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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

In re A.G., a Person Coming Under the
Juvenile Court Law.

SAN BERNARDINO COUNTY
CHILDREN AND FAMILY SERVICES,

Plaintiff and Respondent,

v.

ALBERT G.,

Defendant and Appellant.

E055085

(Super.Ct.No. J229138)

OPINION

APPEAL from the Superior Court of San Bernardino County. Barbara A. Buchholz, Judge. Affirmed.

William D. Caldwell, under appointment by the Court of Appeal, for Defendant and Appellant.

Jean-Rene Basle, County Counsel, Svetlana Kauper and Jamila Bayati, Deputy County Counsel, for Plaintiff and Respondent.

Appellant Albert G. (father) is the biological father of A.G. (the child). His parental rights as to the child were terminated. Father now contends that: (1) the juvenile court abused its discretion in denying his Welfare and Institutions Code¹ section 388 petition; and (2) the beneficial relationship exception applied. (§ 366.26, subd. (c)(1)(B)(i).) We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

On September 25, 2009, the San Bernardino County Children and Family Services (CFS) filed a section 300 petition on behalf of the child. She was approximately one week old at the time. The petition alleged that the child came within the provisions of section 300, subdivisions (b) (failure to protect), and (g) (no provision for support). The petition included the allegations that the child's mother (mother)² had a substance abuse problem, that she attempted suicide, that she had failed previous family maintenance plans, that father and another alleged father³ should have known that she had a substance abuse problem, and that father's whereabouts were unknown.

Detention

The social worker filed a detention report and stated that the child tested positive for methamphetamines at birth. Mother admitted using methamphetamines during her pregnancy and indicated that she had no prenatal care for the child. Mother informed the

¹ All further statutory references will be to the Welfare and Institutions Code, unless otherwise noted.

² Mother is not a party to this appeal.

³ The other alleged father, Arthur G., is not a party to this appeal.

social worker that she allowed her aunt to take legal guardianship of her three older children in December 2008.⁴ Father and mother were never married, and father's current whereabouts were unknown.

Father was located in time to receive notice for the detention. He appeared at the detention hearing on September 28, 2009. Father requested that there be paternity testing, since there was another alleged father. The court placed the child in the temporary custody of CFS and detained her in foster care. The court ordered paternity testing and ordered that there be no visitation for the alleged fathers until paternity was established.

Jurisdiction/disposition

The social worker filed a jurisdiction/disposition report on October 14, 2009. The social worker reported that the child was placed with her maternal great aunt. The child now lived in the same home with her three older half siblings, as the maternal great aunt had legal guardianship of them.

At a jurisdiction/disposition hearing on November 2, 2009, the court found that the child came within section 300, subdivisions (b) and (g), and declared the child to be a dependent of the court. The court found that father was the biological father of the child and ordered him to participate in reunification services. The child was removed from the parents, placed in the custody of CFS, and maintained in the home of the maternal great aunt. The court also ordered supervised visitation, twice a week.

⁴ The father of the three older children is Arthur G.

Six-month Status Review

The social worker filed a report on April 22, 2010 and recommended that father's services continue, but that mother's services be terminated. Mother completed a residential substance abuse program, but continued to use methamphetamine. Father was engaged in services. His plan included counseling, parenting education, and substance abuse testing. He completed a parenting education class, and made satisfactory progress in counseling before being terminated for missing three sessions. He tested clean for drugs. Father did not have a suitable home where the child could live with him. The maternal great aunt was willing to adopt the child should reunification efforts fail.

Father was visiting the child weekly, and he interacted appropriately with her. He fed her, changed her, and bathed her. However, father had not been showing up for visits the last two months.

At a contested six-month review hearing, the court terminated mother's services, but continued services for father.

12-month Status Review

The social worker filed a 12-month status review report on November 17, 2010, and recommended that father's services be terminated. The social worker reported that father was arrested for possession of a controlled substance on June 17, 2010, as a violation of his probation. Father denied drug use, despite his arrest. He was ordered to be incarcerated and was due to be out of jail in December 2010. Because of his incarceration, he was unable to visit the child.

