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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

In re BRIANNA M., a Person Coming
Under the Juvenile Court Law.

B234691

(Los Angeles County
Super. Ct. No. CK37540)

LOS ANGELES COUNTY
DEPARTMENT OF CHILDREN AND
FAMILY SERVICES,

Plaintiff and Respondent,

v.

ANN D. et al.,

Defendants and Appellants.

APPEALS from orders of the Superior Court of Los Angeles County, Stanley Genser, Commissioner. Affirmed.

Marissa Coffey, under appointment by the Court of Appeal, for Defendant and Appellant Ann D.

Eva E. Chick, under appointment by the Court of Appeal, for Defendant and Appellant Gabriel J.

Andrea Sheridan Ordin, County Counsel, James M. Owens, Assistant County Counsel, and William D. Thetford, Principal Deputy County Counsel, for Plaintiff and Respondent.

Ann D. (Mother) and Gabriel J. (Father) appeal the juvenile court's denial of their respective Welfare and Institutions Code section 388 petitions.¹ We conclude the court correctly determined that the parents failed to demonstrate the necessary changed circumstances to warrant a change of order. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Mother² and Father are the parents of Brianna (born Oct. 2008). On October 16, 2009, a Los Angeles County deputy sheriff responded to a child neglect call. When the deputy arrived at the location, a liquor store, he saw Father sitting on the ground with his back against the store. He had a 40-ounce beer in one hand and his other arm was around Brianna. Father was asleep and Brianna, who was shoeless, was crying. After waking Father, the deputy asked him where Brianna's shoes were. Father did not know. Father stood up. As the conversation continued, the deputy noticed that Father had bloodshot eyes, slurred speech, and continuously staggered as he tried to walk. After the deputy determined that Father was unable to care for his or Brianna's safety, he was arrested for child endangerment and for being drunk in public. After transporting Father and Brianna to the station, the deputy contacted Mother and told her that Father had been arrested and explained the charges. According to the deputy, Mother did not seem concerned and began to laugh. The deputy advised her to respond to the station. He then called the Department of Children and Family Services (DCFS) and informed it that Brianna was in Sheriff's custody.

Later that day, Mother arrived at the station. The deputy met with her. Although he could not ascertain whether she was under the influence of any intoxicating substances, he smelled a slight odor of alcohol on her breath. The deputy spoke to the

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

² Mother had a prior history with the dependency court, having failed to reunify with five other children. Earlier petitions disclosed that Mother was charged with having an untreated alcohol and drug problem.

Children's Social Worker (CSW) who had responded to the station to investigate the referral. He told the CSW that he did not "feel comfortable" releasing Brianna to Mother, explaining that after Mother was told about Father's arrest she simply laughed.

The CSW asked Mother how she felt about Father being found intoxicated outside the liquor store with Brianna. Mother explained that although Father had consumed approximately 48 ounces of beer while at home that day, she did not think he was "drunk," so she decided to take a shower and left Brianna in his care. When she got out of the shower an hour later, she discovered Father and Brianna were gone. Mother denied drinking with Father on the day of his arrest and having a problem with alcohol. She claimed that she drank only on "special occasions like Christmas" and Father generally drank "one to two beers every weekend." The CSW smelled the odor of an alcoholic beverage emitting from Mother's body.

Mother agreed to submit to an on demand drug and alcohol test and assured the CSW that she would test clean. Mother's test results came back positive for alcohol. When the CSW confronted Mother with the dirty test, Mother asserted she had not consumed any alcohol in the past few days and was unable to recall when she last drank an alcoholic beverage. She could provide no reason for the positive test. Mother admitted that on prior occasions she had left Brianna with Father when he was intoxicated.

The CSW spoke to the maternal great-grandfather, who said that he had raised Mother since she was a little girl. He said Mother "definitely" has a problem with alcohol and that she began drinking beer when she was a young teenager. Despite Mother's issue with alcohol, the great-grandfather said Brianna always appeared well cared for. He also believed Father had an alcohol abuse problem, as he had seen Father intoxicated on more than a few occasions.

