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

In re CHRISTIAN S., a Person Coming
Under the Juvenile Court Law.

2d Juv. No. B237241
(Super. Ct. No. JV47603)
(San Luis Obispo County)

SAN LUIS OBISPO COUNTY
DEPARTMENT OF SOCIAL SERVICES,

Plaintiff and Respondent,

v.

CHRISTINA G.,

Defendant and Appellant.

Christina G. (mother) appeals the juvenile court order denying her modification petition, terminating her parental rights, and establishing adoption as the permanent plan for her minor child Christian S. (Welf. & Inst. Code,¹ §§ 366.26, 388.) Mother contends the court abused its discretion in denying her modification petition, and erred in failing to find that the parental benefit exception to adoption applied (§ 366.26, subd. (c)(1)(B)(i)). We affirm.

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

FACTS AND PROCEDURAL HISTORY

The Dependency Petition and Jurisdiction/Disposition Hearing

Before Christian's birth in December 2003, mother permanently lost custody of her two other children in Oregon. In May 2004, San Luis Obispo County Department of Social Services (DSS) opened a voluntary services case as to Christian after mother was placed on a section 5150 psychiatric hold due to a substance-induced psychotic disorder. From July 2005 until October 2008, DSS received numerous referrals alleging that mother was abusing drugs and alcohol. During one investigation, mother told the social worker that she had been diagnosed with multiple sclerosis and fibromyalgia and was taking prescribed pain medication for those conditions. In November 2005, DSS reported that mother kept an alligator in her bedroom that "is longer than three feet . . . and could 'easily eat the baby.' [Mother] is not coherent and she cannot protect Christian from the alligator." Although mother denied having an alligator, in July 2008 it was reported that mother's cell phone had a video of Christian holding the animal. The California Department of Fish and Game removed the alligator and cited mother for having an illegal pet. It was also reported that same date that mother was "slamming" her prescription pain medication and had needle marks on her arms.

In October 2008, a section 300 petition was filed alleging that mother had been found in front of her house under the influence of prescription drugs while Christian was left inside the home unsupervised.² At the jurisdiction and disposition hearing, DSS recommended that mother be offered reunification services while Christian remained in foster care. The court granted reunification services, ordered mother to undergo a psychiatric evaluation, and set the matter for a six-month review hearing.

Six-Month Review

A week prior to the six-month review hearing, DSS filed an ex parte application for an order reducing mother's visits with Christian from three times a week to once a week. The social worker who supervised the visits reported that mother had

² Christopher G., Christian's presumed father, did not participate in the proceedings and is not a party to this appeal.

told Christian he was not to refer to his foster placement as "home" on more than one occasion and had corrected the child when he referred to his foster parent as "mom." Mother also told the child "that he is only to listen to her and not anyone else." The request for reduced visits was supported by Christian's foster parents, his Court Appointed Special Advocate, and his therapist, the latter of whom described the visits as "emotionally battering" for the child.

After engaging in mediation, the parties agreed that mother would be offered an additional six months of reunification services if mother (1) underwent a new assessment by Drug and Alcohol Services (DAS); (2) entered inpatient treatment if DAS so recommended; and (3) quit taking all narcotic pain medication within 30 days. The court adopted the parties' mediation agreement and set the 12-month review hearing for November 17, 2009. In issuing its order, the court found that mother had made "minimal" progress toward achieving the objectives of the case plan.

Twelve-Month Review

In its initial 12-month review report, DSS recommended that reunification services be terminated. The report stated that mother was unemployed and that DAS and County Mental Health had declined to offer her services due to her ongoing abuse of prescription drugs. In an addendum report, DSS reported that mother had entered a residential substance abuse program in October. Although mother had significant problems at the beginning of her stay, she had subsequently shown signs of improvement sufficient for DSS to recommend an additional six months of reunification services. The court adopted the recommendation and set the matter for an 18-month review hearing.

Eighteen-Month Review

In its initial 18-month review report, DSS recommended that mother's reunification services be extended for an additional six-months and the matter be set for a 24-month review hearing. DSS reported that mother had been unable to complete the reunification process within the 18-month period because she had been enrolled in a residential substance abuse program. Based on mother's completion of the program, DSS found "a substantial probability that she and her son will reunify within the next six

months." Mother was fully participating in her DAS program and was attending at least two 12-step meetings every week. DSS also reported that although Christian had formed a strong attachment with his foster parents, he also enjoyed his weekly visits with mother and was observed to have a "strong attachment and allegiance" to her.

