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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

In re DAVID B., a Person Coming Under
the Juvenile Court Law.

ALAMEDA COUNTY SOCIAL
SERVICES AGENCY,

Plaintiff and Respondent,

v.

DEANNA J.,

Defendant and Appellant.

A132472

(Alameda County
Super. Ct. No. OJ09013716)

We last reviewed this dependency case when Deanna J., the mother of David B., petitioned for an extraordinary writ (Cal. Rules of Court, rule 8.452) to vacate an order terminating reunification services and setting a hearing to select a permanent plan under Welfare and Institutions Code section 366.26.¹ In an unpublished opinion (*Deanna J. v. Superior Court* (March 10, 2011, A130538)), we rejected mother’s claims that substantial evidence did not support findings of (1) a substantial risk of detriment were David returned to her, or (2) that reasonable reunification services had been provided by real party in interest Alameda County Social Services Agency (the agency). Here, Deanna J. appeals the juvenile court’s orders denying her section 388 petition and terminating her parental rights. We affirm.

¹ Further unspecified section references are to the Welfare and Institutions Code.

BACKGROUND

Petition through Reunification

We first recount the circumstances leading to the termination of reunification services. In early November 2009, a week after David was born, the agency petitioned for dependency under subdivisions (b) and (g) of section 300 based on inability to care for him due to mother's histories of substance abuse and mental health problems, and continued mental instability. She had recently been "5150'd" under the Lanterman-Petris-Short Act (LPS) (§ 5150 et seq.) three times in as many months, had a history of suicidal threats and depression, and was diagnosed with bipolar and schizoaffective disorders. The father was unwilling to take David, already having assumed care of three older children he had with mother, and was in the process of divorcing her. The allegations were sustained at a jurisdictional hearing soon afterward. Mother was absent but represented by counsel and was already receiving services. A further LPS commitment for her delayed jurisdiction to January 2010, when the court declared dependency and ordered reunification services for both parents.

Mother was present for a six-month review hearing in July 2010, where the court followed social worker recommendations to continue providing reunification services to her for another six months, while discontinuing them to the father. The father had effectively surrendered the three other children to mother's care in February, and she was living at an "outreach ministry" where she planned to stay for a year. Her son Daniel had been diagnosed with autism and required special care. Mother was in partial compliance with her case plan. She was progressing in mental health treatment with a psychiatrist and therapist, was generally good about keeping appointments, and took her medications. She had completed a parenting course, had clean random drug tests, and had satisfactory visits with David. David was well bonded in his foster placement.

The 12-month review hearing was held in November 2010, and the social worker now recommended terminating reunification services and adoption of a permanent plan for David because mother had in effect abandoned her children—all four of them. At the start of October, without informing the agency, she had left her housing program, left her

three nondependent children in a custody arrangement with the case manager there, and moved to Mississippi. She called the child welfare worker (CWW) afterward to say she would be staying with a cousin, would take advantage of family support and housing available to her there, and might move to Louisiana.

The move came before mother's ability to parent David and her three other children together could be assessed, disrupted her visitation and parent-child relationship with David, and left the CWW unable to see a substantial probability that David could safely be returned to her care within another six months. Mother loved her children, but her unannounced departure raised questions about her judgment. Meanwhile, David needed stability and permanency, and an adoption assessment had found him adoptable. He had adjusted to his placement, building a relationship with his foster parents and other family members. Mother did not attend the hearing but participated by phone. She disagreed with the recommendation but understood the court's limited alternatives, and her counsel suggested placing David with a relative in Mississippi but also recognized that there were competing interests.

The court terminated reunification services for mother, finding in part no substantial probability that David would be returned to her custody prior to the expiration of 18 months from the date David was originally removed.

Our opinion denying mother's writ petition upheld challenged findings of detriment from return and reasonable services, noting in part that David's infancy at initial removal made the default period of services six months (§ 361.5, subd. (a); *In re Derrick S.* (2007) 156 Cal.App.4th 436, 444-445), whereas mother had effectively had 12 months, and that extending services any further was neither promising nor practical with mother having left the state.

