

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

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

SONOMA COUNTY HUMAN
SERVICES DEPARTMENT,

Plaintiff and Respondent,

v.

TRACY R.,

Defendant and Appellant.

A141981

(Sonoma County
Super. Ct. No. 4016-DEP)

In this dependency proceeding, Tracy R. (Mother) appeals from the juvenile court’s orders denying her a hearing on her petition under section 388 of the Welfare and Institutions Code¹ and terminating her parental rights to Hans M. (Minor), born in March 2009. We affirm.

BACKGROUND

In June 2012, Minor’s parents signed an informal supervision agreement (§ 301) with the Sonoma County Human Services Department (Department), as a result of previous reports of violence between the parents and drug use by the parents. Among other things, the Minor’s parents agreed to complete substance abuse assessments and to

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

test as requested. Both parents failed to participate in drug treatment and tested positive for methamphetamine.

On September 6, 2012, the Department filed a petition alleging Minor was at substantial risk of harm due to his parents' history of domestic violence and substance abuse, and parents' failure to comply with the June 2012 agreement. (§ 300, subd. (b).) The petition also alleged Minor's father could not offer support because he was incarcerated. (§ 300, subd. (g).)² Among other things, the petition was based on a September 3 incident during which the Sonoma County Sheriff's Office received a report Minor's parents were arguing over a gun. When law enforcement officers arrived and searched the property, they found ammunition and two firearms. The officers arrested Minor's father, who had a prior felony conviction for a weapons offense. The juvenile court ordered Minor detained.

According to the Department's October 2012 report, Mother admitted to using methamphetamine, but claimed she was not a drug addict. Mother tested positive for methamphetamine on September 7 and 11, and failed to test as requested on September 20 and 26. Mother's drug treatment program recommended she receive residential treatment, but she denied needing it.

The juvenile court sustained the allegations in the section 300 petition and declared Minor a dependent of the court. Minor's father waived reunification services. The court ordered reunification services for Mother, with requirements, among others, that she remain free from illegal drugs, show her ability to live free from drug dependency, and drug test.

In a February 2013 oral update, the social worker reported Mother had attended only one outpatient drug treatment group and had been discharged from the program. Mother said she could not participate because of her work schedule. Mother declined two other referrals to drug treatment services. Subsequently, Mother agreed to residential drug treatment. Upon admission on February 4, she tested positive for cocaine and

² Minor's father is not involved in this appeal.

marijuana. Mother was discharged from the program after a few days “due to the degree of her challenging behavior.” Finally, Mother had been randomly drug tested. She provided one clean test, one test positive for methamphetamine, and she could not attend or provide samples for three other tests.

In an April 2013 six-month review, the Department reported Mother tested positive for methamphetamine once in November 2012, twice in February 2013, and twice in March 2013. There was one clean test in January 2013. Following Mother’s discharge from one residential treatment program on February 3, she was offered treatment at another residential program. She lost her space in the program because she failed to enter as scheduled due to an allergic reaction to poison oak, even though the program had informed her she could stay on bed rest until she was able to participate in program activities. The Department also reported Mother had weekly supervised visits with Minor and supervised phone calls twice per week. Mother was attending Narcotics Anonymous meetings and working with a sponsor, and Mother had exhibited a “genuine desire . . . to live a clean and sober lifestyle, and provide a stable environment for her child.” The Department also acknowledged “the apparent connection between the mother and father with their child.” The Department recommended Mother be provided with an additional six months of reunification services.

At the June 5, 2013 six-month review hearing, the juvenile court ordered six more months of reunification services for Mother and continued the matter for a progress report in three months. The Department’s counsel said it would file a request to change the court’s order if Mother failed to “make immediate and dedicated progress.”

