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

In re JEFFREY F., a Person Coming Under
the Juvenile Court Law.

B236260

(Los Angeles County
Super. Ct. No. CK56384)

LOS ANGELES COUNTY
DEPARTMENT OF CHILDREN AND
FAMILY SERVICES,

Plaintiff and Respondent,

v.

JENNIFER F., et al.,

Defendants and Appellants.

APPEAL from an order of the Superior Court of Los Angeles County. Valerie Lynn Skeba, Juvenile Court Referee. Affirmed.

Neale B. Gold, under appointment by the Court of Appeal, for Defendant and Appellant Jennifer F.

Mitchell Keiter, under appointment by the Court of Appeal, for Defendant and Appellant Jeffrey F.

Andrea Sheridan Ordin, County Counsel, James M. Owens, Assistant County Counsel, Byron G. Shibata and Aileen Wong, Deputies County Counsel for Plaintiff and Respondent.

Appellants Jennifer F. (mother) and Jeffrey F. (father) appeal from the juvenile court's order terminating parental rights over their son Jeffrey (born August 2009). Both parents contend the order must be reversed because the juvenile court abused its discretion by denying their respective Welfare and Institutions Code section 388 petitions requesting reunification services.¹ Mother further contends she was wrongfully denied a hearing on her section 388 petition and that the parental exception to terminating parental rights set forth in section 366.26, subdivision (c)(1)(B)(i) applies.

The juvenile court did not abuse its discretion by denying mother a hearing on her section 388 petition or by denying mother's and father's respective section 388 petitions. Mother failed to establish that an exception to terminating parental rights applied in this case. We therefore affirm the juvenile court's order.

BACKGROUND

1. Detention and section 300 petition

In June 2010, the Los Angeles Department of Children and Family Services (the Department) received a referral of general neglect of then 10-month-old Jeffrey. Father had been arrested for receiving stolen property. When police searched the family home, they found broken furniture, vehicle parts, suitcases, tools, dirty clothes, and animal feces scattered throughout the living room and the back yard. Jeffrey was removed from the home to a foster care agency.

Mother's history with the Department included three older children who became dependents of the juvenile court as the result of both mother's drug abuse and domestic violence between mother and the children's father. All three children were in the custody of their father.

In an interview, mother told the Department's social worker that she had married father in 2007 and that Jeffrey was their only child together. Mother admitted to abusing alcohol and methamphetamine since high school. She also said she had been diagnosed

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

with bipolar disorder and was seeing a psychiatrist and taking prescription medication for that condition. Mother admitted she had not seen her psychiatrist or taken her medications for the past six months.

Both parents had criminal histories. Mother was convicted in 2005 and 2007 for use of a controlled substance. Father had multiple convictions from 1977 to 2010 for possession or use of controlled substances, theft, burglary, and parole violations.

The Department filed a petition on Jeffrey's behalf pursuant to section 300, subdivision (b), alleging that Jeffrey and mother's other children were at risk of physical and emotional harm because of mother's mental and emotional problems, father's history of illicit drug use, and both parents' failure to maintain a safe and clean home.

At the July 2010 detention hearing, the juvenile court found father to be Jeffrey's presumed father. The court further found a prima facie case for detaining Jeffrey and accorded both parents family reunification services.

2. Jurisdiction and disposition of section 300 petition

In August 2010, father was incarcerated, pending sentencing later in the month. Father's probation officer stated he would not recommend probation for father, because father had failed to report to the probation officer since March 2010. The probation officer believed father's likely sentence would be 16 months to three years, which would be beyond the period for reunification.

Mother had not enrolled in any services. She was not taking her prescription medication because she said she felt fine without it. Mother stated that father had struggled with substance abuse problems for more than 30 years but that he had been sober for the past eight years.

Mother had monitored visits with Jeffrey three times a week. The visits were appropriate, and Jeffrey did not exhibit any significant problems.

The Department reported in September 2010 that Jeffrey was exhibiting developmental delays in his motor functions and his speech. He remained placed in a

home with foster parents who were willing to continue caring for him and were open to adopting him.

Later that month, mother and the maternal grandmother attended a multidisciplinary team meeting with the Department's social workers. Mother had still not enrolled in any programs and was unwilling to drug test until she spoke to her attorney. Mother disclosed that father had been sentenced to one year in custody and was scheduled to be released in April 2011.

