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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

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

SAN DIEGO COUNTY HEALTH AND
HUMAN SERVICES AGENCY,

Plaintiff and Respondent,

v.

SEAN A.,

Defendant and Appellant.

D062790

(Super. Ct. No. J517800A-C)

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

Sean A. appeals orders denying his petition for modification under Welfare and
Institutions Code section 388¹ and terminating his parental rights to his children under section
366.26. We affirm.

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

FACTUAL AND PROCEDURAL BACKGROUND

Sean is the father of three girls: 11-year-old S.A., 10-year-old Sierra A., and nine-year-old, Natalia A. (collectively, the children or girls). In May 2010, the San Diego County Health and Human Services Agency (Agency) filed petitions on behalf of the children under section 300, subdivisions (b) and (g), alleging the children were at substantial risk of serious physical harm or illness because of Sean's use of methamphetamine, alcohol and inhalants, his recent arrest on charges of driving under the influence and possession of a controlled substance, and their mother's history of substance abuse and disregard for the children's welfare and support.²

The family had 11 child welfare referrals from 2002 to 2010. In February 2010, the Agency opened a voluntary case plan with Sean after it learned the family was homeless and the children's mother had left the children with Sean and in turn Sean had left them with a friend without any provision for support. Sean recently tested positive for methamphetamine and marijuana. The children were not attending school regularly. They were neglected and dirty. During the children's early years, Sean was arrested for domestic violence, disorderly conduct, aggravated domestic violence, aggravated robbery, probation violations and failure to appear. Before the children were born, Sean was convicted in separate incidents on charges of felony burglary and misdemeanor burglary.

Sean was arrested on drug charges in July 2010. He enrolled in an outpatient substance abuse recovery program but was expelled from that program after two weeks.

Starting in August 2010, Sean visited the girls twice a week. His interactions with them were positive. The social worker said S.A., Sierra and Natalia were sweet girls who got along

² The children's mother did not actively participate in their dependency proceedings and does not appeal.

well with each other. They were well-mannered and did not have developmental delays or behavioral problems. Although homeless, Sean was in regular contact with the children and social worker, and successfully completed a 15-week parenting class. Sean's drug tests in November and December were negative.

In January 2011, Sean was arrested on an outstanding warrant. In March, he was arrested for making criminal threats against his landlady. A week later, Sean was arrested by a SWAT team for threatening to kill his landlady and his girlfriend, domestic violence and committing a felony while on bail. He admitted to drinking, inhaling aerosol spray and breaking items in a room he was renting. In April, Sean was arrested on robbery charges. He was incarcerated until June, when he was released into an inpatient substance abuse recovery program. He was expelled from that program in July.

In September, the court terminated reunification services and set a section 366.26 hearing. In January 2012, the juvenile court continued the section 366.26 hearing to allow the Agency to consider alternative permanency plans for the children, who were considered difficult to place for adoption because of their ages and sibling bonds.

Sean was incarcerated from early September 2011 to late February 2012. He entered a substance abuse recovery program in March, secured full-time employment in April and rented two bedrooms in a home in June. At the end of July, Sean filed a section 388 petition seeking the children's return to his care under a plan of family maintenance services.

The Agency reported that Sean successfully completed his substance abuse recovery program but was not enrolled in an aftercare program. He had recently received a promotion at work. The Agency verified that Sean had a home for the children. When the children learned

that Sean was asking the court to place them in his care, S.A. said she would like to live with her father but worried he would continue "to drink and do drugs and fight." She did not believe that she and her sisters would be safe in their father's care. Sierra and Natalia shared S.A.'s concerns. The social worker recognized Sean's progress but questioned whether his circumstances were sufficiently stable to allow the children to safely return to his care.

At the hearing on the section 388 petition, after reading and considering the entire record and hearing argument, the juvenile court found that returning the children to Sean's care would place them at great risk of harm due to Sean's lengthy criminal and substance abuse history. The court denied the section 388 petition without an evidentiary hearing.

The section 366.26 hearing was heard on September 12 and 13. The juvenile court admitted the Agency's reports in evidence and heard testimony from Jennifer Kadas, the children's adoptions social worker; Laura H., a family friend; and Sean. The court accepted the stipulated testimony of Drew Cabral, M.S.W., an investigator with the Dependency Legal Group, and each of the children.

Kadas testified that the children consistently asked to visit their father. Adoption was in their best interests provided they could continue to visit Sean. Visitation with their father was in their best interests only if he remained sober. Kadas would not have selected an adoptive family for the girls if that family would not allow them to visit Sean. The girls first met the prospective adoptive parents in August. After the visit, S.A. gave permission to Kadas to proceed with the adoption. All the visits between the children and the family had been positive.

