Filed 2/20/13 In re Shayla V. CA4/1

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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

In re SHAYLA V., a Person Coming Under the Juvenile Court Law.	
SAN DIEGO COUNTY HEALTH AND HUMAN SERVICES AGENCY, Plaintiff and Respondent, v. BETHANY V., Defendant and Appellant.	D062695 (Super. Ct. No. NJ11814D)

APPEAL from a judgment of the Superior Court of San Diego County, Michael J. Imhoff, Commissioner. Affirmed.

Bethany V., the mother of Shayla V., appeals the judgment terminating her parental rights under Welfare and Institutions Code, section 366.26.[1] Bethany contends the juvenile court erred by denying her section 388 petition, which sought to modify the court's previous orders terminating reunification services and setting a permanent plan hearing under section

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

366.26. Bethany also contends the court should have applied the beneficial parent-child relationship and sibling bond exceptions to adoption. We affirm.

FACTS

In July 2011, the San Diego County Health and Human Services Agency (Agency) filed a dependency petition on behalf of Shayla, then two years old. (§ 300, subd. (b).) The case arose when police stopped a vehicle driven erratically by G.V., who is Shayla's father and Bethany's husband.[2] Also in the vehicle were Bethany, Shayla and three of her six half siblings. Police found hashish, marijuana and drug paraphernalia, including a methamphetamine pipe, within the children's reach. Shayla was sitting in a booster seat, which was not properly secured.

Shayla's 11-year-old half sister Roxanne told the social worker that Bethany and G.V. fight a lot, sometimes physically. Roxanne also said she often has to take care of Shayla and the other two children in the household because Bethany and G.V. leave them alone.

On July 8, Shayla was detained at Polinsky Children's Center. On July 14, Shayla was moved to the home of a second cousin, where she has remained throughout these proceedings.

On August 17, the juvenile court sustained the petition and ordered the Agency to offer a reunification plan to Bethany. Bethany's case plan required her to participate in a domestic violence treatment program, individual counseling (to start only after she had been clean and sober for 30 days), a psychological evaluation, parenting education and substance abuse services (including Alcoholics Anonymous/Narcotics Anonymous meetings, random drug testing and a residential treatment program). Bethany had a 25-year history of drug addiction.

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2 G.V. is not a party to this appeal and will be discussed only when relevant.

She has been convicted on numerous drug charges and has been registered as a narcotic offender since January 2001.

At the six-month review hearing on April 9, 2012, the juvenile court followed the Agency's recommendation to terminate reunification services and set a section 366.26 hearing. Bethany had not participated in any services offered to her by the Agency, but maintained fairly regular contact with Shayla. The court found Bethany did not make substantive progress with her case plan and there was not a substantial probability of returning Shayla to her care by the date of the 12-month review hearing.[3] The court also granted de facto parent status to Shayla's relative caretaker.

In her adoption assessment report, social worker Lisa Olimpio opined that Shayla was likely to be adopted and recommended adoption as the child's permanent plan. Shayla was a sociable three-year-old girl who was in good health and developmentally on target. Shayla had been living with the relative caretaker for more than one year, and the caretaker, who had begun the adoptive home study process, wanted to adopt her. If the relative caretaker could not adopt Shayla, there were 106 families in San Diego County interested in adopting a child like Shayla.

Olimpio acknowledged Bethany had shown progress after recently entering the North County Serenity House (Serenity House) treatment program, but noted she only began participating in a program after having been ordered to do so in connection with a criminal case. Bethany had been regularly visiting Shayla and the visits were positive.

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[3] This court denied Bethany's petition for extraordinary writ relief challenging the juvenile court's orders to terminate services and set the section 366.26 hearing. (Cal. Rule of Court, rule 8.452; *Bethany V. v. Superior Court* (July 19, 2012, D061754) [nonpub. opn.].)