At the September 2010 adjudication hearing, the juvenile court sustained an amended petition under section 300, subdivision (b) as the result of mother's mental health problems and past and current drug use, for father's history of drug use, and both parents' failure to provide a safe and sanitary home. The court accorded reunification services for mother only, and denied father services because of his incarceration. The court ordered mother to attend parenting education, individual counseling to address mental health, parenting skills, and substance abuse issues, and to be randomly tested for drugs and alcohol. Both parents were accorded monitored visits. Mother was permitted monitored overnight visits after eight consecutive clean drug tests. The Department was accorded discretion to liberalize mother's visits.

3. Review proceedings

A cyst was discovered on Jeffrey's brain in November 2010. Mother authorized surgery to remove the cyst the following month. After the surgery, Jeffrey was able to crawl and lift himself up more easily, and the shape of his head was rounding out. Medical providers were considering whether a helmet would be necessary to remedy any deformation in Jeffrey's skull. Jeffrey was now receiving therapy and services through a regional center.

In December 2010, the Department reported that Jeffrey remained placed with the same foster family. Mother had failed to enroll in any programs and failed to appear for three drug tests. When the social worker confronted mother about her failure to enroll in court ordered programs, mother said she could not afford to pay for those services.

At a hearing in mid-December 2010, the juvenile court ordered the Department to provide information regarding father's status and to keep both parents apprised of Jeffrey's medical condition. The court ordered mother to participate in drug testing and low or no cost counseling as directed by the Department.

In March 2011, the Department reported that Jeffrey had been placed with the maternal grandmother in September 2010, but shortly thereafter the maternal grandmother asked that the child be returned to his foster parents. The maternal grandmother reported that mother threatened her and refused to follow visitation guidelines. The maternal grandmother had allowed mother's roommate to return Jeffrey to the foster family agency after visits, but offered no explanation for allowing unauthorized persons to have access to the child, other than her own stress as the result of mother's behavior. As a result, the Department recommended against placing Jeffrey with the maternal grandmother as a permanent plan.

After his removal from the maternal grandmother's home, Jeffrey remained placed with the same foster family, who was integrating Jeffrey into their family. The foster parents appeared loving and highly invested in caring for Jeffrey.

Mother had enrolled in parenting education and counseling. She had been drug tested three times, with one negative test, one positive, and one test pending. She failed to appear for drug testing seven times between December 2010 and February 2011.

Father was released from custody on April 22, 2011. That same month, mother was terminated from her drug treatment program for noncompliance. Mother thereafter declined a referral to a no cost inpatient drug program and enrolled in an outpatient therapy and counseling program. Mother failed to drug test in March and mid-April 2011. Mother's counselor at her outpatient treatment program reported that mother was not in compliance with the program, was not participating in classes, and was in danger of being terminated from the program.

At the April 2011 review hearing, the juvenile court found that neither parent had made significant progress in resolving their problems and that neither had consistently

and regularly contacted Jeffrey. The court found that there was no substantial probability that Jeffrey would be returned to his parents' custody in the next six months. The juvenile court terminated mother's reunification services and set the matter for a section 366.26 hearing.

In August 2011, the Department reported that Jeffrey had been diagnosed with hydrocephalus and was considered to be medically fragile. In May 2011, Jeffrey had been placed with a new foster mother who had medical training to address the needs of medically fragile children. Jeffrey's new foster mother had previously adopted a medically fragile niece. She was committed to adopting Jeffrey as well and had an adoption home study approved for her on May 25, 2011.

In August 2011, the Department reported that neither parent had provided a current address. Both parents were visiting Jeffrey together; however, they cancelled more visits than they attended. When the parents did visit, they had to be reminded to be careful with Jeffrey because of his medical condition, and they did not appear to fully comprehend the seriousness of that condition. When the visits concluded, Jeffrey did not exhibit any distress at separating from his parents.

4. Section 388 petitions

Father's section 388 petition

In August 2011, father filed a section 388 petition seeking reunification services and unmonitored visits with Jeffrey. Father said the request would be in Jeffrey's best interests because the child was young and would benefit from a strong and healthy relationship with his father. Father stated that he parented Jeffrey during the first 10 months of life and was determined to resume his parental role. He cited as changed circumstances his completion of a 12-week domestic violence program that included both parenting and drug education. Father had also enrolled in July 2011, a six-month inpatient drug treatment program that included parenting education, individual counseling, and weekly random drug and alcohol testing. Since his enrollment in the

program, all of father's drug tests had been negative. The juvenile court granted father a hearing on his petition, set to occur on the same day as the section 366.26 hearing.