In her reports, Kadas said Sean obviously loved his children but his relationships with his children were disrupted by his substance abuse, criminal activity and incarceration. Another social worker characterized Sean's relationship to the children as a "friendly visitor." Kadas said Sean comforted the children and showed he was concerned about their well-being during visits. However, in view of children's limited and disrupted relationships with Sean, Kadas believed the children would gain greater benefit from the permanency and stability of adoption than they would from maintaining the parent/child relationship in a less stable permanency plan.

Laura H. testified Sean and the girls lived with her for three or four months in 2009. Their mother was in and out of the home. The girls were "daddy's girls" and went exclusively to him for their care and needs.

Sean testified he talked to each girl every day. He bought clothes and school supplies for them. The girls were always happy to see him. When he was incarcerated, he telephoned and sent letters to them. The girls would write back. Sean said he loved his children and cared about them. He had been clean and sober since April 15, 2011.

Cabral observed a visit between Sean and the children on August 14. He reported that all interactions between the children and their father were appropriate. They interacted happily and often. Sean showed good communication skills with his children. They listened to his instructions and did not argue with him. Sean often praised them and showed good reflective listening skills. The children appeared to be very attached to him.

In stipulated testimony, S.A. stated: "If I could live with anyone in the world, I would live with [current foster mother] because I would be able to keep seeing my dad and the family

that wants to adopt me. [¶] My second choice is to live with my dad. I have heard that I am going to move in with the family that wants to adopt me. My dad will always be my dad and that will never change. [¶] . . . If I were in charge of setting up visits with my dad, I would see him two times a week, once on Tuesday and once on Saturday. [¶] I do not know if I want to be adopted. I am confused about the idea of adoption because the family that wants to adopt me is nice, but my dad wants us to live with him. . . ."

Sierra stated: "If I could live with anyone in the world, I would live with my dad. I feel safe with my dad. I also like the family that wants to adopt me. [¶] I want to be adopted, and I want to keep seeing my dad. I see my dad every Tuesday and that is enough. If I could not visit my dad next week, I would be a little bit sad."

Natalia stated: "If I could live with anyone in the world, I would live with my dad. My dad is my first choice because he bought us bikes, and because he has been there since I was born. [¶] I see my dad two days a week, and I would feel kind of sad if my dad had to cancel a visit." "If I am not able to live with my daddy, I want to be adopted by [the prospective adoptive parents]." "My visits with [them] are good. They showed me the dog they will give me if they adopt me, and we have gone to Boomers."

The juvenile court said the case was difficult. The children had a significant emotional attachment to their father. There was no doubt they loved him. However, they did not fully trust him to continue to do well. The court said the father's history showed that "when [he] fell back, he fell back hard, and it wasn't just using over a weekend." His lapses were very serious.

In weighing the benefits of adoption against maintaining the quality and strength of the parent/child relationships, the juvenile court said a plan of long-term foster care would expose

the children to the possibility of separation and multiple placements. With respect to guardianship, the court had handled many cases in which guardians requested termination of guardianship when their wards became teenagers, and it could not disregard that experience in making its decision. Here, the children had the opportunity to have a permanent home with the representation, which the court had no reason to doubt, the children could have continued contact with their father as long as he did well. The court found that the benefits of adoption outweighed the continuation of the parent/child relationships and terminated parental rights.

DISCUSSION

I

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

Sean contends the juvenile court erred when it denied his section 388 petition. He asserts he showed changed circumstances and proved it was in his children's best interests to return to his care or alternatively, to reinstate reunification services. Sean also claims the court erred when it did not hold an evidentiary hearing on the section 388 petition. He states because the erroneous denial of the section 388 hearing "infected" the section 366.26 hearing, reversal of the findings and orders under section 388 requires reversal of the findings and orders under section 366.26.

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).)

"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.* (1993) 5 Cal.4th 295, 310 (*Marilyn H.*); *In re Hashem H.* (1996) 45 Cal.App.4th 1791, 1798-1799; Cal. Rules of Court, rule 5.570(a).) "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 (*Zachary G.*)) The court must liberally construe the petition in favor of its sufficiency. (*Marilyn H.*, at p. 309.)

We review a denial of a hearing on a modification petition for abuse of discretion. (*Zachary G.*, *supra*, 77 Cal.App.4th at p. 808.) 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.)

