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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

In re ANGEL H., A Person Coming
Under the Juvenile Court Law.

B232515
(Los Angeles County
Super. Ct. No. CK50890)

LOS ANGELES COUNTY
DEPARTMENT OF CHILDREN AND
FAMILY SERVICES,

Plaintiff and Respondent,

v.

GABRIELA D.,

Defendant and Appellant.

APPEAL from orders of the Superior Court of Los Angeles County.
Elizabeth Kim, Juvenile Court Referee. Affirmed.

Robert McLaughlin, under appointment by the Court of Appeal, for
Defendant and Appellant.

Andrea Sheridan Ordin, County Counsel, James M. Owens, Assistant
County Counsel, and Peter Ferrera, Deputy County Counsel, for Plaintiff and
Respondent.

Appellant Gabriela D. (Mother) appeals the juvenile court's denial of her petition for modification under Welfare and Institutions Code section 388 and its order terminating parental rights under section 366.26.¹ She contends substantial evidence does not support the court's orders. Finding no merit in her contentions, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

A. Original Petition, Detention and Mother's Progress

In January 2009, The Department of Children and Family Services (DCFS) filed a petition contending Mother and Martin H. (Father) were long-time substance abusers and had engaged in violent altercations in the presence of their child, Angel H., born in April 2008. Witnesses reported that Mother was a heavy drinker and regularly used marijuana and methamphetamine. Mother admitted having recently used methamphetamine and marijuana, and having used drugs when she was pregnant. She admitted being beaten by Father on numerous occasions. Angel was placed with his paternal grandmother, Laura E.² Laura reported that she had regularly cared for Angel, sometimes throughout the night when Mother went out, and that Mother had on several occasions offered to give custody of the infant to Laura. At the jurisdictional hearing, the court found that Mother had a six-year history of substance abuse and was a current abuser of methamphetamine, marijuana and alcohol, and that Mother and Father engaged in violent altercations in Angel's presence. In the dispositional phase, Mother was

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

² At the time, Angel had been sick for several weeks, and there was no indication Mother had sought medical treatment for him. After the detention, Laura took Angel to a clinic where he was diagnosed with pneumonitis. The treating physician stated that this condition was "a direct result of someone's neglect."

ordered to participate in drug rehabilitation with random testing, domestic violence counseling and parent education.³

This was not Mother's first involvement with DCFS. In 2002, two older boys (Angel's half-siblings) were detained due to Mother's use of drugs and failure to maintain a healthy and sanitary home environment.⁴ Parental rights to those two boys was terminated in June 2005, and they were adopted by their maternal grandmother. After the adoption, the grandmother allowed Mother to have unsupervised visits. During one such visit, one of the boys was struck and killed by a motor vehicle.

Shortly after Angel's detention, Mother began attending an outpatient drug treatment program and domestic violence counseling. She was enrolled in a residential drug treatment program by January 23, 2009, where she made satisfactory progress and had uniformly negative substance tests, although she denied having a drug problem for many months. Mother was visiting Angel regularly and caring for him during the visits, including feeding him and changing his diapers. Angel appeared very comfortable with Mother.⁵ In July 2009, Mother completed the residential program and enrolled in outpatient treatment. DCFS recommended that Angel be returned to her custody. In August, Angel was returned to Mother with the proviso that she continue to drug test and participate in family maintenance services provided by DCFS.

³ The court ordered no reunification services for Father, who was incarcerated at the time of the hearing and remained incarcerated throughout most of the proceedings. Father is not a party to this appeal.

⁴ Prior to that time, there were several referrals alleging that Mother had been neglecting the children; they were investigated and closed as unfounded. There was also a prior dependency proceeding involving Father and his children (Angel's other half-siblings), which resulted in those children receiving permanent placement services.

⁵ During this period, the caseworker also reported that Angel was developing a bond with Laura.

B. Section 387 Petition and Second Detention

In February 2010, the caseworker reported that Mother was caring for Angel adequately, but that there had been two instances of reported drinking -- in September 2009 and December 2009. On the second occasion, a wedding, Mother reportedly got very drunk and physically fought with family members. After that incident, Mother was told to leave her mother's home, where she had been living, and found temporary housing with an aunt. At the caseworker's insistence, Mother began attending AA meetings. During the period between August 2009 and February 2010, Mother tested negative for drugs and alcohol 11 times, but missed two tests. She obtained employment at a fast food restaurant. DCFS recommended no change in custody and continued monitoring. The court ordered family preservation services to continue.