On June 28, 2013, the Department filed a section 388 petition seeking termination of Mother’s reunification services and the setting of hearing pursuant to section 366.26 to select a permanent plan for Minor. The Department reported that on June 23 Mother was discharged from her residential drug treatment program for making violent threats to other clients. At the August 27 hearing on the petition, the Department argued the court

should terminate reunification services pursuant to section 361.5, subdivision (b)(13),³ because Mother had failed to comply with drug treatment programs on at least two prior occasions. The social worker testified Mother had not made substantive progress in her treatment program and was unlikely to reunify with Minor. Mother testified on her behalf. The juvenile court granted the petition, terminating reunification services and scheduling a section 366.26 permanency planning hearing.

In its December 2013 report for the 366.26 hearing, the Department stated Minor was living with his maternal grandmother, who had been identified as his prospective adoptive parent. The grandmother had created a “child friendly and safe home environment;” she “appear[ed] to have substantial emotional ties” with Minor. Minor was happy to live with his grandmother and sought her out for emotional support and guidance. Mother had weekly supervised visits before loss of reunification services and starting in October 2013 had monthly visits. The report asserted, “[Mother] has difficulty keeping the visits with her son positive and focused on his needs. She will make comments about the court case, about other people having more contact with her son than she has, and pleads for affection from her son even when he does not wish to reciprocate.” The social worker opined that, while the interaction between Mother and Minor “may have some incidental benefit, such benefit does not outweigh the benefit that will be gained through the permanence of adoption.” In a February 2014 addendum, the Department reported Mother had missed numerous of her scheduled twice weekly calls to Minor.

On February 27, 2014, Mother filed a section 388 petition, requesting that the juvenile court modify its previous orders and return Minor to her care. The petition

³ Section 361.5, subdivision (b)(13) provides that reunification services need not be provided to a parent when the court finds, by clear and convincing evidence, “[t]hat the parent or guardian of the child has a history of extensive, abusive, and chronic use of drugs or alcohol and has resisted prior court-ordered treatment for this problem during a three-year period immediately prior to the filing of the petition that brought that child to the court’s attention, or has failed or refused to comply with a program of drug or alcohol treatment described in the case plan required by Section 358.1 on at least two prior occasions, even though the programs identified were available and accessible.”

alleged circumstances had changed because Mother had attended twenty sessions at the Drug Abuse Alternatives Center (DAAC); she visited Minor regularly and consistently, and Minor said he missed her and wanted to live with her during the most recent visit; and Mother had a stable home, job, and relationship. Attached to the petition were two November 18, 2013 letters from the DAAC Outpatient Program Manager. The first letter stated Mother was admitted to outpatient treatment on October 18, 2013 and described the anticipated treatment program. It continued, “Since enrolling in treatment, you have shown motivation to participate and gain tools to further your recovery. You have become more open to recovery and have been willing to look at your behaviors and make positive changes.” The second letter stated Mother was admitted to outpatient treatment from March 13 to June 13, 2013. She attended 23 group sessions and was an “active participant;” she was discharged from the outpatient program in June “upon entering into residential treatment.” The juvenile court denied Mother’s supplemental petition without an evidentiary hearing, on the basis that the petition did not present new evidence or a change in circumstances and the proposed change of order did not promote Minor’s best interest.

To her counsel’s “shock[],” Mother did not appear at the March 18 contested section 366.26 hearing. Counsel had planned “to call her as a witness to talk about the relationship that she has with [Minor].” Service logs chronicling Mother’s visits with Minor were admitted into evidence. According to the logs, Mother was “loving with” Minor and they hugged during the visits; Minor told Mother he loved her. Mother brought toys and activities to the visits, and Mother and Minor played during the visits. During one visit, Mother “quieted and calmed” Minor and “rubbed his back and sang to him” when he was upset. During another visit, Minor brought pictures he had drawn for Mother, telling her one of the pictures was of the two of them.

The court found it was likely Minor would be adopted and terminated Minor’s parents’ parental rights. This appeal followed.

DISCUSSION

I. *The Juvenile Court Did Not Abuse its Discretion in Denying Mother’s Section 388*

Petition Without a Hearing

Mother contends the juvenile court erred in denying without a hearing her section 388 petition seeking return of Minor. We reject the claim.

