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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

In re R.P., a Person Coming Under the
Juvenile Court Law.

SAN DIEGO COUNTY HEALTH AND
HUMAN SERVICES AGENCY,

Plaintiff and Respondent,

v.

N.T. et al.,

Defendants and Appellants.

D062094

(Super. Ct. No. SJ12371)

APPEALS from a judgment of the Superior Court of San Diego County, Ronald F. Frazier, Judge. Affirmed.

This is the dependency case of child R.P., who is now five years old. In May 2012, the juvenile court denied the Welfare and Institutions Code section 388¹ modification petition of his maternal aunt, Gabriella S., and terminated the parental rights

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

of R.P.'s mother and father, N.T. and Robert P. (together, the parents). The parents and Gabriella appeal. N.T., joined by Robert,² contends the court erred by declining to apply the beneficial relationship exception to termination of her parental rights (§ 366.26, subd. (c)(1)(B)(i)). Gabriella contends the court abused its discretion in denying her section 388 petition. We affirm.

BACKGROUND

N.T. has a history of paranoid schizophrenia. She was stable when she took her prescribed medication, but stopped taking the medication in order to become pregnant. When R.P. was born in November 2007, N.T. did not resume taking her medication.

In May 2010, Gabriella went to N.T.'s home and found her in a "zombie like" state. Two-year-old R.P. was hungry and extremely dirty. The home was in disarray. N.T. expressed suicidal and homicidal thoughts. She had not eaten for three days. She said she wanted to see R.P. "die slowly" by starvation.

Gabriella took N.T. to a psychiatric hospital, then took R.P. to her own home in Riverside County. The San Diego County Health and Human Services Agency (Agency) filed a dependency petition for R.P. based on the above events and the parents' history of paranoid schizophrenia.

R.P. was detained with Gabriella. R.P. had never been away from N.T. and cried for her. Gabriella told the Agency she was committed to adopting R.P. or becoming his guardian if the parents did not reunify with him. R.P. exhibited problematic behavior in

² Robert contends if N.T.'s parental rights are reinstated, his must also be reinstated.

Gabriella's care, including self-induced vomiting, biting, sleep disturbances and frequent tantrums. N.T. was openly critical of Gabriella's care of R.P.

It was clear at the beginning of the case that R.P. was bonded with N.T. Although N.T. was sometimes loving and appropriate during their supervised visits, at other times she was unable to set limits, discipline R.P. appropriately and redirect his behavior when needed. N.T. related to R.P. in ways inappropriate to his age. She spoke to him about issues beyond a child's comprehension. She cradled and rocked him, as if he were an infant, despite his resistance. N.T. disregarded advice regarding R.P.'s physical health. She persisted in putting gel in his hair although his pediatrician said the gel caused a rash. N.T. gave R.P. chocolate although she knew he might be allergic to it.

On July 14, 2010, Gabriella took R.P. to the maternal grandparents' home. The next day, Gabriella called social worker Caitlin McCann and said that due to unforeseen financial and family circumstances, she could no longer care for R.P. Gabriella cited R.P.'s behavior, her own conflicts with N.T. and other issues. There was extreme tension between Gabriella and N.T., and Gabriella appeared unable to cope with the tension. She was also unable to "assist and [redirect N.T.] in her increasing concerning interactions with [R.P.]." R.P. was aware of the discord between N.T. and Gabriella, and it affected him adversely. Gabriella had several children, including one with special needs, and her husband was on military deployment.

On July 15, 2010, McCann picked up R.P. from the maternal grandparents' home and transported him to Polinsky Children's Center. On July 23, because no relatives' homes were available for placement, the Agency moved R.P. to a preadoptive foster

home, that is, the home of a foster parent who was willing to provide R.P. a permanent home if reunification efforts failed (§ 366.21, subd. (l)(1); see also § 358.1, subd. (b)). R.P.'s behavior improved in the foster home.

In August 2010, the court made a true finding on the dependency petition. In October, the court ordered R.P. placed in foster care and granted N.T. reunification services. In November and December, Robert physically assaulted his brother and verbally threatened his elderly mother. Although N.T. was aware of Robert's violence, she continued to take him to visits with R.P.³ N.T. insisted that the three of them should "be a family."

In November or December 2010, R.P.'s foster parent notified the Agency that her church obligations prevented her from caring for R.P. any longer. McCann contacted Gabriella and asked her if it would be feasible to place R.P. with her. Gabriella said no and noted that her husband was still deployed and they might be moving to Japan. This was Gabriella's first contact with the Agency since July.

