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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

In re ANTHONY M., Jr., et al., Persons  
Coming Under the Juvenile Court Law.

SAN DIEGO COUNTY HEALTH AND  
HUMAN RESOURCES AGENCY,

Plaintiff and Respondent,

v.

ANTHONY M. et al.,

Defendants and Appellants.

D066067

(Super. Ct. No. NJ14767A-B)

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

Law Offices of Rosemary Bishop and Rosemary Bishop, under appointment by the Court of Appeal, for Defendant and Appellant Anthony M.

Patti L. Dikes, under appointment by the Court of Appeal, for Defendant and Appellant Jennifer R.

Thomas E. Montgomery, County Counsel, John E. Philips, Chief Deputy County Counsel, and Scott Starr, Deputy County Counsel, for Plaintiff and Respondent.

This action involves two boys, Anthony M., Jr. (Anthony Jr.) and Matthew M. The juvenile court denied a petition under Welfare and Institutions Code<sup>1</sup> section 388, filed by their mother, Jennifer R. (mother), seeking reinstatement of services and/or return of custody, and then terminated parental rights under section 366.26 and referred the children to the San Diego Health and Human Services Agency (the Agency) for adoptive placement.

Both parents appeal the denial of mother's section 388 petition. Mother asserts the juvenile court erred in (1) failing to conduct a full and fair evidentiary hearing on her section 388 petition, and (2) finding the beneficial relationship exception under section 366.26, subdivision (c)(1)(B)(i) did not apply to render termination of parental rights detrimental to the children. The father, Anthony M., Sr. (father), also seeks reversal of the termination of his parental rights and "joins and incorporates each and every argument set forth in Mother's brief to the extent they inure to his benefit." We affirm.

#### FACTUAL AND PROCEDURAL BACKGROUND

In January 2013 the Agency filed a petition in the juvenile court under section 300, subdivision (b)(1) when then two-year-old Anthony Jr. was found outside an apartment complex without adult supervision. Mother was arrested for felony child endangerment, and the Agency found there was a substantial risk he would suffer

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<sup>1</sup> Unless otherwise specified, all further statutory references are to the Welfare and Institutions Code.

"serious physical harm or illness." As a result of the petition involving Anthony Jr., the Agency filed a section 300, subdivision (j) petition as to Matthew, finding there was a substantial risk that Matthew would also be abused or neglected.

The Agency's detention report summarized the facts leading up to the petitions in this case. Father, mother, Anthony Jr. and Matthew were living out of a vehicle when Anthony Jr. left the vehicle while his parents slept. The manager of an apartment complex near where their car was parked found Anthony Jr. playing on the steps of the apartment complex at approximately 11:45 a.m. When he was unable to locate a parent or guardian at the complex, the manager called the police. The responding police officer indicated that Anthony Jr. could say words but could not tell him where he lived. After searching three nearby apartment complexes and numerous surrounding houses with no results, the officer took Anthony Jr. into custody.

Mother was aware when she awoke that Anthony Jr. was missing. However, she did not attempt to pick up Anthony Jr. until approximately 4:30 p.m., at which time she was detained by police. She reported to law enforcement that she waited so long because she was afraid of being arrested.

An Agency social worker responded and met Anthony Jr. He was clean, healthy, and without any visible marks or bruises. He was appropriately dressed but had no socks or shoes on. The family had a previous child welfare history and the parents each had criminal records. Father was a parolee at large for violating the terms of his parole. The police told the social worker that the mother had a drug history and was associated with a gang called the Deep Valley Crips.

The social worker thereafter interviewed mother at Las Colinas Detention Center. Mother said the family had spent the night in their car. They were parked near a friend's house by Oceanside High School. They got food at a 7-Eleven store and changed the boys' diapers in the parking lot of the store. They then decided to take a nap as they did not sleep very well at night when they were in the car. Mother stated the children were buckled in their car seats in the back seat. They awoke about 45 minutes later to the sound of Matthew crying. Matthew was still in the back seat but Anthony Jr. was missing. She had the father search for Anthony Jr. as she was afraid of being arrested.

Subsequently, mother went to talk to the manager of the apartment complex. When she arrived at the apartment complex, the police were there and they arrested her.

Matthew was not located and mother reported that he was with his father, a parolee at large, in a vehicle . However, she did not know father's whereabouts, and he did not have a working phone. Thereafter, on January 17, 2013, mother surrendered Matthew to the juvenile court, and he was placed in foster care with Anthony Jr.

