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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

In re M.B. et al., a Person Coming Under
the Juvenile Court Law.

SAN DIEGO COUNTY HEALTH AND
HUMAN SERVICES AGENCY,

Plaintiff and Respondent,

v.

MARISOL B. et al.,

Defendants and Appellants.

D061058

(Super. Ct. No. J517334A-C)

APPEALS from a judgment of the Superior Court of San Diego County, Cynthia Bashant, Judge. Affirmed.

Marisol B. appeals the judgment terminating her parental rights to her daughters, M.B. and K.E., and her son, Israel E. (together, the children). Marisol contends that the court erred in denying her Welfare and Institutions Code section 388¹ petition in which she sought placement of the children with her, or in the alternative, that she be provided services

¹ All further statutory references are to the Welfare and Institutions Code.

to facilitate their transition into her home. Marisol also contends that the court erred in declining to apply the beneficial relationship exception to termination of her parental rights (§ 366.26, subd. (c)(1)(B)(i)). Jose E., the father of K.E. and Israel,² also appeals, and joins in Marisol's contentions. We affirm the judgment.

I

BACKGROUND

In December 2008, the San Diego County Health and Human Services Agency (the Agency) filed dependency petitions on behalf of three-and-one-half-year-old M.B., one-and-one-half-year-old K.E. and newborn Israel. The petitions alleged that beginning in May of that year, the children had been exposed to violent confrontations between Marisol and Jose. Specifically, on May 5, Jose pushed Marisol against the floor and sat on her, then pushed her to the bed and slapped her face. As a result, Marisol lost hearing in one ear. In the 18 months that Marisol and Jose had been together, there had been six previous violent episodes. The Agency had opened a voluntary case, but Marisol and Jose failed to comply with their case plan. Then, on November 24, Jose pushed Marisol to the bed where M.B. and Israel were sleeping. K.E. was also in the room at the time. Jose broke Marisol's telephone when she attempted to call law enforcement, and tried to punch her. Marisol bit and hit Jose, and also pulled a knife and threatened him.

The children were detained with Marisol on the condition that she remain in a confidential shelter and that Jose remain out of the home. In February 2009, the court made true findings on the petitions and ordered the children placed with Marisol on the condition

² M.B.'s father, Juan C., does not appeal.

that she remain in a domestic violence shelter or in an Agency-approved confidential home. The court ordered family maintenance services for Marisol and reunification services for Jose.

The paternal grandmother cared for the children in her home while Marisol was at work. On September 20, 2009, M.B. told Marisol that the paternal grandfather had "been touching her in her private area."³ After M.B.'s report, Marisol arranged for a maternal aunt to care for M.B., but continued to leave K.E. and Israel with the paternal grandmother while she was working. On September 21, the Agency received a referral stating that the paternal grandfather had sexually abused M.B. During the course of the investigation, Marisol admitted that she had been present in the paternal grandmother's home while Jose was there on at least six occasions in the past four months.

On September 25, 2009, the Agency filed section 387 supplemental petitions on behalf of the children. The petitions alleged that on September 21, Marisol admitted that she had repeatedly violated a restraining order by having ongoing contact with Jose. In addition, the petitions stated that Marisol had been minimally compliant with her family maintenance plan, and that the parents had continued to allow the paternal grandmother to supervise Jose's visits with the children, despite the court's order to the contrary.

The children were detained in a foster home. In October 2009, the court made true findings on the section 387 petitions and ordered the children placed in foster care. In February 2010, the children were moved to the home of Gloria E., a nonrelative extended family member. In April, Marisol gave birth to a daughter, Liliana R., whose father is

³ The paternal grandfather was the ex-husband of the paternal grandmother.

Christopher R.⁴ In September, the court gave the Agency discretion to allow the children to begin a 60-day trial visit with Marisol, with the concurrence of the children's counsel. On October 25, M.B. began a 60-day trial visit with Marisol.

On January 5, 2011, the Agency received a referral stating that M.B. had witnessed Christopher trying to strangle Marisol. During the course of the investigation, M.B. reported that Christopher "hits her with his belt on her bottom" and "it hurts."

On January 11, 2011, the Agency filed a section 387 petition for M.B.. The petition alleged that Marisol and Christopher had engaged in domestic violence in M.B.'s presence. On one occasion, Christopher had grabbed Marisol by the neck and pushed her to the ground. On another occasion, on December 31, 2010, he kicked her in the vagina. When Marisol fell to the floor, Christopher choked her into unconsciousness. On January 1, Christopher punched Marisol in the head. Marisol failed to report any of these episodes because she feared that M.B. would be removed from her care.