Prior to the May 2010 status hearing, Mother had three negative tests, and five "no shows," but there was no other reported negative behavior and Mother agreed to be more consistent with testing. The matter was set for another status hearing in August. On July 30, however, DCFS filed a supplemental petition alleging that on July 22, Mother had tested positive for amphetamine and methamphetamine and that her continued substance abuse posed a risk to Angel.⁶ Prior to the test, the maternal grandmother -- with whom Mother and Angel were again living -- and a maternal aunt reported that Mother was drinking and using drugs, and that she was staying out late and sleeping in, rather than getting up to

⁶ Mother denied having used drugs and at one point accused the maternal grandmother of putting drugs in her drink.

care for Angel.⁷ Mother had had multiple negative drug and alcohol tests during this period, but had also had five additional “no shows.”

Angel was detained and returned to Laura’s custody. Laura reported that Angel’s behavior had deteriorated. He had begun expressing fear without apparent basis and throwing tantrums. Laura also reported that Mother had attempted to persuade her to allow unmonitored visits with Angel.

After the second detention, DCFS initially recommended further drug treatment and counseling for Mother. However, by the time of the second jurisdictional/dispositional hearing, DCFS changed its recommendation to “no family reunification services,” giving as its explanation that Mother “continues to not take any responsibility regarding her relapse,” “blames maternal grandmother,” and “has not been consistent with her programs.” At the August 11 hearing, the court found the allegations of the supplemental petition true and ordered no reunification services. A section 366.26 hearing was set for December 2010.

C. Section 388 Petitions

On August 16, 2010, a few days after the second jurisdictional/dispositional hearing, the maternal grandmother filed a section 388 petition seeking custody of Angel, claiming that the boy had developed a bond with his half-brother. On September 9, 2010, Mother filed a section 388 petition stating that she had been enrolled in an inpatient drug treatment program for one month and had been testing negative for drugs. She requested that Angel be returned to her care at the program and/or that she receive an additional six months of services. The court set a

⁷ The caseworker personally observed this behavior in July, when she made an unannounced visit to Mother’s residence at 10:30 a.m. and found Mother asleep and Angel wearing a very full diaper.

hearing on both petitions and instructed DCFS to prepare a supplemental report on the allegations of the petitions.

In supplemental reports prepared in October 2010, DCFS recommended against placing Angel with the maternal grandmother, stating that she had difficulty setting limits for Mother and would be unable to protect Angel from her. The caseworker reported that not only had Laura had custody of Angel between December 2008 and August 2009, but that during the period Mother had custody, she often left the boy with Laura to babysit. With respect to Mother's petition, the report noted that "concerns relating to [Mother's] care [of Angel] began soon after the child was ordered home of parent" and "led to the child being re-detained on [July 27, 2010]." "Based on [Mother's] . . . behavior over the past six months, her inability to stop using substances while being supervised [by DCFS], the ongoing concern relating to her care [of Angel], her history of substance abuse and her having lost parental right[s] over [her other two] children," DCFS recommended denial of the petition. The court denied both petitions, concluding that the changes requested would not be in Angel's best interest.

In November 2010, Mother filed a second section 388 petition. She alleged that she had continued to participate in the inpatient drug treatment program, was testing clean, and was participating in domestic violence counseling, parenting, and individual and group counseling. Mother again requested that Angel be allowed to live with her at the drug treatment facility and/or that the court order six months of reunification services. The court ordered a hearing on the petition, to be held the same day as the scheduled section 366.26 hearing. The caseworker interviewed Mother who "acknowledged that she 'messed up' and admitted that when she was in [the prior] treatment program she was only focused on trying to get [Angel] back," but claimed that this time she was "trying to get better [and] learn to be sober." DCFS recommended denial of the petition due to Mother's history, "the

fact that she has already completed a substance abuse program and resumed with the same behaviors,” and “the fact that the case is at a WIC 366.26 hearing.” On December 8, 2010, the court continued the section 366.26 hearing at the request of DCFS, and Mother withdrew her petition in order to file a more updated one prior to the continued date.