“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.] A parent need only make a prima facie showing of these elements to trigger the right to a hearing on a section 388 petition and the petition should be liberally construed in favor of granting a hearing to consider the parent’s request.” (*In re Zachary G.* (1999) 77 Cal.App.4th 799, 806 (*Zachary G.*)) “[C]onclusory claims are insufficient to require a hearing.” (*In re Ramone R.* (2005) 132 Cal.App.4th 1339, 1348 (*Ramone R.*)) Instead, “[s]pecific descriptions of the evidence constituting changed circumstances [are] required.” (*Ibid.*) “The prima facie requirement is not met unless the facts alleged, if supported by evidence given credit at the hearing, would sustain a favorable decision on the petition.” (*Zachary G.*, at p. 806.) “In determining whether the petition makes the necessary showing, the court may consider the entire factual and procedural history of the case.” (*In re Justice P.* (2004) 123 Cal.App.4th 181, 189.) “The juvenile court’s determination to deny a section 388 petition without a hearing is reviewed for abuse of discretion.” (*In re Brittany K.* (2005) 127 Cal.App.4th 1497, 1505.)

Mother contends she made a sufficient prima facie showing of changed circumstances. She argues, “at the time [M]other filed her section 388 petition, [M]other’s motivation and desire to make positive changes in her life was recognized by the outpatient program manager at the DAAC. Mother’s efforts to seek and resume treatment showed commitment to making the necessary changes in her life. She was no longer in a relationship with [Minor’s] father, she had a stable job, a stable home and a stable relationship, and was in [an] outpatient drug treatment program.” We conclude the juvenile court did not abuse its discretion in finding Mother failed to make a prima facie showing of changed circumstances. In light of the record of Mother’s repeated failures in

treatment programs and positive drug tests, Mother’s conclusory assertions of sobriety were insufficient to establish a prima facie case. The letters attached to Mother’s petition showed only that she participated in months of treatment before the August 2013 termination of reunification services, and that she subsequently had been in treatment for one month (October 18 through November 18).

The present case is similar to *In re Anthony W.* (2001) 87 Cal.App.4th 246 (*Anthony W.*), where the juvenile court also denied a mother’s section 388 petition without an evidentiary hearing. In her petition, the mother alleged she had completed her reunification program, including drug counseling, drug testing, and parenting classes; she visited the minors regularly; and she had given birth to a new child who was not a dependent of the court. (*Id.* at p. 251.) The *Anthony W.* court rejected those allegations as insufficient, stating “These statements are conclusory. No mention is made of dates or names of counselors. The assertions are unsupported by any evidence such as certificates of completion or drug test results.” (*Ibid.*) Similarly, in the present case the juvenile court was well within its discretion in concluding Mother’s petition failed to make a prima facie showing that Mother had her longstanding and persistent drug addiction under control.

Although the lack of a showing of new evidence or changed circumstances is sufficient basis to deny a section 388 petition without a hearing (*Zachary G., supra*, 77 Cal.App.4th at p. 806), the juvenile court also found Mother had failed to make a prima facie showing that the requested change—returning Minor to Mother’s care—was in Minor’s best interest. “On the eve of a section 366.26 hearing, the child’s interest in stability is the court’s foremost concern, outweighing the parent’s interest in reunification.” (*Ramone R., supra*, 132 Cal.App.4th at p. 1348.) Mother emphasizes the importance of “ [t]he relationship of a natural parent and a child’ ” (*In re Andrew L.* (2004) 122 Cal.App.4th 178, 195), and emphasizes the allegations that Minor said he missed and wanted to live with Mother. However, as in *Anthony W.*, “Mother made no showing how it would be the [Minor’s] best interest to continue reunification services, to remove [him] from [his] comfortable and secure placement to live with [M]other who has

a long history of drug addiction and a recurring pattern of domestic violence in front of’ Minor. (*Anthony W.*, *supra*, 87 Cal.App.4th at p. 252.) Most fundamentally, without a prima facie showing Mother’s drug addiction was firmly under control, she could not make a prima facie showing that return of Minor was in his best interest. (*In re Heather P.* (1989) 209 Cal.App.3d 886, 892 [“each child’s best interests would necessarily involve eliminating the specific factors which required placement outside the parent’s home”].)

