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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

In re CESAR O., a Person Coming Under
the Juvenile Court Law.

LOS ANGELES COUNTY
DEPARTMENT OF CHILDREN AND
FAMILY SERVICES,

Plaintiff and Respondent,

v.

DIANA G. et al.,

Defendants and Appellants.

B235660

(Los Angeles County
Super. Ct. No. CK73620)

APPEAL from orders of the Los Angeles Superior Court, Stephen Marpet,
Commissioner. Affirmed.

Karen B. Stalter, under appointment by the Court of Appeal, for Defendant and
Appellant Diana G.

Catherine C. Czar, under appointment by the Court of Appeal, for Defendant and
Appellant Cesar O.

John F. Krattli, Acting County Counsel, James M. Owens, Assistant County
Counsel, Emery El Habiby, Deputy County Counsel for Plaintiff and Respondent.

Parents Diana G. and Cesar O. appeal from orders of the juvenile court denying their petitions under Welfare and Institutions Code section 388 for modification of orders¹ and termination of their parental rights under section 366.26. They contend that it was in the best interests of their son (also named Cesar O.²) to grant their petitions to modify orders of the juvenile court denying reunification services and placing the child in the home of his paternal grandparents. They also contend the juvenile court erred in finding that the beneficial parent/child exception to the preference for adoption did not apply in selecting a permanent plan under section 366.26. We find no error and affirm.

FACTUAL AND PROCEDURAL SUMMARY

Mother and father (collectively parents) have a history of domestic violence. Each has a lengthy history of substance abuse, arrests, and incarceration. They have three older children, J.O., D.O., and A.O., who were dependents of the juvenile court in a proceeding which was open when the child in this matter, Cesar, was born in January 2010. The dependency proceeding as to the three older children was opened in 2008 when mother had positive drug tests on giving birth to A.O. After parents failed to participate in a voluntary family maintenance plan, a petition regarding the three children was filed and sustained in 2008. It alleged that both parents had a history of substance abuse and domestic violence, and criminal histories that endangered the children. In addition, it was alleged that parents failed to provide for the children. The older children were placed with paternal grandmother. Parents were arrested on August 12, 2009 and imprisoned.

Based on this history, the Department of Children and Family Services (the Department) concluded that Cesar was at risk and placed the child in protective custody. The child was detained in the home of paternal grandparents. In February 2010, a petition was filed under section 300 alleging that Cesar should be found a dependent

¹ Statutory references are to the Welfare and Institutions Code.

² We refer to the minor as “the child” or “Cesar” to avoid confusion with his father, to whom we refer as “father.”

child because of parents' history with the three older children, including domestic violence, substance abuse, criminal activity, and failure to protect.

In March 2010, the parental rights of parents as to the three older children were terminated. Adoption was recommended as the permanent plan. The Department recommended that no reunification services be offered parents as to Cesar O. because of their failure to reunify with the three older children. Parents were released from state prison in April 2010 and enrolled in inpatient drug rehabilitation programs. On June 17, 2010, Cesar was declared a dependent under section 300, subdivisions (a) and (b), and reunification services were denied (§ 361.5, subd. (b)). A section 366.26 hearing was set to select and implement a permanent plan for him.

Father filed a request on November 15, 2010 under section 388 to change the court's order denying reunification services. He cited his completion of an inpatient drug treatment program (on October 29, 2010) and parenting and anger management classes, as changed circumstances. He also was continuing to participate in a 52-week domestic violence course. Father was complying with random drug testing and attached proof of his 17 clean tests. He was visiting Cesar regularly. Father asked the court to grant either family maintenance or family reunification services, return the child to his care, or allow unmonitored visits. The court set the matter for hearing.