At the 2010 Thanksgiving holiday, Gabriella had an overnight visit with R.P. This was her first contact with R.P. since July. R.P.'s problematic behaviors, which had nearly disappeared, resumed after the visit.

Following a 2010 Christmas holiday visit at Gabriella's home, she reported R.P. had tantrums, repeatedly "cried over everything," threw himself on the ground when

³ In January 2011, a temporary restraining order was issued to prohibit contact between Robert and R.P. and, in May, the juvenile court ordered that there be no in-person contact between Robert and R.P. There is no indication N.T. violated either order.

anyone told him "no," scratched himself on purpose, curled up in a fetal position and was restless in his sleep. Gabriella appeared overwhelmed by this behavior.

On December 27, 2010, when McCann met with Gabriella, Gabriella asked to be reevaluated for R.P.'s placement. The Agency inspected and approved Gabriella's home. McCann inquired how Gabriella's circumstances had changed to allow her to resume caring for R.P. Gabriella replied that aside from her financial situation, which had been rectified, "nothing has changed."⁴ Gabriella said, "We're just [going to] have to make it work. I don't know how, but [we're going to] have to make it work. I don't want him to go to strangers."

The Agency "had numerous concerns with [Gabriella]'s ability to care for [R.P.] and his special needs, as well as her abilities to care for him long term if a concurrent plan is needed." The Agency was concerned about the conflicts between Gabriella and N.T., which would hinder reunification, and about R.P.'s behavior while in Gabriella's care. McCann spoke with Gabriella about the factors that had led her to discontinue caring for R.P. in July 2010, including the impact on her children, her husband's deployment and the delay inherent in arranging for services in Riverside County. During the December 27 discussion, Gabriella claimed she would be able to set boundaries with N.T. and help her interact with R.P. more appropriately. McCann saw Gabriella as making "a last ditch effort rather than really wanting and truly committing to [R.P]."

⁴ At the section 388 hearing, Gabriella testified that she made this statement in November 2010, not in December. She testified that in December her financial situation was "fine," although she apparently did not have a vehicle large enough to transport her children and R.P. simultaneously.

The Agency decided Gabriella was "not an appropriate placement for [R.P.] at this time" and placement with Gabriella would not be in R.P.'s best interests. On January 21, 2011, the Agency notified Gabriella of this decision. Gabriella had no further in-person contact with R.P. for the rest of this case.

Meanwhile, on January 4, 2011, the Agency moved R.P. to a temporary foster home while the Agency searched for a preadoptive home. On March 14, after a transition period lasting approximately one month, R.P. was moved to the preadoptive foster home of the M. family. The M.'s were willing to adopt R.P. if reunification efforts failed. This was R.P.'s fifth placement, and he remained in the M.'s home for the remainder of the case.

At the 12-month review hearing in November 2011, the court terminated reunification services and set a section 366.26 hearing. In December, Gabriella moved to Japan. In January 2012, she learned that services had been terminated. On May 11, she filed her section 388 petition. The petition sought modification of an unspecified "February 2011" order and requested that R.P. be placed with Gabriella for adoption.⁵ On May 31, 2012, the court denied the petition and terminated parental rights.

⁵ The maternal grandparents were additional petitioners, and the petition requested placement with Gabriella as an alternative to placement with the maternal grandparents. The court summarily denied the petition insofar as it concerned the maternal grandparents, and they do not appeal. Gabriella now contends the court improperly denied the maternal grandparents' request for placement. We need not address this contention, as Gabriella lacks standing to raise the issue. (*In re S.A.* (2010) 182 Cal.App.4th 1128, 1134.)

GABRIELLA'S 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 the proposed modification would promote the child's best interests. (*In re Zachary G.* (1999) 77 Cal.App.4th 799, 806.) When a case is past the reunification phase, the focus is on the child's need for permanency and stability, and there is a rebuttable presumption that it is in the child's best interests to remain in the current placement. (*In re Stephanie M.* (1994) 7 Cal.4th 295, 317.) We review the denial of a section 388 petition for an abuse of discretion. (*In re Jasmon O.* (1994) 8 Cal.4th 398, 415.)

As a changed circumstance, Gabriella's petition alleged that that she was no longer having financial difficulties.⁶ The court concluded she had shown a change of circumstance with respect to her financial situation, but she had not shown that a change of placement was in R.P.'s best interests. The court noted there had been five placements, and R.P. was in a stable environment where he was thriving.