Post-Reunification through the Plan Hearing

In December 2011, pending our decision, David was removed from the foster parents who had cared for him since January 2010 (the W.'s). This was done because the foster mother, since August 2010, had been oddly insisting that David had seizures, low weight, and other medical problems when repeated medical observation, hospitalization,

and tests did not bear out those problems. There was also concern that the foster mother, who had always resisted mother's visitation, had been fabricating reasons to frustrate reunification. The court ultimately denied efforts by the W.'s to achieve de facto and adoptive parent status. Those are not issues posed by this appeal, but the upshot is that David did not return to their care.

David was placed with new foster parents (the S.'s) starting in mid-December 2010, at 13 months old, and had to form new caretaker relationships. He made a good transition, was healthy, did not display the previously reported medical problems, and began building attachments to his new foster family.

In February 2011, the agency proposed terminating parental rights and selecting adoption as the permanent plan. Mother was "in reluctant agreement" with adoption but preferred it be by her out-of-state relatives. Assessment of those relatives had begun for potential adoptive homes, and the S.'s were also interested in adoption. Mother had not visited David since leaving, but she called CWW Laura Luo, and the new foster mother, to check on how he was doing. Father had ceased all contact with David, and there is no direct challenge on this appeal to the eventual termination of his parental rights.

Mother filed a section 388 petition in April 2011, seeking to modify the orders terminating services and setting the plan hearing, and instead order David (1) returned to her care in Mississippi, with dependency dismissed, (2) returned to her care there under family maintenance "with courtesy supervision," or (3) placed with mother's relatives in Mississippi. The asserted benefit for David under any of these options was to let him "grow up in his natural family and have a relationship with his biological relatives." The changed circumstances cited were that the first foster mother had falsified his medical condition, interfering with mother's visitation; that mother had moved to Mississippi, stabilized on her medication, sought a therapist, and secured affordable housing and family support; and that she had her three older children in her care there. With her petition came a change of stance on the adoption plan, from reluctant agreement to disagreement. An 18-month status review hearing later that month left all operative orders unchanged.

The plan selection hearing (§ 366.26), which had been stayed pending our decision on the writ petition, proceeded on May 12, 2011, with mother traveling from Mississippi to testify as to both plan selection and her modification petition. And the matter was continued to June 1 to allow investigation by the agency into the situation in Mississippi should the court opt to grant modification. At the conclusion of the hearing that day the court made its ruling, in light of the following facts.

Mother's situation was shown by documentary evidence and her testimony. She had moved to Mississippi because she lacked family support in the Bay Area, had gone through a divorce, home foreclosure and bankruptcy, was offered support by family in Mississippi, felt unable to find affordable housing here (housing being an element of her reunification plan), and feared loss of her other three children—14-year-old daughter F.B., and twin boy and girl D.B. and G.B., nearly five years old. She rued leaving, knowing it would jeopardize regaining David, but felt she had no way out and was unaware yet of the problems David had while with the W.'s. Since November 2010, she had rented a three-bedroom house in Ocean Springs, Mississippi, for \$580 a month plus utilities, several doors down from homes where two first cousins lived, and her three older children had moved there in December. She was disabled and not currently working, but had no problem with food, clothing or housing. She received child support, had help from family, and was with her children when they were not in school. She was still looking for therapists for them and would find one for David if he were returned to her. Her autistic son had special services (unspecified) through the Autism Society of America and school district. She was seeing a therapist and another doctor to manage her bipolar disorder, was stable, with monitored lithium levels, and was taking Abilify and Trazadone daily. As alternatives to David being returned to her, a cousin in her neighborhood, and another relative two hours away in Louisiana, were being assessed under the Interstate Compact on the Placement of Children (ICPC) (Fam. Code, § 7901). Mother had a visit with David under agency supervision four days after her testimony but had not otherwise seen him in the seven months since leaving. She had telephoned the

foster mother perhaps four times, had been in contact with CWW Luo, and had spoken to David twice over the telephone.