Prior to the 18-month review hearing date, DSS discovered that mother had missed several of her scheduled DAS group sessions, failed to show up for half of her random drug tests, and had a positive test for alcohol. Mother had also missed her orientation meeting for Dependency Drug Court, and had yet to deal with an outstanding warrant as directed by the social worker and her drug and alcohol counselor. Based on this new information, DSS recommended that reunification services be terminated and that Christian be referred for an adoptability assessment. On May 21, 2010, the court terminated reunification services and set the matter for a permanency planning hearing.

The First Section 388 Petition and Section 366.26 Hearing

On October 6, 2010, mother filed a section 388 petition (JV-180 form) requesting that the court either provide an additional six months of reunification services or return Christian to her custody. In support of the petition, mother offered that she had among other things (1) been steadily employed for the preceding five months; (2) attended 12-step meetings four to five times a week with a sponsor; (3) quit taking narcotic pain medication and drinking alcohol.

In its initial section 366.26 report, DSS reported that Christian was likely to be adopted by his current foster parents. Mother continued to visit Christian every week, but had not attended a scheduled mediation regarding post-adoption contact. When asked about this, mother simply stated that Christian "was not going to be adopted."

A hearing on the section 366.26 report and mother's section 388 petition was held on October 14, 2010. On January 31, 2011, the court issued its written ruling denying mother's section 388 petition. The court declined to terminate mother's parental rights, however, based on the absence of clear and convincing evidence that Christian was likely to be adopted. This changed circumstance was due to the fact that Christian had been removed from his prospective adoptive home in December 2010 at the request

of his foster parents. The only reason the foster parents gave for their request was that they were expecting their own biological child. Christian's abrupt removal from the home had understandably caused the child to become sad and depressed. According to his therapist, "it could be difficult for him to adjust to a new family if he knows that his mother's parental rights are terminated." The therapist had met Christian's new foster mother and believed that she was "a good match" for the child. The court determined that although the termination of parental rights was "premature," adoption remained the permanent placement goal. DSS was directed to continue its efforts to find an appropriate adoptive placement and set the matter for further hearing in July 2011.

The Second Section 388 Petition and Section 366.26 Hearing

On July 7, 2011, mother filed another section 388 petition requesting additional reunification services or the return of Christian. Mother claimed that she had maintained her sobriety and had a stable home and employment. She also asserted that she had participated in individual counseling sessions every week since March 2011, and had undergone random weekly drug tests with all negative results. The matter was set for a combined section 388 and section 366.26 hearing on September 9, 2011.

On August 4, 2011, mother gave birth to Tatiana.³ Child and mother both tested positive for methadone, and Tatiana suffered withdrawal symptoms from the drug. Tatiana was immediately removed from mother's custody and a dependency petition was filed alleging failure to protect. The petition alleged among other things that mother had gone to the emergency room seeking narcotic pain medication on four different occasions between January 15 and March 4, 2011. Mother told the social worker that she began participating in a methadone maintenance program in April 2011 "because she wanted help getting off of opiates." The court detained Tatiana and set the matter for a combined jurisdictional and dispositional hearing. Tatiana was placed with Christian's foster parents, who indicated their desire to adopt both children.

³ Tatiana is not a subject of this appeal.

On October 14, 2011, the court held a combined hearing on mother's section 388 petition, Christian's permanency planning, and Tatiana's jurisdiction and disposition.⁴ In opposing the section 388 petition, DSS noted the evidence contradicted mother's claims that she had remained sober and maintained employment. DSS also reported that Christian was doing well with his new prospective adoptive parents, with whom he had been living since January 2011. Christian had become close with the prospective adoptive parents' biological son and referred to him as his brother. The parents had ensured that Christian continued with his therapist and were comfortable with an open adoption so that Christian could continue to have a relationship with mother. The prospective adoptive parents were also planning to adopt Tatiana, who had been in their custody since her birth.

Although Christian continued to enjoy monthly one-hour visits with mother, he had no problem separating from her and was excited to see his prospective adoptive parents when they picked him up. The social worker characterized Christian's visits with mother as "more like a play date with a friend rather than . . . [a] parent/child kind of relationship." He referred to his prospective adoptive parents as "mom and dad" and only mentioned his mother and former foster parents in the context of past experiences. The social worker concluded that Christian's need for security and stability through adoption outweighed the significance of his relationship with mother. Even if Christian's visits with mother were terminated, his security in adoption would not be diminished. Christian's therapist concurred in this assessment.

With respect to the section 388 petition, DSS concluded that mother's long history of substance abuse rendered the short amount of time she had participated in methadone treatment insufficient to demonstrate that she would be able to maintain her sobriety. In the jurisdiction and disposition report filed as to Tatiana, it was concluded that "[mother's] circumstance has not only remained unchanged, it has become worse."

