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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

In re C.B. et al., Persons Coming Under the
Juvenile Court Law.

SOLANO COUNTY HEALTH AND
SOCIAL SERVICES DEPARTMENT,

Plaintiff and Respondent,

v.

C.S. et al.,

Defendants and Respondents.

A144166

(Solano County Super. Ct.
Nos. J41956, J41957, J41958)

C.S. (mother) appeals from an order denying her petition under Welfare and Institutions Code section 388,¹ by which she sought to reinstate reunification services for the three children who are the subject of this dependency proceeding. She also appeals from an order under section 366.26 terminating her parental rights to those children. D.G. (father) appeals from an order denying his section 388 petition, which sought presumed father status and reunification services as to two of the children, of whom he is the biological father. (§ 388.) He additionally joins in mother's arguments regarding the order terminating parental rights. We affirm.

¹ Further statutory references are to the Welfare and Institutions Code.

BACKGROUND

The current dependency proceedings involve mother's three youngest children: C.B. (born 2007), D.J.G. (born 2009) and K.G. (born 2011). Her three older children, who are not subjects of the current proceedings, resided with family members at the time of the events leading to this case. Father is the biological father of D.J.G. and K.G., but has never been their custodial parent.²

Mother has a long history of methamphetamine use, mental health issues, domestic violence and incarceration. She has been to prison twice and has had approximately 15 drug-related violations while on parole. Between July 2000 and May 2013, 11 child welfare referrals were received against mother. From March 2012 through July 2012, mother received voluntary family maintenance services.

In April 2013, the Solano County Health and Social Services Department (Department) filed a petition alleging that C.B., D.J.G. and K.G. were dependents under section 300, subdivisions (b) and (g). The court sustained an amended version of the petition in June 2013 and ordered that the children remain in mother's custody with family maintenance services. Father did not respond to requests to be interviewed by the Department.

In October 2013, the Department filed a supplemental petition under section 387 seeking the removal of the children from mother's custody based on her failure to maintain contact with the Department, ensure the children's needs were met, access services, or address her parenting, substance abuse and mental health issues. She admitted using methamphetamine and had not been able to follow through with detox and drug treatment programs or with mental health appointments. At a jurisdictional/dispositional hearing held on the supplemental petition in November 2013, the children were removed from mother's custody and placed with their maternal great-aunt. Mother was given a reunification plan that included components of counseling,

² C.B.'s biological father is not a party to this appeal.

mental health services, a substance abuse evaluation, drug testing and a 12-step program, along with supervised visits of at least one hour a week.

Father was incarcerated for theft-related offenses when the hearing on the section 387 petition was held and was scheduled to be released in October 2014. The Department filed a subsequent petition under section 342 alleging father knew or reasonably should have known about mother's substance abuse and untreated mental health issues and failed to protect his children, that he had an extensive history of substance abuse, and that he was incarcerated and could not arrange for the care of the children. Father submitted to these allegations in January 2014, and was granted supervised visitation after the court found him to be the biological father of D.J.G. and K.G. The court denied him reunification services, finding they would not be in the best interests of the children. (See § 361.5, subd. (a); *In re Raphael P.* (2002) 97 Cal.App.4th 716, 725, fn. 7 [biological father who is not a "presumed" father not entitled to reunification services unless services would benefit child].)

In April 2014, the Department prepared a report for the six-month status review hearing, recommending that the court terminate mother's reunification services and set the case for a section 366.26 hearing. The report indicated that mother was losing her housing, which was inadequate in any event; that she had made no progress in accessing mental health services or addressing possible medical issues; that she had declined residential treatment for her drug problem even though outpatient treatment had been deemed inappropriate for her; that she was using drugs and alcohol and reported blackouts and erratic thoughts; that she had missed several appointments for therapeutic visitation with the children; and that there had been several incidents of domestic violence between mother and her boyfriend. The social worker had arranged for D.J.G. and K.G. to visit father at the jail where he was incarcerated, but the children crawled under a table and would not come out, and D.J.G. told the social worker she did not want to go to the jail again.

On April 29, 2014, father filed a section 388 petition (JV-180) seeking to be declared a presumed father, and to be provided with family reunification services in

accordance with this elevated status. A hearing on the petition was held May 27, 2014, concurrently with the contested six-month status review hearing.

