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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

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

SAN DIEGO COUNTY HEALTH AND
HUMAN SERVICES AGENCY,

Plaintiff and Respondent,

v.

JESUS A.,

Defendant and Appellant.

D062128

(Super. Ct. No. J517906A-B)

APPEAL from orders of the Superior Court of San Diego County, David B.

Oberholtzer, Judge. Affirmed.

Jesus A. appeals juvenile court orders summarily denying his Welfare and Institutions Code section 388¹ petition for modification and terminating his parental rights to his minor children, J.A. and M.A. (together, the minors), under section 366.26. Jesus contends the court erred by denying him a full and fair hearing on his modification petition, by which he sought to have the minors returned to his custody. He also challenges the sufficiency of the evidence to

¹ Statutory references are to the Welfare and Institutions Code.

support the court's finding the beneficial parent-child relationship exception to adoption did not apply to preclude terminating his parental rights. We affirm the orders.

FACTUAL AND PROCEDURAL BACKGROUND

In October 2010, four-year-old J.A. and two-year-old M.A. became dependents of the juvenile court under section 300, subdivision (b) and were removed from parental custody based on findings their mother, Laura G., used methamphetamine, had a history of substance abuse and had drugs in the family home within reach of the minors.² The court placed the minors with their maternal grandparents (the grandparents).

Laura identified Jesus as the minors' father. They had been in a four-year relationship which involved domestic violence. Jesus's criminal history included an arrest in 2008 for battery. At the time the minors were taken into protective custody, Jesus was incarcerated for inflicting injury on his live-in girlfriend. He claimed he had been drinking and did not remember hitting her. Jesus was deported to Mexico in August 2010, but illegally returned to San Diego two weeks later. When the San Diego County Health and Human Services Agency (Agency) located him, he said he did not want to appear in juvenile court or participate in reunification services because he was afraid of being deported. Nevertheless, Agency set up visitation between Jesus and the minors, supervised by the grandparents.

According to a six-month review report dated March 30, 2011, the grandparents had initially struggled with the minors' negative behaviors, but these behaviors improved as a result of the grandparents' consistent parenting. Jesus told the social worker he now wanted to participate in reunification services, but he wanted Laura to raise the minors. Jesus and his

² The minors' half sibling, J.O., also became a dependent. Jesus is not J.O.'s father, and J.O. is not the subject of this appeal.

girlfriend had a child together and were expecting another one in August. Because Jesus had a new family, he was not sure he could also have the minors in his care. Jesus agreed the minors should continue living with the grandparents, but said he wanted to remain involved in the minors' lives and have an ongoing positive relationship with them. He was attending weekly Alcoholics Anonymous (AA) meetings and was receiving in-home parenting training for the child in his care.³

Jesus made his first court appearance at the six-month review hearing. The court found he was the minors' presumed father and ordered six more months of services for him.

Jesus continued to participate in domestic violence counseling and parenting classes, and he visited the minors at a park once or twice a week. He said he wanted to be considered for placement, even though his girlfriend did not want the minors to live with them. Jesus and his girlfriend were renting a bedroom in the home of the girlfriend's parents, where they lived with their two-year-old and eight-month-old children. Jesus reported he had stopped drinking alcoholic beverages three months earlier. He was authorized to have unsupervised visits with the minors.

At the 12-month review hearing, the court found returning the minors to parental custody would be detrimental to them and the parents had not made substantive progress with their case plans. The court terminated reunification services and set a section 366.26 selection and implementation hearing.

The social worker recommended adoption as the minors' permanent plans. She assessed the minors as generally adoptable. Additionally, the grandparents, with whom the minors had

³ Agency had filed a dependency petition on behalf of this child, and Jesus was participating in voluntary services. The petition was later dismissed.

lived for the past 17 months, were committed to adopting them. The grandparents were willing to allow continued contact between the minors and Jesus.