The social worker also reported that throughout the dependency the relative caretaker has arranged visits between Shayla and half sister Roxanne twice a month and wanted the visits to continue if she adopted Shayla. The caretaker also said she will allow visits between Shayla and Bethany as long as she is clean and sober.

On August 29, Bethany filed a section 388 petition to modify the court's April 29 orders; specifically, the petition sought to reinstate court-ordered reunification services and the return of Shayla to Bethany's care. According to the petition, since May 29, Bethany "is fully engaged in her recovery services as an inpatient resident . . . of Serenity House . . . [and] is now consistently visiting with [Shayla]." The petition also claimed the requested modification would promote Shayla's best interest because "[r]eunification with mother would allow [Shayla] to have the daily support and care provided by her biological mother[.] [F]urther, in the future, it would allow [Shayla] the opportunity to develop a normal sibling relationship with her brothers and sisters."

Attached to section 388 petition were letters from Serenity House personnel reporting that Bethany was fully participating in the program—including more than 150 hours of classes. The associate director of the program said Bethany "is an ideal resident."

On September 14, the juvenile court held a hearing on Bethany's section 388 petition in which she and a Serenity House family intervention specialist testified. The specialist said Bethany was resilient and had reached a point in her services where she had taken responsibility for her progress and participation. Bethany testified she gained more from the Serenity House program than at other treatment programs because for the first time she had the chance to work through a 12-step program and learned that she cannot become complacent

about her addiction. The program also provided her with more insight into child rearing. Although Bethany had completed the program requirements in three and one-half months, she was committed to remaining at Serenity House for another nine months.

The juvenile court denied Bethany's section 388 petition, finding she had shown "changing [circumstances]," but not changed circumstances, and it would not be in Shayla's best interests to grant the petition. "The relief requested is to place [Shayla] with her mother, and in order for that to . . . be in the best interests of [Shayla], the mother would need to demonstrate longer than four months of sobriety given the mother's ongoing struggles over the last two decades," the court said.

Proceeding to the section 366.26 hearing, the court terminated Bethany's parental rights. The court found Shayla was likely to be adopted, termination of parental rights would not be detrimental to her, and adoption was in her best interests. The court also found the parent-child beneficial relationship and the sibling bond exceptions to adoption did not apply. Additionally, the court granted the relative caretaker prospective adoptive parent status. (§ 366.26, subd. (n).)

DISCUSSION

I

Denial of Section 388 Petition

Bethany contends the juvenile court abused its discretion by denying her section 388 petition. The contention is without merit.

Under section 388, a parent may petition the court to change, modify, or set aside a previous court order on the grounds of changed circumstances or new evidence. (§ 388, subd.

(a).) The petition shall set forth why the requested modification is in the best interests of the dependent child. (§ 388, subd. (b)(4).)

The parent bears the burden of showing both a change in circumstances exists and the proposed change is in the child's best interests. (*In re Casey D.* (1999) 70 Cal.App.4th 38, 47.) The juvenile court may consider the entire factual and procedural history of the case in considering a section 388 petition. (*In re Jamika W.* (1997) 54 Cal.App.4th 1446, 1450-1451.)

Rulings on section 388 motions are reviewed on appeal for abuse of discretion. (*In re Stephanie M.* (1994) 7 Cal.4th 295, 318.) " 'The appropriate test for abuse of discretion is whether the trial court exceeded the bounds of reason. When two or more inferences can reasonably be deduced from the facts, the reviewing court has no authority to substitute its decision for that of the trial court.' [Citations.]" (*Id*. at pp. 318-319.) An order on a section 388 motion will not be disturbed on appeal unless the court has exceeded the bounds of reason by making an " ' "arbitrary, capricious, or patently absurd determination." ' " (*Id*. at p. 318.)