Father presented evidence that he had frequent contact with D.J.G during the first year of her life. He acknowledged there was a period of time when he did not hold out K.G. as his daughter. The maternal grandmother testified that father never lived with the children. Father had stabbed mother in the back and the maternal grandmother had witnessed him striking mother with a hammer. Social worker Jesus Naranjo testified that D.J.G. and K.G. would not benefit if reunification services were offered to father because the children did not have a relationship with him and the children were not comfortable with him during the visitation at the jail. Father had previously told Naranjo he wanted to “get into” his children’s lives, but did not necessarily want to take care of them.

The trial court denied father’s section 388 petition, concluding (1) father’s change of heart as to how much he wanted to participate in the children’s lives was not a change in circumstances under section 388, and (2) it was not in the best interests of the children to declare father a presumed father. The court terminated reunification services as to mother and set the case for a section 366.26 hearing on all three children. Neither parent appealed or filed a writ petition challenging the order.

In the report prepared for the section 366.26 hearing, the Department recommended that the court terminate parental rights and select adoption as the permanent plan. The children had done very well in the care of the maternal great-aunt, and the maternal grandmother, who had also lived in the home, wanted to adopt them. Should the grandmother be unable to adopt, the maternal great-aunt and another great-aunt wished to do so.

Mother had been offered once-monthly supervised visitation and was allowed to call the children and speak with them at any time, but she frequently did not call. Her interactions when she did see the children were loving and appropriate, and D.J.G. and K.G. said they missed mother and wanted to live with her. As of August 14, 2014, mother had been in a detox facility for six days and said she was afraid to leave until she could secure a bed in a residential facility. She told the social worker she would be

“suicidal” if her children were not returned to her, and she wanted to get her life together so they could be returned to her care. She left the detox center a few days later without contacting the Department and was arrested September 10, 2014.

On August 29, 2014, father filed another section 388 petition (form JV-180) asking the court to modify its order denying his prior section 388 petition. The petition stated that in February 2012, during a family court hearing held before the dependency proceedings were initiated, a child custody counselor had recommended that father be granted sole legal and physical custody of D.J.G. and K.G. The Department opposed the motion on the ground there had been no change in circumstances since the court denied the prior petition and that the children’s best interests would not be served by providing father with reunification services. In supplemental papers, father cited his release from jail on October 12, 2014, as an additional change in circumstances, and provided copies of documents from the family court file, including the report recommending that he be granted custody and a March 19, 2012, order granting both parents joint legal custody but awarding primary physical custody to mother.

On December 10, 2014, five days before the scheduled section 366.26 hearing, mother filed a section 388 petition (form JV-180) asking the court to reinstate reunification services based on her enrollment in substance abuse treatment at Healthy Partnerships.

On December 15, 2014, the court denied father’s section 388 petition without an evidentiary hearing, noting that the petition did not allege any facts that were unknown at the time of the hearing on the previous section 388 petition. After considerable discussion about the timeliness of mother’s section 388 petition (which had been filed after the date set by the court), the court denied it summarily, indicating mother had not stated new evidence or a change in circumstances sufficient to set it for a hearing.

The section 366.26 hearing commenced immediately thereafter. Social worker Rebecca Curcuro, whose testimony was consistent with the report, indicated that mother’s participation in an outpatient drug treatment program would not cause her to change her recommendation that adoption be the permanent plan. She opined that

guardianship was not an appropriate alternative for the children given their age, their anxiety about being left, and their worrying about mother. The court terminated parental rights and ordered a permanent plan of adoption. It recognized that mother had regularly visited the children except when she was incarcerated, but concluded her relationship was not parental in nature and did not outweigh the benefits that would be conferred through adoption.

DISCUSSION

I. *Denial of Father's Section 388 Petition*

The trial court denied father's second section 388 petition without a hearing, explaining it was "res judicata. He's already had his hearing about whether or not he is or is not the presumed father." Father contends this ruling was in error because his second petition stated a prima facie case for relief. We disagree.

Under section 388 a parent may petition the court to change, modify or set aside a previous court order. The petitioning party has the burden of showing, by a preponderance of the evidence, that (1) there are changed circumstances or new evidence, and (2) the proposed modification is in the child's best interests. (§ 388; *In re Jasmon O.* (1994) 8 Cal.4th 398, 415-416.) When, as here, the section 388 petition is filed after reunification services have been terminated and the case set for a section 366.26 hearing, the focus of the proceedings shifts from the parent's interest in the care, custody and companionship of the child to the child's best interests. (*In re Stephanie M.* (1994) 7 Cal.4th 295, 317.)