The Department's response to father's request stated that there was no provision for children to stay at the residential program in which father was enrolled. It acknowledged father's completion of the programs outlined in the section 388 request. Father, with mother, had been visiting Cesar and his siblings in the caregivers' home for about two hours each weekend. In addition, father visited on Thanksgiving. Father told the social worker that he understood that Cesar could not be returned to him at this time, and that he planned to stay in his residential program. He was attending Narcotics Anonymous meetings two times a week and was taking aviation mechanics classes at the community college. Paternal grandmother, the caregiver, said father visited regularly. In her opinion, she did not believe father was ready for the child to be returned home. While father was doing well in his program, paternal grandmother was uncertain about

how well he would do on his own. In light of the family history, the Department continued to recommend that father not be offered family reunification or maintenance services. It recommended that he have unmonitored visits within the caregiver's home and monitored visits outside of that setting.

On February 8, 2011, mother filed a section 388 request to change the order denying reunification services and setting a section 366.26 hearing. She requested reunification services and liberalized visitation. Mother alleged that she had been actively participating in substance abuse treatment, random drug testing, 12-step meetings, parenting classes, individual therapy, anger management classes, domestic violence classes, educational and vocational training. Mother said she had been visiting Cesar and had been working to address the issues that led to removal of her children. She alleged she was in a position to provide a stable and drug-free loving home and that Cesar would benefit from a relationship with her. The juvenile court set hearing on both parents' section 388 requests for the same date as the section 366.26 hearing.

The Department advised the court that the paternal grandparents' home study had been approved and recommended that parents' rights as to Cesar be terminated and that he be placed for adoption. In a June 2011 interim report, the Department reported that parents were living together in a rented room. Other residents included the owner, the owner's adult son, and another tenant. Father was currently unemployed but anticipated getting a job at his community college. Parents had completed inpatient drug programs and parenting training. Each was enrolled in domestic violence counseling (mother had completed 23 of 52 weeks, father had completed 37 of 52 weeks). Mother and father had multiple negative random drug tests and no positive tests. Parents were visiting regularly at the caregivers' home for three to four hours on the weekends.

Paternal grandmother was asked her position regarding the section 388 petitions. She said: "I don't know. It is very difficult for me to make this decision. I wouldn't like the child [Cesar] to be separated from his siblings. I feel the Department should evaluate their progress out of the program since they were recently released from their program. I have seen my son to appear very motivated to get his son back." The

Department recommended no reunification services be offered to parents, that their rights be terminated, and that adoption be the permanent goal for Cesar.

At the outset of the combined section 388 and 366.26 hearing the parties agreed that parents had demonstrated the change of circumstances required by section 388. Father testified that he and mother had been visiting Cesar three days a week, for four to five hours. During these visits, father said he feeds the child, changes his diapers, and takes him to the park. They had gone to the fair and Disneyland. The child interacts with his siblings, but spends more time with his parents. Father said he did not think it would change anything or harm Cesar to leave his siblings and return to father's custody. Father said he thought Cesar would need him even more because paternal grandfather is aging. He said his position as a father figure to Cesar would not change if the child was adopted by paternal grandparents.

Mother testified that she usually visited Cesar together with father, except during the child's physical therapy appointments if father was unable to attend. She described the physical therapy sessions and helping the child with his exercises. During her visits at the caregivers' home she plays ball with the child, goes to the park, changes his diapers, bathes, and feeds him. He calls her "mom" and father "dad." He runs to them when he sees parents. He cries when they are leaving. Mother testified that paternal grandmother is too overwhelmed with the three older children, each of whom has behavioral problems. Cesar has a good bond with his siblings, who participate in the visits, holidays, and birthdays. Mother wanted the child returned to her. She said she did not visit every day because she was not allowed to by the social worker. If paternal grandparents adopted Cesar, mother planned to continue visits, to go with him to medical appointments, and to be a guiding force in his life.

In argument, counsel for the child acknowledged that parents had changed their lives. But she argued that neither parent had shown that it would be in the child's best interest to provide family reunification services. He has been placed with loving grandparents his entire life, with his older siblings. Although parents visited regularly, they had not played a parental role with the child on a consistent basis. The Department

also urged denial of the section 388 petitions on the ground that parents had not demonstrated that reunification would be in the child's best interest now that they were again living together outside of a structured program.