On October 23, 2009, DCFS filed a petition on Brianna's behalf, alleging pursuant to section 300, subdivision (b) that: (1) on October 16, 2009, Father had endangered the child by being under the influence while she was in his care, and Mother, knowing of Father's history of alcohol abuse and his alcohol consumption on October 16, failed to

take action to protect the child; (2) Mother has a 15-year history of substance abuse involving marijuana and alcohol and is a current abuser of alcohol which renders her periodically incapable of providing Brianna with appropriate care, placing the child at risk of harm; (3) Brianna's siblings received DCFS services due to Mother's substance abuse; (4) Father has a history of substance abuse and is a current abuser of alcohol; and (5) on October 16 and other occasions, Father cared for Brianna while under the influence of alcohol, placing the child at risk of harm. That same day, the court ordered that Brianna remain detained, and she was placed in foster care. It deemed Father to be Brianna's presumed father and ordered monitored visitation for the parents.

Mother and Father were interviewed for the December 2009 jurisdiction/disposition report. Mother stated that Father was not drunk on the day she left him with Brianna and he was arrested. Concerning his arrest she said, "The police are just adding more stuff to the story." On the subject of her alcohol consumption, Mother declared, "I don't have a drinking problem. I drink maybe every other weekend but it's only a 24 oz. beer." Father acknowledged that he was "a bit drunk" on the day he was arrested. As to Mother's drinking habits, he said, "Yes [she] drinks sometimes. Not a lot[,] maybe like 6 or 9 beers only on the weekends." He claimed he only drank on the weekends, usually consuming "an 18 pack between Saturday and Sunday. I might have one during the week after work. I don't think I have a big problem."

The report noted that Mother had enrolled in an outpatient alcohol program on November 16, 2009. She was required to attend group sessions and NA/AA (Narcotics Anonymous/Alcoholics Anonymous) meetings three times a week and submit to weekly random drug and alcohol testing. The letter from the program, dated December 3, 2009, stated that Mother had one unexcused absence, had submitted one diluted sample for testing, and had missed a drug test. As to the missed test, Mother explained that she drank alcohol over the weekend and decided not to submit a sample.

Father was referred to a program to assess his alcohol problem. He had attended one parenting class and three AA meetings.

Mother had weekly monitored visits with Brianna. Father's monitored visits were more sporadic due to scheduling problems caused by his employment.

On December 28, 2009, pursuant to an agreement between the parties, Mother and Father admitted the allegations of an amended petition.³ DCFS was ordered to provide family reunification services, including individual and drug and alcohol counseling, parenting classes, and drug and alcohol testing.

On February 23, 2010, the court approved Brianna's placement with the paternal aunt and uncle. In April, the aunt and uncle informed DCFS that they were no longer willing to care for Brianna and she again was placed in foster care.

The May 21, 2010 six-month status report informed the court that Father had not yet enrolled in individual counseling. He successfully completed parent education classes and a domestic violence program. Father had participated in 11 individual drug counseling sessions and had submitted to random drug and alcohol testing. All tests were negative.

Mother had not enrolled in individual counseling. She was attending parenting classes. She was continuing to participate in an outpatient substance abuse program. Although she tested negative for drugs and alcohol on a number of occasions, she provided two diluted test samples, in November and December 2009, and missed tests on three occasions, in November and December 2009 and January 2010. Mother admitted to the CSW that she had consumed a beer, explaining why she had missed one of the tests.

Monitored visits were satisfactory. DCFS reported that the parents were in partial compliance with the case plan.

In a July 2010 report for the contested six-month review hearing, DCFS noted that Brianna's foster mother told the CSW that in November 2009, Mother called her between 11:30 p.m. and midnight and seemed to be drunk. On January 4, 2010, the foster mother said Mother called all day on the previous Saturday. Mother seemed agitated and sounded as though she had been drinking. The foster mother reported that on that same

³ The amended petition dropped the allegations concerning Brianna's siblings and Father's history of substance abuse and current alcohol abuse.

weekend, Father came to pick up Brianna for a visit and appeared to be under the influence of alcohol. The paternal uncle who accompanied Father told the foster mother that Father had been drinking.