A parent need only make a prima facie showing of the necessary elements—change of circumstances and best interests—to trigger the right to a hearing on a section 388 modification petition. (*In re Marilyn H.* (1993) 5 Cal.4th 295, 309-310; *In re Zachary G.* (1999) 77 Cal.App.4th 799, 806 (*Zachary G.*)) But, if the liberally construed allegations of the petition do not make a prima facie showing that circumstances have changed and the proposed change would promote the best interests of the child, the court need not order a hearing on the petition. (*Zachary G.*, at p. 806.) "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. [Citation.]” (*Ibid.*) We review the summary denial of a section 388 petition for abuse of discretion. (*In re Anthony W.* (2001) 87 Cal.App.4th 246, 250 (*Anthony W.*.)

Here, the court had already held a full evidentiary hearing on a prior section 388 petition by which father sought to establish presumed father status and obtain reunification services. The court denied that petition, and father did not challenge that ruling on appeal or by writ. Although principles of res judicata and collateral estoppel do not generally preclude a section 388 petition seeking to modify a prior order based on changed circumstances (see *Sheila S. v. Superior Court* (2000) 84 Cal.App.4th 872, 879), a parent may not raise issues on appeal that go to the validity of a prior appealable order that has become final. (*In re Meranda P.* (1997) 56 Cal.App.4th 1143, 1150.) The court had already ruled that father had not taken sufficient action to be considered a presumed parent and that it would not be in D.J.G.’s and K.G.’s best interests to afford him reunification services. These findings led to the denial of father’s first section 388 petition and he cannot now relitigate those matters.

Father argues his second petition showed a change in circumstances since the time of the first section 388 petition because (1) he was out of jail at the time the second petition was filed, and (2) he presented copies of documents in a family law matter showing he had previously sought custody of the children and had been recommended for sole legal and physical custody. Although father’s circumstances changed when he was released from custody, that change was not material given the absence of any evidence that he had taken steps to address his criminal lifestyle or history of domestic violence and substance abuse. As to the family court counselor’s 2012 recommendation that father receive sole legal and physical custody (which was lukewarm at best), it was not adopted by the family court. In any event, the family court documents could not reflect a change in circumstances when they predated the dependency proceedings and could have been brought to the court’s attention during the hearing on father’s first section 388 motion.

Moreover, neither of the changes in circumstances cited by father would support a finding it would be in the best interests of the children to delay the section 366.26 hearing and provide him with reunification services. “It is not enough for the 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.” (*In re Kimberly F.* (1997) 56 Cal.App.4th 519, 529.) Father had a long history of drug use, domestic violence and criminality, and had spent much of the children’s lives in jail. He did not promptly come forward and seek custody, or even reunification services, when the children were removed from mother’s custody. Even D.J.G., with whom father has had the most contact, barely knew him by the time of the section 366.26 hearing. The court did not abuse its discretion in denying father’s second section 388 petition without a hearing.

II. Denial of Mother’s Section 388 Petition

Mother argues the trial court should have held a hearing on her section 388 petition because she alleged facts showing she was finally addressing the substance abuse issues that had led to the dependency proceedings. We conclude the court did not abuse its discretion. (*Anthony W., supra*, 87 Cal.App.4th at p. 250.)

“A petition which alleges merely changing circumstances and would mean delaying the selection of a permanent home for a child to 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 interest.” (*In re Casey D.* (1999) 70 Cal.App.4th 38, 47 (*Casey D.*)) Mother’s section 388 petition simply alleged that she had entered Healthy Partnerships, an outpatient program from which she had been previously discharged due to her need for inpatient treatment. At the section 366.26 hearing, counsel advised the court that mother had been participating for 45 days. In light of mother’s lengthy history of substance abuse and previous indications that inpatient treatment was necessary, her recent enrollment in an outpatient program established “changing” circumstances at best. She did not make a prima facie showing it

would be in the best interests of the children to delay the selection of a permanent plan, and the trial court did not abuse its discretion in denying her section 388 petition.

III. *Order Terminating Parental Rights*

Mother argues the order terminating parental rights should be reversed because the beneficial parental relationship exception to adoption applies. (§ 366.26, subd. (c)(1)(B)(i).) Father does not claim the exception applies to him directly, but joins in mother's argument. (See *In re DeJohn B.* (2000) 84 Cal.App.4th 100, 110 [reinstating father's parental rights when order terminating mother's parental rights was reversed based on lack of notice].) We reject the claim.