Bethany's proffered changed circumstances were her full engagement in an inpatient treatment program, her sobriety and her regular visitation with Shayla. No one disputes that Bethany had shown excellent progress during her stay at Serenity House. However, she had been in the program only three and one-half months and such a short period of sobriety is not viewed as a changed circumstance, particularly in a person with a long history of substance abuse. "It is the nature of addiction that one must be 'clean' for a much longer period than 120 days to show real reform." (*In re Kimberly F.* (1997) 56 Cal.App.4th 519, 531, fn. 9.) Bethany's sobriety at the time of the section 388 petition hearing might be considered a

"changing circumstance[]," but not a changed circumstance within the meaning of section 388. (*In re Casey D.*, *supra*, 70 Cal.App.4th at p. 47.)

This court and others have concluded that changing circumstances concerning a parent's substance abuse problems do not constitute a sufficient showing to grant a section 388 petition to modify a previous order. (*In re Casey D.*, *supra*, 70 Cal.App.4th at pp. 47-48 [mother's short drug recovery period and failure to complete prior treatment programs showed only changing circumstances; no abuse of discretion]; see also *In re Baby Boy L.* (1994) 24 Cal.App.4th 596 [mother with long drug abuse history only showed she was beginning to rehabilitate, not changed circumstances].) Bethany's long-standing substance abuse problem had not been eliminated; the evidence showed only she was making another attempt to treat it. Substantial evidence supported the juvenile court's finding that Bethany had not shown changed circumstances.

Furthermore, to prevail, Bethany had to show that granting her petition would be in the best interests of Shayla. (*In re Casey D.*, *supra*, 70 Cal.App.4th at p. 47.) The child's best interests are the fundamental concern of the juvenile dependency system. This concern underlies the system's primary goals of child safety and well-being, preservation of the natural family and timely permanency stability for a dependent child. (*In re William B.* (2008) 163 Cal.App.4th 1220, 1227.)

The factors to be considered in evaluating the child's best interests under section 388 are the seriousness of the problem that led to the dependency and the reason for any continuation of that problem, the strength of the child's bond with the caretaker compared with the strength of the child's bond with the parent and 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.*, *supra*, 56 Cal.App.4th at p. 532.) None of these factors favors Bethany. The seriousness of the reasons for the dependency—substance abuse, child endangerment/neglect and domestic violence—should not be understated. A household that includes these problems presents dangerous risks for a young child. There is nothing in the record to indicate Bethany's bond with Shayla is stronger than the child's bond with the relative caretaker, with whom she has lived for more than one year in a healthy, supportive and stable home. Solving Bethany's substance abuse problem, which has spanned a quarter-of-a-century, will not be an easy task, and although Bethany's recent participation in the Serenity House program is a positive start, it is no guarantee.

Moreover, the strength of the relative bonds between the child and parent, and the child and caretaker becomes an even more important factor when a section 388 petition is filed after reunification services have been terminated. "After the termination of reunification services, the parents' interest in the care, custody and companionship of the child are 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.*, *supra*, 7 Cal.4th at p. 317.)

In her petition, Bethany alleged Shayla's best interests would be served by reunification because the child would "have the daily support and care provided by her biological mother" and "the opportunity to develop a normal sibling relationship with her brothers and sisters." Aside from the fact that any reunification between Shayla and Bethany was highly speculative, the allegation completely ignored Shayla's interest in stability. The

evidence before the juvenile court was Shayla was thriving in the home of the relative caretaker, who was willing to provide a permanent plan of adoption for her. "At this point in the proceedings, on the eve of the selection and implementation hearing, the [child's] interest in stability was the court's foremost concern, outweighing any interest mother may have in reunification." (*In re Anthony W.* (2001) 87 Cal.App.4th 246, 251-252.)

The juvenile court did not abuse its discretion by denying Bethany's section 388 petition.

II

Beneficial Parent-Child Relationship Exception to Adoption

Bethany contends the juvenile court erred by not applying the beneficial parent-child relationship exception to adoption. (§ 366.26, subd. (c)(1)(B)(i).) The contention is without merit.