⁶ At the hearing, Gabriella testified that in July 2010, her car was repossessed and she was on the verge of losing her home through foreclosure. She also testified that she then lived in Riverside County, and it had been difficult for her to access services for R.P. in San Diego County. Gabriella did not apprise the Agency of these specific difficulties at the time. Furthermore, in 2010, Gabriella and N.T. told the Agency that N.T. and other relatives were planning to move to Riverside County. Thus, McCann communicated with the Riverside County Department of Public Social Services about services available there, and about a possible transfer of the case if N.T. moved.

Gabriella contends the court abused its discretion by failing to find that it was in R.P.'s best interests to be placed with her.⁷ She argues she and her family had a bond with him that began when he was born; he was placed with her early in this case; and she is able to give him a stable and loving home. Gabriella asserts her sole motive in relinquishing R.P. in July 2010 was to further his best interests, and her subsequent paucity of contact with him was motivated by her wish not to interfere with N.T.'s reunification. Gabriella claims that as a relative, she is entitled to placement preference (§ 361.3). Finally, she argues the M.'s were unwilling "to nurture any relationship" between R.P. and his biological family and there was no evidence that severing R.P.'s bond with the M.'s would cause him long-term emotional problems. To the extent the

⁷ Gabriella raises several forfeited issues. (*In re S.B.* (2004) 32 Cal.4th 1287, 1293, superseded by statute on other grounds as stated in *In re M.R.* (2005) 132 Cal.App.4th 269; *In re Crystal J.* (1993) 12 Cal.App.4th 407, 411-412.) First, she argues that before she relinquished care of R.P. in July 2010, she repeatedly asked the Agency for services in Riverside County, to no avail, and the lack of services contributed to her financial strain and caused the relinquishment. She did not raise this issue until the section 388 proceedings, when it was too late for any effective relief.

Second, Gabriella argues the Agency should have placed R.P. with her in December 2010 or January 2011 when her circumstances had changed; the Agency instead moved him twice without informing her; and the Agency failed to place R.P. with her because she had relinquished him and because her husband was in the military. She argues this failure to place led to her section 388 petition, and she did not know earlier that she could file a petition to seek placement. The time for Gabriella to challenge this placement denial was in early 2011, when the Agency notified her of the denial, not now.

Third, at the section 388 hearing, the Agency offered into evidence a "gram" regarding placement prepared by McCann in January 2011. Gabriella did not object in the juvenile court to the admission of the gram, and the court admitted it into evidence. The gram is dated "[January 2, 2011]," but refers to McCann's "[January 21, 2011]" consultation with her supervisor. Gabriella now complains the dates in the gram are internally inconsistent and inconsistent with McCann's testimony. Gabriella also questions why the court did not receive the gram until the section 388 hearing. Gabriella may not raise this evidentiary challenge for the first time on appeal.

Agency's evidence conflicts with Gabriella's on the best interests issue, we accept the court's implied determination that the Agency's evidence was more credible. (*In re Dakota H.* (2005) 132 Cal.App.4th 212, 228.)

The relative placement preference does not assist Gabriella. Section 361.3 gives "preferential consideration" to placement requests by certain relatives upon the child's removal from the parent's physical custody at the dispositional hearing. (§ 361.3, subds. (a) & (c); *In re Lauren R.* (2007) 148 Cal.App.4th 841, 854.) " 'Preferential consideration' means that the relative seeking placement shall be the first placement to be considered and investigated." (§ 361.3, (c)(1).) "Preferential consideration 'does not create an evidentiary presumption in favor of a relative, but merely places the relative at the head of the line when the court is determining which placement is in the child's best interests.' [Citation.]" (*In re Antonio G.* (2007) 159 Cal.App.4th 369, 376.) After the original dispositional hearing, the relative placement preference does not arise again until "a new placement of the child must be made" (§ 361.3, subd. (d), quoted in *In re Lauren R.*, at p. 854.) At the time of the section 388 hearing, R.P. had been in his preadoptive home for more than a year and no new placement was necessary. Moreover, as noted above, because this case was past the reunification phase, the focus was on R.P.'s need for permanency and stability, and there was a rebuttable presumption that it was in his best interests to remain with the M.'s. (*In re Stephanie M.*, *supra*, 7 Cal.4th at p. 317.)