At a hearing under section 366.26, the court may order one of three alternative plans: adoption (necessitating the termination of parental rights), guardianship or long-term foster care. (§ 366.26, subd. (b)(1), (3), (5), (6).) If the child is adoptable, there is a strong preference for adoption over the other alternatives. (*In re S.B.* (2008) 164 Cal.App.4th 289, 297 (*S.B.*)) “ [B]ecause a section 366.26 hearing occurs only after the court has repeatedly found the parent unable to meet the child's needs, it is only in an extraordinary case that preservation of the parent's rights will prevail over the Legislature's preference for adoptive placement.” [Citation.]” (*In re K.P.* (2012) 203 Cal.App.4th 614, 621.)

Once the court determines the child is adoptable, a parent seeking a less restrictive plan has the burden of showing a “compelling reason” the termination of parental rights would be detrimental under one of the exceptions listed in section 366.26, subdivision (c)(1)(B). (*S.B.*, *supra*, 164 Cal.App.4th at p. 297; *In re Bailey J.* (2010) 189 Cal.App.4th 1308, 1314 (*Bailey J.*)) Section 366.26, subdivision (c)(1)(B)(i) provides for one such exception when “[t]he parents have maintained regular visitation and contact with the child and the child would benefit from continuing the relationship.” This exception requires the juvenile court to balance “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.” (*In re Autumn H.* (1994) 27 Cal.App.4th 567, 575 (*Autumn H.*.) A parent seeking to invoke the exception must show that he or she occupies a parental role in the life of the child. (*In re I.W.* (2009) 180 Cal.App.4th 1517, 1527 (*I.W.*.)

Case law has been divided as to the correct standard for appellate review of an order determining the applicability of the beneficial parental relationship exception, with some courts applying a substantial evidence test, some an abuse of discretion analysis, and some a combination of both. (E.g., *Autumn H.*, *supra*, 27 Cal.App.4th at p. 576; *In re Jasmine D.* (2000) 78 Cal.App.4th 1339, 1351; *Bailey J.*, *supra*, 189 Cal.App.4th at pp. 1314-1315.) In *I.W.*, *supra*, 180 Cal.App.4th at page 1528, the court concluded that because the parent has the burden of proof in establishing the beneficial relationship exception, the precise question when reviewing the sufficiency of the evidence supporting the court's ruling is “whether the evidence compels a finding in favor of the appellant as a matter of law.”

We perceive no error by the trial court under any of these deferential standards. The court found mother had maintained visitation and contact with the children when she was out of custody, but concluded the resultant relationship was not a parental one and did not outweigh the benefit the children would gain from the stability of an adoptive home. This conclusion was supported by the evidence, was not an abuse of discretion, and was not erroneous as a matter of law. The beneficial relationship exception is difficult to establish “in the situation, such as the one here, where the parents have [not] . . . advanced beyond supervised visitation.” (*Casey D.*, *supra*, 70 Cal.App.4th at p. 51.) Though mother obviously loved her children and they loved her, it is not enough to establish a friendly and loving relationship. (*In re Beatrice M.* (1994) 29 Cal.App.4th 1411, 1418 (*Beatrice M.*); *In re Brian R.* (1991) 2 Cal.App.4th 904, 924.) “While friendships are important, a child needs at least one parent. Where a biological parent . . . is incapable of functioning in that role, the child should be given every opportunity to

bond with an individual who will assume the role of a parent.” (*In re Brittany C.* (1999) 76 Cal.App.4th 847, 854.)

“ ‘Interaction between [a] natural parent and child will always confer some incidental benefit to the child,’ ” but the beneficial relationship exception contemplates that the parents have “occupied a parental role.” (*Beatrice M., supra*, 29 Cal.App.4th at p. 1419.) It is true, as mother notes, that she has been observed to be “loving and affectionate” with her children, but she has also injected a great degree of instability into their lives through her drug use, criminality and participation in abusive relationships. It was reasonable for the trial court to conclude that while mother’s bond with her children conferred a benefit, their stability and security were paramount. The children had been placed with relatives who were likely to adopt and were doing well in their care; the court did not err in terminating parental rights and selecting adoption as the permanent plan.

DISPOSITION

The orders denying the petitions for modification under section 388 are affirmed, as is the order terminating parental rights under section 366.26.

NEEDHAM, J.

We concur.

JONES, P.J.

SIMONS, J.