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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

In re AYDEN S., a Person Coming Under
the Juvenile Court Law.

2d Juv. No. B251160
(Super. Ct. No. JV39054)
(San Luis Obispo County)

SAN LUIS OBISPO COUNTY
DEPARTMENT OF SOCIAL SERVICES,

Plaintiff and Respondent,

v.

MIA A., et al.,

Defendants and Appellants.

Mia A. (Mother) and Gerald S. (Father) are the biological parents of Ayden S., born in March 2011 and adjudicated a dependent of the juvenile court in October 2011. In September 2013, the juvenile court found Ayden to be adoptable and terminated the parental rights of Mother and Father. (Welf. & Inst. Code, § 366.26.)¹ At the same hearing, the court denied Mother and Father's respective petitions to modify its prior orders terminating family reunification services. (§ 388.) Mother and Father appeal from both orders. We affirm.

¹ All statutory references are to the Welfare & Institutions Code unless otherwise stated.

Facts

Ayden was born in March 2011 and removed from the custody of his biological parents in October of the same year. In February 2012, the court terminated reunification services for both Mother and Father and set a permanency planning hearing. (§ 366.26.) We affirmed that order in a non-published opinion. (No. B247099.)

Our prior opinion details the facts concerning Ayden's initial detention through the order terminating reunification services. Briefly, Mother and Father had a relationship characterized by substance abuse, domestic violence, incarceration, unemployment and homelessness. Ayden was constantly exposed to their drug use and to their verbal and physical violence toward each other. He arrived in foster care showing signs of emotional trauma and chronic neglect. A behavioral health assessment of Ayden conducted six months after his placement in foster care noted, "When placed with his foster family at nearly seven months of age, it was reported Ayden did not know how to drink from a bottle. It was reported he did not laugh for the first two months he was placed with the foster family, was very solemn and watchful, was sensitive to raised voices, and would arch his back if hugged. Ayden is fearful of being left alone He arrived at foster care with an unusually piercing, screeching cry as noted by [respondent's staff] and by his foster family. Ayden continues to use this cry, escalating in a matter of seconds from mild distress to frantic, desperate crying. The cry occurs when he wakes in the morning, the moment he sees any food, and when he wants his foster mother's attention. It is reported that he is subdued during visits with his biological mother." The assessment also noted that Ayden displayed "hyper-sensitivity to raised voices" and that he resisted close physical contact with care givers.

By the time of the permanency planning hearing in June 2013, Ayden had made "steady and adequate progress" He now liked to be cuddled and seemed to have grown used to receiving positive attention. Although he continued to show signs of hyper-vigilance and had difficulty adjusting to changes in his routine, Ayden would also leave his caregiver when he felt safe, indicating that he was learning to trust. He was less likely to gorge on food or to cry uncontrollably. He did, however, have difficulty after

visits with his biological parents. After a May 2013 visit, for example, "Ayden had several days of ongoing upset [His foster parent] said that he vacillated from being whiney and angry, to throwing things that he normally enjoys. Sometimes he would get so overwhelmed that he would scream and cry for no apparent reason and his whole body would shake."

While this case was pending, Father spent periods of time in custody and in residential drug treatment. His long criminal history includes numerous arrests for disorderly conduct and domestic violence involving Mother. While he was in custody and in treatment, Father was unable to visit with Ayden. After he completed treatment, Father attended the supervised visits he was offered. Father was employed and had maintained his sobriety for about one year when the section 366.26 hearing occurred. He was once again living with Mother, who was pregnant and due to deliver in December 2013.

Mother also has a lengthy criminal history, with numerous arrests for disorderly conduct, drug-related offenses, assaults and other crimes. Her two older biological children were placed in foster care as a result of Mother's drug abuse and have been adopted by extended family members. Throughout this case, Mother has maintained that she was not using illegal drugs. She declined to drug test at the county testing facility as requested by the social worker, but did test at another facility on several occasions. Each test was negative for all drugs. Nevertheless, Mother's behavior, which social workers referred to as erratic, belligerent, confrontational and uncooperative, indicated to the contrary. In the spring of 2012, Mother was diagnosed with a mental illness while incarcerated in the county jail. Once she began taking medication for her illness, Mother's behavior and attitude dramatically improved.