⁴ The proceedings as to Tatiana were ultimately continued.

Mother's treating physician at the methadone clinic testified that she had first requested a detoxification program in October 2010. The doctor did not know, however, whether mother had actually participated in such a program. The doctor indicated that methadone maintenance therapy was the safest approach for a pregnant woman dealing with narcotic addiction. Mother's drug tests since being in the program were all favorable, and she had not sought out prescription medication during that time.

At the conclusion of the hearing, the court denied mother's section 388 petition. The court found that mother had shown changing circumstances, not changed circumstances. The court reasoned: "Christian can't wait any longer to see if his mom is going to be successful this time. I hope she is. She may very well be successful this time, but the time has passed for me to be able to find that it's in his best interest. . . . And when I look at what he needs -- and that's what I'm required to do[,] look at his best interest -- I don't have any testimony before me that it's in his best interest . . . to continue to wait and see whether or not his mother's successful." The court went on to find that Christian's likelihood of adoption was supported by clear and convincing evidence and that none of the statutory exceptions to adoption applied. Mother's parental rights to Christian were accordingly terminated.

DISCUSSION

Section 388

Mother contends the court erred in denying her section 388 petition because she demonstrated that circumstances had changed and that returning Christian to her custody would be in his best interests. We disagree.

Section 388 authorizes a juvenile court to modify a prior order if a parent shows a change of circumstances and establishes that modification is in the best interests of the child. (*In re Stephanie M.* (1994) 7 Cal.4th 295, 317.) The court has broad discretion in resolving a petition to modify a prior order, and its determination will not be disturbed on appeal unless an abuse of discretion is clearly shown. (*Id.* at p. 318.)

"[U]p until the time the section 366.26 hearing is set, the parent's interest in reunification is given precedence over a child's need for stability and permanency.'

[Citation.] 'Once reunification services are ordered terminated, the focus shifts to the needs of the child for permanency and stability.' [Citation.] 'The burden thereafter is on the parent to prove changed circumstances pursuant to section 388 to revive the reunification issue. . . .'" (*In re Zacharia D.* (1993) 6 Cal.4th 435, 447; *In re Vincent M.* (2008) 161 Cal.App.4th 943, 955.) Where, as here, the court's ruling is against the party who has the burden of proof, it is almost impossible for the party to prevail on appeal by arguing the evidence compels a ruling in his favor. Unless the trial court makes specific findings of fact in favor of the moving party, we must presume the trial court found that her evidence lacks sufficient weight and credibility to carry the burden of proof. (*Rodney F. v. Karen M.* (1998) 61 Cal.App.4th 233, 241.) "[W]hen a court has made a custody determination in a dependency proceeding, "a reviewing court will not disturb that decision unless the trial court has exceeded the limits of legal discretion by making an arbitrary, capricious, or patently absurd determination [citations].'" [Citations.] . . . ' . . . When two or more inferences can reasonably be deduced from the facts, the reviewing court has no authority to substitute its decision for that of the trial court.'" [Citations.]" (*In re Stephanie M.*, *supra*, 7 Cal.4th at pp. 318-319.)

To prove changed circumstances, mother had to do more than demonstrate that circumstances were changing; she had to prove that the circumstances had in fact changed. (*In re Casey D.* (1999) 70 Cal.App.4th 38, 49.) She failed to make such a showing. As the court found, the evidence merely demonstrated that mother was committed to maintaining her sobriety, and not that she had successfully done so. Given mother's lengthy history of drug abuse and her numerous relapses—the most recent of which occurred after mother's first section 388 petition was filed—the court did not exceed the bounds of reason in finding that the relatively brief amount of time she had spent in the methadone maintenance program was insufficient to establish changed circumstances. (*In re Clifton B.* (2000) 81 Cal.App.4th 415, 423-424 [given parent's history of drug use and relapses after periods of sobriety, seven months of sobriety was insufficient to assure court that recent relapse would not reoccur].)

With regard to whether it would be in Christian's best interests to either grant mother further reunification services or return him to her custody, the court found that there was simply no evidence to support such a finding. In challenging the court's ruling on this point, mother essentially offers that she and Christian share a close bond. This, of course, is not enough to overcome Christian's need for permanency and stability. The child's social worker and therapist both agreed that this need would be best met if Christian were adopted. Although mother argues that the child will suffer emotional harm if their visits are terminated, the record indicates that the prospective adoptive parents are committed to continuing Christian's relationship with mother through an open adoption. Under the circumstances, the court reasonably found that granting mother's requested relief would not be in Christian's best interests, but rather to his detriment.