At the time of the hearing, Gabriella and her family were living in Japan where her husband will be stationed until approximately December 2014. Gabriella testified there

were services available there, but admitted she did not know what services R.P. needed. Gabriella declared N.T. would be unable to interfere with her care of R.P. any longer because Gabriella was in Japan. Gabriella testified that N.T. would also be prevented from interfering if Gabriella became R.P.'s adoptive parent; R.P.'s behavior had not been a factor in her decision to stop caring for him; and her financial condition had been the sole factor.⁸

Gabriella had not seen R.P. since December 2010. In the 15 months preceding the hearing, she had apparently spoken with him by telephone only once, in January 2012.⁹ Gabriella testified she kept her "distance" from R.P. to avoid conflicts with N.T. and other relatives and because it would "devastate" Gabriella and her family if they never saw R.P. again. Gabriella believed this distance had been in R.P.'s best interests.

The court did not abuse its discretion in concluding that Gabriella had failed to show the proposed modification was in R.P.'s best interests. As discussed more fully below, R.P. had been living with the M.'s for more than a year; they wished to adopt him; and he was flourishing in their care and bonded with them. An order granting Gabriella's section 388 petition would have caused R.P. to be removed from a loving, stable home

⁸ In her declaration in support of her section 388 petition, Gabriella listed N.T.'s interference as another reason for the relinquishment. The Agency asserts the declaration was not offered into evidence and the court did not consider it. The declaration was part of the section 388 petition and R.P.'s counsel cross-examined Gabriella about the declaration.

⁹ At the hearing, R.P.'s counsel asked Gabriella "how many times [she had] spoken to" R.P. "in the past 15 months." Gabriella replied, "I spoke with him the day before I left this January." She did not mention any other conversations.

and placed in an unfamiliar environment with caregivers with whom he had had little recent contact.

The court did not abuse its discretion by denying the section 388 petition.

THE BENEFICIAL RELATIONSHIP EXCEPTION

If a dependent child is adoptable,¹⁰ 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. (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.) 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

¹⁰ N.T. does not contest the adoptability finding.

For the first time in her reply brief, N.T. contends the Agency attempted to restrict her free exercise of religion by directing that the daily blessing she gave R.P. be in English. N.T. filed a section 388 petition on this issue, and the court allowed her to give the blessing in Spanish as she requested.

judgment (*ibid.*), we conclude that while N.T. maintained regular visitation and contact, substantial evidence supports the court's finding the benefits adoption would confer on R.P. outweighed the parent-child bond.

At the time of the hearing, R.P. was four and one-half years old and had been out of N.T.'s care for two years. Their visits were always supervised. According to R.P.'s behavioral therapist, the relationship between R.P. and N.T. was dysfunctional. Adoptions social worker Sarah Ulrich believed N.T.'s relationship with R.P. was not "a parenting type of relationship." N.T. lacked critical and fundamental parenting skills. She remained unable to set limits and allowed R.P. to be the authority figure in their relationship.

N.T.'s behavior during visits upset R.P., and she was unable to recognize this. N.T. frequently argued with the social worker and others in R.P.'s presence. During a January 2012 visit attended by R.P.'s court-appointed special advocate (CASA), N.T. repeatedly asked the CASA if she "was going to rip her child out of her arms." After visits with N.T., R.P. was "worn out" and subdued.

N.T. was sometimes inattentive to R.P. during visits and sometimes confrontational with him. She interrogated him. She repeatedly told him to be careful when there was no apparent danger. During visits and telephone calls, N.T. repeatedly discussed matters pertaining to the case with R.P. During a May 2012 visit, she tried to discuss placement with him. She refused to change the subject although the social worker told her several times to do so and R.P. cried and begged N.T. to stop.

R.P. enjoyed visits largely because he demanded certain gifts from N.T. and she generally complied. When she did not, he became upset. He showed no distress when they parted. Often R.P. did not want to come to the telephone when N.T. called and, after telephone conversations with her, he appeared emotionally upset.

R.P. was flourishing in his prospective adoptive home. His behavioral therapist described the M.'s as supportive of R.P. and said they had created a good home for him. R.P. had lived in the home for more than a year. He had adjusted well and was well behaved. He was happy, attached to the M.'s and called them "mom and dad." R.P. was also very close to the M.'s six-year-old son. The M.'s wished to adopt R.P. When Ulrich asked R.P. how he would feel about being adopted by his prospective adoptive parents, R.P. said, "I have been trying really hard . . . on getting them to keep me." R.P. said he would be sad if he did not see N.T. again, but "she was not safe." He described feeling scared when he was in her care.

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

DISPOSITION

The judgment is affirmed.

HALLER, Acting P. J.

WE CONCUR:

McINTYRE, J.

O'ROURKE, J.