After Mother was released from custody in late May 2012, she moved into a sober living house, rather than into a residential drug treatment program as she had previously agreed. Although respondent recommended that her reunification services be terminated based on this failure to enter treatment, the juvenile court instead ordered the parties to develop a new case plan for Mother. Mother and respondent eventually agreed

on a case plan that required Mother to remain drug and alcohol free, comply with the orders of her mental health treatment team and obtain suitable housing for herself and Ayden after her graduation from the sober living home.

By the 12-month review hearing in February 2013, both parents were employed and had maintained their sobriety. Respondent nevertheless continued to recommend termination of family reunification services based on four considerations. First, while Mother had a years' long history of struggling with mental health issues, substance abuse and inappropriate behavior, her stability and sobriety were relatively recent and short lived. Second, her relatives believed Mother should not be given custody of Ayden because she had never been able to sustain appropriate behavior for a significant period of time, and had made little effort to be involved with her two older children. Mother's relatives feared "this is a pattern that will ultimately continue down the road with Ayden." Third, Mother and Father steadfastly maintained their relationship with each other, even though that relationship is marked by domestic violence, quarreling and substance abuse, all of which are extremely traumatic for Ayden. Finally, Mother continued to be in denial about the circumstances and behavior that led to Ayden's detention, had difficulty taking responsibility for her own actions and "is, therefore, unlikely to make the necessary permanent changes in her behavior to meet the long term needs of her child."

At the conclusion of the evidentiary hearing, the juvenile court adopted respondent's recommendation, terminating reunification services for both Mother and Father and scheduling a permanency planning hearing. We denied Mother's petition for extraordinary writ relief.

The juvenile court consolidated Ayden's permanency planning hearing with hearings on the section 388 petitions filed by Mother and Father. Each petition requested that Ayden be placed with the parents or that family reunification services be reinstated. Both parents contended Ayden's best interests would be served by reunification because they were closely bonded as a family. They cited their sobriety, reclaimed mental health and employment as changed circumstances.

Respondent's report for the section 366.26 permanency planning hearing recommended that Mother and Father's parental rights be terminated and that adoption be selected as Ayden's permanent plan. Respondent described Ayden as being "on track in regard to most developmental milestones[,] and as having made "steady and adequate progress" at addressing his difficulties with self-regulation, frequent screaming and crying and gorging on food. Respondent noted that the parents' visits with Ayden were consistent and positive after the termination of reunification services. Ayden had, however, become extremely upset after returning to his foster family. For the next five days, Ayden could not sleep through the night and "would scream and cry for no apparent reason." The social worker opined that seeing his parents again "really set him back." A married couple in Louisiana had been identified as Ayden's prospective adoptive parents. They are close friends with, and live near Ayden's maternal grandfather and his wife, who are in the process of adopting one of Mother's older children, a son named Ian.

Respondent's opposition to the parents' respective section 388 petitions noted that Mother was again living with Father, was enrolled in an on-line school program through the Department of Rehabilitation and was also enrolled in Behavioral Drug Court. This required her to attend weekly group therapy and appear in court each month. She and Father were also attending couple's counseling. Mother was pregnant with her fourth child and due to deliver in late December 2013. Father had completed a six-month residential treatment program and had reportedly been drug free for at least the past six months. Respondent noted that Father's "healthy and stable lifestyle, outside of a structured program, is very young."

Respondent maintained that reunification with his biological parents was not in Ayden's best interests. Based on Ayden's difficulty in adjusting to his foster family after parental visits, respondent concluded it was unlikely this "previously traumatized child can and will flourish in [their] care." Respondent also disagreed that Ayden was closely bonded to either biological parent. "[W]hile Ayden recognizes his mother, he does not appear to be closely bonded with her because he does not readily ask for her, respond to her when she reaches out to him and appears to be basically unemotional

when he is in her presence. It is observed that his overall affect is flat during visits." Ayden had a similar reaction to Father. Father's "contact with Ayden thus far has been once a month for two hours at a park. While there [Father] plays with him and brings him different toys that he thinks Ayden will like; however Ayden does not readily seek him out for a hug or go to him for comfort if he falls down. Ayden is somewhat quiet, and reserved during his time at the visits with his parents and even when [Father] will tell him he loves him, Ayden reluctantly responds or has no response at all."