At the contested 12-month review hearing on February 2, 2011, the court found that father was making “moderate” progress in alleviating the causes of the child’s removal. The court granted father an additional six months of reunification services. The court also ordered father to participate in an outpatient substance abuse program.

That same day, the maternal great aunt filed for de facto parent status. The court later granted the request.

18-month Status Review

The social worker filed an 18-month status review report on March 11, 2011. The social worker reported that father had been participating in services, and that he had completed the counseling and parenting education components of his case plan. However, he had not followed through with his objective to stay away from illegal drugs. He was incarcerated from August 26, 2010 to December 28, 2010, for possession of a controlled substance. Since his release, he enrolled and participated in a substance abuse program, but he was not scheduled to complete it until June 2011. He also maintained visitation with the child and appeared to be bonding with her. However, since being released from jail, father lived with his mother, and then moved out and stayed with friends or family. He apparently moved back in with his mother, but was not employed and had no source of income to help meet the child’s needs. The social worker recommended that services for father be terminated and that the court order adoption as the permanent plan. Father had had 18 months of services, and still had not completed his case plan. The child was thriving in her current placement and was bonded to the

maternal great aunt and her family. The maternal great aunt was committed to the child and willing to provide her with a permanent home.

The 18-month review hearing was held on May 10, 2011. Father testified and admitted that, at the time he was arrested for possession of a controlled substance on August 16, 2010, he was using controlled substances. He said he went for 12 years without using methamphetamine, and then only used it that one time when he was arrested. Father said he was living with his mother, father, and brother. He admitted that he was not in a position to take the child back now, but wanted more time. His plan was to have the child stay with his family until he could get a job and pay rent.

The social worker also testified at the hearing and said she did not believe the child could be safely placed in father's custody at that time, since he had not been able to demonstrate an ability to maintain sobriety. She noted that father had previously had a "falling out" with his mother, which was when he moved out of her residence. Although he was living with her again, the social worker was concerned that they may have another dispute. She was also concerned that father had not shown that he could "make it on his own." At that point, the child had been removed 20 months ago.

The court concluded that it would follow the department's recommendations to terminate services and set a section 366.26 hearing, since the proceedings were already at the 18-month review and the statutory time frame had run. The court stated that it was more concerned with the permanency of the child, at that point. The court set the section 366.26 hearing for September 7, 2011.

Section 366.26 and Section 388 Petition

The social worker filed a section 366.26 report on August 29, 2011, and recommended that parental rights be terminated, and that adoption with the current caregiver be the permanent plan.

A section 366.26 hearing was held on September 7, 2011. Father indicated that he intended to file a section 388 petition. Both parents set the matter for contest, and the court set the hearing for October 12, 2011.

Father filed a section 388 petition on September 16, 2011, requesting that the court return the child to his custody or, in the alternative, reinstate his services. As to changed circumstances, father alleged that he completed a substance abuse program, a parenting class, a relapse prevention class, and “strengthening families and nurturing fathers” classes. He also alleged that he had attended 12-step meetings, tested negative for all substances, maintained steady employment, had stable housing, and visited the child regularly. As for best interests of the child, father alleged: “This would allow my child and I to further develop our already strong bond and transition her into my care. It would be better for her to be in the care and custody of her father.”

A combined section 388 and 366.26 hearing was held on November 4, 2011. At the outset of the hearing, the parties stipulated that there had been a change of circumstances, and the first prong of the section 388 requirement had been met. The court accepted the stipulation and stated that “the only prong left in dispute would be the best interest of the minor prong.” The court heard testimony from the adoptions worker, father, and the maternal great aunt. The court then stated that it was mandated to look at,

since the 18-month review hearing, the permanency of the children, which was paramount. The court noted that the child had considered the maternal great aunt her mother since birth, and that the child lived with her siblings. The maternal great aunt was more than willing to adopt the child, and she had proven that over the course of the child's life. The court denied the section 388 petition and proceeded with the section 366.26 hearing.

