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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

In re IAN F., A Person Coming Under the Juvenile Court Law.	
SAN DIEGO COUNTY HEALTH AND HUMAN SERVICES AGENCY, Plaintiff and Respondent, v. ALINA F. et al., Defendants and Appellants.	D061102 (Super. Ct. No. J517568)

APPEAL from a judgment of the Superior Court of San Diego County, Carol Isackson, Judge. Judgment affirmed.

Alina F. and Isidro S. (the parents) appeal a judgment terminating parental rights to their minor son, Ian F., under Welfare and Institutions Code section 366.26. (Undesignated statutory references are to this code.) The parents assert the juvenile court erred when it denied Alina's section 388 petition and found that the beneficial parent-

child relationship exception of section 366.26, subdivision (c)(1)(B)(i) did not apply. We affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

Alina gave birth to Ian in July 2009. At that time, she and Isidro were estranged. Shortly after Ian's birth, psychiatrist Dr. Jonathan Koelle concluded that Alina could not safely care for Ian. In August 2009, the San Diego County Health and Human Services Agency (Agency) filed a section 300, subdivision (b) petition on behalf of Ian alleging that Alina's mental health illness incapacitated her and prevented her from caring for Ian without supervision. The Agency removed Ian from Alina's care and detained him in a foster home. Later that month, the court assumed jurisdiction, declared Ian a dependent of the court, removed him from parental care, ordered reunification services for Alina and set review hearings in due course.

In the six-month review report the social worker reported that Alina was motivated to regain custody of Ian but had " '[s]erious psychiatric problems and has been under treatment for several years.' " At the six-month review hearing in February 2010, the juvenile court granted Alina additional services and set the 12-month review hearing for August 2010. A psychologist later diagnosed Alina with generalized anxiety disorder and borderline personality disorder with paranoid features. In April 2010, the Agency located Isidro and provided him with visitation and services, but he was arrested the following month and his involvement with Ian ended.

At the 12-month review hearing in August 2010, the juvenile court found that Alina had made substantive progress with the provisions of the case plan and there was a

substantial probability that Ian would be returned to her care by the 18-month date. At the initially scheduled 18-month review hearing in January 2011, the matter was set for trial. Ian spent his first overnight visit with Alina in early April 2011. Shortly thereafter, the Agency requested that the contested 18-month review hearing be continued for two months to ascertain whether Alina could progress from overnight visits to a 60-day trial period and possible placement of Ian with her.

In an addendum report, the social worker indicated that as the duration of Ian's visits with Alina increased, Alina's anxiety increased. On May 11, 2011, the social worker received a telephone call from an infant educator who was visiting Alina's home because Alina was behaving erratically. The infant educator was scared of Alina and concerned for Ian's safety. After Alina called the social worker to complain, the social worker decided to visit Alina's home. During the home visit, Alina expressed the view that the social worker was violating her rights. Alina mentioned that she had "two consecutive overnights and now three and did not understand who was making these decisions." When the social worker told Alina that there were services to help her, Alina stated that she did not want to ask for help because she did not want to " 'abuse the system.' " Because Alina remained agitated, the social worker called 911 for assistance. When the police officers arrived and told Alina that the social worker would be taking Ian, Alina grabbed Ian and ran toward her room. The police struggled with Alina, but eventually retrieved Ian.

At the contested 18-month review hearing in June 2011, the juvenile court found that the Agency had provided Alina with "extraordinary efforts" and that Alina had made

"great progress," but concluded it could not return Ian to Alina's care because of her fragile mental health. The juvenile court found Alina had not made substantive progress on her reunification plan, terminated services to her and set the matter for a section 366.26 hearing.

The Agency prepared a series of reports for the contested section 366.26 hearing. The reports recommended terminating Alina's parental rights and selecting adoption as Ian's permanent plan. At the contested section 366.26 hearing in December 2011, the juvenile court summarily denied Alina's section 388 petition. Although Alina believed that guardianship or long term foster care rather than adoption would be a more appropriate permanent plan for Ian, the juvenile court found by clear and convincing evidence that Ian was adoptable and that Alina had not met her burden of showing that any exceptions to adoption existed. Following these findings, the juvenile court terminated parental rights to Ian.

DISCUSSION

I. *Section 388 Petition*

In her section 388 petition Alina requested the juvenile court vacate the section 366.26 hearing it ordered in June 2011 and return Ian to her care or alternatively, to put services in place in order to transition Ian to her care. Alina argued that she visited with Ian since birth, she had made progress in therapy and had been compliant with psychiatric medications. After reviewing the evidence, the juvenile court concluded that Alina did not demonstrate a prima facie showing of changed circumstances. Alina

contends the juvenile court erred in summarily denying her petition to reinstate services. Isidro joins in Alina's argument.