Mother's section 388 petition

On September 14, 2011, mother filed her own section 388 petition seeking reinstatement of reunification services, unmonitored visitation, and removal of the section 366.26 hearing from the court's calendar. Mother claimed granting her petition would be in Jeffrey's best interests because she had cared for him during the first 10 months of his life and had maintained a bond with him throughout the case. She cited as changed circumstances her participation since April 11, 2011, in a substance abuse program that included two months in an outpatient program and, since July 1, 2011, her enrollment in an inpatient treatment program. In support of her petition, mother submitted letters from counselors stating that mother had been enrolled in the outpatient program for more than two months, was consistent and motivated in her current inpatient program, and was attending weekly Alcoholics Anonymous and Narcotics Anonymous meetings.

5. Section 388/366.26 hearing

Father testified at the hearing on his section 388 petition, stating that he was incarcerated for eight months and released on April 22, 2011. During his incarceration, father made repeated requests for services to the prison authorities, and was eventually allowed into a six-month program that included a substance abuse component. He attended daily Narcotics Anonymous and Alcoholics Anonymous classes and attempted unsuccessfully to obtain a sponsor while in the prison program. Father said Jeffrey was his motivation for remaining sober, that he was on step two of his 12-step Narcotics Anonymous program, and that his religious beliefs helped his recovery process. He had been sober since June 2010. Since his release from prison, father visited regularly with Jeffrey, who was excited and happy to see father.

When cross-examined, father admitted that the program he attended in prison was a 12-week domestic violence program. He had been on his current 12-step recovery program for approximately two months.

The juvenile court denied mother's request to testify as to her section 388 petition.

After hearing argument from the parties, the juvenile court denied both parents' section 388 petitions. The court found that neither parent had shown changed circumstances and that their requested changes were not in Jeffrey's best interest.

The court then proceeded to the section 366.26 hearing. Mother testified that she was in a substance abuse program for five of the past six months. She had visited Jeffrey regularly when she was in her outpatient program, but when she enrolled in her current inpatient program, transportation to the visits became difficult. Despite the difficulty, she had been visiting Jeffrey every Monday for the past two months. During the visits, mother would feed and change Jeffrey, read to him, and play with him. Jeffrey was excited to see mother at the outset of the visits, called her "mama," and refused to let go of her when the visits concluded.

The juvenile court then heard argument from the parties. Mother's counsel argued that the parental exception applied, that mother and Jeffrey were bonded to one another, and that legal guardianship was the appropriate permanent plan. Father's counsel also argued that the parental exception applied. Both the Department and Jeffrey's counsel argued that it was in the child's best interest to be adopted by his current foster mother.

At the conclusion of the hearing, the juvenile court found that both parents had maintained regular contact and visitation with Jeffrey and that the child had a relationship with his parents. The court concluded, however, that the bond Jeffrey shared with his parents was not significant enough to override the child's need for permanency. The juvenile court found Jeffrey to be adoptable, designated his current foster mother as the prospective adoptive parent, and terminated parental rights. This appeal followed.

DISCUSSION

I. Section 388 Petitions

Section 388 provides in relevant part: "Any parent . . . [of] a child who is a dependent child of the juvenile court . . . may, upon grounds of change of circumstance or new evidence, petition the court . . . to change, modify, or set aside any order of court

previously made.” 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. (§ 388; Cal. Rules of Court, rule 5.570(a), (e); *In re Casey D.* (1999) 70 Cal.App.4th 38, 47.) “[T]he change of circumstances or new evidence must be of such significant nature that it requires a setting aside or modification of the challenged prior order.” (*Ansley v. Superior Court* (1986) 185 Cal.App.3d 477, 485.)

The parent bears the burden of proving the requested modification should be granted. (Cal. Rules of Court, rule 5.570(i); *In re Stephanie M.* (1994) 7 Cal.4th 295, 317 (*Stephanie M.*)). A juvenile court’s determination on a petition brought under section 388 is reviewed under the abuse of discretion standard. (*Id.* at p. 318.)

A. Father’s section 388 petition

The juvenile court concluded that father had not met his burden of demonstrating changed circumstances and that granting father’s petition for reunification services was in Jeffrey’s best interest. Factors to be considered in determining what is in the best interests of a child under section 388 include “(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 Kimberly F.* (1997) 56 Cal.App.4th 519, 532 (*Kimberly F.*)).

Father’s substance abuse problem was one of the reasons that led to Jeffrey’s removal from his custody. Father’s problem was a longstanding one, as evidenced by his multiple convictions for possession of controlled substances dating back to 1996. Father claimed to have established a 15-month period of sobriety, but the only evidence offered to support this claim was father’s own testimony. He provided no drug test results to corroborate that claim.

In any event, father’s claimed 15-month period of sobriety was relatively short when compared to his long history of substance abuse. At the time of the hearing on

father's petition, father had been enrolled in an inpatient substance abuse program for only two months. At best, father demonstrated changing rather than changed circumstances in addressing his substance abuse issues.