Adoption is the permanent plan preferred by the Legislature. (*In re Derek W.* (1999) 73 Cal.App.4th 823, 826.) At the selection and implementation hearing, the juvenile court must terminate parental rights if the child is likely to be adopted within a reasonable time unless one of the statutory exceptions applies. (§ 366.26, subd. (c)(1).) 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." The exception applies only if both prongs are met. The parent bears the burden to establish by a preponderance of the evidence that an exception to the statutory preference for adoption applies. (*In re Lorenzo C.* (1997) 54 Cal.App.4th 1330, 1343-1345.)

Our standard of review is the substantial evidence test. (*In re Autumn H.* (1994) 27 Cal.App.4th 567, 576.) We determine if there is substantial evidence, contradicted or uncontradicted, to support the conclusions of the juvenile court, resolving all conflicts favorably to the prevailing party, and drawing all legitimate inferences to uphold the lower court's ruling. (*In re Brison C.* (2000) 81 Cal.App.4th 1373, 1378-1379.)

The juvenile court found Bethany had maintained regular contact with Shayla. Agency does not dispute this finding.

However, to establish a beneficial parent-child relationship, Bethany also needed to show that Shayla would benefit from continuing her relationship with her mother. Such a showing requires more than frequent and loving contact, an emotional bond with the child, pleasant visits or incidental benefit to the child. (*In re Derek W.*, *supra*, 73 Cal.App.4th at p. 827.) To overcome the statutory preference for adoption, a 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. (*Ibid.*; *In re Elizabeth M.* (1997) 52 Cal.App.4th 318, 324.)

In *In re Autumn H.*, *supra*, 27 Cal.App.4th at page 575, this court explained that to come within the beneficial parent-child relationship exception to adoption, a parent must show the "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." (Italics added.) The court must balance "the strength and quality of the . . . 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." (*Ibid*.) The court's balancing test must be performed on a case-by-case basis, taking into account variables such as "[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 pp. 576, 575.)

Further, the parent must show the benefit arises from a parental relationship rather than a caretaker or friendly visitor relationship. (See *In re Beatrice M.* (1994) 29 Cal.App.4th 1411, 1420.) We affirmed this balancing test, explaining the standard "reflects the legislative intent that adoption should be ordered unless *exceptional circumstances* exist . . . ." (*In re Casey D.*, *supra*, 70 Cal.App.4th at p. 51, italics added.)

Substantial evidence supported the finding Bethany had not demonstrated Shayla would benefit from continuing her relationship with her mother. Bethany's visitation with Shayla showed they had pleasant visits and affectionate contact. However, even frequent and loving contact between parent and child is not sufficient to establish the requisite benefit to the child if the mother does not occupy a parental role and is unable to take custody. (*In re Teneka W.* (1995) 37 Cal.App.4th 721, 728.) A "pleasant" relationship is not enough to establish a benefit to the child because "it bears no resemblance to the sort of consistent, daily nurturing that marks a parental relationship." (*In re Derek W.*, *supra*, 73 Cal.App.4th at p. 827.) We also note Bethany's visits remained supervised throughout the dependency. Parents who have not advanced beyond supervised visitation will have a difficult time establishing the beneficial parent-child relationship exception. (*In re Casey D.*, *supra*, 70 Cal.App.4th at p. 51.)

"Interaction between natural parent and child will always confer some incidental benefit to the child." (*In re Autumn H.*, *supra*, 27 Cal.App.4th at p. 575.) Nonetheless, Bethany had not demonstrated her relationship with Shayla outweighed the benefits of adoption. Bethany was unable to show she can safely parent Shayla. In the past, Bethany had exposed Shayla to substance abuse, domestic violence and neglect.