When the CSW confronted Father with the foster mother's allegation of his condition during the last visit, he said nothing. The CSW reminded him that visits would not take place if he was suspected of being under the influence.

On January 19, 2010, the CSW was speaking to Father and detected a strong smell of alcohol. He asked Father if he had been drinking. Father responded that he had nothing to drink that day; however, he had about a six pack of beer the night before. Father said it was very difficult for him to stop drinking, but he was willing to do whatever it took to get Brianna back.

The next day, the CSW spoke with Mother. Mother said she needed to come clean and admitted to drinking a beer the prior Saturday. She told the CSW that she spoke to her counselor about it and was continuing to test.

During a June 8, 2010 scheduled home visit, Mother was showing the CSW around the residence, a one bedroom, one bath apartment. While in the kitchen, the CSW asked Mother to open the refrigerator. The CSW noticed what appeared to be a 32- or 40-ounce bottle of beer. When the CSW asked Mother about the beer, Mother quickly closed the refrigerator door. The CSW asked Mother who the beer belonged to and Mother responded it was a neighbor's. When asked why a neighbor would keep a beer in Mother's refrigerator, Mother then said the beer belonged to her grandfather. A second CSW arrived at the home and after discussing the matter further, Mother again changed her story and claimed the beer belonged to a homeless man that she allowed into the apartment that morning.

On June 16, the CSW spoke with Father. When she asked him about the beer in the refrigerator, he stated it belonged to a cousin who had visited on the weekend prior to the visit.⁴

On June 30, Mother tested positive for alcohol.

The parents continued to have monitored visits with Brianna. The maternal great-grandfather who was the monitor told the social worker the visits were going “[o]kay.”

On July 6, 2010, the parents withdrew their request for a contested six-month review hearing. The court’s previous orders remained in effect. The matter was set for an October 28, 2010 12-month review hearing.

The October 2010 12-month status report revealed the following. On August 2, 2010, Father came to the DCFS office to pick up his bus pass. The CSW met with him in the lobby and noted the strong odor of alcohol emanating from his person. As they spoke, she saw that his eyes were red. When she asked if he had been drinking, Father denied that he had, stating, “I feel that you are trying to take my daughter away.”

On August 31, 2010, the CSW conducted an unannounced home visit. As the CSW approached the home, she looked into a window that had no blinds or curtains. She observed Mother sitting at a table by the window. On the table was what appeared to be a 40-ounce liquor bottle filled with a yellow liquid. When Mother noticed the CSW, she grabbed the bottle and walked away from the window. Once inside the home, the CSW asked Mother why she was drinking. Mother became hostile and said, “[Y]ou (DCFS) are always out to get me [because] you want to keep my daughter away.”

Father returned to the home. The CSW spoke with Father in the kitchen and told him she had seen alcohol on the table near Mother. Father covered his face with his hands and cursed. However, he denied that he has witnessed Mother drinking. Mother came into the kitchen. At first, she berated the CSW and asked her questions about her

⁴ In a conversation on June 22, Mother told the CSW that the beer belonged to her cousin and his girlfriend who spent the weekend at the apartment while Mother and Father were not home.

drinking habits. When the CSW reminded Mother that she had an open case, Mother pleaded with her not to report to the court what she had seen.

Father had not begun individual counseling. In July 2010, he completed a six-month outpatient alcohol treatment program. He tested positive for alcohol twice in September 2010 and submitted diluted samples twice in July. The July tests occurred after Father had completed the outpatient program.