At the January 2013 detention hearing, the juvenile court ordered out-of-home detention for both children and supervised visits with mother.

The Agency's January 2013 jurisdiction report stated that the children remained in out-of-home care. Mother stated that she believed the children should be returned to her care and she was unwilling to consider other options. Her primary goal appeared to be protecting the father.

In foster care, Anthony Jr. was initially aggressive with Matthew, but there were no significant concerns because it was believed that occurred because Anthony Jr. was

the first to arrive at the foster home and originally had all attention focused on him alone. The children appeared to have a close bond with each other.

The parents were advised that because their children were under three years of age when removed from parental care, they had six months to participate in and make substantive progress in court-ordered treatment programs.

Mother told the social worker that she had been raised by her mother and father and had been very close to her mother. She also reported that her father was an alcoholic and that he raped her when she was a teen. The incident was reported to law enforcement but no charges were filed. Her mother allowed father to move back into the home about three months later. Mother's sister took legal custody of her two older children. She sometimes left presents for them on the doorstep, but believed it was too late to repair her relationship with them.

Mother stated that she began to use methamphetamine around 2007 when she became homeless, but quit in 2010 when she became pregnant with Anthony Jr. When Anthony was three months old, mother went into drug treatment as a result of a drug charge. However, she was discharged from the program after three months due to a physical altercation with another resident. Mother also reported that she had been diagnosed with depression, anxiety, attention deficit hyperactivity disorder, and obsessive compulsive disorder. She stated she had been seeing a psychiatrist and was prescribed medications, but stopped taking them when she became pregnant with Matthew.

Mother met father in 2007 at a shelter for youth and they married three weeks later. The family was chronically homeless thereafter. Mother reported that there had

been several incidents of domestic violence between father and her, which resulted in law enforcement actions. She stated that there was an incident the previous July that resulted in father fleeing the scene and later turning himself in to his parole officer. Mother reported that the incident was due to a fight over cigarettes and a cell phone. Mother never received any treatment for domestic violence.

Subsequent reports by the Agency stated that during the six-month review period mother was involved in an altercation where methamphetamine was found, and also that mother was arrested in a separate incident for possession of methamphetamine for sale.

In a follow-up interview with father, he stated that he was a narcotics registrant, but claimed that he had not used drugs in several years. He also stated that he had spent significant time in jail. Father stated he was arrested for domestic violence, assault, possession of drugs, and "other drug charges." As a result of an incident in July 2012, he was ordered to stay away from mother. He did not feel this was reasonable as he believed he and mother should be together and jointly caring for the children.

Between the time of the detention report and the six-month review hearing, mother reported to the Agency several incidents of domestic violence committed by father. Additionally, on July 5, 2013, both parents were involved in a physical altercation with another woman in a hotel room where law enforcement found methamphetamine. The woman reported that she, mother and father had been using drugs in the hotel room and a fight ensued. Mother punched the woman and father also assaulted her, resulting in a bite mark and a cut to her lip.

In July 2013 father was arrested for a parole violation. In July 2013 he was also arrested for an assault and battery warrant. In September 2013 he was arrested on another battery warrant.

From April 2013 to August 2013, mother was permitted to have unsupervised visits with the children. The Agency reported that during the first three months of unsupervised visitation, she was adhering to the rules. She was on time for the pick-up and return, had provisions such as snacks and strollers, and was mindful of the children's schedules for naps and meals.

However, in August 2013, the unsupervised visitation was changed to supervised visitation following reports by law enforcement of illegal activity involving both parents. From August 2013 to September 2013, mother had four scheduled supervised visits and failed to arrive or call to cancel for one visit scheduled for August 29, 2013.

Another supervised visit was scheduled for September 19, 2013, but this visit was canceled by the Agency after it was discovered that mother was incarcerated the day prior to the visit. Unaware that the visitation had been cancelled, mother arrived as scheduled. It was reported that she was irate that the Agency had cancelled the visit because they assumed she would be unable to attend due to her incarceration the previous night.

On September 26, 2013, a visitation was cancelled due to reported car troubles. Mother had planned to get a ride with someone, but that person's car would not start. When she stated that it would take her more than 40 minutes to get there, the social worker informed her she could not keep the children waiting that long.

