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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Butte)

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

BUTTE COUNTY DEPARTMENT OF EMPLOYMENT
AND SOCIAL SERVICES,

Plaintiff and Respondent,

v.

S. S.,

Defendant and Appellant.

C067966

(Super. Ct. No. J35055)

S. S. (mother) appeals from the juvenile court's denial of her petition to modify an existing order and the subsequent termination of her parental rights. (Welf. & Inst. Code,¹ §§ 366.26, 388.) We shall affirm.

¹ Further undesignated statutory references are to the Welfare and Institutions Code.

FACTUAL AND PROCEDURAL BACKGROUND

Butte County Department of Employment and Social Services (the department) filed a section 300 petition as to the infant minor, M. S. alleging: The minor was detained at birth after testing positive for methamphetamine. The minor, born five weeks premature, required hospitalization in the special care unit for 13 days. Mother tested positive for marijuana and methamphetamine. Mother said she had used drugs for 16 years, primarily marijuana, and had used methamphetamine "'one time'" one or two days before the minor's birth. While the minor was in the special care unit, mother failed to provide appropriate care for the minor's special needs and was reluctant to perform parenting duties; on one occasion, mother was very fidgety and difficult to awaken when she needed to feed the minor. The minor's paternity had not been determined. The alleged father, R. B., was homeless and unemployed and had a recent history of criminal convictions related to substance abuse.²

The detention report stated that R. B. claimed Native American ancestry and that notice under the Indian Child Welfare Act (25 U.S.C. § 1901 et seq. (ICWA)) would be sent to the Estom Yumeka Maidu Tribe at Enterprise Rancheria in Oroville, California. The tribe responded that the minor, though not eligible for enrollment, was a member "by tradition and cultural belief systems."

² R. B. requested paternity testing, which confirmed his biological fatherhood. However, he then relinquished his parental rights.

The juvenile court sustained the allegations of the section 300 petition.

The disposition report recommended foster care for the minor and reunification services for mother, who admitted her substance abuse problem and had begun to participate in services to address it. Mother, now 35 years old, had used alcohol and drugs, including "pot and crank," since she was 16. She knew she had done wrong, but considered herself a good mother; she had two sons, a 17 year old who lived with her and an 11 year old who lived with his father.

At the dispositional hearing, the juvenile court made the recommended findings and orders.

The Estom Yumeka Maidu Tribe designated an approved Indian foster home for the minor. The juvenile court ordered the minor placed there.

At an interim hearing, the juvenile court found ICWA applicable.

The department's six-month status review report recommended terminating mother's services and setting a section 366.26 hearing. Mother had refused to enter a residential drug treatment program and had a poor attendance record in outpatient programs. She had had three positive methamphetamine tests, failed to show up for testing on six other dates, and turned in two diluted samples for testing. Her visitation had been suspended and was now conditional on negative drug testing. Although she had completed a parent support group, she had not

regularly attended parenting classes. She believed she had done everything needed to get the minor returned to her.

A state adoptions bureau status report indicated that the bureau would follow ICWA's placement preferences. The minor was placed in a tribal home, and the foster parents were willing to consider adoption.

At the contested six-month review hearing, the juvenile court terminated mother's services and set a section 366.26 hearing.

An adoptions assessment recommended the termination of parental rights and adoption. According to the assessment, there would be no detriment to the minor from terminating parental rights or from any possible interference with the minor's relationship with her half siblings.

The minor had been in her present foster home for over seven months, was thriving there, and had bonded to the foster family. The caretakers wanted to adopt, and a preliminary assessment indicated that they were a suitable adoptive family; however, if they could not be approved for adoption, there were other potential adoptive families known to the tribal representative.

The foster mother was 62 years old; the foster father was 57. They had been married for 13 years. They had five other children in informal placements or foster care, ranging from 15 years old to two years old. The foster father was unemployed and had an elementary school education; he was arrested for an "immigration issue" several years ago, but an amnesty program

had resolved that problem, he reported "no additional criminal history," and the incident appeared to have been "an isolated occurrence." The foster mother, who also had an elementary education, was employed by Enterprise Rancheria and worked from home. The foster parents had demonstrated good parenting practices with the other children in their home and could meet the minor's needs.

