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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

In re A.R. et al., Persons Coming Under the  
Juvenile Court Law.

SAN DIEGO COUNTY HEALTH AND  
HUMAN SERVICES AGENCY,

Plaintiff and Respondent,

v.

ROSA R.,

Defendant and Appellant.

D061639

(Super. Ct. No. EJ3261A-B)

APPEAL from a judgment of the Superior Court of San Diego County, Gary M.

Bubis, Judge. Affirmed.

Rosa R. appeals the judgment terminating her parental rights to her daughter, A.R., and her son, N.R. (together, the children). Rosa contends the juvenile court abused its discretion by summarily denying her modification petition (Welf. & Inst. Code,

§ 388)<sup>1</sup> and erred by declining to apply the beneficial relationship exception (§ 366.26, subd. (c)(1)(B)(i)) to termination of parental rights. We affirm.

## BACKGROUND

Rosa has a history of abusing alcohol and illicit drugs. She has been arrested numerous times on various charges, including being a fugitive from justice, being under the influence of a controlled substance, violating a restraining order, vandalism and assault with a firearm. She has a history of mental illness. At one time, her mental health was stabilized with psychotropic medications, but she developed a pattern of hospitalization, release and noncompliance with recommended treatment. According to the maternal grandmother, Rosa had threatened to kill maternal aunt G.R. In 2008, Rosa lost custody of her oldest child, was denied visitation and ignored the family court's orders to obtain counseling, abstain from drug use and comply with recommended psychiatric medication regimens.

In June 2010, the San Diego County Health and Human Services Agency filed dependency petitions for three-and-one-half-year-old A.R. and four-month-old N.R. The petitions alleged Rosa had a past diagnosis of bipolar disorder and a history of suicide attempts and psychiatric hospitalizations. She behaved erratically and aggressively. On June 17, she threatened to kill herself and N.R. On June 19, while holding N.R., she attacked G.R.; kicked a fan; and threw N.R. on the bed, where he collided with G.R.'s

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<sup>1</sup> All further statutory references are to the Welfare and Institutions Code.

three-month-old baby. Rosa was incarcerated and the whereabouts of the children's fathers were unknown.

The children were detained in a foster home, and then in the home of nonrelative extended family members. In July 2010, the court amended the petitions by replacing the allegation Rosa was incarcerated with an allegation her whereabouts were unknown. The court entered true findings on the petitions as amended. In August, the court ordered the children removed from Rosa's custody and placed in the home of nonrelative extended family members. The court ordered reunification services for Rosa, including individual therapy, a psychotropic medication evaluation and inpatient substance abuse treatment. In September 2011, at the 12-month review hearing, the court terminated Rosa's services and set a section 366.26 hearing for January 2012. In March, just days before the continued section 366.26 hearing, the court received Rosa's section 388 modification petition. The court summarily denied the petition and 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 change would promote the child's best interests. (*In re Zachary G.* (1999) 77 Cal.App.4th 799, 806.) To obtain a hearing on a section 388 petition, the parent must make a prima facie showing as to both of these elements. (*Ibid.*; *In re Justice P.* (2004) 123 Cal.App.4th 181, 188.) The petition should be liberally construed in favor of granting a hearing, but "[t]he prima facie requirement is not met unless the facts alleged,

if supported by evidence given credit at the hearing, would sustain a favorable decision on the petition." (*In re Zachary G.*, at p. 806.) "In determining whether the petition makes the necessary showing, the court may consider the entire factual and procedural history of the case." (*In re Justice P.*, at p. 189.) We review the summary denial of a section 388 petition for abuse of discretion. (*In re Zachary G.*, at p. 808; *In re Jeremy W.* (1992) 3 Cal.App.4th 1407, 1413; *In re Aljamie D.* (2000) 84 Cal.App.4th 424, 431, 433.)

Rosa's section 388 petition asked the court to vacate the September 2011 orders terminating her services and setting the section 366.26 hearing. The petition sought the children's placement with her with family maintenance services.

As changed circumstances, the petition alleged that after passing a drug test, Rosa had been accepted at a sober living facility, where she had resided since September 2011. There, she benefited from a career center and required participation in a 12-step program. She was attending Alcoholics Anonymous and Narcotics Anonymous meetings. Her random substance abuse tests were negative. She was employed and it was likely she would be able to provide the children a safe, permanent home. From September 2011 until January 2012, when she lost her bus pass, she participated in the ParentCare Family Recovery Center (ParentCare) substance abuse treatment program;<sup>2</sup> attended classes in domestic violence, anger management and parenting education; and attended treatment

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<sup>2</sup> ParentCare is apparently an outpatient program.

groups five days a week. She was just a few classes away from completing the 52-week domestic violence program,<sup>3</sup> and had learned to control her anger.

The petition alleged the proposed modification was in the children's best interests because it would give them a safe, permanent home and spare them the psychological harm that might result from termination of parental rights. The children and Rosa had a close relationship. This was especially true of A.R., who knew Rosa as her mother, loved her, was excited to see her at visits and initiated physical and verbal affection. During twice-weekly visits, the children sought Rosa's attention and affection, and she fed them, engaged and encouraged them and addressed their needs.

