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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

In re CHRISTOPHER W. et al., Persons
Coming Under the Juvenile Court Law.

SAN DIEGO COUNTY HEALTH AND
HUMAN SERVICES AGENCY,

Plaintiff and Respondent,

v.

BENNIE W. et al.,

Defendants and Appellants.

D061692

(Super. Ct. No. EJ2467B-C)

APPEALS from orders of the Superior Court of San Diego County, Gary M. Bubis,
Judge. Affirmed.

Bennie W. and Stacy W. (together, the parents) appeal juvenile court orders terminating their parental rights to their minor children, Christopher W. and Ryan W. (together, the minors) under Welfare and Institutions Code section 366.26.¹ The parents contend the court erred by summarily denying Bennie's section 388 modification petition, by which he sought to have the

¹ Statutory references are to the Welfare and Institutions Code.

minors returned to his custody. They also challenge the sufficiency of the evidence to support the court's finding the beneficial parent-child relationship exception to adoption did not apply to preclude terminating their parental rights. We affirm the orders.

FACTUAL AND PROCEDURAL BACKGROUND

In May 2010, seven-year-old Christopher and three-year-old Ryan became dependents of the juvenile court under section 300, subdivision (b) and were removed from parental custody based on findings they were at substantial risk of harm because Stacy had a mental illness for which she had been hospitalized after threatening to kill herself and the minors; the parents had a history of domestic violence; the parents had not previously cooperated with voluntary services; Stacy was not taking her prescription medications or participating in treatment for her mental illness; Stacy and the minors had poor hygiene; and Stacy was neglecting the minors and not providing them with proper nutrition.² Bennie had not followed through on voluntary services and had placed the minors at risk by allowing Stacy to care for them. The court placed the minors in foster care and ordered the parents to participate in reunification services.

During the next six months, Bennie participated in a bipolar/depression support group, individual therapy and a parenting class as required by his case plan. He was working 60 to 80 hours a week, had his own apartment and had established some boundaries with Stacy. Bennie was having unsupervised visits with the minors. However, his visits became supervised when he violated the visitation terms by allowing Stacy to be present.

² The parents' 14-year-old daughter, Nicole W., also became a dependent and was removed from parental custody. Nicole is not a subject of this appeal.

At the time of the six-month review hearing, the parents were homeless and living in Stacy's car. They intended to remain in a relationship. The court continued the parents' reunification services for six more months, and ordered Bennie to have unsupervised visits with the minors conditioned on not allowing Stacy to be present.

In a report prepared for the 12-month hearing, the social worker for the San Diego County Health and Human Services Agency (Agency) recommended the court continue services for the parents for another six months. Bennie was still working between 60 and 80 hours a week, and the parents now had housing. Stacy was receiving treatment for her mental illness and was taking her prescription medications. She was permitted to attend Bennie's unsupervised visits with the minors once a week. The court continued the parents' services to the 18-month date.

As a result of Stacy's disruptive behavior toward Christopher's foster parents, Agency was required to change Christopher's placement, causing him to become angry with his parents and feel abandoned by his foster parents. He refused to speak to or visit his parents for a period of time. After being in the new foster home for four months, Christopher was again moved to another foster home. Christopher told the social worker that being with his parents did not "feel like home," and sometimes he did not feel safe with them. Christopher told his therapist he felt safe with his previous and current caregivers.

Ryan was in a separate foster home, where he seemed happy. Before visits with his parents, Ryan frequently cried, was anxious and said he did not want to visit. During visits with his parents, Ryan displayed oppositional behaviors. He was never excited to see his

parents or distressed when he returned to his foster home. In the social worker's opinion, Ryan was more bonded with his caregivers than with his parents.

The parents continued to live together in their rented apartment, and Bennie still worked long hours. Stacy was not going to therapy, regularly attending medication management appointments or complying with other aspects of her case plan. Although Bennie had attended therapy for a year and a half, his therapist reported Bennie's decision to reunite with Stacy "has not allowed the case to move forward." Bennie knew that if the minors were returned to his custody, they would primarily be in Stacy's care, yet he expressed no concerns about the minors' welfare under those circumstances.

Bennie continued to have unsupervised visits with the minors and was allowed to supervise Stacy's visits. The parents visited the minors one hour on Wednesdays and three to five hours on Thursdays. The minors began to show some affection toward Stacy, but gravitated toward Bennie when they were not busy playing. Although the parents knew the minors were prediabetic, they made only marginal efforts to provide healthy food at visits.³

In the social worker's opinion, the parents would not be able to provide the minors with a minimum level of care if they were returned home. Stacy lacked the skills to parent the minors without risk of neglect, and it was not possible for Bennie to ensure the minors' safety in the home because he worked long hours and could not assume the role of a single parent. The parents had a history of financial instability, and had no financial plan to maintain their current residence. The social worker was also concerned about the parents' marital conflict and their continuing social isolation.