Mother was aware of the agency's position against modification and serious reservations expressed in a recent letter by Shalini Venktash, a senior case manager with long experience in working with David through the SEED (Services to Enhance Early Development) Program at Children's Hospital and Research Center in Oakland. But mother's testimony was apparently emotional and convincing as she expressed love for David, her regret at the circumstances and her own shortcomings, yet appreciation for what had been done for David, support for his current foster parents, and an ultimate desire that the court do what was best for David.

Attorney Marcie Neff, counsel for David, was moved by the close of mother's May 12 testimony to change her position and support David going to her in Mississippi. Counsel for the agency, acknowledging "very credible," "genuine," and "commendable" testimony by mother, adhered to the agency's position, based in part on the SEED Program position as articulated by Venktash.

Venktash's views were fully stated in a final letter report filed two weeks later. She had provided weekly infant-parent psychotherapy for the six months before mother left, overlapping weekly parental and developmental guidance to the W.'s for six months before David's removal from that home, and since then, the same guidance to the S.'s. Venktash recounted David's history of disruptions and loss of caregivers that began with separation from mother soon after birth, then three months with a first foster family that ended abruptly at their request, then life with the W.'s from ages three to 14 months that ended abruptly when he was placed with the S.'s. Thus he had three abrupt changes in caregivers in his first year of life, plus five months of unnecessary medical treatments, hospitalizations, medications, and emergency room visits during the W.'s' inaccurate reports of seizure activity.

On the prospect of a further change from the S.'s to mother at 19 months of age, Venktash wrote that, while placement with biological parents is usually the first choice if at all possible, this would "come at a serious cost to the child" at this point. This was a

critical time in his life for forming attachment relationships to “create deep, broad and far reaching consequences that directly affect young children’s capacity for learning, their sense of themselves as lovable and having agency in the world, and belief of the world as a safe place.” His current attachment figures were the S.’s, while mother was “a relatively unfamiliar person in his life”; and “[i]n these formative years, when this sense of self and others is being formed, each disruption, each move creates exponential risk that the child cannot regain ground in gaining a firm and healthy sense of himself in the world and in relationship to others.” Trying to cope with disruption and loss of caregivers can require a child using all his energies to create safety or adapt, “leaving little room for anything else,” and forestalling development in all areas, including the brain. Examples of adaptive behaviors are excessive dependence on caregivers, or avoiding them and being overly absorbed in exploring the inanimate world. David evidenced such behaviors when he came to the S.’s, showing a withdrawn affect, clinginess, anxiety in separating from Mrs. S., and confusion in where to look for comfort and security. He had trouble sleeping and would wake up often throughout the night, something the S.’s eased by sleeping in the same room with him. David appeared to respond to stress by withdrawing and appearing detached from adults, acting as if he did not need them, when his actual needs were the opposite—signals that are difficult for caregivers to read.

Through much work with the S.’s, Venktash wrote, these symptoms had eased, bringing many positive developmental changes, including using more single words, jabbering with the S.’s, using them for comfort, smiling and laughing more, and giving clear signals of his needs. “[I]t is in his relationship with [them] that David is able to show increased focus and expansion in his play skills. David entered this caregiving relationship with a compr[om]ised sense of himself based on his previous experiences and it is within this attentive, responsive and sensitive caregiving that David has shown improvement. It should be expected that if there is yet another change, he would at minimum regress to his previous behaviors and more likely they would be magnified, and perhaps new behaviors may emerge; as once again he may feel his world shaken up.”

Should the court decide to place David in mother's care, it was "imperative to consider a carefully planned transition that will decrease the impact of stress on David." She urged a minimum of four weeks of gradual and increasing transition time.

