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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

In re BRYAN C., a Person Coming Under  
the Juvenile Court Law.

B240405

(Los Angeles County  
Super. Ct. No. CK27219)

LOS ANGELES COUNTY  
DEPARTMENT OF CHILDREN AND  
FAMILY SERVICES,

Plaintiff and Respondent,

v.

RICHARD C.,

Defendant and Appellant.

APPEAL from orders of the Superior Court of Los Angeles County, Amy  
Pellman, Judge. Affirmed.

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

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

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Richard C., the father of five-year-old Bryan C., appeals from the juvenile court's orders denying his petition for modification pursuant to Welfare and Institutions Code section 388<sup>1</sup> without a hearing and terminating his parental rights pursuant to section 366.26. Richard contends he demonstrated changed circumstances following the termination of family reunification services and his bond with Bryan warranted application of the parent-child relationship exception to the termination of parental rights provided in section 366.26, subdivision (c)(1)(B)(i). We affirm.

### **FACTUAL AND PROCEDURAL BACKGROUND**

Bryan was born in September 2007. On August 31, 2009 Bryan's mother, Judith C., gave birth to Matthew C., who was born addicted to methamphetamine. Judith left the hospital later that day without making arrangements for Matthew. The next day, having received a referral from the hospital, a social worker from the Los Angeles County Department of Children and Family Services (Department) attempted to locate Judith at the home of her mother. Judith's mother, who had previously adopted five of Judith and Richard's children, denied any knowledge of her whereabouts.<sup>2</sup> The social worker also attempted unsuccessfully to locate Richard. She received a voicemail from him on September 10, 2009 acknowledging he understood she was looking for him, but Richard left no number and failed to call back.

On September 17, 2009 the Department filed a petition on behalf of Matthew and Bryan, alleging violations of section 300, subdivisions (b) (failure to protect), (g) (no provision for support) and (j) (abuse of sibling), arising from both parents' prolonged

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<sup>1</sup> Statutory references are to the Welfare and Institutions Code.

<sup>2</sup> Matthew was Judith's 10th child, nine of whom she listed as the children of Richard. Richard denied having fathered all the children, even though they bore his name, but admitted paternity of seven of the children. He disputed paternity of Matthew, but DNA testing confirmed a 99.9 percent likelihood he was Matthew's father. The termination of Richard's parental rights with respect to Matthew is not an issue in this appeal.

drug abuse, the termination of their parental rights over seven older children<sup>3</sup> and Judith's abandonment of Matthew at the hospital shortly after his birth. At the detention hearing the juvenile court found that Bryan and his parents were "AWOL," detained both children and issued arrest warrants for the parents and a protective custody warrant for Bryan. In an October 26, 2009 jurisdiction/disposition report, the Department noted Bryan and his parents remained at large. Based on Judith and Richard's history with the Department (the termination of parental rights to each of their older children), the Department recommended the denial of family reunification services.<sup>4</sup>

Richard was arrested pursuant to the warrant and appeared in court on November 2, 2009. He told the court he had no information regarding Bryan or Judith's location and speculated they were out of state. He also told the court he had been living at his mother's house. Contacted after the hearing, Richard's mother told a social worker Richard had not been living with her. She acknowledged she had seen him with Judith and Bryan several days earlier, but claimed to have no information about where the family had been living. Richard appeared in court again on November 25, 2009 and once more denied any knowledge of Bryan's whereabouts.

On December 18, 2009 Judith was arrested for shoplifting and found to be in possession of marijuana. On December 24, 2009 she appeared in juvenile court and claimed she had not seen Bryan since Richard took him when she went into labor with Matthew.

On January 5, 2010 Richard arrived for a court hearing but disappeared before the matter was called. Several hours later Richard was arrested for possession of marijuana, methamphetamine and narcotics paraphernalia (including a needle and spoon). The

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<sup>3</sup> Judith's parental rights to her first child, Austin S., had also been terminated. Other than Austin, all of Judith's children were adopted by family members and routinely saw both Judith and Richard, notwithstanding the termination of parental rights.

