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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

In re L.G. et al., Persons Coming Under the
Juvenile Court Law.

SAN DIEGO COUNTY HEALTH AND
HUMAN SERVICES AGENCY,

Plaintiff and Respondent,

v.

ANGELA S.,

Defendant and Appellant.

D061959

(Super. Ct. No. EJ3305A-C)

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

Angela S. appeals orders denying her petition for modification under Welfare and
Institutions Code section 388¹ and terminating parental rights to her children under section
366.26. We affirm the orders.

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

FACTUAL AND PROCEDURAL BACKGROUND

Angela is the mother of L.G., John G., and T.H.² (collectively, the children), who are now ages nine, seven and two years old, respectively. Angela has a 25-year history of binge drinking and alcoholism, chronic neglect of her children and involvement with child protective services.

In 2005, L.G. and John were taken into protective custody when Angela was arrested on charges of cultivating and selling marijuana. The family home was dirty and dangerous, with rats running through the home. L.G. and John had thrush due to malnutrition, and two-month-old John was severely dehydrated and required an IV to stabilize his condition. The children were returned to Angela's care after she cleaned the family home. Six months later, John fell into a pot of water and nearly drowned while Angela was sleeping. Hospital personnel reported that Angela smelled of alcohol. Angela refused the San Diego County Health and Human Service Agency's (Agency) offer for voluntary services.

In January 2009, Angela was convicted on felony charges of child cruelty and cultivation and sales of marijuana. In July, there was a methamphetamine explosion in a shed behind the family home. In August, the children were briefly detained in protective custody after police found methamphetamine and drug paraphernalia in Angela's home while executing a warrant for her arrest. The drugs and drug paraphernalia were within L.G.'s and John's reach. After a man died in a fight at her home in early September, Angela left L.G. and John in the care of their paternal grandfather for the rest of the month. The grandfather reported that

² The children's fathers do not appeal.

Angela was "running from something." Angela was incarcerated from October 2009 to January 2010. She left L.G. and John in the care of a friend during this time.

In September 2010, the Agency investigated a referral alleging Angela was neglecting her children, and L.G. and John were not attending school and were left unsupervised. A sheriff's deputy said his department was regularly called to Angela's home on reports of substance abuse, domestic violence and general fighting and disturbances. At the family home, the social worker observed that L.G. and John were barefoot and there were a number of dangerous items on the floor of the home, including steak knives, broken glass, broken plates and a hand saw. L.G. told the social worker she was hungry because Angela had not fed her that day. John said he and L.G. were afraid of "[Robert H.]" (later identified as T.H.'s father) because "he took a knife and scraped the wall because my mommy moved out of the way." L.G. said "[Robert]" tried to stab Angela and threatened to "cut the baby out of her."

In early October 2010, the Agency detained the children in protective custody and filed, as later amended, a section 300 petition alleging L.G. and John were not adequately supervised, and all three children were at substantial risk of harm because there were adults with criminal drug records present in the family home, and conditions in the home were hazardous to the children.

For various reasons, the jurisdictional and dispositional hearing was continued to April 6, 2011. The juvenile court sustained the petitions, removed the children from parental custody and ordered a plan of family reunification. Angela's case plan required her to participate in general counseling, a parenting education program and an outpatient substance abuse program, including a 12-step program and random drug testing.

Angela did not address any of the protective issues that resulted in the children's removal from her care. In her report for the six-month review hearing, the social worker recommended that the court terminate family reunification services and set a section 366.26 hearing.

In October, the court ordered Angela to participate in drug court. At the six-month review hearing on November 17, the court terminated reunification services and set a section 366.26 hearing.

On April 23, 2012, Angela filed a section 388 petition asking the court to return the children to her care under a plan of family maintenance services. Angela alleged she had remained clean and sober for approximately eight months and it was in the children's best interests to reunify with her. She had maintained regular visitation and could now provide a permanent and safe home to the children.

On April 25, the juvenile court found that the section 388 petition stated a prima facie case of changed circumstances and best interests of the children, and granted a hearing on the merits of the petition, to be trailed by the scheduled section 366.26 hearing. The court admitted in evidence Angela's section 388 petition and attached exhibits, the Agency's reports and a letter from drug court stating that as of April 17, 2012, Angela had 188 days of sobriety.