Mother arrived on time for a scheduled visitation on October 3, 2013, but was excessively late for her visit on October 4, 2013, leading to the visit's cancellation. On October 10, 2013, mother was nearly an hour late to her visit due again to reported trouble with her car. A friend was supposed to drive her, but his car ran out of gas. It was reported that mother was late to several of her supervised visits.

Father visited the children twice, on April 2, 2013 and April 16, 2013. In subsequent visits, he cancelled once and did not show up on another occasion, resulting in cancellation of his referral for supervised visits.

The services outlined in mother's case plan included individual therapy and parenting education. The Agency's October 31, 2013 status review report noted that mother failed to complete the 10-week parent education course. Mother failed to appear at two different appointments for therapy, and the therapist was unwilling to reschedule a third time.

The Agency's October 31, 2013 status review report also indicated that Anthony Jr. and Matthew remained together in the same foster home. It also noted that Anthony Jr. had developed issues with food. He would seek out food and gorge himself if given the opportunity. However, he was beginning to like vegetables and he was provided healthy meals. Anthony Jr. had been receiving behavioral services due to his tantrums and difficulty regulating self-control. Matthew was not receiving any behavioral services but had begun to imitate Anthony Jr. The foster parents reported they were monitoring his behavior.

On February 11, 2013, father was arrested for violating his parole. Due to this arrest, father was incarcerated during much of the six-month review period. On July 20, 2013, father was arrested again for a warrant on an assault and battery charge. This warrant was related to the incident that took place on July 5, 2013. On July 23, 2013, father was arrested for corporal injury to a spouse.

The services outlined in father's case plan included complying with the terms of his parole and completing parent education. However, the Agency's October 31, 2013 status review report noted father failed to complete the 10-week parent education course. Father also failed to comply with the terms of his parole as he was arrested in February 2013 for a parole violation, in July 2013 for an assault and battery warrant, and in September 2013, again for battery.

In May 2013 mother called the social worker to report four incidents of domestic violence between father and her. In one incident that occurred on May 10, 2013, the police were called to a fast food restaurant after mother reported father had beaten her up and choked her in a car in the parking lot. Mother sustained scratches to her face, bruises on her left eye, and redness to her neck. No charges were filed because mother and father failed to cooperate with police.

In the October 2013 case plan update, the Agency recommended a permanent plan of adoption for Anthony Jr. and Matthew. Adoption remained the Agency's recommendation in an addendum report dated December 19, 2013.

The Agency's December 2013 status review report addendum noted that mother had been incarcerated for criminal activity during the reporting period. Mother was

charged in two separate instances with possession of a controlled substance for sale and fighting in a public place.

On December 20, 2013, at the six-month review hearing, the court found that reasonable services had been provided but neither parent had made substantive progress with their respective case plans. The court ordered reunification services terminated.

The foster parents expressed an interest in adopting both children. In the Agency's April 17, 2014 section 366.26 WIC report, the social worker reported that they were adoptable given their young age, good general health, sociability, personality, and developmental characteristics. Moreover, if the foster parents did not adopt them, there were 37 families willing to adopt both children, 56 willing to adopt someone like Anthony Jr., and 72 willing to adopt someone like Matthew.

A few days before the contested section 366.26 hearing, mother filed a section 388 petition seeking the juvenile court return Anthony Jr. and Matthew or, alternatively, reinstate reunification services. In that petition, it was revealed that *one day* prior to the filing of the petition mother had enrolled in parenting education, and obtained housing at Interfaith Community Services Addiction Recovery Program (Interfaith). Mother asserted in the petition that she was not the same person she was in the past because she had since completed an HIV/STD class, enrolled in parenting education, and obtained housing at Interfaith. She also argued she had a renewed sense of purpose and understanding and was committed to doing what was best for the children.

The court denied mother's section 388 petition, finding there was not a substantial change in circumstances and, even if such a change existed, modification of the order was

not in the best interests of the children. The court found at the section 366.26 hearing that Anthony Jr. and Matthew were adoptable and none of the exceptions under section 366.26, subdivision (c)(1)(B)(i), applied to render termination of parental rights detrimental to them.

At the hearing the court stated:

"The Agency prepared a case plan for mother, which was reasonable, the mother [was] given . . . referrals, and mother was not able to make progress for the first six months. Part of that time mother was incarcerated. But there was a substantial period of time when mother was not, and did not make progress with the referrals."