³ The parents mostly brought potato chips, sodas and other nonnutritional foods to visits.

At the 18-month hearing, the court found there was a substantial risk of detriment to the minors if they were returned to parental custody. The court terminated the parents' services and set a section 366.26 hearing to select and implement a permanent plan for the minors.

The social worker assessed the minors as generally and specifically adoptable. The minors had been placed together in a prospective adoptive home. Their caregivers had an approved home study and were interested in adopting both boys. The minors said they liked this home and were happy living with each other. Christopher said he wanted to be adopted by the caregivers. There were other approved families willing to adopt a sibling set with the minors' characteristics. The minors never said they missed their parents or wanted to reunify with them.

The parents were always together and lived in their car. Bennie continued to allow Stacy to have contact with the minors. The parents had a "violent verbal confrontation" in Ryan's presence before a visit. Bennie told the social worker he would "snap" and do "something" if the minors were adopted. Bennie repeatedly demanded Ryan's birth certificate, passport and Social Security card from the foster mother and the social worker, and said he wanted to pick up Ryan from school. This caused the social worker to be concerned that Bennie might try to flee with the minors. Bennie also left angry telephone messages for the social worker, and his outbursts concerned her in light of his history of domestic violence. Consequently, the court ordered Bennie's visits with the minors to be supervised.

Once the minors moved to their prospective adoptive home, they seemed more relaxed during visits with Bennie and enjoyed playing board games with him. However, they were beginning to emotionally detach from him. They did not appear sad at the end of visits and did

not ask to spend more time with him. When the parents telephoned the caregivers' home, the minors either refused to speak to them or spoke to them very briefly. Recently, the minors were refusing to visit the parents and became angry and upset when forced to do so.

The social worker noted the parents had exposed Christopher to a chaotic home environment and domestic violence, and they had not met his needs. Christopher expressed his anger and resentment toward his parents for not providing him with a safe home, and blamed them for his placement in foster care and for sabotaging the foster homes he liked. The minors had been in multiple placements since their removal from parental custody.

The social worker firmly believed the minors did not have an emotional connection with their parents that constituted a parent-child relationship. In her opinion, the minors needed a safe, stable and permanent home with parents who could meet their needs, and they should not have to wait for permanency. The parents had exposed the minors to considerable trauma, causing them to be removed from parental custody three times. The minors deserved to have a sense of normalcy, which could only occur through adoption.

On the day of the selection and implementation hearing, Bennie filed a section 388 modification petition seeking return of the minors to his custody with family maintenance services. The petition alleged Bennie's circumstances had changed because he had obtained suitable housing where the minors could live, and he had arranged for childcare with someone other than Stacy. The petition further alleged it was in the minors' best interests to have a permanent home and to reunify with him. The court summarily denied the petition, finding Bennie had not made a prima facie showing as to changed circumstances or best interests.

At the contested selection and implementation hearing, social worker Ofelia Figueroa testified she recommended adoption as the minors' permanent plans. She had observed seven visits between Bennie and the minors from January 26 through March 7, 2012. The minors were affectionate with Bennie and called him "Daddy." Bennie spent the entire visit playing board games with the minors, and they seemed to have a good time. Bennie continued to bring unhealthy snacks to visits. Figueroa could not describe Bennie as a good parent or one who assumed parental responsibilities. He did not ask about the minors' health, attend their medical appointments, attend meetings with their teachers or help them with homework. Ryan sometimes asked to go home before the visit ended. The minors did not cry when they left Bennie after visits.

Figueroa further testified the parents remained in a relationship fraught with conflict. She witnessed an argument between the parents in front of Ryan and heard them arguing when they telephoned her. Figueroa believed this behavior was still a safety concern for the minors.

In Figueroa's opinion, terminating parental rights would not result in emotional damage or detriment to the minors. Although the minors enjoyed visits with Bennie more than with Stacy, their relationship with Bennie did not rise to the level of a parent-child relationship.

Bennie testified that during visits, he asked the minors about their activities and well-being. He offered to help Christopher with his homework, but Christopher chose to play instead. He interacted with the minors and tended to their needs. Bennie denied that the minors refused to come to a visit or asked to end a visit early. He downplayed the seriousness of a recent verbal confrontation he had with Stacy, but admitted Ryan may have heard it.

