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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

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

B241211  
(Los Angeles County  
Super. Ct. No. CK88033)

LOS ANGELES COUNTY  
DEPARTMENT OF CHILDREN AND  
FAMILY SERVICES,

Plaintiff and Respondent,

v.

ALEJANDRO M. and CHRISTINA L.,

Defendants and Appellants.

APPEAL from an order of the Superior Court of Los Angeles County.  
Marilyn Martinez, Juvenile Court Referee. Affirmed.

Nicole Williams, under appointment by the Court of Appeal, for Defendant  
and Appellant Mother.

Christopher R. Booth, under appointment by the Court of Appeal, for  
Defendant and Appellant Father.

John F. Krattli, County Counsel, James M. Owens, Assistant County  
Counsel, and Kimberly A. Roura, Deputy County Counsel, for Plaintiff and Respondent.

Appellants Alejandro M. (Father) and Christina L. (Mother) are the parents of Christopher M. (born March 2011). They appeal from the court's order terminating their parental rights. Father also appeals from the denial of his Welfare and Institutions Code section 388 petition. We affirm.

*FACTUAL & PROCEDURAL BACKGROUND*

On May 23, 2011, shortly before midnight, Mother and Father were observed walking the streets with Christopher (then two months old). After police determined that in the past both parents had used drugs and engaged in domestic violence, the Department of Children and Family Services (the Department) detained Christopher. The Department filed a petition on May 27, 2011, pursuant to Welfare and Institutions Code section 300, subdivisions (a) and (b).<sup>1</sup>

Father had a long criminal history. He admitted to using narcotics since he was a teenager, said he had "tried every drug", used drugs every day and had never completed a drug treatment program. Mother had a misdemeanor drug use conviction and had previously attempted suicide. She admitted to using methamphetamines daily for three years. Christopher was placed in foster care and Mother and Father were allowed monitored visitation. Mother went to a domestic abuse shelter but was asked to leave and went back to live with Father. On August 3, 2011, at a combined jurisdictional/disposition hearing, the court sustained the allegations of the petition pursuant to section 300, subdivision (b) and ordered Christopher removed from parents' physical custody. Parents were ordered to participate in reunification services. Christopher was placed with his paternal aunt and uncle. Mother attempted suicide again in August 2011. Visits were irregular and conflicts ensued between the parents and uncle, so the visits took place at the Department offices. Mother enrolled in an outpatient substance abuse treatment and Father enrolled in an inpatient program. Mother was

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<sup>1</sup> All subsequent statutory references shall be to the Welfare and Institutions Code unless otherwise indicated.

discharged from her program after relapsing and Father left one program within a week. Both parents continued to struggle with drug addiction and domestic violence issues and missed multiple substance abuse tests. Mother entered a residential treatment program but was terminated after relapsing.

On January 31, 2012, the court terminated reunification services and set a section 366.26, subdivision (e) hearing for May 10, 2012. Mother reenrolled in a drug abuse program.

The social worker's report prepared for the May 2012 hearing indicated that Mother visited inconsistently and the visits did not go well. Christopher reportedly had difficulty separating from the caregiver and cried during the visits, and behaved aggressively after the visits. Father reenrolled in a substance abuse program in February 2012 but was terminated when a counselor reported relapse issues six weeks later. His visits with Christopher were sporadic although Father reportedly engaged well with Christopher at one monitored visit.

The social worker also reported Christopher was doing well in the home of his paternal aunt and uncle who were interested in adopting him.

On April 30, 2012, Mother filed a section 388 petition requiring reinstatement of reunification services.

On May 1, 2012, Father filed a petition pursuant to section 388 requesting reinstatement of reunification services.

On May 10, 2012, the juvenile court conducted both the section 366.26 hearing and the hearings on the section 388 petitions. Both Mother and Father requested a contested hearing and the court asked for an offer of proof. Mother's counsel stated that contrary to the information presented to the court in the social worker's report, the visits went well and there was a bond between her and Christopher. She admitted she missed visits but claimed those were due to misunderstandings with the Department. Father's counsel also admitted he had cancelled several visits, but claimed it was due to the caretaker's unavailability. Father felt that the visits went well and that Christopher was bonded to him and he wanted an opportunity to testify to that effect.

