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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Shasta)

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

C072380

SHASTA COUNTY HEALTH AND HUMAN SERVICES AGENCY,

(Super. Ct. No. 11JVSQ2882301)

Plaintiff and Respondent,

v.

S. H. et al.,

Defendants and Appellants.

Margaret W. and Shawn H., parents of the minor, appeal from orders of the juvenile court denying mother’s petition for modification and terminating their parental rights. (Welf. & Inst. Code, §§ 366.26, 395 [further undesignated statutory references are to the Welfare and Institutions Code].) Mother contends the court abused its discretion in denying the petition for modification and erred in failing to find the parental relationship exception to termination of parental rights applied. Father argues that if the order

terminating mother's parental rights is reversed, the order terminating his parental rights must also be reversed. (Cal. Rules of Court, rule 5.725(a)(2).) We affirm.

### **FACTS**

The Shasta County Health and Human Services Agency (Agency) filed a petition to detain four-month-old S.H. due to parental neglect and failure to comply with a voluntary plan. Both parents have mental health and substance abuse issues that resulted in neglect of the minor's care and led to the minor's being diagnosed with failure to thrive. The court ordered the minor detained in March 2011.

The court sustained the petition in June 2011 and ordered the parents to participate in reunification services. After 12 months of services, mother had completed her plan but did not participate in aftercare services. Father, who was dropped from his substance abuse treatment program in November 2011 did not reenroll until January 2012 and had a positive test in March 2012. The juvenile court terminated services in June 2012 and set a selection and implementation hearing.

The report for the selection and implementation hearing stated that after voluntary, interim, and reunification services, the parents were unwilling or unable to accept responsibility for their actions, address their issues, or maintain sobriety. The parents failed to show consistent and positive behavioral changes and did not show an ability to meet the minor's needs. The parents visited regularly and there were no concerns about the visits. The minor was healthy, happy, and developmentally on target, although small for her age. She was in her fourth placement, a prospective adoptive placement, and demonstrated a secure attachment to her current caregivers. The social worker visited the minor in her foster home and had observed the minor going to the foster parents seeking attention, reassurance, and assistance and responding to their consistency and limit setting. The minor's failure-to-thrive issues had resolved. The Agency assessed that in the unlikely event the current caretakers were unable to adopt, the minor was highly likely to be adopted by another family. The parents consistently visited but had not

shown they could safely parent the minor. Because the minor needed permanency, the agency recommended termination of parental rights.

In September 2012 mother filed a petition for modification seeking return of the minor and family maintenance services and alleging as changed circumstances that she was back on Xanax, a drug she had taken in the past that worked for her. Medi-Cal had stopped paying for the medication, but she had recently completed a treatment authorization request (TAR) and was able to get the drug. The petition further alleged that the modification was in the minor's best interests because mother had a strong parent-child bond with the minor and had completed her case plan. In support of the petition mother attached copies of visit logs that showed the minor was happy and engaged in visits and that the parents interacted with the minor, although they occasionally failed to maintain boundaries. The minor showed no distress at the end of visits.

At the hearing, mother testified that after services were terminated, father moved out of the home. The medication she was taking at that time made her very emotional and she had a hard time coping without him. Two weeks after father left the home, he and mother met to discuss their relationship because mother wanted her family together and said she could not "be in the home by myself." Father then moved back in because mother was increasingly depressed and "couldn't handle being by [herself] in the house." She said father had completed his substance abuse classes and was not drinking. Mother denied covering up for father's drinking in the past and said he lied to her about it. Mother testified the only medication that relieved her anxiety symptoms was Xanax, and since August 2012 she was able to again afford the drug after completing TAR processing. Xanax allows her to think, concentrate, and control her emotions. Mother testified she had completed the elements of her plan and was not currently in any services except visiting the minor. Mother described the visits as "Great." At the beginning of a visit, the minor was happy and smiling and called the parents "Mommy" and "Daddy."

Mother said they had fun together during the visits and she parented the minor when needed.

Father did not testify, but his counsel made an offer of proof that father did continue his substance abuse classes, which were completed in early September 2012, and he has remained clean and sober. Further, father would testify he has a Proposition 215 recommendation and uses marijuana regularly to alleviate pain. Father has visited regularly and believes he and mother have a good parental relationship with the minor and that it would be emotionally detrimental to sever the relationship.

As to the petition for modification, mother argued it was safe to return the minor home. Her primary issue was her medications, and she had stabilized with a return to effective medication. Further, mother argued the visit logs showed a significant bond with the minor. Father adopted mother's argument, noting that mother was now stable and a "different person." Minor's counsel argued for an extension of services to 24 months. The court found there had been some change in mother's circumstances, but the changes were recent and the long-term results were unknown. The court further found that the visitation logs were not sufficient evidence of a strong bond and that there was little evidence of a parent-child bond. The court denied the petition, observing that the minor needed permanency.

The parties submitted on the selection and implementation issues without further evidence or argument. The court terminated parental rights and selected adoption as the permanent plan.

## **DISCUSSION**

### **I**

Mother argues the juvenile court abused its discretion in denying her petition for modification.