In February 2011, Mother filed a third section 388 petition stating she had been successfully enrolled in the residential drug treatment program for over six months, had continued to test negative throughout that period and was having unmonitored visits with Angel at the facility. The court set another hearing and again asked DCFS to prepare a response. In a March 2011 report, DCFS noted that Mother had “initially participated in an inpatient substance abuse program from 01/23/09 through 7/13/09 . . . successfully complet[ing] that program,” but that after leaving the program, she began to miss tests and had a positive test within a few months. The report further noted that Mother had not yet proved she could “function well in a normal, non-contained environment.” Accordingly, DCFS recommended that the petition be denied. On March 16, the court denied the petition. A few days later, Mother walked out of the residential program without having completed it.

On March 28, 2011, Mother filed a fourth section 388 petition. In it she stated she had enrolled in an outpatient program and parenting classes. Mother again requested Angel’s return to her custody or additional reunification services. DCFS again recommended denial. At the hearing on April 19, Mother testified that she left the residential program because she was “confused.” The caseworker had told her she would not get Angel back whether or not she was in the program, and the prior report had said she needed to demonstrate she could live substance-free on her own. She enrolled in the outpatient program on April 6 because she wanted to prove her ability to “stay clean” and “be a better mother to [Angel].”

The court denied the petition, noting that Mother had not successfully completed either of her recent drug programs or demonstrated “a track record of sobriety.”

D. Termination of Parental Rights

Between December 2010 and the April 19, 2011 section 366.26 hearing, the caseworker reported that Mother was visiting regularly, that Angel was “enthusiastic” about visits with Mother, and that Mother was “nurturing and affectionate” and “display[ed] good parenting skills,” by, for example, making sure he sat and ate his lunch, telling him to slow down, enforcing directions, and assuring his safety on the playground.⁸ The caseworker described an incident where Angel had fallen and hurt his lip while playing. Mother “rushed over to make sure he was well,” “held a damp towel to his lip . . . until it stopped bleeding,” “soothed Angel,” and “explained . . . why it is not good to run in the play area.”

DCFS also reported that Laura provided “a safe, stable and structured” home, and that Angel had formed “a secure bond” with her, appeared “comfortable and adjusted in her care,” and sometimes referred to Laura as “‘Mom.’” Angel did not cry when picked up from visits with Mother to be returned to Laura. It appeared to the caseworker that “the child has bonded with [Laura] and he has been provided with the basic needs by [her]” and “has attached well to [her].” Laura continued to express her desire to provide a permanent home through

⁸ This was in line with prior reports that had said Mother “connected well” with Angel, that Angel had a “strong attachment” to her, and that they appeared to have a “healthy relationship.”

adoption. DCFS recommended termination of parental rights to free Angel for adoption.⁹

At the hearing, Mother testified that since December, she had had an eight-hour visit with Angel every Sunday. During those visits, she would play with him, feed him and read to him. Angel was excited to see her and wanted to hug her and hold her. He often asked about his half-brother. He called her “Mom.” At the end of the visits, he would say he wanted to stay with her and not return to Laura. She bought him presents for his birthday and taught him to ride a bicycle. She knew which preschool he attended and the name of his teacher.

After hearing the evidence and the argument of counsel, the court terminated parental rights and freed Angel for adoption by Laura. The court stated that Mother met the first prong of the statutory exception to termination of parental rights by establishing that she “regularly visited [Angel] and . . . maintained contact with [him] and has always taken advantage of the opportunity to see him when it was afforded to her.” However, “the benefit from the continued relationship” did not “outweigh the security provided by a permanent home.” In weighing the benefits of continuing the relationship against the security provided by a permanent home, the court considered among other things, “the age of the child, the amount of time that has been spent with the parents[,] as well as . . . the child’s needs.” Mother appealed both the order terminating parental rights and the order denying the fourth section 388 petition.

⁹ At the hearing, the attorney for Angel joined DCFS in urging termination of parental rights.