The juvenile court acknowledged the progress parents had made in their programs. But it concluded that they had not demonstrated that it would be in the child's best interests to grant the section 388 petition since the child was in a stable placement, which was all he had known since birth. The court also declined to find that the parental relationship exception to adoption applied under section 366.26, subdivision (c)(1)(B)(i). It found no evidence that parents had played a parental role during their monitored visits with the child. The parental rights of father and mother were terminated and the matter was ordered into adoption planning. Father and mother filed timely appeals from denial of their section 388 petitions and from the order terminating parental rights.

DISCUSSION

I

Parents argue the juvenile court erred when it concluded that granting their section 388 petitions was not in Cesar's best interests.

“Section 388 allows a parent or other person with an interest in a dependent child to petition the juvenile court to change, modify, or set aside any previous order. (§ 388, subd. (a).) ‘Section 388 provides the “escape mechanism” that . . . must be built into the process to allow the court to consider new information.’ [Citations.] The petitioner has the burden of showing by a preponderance of the evidence (1) that there is new evidence or a change of circumstances and (2) that the proposed modification would be in the best interests of the child. [Citations.] That is, ‘[i]t is not enough for [the petitioner] to show just a genuine change of circumstances under the statute. The [petitioner] must show that the undoing of the prior order would be in the best interests of the child. [Citation.]’ (*In re Kimberly F.* (1997) 56 Cal.App.4th 519, 529.) Furthermore, the petitioner must show changed, not changing, circumstances. [Citation.] The change of circumstances or new evidence ‘must be of such significant nature that it requires a setting aside or

modification of the challenged prior order.’ [Citation.]” (*In re Mickel O.* (2011) 197 Cal.App.4th 586, 615, italics omitted.)

“In evaluating whether the petitioner has met his or her burden to show changed circumstances, the trial court should consider: (1) the seriousness of the problem which led to the dependency, and the reason for any continuation of that problem; (2) the strength of relative bonds between the dependent children to both parent and caretakers; and (3) the degree to which the problem may be easily removed or ameliorated, and the degree to which it actually has been. (*Kimberly F., supra*, 56 Cal.App.4th at p. 532.) The petition is addressed to the sound discretion of the juvenile court, and its decision will not be overturned on appeal in the absence of a clear abuse of discretion. [Citations.]” (*In re A.A.* (2012) 203 Cal.App.4th 597, 612.)

It is significant that no reunification services were offered parents and that the case was set directly for permanent planning under section 366.26. Where no services are offered, or services have been terminated, “the juvenile court’s focus shifts from family reunification to the child’s permanent placement and well-being, and the burden accordingly shifts to the parent to show that a termination of parental rights is not in the child’s best interests. (*In re Marilyn H.* (1993) 5 Cal.4th 295, 306–307, 309; *In re Zachary G.* (1999) 77 Cal.App.4th 799, 808.) A parent may regain custody after reunification services have been terminated only by showing that changed circumstances demonstrate a return to parental custody is in the child’s best interests. (§ 388; *In re Marilyn H.*, at p. 309; *In re Kimberly F., supra*, 56 Cal.App.4th 519, 528–529.)” (*In re Nolan W.* (2009) 45 Cal.4th 1217, 1235.) Whether an order should be modified is left to the sound discretion of the juvenile court and we may not disturb its order absent a clear abuse of discretion. (*In re Aaliyah R.* (2006) 136 Cal.App.4th 437, 447.)

While parents made excellent progress in their programs, they failed to demonstrate that an order granting their section 388 petitions would have been in Cesar’s best interests. He was in the stable, approved, adoptive home of his paternal grandparents with his three siblings. This was the only home he had known, because for most of his young life his parents were incarcerated or residing in rehabilitation

programs. They were unemployed and were living in a rented room. Even paternal grandmother questioned whether parents would be able to maintain a positive lifestyle free of substance abuse and domestic violence outside the structure of an in-patient rehabilitation program. We find no abuse of discretion in the juvenile court's denial of the section 388 petitions.

II

Father and mother argue the trial court erred in concluding that they had not demonstrated the applicability of the parent/child relationship exception to adoption as the permanent plan for Cesar. They contend that the evidence established that they played a parental role in his life and that their parental rights should not have been terminated.