Father asked the court to consider the bond between him and the child and then requested legal guardianship, rather than adoption as the permanent plan. The court found it likely that the child would be adopted, terminated parental rights, and ordered adoption as the permanent plan.

ANALYSIS

I. The Court Properly Denied Father's Section 388 Petition

Father argues that the court abused its discretion in denying his section 388 petition, claiming that the court was "unaware" that it had the discretion to modify its previous order terminating his reunification services and extend his services pursuant to section 366.22, subdivision (b). He contends that the court "may have denied his petition because [it] believed that statutorily authorized reunification services had been [exhausted] at 18 months." He claims that the court erroneously "assumed the petition was beyond any statutorily authorized reunification period" and that the focus had shifted the child's need for permanency and stability. We find no abuse of discretion.

A juvenile court order may be changed, modified or set aside under section 388 if the petitioner establishes by a preponderance of the evidence that (1) new or changed

circumstances exist, and (2) the proposed change would promote the best interest of the child. (*In re Stephanie M.* (1994) 7 Cal.4th 295, 316-317 (*Stephanie M.*)) A section 388 petition is addressed to the sound discretion of the juvenile court, and its decision will not be disturbed on appeal in the absence of a clear abuse of discretion. (*Id.* at p. 318.)

“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.

[Citation.] A court hearing a motion for change of placement at this stage of the proceedings must recognize this shift of focus in determining the ultimate question before it, that is, the best interest of the child.” (*Id.* at 317.)

The juvenile court here did not abuse its discretion in denying father’s section 388 petition, since he failed to show that a changed order would be in the child’s best interest.

The parties stipulated that there had been a change of circumstances, and the court recognized that the only issue left to decide was whether the proposed change would promote the best interest of the child. “[A] primary consideration in determining the child’s best interest is the goal of assuring stability and continuity.” (*Stephanie M., supra*, 7 Cal.4th at p. 317.) In his petition, father requested that the court return the child to his custody or, in the alternative, reinstate his reunification services and allow overnight and weekend visits. As to best interest of the child, he merely alleged that the change in order would allow him and the child “to further develop [their] already strong bond and transition her into [his] care.” Then, he simply concludes that “[it] would be

better for her to be in the care and custody of her father.” At the section 388 hearing, father similarly testified that the child “need[ed] to be with one of her parents,” and expressed that he loved her and would take good care of her. Father clearly failed to demonstrate *how* returning the child to his custody would be in her best interest.

In denying the section 388 petition, the court acknowledged father’s love for the child and the changed circumstances. However, since father’s reunification services had already been terminated, the court properly recognized that the focus had shifted from father’s interest in the care and custody of the child to the child’s need for permanency and stability. (*Stephanie M., supra*, 7 Cal.4th at p. 317.) The court noted that the child had resided with the maternal great aunt essentially since birth, and that she considered the maternal great aunt her mother.⁵ The court further noted that the child was living with her siblings, and that the maternal great aunt was more than willing to take on the responsibility of adopting the child. Considering the totality of the circumstances, the court stated that it had “to keep the child where the child believe[d] [was] her home.”

Father now argues that the court abused its discretion in denying his petition, claiming that it erroneously “assumed the petition was beyond any statutorily authorized reunification period and [that the] focus had shifted to [the child’s] need for permanency and stability.” He claims the court could have extended his services until September 25, 2011, or 24 months after his daughter was removed from his custody, pursuant to section

⁵ The court said that the child considered the maternal *grandmother* her mother from the day she was born. However, the court apparently misspoke and meant to refer to the maternal great aunt, since that is the relative the child was living with.