Father contends his release from prison constituted a change of circumstance sufficient to grant his section 388 petition because his incarceration was the sole basis for the juvenile court's decision to deny him reunification services. Father did not raise this argument in the juvenile court below and arguably forfeited the issue on appeal. (See *In re S.B.* (2004) 32 Cal.4th 1287, 1293-1294.) The only circumstances father cites in his petition as having changed since the order denying him reunification services are his efforts at maintaining his sobriety and his visits with Jeffrey. Even assuming father's release from prison constituted a sufficient change of circumstance for purposes of his section 388 petition, the juvenile court's denial of the petition was not an abuse of discretion because father failed to demonstrate that granting his petition was in Jeffrey's best interest. At the time of the hearing on father's section 388 petition, Jeffrey was placed with a foster mother who had the medical training necessary to meet his special needs, who was willing to adopt him, and who had an approved home study. Father, on the other hand, did not fully appreciate Jeffrey's medical and developmental problems and had to be reminded of Jeffrey's medically fragile condition during visits.

Father next contends the denial of his section 388 petition must be reversed because the juvenile court based its decision on numerous mistaken factual and legal premises. Father maintains, for example, that the juvenile court denied him reunification services because it mistakenly believed there was a six-month maximum period for reunification services that would have expired before father was released from prison. The record discloses no such mistake on the part of the juvenile court. The court itself stated at the section 388 hearing that it rarely terminates reunification services at the six-month review hearing.

Father claims the juvenile court mistakenly believed Jeffrey was detained when he was eight months old and that the child was three years old at the time of the section 388

hearing when in fact Jeffrey was detained at eleven months of age and was two years old at the time of hearing. Father acknowledges, however, that “a rational court may have denied the [section 388] petition nonetheless.” We agree.

Finally, father contends the juvenile court mistakenly believed he was incarcerated in June 2010 for failure to comply with the requirements of his substance abuse program rather than the receiving stolen property charge for which father had been arrested. Before denying father’s section 388 petition, the juvenile court stated: “If I recall, he was originally out briefly, and then was re-incarcerated because of his lack of cooperation with his substance abuse program. That’s father’s conduct. That’s not the Department’s conduct.” Father claims the juvenile court’s mistaken belief regarding father’s past lack of compliance with a substance abuse program doomed his section 388 petition to failure. The record shows, however, that the juvenile court based its decision on father’s long history of substance abuse, rather than the single incident of his arrest, as well as the fact that father had only recently enrolled in a drug treatment program.

The record discloses no abuse of discretion by the juvenile court in denying father’s section 388 petition. (*Kimberly F.*, *supra*, 56 Cal.App.4th at pp. 530-532.)

B. Mother’s section 388 petition

Mother contends the juvenile court erred by denying her an evidentiary hearing on her section 388 petition. To obtain an evidentiary hearing on a section 388 petition, the petitioner must plead facts sufficient for a prima facie showing that (1) the circumstances have changed since the prior juvenile court order, and (2) the proposed modification will be in the best interests of the child. (*In re Marilyn H.* (1993) 5 Cal.4th 295, 310; *In re Daijah T.* (2000) 83 Cal.App.4th 666, 672.) In determining whether the petition has made a prima facie showing that modification of the prior order is in the child’s best interests, it is important to consider the stage of the dependency proceedings. “After the 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’ [citation], and in fact, there

is a rebuttable presumption that continued foster care is in the best interests of the child. [Citation.]” (*Stephanie M.*, *supra*, 7 Cal.4th at p. 317.) “[S]uch presumption obviously applies with even greater strength when the permanent plan is adoption rather than foster care.” (*In re Angel B.* (2002) 97 Cal.App.4th 454, 464.) We cannot reverse a summary denial of an evidentiary hearing on a section 388 petition unless the ruling constituted an abuse of discretion, i.e., it was arbitrary, capricious, or beyond the bounds of reason. (*In re Anthony W.* (2001) 87 Cal.App.4th 246, 250; *In re Zachary G.* (1999) 77 Cal.App.4th 799, 805; see *Stephanie M.*, *supra*, at p. 316.) If no prima facie evidence exists there is no due process requirement to hold a hearing. (See *In re Jeremy W.* (1992) 3 Cal.App.4th 1407, 1416.)

Mother failed to make a prima facie showing of changed circumstances. The record shows that mother resisted the Department’s efforts early in the case to have her drug test and enroll in a treatment program. She did not enroll in a treatment program until January 2011, and was terminated from that program in April 2011 for failure to participate. Mother’s enrollment in another drug program five months before the section 366.26 hearing demonstrated changing circumstances, at best, rather than changed circumstances.