The court also stated:

"So while I am pleased that mother's with Interfaith, she's been there for less than 24 hours. Her parenting class indicates that she first attended yesterday, which, again, I think is a positive step, but it does not amount to a substantial change in circumstance in this case so I cannot find that mother has carried her burden by a prima facie showing."

As noted, *ante*, both parents have filed timely notices of appeal.

## DISCUSSION

### I. DENIAL OF SECTION 388 PETITION

Mother asserts the juvenile court abused its discretion when it summarily denied her section 388 petition, terminated her parental rights, and followed the Agency's recommendation of adoption. She contends her petition stated a prima facie case showing her circumstances had changed because she now had housing, was not in custody, had entered an in-patient rehabilitation program, and was enrolled in parenting classes. She also asserts a modification of the prior orders was in the children's best

interests because they are part of a sibling group and a bond between them existed.

These contentions are unavailing.

*A. Applicable Legal Principles*

Under section 388, a parent, interested person or the dependent child 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; *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.) The court must liberally construe the petition in favor of its sufficiency. (*In re Marilyn H.*, at p. 309.)

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

*B. Analysis*

As we have noted, *ante*, mother began her participation in the services at Interfaith only one day prior to her filing the section 388 petition. After 18 months of failing to make progress in the reunification process, mother thus cannot show changed

circumstances sufficient to justify an evidentiary hearing. Based upon mother's history of substance abuse, domestic violence, and chronic homelessness, the juvenile court acted well within its discretion in denying further reunification services.

Mother asserts that because her being homeless was the main issue that led to the detention of the children, securing housing was a "huge" change of circumstances. We reject this contention.

Of greater importance than mother's lack of housing was a failure to show that she was progressing with the services provided by the Agency. Mother cannot show such progress, particularly given her history, simply because she enrolled in programs the day before filing the section 388 petition. Only substantial and continued participation and progress in those services would suffice to show changed circumstances.

Further, mother cannot show that continued reunification services promoted the children's best interests. As the Court of Appeal stated in *In re Baby Boy L.* (1994) 24 Cal.App.4th 596, 609-610:

"A parent's rights to the care and companionship of her child are, of course, compelling. But the child's rights to a stable and loving family are equally compelling, and in any decision regarding the child's custody, the two must be balanced. The balance between the parent's and the child's rights shifts after the child has been removed from the parent's home for a substantial time, owing to abuse or neglect by the parent, and the parent has failed to correct the problems which led to the removal. [Citation.] Accordingly, under California law, after reunification services are terminated in a dependency proceeding, the focus of the court's concern shifts from assisting the parent in reunification with the child to securing a stable new home for the child."

The facts supporting a termination of reunification services in *In re Baby Boy L.* are similar to the facts in this case:

"By the time of the [section] 366.26 hearing in this case, Baby Boy L. was nearly two years of age and had been removed from [the mother's] custody for well over eighteen months. This is not a case in which the record suggests that the mother's circumstances had changed for the better, and yet the court refused to receive evidence of the improvement. Quite the contrary. The mother remained entirely out of the picture for the first 13 months of the proceedings—the first 14 months of the child's life. Only then did she appear, requesting reunification. Three months later, she was in jail and remained there until approximately the latest time allowed for any continuation of reunification efforts. Three months after that, at the eleventh hour and the fifty-ninth minute, she offered a bare scintilla of proof that she was *beginning* to rehabilitate. But '[c]hildhood does not wait for the parent to become adequate.' [Citation.] A mere prima facie showing of changing—we hesitate to say, 'changed'—circumstances was not enough to require or justify a hearing on return of the child to her after two years." (*In re Baby Boy L.*, *supra*, 24 Cal.App.4th at p. 610.)

In sum, the court did not abuse its discretion in terminating parental services and initiating a permanent placement plan for the children.

## II. *BENEFICIAL PARENT-CHILD RELATIONSHIP EXCEPTION*

Mother asserts the juvenile court erred when it refused to apply the beneficial parent-child relationship exception to prevent the termination of her parental rights. This contention is unavailing.