Parental Benefit Exception (§ 366.26, subd. (c)(1)(B)(i))

Mother asserts that the court erred in failing to find that the parental benefit exception to adoption applied to Christian, as provided in section 366.26, subdivision (c)(1)(B)(i). The People respond that mother forfeited this claim because she did not raise it below, and that the exception in any event does not apply. Mother counters that the evidence and arguments she presented were sufficient to preserve the issue, and that the claim in any event is not subject to forfeiture.

We need not decide whether mother's claim is forfeited because it lacks merit. The parental benefit exception provides that parental rights shall not be terminated if "[t]he parents have maintained regular visitation and contact with the child and the child would benefit from continuing the relationship." (§ 366.26, subd. (c)(1)(B)(i).) The parent bears the burden of proving the exception. Only in the "extraordinary case" can a parent establish the exception because the permanent plan hearing occurs "after the court has repeatedly found the parent unable to meet the child's needs." (*In re Jasmine D.* (2000) 78 Cal.App.4th 1339, 1350.) To meet his or her burden of proof, a parent must show more than frequent and loving contact or pleasant visits. (*In re Derek W.* (1999) 73 Cal.App.4th 823, 827.) "Interaction between natural parent and child will always confer some incidental benefit to the child. . . . The relationship arises from day-to-day

interaction, companionship and shared experiences." (*In re Autumn H.* (1994) 27 Cal.App.4th 567, 575.) The parent must show he or she occupies a parental role in the child's life, resulting in a significant, positive, emotional attachment from child to parent. (*Ibid.*; *In re Elizabeth M.* (1997) 52 Cal.App.4th 318, 324.)

A 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, or that the parental relationship may be beneficial to the child only to some degree. (*In re Angel B.* (2002) 97 Cal.App.4th 454, 466.) The parent must also show that continuation of the parent-child relationship will promote "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.*, *supra*, 27 Cal.App.4th at p. 575.) The juvenile court may reject a parent's assertion of the exception simply by finding that the relationship maintained during visitation does not benefit the child significantly enough to outweigh the strong preference for adoption. (*In re Jasmine D.*, *supra*, 78 Cal.App.4th at p. 1350.) "[I]f an adoptable child will not suffer great detriment by terminating parental rights, the court must select adoption as the permanency plan." (*In re Dakota H.* (2005) 132 Cal.App.4th 212, 229.)

We review the court's finding that the parental benefit exception to adoption does not apply for substantial evidence.⁵ (*In re Clifton B.*, *supra*, 81 Cal.App.4th at pp. 424-425; *In re Autumn H.*, *supra*, 27 Cal.App.4th at p. 576.) Under this standard, we must affirm the ruling if it is supported by evidence that is reasonable, credible, and of solid value. (*In re Christina A.* (1989) 213 Cal.App.3d 1073, 1080.) The

⁵ As frequently noted, some courts have reviewed such findings for an abuse of discretion. (See, e.g., *In re Jasmine D.*, *supra*, 78 Cal.App.4th at p. 1351 [application of parental benefit exception is a "quintessentially discretionary determination"].) However, "[t]he practical differences between the two standards of review are not significant. '[E]valuating the factual basis for an exercise of discretion is similar to analyzing the sufficiency of the evidence for the ruling. . . . Broad deference must be shown to the trial judge. The reviewing court should interfere only "'if [it] find[s] that under all the evidence, viewed most favorably in support of the trial court's action, no judge could reasonably have made the order that he did.' . . .'" [Citations.]" (*Ibid.*)

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." (*In re Autumn H.*, at p. 576.)

Mother failed to meet her burden of establishing that the parental benefit exception to adoption applied. Evidence of her consistent and loving contact with the child is not enough to establish that his adoption is precluded by the parental benefit exception. (*In re Beatrice M.* (1994) 29 Cal.App.4th 1411, 1419.) The court expressly found that the contact mother had maintained with Christian "has not been the kind of visitation that would enable the court to find he would benefit from continuing that relationship" as contemplated in subdivision (c)(1)(B)(i) of section 366.26. The social worker's testimony that Christian's need for security and stability through adoption outweighed the significance of his relationship with mother is sufficient by itself to support the court's finding. (*In re Dakota H.*, *supra*, 132 Cal.App.4th at p. 229.)

The order terminating mother's parental rights and denying her modification petition is affirmed.

NOT TO BE PUBLISHED.

PERREN, J.

We concur:

GILBERT, P.J.

YEGAN, J.

Ginger E. Garrett, Judge
Superior Court County of San Luis Obispo

Joseph T. Tavano, under appointment by the Court of Appeal, for
Defendant and Appellant.

Warren R. Jensen, County Counsel, Leslie H. Kraut, Deputy County
Counsel, for Plaintiff and Respondent.