The juvenile court did not abuse its discretion in denying Mother’s section 388 petition without a hearing.

II. *The Trial Court Did Not Abuse Its Discretion in Terminating Parental Rights*

Mother contends the juvenile court erred in failing to find the beneficial relationship exception (§ 366.26, subd. (c)(1)(B)(i)) precluded termination of her parental rights as to Minor. We review the court’s finding the exception did not apply for abuse of discretion. (*In re Jasmine D.* (2000) 78 Cal.App.4th 1339, 1351 (*Jasmine D.*).)⁴

At a section 366.26 hearing, the juvenile court must determine a permanent plan of care for the child. (*In re Casey D.* (1999) 70 Cal.App.4th 38, 50.) The statute provides three alternatives for permanent placement: adoption, guardianship, and long-term foster care. (§ 366.26, subd. (b); *In re Autumn H.* (1994) 27 Cal.App.4th 567, 573 (*Autumn H.*).) Adoption is the permanent plan preferred by the Legislature “because it gives the child the best chance at [a full emotional] commitment from a responsible caretaker.” (*Jasmine D.*, *supra*, 78 Cal.App.4th at p. 1348; accord, *In re Celine R.* (2003) 31 Cal.4th 45, 53 (*Celine R.*).) Accordingly, if the court finds the child is likely to be adopted, it must terminate parental rights and order the child placed for adoption unless it finds, for one of six “compelling reason[s],” that termination of parental rights would be

⁴ Although appellate courts have routinely reviewed termination orders for substantial evidence, Division Three of this court has ruled the appropriate standard is abuse of discretion. (*Jasmine D.*, *supra*, 78 Cal.App.4th at p. 1351 [whether the exception applies is a “quintessentially discretionary determination”].) We will apply the abuse of discretion standard, recognizing as the court did in *Jasmine D.* that the practical differences between the two standards are insignificant in this context. (*Ibid.*)

detrimental to the child. (See § 366.26, subd. (c)(1)(B)(i)–(vi).) The burden is on the parent to show one of these exceptions applies. (*In re C.B.* (2010) 190 Cal.App.4th 102, 122.)

The “beneficial relationship” exception applies when termination would be detrimental to the child because “[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).) Assuming Mother’s limited but regular visitation and phone calls satisfied the first prong of the exception, the question is whether Minor “would benefit from continuing the relationship.” (*Ibid.*) To establish this, Mother was required to demonstrate that relationship “promotes the well-being of the child to such a degree as to outweigh the well-being the child would gain in a permanent home with new, adoptive parents.” (*Autumn H., supra*, 27 Cal.App.4th at p. 575; accord, *In re C.B., supra*, 190 Cal.App.4th at p. 124.) “[T]he court balances the strength and quality of the natural parent/child relationship in a tenuous placement against the security and the sense of belonging a new family would confer. If severing the natural parent/child relationship would deprive the child of a substantial, positive emotional attachment such that the child would be greatly harmed, the preference for adoption is overcome and the natural parent’s rights are not terminated.” (*Autumn H.*, at pp. 575–576; accord, *In re C.B.*, at p. 124.) The court makes this determination on a case-by-case basis, considering the child’s age and particular needs, the time spent in the parent’s custody, and whether the child’s interaction with the parent produces a positive or negative effect. (*Autumn H., supra*, at p. 575; accord, *In re C.B.*, at p. 124.) If the court finds the relationship with the parent does not benefit the child significantly enough to outweigh the Legislature’s strong preference for adoption, the exception does not apply. (*Jasmine D., supra*, 78 Cal.App.4th at p. 1350.)