DISCUSSION

A. Denial of Section 388 Petition

Section 388 provides in pertinent part: “(a) Any parent . . . may, upon grounds of change of circumstance or new evidence, petition the court in the same action in which the child was found to be a dependent child of the juvenile court . . . for a hearing to change, modify, or set aside any order of court previously made or to terminate the jurisdiction of the court. . . . [¶] . . . [¶] (d) If it appears that the best interests of the child may be promoted by the proposed change of order . . . [or] termination of jurisdiction . . . , the court shall order that a hearing be held” A section 388 petition may be filed and heard at any time, up to and including the time of the section 366.26 hearing. (*In re Marilyn H.* (1993) 5 Cal.4th 295, 309.) However, once the reunification period is over, a presumption arises that “continued care [under the dependency system] is in the best interest of the child.” (*Id.* at p. 310.) At that point, the burden is on the parent to “rebut that presumption by showing that circumstances have changed that would warrant further consideration of reunification.” (*Ibid.*) If imposition of such burden seems unduly harsh, “[i]t must be remembered that up until the time the section 366.26 hearing is set, the parent’s interest in reunification is given precedence over the child’s need for stability and permanency. This could be for a period as long as 18 months. Another four months may pass before the section 366.26 hearing is held. While this may not seem a long period of time to an adult, it can be a lifetime to a young child. Childhood does not wait for the parent to become adequate. [Citation.]” (*Ibid.*)

Among the factors the court considers in determining the minor’s best interests for purposes of undoing a prior order and reviving reunification services are: “the seriousness of the reason for the dependency in the first place” (*In re Kimberly F.* (1997) 56 Cal.App.4th 519, 529-530); “the strength of the existing

bond between the parent and child” compared to “the strength of [the] child’s bond to his or her present caretakers, and the length of time a child has been in the dependency system in [relation] to the parental bond . . .” (*id.* at p. 531); and “the nature of the change, the ease by which the change could be brought about, and the reason the change was not made before” (*Ibid.*) “[E]ach child’s best interests would necessarily involve eliminating the specific factors that required placement outside the parent’s home.” (*In re Angel B.* (2002) 97 Cal.App.4th 454, 463, 464.)

Whether to grant the petition “is addressed to the sound discretion of the juvenile court and its decision will not be disturbed on appeal in the absence of a clear abuse of discretion.” (*In re Jasmon O.* (1994) 8 Cal.4th 398, 415.)

Here, the reason for the dependency was Mother’s long-term substance abuse, a serious problem that had led to loss of parental rights over two older children three years before Angel was born. There was no evidence that Mother had attempted to obtain treatment for her problem prior to giving birth to Angel. Although Mother completed a residential treatment program after Angel’s detention, she obviously failed to take its lessons seriously. She resumed drinking almost immediately after regaining custody of Angel. She did not attend AA meetings until urged to do so by the caseworker. According to some reports, she was also using drugs during this period. Whether those reports were true, there was no question she missed multiple tests, which the court was entitled to conclude would have been positive. There was also no dispute that Mother’s care for Angel during the period of reunion was substandard, and that the back and forth was hard on Angel, who began engaging in tantrums and expressing uncharacteristic fear after the second detention. Mother’s second attempt at rehabilitation was more promising as she appeared to no longer be in denial about her substance problem. However, she entered a one-year program in July 2010, more than 18 months after the original detention. By the time she completed it, Angel would have been three

and would have spent half his life with Laura. In any event, Mother did not complete the second program, but chose to leave it before the scheduled section 366.26 hearing. Assuming Mother was genuinely attempting to stay sober outside the confines of a program, the court was not required to continue the section 366.26 hearing in order to give Mother time to establish herself. The evidence did not support the conclusion that Mother would be able to live a substance-free life, or that further reunification efforts would be in Angel's best interest. Accordingly, the court did not abuse its discretion in denying the petition for modification.

B. Termination of Parental Rights

Section 366.26, subdivision (c)(1) requires the juvenile court to terminate parental rights and order the dependent child placed for adoption if it finds by clear and convincing evidence that the child is likely to be adopted, unless it finds "a compelling reason for determining that termination would be detrimental to the child" due to the existence of certain specified exceptional circumstances. (See § 366.26, subd. (c)(1)(B).) Once the court determines that a child is likely to be adopted, the burden is on the parent to demonstrate that termination of parental rights would be detrimental to the child under one of the exceptions listed in section 366.26, subdivision (c)(1). (*In re Lorenzo C.* (1997) 54 Cal.App.4th 1330, 1343-1345.)

