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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

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

2d Juv. No. B238051
(Super. Ct. No. J1379584)
(Santa Barbara County)

CHILD PROTECTIVE SERVICES,

Plaintiff and Respondent,

v.

CELESTE M.,

Defendant and Appellant.

Celeste M., mother of two-year-old Ezequiel M., appeals from the from the juvenile court's order denying her petition for modification (Welf. & Inst. Code, § 388)¹ and terminating her parental rights (§ 366.26). We affirm.

Facts and Procedural History

On October 16, 2010, Santa Barbara County Child Welfare Services (CWS) placed eleven-month-old Ezequiel in protective custody after Lompoc Police responded to a domestic violence call and found Ezequiel alone and unsupervised. Earlier that day, mother and Ezequeil's father, Juan M., had a physical altercation and left the house. Mother reported that father hit her in the face several times and threatened to kill her. Father was arrested for domestic violence and deported. Mother was charged with child endangerment.

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

CWS filed a dependency petition for failure to protect, serious emotional damage, and failure to support Ezequiel and his half-brother Jesus C. (§ 300, subs. (b), (c) & (g).) The petition stated that CWS had received twelve referrals for neglect, emotional abuse, and caretaker absence/incapacity. Ezequiel was developmentally delayed, lacked muscle tone, was unable to touch his hands together or hold his head up, and could not hold a baby bottle and feed himself.

The trial court sustained the petition, declared Ezequiel a dependent of the court, and ordered reunification services and supervised visits.

At the six-month review hearing, CWS reported that mother suffered from chronic depression and schizophrenia, was homeless and unemployed, and had not completed her case plan. Mother moved multiple times, had sporadic employment, missed mental health and therapy appointments, was not compliant with her medication, and was unable to care for Ezequiel.

The trial court terminated services and set the matter for a section 366.26 permanent placement hearing.

Combined Section 388/366.26 Hearing

Before the hearing, mother filed a section 388 petition to reinstate services. The petition alleged that mother had her own apartment, was employed, and was compliant with mental health services.

CWS recommended that parental rights be terminated and that Ezequiel be freed for adoption. Ezequiel was bonded to his foster parents who were meeting his developmental and medical needs and wanted to adopt. Although Ezequiel was diagnosed with a mild form of cerebral palsy, he was receiving physical therapy three times a week and making substantial progress.

With respect to the 388 petition, the evidence showed that mother had injured herself at work, was terminated, and was not looking for work. Mother shared an apartment with her older daughter who was paying the rent.

The trial court denied the section 338 petition to reinstate services, found that Ezequiel was adoptable, and terminated parental rights.

Section 388 Petition

Mother argues that the trial court erred in denying her petition to reinstate services. The grant or denial of a section 388 petition is committed to the sound discretion of the trial court and will not be disturbed on appeal unless an abuse of discretion is clearly established. (*In re Shirley K.* (2006) 140 Cal.App.4th 65, 71.) The parent bears the burden of showing both a change of circumstances and that modification of the prior order would be in the child's best interests. (*In re S.J.* (2008) 167 Cal.App.4th 953, 959.) "After the termination of reunification services, the parents' interest in the care, custody and companionship of the child are no longer paramount. Rather, at this point, ' the focus shifts to the needs of the child for permanency and stability [citation.]. . . ." (*In re Stephanie M.* (1994) 7 Cal.4th 295, 317.)

Mother claims that she is attending counseling, is taking her medication, and has obtained housing. Substantial evidence supports the finding of no significant change of circumstances. (See e.g., *In re Casey D.* (1999) 70 Cal.App.4th 38, 48-49.) Mother is unemployed, has moved ten times in the last two years, and offered no credible evidence that she has addressed her mental health issues and is able to care for and support Ezequeil as a full-time parent.

Nor is reinstatement of services in Ezequeil's best interest. (*In re Angel B.* (2002) 97 Cal.App.4th 454, 465.) While under mother's care, Ezequeil was neglected and exposed to extensive domestic violence. Mother failed to follow up on recommended appointments to determine Ezequeil's medical needs. The same parenting problems existed at the section 366.26 hearing. Mother never asked about Ezequeil's medical diagnosis or therapy and lacked the training to provide him a safe home.

During supervised visits, mother force fed Ezequeil until he gagged and claimed he is too "lazy to grasp his bottle." When Mother tried to use a sippy cup instead of a bottle, "it was even worse."

Mother failed to follow basic feeding instructions, was not responsive to Ezequeil's clues, and fed him until he threw up. When Mother was reminded about food portion control, she fed Ezequeil spoonfuls of food that were too big to chew or swallow.

At a June 21, 2011 supervised visit, mother tossed a ball that hit Ezequiel in the head, laughed, and tossed the ball again at his head. On another visit Mother changed Ezequiel's diaper and left the dirty diaper within his reach where he kicked it and soiled his shoes. When the supervised visits were increased to two hours a week, mother did not know what to do with Ezequiel and looked at her cell phone to see how much time she had left.