366.22, subdivision (b). Father’s argument is misplaced. Section 366.22, subdivision (b), provides in relevant part, that if the child is not returned to a parent or legal guardian at the 18-month review hearing “and the court determines by clear and convincing evidence that the best interests of the child would be met by the provision of additional reunification services to . . . a parent recently discharged from incarceration or institutionalization and making significant and consistent progress in establishing a safe home for the child’s return, the court may *continue* the case for up to six months for a subsequent permanency review hearing, provided that the hearing shall occur within 24 months of the date the child was originally taken from the physical custody of his or her parent or legal guardian.” (Italics added.) While section 366.22, subdivision (b), gives the court the discretion at the 18-month hearing to *continue* services up to 24 months, father’s services had already been *terminated*. The termination of his services is what prompted him to file the section 388 petition. Thus, the court had no discretion under section 366.22, subdivision (b), to grant the section 388 petition.

Ultimately, the court here properly evaluated the evidence, and “placing special weight on the child’s need for stability, as was appropriate at that stage of the proceedings, determined that [father] had not carried [his] burden of proof.” (*Stephanie M., supra*, 7 Cal.4th at p. 319.) It is clear that the court was well within its discretion in deciding that granting father’s request for placement, or the reinstatement of his services, was not in the child’s best interest.

II. The Beneficial Parental Relationship Exception Did Not Apply

Father contends that the court erred in not applying the beneficial parental relationship exception under section 366.26, subdivision (c)(1)(B)(i). He claims that the evidence demonstrated he had a “unique and significant relationship” with the child. We disagree.

At a section 366.26 hearing, the court determines a permanent plan of care for a dependent child. (*In re Casey D.* (1999) 70 Cal.App.4th 38, 50.) Adoption is the permanent plan preferred by the Legislature. (*In re Celine R.* (2003) 31 Cal.4th 45, 53.) If the court finds that a child may not be returned to his or her parents and is likely to be adopted, it must select adoption as the permanent plan, unless it finds a compelling reason for determining that termination of parental rights would be detrimental to the child under one of the exceptions set forth in section 366.26, subdivision (c)(1). One such exception is the beneficial parental relationship exception set forth in section 366.26, subdivision (c)(1)(B)(i). (See *In re Jerome D.* (2000) 84 Cal.App.4th 1200, 1206.) This exception applies when the parents “have maintained regular visitation and contact with the child and the child would benefit from continuing the relationship.” (§ 366.26, subd. (c)(1)(B)(i).) The phrase “benefit from continuing the relationship” refers 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.* (1994) 27 Cal.App.4th 567, 575 (*Autumn H.*)) It is the parent's burden to show that the beneficial parental relationship exception applies. (*In re Lorenzo C.* (1997) 54 Cal.App.4th 1330, 1345.)

In support of his position, father asserts that he fed the child, changed her diapers, bathed her during some of the visits, and that the child called him "da-da" and enjoyed his visits. He also asserts that he is the "only father she has ever known despite their lack of day-to-day contact," and that he completed the prerequisites for reunifying with her.

Father's interactions with the child do not even begin to demonstrate that his relationship with her promoted her well-being "to such a degree as to outweigh the well-being the child would gain in a permanent home with new, adoptive parents." (*Autumn H., supra*, 27 Cal.App.4th at p. 575.) Father has not proffered any evidence to support a finding that the child had a "substantial, positive emotional attachment [with him] such that the child would be greatly harmed" if the relationship was severed. (*Ibid.*)

In contrast, the evidence shows that the child had a strong bond with the maternal great aunt and her adult daughter, who were the prospective adoptive parents. The child had lived in their home since she was eight days old. They were successfully meeting her emotional and physical needs. The child was being raised with her three older siblings, and she was bonded with them. The prospective adoptive parents loved the child and wanted to make sure she was raised with her siblings. They were committed to providing the child with a stable, loving home.

We conclude that the beneficial parental relationship exception under section 366.26, subdivision (c)(1)(B)(i), did not apply here.

DISPOSITION

The order is affirmed.

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HOLLENHORST
Acting P. J.

We concur:

McKINSTER
J.

MILLER
J.