An addendum report by CWW Luo took essentially the same tone in urging termination of parental rights, and Luo recounted a visit she observed between mother and David. The S.'s brought David to the room, and he did not notice mother at first. With the S.'s in the room, he was able to interact with mother, and she was able to follow his lead. When she offered to lift him up to see trucks on the highway, however, he hesitated and tensed up a bit, allowing her to pick him up but then "squirming down" after a few seconds and asking for the S.'s to pick him up. He watched as Mr. S. left the room and went out to greet him when he returned. He refused to hug or give a high five to mother while Mr. S. was gone, but did give mother a high five when held by Mrs. S. "[I]n David's mind," Luo wrote, "his foster parents are his primary caregivers, while his mother, although she may not feel like a complete stranger to him, is at the most somebody that looks and/or feels somewhat familiar to him."

At the foster mother's home the next day, Luo saw that David called Mrs. S. mommy, climbed on her lap, "scrubbed her face and hair," and looked comfortable with her. She was loving and nurturing yet firm when setting limits, and David looked to her frequently for assurance.

Luo had gotten contact information from mother from Mississippi but, as of the writing nearly two weeks later, had not heard back yet from mental health providers and lacked information about treatment content and goals. She had learned that the older daughter was doing well in school. Daniel was enrolled in a special education program two days a week, and was reportedly " 'smart [and] funny but extremely impulsive and disregulated,' " having little control over his own behavior. School staff noted that he did not mind mother. His twin sister was home days, awaiting enrollment in Kindergarten, and was also a very active child.

Luo noted again the lack of opportunity to assess mother with the children already in her care, who had experienced much disruption and instability themselves and would

be adjusting to being with mother full time again. “For David, he would have to start from ground zero and he would need tremendous help from the birth mother and from some level of therapeutic support probably for a long time.” Uncertainties about the stability and care he could receive with mother made the benefit of placement with her “highly questionable,” yet he needed stability, permanency and consistent support. Currently, he was with foster parents that had “provided for him and state[d] their commitment to provide whatever he needs, including on-going therapeutic support,” and Luo did not believe it was in his best interest to return to mother’s care. The S.’s were committed to continued work with the SEED Program therapist, as well as “very open” to future contact with the birth family.

Mother appeared by telephone at the continued hearing on June 1, 2011, and David’s counsel, Neff, began by saying that she had been moved by mother’s “unselfish love” and “very emotional testimony” at the last hearing, but now regretted having given her any false hope. Having since had a long talk with Venktash, Neff could no longer advocate David going to mother. His “relationship and emotional attachment issues” made her unwilling to expose David to “risk what is already a really fragile situation.” Mother’s counsel urged that modification be granted but that, if it were not, mother be allowed to have postadoption contact with David, and counsel for the agency conveyed her understanding that the S.’s were in fact willing to allow mother continuing contact.

The court seconded Neff’s view of mother’s testimony, but denied modification. Having praised mother’s testimony as “extremely compelling,” the court stated: “I find the family history extremely compelling also, but the decision has to be made and it has weighed very heavily on my consc[ience] and my legal authority as a judge and my humanity as a person, and this has got to stop now. [¶] I believe that the best thing for your son under the circumstances is that he be adopted.” The court added: “I am so sorry because I am sure this hurts you terribly, which is the last thing that I want to do; but I have read so many reports and felt so frustrated about the circumstances that this little guy has been in and finally he seems like he’s in a place where he is loved and nurtured where he will be safe and adored and I know that that’s what you want for him,

too.” The court praised mother for her integrity but denied her petition, adding hope that she would have a continuing relationship with David. The court’s form order indicates that denial was because “[t]he proposed change or order . . . does not promote the best interest of the child.” The court also terminated parental rights.

DISCUSSION

Mother challenges the denial of her section 388 petition. “A juvenile court order may be changed, modified or set aside under section 388 if the petitioner establishes by a preponderance of the evidence that (1) new evidence or changed circumstances exist and (2) the proposed change would promote the best interests of the child. [Citation.]” (*In re Zachary G.* (1999) 77 Cal.App.4th 799, 806.)