The evidence clearly shows that reinstating services would be detrimental to Ezequiel and undermine the permanency and stability of an adoptive placement that he so badly needs. A section 388 "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 interests. [Citation.]" (*In re Casey D.* (1999) 70 Cal.App.4th 38, 47.)

Section 366.26 Adoptability Finding

Mother argues that the trial court abused its discretion in terminating parental rights and freeing Ezequiel for adoption. An order terminating parental rights will be affirmed where there is clear and convincing evidence of a likelihood of adoption. "[A] prospective adoptive parent's willingness to adopt generally indicates the minor is likely to be adopted within a reasonable time either by the prospective adoptive parent or by some other family. [Citations.]" (*In re Sarah M.* (1994) 22 Cal.App.4th 1641,1650.)

Mother claims that Ezequiel is not adoptable because he suffers from a mild form of cerebral palsy. Ezequiel, however, has responded well to the therapy and is expected to progress to the point where he can live without noticeable symptoms. CWS reported that Ezequiel is mentally and emotionally stable, is closely bonded to his foster parents, and has made significant progress.

Mother argues that a child who requires long term medical care is at risk of becoming a legal orphan if parental rights are terminated and the prospective adoptive family is later found to be unsuitable. (See *In re Carl R.* (2005) 128 Cal.App.4th 1051, 1062.) "[A] finding of adoptability can nevertheless be upheld if a prospective adoptive

family has been identified as willing to adopt the child and the evidence supports the conclusion that it is reasonably likely that the child will in fact be adopted within a reasonable time. [Citations.]" (*In re K.B.* (2009) 173 Cal.App.4th 1275, 1292.)

Ezequiel has lived with his fost-adopt parents for half his life and is happy and well adjusted in their home. The family has adopted before, is fully aware of Ezequiel's medical and emotional needs, and is committed to providing him a safe and stable home. "[I]t is only common sense that when there is a prospective adoptive home in which the child is already living, and the only indications are that, if matters continue, the child will be adopted into that home, adoptability is established. . . . [¶] Case law has also established that adoptability may be satisfied by a *general* adoptability, independent of whether there is a prospective adoptive family (as the term of art goes) ' "waiting in the wings." ' [Citations.]" (*In re Jayson T.* (2002) 97 Cal.App.,4th 75, 85.)

Freeing Ezequiel for adoption carries little risk that he will become a "legal orphan." A child may file a section 388 petition to set aside an order terminating parental rights where the child is not adopted within three years and the trial court determines the child is no longer likely to be adopted and reinstatement of parental rights is in the child's best interest. (§ 366.26, subd. (i)(2); Cal. Juvenile Dependency Practice (Cont.Ed.Bar2011) § 8.50, p. 666.)

Beneficial Parent-Child Relationship Exception

Mother finally asserts that the beneficial parent-child relationship exception bars termination of her parental rights. (§ 366.26, subd. (c)(1)(B)(i).) Where the dependent child is adoptable, the juvenile court must terminate parental rights at the section 366.26 hearing unless the parent shows that the parent-child bond is a substantial positive emotional attachment such that the child would be greatly harmed if parental rights were terminated. (*In re Helen W.* (2007) 150 Cal.App.4th 71, 81.) To meet that burden of proof, a parent must show more than frequent or pleasant visits. (*In re Dakota H.* (2005) 132 Cal.App.4th 212, 229.) The parent must show that he or she occupies a parental role in the child's life, resulting in a significant, positive, emotional attachment

from child to parent. (*In re Autumn H.* (1994) 27 Cal.App.4th 567, 575; *In re Elizabeth M.* (1997) 52 Cal.App.4th 318, 324.)

Ezequiel is two years old and has spent more than half of his life with his fost-adopt parents to which he is closely bonded. The trial court reasonably concluded that mother's relationship with Ezequiel bears no resemblance to the sort of consistent, daily nurturing that marks a parental relationship. (See e.g., *In re Derek W.* (1999) 73 Cal.App.4th 823, 827.) The benefit, if any, of returning Ezequiel to mother is far outweighed by the stability and care he has received and will continue to receive from his fost-adopt parents.

We reject the argument that the beneficial parental relationship applies. "The reality is that childhood is brief; it does not wait until a parent rehabilitates himself or herself. The nurturing required must be given by someone, at the time the child needs it, not when the parent is ready to give it." (*In re Debra M.* (1987) 189 Cal.App.3d 1032, 1038.)

The judgment (order denying section 388 petition and terminating parental rights) is affirmed,

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YEGAN, J.

We concur:

GILBERT, P.J.

PERREN, J.

Arthur A. Garcia, Judge
Superior Court County of Santa Barbara

Maureen L. Keaney, under appointment by the Court of Appeal, for
Appellant.

Dennis A. Marshall, County Counsel, County of Santa Barbara and Sarah
A. McElhinney, Deputy County for Respondent.