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

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

B236899

(Los Angeles County
Super. Ct. No. CK80042)

LOS ANGELES COUNTY
DEPARTMENT OF CHILDREN AND
FAMILY SERVICES,

Plaintiff and Respondent,

v.

MELISSA H.,

Defendant and Appellant.

APPEAL from orders of the Superior Court of Los Angeles County, Margaret Henry, Judge. Affirmed.

Patti L. Dikes, under appointment by the Court of Appeal, for Defendant and Appellant.

Andrea Sheridan Ordin, County Counsel, James M. Owens, Assistant County Counsel, and Melinda White-Svec, Deputy County Counsel, for Plaintiff and Respondent.

Melissa H. (Mother) and Joey S. (Father) are the parents of D.S. (born Mar. 2008). Mother appeals from the orders of the juvenile court denying her Welfare and Institutions Code section 388¹ petition and terminating her parental rights. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Mother and Father are not married. D.S. was born when Mother was incarcerated. D.S. was in the care of his paternal aunt, Sherry D., for several months after Mother was arrested. The Department of Children and Family Services (the Department) was notified in October 2009 that Mother had dropped off D.S. at a friend's home without making plans for his ongoing care and supervision.

Mother first spoke with the Department on October 23, 2009. She said that she had no home, no income, and no plan to care for D.S. She agreed to have Sherry D. care for D.S. Mother contacted the Department on November 3, 2009, stating that she was going to move into Sherry D.'s house; however, Sherry D. had not heard of this plan and said she would not agree to it.

On November 9, 2009, at the first team decision meeting scheduled with Father, Sherry D., and maternal grandmother, Mother was late and the meeting had to be rescheduled. At the rescheduled meeting, Mother disclosed that she was on probation for possession of a controlled substance and did not have a place to live. She had been living with maternal grandmother, but maternal grandmother made her leave the home because she had not taken responsibility for D.S. Father was also on probation for possession of controlled substances and did not have a place to live. Both parents admitted to using marijuana.

The Department determined that Mother had two previous referrals of child abuse and neglect regarding D.S., but no findings had been made in those cases. Mother had previously been convicted of a felony of possessing narcotics for sale. Mother told a

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

social worker in December 2009 that she was homeless and stayed at various motels with a friend. She did not have any money or source of income. Mother wanted D.S. to stay with Sherry D. until she could get permanent housing. Father stated that Mother has never taken full responsibility as a parent and that he knew his sister, Sherry D., could provide a good home for D.S.

On November 19, 2009, the Department filed a petition pursuant to section 300, subdivisions (b) and (g), and after a short period in foster care, D.S. was placed in the custody of Sherry D. On January 15, 2010, the petition was sustained as amended. Mother was granted reunification services and monitored visitation. The court recommended a custodial drug rehabilitation program for Mother.

Mother did not contact the Department again until March 27, 2010. She told the social worker that she was enrolled in parenting classes and individual counseling. She had not been able to visit D.S. as much as she wanted, but had visited him once or twice a month. The social worker determined, however, that Mother had enrolled in a parenting class but not participated in it. Nor had she participated in drug counseling or treatment. Mother had visited D.S. only once in December, twice in January, and twice in March.

In April 2010, the social worker telephoned Mother and her speech was slurred, but she denied being intoxicated. Mother said she was participating in therapy. The social worker later determined that Mother had never participated in counseling. During the rest of that month, the social worker attempted to contact Mother, but was successful reaching her only once. Mother said she would return the call, but never did.

At a hearing on July 16, 2010, the court admonished Mother for her lack of participation and failure to keep in contact with the Department. It recommended a drug program in which Mother could enroll at the courthouse. By August 6, 2010, Mother had not signed up for any program or visited with D.S. At a hearing on August 19, 2010, Mother did not appear. The court found that Mother was not in compliance with the case plan and terminated Mother's reunification services. It also found that return of D.S. to his parents' physical custody would create a substantial risk to his physical and emotional well being. A section 366.26 hearing was set for December 16, 2010. The hearing was

then continued until April 2011. In the meantime, Father informed the Department that he had no interest in appearing in court and that Sherry D.'s home was the "best possible place" for D.S.