### A. *Applicable Authority*

Adoption is the permanent plan favored by the Legislature. (*In re Autumn H.* (1994) 27 Cal.App.4th 567, 573.) If the court finds by clear and convincing evidence that a child is adoptable, it becomes the parent's burden to show that termination of parental

rights would be detrimental to the child because a specified statutory exception exists. (*Id.* at p. 574.) Under the exception found in section 366.26, subdivision (c)(1)(B)(i), the parent is required to show termination would be detrimental in that "[t]he parents have maintained regular visitation and contact with the child and the child would benefit from continuing the relationship." In *In re Brandon C.* (1999) 71 Cal.App.4th 1530, 1534, the court noted "[c]ourts have required more than just 'frequent and loving contact' to establish the requisite benefit for [the] exception." Moreover, to prevail on a claim the beneficial relationship exception to adoption exists, a parent must prove the child would be greatly harmed by the termination of parental rights. (*In re Autumn H., supra*, 27 Cal.App.4th at p. 575.)

In reviewing whether there is sufficient evidence to support the trial court's finding, the appellate court reviews the evidence in the light most favorable to the trial court's order, "giving the prevailing party the benefit of every reasonable inference and resolving all conflicts in support of the order." (*In re Autumn H., supra*, 27 Cal.App.4th at p. 576.)

#### B. *Analysis*

Mother fails to specify what harm, if any, the children would suffer if parental rights were terminated. Instead, she only describes some of the pleasant aspects of her visits.

By contrast, the social worker testified that the children would not suffer harm if parental rights were terminated. The social worker described the lack of a bond between mother and the children, the fact that her relationship with the children did not resemble a

parent-child relationship, the children's inability to identify their mother, and the fact that neither child depended upon mother to meet their physical or emotional needs.

Moreover, at the time of the section 366.26 hearing, Anthony Jr. was four years old and Matthew was two years old. They had resided with their caregivers since Anthony Jr. was two years old and Matthew was 15 months old.

In support of her claim that there is no substantial evidence to support the court's finding that no exception to adoption applied in this case, mother cites *In re Jerome D.* (2001) 84 Cal.App.4th 1200 and *In re S.B.* (2008) 164 Cal.App.4th 289. However, these cases do not support her position.

In *In re Jerome D.* (2000) 84 Cal.App.4th 1200 this court held that the juvenile court erred in determining that the mother had not demonstrated the type of beneficial relationship with Jerome required to invoke the exception to adoption. (*Id.* at pp. 1206-1209.) In doing so we observed that Jerome was nine years old and had lived with his mother for six and one-half years. (*Id.* at p. 1203.) In addition, Jerome expressed his wish to live with her again. (*Id.* at p. 1206.) Further, Jerome had been having unsupervised visits in his mother's home for two months before the section 366.26 hearing. Finally, Jerome called his mother "mom" or "mommy," and there was no person in his life, apart from his mother, with whom he had a beneficial relationship. Under the circumstances, the Court of Appeal concluded that insufficient evidence supported the juvenile court's conclusion that Jerome's mother failed to establish the type of relationship with Jerome that is necessary for the exception to adoption to apply. (*In re Jerome D.*, at p. 1207.)

In this case, by contrast, no evidence was presented to indicate that the children wished to live with their mother. Moreover, the children had lived with their caregivers for approximately half their lives. In addition, the evidence demonstrates that the children have benefitted from a special relationship with their caregivers, who expressed the desire to adopt them. These facts readily distinguish this case from *In re Jerome D.*

*In re S.B.* (2008) 164 Cal.App.4th 289 also does not support mother's position. She cites that case for the proposition that the beneficial parental exception may apply, even in the absence of either "day-to-day contact" (*id.* at p. 299) or a "primary attachment" (*ibid.*). *In re S.B.* recognized, however, that the exception does require evidence that the child would be "greatly harmed" by severance of the natural parent/child relationship. (*Id.* at p. 297, quoting *In re Autumn H.*, *supra*, 27 Cal.App.4th at p. 575.) In *In re S.B.*, the father had been the child's primary caregiver for three years. (*In re S.B.*, at p. 298.) A bonding study indicated that "because the bond between [the father] and [the child] was fairly strong, there was a potential for harm to [the child] were she to lose the parent-child relationship." (*Id.* at p. 296.) The social worker even admitted that there would be "some detriment" to the child if parental rights were terminated. (*Id.* at p. 295.) The juvenile court found that the father and the child had "an emotionally significant relationship . . . ." (*Id.* at p. 298.) There is no similar evidence in this case.

In sum, the juvenile court's decision not to apply the beneficial relationship exception is supported by substantial evidence.

DISPOSITION

The judgment is affirmed.

NARES, Acting P. J.

WE CONCUR:

O'ROURKE, J.

AARON, J.