When 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.) Here, the record shows that Sean had a significant and protracted history of substance abuse, crime and incarceration. His personal relationships were afflicted with drug use and domestic violence. His children were neglected. They were aware of his substance abuse and arrests. Sean left the children in the care of a drug addict for two months

without adequate provision for support. During the reunification period, Sean was expelled from two substance abuse recovery programs and drug court. He was arrested approximately six times for robbery, possession of controlled substance, possession of drug paraphernalia, driving under the influence, felony with a weapon and making criminal threats. One incident prompted a SWAT team response. He was incarcerated for approximately nine months during the children's dependency proceedings.

After his release from jail in February 2012, Sean took positive steps to stabilize his circumstances. In the four months prior to the section 388 hearing, Sean entered and completed a substance abuse recovery program, participating in a variety of supportive services. He obtained full-time employment, secured appropriate accommodations and found school and after-school programs for the children. Sean's treatment counselor said Sean was a model client. He was promoted at work.

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 (*Kimberly F.*))

Despite Sean's commendable efforts to stabilize his circumstances following his release from jail, the juvenile court could reasonably conclude that the evidence, viewed most favorably to Sean, would not sustain a favorable decision on the petition. (*Zachary G., supra,*

77 Cal.App.4th at p. 806.) In assessing the seriousness of the problems which led to the dependency and the reason for any continuation of those problems, the juvenile court could reasonably conclude those problems resulted from multiple factors, including Sean's abuse of drugs, alcohol and other substances, his volatile relationships with women who were also using drugs, his criminal activities and his inability to recognize how his poor choices affected his children. Sean's long history of substance abuse and crime, and his continued problems during the reunification period, support a finding that his problems were not easily removed or ameliorated. (*Kimberly F.*, *supra*, 56 Cal.App.4th at p. 532.)

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 juvenile court reasonably concluded that Sean had not successfully resolved or ameliorated his problems to the degree necessary to provide a safe and stable home for his children. (*Kimberly F.*, *supra*, 56 Cal.App.4th at p. 532.) This finding is supported by S.A.'s statement that although she would like to live with her father, she was concerned that he would continue to drink, do drugs and fight. She did not believe that she and her sisters would be safe in his care. The social worker said although Sean had made progress, his circumstances were not sufficiently stable to allow the children to safely return to his care.

The court is required to hold an evidentiary hearing only if the facts alleged at the hearing would sustain a favorable decision on the petition. (*Zachary G.*, *supra*, 77 Cal.App.4th at p. 806.) Here, the juvenile court reasonably concluded that the evidence of Sean's progress in the four months preceding the section 388 hearing was not sufficient to sustain a favorable

decision. We conclude the court did not abuse its discretion when it denied Sean's section 388 petition without a full evidentiary hearing and proceeded to a section 366.26 hearing.

II

A

Legal Framework for Termination of Parental Rights

At a section 366.26 hearing, the court may select one of three alternative permanent plans for the dependent child—adoption, guardianship or long-term foster care. (*In re Taya C.* (1991) 2 Cal.App.4th 1, 7.) If the child is adoptable, there is a strong preference for adoption over alternative permanency plans. (*San Diego County Dept. of Social Services v. Superior Court* (1996) 13 Cal.4th 882, 888; *Zachary G., supra*, 77 Cal.App.4th at pp. 808-809.)

A finding of adoptability requires clear and convincing evidence the child is likely to be adopted within a reasonable time. (*In re Zeth S.* (2003) 31 Cal.4th 396, 406 (*Zeth S.*); § 366.26, subd. (c)(1).) If the court determines that the child is adoptable, the court is required to terminate parental rights unless the parent shows that termination of parental rights would be detrimental to the child under one of the exceptions listed in section 366.26, subdivision (c)(1)(A) and (B). (*In re Lorenzo C.* (1997) 54 Cal.App.4th 1330, 1343-1345.)

One of those exceptions applies when a parent proves that he or she has "maintained regular visitation and contact with the child and the child would benefit from continuing the relationship." (§ 366.26, subd. (c)(1)(B)(i).) This court has interpreted the phrase "benefit from continuing . . . the relationship" to mean "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." (*In re Autumn H.* (1994) 27 Cal.App.4th 567,

575 (*Autumn H.*.) Where the parent has continued to regularly visit and contact the child, and the child has maintained or developed a significant, positive, emotional attachment to the parent, "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." (*Ibid.*)

The reviewing court determines whether the record contains substantial evidence from which the court could find clear and convincing evidence that the child was likely to be adopted within a reasonable time, and for substantial evidence to support the juvenile court's finding the child will not be greatly harmed by termination of parental rights. (*In re Gregory A.* (2005) 126 Cal.App.4th 1554, 1561-1562; *Zeth S.*, *supra*, 31 Cal.4th at p. 406.) If the findings are supported by substantial evidence, the reviewing court must affirm the juvenile court's rejection of the exceptions to termination of parental rights. (*Autumn H.*, *supra*, 27 Cal.App.4th at p. 576.)