Jesus continued to have unsupervised visits with the minors. He picked them up from school two days a week and brought them to a park for two hours. His girlfriend and their two children usually accompanied them. The grandparents reported the minors liked spending time with Jesus. When the grandparents encouraged Jesus to spend more time with the minors, he declined, stating the "judge" had not allowed it. On one or two occasions, the minors did not want to visit Jesus. He often seemed rushed and had difficulty interacting with the minors one-on-one because he had to care for his two younger children, and his girlfriend was unwilling to assist him. Jesus provided no financial support for the minors. In the social worker's opinion, Jesus had not been able to maintain a significant parental role, and it would not be detrimental to the minors to terminate parental rights.

According to an addendum report, the social worker observed a morning visit between Jesus and the minors. Jesus arrived 20 minutes after the grandmother telephoned him to ask why he was not there. The minors greeted Jesus by running to him and calling him "daddy." J.A. told Jesus his breath smelled like beer, but Jesus did not appear intoxicated. The social worker continued to recommend adoption as the minors' permanent plans.

Jesus filed a section 388 petition for modification, seeking to set aside the selection and implementation hearing and have the minors placed with him. The petition alleged Jesus's circumstances had changed in that he had completed a 52-week domestic violence treatment program, continued in substance abuse treatment and maintained consistent visitation with the minors. The petition further alleged placing the minors with him was in their best interests

because they would be able to be raised with two half siblings in the home of a biological parent.

Agency opposed the request, noting Jesus had attended AA meetings for the past year only sporadically. Also, Jesus had not provided any new information after his girlfriend said she would not agree to have the minors live with them. Although Jesus was regularly visiting the minors, he did not ask about J.A.'s therapy or the minors' medical appointments. Jesus limited his visits to only two hours, even though he was able to visit longer. Jesus was still living with his girlfriend and their two children in one bedroom, despite knowing his housing arrangements were inadequate for placement of the minors.

The court summarily denied the section 388 petition, finding Jesus had not made a prima facie showing that granting the request would be in the minors' best interests.

At the contested selection and implementation hearing, the court received in evidence Agency's reports. Social worker Idaliz Rodgers testified about the relationship the minors had with Jesus. The minors referred to Jesus as "dad," and he was loving and affectionate with them during visits. Nevertheless, Rodgers believed the benefits of adoption for the minors outweighed the benefits of maintaining a relationship with Jesus. The minors were young and had many behavioral issues, which the grandparents were addressing by ensuring they received necessary services. If the grandparents adopted the minors, they were willing to maintain contact between the minors and their parents.

Jesus testified he did not want the minors to be adopted, but instead wanted to raise his four children together. He said the minors were happy to see him at visits and were sad when visits ended.

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

DISCUSSION

I

Jesus contends the court erred by denying his section 388 modification petition without an evidentiary hearing. He asserts he made a prima facie showing his circumstances had changed and the requested modification—to have the minors placed with him—was in the minors' best interests. Jesus further contends the summary denial of his petition violated his due process rights.

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." (*In re Marilyn H.*, 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.) "However, if 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

Jesus's petition alleged his circumstances had changed because he had completed a 52-week domestic violence treatment program, continued in substance abuse treatment and maintained consistent visitation with the minors. In support of his request, Jesus attached verification that he had regularly attended AA meetings between January 2011 and April 2012, and had completed a 52-week domestic violence treatment program. Although Jesus's circumstances had changed in some respects, there was no prima facie showing they had changed with regard to having the minors placed with him.

During most of the dependency proceedings, Jesus was unwilling or unable to have the minors live with him. He initially said he wanted the minors to be raised by their mother, even though he knew she had substance abuse issues. He also said he could not care for the minors because he had a new family, and he preferred that the minors live with the grandparents while he had weekly unsupervised visits with them. Jesus later asked to be considered as a

placement option for the minors, but his girlfriend did not want to be responsible for them.⁴ Jesus's petition did not allege this circumstance had changed. Moreover, Jesus, his girlfriend and their two children all shared a bedroom, and there was no allegation Jesus had adequate housing for the minors. Thus, Jesus's circumstances had not changed sufficiently to warrant a hearing on his section 388 petition.