Under section 366.26, the statutory preference is to terminate parental rights and order the child placed for adoption. (§ 366.26, subd. (b)(1); *In re C.B.* (2010) 190 Cal.App.4th 102, 123 (*C.B.*)). Parental rights cannot be terminated under section 366.26, subdivision (c)(1)(B)(i), “where the juvenile court ‘finds a compelling reason for determining that 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.’ The exception does not require proof the child has a ‘primary attachment’ to a parent or the parent has ‘maintained day-to-day contact’ with the child. (See *In re S.B.* [(2008)] 164 Cal.App.4th [289,] 299.) [¶] The exception’s second prong requiring that ‘the child would benefit from continuing the [parent-child] relationship’ means that ‘the 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.’ (*In re Autumn H.* [(1994)] 27 Cal.App.4th [567,] 575.) The juvenile 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.’ (*Ibid.*) ‘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.' (*Ibid.*)" (*C.B., supra*, 190 Cal.App.4th at pp. 123-124.)

Parents had the burden of showing that the termination of their parental rights would be detrimental to Cesar under one of the statutory exceptions to adoption. (*C.B., supra*, 190 Cal.App.4th at p. 122.) The abuse of discretion standard governs review of an order terminating parental rights where no exception to adoption is found, but the substantial evidence test applies to pure findings of fact. (*C.B., supra*, 190 Cal.App.4th at p. 123.) "When applying the differential abuse of discretion standard, 'the trial court's findings of fact are reviewed for substantial evidence, its conclusions of law are reviewed de novo, and its application of the law to the facts is reversible only if arbitrary and capricious.' [Citations.]"³ (*Ibid.*)

The juvenile court must take "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.' [Citation.]" (*C.B., supra*, 190 Cal.App.4th at p. 124.)

Mother acknowledges that the "exception applies only where the court finds regular visits and contact have continued or developed a significant, positive, emotional attachment from child to parent.' (*In re Brandon C.* [(1999)] 71 Cal.App.4th [1530,] 1534 (citing *In re Autumn H., supra*, 27 Cal.App.4th 567, 575.))" Cesar was only 19 months old when the section 366.26 hearing was held, so he was unable to express whether he had an emotional attachment to mother or father. There was testimony that he happily greeted his parents at visits and cried when they left. Parents had maintained regular monitored visits with the child since their release from incarceration in April

³ We are aware that appellate courts are split on the appropriate standard of review in this context. (Compare *C.B., supra*, 190 Cal.App.4th at 123 [hybrid combination of substantial evidence and abuse of discretion standards]; *In re I.W.* (2009) 180 Cal.App.4th 1517, 1528 [modified substantial evidence test]; *In re Jasmine D.* (2000) 78 Cal.App.4th 1339, 1351 [abuse of discretion standard]. Our conclusion in this case would be the same under any of these standards.

2010, but the child had never lived with them. Mother testified that she had bathed, fed, and diapered the child and had gone to medical and physical therapy appointments with him. Father also testified that he diapered and fed the child during visits in addition to playing with him.

The juvenile court observed in denying the section 388 petitions that Cesar had been raised by his grandmother. It said: “[R]aising a child is not just visiting six or eight hours a day even. It’s getting up in the middle of the night. It’s taking care of them during the week when the parents aren’t there. All of the things a parent does. [¶] And this child has been raised by his grandmother with his sisters all his life, that’s all he’s ever known.” The same reasoning applied in its conclusion under section 366.26. The court noted that parents had never moved beyond monitored visitation and found that they never had taken a true parental role in Cesar’s life.

The record supports the juvenile court’s findings. While parents visited the child regularly once they were released from prison, they had not yet established a parental role in his life sufficient to overcome the preference for adoption. We find no error in the order finding that no exception under section 366.26 applied and terminating parental rights.

DISPOSITION

The orders of the juvenile court denying the petitions for modification by mother and father are affirmed. We also affirm the order terminating parental rights for both parents as to Cesar.

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EPSTEIN, P. J.

We concur:

WILLHITE, J.

SUZUKAWA, J.