B

There Is Substantial Evidence to Support the Court's Finding the Beneficial Parent/Child Relationship Exception Did Not Apply

Sean contends the juvenile court erroneously terminated parental rights when the evidence showed the children were fiercely and beneficially bonded with him. He objects to the Agency's characterization of his relationship with the children as that of a "friendly visitor." Sean points out that the finding of no harm to the children was premised on the adoptive family's unenforceable promise to allow the children to have continued contact with him. He

also contends the court erred by refusing to consider a plan of guardianship for the children. Sean argues adoption is inappropriate because he and his children have maintained strong relationships through regular contact and visitation, despite his personal failures and shortcomings.

We are not persuaded by the Agency's argument Sean was merely a "friendly visitor" to the children. The juvenile court found that the children loved their father and had a significant emotional attachment to him.³ The record shows the children confided in their father, missed him and wanted to return to his care. That is not the end of the analysis, as Sean contends. Where the parent has met the requirements of section 366.26, subdivision (c)(1)(B)(i) on its face, the court must then balance 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. (*Autumn H.*, *supra*, 27 Cal.App.4th at p. 575.)

Sean spent the reunification period using drugs, committing crimes—some violent—and serving time. His criminal history dated to 1998, with approximately 11 arrests occurring after one or more of the children were born. Sean had a history of poly-substance abuse. He repeatedly became involved with women who had substance abuse problems of their own and their relationships were volatile and abusive.

In reaching its decision, the juvenile court was not required to ignore Sean's unstable history. This is not, as Sean argues, imposing elevated reunification standards to determine

³ We remind the Agency of the standard of review that applies when the issue on appeal challenges the juvenile court's resolution of disputed factual questions. (*In re Michael G.* (2012) 203 Cal.App.4th 580, 584 ["Appellate practitioners would be well advised to remember it is the function of the trier of fact, not the appellate court, to determine the facts, and to cast their arguments in this court within the confines of that basic principle."].)

whether the beneficial parent/child relationship exception applied. Rather, a parent's circumstances necessarily affect the nature and quality of the parent/child relationship. Sean was arrested approximately six times in 2011. Natalia struggled emotionally after learning that he was in jail. S.A. loved her father but did not trust him to remain sober or nonviolent. Her sisters agreed.

In balancing the strength and quality of the children's relationships with Sean, the juvenile court made a difficult decision based on the practical realities of the children's circumstances. The children had an opportunity to have a stable, secure home with new, adoptive parents. The prospective adoptive parents were willing to allow the children to have continued contact with their father. The juvenile court was concerned that a plan of long-term foster care would lead to multiple—and possibly separate—placements for the children. Although guardianship is a legally viable permanent plan, the children's foster mother was only willing to assume guardianship of the children for two years. The children did not want to live with their paternal grandmother. The children's initial placement with their paternal grandfather and his wife lasted only four days before their grandfather asked the social worker to remove them. He did not want to adopt the children. From his initial refusal to continue to care for the children and his lack of interest in adoption, we draw the reasonable inference the paternal grandfather was not willing or able to provide a stable, permanent home to the children through guardianship or, if he were, the guardianship would prove to be unstable.

The juvenile court is not required to ignore the practical realities of a child's circumstances when it determines whether the child would be greatly harmed by termination of parental rights. Here, in view of Sean's history of instability, crime, repeated arrests and

incarceration, drug use, domestic violence and child neglect, the juvenile court could reasonably conclude that despite the children's significant emotional attachment to their father, the parent/child relationship did not promote the children's well-being to such a degree as to outweigh the well-being they would gain in a permanent home with new, adoptive parents. (*Autumn H., supra*, 27 Cal.App.4th at p. 575.) Further, the children's affection for the prospective adoptive parents and willingness to allow the adoption to proceed supports the finding they would not be greatly harmed by termination of parental rights. (*Ibid.*)

DISPOSITION

The findings and orders are affirmed.

HUFFMAN, J.

WE CONCUR:

McCONNELL, P. J.

HALLER, J.