In December 2010, Sherry D. told the social worker that Mother had become angry and hostile with her. When the social worker asked Mother about this, Mother admitted she had behaved as reported, but then became hostile with the social worker. In the meantime, D.S. appeared to be very attached to Sherry D. and they appeared to have a parent-child relationship.

Mother visited D.S. once in February 2011 and once in March 2011. She attended his birthday party in March and her behavior was appropriate.

Mother tested positive for THC² once in February and three times in March 2011. Mother enrolled in the Shields for Families program in January 2011, but had attended only 10 out of 23 sessions and had seven unexcused absences. In February and March 2011, she attended 15 out of 21 sessions and had two unexcused absences. In April 2011, she attended eight out of 20 sessions and had four unexcused absences. Mother tested positive for THC twice in April 2011 and three times in May 2011. In May, Mother completed a parenting class. Mother continued to participate in the Shields for Families program but her THC levels continued to fluctuate. She had weekly monitored visits with D.S. and her behavior was appropriate.

The Department recommended adoption by Sherry D. but the home study was not completed by August 2011 and the selection and implementation hearing was continued until October 2011.

² THC is the main active chemical in marijuana. (National Institute on Drug Abuse (InfoFacts: Marijuana (rev. Nov. 2010).)

Mother filed a section 388 petition on August 25, 2011.³ She requested that the juvenile court return D.S. to her care, or in the alternative, grant reunification services and unmonitored visitation.

The social worker reported that Mother had not reported timely to program sessions and failed to provide urine samples in August and September 2011. Mother tested positive for THC twice in September 2011. However, Mother had completed several parenting and counseling programs by October 2011. One Shields for Families coordinator reported that Mother had positive interaction with staff and others in the program. Another stated that Mother had demonstrated a commitment to her therapy and sobriety but needed further work to meet treatment goals.

The court held a hearing on October 13, 2011, in which it denied the section 388 petition, terminated parental rights of Mother and Father pursuant to section 366.26, and ordered a permanent plan of adoption with Sherry D. Mother appealed, contending that the court abused its discretion in denying her section 388 petition and in terminating her parental rights.⁴

DISCUSSION

I. Denial of Section 388 Petition

Section 388 provides that a juvenile court may modify, change, or set aside previous orders when the moving party presents new evidence or demonstrates a change of circumstances and establishes that the proposed change is in the child's best interests. (§ 388; Cal. Rules of Court, rule 5.570; *In re Stephanie M.* (1994) 7 Cal.4th 295, 317; *In re Casey D.* (1999) 70 Cal.App.4th 38, 47.) "A petition which alleges merely changing circumstances and would mean delaying the selection of a permanent home for a child to

³ Mother also filed a section 388 petition in June 2011, but it was later withdrawn by her attorney.

⁴ Father's parental rights were also terminated but he is not a party to this appeal.

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. [Citation.]” (*In re Casey D.*, *supra*, at p. 47.) We review the denial of a section 388 petition for abuse of discretion. (*In re Jasmon O.* (1994) 8 Cal.4th 398, 415; *In re Anthony W.* (2001) 87 Cal.App.4th 246, 250.)

Mother contends she met her burden and demonstrated that return of D.S. to her custody would be in his best interests. She argues she was actively involved in the treatment and recovery process and was making progress. She points to the letters and certificates of completion from the Shields for Families program, as well as evidence of successful visits with D.S.

While we agree that Mother has progressed in her treatment, she did not begin to attend treatment programs for almost two years after the Department intervened. She was not in communication with the Department for several months. When she did speak with the social workers, she was often not credible. She still did not have a home of her own (she was living with the maternal grandmother), a job, or a source of income. Once she did enroll in programs, she did not attend every session, even after her section 388 petition was filed. She failed to consistently test negative for controlled substances. Although Mother had some clean tests, she had tested negatively in the months leading up to the hearing. In light of her past drug history, we cannot say that she has changed her life or conquered her narcotics addiction.