Shortly after the adoptions assessment was submitted, mother filed a section 388 petition, requesting the reinstatement of services or the placement of the minor in her custody. Mother alleged that she was now in a residential substance abuse treatment program and had been clean and sober for "an extended period."

The juvenile court set the section 388 petition for hearing together with the section 366.26 proceeding.

The section 366.26 report recommended termination of parental rights and adoption. The minor was still thriving in the prospective adoptive home. The tribe supported the department's plan, and the Indian expert did not object to it. Mother had visited only twice in the last four months. The prospective adoptive parents were open to postadoption contacts with the minor's birth family, including mother.

The report of Indian expert Angelina Arroyo recommended keeping the minor in her current placement until a permanent placement plan had been determined. The minor was thriving and happy there, and was clearly attached to the foster father.

Mother reported to Arroyo that she had been in rehabilitation for 77 days and felt she was doing well; she had moved to another county to start a better life. She had had a good three-hour visit with the minor around a month ago. She had good support from the maternal grandmother (who saw the minor every other week) and other family members.

The foster family reported to Arroyo that although the minor had a weak immune system, mother had returned the minor from a visit without socks and the minor afterward became ill. When mother was allowed to stay at the foster home to visit the minor, mother did not respond to the minor's needs, but let the foster mother do it instead.³

It was Arroyo's opinion that continued custody of the minor by the biological parent was likely to result in serious emotional or physical harm to the minor.

A letter from the "Family Program Facilitator" at Door To Hope, mother's treatment program, stated: Mother had been in residence for just over two months and was now entering the last phase of treatment. Women who did "the initial [r]ecovery work" for four to six months, then moved to a transitional facility with their children, then stayed in a "clean and sober [c]ommunity" for another 18 months, normally did very well.

In an addendum to her report, Arroyo found that active efforts had been made to provide remedial services and

³ Arroyo's report did not give the dates of these alleged incidents.

rehabilitation to prevent the breakup of the Indian family, those efforts were unsuccessful, and that as a result there was proof beyond a reasonable doubt that continued custody of the minor by the parent was likely to result in serious emotional or physical damage to the minor.⁴ Therefore, Arroyo now recommended termination of parental rights.

At the contested section 388/section 366.26 hearing, state adoptions social worker Sydne Murua testified that she believed the foster father was a legal resident, but not a United States citizen. If he were to be arrested or deported, Murua would assume that could affect the stability of the prospective adoptive home. However, Murua had no reason to doubt the foster mother's statement that the foster father completed an amnesty program and was no longer considered illegal.⁵ Aside from his past problem with immigration, he had no criminal history.

Murua believed the foster parents had not obtained specialized training in the health issues of children who tested positive for drugs at birth. Despite that fact, Murua considered their home a suitable adoptive placement. The minor

⁴ These findings are required under ICWA before the juvenile court may terminate parental rights where the child is an Indian child. (25 U.S.C. § 1912(d), (f).)

⁵ Murua testified that the foster father had told her about the amnesty program, but then amended her testimony to explain that the foster mother had told her that the foster father reported he completed the amnesty program.

had been assessed for developmental issues, and it was determined that she did not have any at this point.

Mother's 18-year-old son, St. S., testified that until mother went into rehabilitation, he and she often visited the minor together. Whenever mother saw the minor, mother got very excited and picked her up as soon as she could. St. S. saw mother hold the minor, change her, and feed her. When he and mother visited, the minor looked to mother for care.

Since mother went into rehabilitation, according to St. S., she seemed to be "a lot calmer" and paid attention to more things than usual. He had no concern that she would return to substance abuse.⁶ He thought the minor would be safe in mother's care and it was important for the minor to be raised by her biological family. He admitted that he had no reason to think he would not still be able to see the minor if she were adopted.