The juvenile court did not abuse its discretion in finding the beneficial relationship exception did not apply. In arguing the juvenile court erred, Mother emphasizes the delivery service logs show Minor has a bond with Mother, was affectionate with her, and turned to her for comfort. She argues the logs also show Mother was prepared for the

visits and interacted appropriately with Minor in a parental role.⁵ Mother also asserts she adequately cared for Minor for the first three years of his life, prior to his detention under the current petition.

The beneficial relationship exception requires more than a showing that the parent has maintained frequent and loving contact with the child, that the two share an emotional bond, or that the parent was more than a friendly adult visitor. (See, e.g., *Jasmine D.*, *supra*, 78 Cal.App.4th at p. 1350; *In re Derek W.* (1999) 73 Cal.App.4th 823, 826–827.) The exception’s applicability turns on the *strength and quality* of the parent-child bond. (*Autumn H.*, *supra*, 27 Cal.App.4th at p. 575.) A parent cannot “derail an adoption merely by showing the child would derive some benefit from continuing a relationship.” (*Jasmine D.*, at p. 1348.) Indeed, “continued interaction between the biological parent and child will almost always confer some benefit on the child.” (*In re Zachary G.*, *supra*, 77 Cal.App.4th at p. 811; accord, *Autumn H.*, *supra*, 27 Cal.App.4th at p. 575.) Mother was required to show “ ‘exceptional circumstances’ ”—that the relationship promotes Minor’s well-being to such a degree as to outweigh the well-being he would gain in a permanent home. (*Jasmine D.*, at pp. 1348–1349; see also *In re G.B.* (2014) 227 Cal.App.4th 1147, 1165.)

Mother compares the present case with *In re Amber M.* (2002) 103 Cal.App.4th 681, in which the court of appeal held the juvenile court erred in failing to apply the beneficial relationship exception, even though the mother was not ready to have the children placed in her care. (*Id.* at pp. 690–691.) However, in that case there was substantial evidence from “experts” supporting application of the exception. (*Id.* at p. 690.) As *Amber M.* summarized, “The common theme running through the evidence from the bonding study psychologist, the therapists, and the CASA is a beneficial parental relationship that clearly outweighs the benefit of adoption.” (*Id.* at p. 690.)

⁵ The Department’s December 2013 section 366.26 report described some inappropriate remarks by Mother at visits and stated Mother had “difficulty keeping the visits with her son positive and focused on his needs.” Mother points out the Department did not provide an addendum report before the March 2014 hearing that addressed the positive interactions described in the more recent visitation logs.

Another case Mother cites, *In re Scott B.* (2010) 188 Cal.App.4th 452, is distinguishable for the same reason. (*Id.* at p. 471 [“The CASA repeatedly stated in her reports that Mother and [the minor] have a very close relationship and it would be detrimental to [the minor] for their relationship to be disrupted.”].) In the present case, there is no expert evidence supporting application of the exception, and little evidence of any kind, other than the visitation service logs. (See *In re J.C.* (2014) 226 Cal.App.4th 503, 533–534 [distinguishing *Amber M.* and stating “[t]here was no bonding study or evidence, other than Mother’s self-serving declaration, to counter the social worker’s conclusion [the minor] would not suffer any detriment”].)

Mother’s visits with Minor were positive, but they only occurred on a monthly basis and in a supervised setting. Although the evidence showed a meaningful bond between Mother and Minor, it did not show a bond of such “strength and quality” that the juvenile court was compelled to conclude Minor would be “greatly harmed” by termination of parental rights. (*Autumn H.*, *supra*, 27 Cal.App.4th at p. 575; see *In re Adoption of Myah M.* (2011) 201 Cal.App.4th 1518, 1545 [“[the minor] has a strong bond with her father and some bond with her mother, but these bonds did not require the court to find it was not in her best interest to be adopted by her paternal grandparents when it weighed all of the factors”].) The juvenile court did not abuse its discretion in finding the beneficial relationship exception inapplicable.

DISPOSITION

The juvenile court’s orders are affirmed.

SIMONS, J.

We concur.

JONES, P.J.

BRUINIERS, J.