Bennie explained that when he said he would "snap" if parental rights were terminated, he meant he would get emotional because it would hurt.

After considering the evidence and arguments of counsel, the court found the minors were adoptable and none of the exceptions to adoption applied. The court terminated parental rights and referred the minors for adoptive placement.

DISCUSSION

I

Bennie contends the court erred by summarily denying his section 388 modification petition. He asserts he made a prima facie showing his circumstances had changed and the proposed modification—returning the minors to his custody—was in the minors' best interests. Stacy joins in this argument.

A

A party may petition the court under section 388 to change, modify or set aside a previous court order. The petitioning party has the burden of showing, by a preponderance of the evidence, that (1) there is a change of circumstances or new evidence, and (2) the proposed change is in the child's best interests. (§ 388; *In re Jasmon O.* (1994) 8 Cal.4th 398, 415; *In re Casey D.* (1999) 70 Cal.App.4th 38, 47.) The petition must be liberally construed in favor of its sufficiency. (Cal. Rules of Court, rule 5.570(a); *In re Marilyn H.* (1993) 5 Cal.4th 295, 309.) "The parent need only make a prima facie showing to trigger the right to proceed by way of a full hearing." (*Id.* at p. 310.) " '[I]f the petition presents any evidence that a hearing would promote the best interests of the child, the court will order the hearing.' [Citation.]" (*In re Jasmon O.*, at p. 415.) If, however, "the liberally construed allegations of the petition do not

make a prima facie showing of changed circumstances and that the proposed change would promote the best interests of the child, the court need not order a hearing on the petition. [Citations.] The 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.* (1999) 77 Cal.App.4th 799, 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.* (2004) 123 Cal.App.4th 181, 188-189.)

B

Bennie's modification petition sought to have the court return the minors to his custody with family maintenance services. The petition alleged Bennie's circumstances had changed because he had obtained suitable housing in which the minors could live, and he had arranged for the minors' childcare. In support of his request, Bennie attached a document dated February 28, 2012, entitled "Deposit and Rent Status," showing he had paid an \$80 rental application fee for an apartment. The lease term was from March 24 through September 30, 2012, and included four occupants. He also attached a document signed by Mike P. and Bennie, which stated Mike had "tentatively" agreed, contingent on Bennie regaining custody of the minors, to allow his 16-year-old daughter to care for the minors while Bennie worked, and "[m]onetary arrangements will be paid for accordingly."

Bennie's petition and supporting documentation show, at most, his circumstances were "changing," but had not changed. (*In re Casey D.*, *supra*, 70 Cal.App.4th at p. 47.) Bennie had not yet secured an apartment, paid a "rental application holding/security deposit," or been approved as a tenant. Paying an application fee was merely the first step in obtaining suitable

housing for the minors. Although Bennie was making efforts to change his circumstances, his housing was not yet in place.⁴ Moreover, the petition did not allege Bennie would be living separately from Stacy, which was a hindrance to having the minors returned to his custody. A petition like Bennie's that alleges changing circumstances does not promote stability for a child or the child's best interests because it would mean delaying the selection of a permanent home to see if a parent, who has failed to reunify with the child, might be able to reunify at some future point. (*Ibid.*) "Childhood does not wait for the parent to become adequate." (*In re Marilyn H.*, *supra*, 5 Cal.4th at p. 310.)

We agree Bennie made a prima facie showing of changed circumstances with respect to the minors' childcare, even though the agreement was somewhat vague and contingent on Bennie having custody of the minors. However, this single alleged change did not warrant an evidentiary hearing in light of Bennie's failure to sufficiently prove he had suitable housing for the minors, he intended to live apart from Stacy and other circumstances had changed, such as his ongoing volatile relationship with Stacy, which placed the minors at risk.

C

In any event, Bennie's petition did not make a prima facie showing that placing the minors with him was in their best interests. Although the petition alleged returning the minors to Bennie's custody would provide them with a permanent and safe home and preserve the family, the record shows that despite having full-time employment, Bennie had a history of

⁴ The record shows that as of March 2, 2012, Bennie's updated address on file with the court was the apartment for which he had paid a rental application fee. Bennie also listed this apartment as his address in his section 388 petition filed on March 13. However, when the court mailed correspondence to that address on March 15, it was returned three days later as "attempted - not known." Thus, a reasonable inference can be drawn that Bennie was not actually living at the address he used.

unstable housing. On several occasions, he had acquired an apartment but then became homeless and lived in his or Stacy's car. At the time he filed his section 388 petition, he did not have suitable housing for the minors. Moreover, Bennie had participated in 18 months of services but had not resolved his codependency issues with Stacy, or learned to set and follow through with healthy boundaries with her. He continued to live with Stacy despite knowing this would diminish his chances of reunifying with the minors. The parents continued to act aggressively toward each other and engage in verbal abuse in the minors' presence. Bennie was easily manipulated by Stacy and thus, it was unlikely he would be able to protect the minors from her. Because Bennie could not provide the minors with a permanent and safe home, he failed to make a prima facie showing it was in their best interests to be returned to his custody. Although Bennie argues the minors would benefit from being raised by their father, "[t]he presumption favoring natural parents by itself does not satisfy the best interests prong of section 388." (*In re Justice P.*, *supra*, 123 Cal.App.4th at p. 192.)