Mother was still enrolled in a one-year outpatient substance abuse program. In July and August 2010, Mother missed a few classes and submitted a diluted test sample on August 23. Mother's counselor at the program contacted the CSW and told her that she had received an anonymous call from a party who claimed to have seen Mother in the parking lot outside of the program. Mother retrieved a liquor bottle from her purse and drank. According to the caller, Mother was under the influence. The counselor said she met with Mother after receiving the call. Mother was confrontational and avoided eye contact with her. The counselor had Mother tested on demand. The result of that test was positive for alcohol. In September and October, Mother submitted three diluted test samples and failed to show for two other tests. She also failed to attend the program on several occasions between August and October. Mother's counselor reported, "[Mother's] inconsistency has affected her recovery and has caused her to relapse."

Monitored visits continued, although there was a problem with the maternal great-grandfather remaining as the monitor. It appeared that some of the visits took place at Mother's home without DCFS approval and on one occasion Mother and Brianna were together without a monitor. DCFS arranged for a different monitor. The parents were reported to be very loving and nurturing with Brianna.

DCFS acknowledged that the parents had been consistent with their monitored visits with Brianna. However, they failed "to recognize the negative impact their use of alcohol has had in their lives and seem unwilling or unable to adequately address this issue. Both parents had positive tests in September 2010." DCFS believed Mother was in denial with regard to her consumption of alcohol. The parents were not participating

in individual counseling, which DCFS thought was essential to their recovery. DCFS recommended that the court terminate reunification services.

On October 28, 2010, the 12-month review hearing was set for a November 22 contest. A last minute information report to the court noted that Father had enrolled in an alcohol aftercare program on November 5 and had submitted two negative alcohol tests. Mother had enrolled in individual counseling and had attended two sessions. She submitted two diluted test samples in November.

At the November 22 hearing, the court stated it could not conclude that there was a substantial probability either parent would reunify with Brianna by the 18-month review date. It terminated reunification services and set the matter for a March 21, 2011 section 366.26 hearing.

On January 26, 2011, Mother filed a section 388 motion. She requested family reunification services, unmonitored visits and, in the event Brianna had to be placed in another home, that she be placed with a relative. Mother declared that she: (1) was clean and sober and attending AA meetings at least three times per week; (2) had completed her drug program and had submitted clean tests since November 19, 2010; (3) had enrolled in an aftercare program; and (4) had bi-weekly visits with Brianna, who called her “Mommy.” The motion was set for a March 9, 2011 hearing.

DCFS reported for the March 9 hearing that Mother completed her outpatient treatment program on January 20, 2011, and had been admitted to an aftercare program. Mother had submitted four negative test samples. She was participating in individual therapy. She had attended seven sessions, with four of them taking place after the court terminated reunification services. However, since January 7, she had missed five sessions. Mother denied that Father was drinking, even though he had a positive test on November 29, 2010, and submitted a diluted sample on February 8, 2011. The monitored visits went well. The hearing on Mother’s petition was continued.

The report prepared for the scheduled March 21, 2011 section 366.26 hearing noted that Brianna had been matched with a prospective adoptive family. The family had a completed home study.

On March 21, the court set the section 366.26 hearing for a May 23, 2011 contest. The hearing on Mother's section 388 petition was continued to the same date.

On May 20, 2011, Father filed a section 388 petition. He sought Brianna's return to his custody or, in the alternative, reunification services with unmonitored visits. He claimed that "[s]ince my brief relapse in November 2010, I have continuously been sober and tested clean." Father also stated that he was participating in individual counseling and attending AA meetings. The court set a hearing date for Father's petition.

On May 23, the court was advised that there might be a conflict between Brianna and her lawyer. On June 20, the court appointed new counsel to represent Brianna.