In addition, D.S. had lived with Mother for only a few days immediately after his birth. He was doing well with Sherry D., who was very interested in adopting him. Mother did not show that a change would be in the child's best interests, even though her visits with him were successful. It was important for D.S. to form a long-lasting emotional attachment to his prospective adoptive family. (*In re Brian R.* (1991) 2 Cal.App.4th 904, 923-924.)

As Mother did not show there was a change of circumstances or that it was in D.S.'s best interests to offer Mother reunification services, the court's denial of Mother's

section 388 petition was not an abuse of discretion. (*In re A.S.* (2009) 180 Cal.App.4th 351, 358; *In re Edward H.* (1996) 43 Cal.App.4th 584, 594.)

II. Termination of Parental Rights

Mother contends the juvenile court erred in terminating her parental rights because she consistently visited and positively interacted with D.S., and she occupies a parental role in his life.

Pursuant to section 366.26, subdivision (c)(1), once the juvenile court determines a child is adoptable, the court shall terminate parental rights and order the child placed for adoption unless it finds a compelling reason for determining that termination would be detrimental to the child due to specified circumstances. One such circumstance is where “[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).) Mother asserts this exception applies here.

It is the parent’s burden to show that termination would be detrimental. (*In re Erik P.* (2002) 104 Cal.App.4th 395, 401.) “To meet the burden of proof for the section 366.26, subdivision (c)(1)(B)(i) exception, the parent must show more than frequent and loving contact or pleasant visits. [Citation.] . . . 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. [Citations.]” (*In re L. Y. L.* (2002) 101 Cal.App.4th 942, 953-954.)

To justify application of section 366.26, subdivision (c)(1)(B)(i), the relationship between the parent and child must be sufficiently significant that the child would suffer detriment from its termination. (*In re Angel B.* (2002) 97 Cal.App.4th 454, 468.) The juvenile court must consider many variables, including the child’s age, the length of time the child was in parental custody and in foster care, the effect of interaction between parent and child, and the child’s particular needs. (*In re Amber M.* (2002) 103 Cal.App.4th 681, 689; *In re Zachary G.* (1999) 77 Cal.App.4th 799, 810-811.) The court must then balance the strength and quality of the parent-child relationship against the

security and sense of belonging that a stable family would confer on a child. (*In re Zachary G.*, *supra*, at p. 811.)

A dual standard of review applies to the juvenile court's determination of whether the exception applies. Whether a beneficial relationship exists is reviewed for substantial evidence, and whether such a relationship constitutes a compelling reason for concluding termination would be detrimental to the child is reviewed for abuse of discretion. (*In re Bailey J.* (2010) 189 Cal.App.4th 1308, 1314-1315.)

Although Mother claimed that she and D.S. maintained regular contact and enjoyed their monitored visits, she did not visit him more than once a month during the first year of the dependency jurisdiction. Her regular weekly visits did not begin until early 2011. In addition, she failed to show that D.S. would benefit from a continuation of the parent-child relationship. D.S. had never lived with Mother for any extended period of time and he was thriving in foster care. Mother did not demonstrate the ability to provide D.S. with a safe and stable home, as she had never had permanent housing during his lifetime. In contrast, Sherry D. lived in one home and wanted to adopt him.

Although we do not doubt that Mother loves her child and that Mother and D.S. enjoyed their visits, it is clear that Sherry D. occupies the role of parent in D.S.'s life. Balanced against the uncertainty of Mother's continued substance abuse and her unresolved living situation, adoption by Sherry D. will confer a much stronger sense of security and belonging to D.S.

We conclude the court did not abuse its discretion by finding there was no compelling reason to preclude termination of Mother's parental rights.

DISPOSITION

The juvenile court's orders denying Mother's section 388 petition and terminating her parental rights are affirmed.

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SUZUKAWA, J.

We concur:

EPSTEIN, P. J.

MANELLA, J.