Mother also failed to demonstrate that granting her petition would have been in Jeffrey’s best interest. By the time of the hearing, Jeffrey was placed with a foster mother who was trained to meet his special needs, who was willing to adopt him, and who had an approved adoptive home study. The juvenile court did not err by determining that Jeffrey’s needs for permanency and stability were paramount in this case. The denial of mother’s section 388 petition was not an abuse of discretion.

II. Termination of Parental Rights

Section 366.26, subdivision (c)(1), provides for the termination of parental rights if family reunification services have been terminated and the juvenile court finds by clear and convincing evidence that the child is likely to be adopted. Once reunification services have been terminated, “[f]amily preservation ceases to be of overriding concern

. . . the focus shifts from the parent’s interest in reunification to the child’s interest in permanency and stability. [Citations.]” (*In re Richard C.* (1998) 68 Cal.App.4th 1191, 1195.) “Adoption, where possible, is the permanent plan preferred by the Legislature. [Citations.]” (*In re Autumn H.* (1994) 27 Cal.App.4th 567, 573 (*Autumn H.*)). Although the statutory preference is in favor of adoption, section 366.26 lists certain exceptions that may preclude termination of parental rights, if the juvenile court finds “a compelling reason for determining that termination would be detrimental to the child.” (§ 366.26, subd. (c)(1)(B).)

The juvenile court’s ruling on whether an exception applies to terminating parental rights pursuant to section 366.26 is reviewed under the substantial evidence standard. (*In re Clifton B.* (2000) 81 Cal.App.4th 415, 424-425; *Autumn H.*, *supra*, 27 Cal.App.4th at p. 576.) Under this standard, an appellate court must affirm the juvenile court’s order if there is evidence that is reasonable, credible, and of solid value to support the order (*In re Christina A.* (1989) 213 Cal.App.3d 1073, 1080), and the evidence must be considered “in the light most favorable to the prevailing party, giving the prevailing party the benefit of every reasonable inference and resolving all conflicts in support of the order. [Citations.]” (*Autumn H.*, at p. 576.)

Mother contends the exception to terminating parental rights set forth in section 366.26, subdivision (c)(1)(B)(i) applies. That exception provides as follows: “The parents have maintained regular visitation and contact with the child and the child would benefit from continuing the relationship.”

The parent bears the burden of proving that this exception applies. (*In re L. Y. L.* (2002) 101 Cal.App.4th 942, 952-954.) “[T]he exception does not permit a parent who has failed to reunify with an adoptable child to derail an adoption merely by showing the child would derive some benefit from continuing a relationship maintained during periods of visitation with the parent.” (*In re Jasmine D.* (2000) 78 Cal.App.4th 1339, 1348.)

For the exception to apply, the parent must have maintained regular visitation with the child, and the juvenile court must determine that the parent/child 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 other words, the 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.” (*Autumn H.*, *supra*, 27 Cal.App.4th at p. 575.) A parent must establish more than merely some benefit to the child by continuing the parent/child relationship. That relationship must be “a substantial, positive emotional attachment such that the child would be greatly harmed” if the relationship were severed. (*Ibid.*) To overcome the benefits associated with a stable, adoptive family, the parent seeking to continue a relationship with the child must prove that severing the relationship will cause not merely some harm, but *great harm* to the child. (*In re Brittany C.* (1999) 76 Cal.App.4th 847, 853.) Factors that the juvenile court should consider when determining the applicability of the exception 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” (*Autumn H.*, *supra*, at p. 576.)

There is ample support in the record for the juvenile court’s determination that the parental exception to terminating parental rights did not apply. Mother’s visits with Jeffrey throughout the case were sporadic. There was little evidence of a significant parental bond between mother and Jeffrey. Although mother testified that she would feed, change, and play with Jeffrey during their visits, the child did not exhibit any distress or anxiety when the visits concluded. There was scant evidence of a parent/child bond that would cause Jeffrey great harm if severed or that would outweigh the benefits of a stable and permanent adoptive home.

Jeffrey’s prospective adoptive parent was able and willing to care for his special needs, had an approved home study, and was willing to adopt Jeffrey. Substantial evidence supports the juvenile court’s determination that Jeffrey’s need for stability

outweighed any benefit he would derive from continuing a parent/child relationship with mother.

DISPOSITION

The order denying father's and mother's section 388 petitions and terminating parental rights is affirmed.

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_____, J.
CHAVEZ

We concur:

_____, Acting P. J.
DOI TODD

_____, J.
ASHMANN-GERST