

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

In re SAMANTHA T., et al., Persons
Coming Under the Juvenile Court Law.

SAN DIEGO COUNTY HEALTH AND
HUMAN SERVICES AGENCY,

Plaintiff and Respondent,

v.

ASHLEY T., et al.,

Objectors and Appellants.

D060450

(Super. Ct. No. J517807)

APPEAL from a judgment of the Superior Court of San Diego County, Peter Fagan, Juvenile Court Referee. Affirmed.

Ashley T. and Michael T. (together, the parents) appeal the judgment terminating their parental rights to their daughters, Samantha T. and Emily T. (together, the children). The parents contend the juvenile court abused its discretion by denying Ashley's

modification petition (Welf. & Inst. Code,¹ § 388), which requested the children be placed with the maternal grandparents,² and erred by declining to apply the beneficial relationship and sibling relationship exceptions (§ 366.26, subd. (c)(1)(B)(i), (v)) to termination of parental rights. We affirm.

BACKGROUND

Samantha was born in November 2006. Her brother Aiden T. was born in June 2008. Aiden died in September 2009 in Sacramento. In May 2010 the parents were arrested in San Diego and jailed in Sacramento in connection with Aiden's death. The parents were charged with felony child endangerment. Ashley posted bail and Michael remained in jail for a month.

In May 2010 the San Diego County Health and Human Services Agency (the Agency) filed a dependency petition for three-and-one-half-year-old Samantha. Count 1 of the petition alleged the family home was filthy. Count 2 alleged that in September 2009 the parents caused Aiden's death by abuse or neglect. When Aiden died he was emaciated and weighed 15 pounds. He suffered from cerebral atrophy and severe thymic involution from stress, conditions consistent with chronic malnutrition. His stomach and small intestine were completely empty and he was severely dehydrated.

Samantha was detained in a foster home. After approximately one month, she was moved to a different foster home. In October 2010 the court entered true findings on

¹ Further statutory references are to the Welfare and Institutions Code unless otherwise specified.

² In the juvenile court, Michael supported Ashley's petition.

Samantha's dependency petition, ordered her placed in foster care and denied the parents reunification services.

When Emily was born in November 2010, the Agency filed a dependency petition for her. The petition contained one count, identical to count 2 of Samantha's petition. Emily was detained in the hospital and then in a foster home. In January 2011 the court entered a true finding on Emily's dependency petition, ordered her placed in foster care and denied reunification services.

In February 2011 Emily was moved to Samantha's foster home. The foster parent was unwilling to adopt due to her advanced age, but by early August the Agency had identified a prospective adoptive family and the children's transition had begun.³ On August 22, Ashley filed her section 388 petition. On August 25, the court denied the petition. On September 1, the court terminated parental rights.

THE SECTION 388 PETITION

Section 388 allows the juvenile court to modify an order if a parent establishes, by a preponderance of the evidence, that changed circumstances exist and the proposed modification would promote the child's best interests. (*In re Zachary G.* (1999) 77 Cal.App.4th 799, 806.) We review the denial of a section 388 petition for abuse of discretion. (*In re Jasmon O.* (1994) 8 Cal.4th 398, 415.)

³ Samantha had been told she would be moving to the home of a new family, but the children had not met the prospective adoptive family.

Ashley's section 388 petition asked the court to vacate the January 2011 order for foster home placement⁴ and order the children placed with the maternal grandparents. As changed circumstances, the petition alleged the maternal grandparents wanted the children placed in their home; at the time children were placed in a foster home, the maternal grandmother was recovering from cancer; her cancer had been in remission for one and one-half years; and the maternal grandparents were able to care for the children. The section 388 petition alleged the proposed modification was in the children's best interests in light of the relative placement preference (§ 361.3). As additional factors demonstrating the change was in the children's best interests, the petition alleged the foster parent was unwilling to adopt; the Agency recommended adoption; and the maternal grandparents were employed, the caretakers of another child,⁵ willing to adopt and able to care for and protect the children. The juvenile court determined there had been no change of circumstances that would benefit the children and it would not be in their best interests to grant the petition. The court did not abuse its discretion.

Near the beginning of Samantha's case, the maternal grandparents' home in Nevada was evaluated for placement pursuant to the Interstate Compact on the Placement of Children (ICPC) (Fam. Code, § 7900 et seq.). On August 24, 2010, the Agency learned the maternal grandparents' placement request had been denied "due to ongoing medical and financial concerns." Specifically, the maternal grandmother was supposed to

⁴ Emily's dispositional hearing took place in January 2011. There was no hearing in January for Samantha. Her dispositional hearing took place in October 2010.