As indicated in our first opinion, timing is important here. David’s infancy upon removal presumptively limited services to six months (§ 361.5, subd. (a)(1)(B)), and the petition came 18 months after removal, and six months after the termination of a year of reunification services and the setting of a plan hearing. Until a section 366.26, hearing is set, a parent’s interest in reunification is given precedence over the child’s need for stability and permanency, but the focus afterwards shifts to the child’s needs, casting on the parent the burden to support the proposed change. (*In re Jasmon O.* (1994) 8 Cal.4th 398, 419-420; *In re Stephanie M.* (1994) 7 Cal.4th 295, 317; *In re Mary G.* (2007) 151 Cal.App.4th 184, 204.)

The ruling is committed to the trial court’s sound discretion, not to be overturned unless an abuse of discretion is clearly established. We ask only whether the trial court exceeded the limits of legal discretion by making an arbitrary, capricious, or patently absurd determination, and cannot substitute our own decision for that of the trial court when two or more inferences can reasonably be deduced from the facts. (*Stephanie M., supra*, 7 Cal.4th at pp. 318-319.)

Mother’s having established a change of circumstances seems undisputed on appeal, and ample evidentiary support for that implicit finding compels us to accept the agency’s apparent concession on the point. The problem is the best interest prong of the section 388 test. Yes, as mother points out, section 388 provides an important *escape*

mechanism of due process protection in the dependency scheme for important changes arising between the termination of services and final determination of custody. (*In re Hunter S.* (2006) 142 Cal.App.4th 1497, 1506; *In re Kimberly F.* (1997) 56 Cal.App.4th 519, 528; see generally *In re Marilyn H.* (1993) 5 Cal.4th 295, 309.) But: “It is not enough for a parent to show *just* a genuine change of circumstances under the statute. The parent must show that the undoing of the prior order would be in the best interests of the child. [Citation.]” (*Kimberly F.*, *supra*, 56 Cal.App.4th at p. 529.) And here, mother was afforded a full hearing on her petition and could not muster much support for the best interests element. On appeal, she asserts only that “it would be in David’s best interest to grow up with his mother and siblings and with his natural family.” Mother’s status as a natural parent did not alone satisfy the best interests test of section 388. (*In re Justice P.* (2004) 123 Cal.App.4th 181, 192.) And she never established that David had a significant relationship with any of his siblings, or other relatives, or even a strong relationship with herself.

Mother’s argument amounts to an optimism that, somehow, it would prove to be in David’s best interests over an extended period of time to get to know her, his siblings, and his extended natural family. The court, however, had to decide what was in David’s best interests at the time of the ruling. David needed stability, permanence, and support then, and he was getting all of those things from the S.’s, who also wished to adopt and were very open to having his contact with mother and the biological family continue on. Not only that, but overwhelming evidence shows that three abrupt separations from caregivers in about a year’s time had left the 19-month-old with serious attachment difficulties that were likely to worsen or, at the very best, send him back to square one. This would happen even with the most loving and nurturing new caregiver, and it made any further change of placement very risky for him. Some of the disruption in caregivers was certainly not mother’s fault, but that was how the court had to assess the case.

The grave risk posed by another disruption also answers mother’s reasoning that some of CWW Luo’s concerns about David getting adequate therapy or other care could have been overcome, or that placing him with relatives, or with mother under a program

of family maintenance (perhaps under the ICPC), might have ameliorated those concerns. The fundamental point was that it was a further disruption in caregivers, in David's particular situation, that posed the biggest risk and would throw him back to square one. SEED Program case manager Venktash's recommendations for a careful transition and long therapeutic support was a backup position to minimize trauma and loss to David if the court *overrode* Venktash's opinion that there should be *no* further disruption.

No abuse of discretion is shown in the denial of the section 388 petition, and since mother's only arguments against the ensuing orders terminating her parental rights are based on the section 388 error predicate (*Kimberly F., supra*, 56 Cal.App.4th at pp. 535-536), we must affirm the ensuing orders as well.

DISPOSITION

The orders of June 1, 2011, denying the section 388 petition, terminating parental rights, and selecting a permanent plan of adoption are affirmed.

Richman, J.

We concur:

Haerle, Acting P.J.

Lambden, J.