To obtain an evidentiary hearing on a section 388 petition, the petitioner must plead facts sufficient for a prima facie showing that (1) the circumstances have changed since the prior juvenile court order, and (2) the proposed modification will be in the best interests of the child. (*In re Daijah T.* (2000) 83 Cal.App.4th 666, 672-673.) If the petition does not make a prima facie showing, the juvenile court may deny it summarily without an evidentiary hearing. (See *In re Zachary G.* (1999) 77 Cal.App.4th 799, 808.) We review a summary denial of a hearing on a section 388 petition for abuse of discretion. (*In re A.S.* (2009) 180 Cal.App.4th 351, 358.)

Alina began seeing a therapist in high school and was first medicated in 1992, at the age of 22. Alina reported a history of depression and anxiety since her freshman year in college and she has been in and out of therapy over the past 20 years. Alina's parents similarly reported that she had a history of depression, an inability to focus, easy distractibility, paranoid ideation, obsessive ruminations, and compulsive behaviors.

Alina lived alone in an apartment and received a monthly stipend from her father who lived in Mexico. After Ian's birth in June 2009, Alina's mother expressed concern whether Alina would be able to safely take care of an infant. Dr. Koelle ultimately concluded that Alina could not safely care for Ian alone and unsupervised. Unfortunately, because of Alina's history of mental health instability and verbal aggression with her family members, there were no family members willing or able to care for her or Ian.

In March 2010, psychologist Dr. Louise Green stated that Alina seemed "motivated and willing to try her best to benefit from the reunification process," but concluded that Alina's prognosis was merely "fair." Thereafter, Alina displayed improvement. In June 2010 the social worker stated that Alina was consistent with her appointments, that she had made good progress and appeared more confident of herself and her ability to parent Ian. In July 2010, Alina's therapist, Dr. Mara Lynn Katzman, found that Alina was ready for unsupervised visitation, but recommended that supervision be close by and available by telephone in case Alina needed assistance. Accordingly, the Agency planned to transition Alina to short supervised visits, then longer visits and eventually weekend overnights and a 60-day trial visit. In April 2011, the social worker recommended a two-month continuance to ensure that Alina would be comfortable with overnight visits because the Agency was concerned about putting pressure on Alina and causing her to feel overwhelmed.

Unfortunately, the social worker noted the following month that Alina's anxiety increased as her overnights with Ian increased. Ultimately, Ian never spent more than two nights at a time with Alina. On several occasions, Alina left voice mail messages for the social worker who could hear Ian crying in the background. The social worker told Alina that she needed to become more independent and not rely on the social worker's help for everything. Alina did not seem to understand that she should not yell and get upset while Ian was present despite reminders from social workers that she should not display these behaviors in front of Ian. Alina returned to supervised visitation after the May 2011 incident where the social worker needed to call the police. Thereafter, the

juvenile court terminated services to Alina and set a section 366.26 hearing at the contested 18-month review hearing in June 2011.

Alina argued in her section 388 petition that she visited with Ian since birth, she had made progress in therapy and had been compliant with psychiatric medications. All of these assertions are true and not disputed by the Agency. This evidence, however, does not establish a change in circumstances as these assertions were true at the time of the contested 18-month review hearing. At that time, the juvenile court noted "from the beginning of this case" that Alina's mental illness made it "very difficult for her to provide regular care, appropriate care, to Ian." Alina's mental illness and her inability to safely care for Ian precipitated the filing of the petition and remained the Agency's concern even though Alina had completed most of her services.

At the time of the October 2011 section 366.26 report, the Agency noted that despite completing parenting classes and receiving over one year of intensive in-home support services, Alina still exhibited an inability to redirect Ian, failed to feed him adequate meals and her home remained cluttered and not baby proofed. The social worker commented that "[a]lthough [Alina] received an array of services over a long period of time it appears that she is not able to think logistically and on her own and does not know what to do in certain situations when it comes to parenting Ian."