Arroyo testified that the minor was not a member of Enterprise Rancheria and was not eligible for membership because enrollment was closed, but was nevertheless treated as an Indian child due to her heritage. Arroyo restated her opinion that active efforts had been made to provide remedial services and rehabilitative programs to prevent the breakup of the Indian family, those efforts had been unsuccessful in rehabilitating mother, there was proof beyond a reasonable doubt that continued custody of the minor by the mother at this time would likely

⁶ He admitted that he had not become aware of mother's drug use until a year ago.

result in serious emotional or physical damage to the minor, and that mother was not in a position to be reunified with the minor. A representative of Enterprise Rancheria had told Arroyo that the tribe agreed with the department's recommendation.

Craig Busse, who supervised visits with the minor by mother and her family members, testified that mother's interaction with the minor was appropriate; mother held the minor, fed her, and changed her. Busse did not observe any difference between the minor's reaction to mother and the minor's reaction to other people in the room.

Mother had had three two-hour visits in the months just prior to the hearing. Nothing that happened during those visits gave Busse any concern about the minor's safety with mother or mother's sobriety. Her actions and demeanor had improved since she went into rehabilitation: she seemed clearer, more focused, and more attentive.

Mother testified that she was living in Salinas, California. After completing Door To Hope's outpatient program, she had just graduated from its residential rehabilitation program; she was now in the aftercare program, which would last a year. The programs had numerous components, including relapse prevention. Mother had developed a "safety plan" during her relapse prevention program. She knew how to identify and deal with situations that might tempt her to relapse.

Methamphetamine was mother's drug of choice; starting at 19, she used it "[o]ff and on" for about 17 years, resuming after a six-year period of sobriety. She last used it on May 5,

2010.⁷ She had been clean and sober since that date. Her random drug tests in Door To Hope were always negative. She had a "huge support system," was heavily involved with Alcoholics Anonymous and Narcotics Anonymous, and had a sponsor. She attended Narcotics Anonymous meetings three times a week. She believed her work on changing herself would be a lifelong process.

When the minor was born, mother did not have the capacity to be a good parent. Now, however, she believed that she had that capacity because no one could love the minor as much as she did and she had learned a lot in residential rehabilitation. Her recent visits with the minor had gone "wonderful[ly]."

If mother regained custody of the minor, she would go immediately into a six-month rehabilitation program called Nueva Esperanza for children and their parents; appropriate lodging for the minor would be available. After that, she could stay for 18 months in a "clean and sober" community called Pueblo on the Monterey Peninsula.

Mother planned to go back to school to be a substance abuse counselor; she had a job lined up at Door To Hope if she followed through with her remaining programs. She intended to stay in Monterey County as part of her safety plan.

After hearing argument, the juvenile court ruled: As to section 388, mother had shown a change in circumstance, but had

⁷ The section 388/section 366.26 hearing took place on February 17, 2011.

not shown that placement of the minor with her or further reunification services would be in the minor's best interest. Therefore, the section 388 petition was denied.

As to section 366.26, the court found by clear and convincing evidence that the minor was adoptable, and mother had not proved that any exception to adoption applied. Therefore, the court terminated mother's parental rights and ordered adoption as the minor's permanent plan.

DISCUSSION

Mother contends the juvenile court erred by failing to grant her section 388 petition.⁸ We disagree.

A petition to modify a juvenile court order under section 388 must allege facts showing new evidence or changed circumstances, and that changing the order will serve the minor's best interests. (*In re Daijah T.* (2000) 83 Cal.App.4th 666, 671-672.) The petitioner has the burden of proof on both points by a preponderance of the evidence. (Cal. Rules of Court, rule 5.570(h)(1)(D).) In assessing the petition, the court may consider the entire history of the case. (*In re Justice P.* (2004) 123 Cal.App.4th 181, 188-189.)