A parent may bring a petition for modification of any order of the juvenile court pursuant to section 388 based on new evidence or a showing of changed circumstances.<sup>1</sup> “The parent requesting the change of order has the burden of establishing that the change is justified. [Citation.] The standard of proof is a preponderance of the evidence. [Citation.]” (*In re Michael B.* (1992) 8 Cal.App.4th 1698, 1703.) Determination of a petition to modify is committed to the sound discretion of the juvenile court, and absent a showing of a clear abuse of discretion, the decision of the juvenile court must be upheld. (*In re Stephanie M.* (1994) 7 Cal.4th 295, 318-319; *In re Robert L.* (1993) 21 Cal.App.4th 1057, 1067.) The best interests of the child are of paramount consideration when the petition is brought after termination of reunification services. (*Stephanie M.*, at p. 317.) In assessing the best interests of the child, the juvenile court looks not to the parent’s interests in reunification but to the needs of the child for permanence and stability. (*Ibid.*; *In re Marilyn H.* (1993) 5 Cal.4th 295, 309.)

Even assuming mother’s recent stabilization on her medication established changed circumstances, mother did not establish that the proposed modification was in the minor’s best interests. The 23-month-old minor had been out of parental custody since she was four months old. The visitation records showed that the visits were unremarkable, albeit pleasant, interactions. At most, visits demonstrated a friendly visitor relationship. While the minor was happy to see her mother and father, she showed no distress at leaving the visit and no particular bond. This is unsurprising given the minor’s tender years and limited interaction with appellants. The behavior is in stark

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<sup>1</sup> Section 388 provides, in part: “Any parent . . . may, upon grounds of change of circumstance or new evidence, petition the court in the same action in which the child was found to be a dependent child of the juvenile court . . . for a hearing to change, modify, or set aside any order of court previously made or to terminate the jurisdiction of the court.” (§ 388, subd. (a).) The court must set a hearing if “it appears that the best interests of the child may be promoted by the proposed change of order . . . .” (§ 388, subd. (d).)

contrast to the minor's behavior with her current caregivers, where she was observed actively seeking reassurance, attention, and assistance from her foster parents. Moreover, appellants have a history of instability. Mother's current maintenance on Xanax appeared to have stabilized her for a short period of time, but that stability depended on maintaining the drug and refraining from alcohol abuse and other activities that impaired. Mother had not participated in aftercare and had a relatively short history of sobriety. The court did not abuse its discretion in denying the petition for modification to return the minor to a home that had only recently shown signs of stability.

## II

Mother contends the court erred in failing to find that termination of parental rights would be detrimental to the minor because the minor would benefit from continuing the relationship.

At the selection and implementation hearing held pursuant to section 366.26, a juvenile court must choose one of the several " 'possible alternative permanent plans for a minor child. . . . *The permanent plan preferred by the Legislature is adoption.*' If the court finds the child is adoptable, it *must* terminate parental rights absent circumstances under which it would be detrimental to the child." (*In re Ronell A.* (1996) 44 Cal.App.4th 1352, 1368 [citations omitted].) There are only limited circumstances that permit the court to find a "compelling reason for determining that termination [of parental rights] would be detrimental to the child." (§ 366.26, subd. (c)(1)(B).) The party claiming the exception has the burden of establishing the existence of any circumstances that constitute an exception to termination of parental rights. (*In re Cristella C.* (1992) 6 Cal.App.4th 1363, 1373; *In re Melvin A.* (2000) 82 Cal.App.4th 1243, 1252; Cal. Rules of Court, rule 5.725(d)(4); Evid. Code, § 500.)

After the court denied mother's petition for modification, mother submitted the selection and implementation issues on the same evidence as presented on the petition for modification. Mother's counsel did not argue termination of parental rights would be

detrimental to the minor within the meaning of any of the statutory exceptions. (§ 366.26, subd. (c)(1)(B).) The court did not specifically rule on the existence of any exception. Mother now argues for the first time that the court erred in failing to find the benefit exception applied to defeat termination of parental rights. The issue is forfeited for failing to raise it first in the trial court. (*In re Christopher B.* (1996) 43 Cal.App.4th 551, 558; *In re Dakota S.* (2000) 85 Cal.App.4th 494, 501-502.)

Assuming the issue is not forfeited, termination of parental rights may be detrimental to the minor when “[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).) However, the benefit to the child must promote “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 other words, the 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. 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.” (*In re Autumn H.* (1994) 27 Cal.App.4th, 567, 575.) Even frequent and loving contact is not sufficient to establish this benefit absent a significant positive emotional attachment between parent and child. (*In re Beatrice M.* (1994) 29 Cal.App.4th 1411, 1418-1419; *In re Teneka W.* (1995) 37 Cal.App.4th 721, 728-729; *In re Brian R.* (1991) 2 Cal.App.4th 904, 924.)

The evidence established mother visited the minor regularly. However, no evidence showed that the minor would benefit from continuing contact with mother. The visit logs do not show a “substantial, positive emotional attachment” that would outweigh the minor’s need for permanency. At best, the visit records showed mother and the minor had a pleasant, playful relationship. Although the minor played happily with her parents

and clearly enjoyed the visits, the minor showed no distress at the end of visits and there was little evidence of a parental relationship. There was no error in failing to find an exception to the preference for adoption.

Because we find no error as to mother, the order terminating father's parental rights is also affirmed.

**DISPOSITION**

The orders of the juvenile court are affirmed.

\_\_\_\_\_ RAYE \_\_\_\_\_, P. J.

We concur:

\_\_\_\_\_ NICHOLSON \_\_\_\_\_, J.

\_\_\_\_\_ MURRAY \_\_\_\_\_, J.