⁵ The maternal grandparents had a 15-year-old son.

have an MRI in May, following cancer surgery, but she did not schedule the MRI because she could not afford it.

On August 25, 2011, the maternal grandmother variously testified she had been told "recently" she was cancer free; she could not remember when she had been told, although it was in 2011; and she had been told in a letter dated June 21. She also testified she had been cancer free for a year and a half, which places her remission date in February 2010, months before the ICPC denial and even before Samantha was detained. The juvenile court found the maternal grandmother's testimony not credible and concluded there had been no change of circumstances. We accept the court's credibility evaluation. (*In re Dakota H.* (2005) 132 Cal.App.4th 212, 228.)

The court also correctly concluded the proposed change would not be in the children's best interests. In the year after the ICPC denial, the maternal grandparents had not contacted the Agency or the foster parent to ask about the children, and had not requested visitation. Indeed, the maternal grandparents did nothing until they learned that parental rights might be terminated. The maternal grandmother testified she had never met Emily, she had last seen Samantha in April 2010 and she had had no contact with Samantha after she was moved to a new foster home.⁶ Although the maternal grandmother had seen the parents about a month before the hearing, and had spoken to Ashley "a few days" before the hearing, she had never asked the parents why she was not

⁶ Samantha's only move to a new foster home was in June 2010.

having contact with Samantha. Additionally, Samantha had not asked about the maternal grandparents.

The maternal grandmother testified she saw Aiden a week before he died, he appeared to be in good health and the parents were taking good care of him. She had heard he had starved to death, but did not know if that was true. She believed Samantha had become a court dependent because the parents' home was messy.

Samantha's therapist testified it would be detrimental to Samantha to move from San Diego because she was bonded with the therapist and the foster mother. Transitions were difficult for Samantha, and it was important to maintain her relationship to her current therapist at the beginning of the transition to an adoptive home. Samantha was only five years old, distrustful and "very fragile." It would be extremely difficult, if not impossible, for her to adjust after an abrupt move to a strange environment. It would take at least a year of at least weekly visits from the maternal grandmother to accomplish a transition to the maternal grandparents' home. Even so, the therapist was unsure if it would be possible for Samantha to be moved to that home in a way that was safe and comfortable for her. It would be in Samantha's best interest to transition to an adoptive home in San Diego, so she would be able to continue seeing her therapist and foster mother, and her bond with the foster mother could "be extinguished more gradually."

The parents contend the court erred by failing to consider section 361.3, re-evaluate the maternal grandparents for placement and state on the record its reasons for denying their placement request (§ 361.3, subd. (e)). Section 361.3 gives preferential consideration to placement requests by certain relatives when a new placement is

necessary. (§ 361.3, subds.(a), (c)(1), (d); *In re Lauren R.* (2007) 148 Cal.App.4th 841, 854) " 'Preferential consideration' . . . merely places the relative at the head of the line when the court is determining which placement is in the child's best interests." (*In re Sarah S.* (1996) 43 Cal.App.4th 274, 286.). The preference applies to temporary placements, not adoptive placements. (*In re Lauren R., supra*, at pp. 845, 853.) Even if the relative preference applied here, the overriding concern was the children's best interests. (*Id.* at p. 855; *Samantha T. v. Superior Court* (2011) 197 Cal.App.4th 94, 111, 113.) The maternal grandparents' home⁷ had not been approved for placement, a process that could take several months, delaying permanency for the children. As discussed above, the court could have reasonably have concluded it was not in the children's best interests to be placed with the maternal grandparents.

The court did not abuse its discretion by denying the section 388 petition.

THE BENEFICIAL RELATIONSHIP EXCEPTION

If a dependent child is adoptable,⁸ the juvenile court must terminate parental rights at the section 366.26 hearing unless the parent proves the existence of a statutory exception. (§ 366.26, subd. (c)(1); *In re Helen W.* (2007) 150 Cal.App.4th 71, 80-81.) One such exception exists if "[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).) 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

⁷ The maternal grandparents had moved to a new home in October 2010.

⁸ The parents do not contest the adoptability findings.

home with new, adoptive parents." (*In re Autumn H.* (1994) 27 Cal.App.4th 567, 575.) If terminating parental rights "would deprive the child of a substantial, positive emotional attachment such that the child would be greatly harmed, the preference for adoption is overcome" (*Ibid.*) The existence of a beneficial 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.) Examining the evidence in the light most favorable to the judgment (*ibid.*), we conclude substantial evidence supports the juvenile court's conclusion the beneficial relationship exception did not apply.⁹

The parents' visits were supervised. After Samantha was detained, the parents were in Sacramento and had no visits for one month. In May 2010 Samantha refused to speak with Ashley by telephone and cried and had behavioral problems after the call. In June the parents began regular twice weekly visits.