Even had Jesus made a prima facie showing of changed circumstances, he did not meet his burden of showing that placing the minors with him was in their best interests. The minors had never lived with Jesus. They were thriving in the home of the grandparents, who were meeting the minors' special needs and successfully addressing their challenging behaviors. The grandparents were committed to providing the minors with a permanent home. There was no prima facie showing the minors' best interests would be served by removing them from their grandparents' care and placing them with Jesus. (See *In re Anthony W.* (2001) 87 Cal.App.4th 246, 252 [juvenile court properly denied section 388 petition without a hearing where there was no showing it was in minors' best interests to return to parent's custody]; *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].)

Although Jesus argues the minors would benefit from being raised with two half siblings in the home of a biological parent, neither the relative placement preference nor the presumption favoring natural parents, without more, is sufficient to "satisfy the best interests prong of section 388." (*In re Justice P.*, *supra*, 123 Cal.App.4th at p. 192; *In re Antonio G.*

⁴ As the social worker noted, having the girlfriend as an unwilling caregiver was not in the minors' best interests.

(2007) 159 Cal.App.4th 369, 376 [relative placement preference of section 361.3 does not create an evidentiary presumption in favor of placement with a relative].) "[A] primary consideration in determining the child's best interest is the goal of assuring stability and continuity. [Citation.] 'When custody continues over a significant period, the child's need for continuity and stability assumes an increasingly important role. That need will often dictate the conclusion that maintenance of the current arrangement would be in the best interests of that child.' " (*In re Stephanie M.* (1994) 7 Cal.4th 295, 317.) As the social worker noted, it would be detrimental to the minors to wait for Jesus's girlfriend to agree to help care for them. The proper focus of this case was the minors' needs for stability, continuity and permanency, regardless of Jesus's interest in reunification. (*Id.* at pp. 317-318; *In re Brittany K.* (2005) 127 Cal.App.4th 1497, 1507.) Because the liberally construed allegations would not have sustained a favorable decision on the section 388 petition, Jesus was not entitled to an evidentiary hearing. (*In re Zachary G., supra*, 77 Cal.App.4th at p. 806; *In re Mary G.* (2007) 151 Cal.App.4th 184, 205-206.)

C

Jesus asserts the court violated his due process rights when it denied him the opportunity to call, cross-examine and confront witnesses, and present affirmative evidence to contradict the information contained in Agency's reports. However, section 388 required the court to conduct a hearing at which Jesus had the burden of making a prima facie showing before he was entitled to an evidentiary hearing. In the context of that prima facie hearing, Jesus had the opportunity to submit documentation and argue the merits in support of his modification petition. This allowed the court to consider all relevant and current information

before deciding whether to grant an evidentiary hearing. Once Jesus did not meet his threshold burden of showing changed circumstances or best interests, no further hearing to "prove" his allegations was required. The court did not violate Jesus's due process rights by summarily denying his petition. (*In re C.J.W., supra*, 157 Cal.App.4th at pp. 1080-1081 [hearing may comport with due process where court receives written evidence and hears argument of counsel]; *In re Jackson W.* (2010) 184 Cal.App.4th 247, 260 [summary denial of section 388 petition does not violate due process]; *In re E.S.* (2011) 196 Cal.App.4th 1329, 1340 [minor's due process rights were not violated where decision on section 388 petition was based on information provided in the petition, documentary evidence and argument by counsel].)

II

Jesus 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. He asserts he regularly visited the minors and took on a parental role during visits, and the minors shared a warm and loving bond with him.

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 termination of parental rights would be detrimental to the child under one of the specified statutory exceptions. (§ 366.26, subd. (c)(1)(A) & (B)(i)-(vi); *In re Erik P.* (2002) 104 Cal.App.4th 395, 401.)