At the permanency planning hearing in September 2013, the parties agreed that Mother and Father had established changed circumstances in their section 388 petitions. The dispute centered on whether Ayden's best interests would be served by reinstating family reunification services, placing Ayden with his biological parents or continuing with adoption as his permanent plan. Ayden's social worker testified that he had had four visits with his prospective adoptive parents, which lasted from three to four days. In contrast to the difficulties he experienced after visits with Mother and Father, Ayden had no negative behaviors after returning from visits with his prospective adoptive parents. The social worker explained, "After the very first visit he had one night where he woke up and he kind of wondered where he was. He was not crying, but he was just unsure. He was able to be soothed and he went back to sleep. But the three visits after that, he had no negative responses after those visits." The social worker had observed that Ayden's demeanor during visits with his biological parents was "a little more subdued" and not as jovial as it had been during his visits with the prospective adoptive family.

The social worker opposed placing Ayden with his biological parents for the reasons stated in respondent's written opposition to their section 388 petitions. She testified: "I think [Mother and Father] are doing well right now, but they are somewhat untested with the normal stressors of life. And so my concern would be that their life together as a couple is too new to take a chance on placing Ayden in their care." When asked "how Ayden would react if he's placed into another placement and then has to be removed[,] " the social worker responded, "I think it would be devastating for him."

Mother testified that she and Father had enjoyable visits with Ayden. Ayden thinks of her as his mother and wants to be with her. She believed Ayden had behavioral and emotional problems after his visits because he did not want to be separated from his parents. Mother testified that she and Father had learned better communication skills in counseling and that they were now better able to establish boundaries with each other.

Father described Mother's parenting style, now that she was taking her medication, as "awesome." Now that Mother was taking her medication and Father had gone through treatment, their relationship was "solid" because: "We communicate. She's not manic. She's not frantic. She's a positive person. . . . We do have struggles in our lives; cell phones, bill, just normal life stressors, and she doesn't panic, you know. We take care of it." Father had been clean and sober for "one year, 14 days; since August 22nd, 2012." He was employed full time and would have benefits after six months.

The juvenile court found that it was not in Ayden's best interests to be returned to his parents' custody or to reinstate family reunification services. Ayden was originally removed from his parents' custody on October 10, 2011. Reunification services could have been provided for a maximum of 24 months, or until October 2013. Even with a continuance to accommodate one of the attorneys' schedules, the matter would need to be completed by November 2013. In order to continue services to that date, the court "would need to find that there's [a]substantial probability of return in light of visitation and contact, progress. And more importantly, a demonstrated capacity to complete a treatment plan and provide for the child's safety, protection, physical and emotional well-being and any special needs [¶] . . . [¶] And this court cannot find that there's a substantial probability that Ayden would be returned in that time frame, particularly in view of the need to show a demonstrated capacity to complete a treatment plan and provide for the child's safety and protection." The court further found Ayden to be adoptable. Although it acknowledged that Ayden derived some benefit from his relationship with his biological parents, it was "unable to find that there is a substantial

attachment that would cause great harm if that attachment was broken. I don't have the evidence to support it. I see that there's a positive attachment. See that there's an emotional one. I don't see it's substantial." As a consequence, the juvenile court denied the section 388 petitions and terminated the parental rights of both biological parents.

Discussion

Section 388 Petitions to Modify Prior Orders

The juvenile court denied appellants' respective section 388 petitions on the ground that they did not have enough time to demonstrate their stability and suitability as parents before the 24-month reunification period expired. Appellants contend their due process rights were violated when the juvenile court applied the statutory time limits to deny their section 388 petitions because those time limits cannot limit the juvenile court's ability to recognize changed circumstances and reunite parents with their children. We conclude the juvenile court did not abuse its discretion.

The statutory procedures used to terminate parental rights satisfy due process "only because of the demanding requirements and multiple safeguards built into the dependency scheme at the early stages of the process." (*In re Hunter S.* (2006) 142 Cal.App.4th 1497, 1504.) After family reunification services have been terminated, section 388 "serves as an 'escape mechanism' to ensure that new evidence may be considered before the actual, final termination of parental rights." (*Id.* at p. 1506.) As our Supreme Court has noted, section 388 provides a procedure "to accommodate the possibility that circumstances may change after the reunification period that may justify a change in a prior reunification order. A petition pursuant to section 388 may be used to raise the issue in the trial court prior to the section 366.26 hearing." (*In re Marilyn H.* (1993) 5 Cal.4th 295, 309.)

To prevail on a section 388 petition, the parent must demonstrate, "by a preponderance of the evidence, that new evidence or a change of circumstances exists warranting a finding that the best interests of the minor child will be served if a previous order of the court is changed, modified or set aside. The petition is addressed to the dependency court's discretion and in an appeal from the order on the petition, the task of

the reviewing court is to determine whether that discretion has been abused." (*In re Marcos G.* (2010) 182 Cal.App.4th 369, 382.)