Bennie's petition also alleged the minors' best interests would be promoted by returning them to his custody because they preferred him to Stacy during visits. The minors did enjoy visits with Bennie, which consisted mostly of playing board games, and as between the parents, the minors showed a preference for Bennie. However, the minors were not sad when visits with Bennie ended, did not ask for him between visits and even refused to visit. Once the minors were placed in a prospective adoptive home, they began to emotionally detach from him. At the time of the hearing on the modification petition, there was no evidence the minors had a strong emotional connection to Bennie. (*In re Angel B.* (2002) 97 Cal.App.4th 454, 465

[hearing on section 388 petition properly denied where evidence did not show any parent-child bond from child's perspective, but only from mother's].)

Moreover, the minors had been placed with caregivers who were prepared to adopt them. The minors said they liked this home and were happy living with each other. Christopher said he wanted to be adopted by the caregivers. Where, as here, reunification services have been terminated, a parent's "interest in the care, custody and companionship of the child [is] no longer paramount. Rather, at this point, 'the focus shifts to the needs of the child for permanency and stability' [citation], and in fact, there is a rebuttable presumption that continued foster care is in the best interest of the child." (*In re Stephanie M.* (1994) 7 Cal.4th 295, 317; see also *In re C.J.W.* (2007) 157 Cal.App.4th 1075, 1081 [summary denial of section 388 petition was proper where there was no showing of how the children's best interests would be served by depriving them of a permanent stable home in exchange for an uncertain future].) The proper focus of this case was the minors' need for stability, continuity and permanency, regardless of Bennie's interest in reunification. (*In re Stephanie M.*, at pp. 317-318; *In re Brittany K.* (2005) 127 Cal.App.4th 1497, 1507.) Because the liberally construed allegations of the petition would not have sustained a favorable decision on the section 388 petition, Bennie was not entitled to an evidentiary hearing. (*In re Zachary G.*, *supra*, 77 Cal.App.4th at p. 808; *In re Mary G.* (2007) 151 Cal.App.4th 184, 205-206.)

II

Bennie challenges the sufficiency of the evidence to support the court's finding the beneficial parent-child relationship exception to adoption did not apply to preclude terminating his parental rights. Bennie asserts he regularly visited the minors, who had a significant

attachment to him as a result of his attention to their needs for physical care, nourishment, comfort, affection and stimulation during the time he had custody of them and during unsupervised visits. Stacy joins in this argument.

A

After reunification services are terminated, the focus of a dependency proceeding shifts from preserving the family to promoting the best interests of the child, including the child's interest in a stable, permanent placement that allows the caregiver to make a full emotional commitment to the child. (*In re Fernando M.* (2006) 138 Cal.App.4th 529, 534.) At the selection and implementation hearing, the court has three options: (1) terminate parental rights and order adoption as the permanent plan; (2) appoint a legal guardian for the child; or (3) order the child placed in long-term foster care. (*Ibid.*)

"Adoption, where possible, is the permanent plan preferred by the Legislature." (*In re Autumn H.* (1994) 27 Cal.App.4th 567, 573.) If the court finds a child cannot be returned to his or her parent and is likely to be adopted if parental rights are terminated, it must select adoption as the permanent plan unless it finds a compelling reason for determining that termination of parental rights would be detrimental to the child under one or more of the enumerated statutory exceptions. (§ 366.26, subd. (c)(1)(A) & (B)(i)-(vi); *In re A.A.* (2008) 167 Cal.App.4th 1292, 1320.) "The parent has the burden of establishing the existence of any circumstance that constitutes an exception to termination of parental rights." (*In re T.S.* (2009) 175 Cal.App.4th 1031, 1039.) Because a selection and implementation hearing occurs "after the court has repeatedly found the parent unable to meet the child's needs, it is only in an

extraordinary case that preservation of the parent's rights will prevail over the Legislature's preference for adoptive placement." (*In re Jasmine D.* (2000) 78 Cal.App.4th 1339, 1350.)