Section 366.26, subdivision (c)(1)(B)(i), provides an exception to the adoption preference if termination of 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 the 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 p. 575; accord *In re Jason J.* (2009) 175 Cal.App.4th 922, 936.)

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 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. (*Ibid.*; *In re Elizabeth M.* (1997) 52 Cal.App.4th 318, 324.)

We review an order terminating parental rights for substantial evidence. (*In re Autumn H.*, *supra*, 27 Cal.App.4th at p. 576.) If, on the entire record, there is substantial evidence to support the findings of the juvenile court, we uphold those findings. 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 Casey D.*, *supra*, 70 Cal.App.4th at pp. 52-53; *In re Baby Boy L.* (1994) 24 Cal.App.4th 596, 610.) The parent has the burden of showing there is no evidence of a sufficiently substantial nature to support the finding or order. (*In re L.Y.L.* (2002) 101 Cal.App.4th 942, 947.)

B

Here, the evidence showed Jesus had regular unsupervised visits with the minors. He did not, however, meet his burden of showing there was a beneficial parent-child relationship sufficient to apply the exception of section 366.26, subdivision (c)(1)(B)(i).

Jesus was loving and affectionate with the minors. He took them to places like the park and restaurants, and was content spending only two hours twice a week with them. The minors were happy to see Jesus and knew he was their father. Nevertheless, Jesus did not play a significant parental role in the minors' lives. He did not ask about J.A.'s therapy or the minors' medical appointments. The minors looked to their grandparents to meet their needs, and they did not appear to be negatively impacted by the absence of Jesus from their daily lives. "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.* (2002) 97 Cal.App.4th 454, 466.) There was no showing the minors had a "significant, positive, emotional attachment" to Jesus such that terminating the parent-child relationship would result in great harm to the minors. (*In re Autumn H.*, *supra*, 27 Cal.App.4th at p. 575; *In re Jason J.*, *supra*, 175 Cal.App.4th at p. 938.)

Further, Jesus did not show that maintaining the parent-child relationship outweighed the benefits of adoption for the minors. At the time of the selection and implementation hearing, the minors had been in out-of-home care for nearly two years. They had challenging behaviors which the grandparents were successfully addressing and were now thriving in this placement. The minors were enjoying the consistency, nurturing and safety provided by the grandparents, who were committed to adopting them. In the social worker's opinion, the minors needed a safe, stable and permanent home with caregivers 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 Jesus. (*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.)

Despite Jesus's preference for guardianship for the minors, the Legislature has decreed that a permanent plan other than adoption "is not in the best interests of children who cannot be

returned to their parents. These children can be afforded the best possible opportunity to get on with the task of growing up by placing them in the most permanent and secure alternative that can be afforded them." (*In re Beatrice M.* (1994) 29 Cal.App.4th 1411, 1419; see also *Jones T. v. Superior Court* (1989) 215 Cal.App.3d 240, 251 [unlike adoption, guardianship is not "irrevocable and thus falls short of the secure and permanent placement intended by the Legislature"].) The minors, whose needs could not be met by Jesus, deserve to have their custody status promptly resolved and their placement made permanent and secure. Substantial evidence supports the court's finding the beneficial parent-child relationship exception did not apply to preclude terminating parental rights.⁵

DISPOSITION

The orders are affirmed.

IRION, J.

WE CONCUR:

McCONNELL, P. J.

AARON, J.

⁵ Jesus relies on cases such as *In re Brandon C.* (1999) 71 Cal.App.4th 1530, and *In re Scott B.* (2010) 188 Cal.App.4th 452, to support his argument he had a beneficial parent-child relationship with the minors. We note that although factual comparisons between cases provide insight, they are not dispositive. The determination on appeal is whether there is substantial evidence to support the court's findings on the particular facts presented. In this regard, these cases are not helpful to Jesus's position.