Mother contends the evidence established that the exception contained in section 366.26, subdivision (c)(1)(B)(i) applied. Subdivision (c)(1)(B)(i) provides an exception to termination of parental rights where "[t]he parents have maintained regular visitation and contact with the child and the child would benefit from continuing the relationship." The subdivision (c)(1)(B)(i) exception is established where there is evidence of a significant, positive emotional attachment of the child to the parent. (*In re Derek W.* (1999) 73 Cal.App.4th 823, 827; *In re Elizabeth M.*

(1997) 52 Cal.App.4th 318, 324.) Courts recognize that interaction between parent and child will almost always confer some “incidental benefit” to the child. (*In re Autumn H.* (1994) 27 Cal.App.4th 567, 575.) However, to support a finding of “benefit” under subdivision (c)(1)(B)(i), the parent-child relationship must “promote[] 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.” (*In re Autumn H.*, *supra*, at p. 575.) Only “[i]f severing the natural parent/child relationship would deprive the child of a substantial, positive emotional attachment such that the child would be greatly harmed,” can the preference for adoption be overcome and parental rights maintained. (*Ibid.*)

The exception to termination of parental rights and adoption “must be examined on a case-by-case basis, taking into account the many variables which affect a parent/child bond. The age of the child, the portion of the child’s life spent in the parent’s custody, the ‘positive’ or ‘negative’ effect of interaction between parent and child, and the child’s particular needs are some of the variables which logically affect a parent/child bond.” (*Autumn H.*, *supra*, 27 Cal.App.4th at pp. 575-576.) Day-to-day contact is not an absolute requirement, but the type of relationship necessary to support the section 366.26, subdivision (c)(1)(B)(i) exception, is “a relationship characteristically arising from day-to-day interaction, companionship and shared experiences.” (*In re Casey D.* (1999) 70 Cal.App.4th 38, 51.) To establish the exception in section 366.26, subdivision (c)(1)(B)(i), “the parents must do more than demonstrate ‘frequent and loving contact’ [citation], an emotional bond with the child, or that the parents and child find their visits pleasant. [Citation.] Rather, the parents must show that they occupy ‘a parental role’ in the child’s life.” (*In re Andrea R.* (1999) 75 Cal.App.4th 1093, 1108-1109, quoting *In re Beatrice M.* (1994) 29 Cal.App.4th 1411, 1418-1419.) “Because adoption is more secure and permanent than a legal guardianship or long-term

foster care, adoption is the Legislature’s first choice for a permanent plan for a dependent minor child who has not been returned to the custody of his or her parents and who is found by the dependency court to be adoptable.” (*In re Scott B.* (2010) 188 Cal.App.4th 452, 469.) “[I]t is only in exceptional circumstances that a court will choose a permanent plan other than adoption.” (*Ibid.*)

We review the court’s section 366.26 finding to determine whether substantial evidence supports it, construing the evidence most favorably to the prevailing party and indulging in all legitimate and reasonable inferences to uphold the court’s ruling. (*In re Misako R.* (1991) 2 Cal.App.4th 538, 545; but see *In re Jasmine D.* (2000) 78 Cal.App.4th 1339, 1351 [concluding that in reviewing whether parent has established a section 366.26, subdivision (c)(1) exception, “the abuse of discretion standard is in order” because juvenile court “is determining which kind of custody is appropriate for the child,” but finding little “practical differences between the two standards of review”].)

Mother contends the court’s order terminating parental rights and referring Angel for adoption was not supported by substantial evidence because the evidence established that Angel would benefit from continuing his relationship with Mother. To support her contention, Mother relies primarily on her satisfactory day-long visits with Angel during the period she was residing at the second drug treatment program. Although DCFS substantiated that the two shared a strong attachment and a healthy relationship, the evidence also supported that Angel shared a strong bond with Laura, with whom he had spent a considerable portion of his young life. Laura had consistently provided a safe, stable and structured home and desired to provide a permanent home through adoption. There was no evidence of actual harm to Angel from severing the parental relationship with Mother. Accordingly, the juvenile court reasonably concluded that this case did not present the

exceptional circumstances requiring it to choose a permanent plan other than adoption.

DISPOSITION

The orders denying the section 388 petition and terminating parental rights are affirmed.

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MANELLA, J.

We concur:

WILLHITE, Acting P. J.

SUZUKAWA, J.