner has met his or her burden to show changed circumstances, the trial court should consider: ‘(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 children 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.’” (*In re B.D.*, *supra*, 159 Cal.App.4th at p. 1229, quoting *In re Kimberly F.*, *supra*, at p. 532, italics omitted.)

A section 388 petition may be filed and heard at any time, up to and including the time of the section 366.26 hearing. (*In re Marilyn H.*, *supra*, 5 Cal.4th at pp. 308-309.) “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.]” (*In re Alayah J.* (2017) 9 Cal.App.5th 469, 478.) However, “[o]nce reunification services are ordered terminated, the focus shifts [from reunification] to the [child’s need] for permanency and stability,” and a presumption arises that “continued care [under the dependency system] is in the best interest of the child.” (*In re Marilyn H.* at pp. 309, 310.) “[I]n order to prevent children from spending their lives in the uncertainty of foster care, there must be a limitation on the length of time a child has to wait for a parent to become adequate.” (*Id.* at p. 308.) “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 . . . might be able to reunify at some future point, does not promote stability for the child or the child's best interests. [Citation.]" (*In re Casey D.* (1999) 70 Cal.App.4th 38, 47.)

Father not only made no effort to address his longstanding drug addiction, he affirmatively misled the caseworker concerning its extent and duration until November 2016, well over a year after his young son was detained and placed in foster care. He gave no reason for the delay. Nonetheless, his belated efforts appeared sincere and the court granted him a hearing on his February 2017 section 388 petition based on the progress he had made. But Father remained sober only a few months before relapsing. Father's October 2017 petition was nearly identical to the first in its optimism that he had finally overcome his long-time addiction to methamphetamine. Granting the petition would have meant delaying Anthony's opportunity for permanency and stability in a loving home with no assurance that he would be reunited with his parents. In view of Father's history of remaining clean for only limited periods following formal treatment, the court could reasonably conclude that his most recent efforts would prove no more effective than his earlier ones. (See *In re Ernesto R.* (2014) 230 Cal.App.4th 219, 223 [parent's sobriety reflected "changing," not changed, circumstances where parent had a history of drug relapses, was in the early stages of recovery, and was still addressing her chronic substance abuse problem]; *In re Kimberly F.*, *supra*, 56 Cal.App.4th at p. 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."].) On the record presented and viewing the petition

in the context of all that had gone before, the court did not abuse its discretion in concluding Anthony's best interests were served by denying Father's second section 388 petition.

B. Parental Benefit Exception

When the section 366.26 permanent plan hearing is held, the juvenile court's choices include: (1) terminating parental rights and ordering that the child be placed for adoption; (2) appointing a long term legal guardian; or (3) ordering long-term foster care. (§ 366.26, subd. (b); *In re Celine R.* (2003) 31 Cal.4th 45, 53.) If the court determines by clear and convincing evidence that it is likely the child will be adopted, the court "shall terminate parental rights and order the child placed for adoption" (§ 366.26, subd. (c)(1)), unless one of the statutory exceptions applies and "provides a compelling reason for finding that termination of parental rights would be detrimental to the child." (*In re Celine R.*, *supra*, at p. 53.) Termination of parental rights to free the child for adoption is the "first choice" because "it gives the child the best chance at [a full] emotional commitment from a responsible caretaker.'" (*In re C.B.* (2010) 190 Cal.App.4th 102, 122.)

Once it is determined that the child is adoptable, a party seeking a different permanent plan "has the burden of showing that the termination of parental rights would be detrimental under one of the exceptions listed in section 366.26, subdivision (c)(1)(B). [Citation.]" (*In re J.C.* (2014) 226 Cal.App.4th 503, 528.) At the hearing, Father sought to invoke the exception found in section 366.26, subdivision (c)(1)(B)(i), precluding termination of parental rights where "[t]he parents have

maintained regular visitation and contact with the child and the child would benefit from continuing the relationship.”

A parent seeking to forestall termination of parental rights under the parental benefit exception must establish: (1) “the existence of a beneficial parental . . . relationship” and (2) that “the existence of that relationship constitutes a ‘compelling reason for determining that termination would be detrimental.’” (*In re Bailey J.* (2010) 189 Cal.App.4th 1308, 1314-1315, quoting § 366.26, subd. (c)(1)(B), italics omitted.) Satisfying the exception requires the parent to prove that “severing the natural parent-child relationship would deprive the child of a substantial, positive emotional attachment such that the child would be greatly harmed,” and that the relationship ““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, italics omitted.) In determining whether to apply the exception, the court should “balance[] 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.” (*In re Autumn H.* (1994) 27 Cal.App.4th 567, 575.) “[A] parental relationship is necessary for the exception to apply, not merely a friendly or familiar one.” (*In re Jasmine D.* (2000) 78 Cal.App.4th 1339, 1350, italics omitted.) “Where a biological parent . . . is incapable of functioning in [a parental] role, the child should be given every opportunity to bond with an individual who will assume the role of a parent.” (*Ibid.*) In determining whether the exception has been established, the court may consider such factors as “the age of the child, the

portion of the child's life spent in the parent's custody, . . . and the child's particular needs.” (*Id.* at pp. 1349-1350.)

In reviewing challenges to a juvenile court's decision as to the applicability of the parental bond exception, we apply the substantial evidence standard of review to evaluate the preliminary findings, such as whether regular visitation occurred and whether a beneficial parental relationship existed. (*In re J.S.* (2017) 10 Cal.App.5th 1071, 1080; *In re K.P.* (2012) 203 Cal.App.4th 614, 621-622.) We apply the abuse of discretion standard to the court's determination whether termination of the relationship would be detrimental to the child. (*In re J.S.*, *supra*, at p. 1080; *In re K.P.*, *supra*, at pp. 621-622.) For the reasons discussed, we find no abuse of discretion in the court's determination that termination of parental rights and adoption would not be detrimental to the boy.

Anthony was only six when he was detained in July 2015. By the time of the section 366.26 hearing, he had been living with the foster parents for more than two years. Anthony had expressed his attachment to his foster parents and his desire to remain with them. He was thriving in their home. His foster parents were aware of his behavioral issues and special needs and ensured they were being addressed. They had repeatedly expressed their desire to adopt him. Mother and Father had not played a parental role in Anthony's life in over two years. Their visitation with him was pleasant but, except for a single day visit, had been limited to brief monitored visits, once a week. There was no evidence that Anthony had difficulty separating from his parents after visits or greatly missed them when he was with his foster family. Father faults the caseworkers for failing to describe parental interaction with Anthony during their visits,

but does not suggest what they might have observed to change the court's decision. On the facts presented, the court did not abuse its discretion in concluding that terminating the parental relationship would not be detrimental to Anthony, and that continuing the relationship would not outweigh the benefit of adoption into a stable home. (See *In re Angel B.* (2002) 97 Cal.App.4th 454, 466, italics omitted ["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."].)

DISPOSITION

The orders denying the section 388 petition and terminating parental rights are affirmed.

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MANELLA, P. J.

We concur:

WILLHITE, J.

COLLINS, J.