Subsequent reports continued to detail instances where Alina displayed poor parenting judgment, became agitated or lost her temper. During one visit Ian took a bite out of a crayon, but Alina failed to remove it from his mouth even after the social worker suggested that she do so. During another visit Alina got upset telling the social worker

about an issue she had with a neighbor and starting yelling in front of Ian. On the day of a court proceeding, Alina yelled at her attorney outside the courtroom and yelled at her mother inside the courtroom while ignoring the requests of the bailiff to be quiet. She also confronted the social worker and later left the social worker rambling voicemail messages that displayed her continued agitation. At a visit a few days later, Alina yelled at the social worker in front of Ian and continued to do so even after the social worker directed her to focus on Ian. At the conclusion of another visit, Alina got agitated talking to the social worker about the case. When the social worker told Alina to set up a meeting so that they could discuss the case when Ian was not present, Alina indicated she was done talking, but then "began to escalate" as the social worker tried to leave with Ian.

Finally, even Alina's therapist concluded in a letter that Alina presented in support of the section 388 petition that "at times," Alina was not successful at employing techniques taught to manage Alina's thoughts. The record is clear that Alina loves Ian and has taken many positive steps in addressing her mental health challenges; however, in "determining whether [a section 388] petition makes the necessary showing, the court may consider the entire factual and procedural history of the case." (*In re Justice P.* (2004) 123 Cal.App.4th 181, 189.) Despite Alina's admirable improvement in dealing with the mental health issues that prompted Agency intervention, the social worker continued to believe Alina could not safely parent Ian as she tended to act out on her feelings in front of Ian. The totality of the evidence reveals that Alina failed to make a prima facie showing of changed circumstances. Accordingly, the juvenile court did not abuse its discretion when it summarily denied Alina's section 388 petition without an

evidentiary hearing. Based on this conclusion, we need not consider the best interests prong of the analysis.

II. *Beneficial Relationship Exception*

Alina concedes that Ian is adoptable, but asserts her parental rights should not have been terminated given the beneficial nature of her ongoing relationship with him. Isidro again joins in Alina's argument. We are not persuaded.

Parental rights may be terminated if there is clear and convincing evidence of adoptability (§ 366.26, subd. (c)(1)); however, an exception exists where a parent has "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 home with adoptive parents. (*In re Autumn H.* (1994) 27 Cal.App.4th 567, 575.) We review the juvenile court's ruling under the substantial evidence test (*id*. at p. 576), viewing the evidence in the light most favorable to the prevailing party (*In re J.I.* (2003) 108 Cal.App.4th 903, 911). We do not attempt to resolve conflicts in the evidence or evaluate the weight of the evidence; rather, we must draw all reasonable inferences in support of the court's findings and affirm the order even if there is substantial evidence supporting a contrary finding. (*In re Baby Boy L.* (1994) 24 Cal.App.4th 596, 610.)

The juvenile court found that Alina maintained regular and consistent contact with Ian, but that there was no "parent-child bond." It noted that Alina and Ian had a "nice relationship" that was "mutually affectionate," but that Alina had ongoing issues dealing

with anxiety and her behavior was unpredictable and sometimes changed without warning. The juvenile court sagely noted that parenting required flexibility, consistency, the ability to withstand scrutiny and criticism, and the ability to deal with stress, frustration and adversity. It found that while Ian enjoyed his time with Alina, he separated from her easily and there was no evidence he would suffer great harm if parental rights were terminated. We conclude that on the facts of this case, the court's findings are fully supported.

Social worker Cynthia Vasquez, observed over 20 visits between Alina and Ian and concluded that while the pair was attached, they did not have a significant parent-child relationship. She considered Alina's relationship with Ian as more like that of a daycare provider and stated that if parental rights were terminated Ian would experience sadness and even some behavioral problems; however, she did not believe that Ian would "be greatly affected" or that it would be so detrimental for him that it would not be in his best interest to terminate parental rights.

Notably, Ian initially referred to the care takers in his life, including Alina, his foster mother, his day care provider, and the social worker as "Mommy." However, by October 2011, Ian began referring to Alina by her first name and the following month started referring to his daycare provider and the social worker by their first names while still referring to his foster mother as "Mommy." Ian's foster parents had been caring for him since he was four days old and were committed to adopting him. Ian was also doing well in his prospective adoptive home and was very loved there. A dependent child "should not be deprived of an adoptive parent when the natural parent has maintained a

relationship that may be beneficial to some degree, but that does not meet the child's need for a parent. [Citation.]" (*In re Angel B.* (2002) 97 Cal.App.4th 454, 466.) Examining the evidence in the light most favorable to the judgment, we conclude that substantial evidence supports the juvenile court's findings that although Alina maintained regular visitation and contact, the benefits to Ian of maintaining that relationship were outweighed by the benefits of his adoption.

DISPOSITION

The judgment is affirmed.

McINTYRE, J.

WE CONCUR:

McCONNELL, P. J.

AARON, J.