M.B. was initially detained at Polinsky Children's Center, and later, with Gloria. By March 1, 2011, Marisol had separated from Christopher and was living at a confidential address. On March 16, the court made true findings on M.B.'s section 387 petition and ordered her placed in the home of a nonrelative extended family member. M.B. was returned to Gloria's home.

At the 18-month review hearing on May 19, 2011, the court terminated services and set a section 366.26 hearing for the children. On October 18, Marisol filed her section 388 petition. On November 30, the children were moved to the home of Ricardo R. and Holly

⁴ Liliana became a juvenile court dependent, but is not a subject of these appeals.

S., who wanted to adopt them.⁵ On December 1, the court denied Marisol's section 388 petition and terminated parental rights.

II

DISCUSSION

A

The Court Did Not Abuse Its Discretion in Denying the Section 388 Petition

Section 388 allows the juvenile court to modify an order if a party establishes, by a preponderance of the evidence, that changed circumstances exist and that the proposed modification would promote the child's best interests. (*In re Zachary G.* (1999) 77 Cal.App.4th 799, 806.) "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 . . . might be able to reunify at some future point, does not promote stability for the child or the child's best interests." (*In re Casey D.* (1999) 70 Cal.App.4th 38, 47.) Because this case was past the reunification phase, the focus was on the children's need for permanency and stability. (*In re Stephanie M.* (1994) 7 Cal.4th 295, 317.) We review the denial of the section 388 petition for an abuse of discretion. (*In re Jasmon O.* (1994) 8 Cal.4th 398, 415.)

In her section 388 petition, Marisol sought modification of the May 19, 2011, order terminating her reunification services and setting the section 366.26 hearing. The petition requested that the court order the children placed with Marisol, or in the alternative, order

⁵ Ricardo and Holly are K.E. and Israel's paternal great-uncle and aunt. Gloria was willing to provide long-term care for the children, but did not want to adopt them.

services to facilitate their transition into her home. As changed circumstances, the petition alleged that Marisol had completed a domestic violence support group on June 8, 2011, and had been one of the most active participants in the group; that she had gained insight through therapy; that she was employed; and that she continued to participate in reunification services in Liliana's case. The petition alleged that the proposed modification would be in the children's best interests because they were bonded to Marisol; they were not in a prospective adoptive home and therefore, were going to have to be moved; and Marisol had learned that the children were her priority.

The court found that Marisol had not met her burden of showing either changed circumstances, as opposed to changing circumstances, or that the proposed modification would promote the children's best interests. As discussed below, we conclude that the court did not abuse its discretion in making these findings.

In January 2011, after Marisol had completed 13 sessions of a domestic violence support group as well as most of a domestic violence course, she reported that Christopher had pushed her, causing her to fall backward and hit her head on the wall. The next day, she retracted her report. In November, the Agency reported that Marisol had recently been seen with Christopher, in violation of a restraining order.

Although Marisol was employed at the time of the section 388 hearing, she continued to depend on others for transportation to visits and services.

Marisol's therapist, Maria Pease, LMFT, reported in July 2011 that Marisol was "insightful about how her low self[-]esteem and lack of living skills ha[ve] triggered her [codependent] behaviors in the past." In October, Pease reported that Marisol had gained

insight into her responsibility for the children's removal, and into the effects on the children of having witnessed domestic violence in their home and being out of her care for more than two years. Pease stated that Marisol understood the children's needs and that her empathy for the children had increased. Pease expressly noted that she had not held conjoint sessions with Marisol and the children, and expressed her view that Marisol "would benefit from concrete feedback about her ability to apply all learned skills with her children."

The social worker, who had observed six visits between Marisol and the children, believed that Marisol was unable to provide the permanency and stability that were of prime importance to the children. Marisol had not taken advantage of all of the visits that she had been offered, and she sometimes became stressed and overwhelmed during visits. In the social worker's view, the children did not have "a significant parent-child relationship" with Marisol, and during visits, Marisol did not fulfill the role of a "primary caregiver."