Angela testified she had been using alcohol since she was in high school, which was more than 25 years ago. She estimated she drank a half-gallon of hard liquor every day for years. She drank until her kidneys failed. This happened on two occasions. Angela's longest period of sobriety was six years. She did not drink when she was pregnant.

Angela testified that she entered an inpatient substance abuse treatment program on October 10, 2011, and completed that program on February 10, 2011. She started an aftercare

program on February 13. Angela had been sober since October and was attending drug court. She had a sponsor and was working on steps 1, 2 and 3 of the 12-step program. Her home was clean.

Angela visited the children once a week. Their visits were always positive. Angela had a good relationship with the children's new foster parents. She was conflicted about adoption. The children were very happy where they were. They had a mom and a dad. The foster parents truly loved the children.

The juvenile court found that Angela was truly in recovery for the first time in her life. However, in view of her lengthy history of alcoholism, she showed only that her circumstances were changing. In addition, it was not in the children's best interests to return to her care. The court found that the children were likely to be adopted and none of the exceptions under section 366.26, subdivision (c)(1) applied and terminated parental rights.

DISCUSSION

A

The Court Did Not Abuse Its Discretion When It Denied Angela's Section 388 Petition

Under section 388, a parent, interested person or the dependent child (generically, petitioner) may petition the court to change, modify or set aside a previous order on the grounds of changed circumstances or new evidence. (§ 388, subd. (a).) The petitioner requesting the modification has the burden to show a change of circumstances or new evidence, and that the proposed modification is in the child's best interests. (*In re Jasmon O.* (1994) 8 Cal.4th 398, 415; Cal. Rules of Court, rule 5.570(e).)

We review the grant or denial of a petition for modification under section 388 for an abuse of discretion. (*In re Shirley K.* (2006) 140 Cal.App.4th 65, 71; *In re Casey D.* (1999) 70

Cal.App.4th 38, 47.) While the abuse of discretion standard gives the trial court substantial latitude, "[t]he scope of discretion always resides in the particular law being applied, i.e., in the 'legal principles governing the subject of [the] action' Action that transgresses the confines of the applicable principles of law is outside the scope of discretion and we call such action an 'abuse' of discretion. [Citation.]" (*City of Sacramento v. Drew* (1989) 207 Cal.App.3d 1287, 1297.)

In evaluating whether the petitioner has met his or her burden to show changed circumstances, the juvenile court should consider a number of factors, including: "(1) the seriousness of the problem which led to the dependency, and the reason for any continuation of that problem; (2) the strength of relative bonds between the dependent children to *both* parent and caretakers; and (3) the degree to which the problem may be easily removed or ameliorated, and the degree to which it actually has been." (*In re Kimberly F.* (1997) 56 Cal.App.4th 519, 532, 531.)

Under section 388, subdivision (a), the focus of a petition for modification is on whether the petitioner has shown a legitimate change of circumstances. The court could reasonably conclude that Angela did not make the required showing. There is substantial evidence to support the finding that Angela's circumstances, while changing, were not yet changed. (*In re Kimberly F., supra*, 56 Cal.App.4th at p. 532.) The record shows that Angela had a 25-year history of alcohol abuse. She had been sober and invested in recovery for only six months. As part of her treatment plan, the Agency recommended that Angela participate in individual therapy. There is nothing in the record to indicate she had addressed the issues underlying substance abuse so severe it endangered her life and health on more than one occasion. Angela was not yet halfway through a 52-week parenting class that was a condition of her probation

for her conviction on charges of child cruelty. She told the social worker she did not have a job or a car and was not yet ready for the children to return home.

The court did not abuse its discretion when it determined that the children's placement with Angela was not in their best interests. Angela's recovery and rehabilitation were not yet complete and the children were happy, safe and stable with their current caregivers, who were willing to adopt the children.