DCFS prepared an interim review report in anticipation of Father's section 388 hearing. Since the termination of reunification services in November 2010, Father completed 11 individual therapy sessions. An intern with the program observed that Father had shown a great interest in his treatment and had verbalized a strong desire to comply with DCFS requirements in order to reunify with Brianna. The CSW was unable to verify if Father was currently attending the aftercare program and his verification slips for the AA meetings showed that he last attended in February 2011. Since his last positive test result in November, Father tested negative on 12 occasions. He submitted one diluted sample in February 2011. Father informed the CSW that he was no longer living with Mother. He was temporarily living with a relative. The monitored visits went well. Based on Father's history of alcohol abuse, DCFS believed he had to abstain from its consumption. DCFS opined that he had not yet committed to a life of sobriety.

On July 1, 2011, the court held a hearing on the parents' section 388 petitions. In addition to receiving the DCFS reports, the court heard testimony from several witnesses.

Leroy Henley testified that he was Mother's AA sponsor. He had been her sponsor for four years and had known her for five.⁵ He was working with Mother on the 12-step program and she was currently on step two. During the last six months, he met

⁵ He said later that he used to be Mother's neighbor. He moved away prior to Brianna being removed from the home. He had recently reestablished contact with Mother and had been her sponsor for about six or seven months.

with her twice a week. Henley said he spoke to Mother every day. He stated that in the past six months he had never observed Mother to be under the influence of alcohol. Henley accompanied Mother on a couple of visits with Brianna. He said Brianna looked happy and she called Mother, “Mom.” Henley believed Mother was committed to her sobriety.

Rebecca Ruiz was Mother’s substance abuse counselor during the time Mother attended an outpatient substance abuse program from November 2009 to November 2010. Mother attended sessions once or twice a month. Although Mother tested positive for alcohol use while she was in the program, she took responsibility for her actions. After she completed the outpatient program, she enrolled in an aftercare program. She completed the aftercare program in June 2011 and did not submit a dirty test sample during the three months she participated.

On cross-examination, Ruiz agreed that Mother had two positive alcohol tests just prior to completing the outpatient program. Ruiz acknowledged that individuals who participated in the program for one year received a completion certificate even if they were still testing positive for alcohol use.

Mother testified that she was no longer drinking alcohol. She said she had been sober since November 2010. She attended AA meetings three times a week. She and Brianna visited twice a week. Brianna called her “Mommy.” They enjoyed their visits and Brianna cried when it was time for her to leave. Mother stated she and Father were no longer living together.

The court denied the parents’ petitions, finding they had presented insufficient evidence of a substantial change in circumstances. It noted, “They may have participated in a program, but they’ve not benefited from those programs. It’s an ongoing problem which they are in denial of.”

The parents’ timely appeal followed.

DISCUSSION

I. The Governing Law

Section 388, subdivision (a) provides in 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 . . . for a hearing to change, modify, or set aside any order of court previously made or to terminate the jurisdiction of the court.” The moving party bears the burden of proving, by a preponderance of the evidence, changed circumstances. (*In re Aaliyah R.* (2006) 136 Cal.App.4th 437, 446.) We review a denial of a section 388 petition for abuse of discretion. (*In re B.C.* (2011) 192 Cal.App.4th 129, 141.) It is a rare case where the denial of a section 388 motion warrants reversal as an abuse of discretion. (*In re Kimberly F.* (1997) 56 Cal.App.4th 519, 522.)

II. Mother’s Appeal

Mother contends the court abused its discretion in denying her motion because after reunification services were terminated in November 2010, “she turned her life around. . . . [¶] By the time the contested hearing was held on [her] section 388 petition on July 1, she had been clean for nine or ten months, a significant change since her services were terminated.” She points to her participation in AA meetings and individual counseling and suggests that she is successfully addressing her problem with alcohol.

“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 [child] to *both* parent[s] 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.’ [Citation.]” (*In re B.D.* (2008) 159 Cal.App.4th 1218, 1229.)