Psychologist Beatriz Heller, who conducted bonding studies in October 2011, found that Marisol and Israel shared a strong parent-child bond. Dr. Heller believed that M.B. and K.E. were also bonded with Marisol, although not as strongly as Israel. Dr. Heller did not predict any clear detriment to the children if their contact with Marisol were to end.

By the time of the hearing on Marisol's section 388 petition, the children had been in the dependency system for three years. Six-and-one-half-year-old M.B. had been out of Marisol's care for a total of two years, and four-and-one-half-year-old K.E. and nearly three-and-one-half-year-old Israel had been out of Marisol's care for more than two years. Marisol had a long history of becoming involved in domestic violence. She had demonstrated only a short period of progress in that area, partly due to the fact that she was

apparently not involved in a domestic relationship. The court could reasonably have concluded that Marisol had demonstrated an inability to protect the children and that the children needed a stable, safe permanent home, which Marisol was not in a position to provide. The court did not abuse its discretion in denying Marisol's section 388 petition.⁶

B

The Court Did Not Err in Refusing to Apply the Beneficial Relationship Exception to Termination of Parental Rights

If a dependent child is adoptable,⁷ the juvenile court must terminate parental rights at the section 366.26 hearing unless the parent establishes the existence of a statutory exception. (§ 366.26, subd. (c)(1); *In re Helen W.* (2007) 150 Cal.App.4th 71, 80.) One such exception exists if "[t]he parent[has] maintained regular visitation and contact with the child and the child would benefit from continuing the relationship." (§ 366.26,

⁶ Marisol asserts that we should apply the factors in *In re Kimberly F.* (1997) 56 Cal.App.4th 519 to our best interests analysis. In *In re Kimberly F.*, the reviewing court stated that the juvenile court should consider the following factors in ruling on a section 388 petition: the seriousness of the problem that led to the dependency, the reason that the problem continued, the ease with which a change of circumstance could be achieved, the nature of any change, the reason a change did not occur sooner, the strength of the parent-child and child-caretaker bonds and the length of time the child has been in the system. (*Id.* at pp. 530-532.) A consideration of these factors would not assist Marisol. The domestic violence was a serious problem that had continued for years. By the time of the section 388 hearing, the children had been in the dependency system for three years. Marisol had received services for more than three and one-half years, including voluntary services, reunification and family maintenance services in this case and reunification services in Liliana's case. Although she had progressed, she was seen with Christopher a short time before the section 388 hearing, in violation of a restraining order. While the children had a bond with Marisol, they had responded positively during their transition into the new placement with Ricardo and Holly.

⁷ The parents do not contest the finding that the children were adoptable.

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 home with new, adoptive parents." (*In re Autumn H.* (1994) 27 Cal.App.4th 567, 575.)

Whether this type of relationship exists is determined by taking into consideration "[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.)

The court found that Marisol had visited consistently, that Marisol and the children shared positive attachments, and that continued visits would be good for the children. The court also found that the children "desperately need[ed] stability" and a permanent home, and that this need outweighed the children's attachment to Marisol and any benefit that the children would derive from continued contact with her. Examining the evidence in the light most favorable to the judgment (*In re Autumn H., supra*, 27 Cal.App.4th at p. 577), we conclude that there is substantial evidence supporting these findings.

As noted at the time of the hearing, M.B. was six and one-half years old, K.E. was four and one-half years old and Israel was nearly three and one-half years old. M.B. had been out of Marisol's care for a total of two years, and K.E. and Israel had been out of her care for more than two years. Marisol's visits had been supervised for the past 11 months. The children loved Marisol and were attached to her, but needed permanency and stability.

There is substantial evidence to support the conclusion that the children did not have "a substantial, positive emotional attachment" to Marisol of the kind that would outweigh the well-being that the children would gain in a permanent, adoptive home. (*In re Autumn*

H., *supra*, 27 Cal.App.4th at p. 575.) There is thus substantial evidence to support the court's finding that the beneficial relationship exception did not apply.⁸

DISPOSITION

The judgment is affirmed.

AARON, J.

WE CONCUR:

BENKE, Acting P. J.

NARES, J.

⁸ Marisol cites *In re S.B.* (2008) 164 Cal.App.4th 289, in which this court concluded that the juvenile court erred in declining to apply the beneficial relationship exception. (*Id.* at p. 301.) That case is distinguishable. There, the appellant father "complied with 'every aspect' of his case plan" and placed his child's needs above his own (*id.* at p. 298).