<sup>4</sup> The Department also reported Judith had an extensive history of convictions for drug abuse, vehicular violations and theft. Richard had a lengthy history of drug-related convictions, as well as a conviction for domestic violence against Judith.

Department filed an amended section 300 petition adding an allegation that Richard was a current abuser of illicit drugs based on the arrest.

During separate visits by social workers to the home of Richard's mother (where he had claimed to be living), Richard's mother denied any knowledge of Bryan's location. On March 4, 2010 the court again issued arrest warrants for both Richard and Judith. At the jurisdiction hearing on March 9, 2009 the court sustained allegations relating to both parents' drug abuse as to Matthew only. The court continued the adjudication as to Bryan until he could be located. On March 26, 2010 Richard appeared in court pursuant to the warrant and again denied any knowledge of Bryan's or Judith's whereabouts; but he told the court he had heard they might have gone to Alabama or Tennessee.

On August 15, 2010 Judith was arrested for shoplifting and jailed.<sup>5</sup> Both Judith's and Richard's families denied having seen Bryan. The Department brought in the child abduction unit to investigate. The court issued another arrest warrant for Richard and set a section 366.26 hearing to consider termination of Judith and Richard's parental rights over Matthew. On October 19, 2010 Richard appeared in court to answer to the warrant and told the court he had last seen Bryan in February 2010 at a pizza parlor.

A section 366.26 hearing concerning Matthew was held on March 8, 2011; Judith and Richard's parental rights were terminated. At the hearing Richard again told the court he did not know where Bryan was and stated he had last seen him eight months before at a pizza parlor. The court continued the jurisdiction hearing for Bryan to September 6, 2011.

Judith was released from prison on April 14, 2011. In the early morning of April 20, 2011 deputies from the Los Angeles County Sheriff's Department, accompanied by a Department social worker, discovered Bryan in the home of a disabled man Richard cared for in exchange for rent. Bryan was detained and placed in foster

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<sup>5</sup> Judith had also been arrested on May 3, 2010 after a hit-and-run accident involving a police car. When she was stopped, a search revealed illegal drugs.

care, and the parents were arrested for felony child concealment. In separate interviews with Judith and Richard, the Department learned Bryan had been with both parents except during Judith's incarceration from September 2010 until April 2011. During those six months, Bryan had been in Richard's sole care. At a hearing on June 1, 2011 the juvenile court found Richard to be the presumed father of Bryan and ordered both parents to be allowed one hour of monitored visitation each week.

On June 21, 2011 the Department filed a second amended petition, adding an allegation that Judith had fled with Bryan to avoid his detention by the Department, that Judith and Richard had conspired to conceal Bryan from the Department and that Bryan had been found in a filthy and unsanitary environment when he was finally located. In addition the Department reported Judith had also been arrested in May 2010, after driving her car into the side of a Lakewood sheriff's patrol car and fleeing the scene. She was subsequently stopped and ticketed for driving without a license or insurance, leaving the scene of an accident and possession of marijuana. Bryan had been with her at the time, as he had been when she was arrested for shoplifting in September 2010.

In August and September 2011 both parents failed to appear for court-ordered drug testing, claiming they lacked identification to test. During a monitored visit with Bryan on September 15, 2011, Richard looked gaunt and acted erratically, leading the social worker to conclude he was under the influence of drugs. When told of this concern, Richard became aggressive and was asked to leave the building.

The jurisdiction hearing for Bryan was held on September 26, 2011. Richard testified he had not used drugs during the last three years but previously had used methamphetamine on a weekly basis. He claimed to have completed a drug treatment program as a result of his 2010 conviction for possession of marijuana and narcotics paraphernalia. Richard acknowledged he had been with Bryan from Matthew's birth through Bryan's detention in April 2011. He admitted lying to the Department and the court about Bryan's whereabouts. Nonetheless, he claimed Bryan had been well cared for and the home had been clean.