Here, Brianna was removed from Mother’s custody because of her substance abuse. The petition to which Mother admitted alleged that she had a 15-year history of

substance abuse. The maternal great-grandfather told the CSW that Mother began drinking as a young teenager. That was well over 20 years prior to the section 388 hearing. Mother also failed to reunify with her other children due to her substance and alcohol abuse. Although we recognize that Mother was sober for nine or 10 months prior to the hearing, that progress pales in comparison to the over 15-year-old history of abuse. We note that Mother relapsed and succumbed to alcohol use while participating in the same preventative programs and counseling she outlined in her petition. At best, Mother demonstrated that her circumstances were changing, an insufficient showing to warrant a change of order. (*Kimberly F.*, *supra*, 56 Cal.App.4th at p. 529.)

The fragile state of Mother's recovery is best demonstrated by her testimony at the hearing. Her attorney asked, "Are you an alcoholic?" One of the attorneys stated without objection that Mother paused before answering, "A lot of that is like a lie. I'm not in denial, but back then, yes. Yes. Yes. Well not anymore." Her answer, combined with her long history of lying about her drinking and denying its effects, provides clear evidence that she has not conquered her addiction to alcohol.

Long-standing substance abuse is a serious problem that cannot be ameliorated in a few months. We cannot conclude the trial court abused its discretion when it determined that Mother had failed to show changed circumstances. (See *In re C.J.W.* (2007) 157 Cal.App.4th 1075, 1081 [court properly found that three months of sobriety was insufficient to show changed circumstances when compared with parents' extensive history of drug abuse and failure to reunify with other children for the same reason]; *In re Amber M.* (2002) 103 Cal.App.4th 681, 686-687 [§ 388 petition properly denied where mother had 17-year history of substance abuse, had relapsed during the course of the case, and had been clean for 372 days].)

III. Father's Appeal

Father urges that he made great strides toward alleviating his alcohol problem after reunification services were terminated. "He picked himself up and addressed his responsibility. [He] continued to randomly drug test for DCFS and all of his tests after

November, 2010[] were negative. On April 1, 2011, [he] moved to a separate residence from mother. [He] also completed eleven sessions of individual therapy on April 27, 2011.”

Like Mother, Father had a long-standing issue with alcohol. His abuse of alcohol was so substantial that he allowed Brianna to stand shoeless on a city street in front of a liquor store while he was passed out as a result of drinking. The evidence showed that he assumed care of Brianna on other occasions while he was intoxicated. The danger Brianna faces as a result of his untreated substance problem is manifest.

Also like Mother, Father demonstrated no changed circumstances. Despite Father’s best efforts to address his problem (completing a six-month alcohol program in July 2010), he continued to suffer relapses. As he readily acknowledged to the CSW, it was very difficult for him to stop drinking. And although he was continuing to take steps to eliminate alcohol from his life, there were questions about his level of participation. We note that the letter stating that Father had enrolled in the aftercare program was dated February 23, 2011, over four months before the July 1 section 388 hearing. The CSW was unable to verify if Father was continuing to participate. In addition, Father’s AA attendance slips showed that he last attended a meeting on February 23, 2011. In any event, given the deep rooted problem Father had, the court did not abuse its discretion in concluding that some AA meetings and 11 therapy sessions did not demonstrate changed circumstances.⁶

⁶ Even if we were to assume the parents showed changed circumstances, they must also establish that a change of order is in the best interests of the child. (*In re Stephanie M.* (1994) 7 Cal.4th 295, 317.) They failed to present any substantial evidence that reinstating reunification services was in Brianna’s best interests. At most, the parents showed that they visited the child often and that the visits were enjoyable. Neither parent had been allowed unmonitored visits. At the time of the section 388 hearing, Brianna was in a prospective adoptive home. The caretakers had completed a home study and were ready to adopt Brianna as soon as she was freed for adoption. The parents made “no showing whatsoever of how the best interests of [this] young [child] would be served by depriving [her] of a permanent, stable home in exchange for an uncertain future.” (*In re C.J.W., supra*, 157 Cal.App.4th at p. 1081.)

DISPOSITION

The orders denying the parents' section 388 petitions are affirmed.

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SUZUKAWA, J.

We concur:

WILLHITE, Acting P. J.

MANELLA, J.