In general, the visits went well. Emily often slept during visits. The parents held her, fed her and changed her diaper. The parents were affectionate with Samantha and she sometimes reciprocated. Samantha usually appeared to be comfortable with the parents but separated from them easily when visits ended. Sometimes Samantha reacted negatively to seeing the parents and became upset before and after visits. Sometimes she refused to attend visits. At some visits, the parents were inattentive to the children; at other visits, they discussed the case in front of Samantha.

⁹ The court did not make an express finding whether the parents maintained regular visitation and contact.

Samantha told her therapist that she did not like the parents. When the therapist broached the subject of having a new family, Samantha said, "I don't need a new mommy. I just need a new daddy, because he's mean." Samantha told her caregiver on several occasions that she was afraid the parents would "smack her on the back." At a visit in December 2010, Samantha told Michael to leave and not to kiss her, but he kissed her anyway. Samantha told the visitation monitor this made her "very very sad." Before another visit, Samantha said the parents were mean, a statement she repeated after the visit.

The last visit took place in early May 2011. After that, the parents were in Sacramento for their criminal case.¹⁰ They had short telephone conversations with Samantha, although she was sometimes reluctant to speak with them. Two months after the last visit, Samantha seemed more relaxed. By the time of the section 366.26 hearing, the parents had not seen the children in four months. The parents did, however, visit the maternal grandparents in Nevada about a month before the hearing.

At the time of the section 366.26 hearing, Samantha was four and one-half years old and Emily was 10 months old. Emily had never lived with the parents and Samantha had been out of their' care for more than 15 months. Although Samantha had a bond with the parents, when she lived with them she suffered from the neglectful and abusive environment. She had been traumatized by Aiden's death. The social worker, who had

¹⁰ The parents suggest they are not responsible for the gaps in visitation necessitated by the criminal case. They are mistaken. (*In re Christopher A.* (1991) 226 Cal.App.3d 1154, 1162.)

observed 19 visits, believed the children needed the stability and permanency of adoption; severance of Samantha's relationship with the parents would not be detrimental to her; and there was not a parent-child relationship between Emily and the parents.

Substantial evidence supports the conclusion the beneficial relationship exception did not apply.

THE SIBLING RELATIONSHIP EXCEPTION

Section 366.26, subdivision (c)(1)(B)(v) provides an exception to termination of parental rights when termination would substantially interfere with the child's sibling relationship and the severance of the relationship would be so detrimental to the child as to outweigh the benefits of adoption. (*In re L.Y.L.* (2002) 101 Cal.App.4th 942, 951-953; § 366.26, subd. (c)(1)(B)(v).) The juvenile court must "balance the beneficial interest of the child in maintaining the sibling relationship, which might leave the child in a tenuous guardianship or foster home placement, against the sense of security and belonging adoption and a new home would confer." (*In re L.Y.L.*, *supra*, at p. 951, citing *In re Autumn H.*, *supra*, 27 Cal.App.4th at p. 575.) Factors to be considered in determining whether this exception applies include whether the siblings were raised in the same home; whether they shared significant common experiences or have existing close and strong bonds; and whether ongoing contact is in the child's best interests, including his or her long-term emotional interests, as compared to the benefit of adoption. (§ 366.26, subd. (c)(1)(B)(v).) "[T]he application of this exception will be rare, particularly when the proceedings concern young children whose needs for a competent, caring and stable parent are paramount." (*In re Valerie A.* (2007) 152 Cal.App.4th 987, 1014.) Examining

the evidence in the light most favorable to the judgment, we conclude substantial evidence supports the conclusion the parents did not meet their burden of proving the exception. (*In re L.Y.L., supra*, at pp. 947, 952.)

Samantha first met Emily in December 2010 when Emily was five weeks old. Samantha was more interested in playing with other children who were present. There were two more visits before the children were placed in the same foster home. Samantha was excited to have Emily live with her. By the time of the hearing, they had lived together for seven months. They were being transitioned to the same identified adoptive home and there were 38 approved, local families willing to adopt a sibling set with the children's characteristics. Thus, substantial evidence supports the conclusion that termination would not interfere with the sibling relationship. In any case, substantial evidence supports the conclusion that even if termination of parental rights were to substantially interfere with the sibling relationship, this would be not so detrimental to the children as to outweigh the many benefits they would achieve through adoption.

Substantial evidence supports the conclusion the sibling relationship exception did not apply.

DISPOSITION

The judgment is affirmed.

O'ROURKE, J.

WE CONCUR:

HUFFMAN, Acting P. J.

McINTYRE, J.