The court found Richard's testimony "was completely not credible" and that he had "continued to lie to this court," which could find "no truth in [his] statements at this time." The court sustained allegations pursuant to section 300, subdivisions (b) and (g), which were based on the facts Matthew had been addicted to methamphetamines at birth, Judith had failed to make a plan for his care, Judith and Richard had a history of drug abuse and their parental rights to Bryan's siblings had been terminated. Further, both parents had conspired to conceal Bryan from the Department. The court declared Bryan a dependent of the court, denied reunification services and set a section 366.26 hearing for January 23, 2012.

In the report prepared for the section 366.26 hearing the Department stated Richard had stopped attending monitored visits with Bryan after the September 2011 incident in which he appeared to be under the influence of drugs. Richard had also failed to submit to drug testing. Meanwhile, Bryan had successfully transitioned to his foster home, and his caregivers wished to adopt him. The Department recommended termination of both parents' parental rights.

In an interim review report for the contested hearing, which had been rescheduled to March 8, 2012, the Department acknowledged Richard had resumed visits with Bryan but continued to recommend termination of Richard's parental rights. The day of the hearing, Richard filed a petition under section 388 requesting the court to order family reunification services for him. As support for the threshold demonstration of changed circumstances, Richard stated he had last used drugs in December 2011 and had been attending Narcotics Anonymous meetings since that time, had submitted to three random drug tests (the last two of which were negative) and had visited weekly with Bryan. He contended he was committed to getting his life together and believed the proposed adoption would not be in Bryan's best interests because the adoptive father had initially been ambivalent about adopting Bryan.

The juvenile court summarily denied Richard's petition, finding there had been no changed circumstances. The court commended Richard on taking steps toward achieving sobriety but concluded his effort was too late for Bryan. The court found Bryan was

likely to be adopted and that none of the exceptions to identification of adoption as the permanent plan for Bryan applied. Accordingly the court terminated Judith and Richard's parental rights.

## **DISCUSSION**

### *1. The Trial Court Did Not Abuse Its Discretion in Denying Richard's Section 388 Petition*

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 Aaliyah R.* (2006) 136 Cal.App.4th 437, 446; see Cal. Rules of Court, rule 5.570(e).)<sup>6</sup> 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 Zachary G.* (1999) 77 Cal.App.4th 799, 806; *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.*, at p. 806; see *People v. Bell* (1989) 49 Cal.3d 502, 554 [prima facie evidence is "such proof as will support a ruling or order in favor of the moving party if no controverting evidence is presented"] (conc. opn. of Kaufman, J.)) "[T]o be entitled to a hearing . . . , [the parent is] not required to establish a probability of prevailing on [his or] her petition." (*In re Aljamie D.* (2000) 84 Cal.App.4th 424, 432.) "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.)

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

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<sup>6</sup> 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 . . . ."

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.) 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.) "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 interest of the child. [Citation.] A court hearing a motion for change of placement at this stage of the proceedings must recognize this shift of focus in determining the ultimate question before it, that is, the best interest of the child." (*In re Stephanie M., supra*, 7 Cal.4th at p. 317.)

We review the summary denial of a section 388 petition for abuse of discretion. (*In re Zachary G., supra*, 77 Cal.App.4th at p. 808; *In re Jeremy W.* (1992) 3 Cal.App.4th 1407, 1413.) 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.) We do not inquire whether substantial evidence would have supported a different order, nor do we reweigh the evidence and substitute our judgment for that of the juvenile court. (*Id.* at pp. 318-319.)