At the selection and implementation hearing, the juvenile court's foremost concern is the child's interest in stability and permanency. (*In re Beatrice M.*, *supra*, 29 Cal.App.4th at p. 1418.) "The purpose of section 366.26 is to select a permanent plan for a child who cannot return home because reunification efforts have failed." (*Ibid*.) Bethany did not establish that severing her relationship with Shayla in favor of "the security and sense of belonging" provided by an adoptive family would harm Shayla. (*In re Autumn H.*, *supra*, 27 Cal.App.4th at p. 575.) Simply put, the relationship between Bethany and Shayla did not "outweigh the well-being [Shayla] would gain in a permanent home with new, adoptive parents." (*Ibid*.) A dependent child should not be made to wait indefinitely for her mother to become an adequate parent. (*In re Marilyn H.* (1993) 5 Cal.4th 295, 310.) "The reality is that childhood is brief; it does not wait while a parent rehabilitates himself or herself. The nurturing required must be given by someone, at the time the child needs it, not when the parent is ready to give it." (*In re Debra M.* (1987) 189 Cal.App.3d 1032, 1038.)

III

Sibling Bond Exception to Adoption

Bethany contends the juvenile court erred by not applying the section 366.26, subdivision (c)(1)(B)(v), sibling relationship exception to adoption. The contention is without merit.

The sibling bond relationship exception to adoption applies when there is a compelling reason for finding detriment to the child because adoption would substantially interfere with that child's sibling relationship. (§ 366.26, subd. (c)(1)(B)(v).) The juvenile court should consider the nature and extent of the relationship, whether the child was raised with a sibling in the same home and whether the child has strong bonds with a sibling. The court must also evaluate whether ongoing contact is in the child's best interests, including the child's long-term emotional interest, compared to the benefit of legal permanence through adoption. (*Ibid*.) The purpose of this exception is to preserve long-standing sibling relationships that "serve as anchors for dependent children whose lives are in turmoil." (*In re Erik P*. (2002) 104 Cal.App.4th 395, 404.)

"The sibling relationship exception contains strong language creating a heavy burden for the party opposing adoption." (*In re Daniel H*. (2002) 99 Cal.App.4th 804, 813.) Similar to the beneficial parent-child relationship exception, application of the sibling relationship exception requires a balancing of interests. (*In re L.Y.L.* (2002) 101 Cal.App.4th 942, 951.) The parent must first show: (1) the existence of a significant sibling relationship; (2) terminating parental rights would substantially interfere with that relationship; and (3) it would be detrimental to the child if the relationship ended. (*Id*. at p. 952.) After the parent shows a

sibling relationship is so strong that its severance would be detrimental to the adoptive child, the court then decides whether the benefit to the child of continuing the sibling relationship outweighs the benefits of adoption. (*Id*. at pp. 952-953; *In re Naomi P*. (2005) 132 Cal.App.4th 808, 823.)

Our standard of review is the substantial evidence test. (*In re L.Y.L.*, *supra*, 101 Cal.App.4th at p. 953.)

Shayla was likely to be adopted by the relative caretaker, who recognized the significant bond between Shayla and Roxanne and had arranged regular contact between the two half siblings throughout the dependency. The relative caretaker had also made arrangements with Roxanne's caretakers to continue the regular contact if she adopted Shayla. Thus, there was no showing the adoption would interfere with Shayla's and Roxanne's relationship. As to Shayla's other half siblings, there was no showing they shared a significant relationship with Shayla and no showing of detriment to Shayla if her relationship with them was terminated. "Many siblings have a relationship with each other, but would not suffer detriment if that relationship ended. If the relationship is not sufficiently significant to cause detriment on termination, there is no substantial interference with that relationship." (*In re L.Y.L.*, *supra*, 101 Cal.App.4th at p. 952.) Substantial evidence supports the court's finding the beneficial sibling relationship exception did not apply to preclude terminating Bethany's parental rights. (*In re Celine R.* (2003) 31 Cal.4th 45, 61-62.)

DISPOSITION

The judgment is affirmed.

BENKE, Acting P. J.

WE CONCUR:

NARES, J.

AARON, J.