The court denied the request for a contested hearing, denied both section 388 petitions, then terminated parental rights. It stated: “As to the 388 petitions, each request is denied. Neither parent has verified any substantial compliance or progress with prior court orders. Recently [Father] enrolled in another drug rehab program from which he was discharged. And given his lack of substantial progress, it is certainly not in this child’s best interest for the court to order additional reunification services. . . . He’s been enrolled, discharged, enrolled and discharged, and he had a recent enrollment from which he was discharged after 41 days and once again he has reenrolled. But there is no substantial progress whatsoever. As to Mother, she is attempting to comply; however, she is at the very beginning of addressing her long history of drug involvement. And because she’s only at the beginning, it is not in the child’s best interest to grant her additional reunification nor unmonitored, overnight visits. I deny the parents’ request to set the matters for a contested .26 hearing. . . . The parents through counsel seem to simply rely on the fact that they have been visiting. . . Parents can visit regularly weekly, and that is still insufficient. Visitation in and of itself is insufficient to persuade the court that it would be detrimental to terminate parental rights. Evidence has not been presented that this child has a significant, emotional attachment to either of the parents such that it would be detrimental to terminate parental rights. The offers of proof are devoid of persuading the court that this child would benefit from continuing a relationship with Mother or Father such that that benefit outweighs a strong preference for adoption. No evidence is offered that this child would be greatly harmed if the court terminated parental rights. No evidence has been presented or offered that maintaining the relationship with Mother and/or Father promotes Christopher’s well-being to such a degree as to outweigh the permanency that adoption provides. . . .”

#### *CONTENTIONS ON APPEAL*

Mother contends that the court erred in refusing to set a contested section 366.26 hearing. Mother disputes the veracity of the social worker’s reports, and claims that she could prove that she had regular positive visits and had a significant relationship with Christopher.

Father contends in his appeal that the court erred in denying his section 388 petition because he established changed circumstances. Although he did not complete two prior substance abuse programs, he enrolled in and was in compliance with a third program beginning on April 11, 2012, and was attending counseling groups and classes. He also contends that he had not engaged in any domestic violence in the one year since the petition was filed. Further, he states that reinstatement of reunification services was in Christopher's best interests because his success in a drug treatment program would allow Christopher to return to his biological father. Finally, he contends that the erroneous denial of the section 388 petition infected the subsequent section 366.26 hearing, requiring reversal of the order terminating parental rights.

#### *DISCUSSION*

##### *1. Denial of Father's section 388 petition*

Section 388 provides that a juvenile court may modify, change, or set aside previous orders when the moving party presents new evidence or demonstrates a change of circumstances and establishes that the proposed change is in the child's best interests. (§ 388; Cal. Rules of Court, rule 5.560; *In re Stephanie M.* (1994) 7 Cal.4th 295, 317; *In re Casey D.* (1999) 70 Cal.App.4th 38, 47.) "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 interests. [Citation.]" (*Ibid.*) We review the denial of a section 388 petition for abuse of discretion. (*In re Jasmon O.* (1994) 8 Cal.4th 398, 415; *In re Anthony W.* (2001) 87 Cal.App.4th 246, 250.)

Father's claims that he had maintained his sobriety for an extended period of time are completely misleading. Father had been enrolled in a third substance abuse program for only one month since the section 388 petition was filed. He had been unsuccessful at completing two prior programs. In light of his lengthy past history, we cannot say that Father had changed his life or conquered his narcotics addiction.

Father's claim that there were no domestic violence issues during the year before the hearing is also misleading. There had been a verbal altercation with Mother in October 2011.

In addition, Christopher had lived with Father for only a short time immediately after his birth. He was doing well with his foster parents, who were very interested in adopting him. It was important for Christopher to form a long-lasting emotional attachment to his prospective adoptive family. (*In re Brian R.* (1991) 2 Cal.App.4th 904, 923-924.) Granting Father's petition would unnecessarily delay permanency in Christopher's life.

The court's denial of Father's section 388 petition was not abuse of discretion. (*In re A.S.* (2009) 180 Cal.App.4th 351, 358; *In re Edward H.* (1996) 43 Cal.App.4th 584, 594.)

## 2. *Refusal to set contested hearing and termination of parental rights*

Pursuant to section 366.26, subdivision (c)(1), once the juvenile court determines a child is adoptable, the court shall terminate parental rights and order the child placed for adoption unless it finds a compelling reason for determining that termination would be detrimental to the child due to specified circumstances. One such circumstance is where "[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).) Mother asserts this exception applies here.

It is the parent's burden to show that termination would be detrimental. (*In re Erik P.* (2002) 104 Cal.App.4th 395, 401.) "To meet the burden of proof for the section 366.26, subdivision (c)(1)[(B)(i)] exception, the parent must show more than frequent and loving contact or pleasant visits. [Citation.] . . . The parent must show he or she occupies a parental role in the child's life, resulting in a significant, positive, emotional attachment from child to parent. [Citations.]" (*In re L. Y. L.* (2002) 101 Cal.App.4th 942, 953-954.)