B

There Is Substantial Evidence to Support the Court's Finding That the Beneficial Parent-Child Exception Does Not Apply

Angela asserts the court erred when it determined the beneficial parent-child relationship exception under section 366.26, subdivision (c)(1)(B)(i) did not apply and terminated her parental rights.

At a permanency plan hearing, the court may order one of three alternatives—adoption, guardianship or long-term foster care. (*In re S.B.* (2008) 164 Cal.App.4th 289, 296-297.) If a child is adoptable, there is a strong preference for adoption over the alternative permanency plans. (*Id.* at p. 297; *San Diego County Dept. of Social Services v. Superior Court* (1996) 13 Cal.4th 882, 888.) Once the court determines that a child is likely to be adopted, the burden shifts to the parent to show that termination of parental rights would be detrimental to the child under one of the exceptions listed in section 366.26, subdivision (c)(1). (*In re Lorenzo C.* (1997) 54 Cal.App.4th 1330, 1343-1345.)

Section 366.26, subdivision (c)(1)(B)(i) provides an exception to termination of parental rights when "[t]he parents have maintained regular visitation and contact with the child and the child would benefit from continuing the relationship." In order to overcome the statutory

preference for adoption, the parent must prove that he or she occupies a parental role in the child's life, resulting in a significant, positive emotional attachment of the child to the parent. (*In re Derek W.* (1999) 73 Cal.App.4th 823, 827; *In re Elizabeth M.* (1997) 52 Cal.App.4th 318, 324.)

We recognize that interaction between parent and child will almost always confer some incidental benefit to the child. (*In re Autumn H.* (1994) 27 Cal.App.4th 567, 575 (*Autumn H.*)) However, in the context of section 366.26, subdivision (c)(1)(B)(i), "benefit" means that the parent-child 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." (*Autumn H.*, at p. 575.) "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." (*Ibid.*)

We determine whether there is substantial evidence to support the court's ruling by reviewing the evidence most favorably to the prevailing party, and indulging in all legitimate and reasonable inferences to uphold the court's ruling. (*In re S.B.*, *supra*, 164 Cal.App.4th at pp. 297-298; *In re Misako R.* (1991) 2 Cal.App.4th 538, 545.) We do not reweigh the evidence, evaluate the credibility of witnesses or resolve evidentiary conflicts. (*Autumn H.*, *supra*, 27 Cal.App.4th at p. 576.)

The record shows that Angela maintained regular and consistent visitation with her children, and the children enjoyed the visits. However, the record supports the finding that the children did not have a significant, positive emotional attachment to Angela and would not be

seriously harmed by termination of parental rights. (*In re Derek W.*, *supra*, 73 Cal.App.4th at p. 827.)

As detailed earlier in this opinion, L.G. and John had a tumultuous upbringing. When interviewed by the social worker about how they felt about returning to Angela's care, both children expressed concerns. L.G. told the social worker she worried she would get hurt if she lived with Angela. She fretted about the possibility T.H.'s father would find out where they lived. L.G. said she wanted to stay with her current caregivers and visit Angela every week. She also said she wished she could live with Angela, too, and they would never run out of food. L.G. said she felt safe with her caregivers. John worried about rats and other people in Angela's home. He said he did not feel safe with Angela and was concerned she had not changed. John said he wanted his current caregivers to be his forever parents.

The record also shows that T.H. would not be seriously harmed by termination of parental rights. He was two months old when detained in protective custody. The social worker said T.H. had no memory of living with his mother and had formed a strong attachment to his caregivers in a short period of time.

In statements indicating she had the best interests of her children at heart, Angela said her children were very happy in the home of their current caregivers and it might be in the children's best interests to be adopted by that family. She recognized that her children would benefit from having "a mom and a dad." Although the record shows that Angela loved her children, there is substantial evidence to support the court's finding that termination of parental rights would not be detrimental to the children, and they would greatly benefit from the security of a stable, permanent home with committed, capable adoptive parents. (§ 366.26, subd. (c)(1)(B)(i); *Autumn H.*, *supra*, 27 Cal.App.4th at p. 575.)

DISPOSITION

The orders are affirmed.

O'ROURKE, J.

WE CONCUR:

NARES, Acting P. J.

McINTYRE, J.