Here, the trial court did not abuse its discretion when it denied the section 388 petitions. While both Mother and Father had made progress in addressing their respective problems with mental illness and substance abuse, that progress was recent and untested. It was too soon to know whether the parents' newfound commitment to mental health and sobriety would survive long term, under the inevitable stresses of living together and raising their new infant child. As a consequence, the trial court could not find that Ayden's best interests would be served by continuing family reunification services or returning him to the custody of his parents.

Nor did the juvenile court err when it considered the statutory time limits for providing family reunification services. Section 388 allows a juvenile court to modify a prior order, including an order terminating reunification services, where there are changed circumstances and the modification would be in the child's best interests. It does not, however, operate in isolation. As our Supreme Court has noted: "One section of the dependency law may not be considered in a vacuum. It must be construed with reference to the whole system of law of which it is a part so that all may be harmonized and have effect." (*In re Marilyn H.*, *supra*, 5 Cal.4th at p. 307.) Thus, the juvenile court properly considered the length of time Ayden had been in foster care in deciding whether further attempts at family reunification were in his best interests. It did not abuse its discretion when it found that Mother and Father's recent progress was not sufficient to demonstrate that Ayden could safely be returned to their care.

Beneficial Relationship

Section 366.26 provides that if parents fail to reunify with an adoptable child, the juvenile court must terminate their parental rights and select adoption as the permanent plan for the child. The juvenile court may choose a different permanent plan only if it "finds a compelling reason for determining that termination would be detrimental to the child [because]: [¶] (i) The parents have maintained regular visitation and contact with the child and the child would benefit from continuing that relationship."

(§ 366.26, subd. (c)(1)(B)(i).) Here, both biological parents contend the juvenile court erred when it found this beneficial relationship exception did not apply. We conclude the juvenile court's finding was supported by substantial evidence. (*In re Marcelo B.* (2012) 209 Cal.App.4th 635, 642.)

"To trigger the application of the parental relationship exception, the parent must show the parent-child relationship is sufficiently strong that the child would suffer detriment from its termination." (*In re Aaliyah R.* (2006) 136 Cal.App.4th 437, 449.) A beneficial relationship "is one that '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 existence of this relationship is determined by "[t]he 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.'" (*Id.* at p. 576.)" (*In re Amber M.* (2002) 103 Cal.App.4th 681, 689.)

In addition to demonstrating regular visitation, the parent seeking to overcome the statutory preference for adoption and the termination of parental rights based on the beneficial relationship exception must prove that "severing the natural parent-child relationship would deprive the child of a *substantial*, positive emotional attachment such that the child would be *greatly* harmed. [Citations.] A biological parent who has failed to reunify with an adoptable child may not derail an adoption merely by showing the child would derive *some* benefit from continuing a relationship maintained during periods of visitation with the parent." (*In re Angel B.* (2002) 97 Cal.App.4th 454, 466.) Evidence that a parent has maintained " 'frequent and loving contact' is not sufficient to establish the existence of a beneficial parental relationship." (*In re Bailey J.* (2010) 189 Cal.App.4th 1308, 1315-1316.)

Here, the parents maintained regular visitation with Ayden, although neither parent was allowed unsupervised visits. Substantial evidence supports the juvenile court's determination that the parents' relationship with Ayden was not so significant and positive that Ayden would be greatly harmed by its termination. Ayden

spent only seven months of his entire life in his parents' custody, and those months were marked by chaos and emotional, if not physical violence. During the two years he spent in foster care, Ayden learned to recognize his biological parents, but he never appeared to be closely bonded to them. According to his social worker, Ayden did not readily ask for either parent, seek them out for comfort, or respond when they reached out to him. Ayden appeared to be "basically unemotional" in their presence. His foster parents reported that Ayden also had periods of extreme anxiety and upset for several days after returning from their visits. There was evidence that Ayden enjoyed some aspects of his visits with Mother and Father. On balance, however, the juvenile court correctly concluded that this "enjoyable" relationship did not rise to the level of a parent-child bond and was not such a substantial attachment that Ayden would be greatly harmed by its severance. Under these circumstances, the juvenile court correctly found the beneficial relationship exception did not apply.

Conclusion

The September 6, 2013 order is affirmed.

NOT TO BE PUBLISHED.

YEGAN, J.

We concur:

GILBERT, P.J.

PERREN, J.

Linda D. Hurst, Judge
Superior Court County of San Luis Obispo

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