Even assuming Richard's allegations were in fact true (notwithstanding his failure to document his efforts to obtain sobriety), the juvenile court did not abuse its discretion in summarily denying his section 388 petition. At the September 2011 jurisdiction hearing Richard steadfastly denied he continued to have a drug abuse problem, notwithstanding his January 2010 arrest for possession of marijuana and narcotics paraphernalia. His December 2011 entry into a 12-step program did not constitute changed circumstances within the meaning of section 388. Long-term drug abuse of the kind documented by the Department over the course of 10 years when intervening on behalf of Judith and Richard's children is not susceptible to instantaneous, successful



rehabilitation. Richard’s argument that failure to recognize his effort misses the point: If he had undertaken rehabilitation earlier in Bryan’s life, the court might have provided that last chance to prove his commitment to changing the circumstances that led to Bryan’s detention.

Moreover, Richard made no showing that granting his petition would serve the best interests of Bryan. There is no evidence the delay by the prospective adoptive father in agreeing to Bryan’s adoption cited by Richard was anything more than an appropriate effort to gauge what should be a significant and permanent commitment by a prospective parent. There was no abuse of discretion by the juvenile court in summarily denying the uncorroborated section 388 petition presented the day of the section 366.26 parental rights termination hearing. (See *In re Edward H.* (1996) 43 Cal.App.4th 584, 593 [“a ‘prima facie’ showing is not an invitation to section 388 petitioners to play ‘hide the ball’ in pleading changed circumstances or new evidence”; “if a petitioner could get by with general, conclusory allegations, there would be no need for an initial determination by the juvenile court about whether an evidentiary hearing is warranted”].)

## *2. The Court Did Not Err in Terminating Richard’s Parental Rights*

Section 366.26 directs the juvenile court in selecting and implementing a permanent placement 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 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”].) When 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 six enumerated exceptions applies. (§ 366.26, subd. (c)(1)(B); see *In re Matthew C.* (1993) 6 Cal.4th 386, 392 [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].)

To satisfy the subdivision (c)(1)(B)(i) exception to termination Richard asserts here, a parent must prove he or she has “maintained regular visitation and contact with the child and the child would benefit from continuing the relationship.” (§ 366.26, subd. (c)(1)(B)(i); see *In re Derek W.* (1999) 73 Cal.App.4th 823, 826 [“parent has the burden to show that the statutory exception applies”].) The “benefit” prong of the exception requires the parent to prove 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 Autumn H.* (1994) 27 Cal.App.4th 567, 575 [“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”].) No matter how loving and frequent the contact, and notwithstanding the existence of an “emotional bond” with the child, “the parents must show they occupy ‘a parental role’ in the child's life.” (*In re Andrea R.* (1999) 75 Cal.App.4th 1093, 1108; see *In re Beatrice M.* (1994) 29 Cal.App.4th 1411, 1418.) The relationship that gives rise to this exception to the statutory preference for adoption “characteristically aris[es] from day-to-day interaction, companionship and shared experiences. Day-to-day contact is not necessarily required, although it is typical in a parent-child relationship.” (*In re Casey D., supra*, 70 Cal.App.4th at p. 51.) Moreover, “[b]ecause a section 366.26 hearing occurs only after the court has repeatedly found the parent unable to meet the child’s needs, it is only in an extraordinary case that preservation of the parent’s rights will prevail over the Legislature’s preference for adoptive placement.” (*In re Jasmine D.* (2000) 78 Cal.App.4th 1339, 1350.)

Whether or not Richard established the requisite relationship with Bryan at some point during the three and a half years he was responsible for Bryan's care, by failing to reunify with his older children and purposefully deceiving the Department about Bryan's whereabouts, Richard completely undermined his credibility with both the court and the Department. Moreover, his failure to acknowledge, let alone address, his serious drug addiction at a time that would have been meaningful to Bryan, Richard never moved beyond monitored visitation, a touchstone for the establishment of the parental role crucial to the section 366.26, subdivision (c)(1)(B)(i), parent-child relationship exception. With a prospective adoption in place, the juvenile court did not abuse its discretion in terminating Richard's parental rights.

**DISPOSITION**

The orders of the juvenile court are affirmed.

PERLUSS, P. J.

We concur:

WOODS, J.

JACKSON, J.