To decide whether mother met her burden, the juvenile court had to consider such factors as the seriousness of the problem that led to the dependency, and the reason for the problem's

⁸ Mother does not make any argument as to the court's section 366.26 ruling other than that reversal as to section 388 would compel reversal as to section 366.26.

continuation; the degree to which the problem may be and has been removed or ameliorated; and the strength of the relative bonds between the dependent child and the child's parents and caretakers. This list is not exhaustive. (*In re B.D.* (2008) 159 Cal.App.4th 1218, 1229; *In re Kimberly F.* (1997) 56 Cal.App.4th 519, 532.)

When a parent brings a section 388 petition after the termination of reunification services, the best interests of the child are of paramount importance. (*In re Stephanie M.* (1994) 7 Cal.4th 295, 316-317.) Therefore, the juvenile court looks not to the parent's interest in reunification but to the child's need for permanence and stability. (*In re Marilyn H.* (1993) 5 Cal.4th 295, 309.)

Where a section 388 petition has been denied after an evidentiary hearing, we review for abuse of discretion. (*In re S.R.* (2009) 173 Cal.App.4th 864, 866.) We reverse only if the ruling exceeded the scope of the court's discretion, or if under all the evidence (including reasonable inferences from the evidence), viewed most favorably to the ruling, no reasonable judge could have made that ruling. (*In re Jasmine D.* (2000) 78 Cal.App.4th 1339, 1351.) Where the evidence conflicts, we reverse only if the evidence compels a finding for the appellant as a matter of law. (*In re I.W.* (2009) 180 Cal.App.4th 1517, 1527-1529.)

Mother has never had physical custody of the minor, who was was detained at birth. Still an infant, the minor has thrived for more than half her life in the care of the foster parents

who want to adopt her and to whom she looks to meet her needs. Mother's visits went well, but there was no showing that the minor responded differently to her than to anyone else in the room with her. Mother's rehabilitation from a drug habit that lasted for 17 years, which by her own account included a relapse after six years of sobriety, is still far from complete or certain. (Cf. *In re Cliffton B.* (2000) 81 Cal.App.4th 415, 423 [seven months of drug rehabilitation did not outweigh long history of addiction and relapses].) Under these circumstances, reopening services for mother, thus indefinitely deferring the goals of permanence and stability for the minor, would not have been in the minor's best interest. (Cf. *In re Marilyn H.*, *supra*, 5 Cal.4th at p. 309.)

Mother asserts that the prospective adoptive home is unsatisfactory in comparison to what she could offer the minor. Mother cites her alleged rehabilitation and the alleged need to preserve and protect her parental rights. Assuming that this contention is properly raised under section 388 (see *In re Kimberly F.*, *supra*, 56 Cal.App.4th at p. 530 [best interests standard under § 388 "cannot be a simplistic comparison between the natural parent's and the caretakers' households"]), it is unpersuasive.

As we have noted, the permanence of mother's rehabilitation is as yet unknown, and her interest in preserving her parental rights no longer controls once reunification services have terminated. Rather, the needs of the child for permanence and stability control. (*In re Stephanie M.*, *supra*, 7 Cal.4th at

p. 317.) Thus, the factors mother counts in her favor weigh little.

Whether the current foster family can adopt the minor, or whether a preferable adoptive family might exist, is irrelevant to the minor's best interests under section 388.⁹ The adoptions social worker and the Indian expert were of the opinion that the foster family could meet the minor's needs, and no evidence cited by mother shows otherwise.

The denial of mother's section 388 petition was not an abuse of discretion.

DISPOSITION

The orders denying mother's section 388 petition and terminating her parental rights are affirmed.

We concur: ROBIE, J.

HULL, Acting P. J.

HOCH, J.

⁹ Even under section 366.26, it does not matter whether the current foster family can adopt the minor. The juvenile court found that the minor was adoptable and did not find that she had any traits which might discourage prospective adoptive parents. Thus, the fact that she was living with foster parents who wanted to adopt her is evidence that she is likely to be adopted by that family or some other in a reasonable time. (*In re Lukas B.* (2000) 79 Cal.App.4th 1145, 1154; *In re Sarah M.* (1994) 22 Cal.App.4th 1642, 1649.)