Section 366.26, subdivision (c)(1)(B)(i) provides an exception to the adoption preference if terminating parental rights would be detrimental to the child because "[t]he parents have maintained regular visitation and contact with the child and the child would benefit from continuing the relationship." We have interpreted the phrase "benefit from continuing the relationship" to refer to a parent-child relationship 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 other words, the court balances the strength and quality of the natural parent[-]child relationship in a tenuous placement against the security and 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.*, *supra*, 27 Cal.App.4th at pp. 575, 574; accord *In re Jason J.* (2009) 175 Cal.App.4th 922, 936-937.)

To meet the burden of proof for this statutory exception, the parent must show more than frequent and loving contact, an emotional bond with the child or pleasant visits. (*In re Jason J.*, *supra*, 175 Cal.App.4th at pp. 936-937; *In re Derek W.* (1999) 73 Cal.App.4th 823, 827.) The parent must show he or she occupies a parental role in the child's life, resulting in a significant, positive emotional attachment from child to parent. (*In re Derek W.*, at p. 827; *In re Elizabeth M.* (1997) 52 Cal.App.4th 318, 324.)

We review the court's finding regarding the applicability of a statutory exception to adoption for substantial evidence. (*In re Autumn H.*, *supra*, 27 Cal.App.4th at p. 576.) In this regard, we do not consider the credibility of witnesses, attempt to resolve conflicts in the evidence or weigh the evidence. Instead, we draw all reasonable inferences in support of the findings, view the record favorably to the juvenile court's order 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.) On appeal, the parent has the burden of showing there is no evidence of a sufficiently substantial nature to support the court's finding or order. (*In re L.Y.L.* (2002) 101 Cal.App.4th 942, 947.)

B

Here, the record shows Bennie regularly visited the minors. He did not, however, meet his burden of showing he had a beneficial parent-child relationship with the minors so as to overcome the legislative preference for adoption.

Although the minors enjoyed Bennie's company during visits and sometimes showed him affection, they did not have an emotional connection with him that constituted a parent-child relationship. Bennie played with the minors, but did not inquire about their well-being, accompany them to medical appointments, talk to their teachers, help them with homework or encourage healthy eating habits. The minors separated easily from Bennie after visits and there was no evidence his absence from their daily lives affected them adversely. The minors began refusing to visit the parents and became angry and upset when forced to visit. Christopher said he resented his parents' inability to provide him with a safe home, and he blamed them for his multiple placements. Thus, the record supports a finding the minors did

not have a " 'significant, positive, emotional attachment' " to Bennie such that terminating parental rights would result in great harm to them. (*In re Jason J.*, *supra*, 175 Cal.App.4th at p. 936; *In re Autumn H.*, *supra*, 27 Cal.App.4th at p. 575.) "A biological parent who has failed to reunify with an adoptable child may not derail an adoption merely by showing the child would derive *some* benefit from continuing a relationship maintained during periods of visitation with the parent." (*In re Angel B.*, *supra*, 97 Cal.App.4th at p. 466.)

Further, the parents had exposed the minors to considerable trauma, causing them to be removed from parental custody three times and requiring multiple placements. At the time of the selection and implementation hearing, the minors had been out of Bennie's custody for two years. They are thriving in the home of their caregivers who are committed to adopting them. Christopher wants to be adopted by his caregivers. The social worker firmly believed the minors needed a safe, stable and permanent home with parents who could meet their needs, and they should not have to wait for permanency. The court was entitled to accept the social worker's opinion that the benefits of adoption for the minors outweighed the benefits of maintaining a relationship with Bennie. (*In re Justice P.*, *supra*, 123 Cal.App.4th at p. 191 [child's interest in stable and permanent home is paramount once a parent's interest in reunification is no longer at issue].) We cannot reweigh the evidence or substitute our judgment for that of the juvenile court. (*In re Casey D.*, *supra*, 70 Cal.App.4th at p. 53.)⁵ Substantial evidence supports the court's finding the beneficial parent-child relationship exception to adoption did not apply to preclude terminating parental rights.

⁵ Bennie's reliance on *In re S.B.* (2008) 164 Cal.App.4th 289, 298-300, is misplaced. We are compelled to reiterate "*S.B.* is confined to its extraordinary facts." (*In re C.F.* (2011) 193 Cal.App.4th 549, 558.) Unlike the father in *S.B.*, Bennie did not comply with all aspects of his case plan and he was not able to meet the minors' needs.

DISPOSITION

The orders are affirmed.

NARES, Acting P. J.

WE CONCUR:

McDONALD, J.

McINTYRE, J.