The court concluded Rosa's circumstances were changing, but she had not made a prima facie showing of changed circumstances or best interests. The court noted Rosa's lengthy history of substance abuse and her "many fits and starts" necessitated inpatient treatment. Although Rosa's visitation was consistent, and the children enjoyed visits, she was not ready to have them placed with her. The court did not abuse its discretion in making these findings.

Rosa began using marijuana around 1993, when she was 13 years old, and began drinking alcohol at age 15. She used both substances heavily, and added the drug ecstasy to the mix. She began using cocaine when she was 16 years old and methamphetamine when she was 17 years old. During the pendency of this case, in May and June 2011, Rosa had three positive tests for marijuana and methamphetamine. In July, she refused to

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<sup>3</sup> This was a requirement of Rosa's probation in an unspecified criminal case.

drug test and was discharged from an outpatient drug treatment program. A substance abuse assessment specialist recommended inpatient treatment, but Rosa refused. On January 23, 2012, a ParentCare counselor reported Rosa was in the first of four phases and her attendance was "fair." On February 1, the counselor reported Rosa had not attended classes for the past couple of weeks and risked termination if she did not resume attending. On February 9, Rosa admitted she had not been attending. When asked why, "she was very vague and said that she had been working a lot." In the context of her approximately 19-year substance abuse history and her noncompliance with treatment, Rosa's sobriety of several months<sup>4</sup> and her latest mediocre performance in outpatient treatment are changing circumstances only in the most charitable interpretation of that phrase.

Similarly, the record demonstrates Rosa's mental instability and propensity for violence had not changed. She had been admitted to emergency rooms and psychiatric hospitals many times, primarily for aggressive, assaultive and confused behavior, and she intermittently exhibited psychotic behavior. Although mood stabilizing prescription medications alleviated her symptoms, she refused to continue taking the medications. Despite the true findings, she denied a history of suicide attempts and any history of being unsafe with N.R. At the time of the hearing, restraining orders protected three persons from Rosa.

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<sup>4</sup> Rosa contends she had been sober for five months.

Additionally, the record belies Rosa's claim that placement with her would be in the children's best interests. First, the section 388 petition does not allege her sober living facility would allow the children to live there. Second, although there were some positive aspects of visitation, there were also glaringly negative ones. For example, during a December 2011 visit, Rosa told A.R. "I don't love you when you act like that" and threatened to end the visit. Often Rosa appeared "disengaged and distracted," staring at the floor or into the distance without noticing her surroundings or responding to the children. This forced the social worker to intervene to ensure N.R. did not run away or do something else unsafe.

Because this case was past the reunification phase, the focus was on the children's need for permanency and stability, and there was a rebuttable presumption that it was in their best interests to remain with their caregivers, who wished to adopt them. (*In re Stephanie M.* (1994) 7 Cal.4th 295, 317.) The court did not abuse its discretion by summarily denying the section 388 petition.

#### THE BENEFICIAL RELATIONSHIP EXCEPTION

If a dependent child is adoptable,<sup>5</sup> the 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.

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<sup>5</sup> Rosa does not contest the adoptability finding.

(c)(1)(B)(i.) A beneficial relationship "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.) 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 court's finding there was "a warm and affectionate loving" relationship between Rosa and the children, but not "a significant positive . . . attachment . . . [such that] the [children] . . . would be greatly harmed if parental rights [were] terminated."<sup>6</sup>

By the time of the hearing, five-year-old A.R. and two-year-old N.R. had been out of Rosa's care for more than one year eight months. Even before the commencement of this case, the children's care was sometimes relegated to relatives due to Rosa's chronic substance abuse and mental instability. During supervised visits, Rosa was affectionate

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<sup>6</sup> The court did not expressly address the regularity of visitation and contact. Between June and October 2010, Rosa was in and out of jail and had no contact with the children. When Rosa relapsed in May 2011, there was another hiatus in visitation, lasting more than a month. Visits were apparently regular after that, but a week before the section 366.26 hearing, the visitation center reported Rosa was at risk of losing the center's services due to missed visits. The missed visits disappointed A.R.

with the children and sometimes interacted positively with them. A.R. was always excited to see Rosa, and N.R. appeared happy, although he did not initiate affection with Rosa. Rosa brought the children food and age-appropriate toys, and performed parental tasks. As noted above, Rosa was often dangerously inattentive. Although this became less frequent in late January 2012, it was "still an issue at nearly every visit." At one visit, Rosa sat and watched as N.R. threw things during a tantrum. The children never cried or showed distress upon leaving visits. They had lived with their caregivers for nearly the entire case and had formed strong bonds with them. The caregivers met their needs, including N.R.'s special behavioral needs.

Substantial evidence supports the conclusion the children's relationship with Rosa did not promote the children's "well-being . . . to such a degree as to outweigh the well-being [they] would gain" by being adopted. (*In re Autumn H.*, *supra*, 27 Cal.App.4th at p. 575.) The court did not err by declining to apply the exception.

#### DISPOSITION

The judgment is affirmed.

McCONNELL, P. J.

WE CONCUR:

NARES, J.

HALLER, J.