To justify application of section 366.26, subdivision (c)(1)(B)(i), the relationship between the parent and child must be sufficiently significant that the child would suffer

detriment from its termination. (*In re Angel B.* (2002) 97 Cal.App.4th 454, 468.) The juvenile court must consider many variables, including the child's age, the length of time the child was in parental custody and in foster care, the effect of interaction between parent and child, and the child's particular needs. (*In re Amber M.* (2002) 103 Cal.App.4th 681, 689; *In re Zachary G.* (1999) 77 Cal.App.4th 799, 810-811.) The court must then balance the strength and quality of the parent-child relationship against the security and sense of belonging that a stable family would confer on a child. (*Id.* at p. 811.)

A dual standard of review applies to the juvenile court's determination of whether the exception applies. Whether a beneficial relationship exists is reviewed for substantial evidence, and whether such a relationship constitutes a compelling reason for concluding termination would be detrimental to the child is reviewed for abuse of discretion. (*In re Bailey J.* (2010) 189 Cal.App.4th 1308, 1314-1315.)

The beneficial relationship exception is "difficult to make in the situation, such as the one here, where the parents have [not] . . . advanced beyond supervised visitation." (*In re Casey D., supra*, 70 Cal.App.4th at p. 51.) Here, Christopher had not lived with Mother or Father except during the two months after he was born. Neither Father nor Mother had a stable home by the time of the hearing, and neither of them had been successful in any kind of drug treatment program. Visits had been sporadic so there was no measurable relationship which had developed during the year since the petition had been filed. In the meantime, Christopher was doing well in the home of his foster parents and they wished to adopt him. He had spent nine months, most of his life, in their care.

Father and Mother each offered to prove that they enjoyed a special bond with Christopher which was worthy of protection. But there is no reasonable probability that any testimony by either parent about the parent-child bond would have persuaded the juvenile court that the beneficial relationship exception applied. "To meet the burden of proof, the parent must show more than frequent and loving contact, an emotional bond with the child, or pleasant visit." (*In re Dakota H.* (2005) 132 Cal.App.4th 212, 229.)

A juvenile court may require an offer of proof before setting a contested section 366.26 hearing on whether the parent can establish facts giving rise to the beneficial relationship exception to termination of parental rights. (*In re Tamika T.* (2002) 97 Cal.App.4th 1114, 1121.)

In *Tamika T.*, *supra*, the mother requested a contested section 366.26 hearing. The court requested an offer of proof and mother's counsel argued that mother had an emotional bond with the minor. The court refused to set a contested hearing and terminated mother's parental rights. On appeal, mother contended her due process rights were violated when she was denied a contested hearing. The court of appeal held that due process is a "flexible concept dependent on the circumstances" and that the court may require an offer of evidence with "significant probative value" before committing limited resources to holding a hearing. (97 Cal.App.4th at p. 1122.)

In reviewing an order which deprives a parent of the opportunity to examine the Department's witnesses, we must first look at the stage of the proceedings to determine what level of due process applies. At a section 366.26 hearing, due process requires a meaningful opportunity to cross-examine the Department's witnesses and controvert its reports. (*In re Thomas R.* (2006) 145 Cal.App.4th 726, 733.) Due process does not preclude the trial court from requiring an offer of proof on a contested issue at a section 366.26 hearing. (*In re Tamika T.*, *supra*, 97 Cal.App.4th at p. 1124.) Here, neither Father nor Mother denied the portions of the social worker's reports which indicated that neither of them had taken full advantage of the services offered them, and had not made any progress towards battling their drug addiction. Father did not complete the prior treatment program which he began in February 2012, and did not begin a new one until April 2012, one month before the hearing. Mother had also been unsuccessful in her battle with drug abuse. Neither of them was attempting to deal with the emotional problems permeating their relationship. Even if we assume that the social worker's reports did not accurately describe the quality of the visits and strength of the bond with Christopher, there still was not enough evidence to meet the beneficial relationship exception. Neither Father nor Mother presented any evidence to show how a return to

them would be in Christopher's best interests, even if their visits with him were shown to be consistent and appropriate.

In sum, the juvenile court's denial of Mother's and Father's request for a contested hearing was not an abuse of discretion or denial of due process.

Although we do not doubt Father and Mother love Christopher, it is clear that the paternal aunt and uncle occupy the role of parents in Christopher's life. Balanced against the uncertainty of Mother's and Father's sobriety and their failure to resolve their issues after numerous opportunities, it is clear that adoption by the foster family will confer a much stronger sense of security and belonging to Christopher.

We conclude the court did not err in finding there was no compelling reason to preclude termination of Mother's and Father's parental rights.

*DISPOSITION*

The orders of the juvenile court denying the section 388 petitions of Mother and Father and terminating their parental rights are affirmed.

**WOODS, J.**

**We concur:**

**PERLUSS, P. J.**

**SEGAL, J.\***

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\*Judge of the Los Angeles County Superior Court assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.