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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA**

**FOURTH APPELLATE DISTRICT**

**DIVISION TWO**

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

RIVERSIDE COUNTY DEPARTMENT  
OF PUBLIC SOCIAL SERVICES,

Plaintiff and Respondent,

v.

C.H. et al.,

Defendants and Appellants.

E055613

(Super.Ct.No. RIJ118059)

OPINION

APPEAL from the Superior Court of Riverside County. Matthew C. Perantoni,  
Temporary Judge. (Pursuant to Cal. Const., art. VI, § 21.) Affirmed.

Lori A. Fields, under appointment by the Court of Appeal, for Defendant and  
Appellant Father.

Rich Pfeiffer, under appointment by the Court of Appeal, for Defendant and  
Appellant Mother.

Pamela J. Walls, County Counsel, and Anna M. Deckert, Deputy County Counsel,  
for Plaintiff and Respondent.

Mother, C.H., and father, A.F., appeal from a judgment terminating their parental rights to S.F., born in 2007, and A.F., born in 2010. The children became dependents due to neglect, based on lack of supervision and the parents' drug use, as well as a history of domestic violence. (Welf. & Inst. Code,<sup>1</sup> § 300, subd. (b).) After one year of services, mother was awarded sole custody of the children. However, six months later, the dependency was reactivated when the parents engaged in domestic violence in the presence of the children and it was learned they were using drugs. Because the parents failed to comply with drug testing, the court denied services when it reestablished jurisdiction, and scheduled a hearing to select and implement a permanent plan of adoption. (§ 366.26.) Subsequently, parental rights were terminated.

On appeal, both parents argue there was a beneficial parent-child relationship warranting continuation of the relationship. In addition, mother argues the court erred (a) in denying reunification services;<sup>2</sup> and (b) denying her petition to modify the order denying services and setting the section 366.26. (§ 388.) We affirm.

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<sup>1</sup> All further statutory references are to the Welfare and Institutions Code, unless otherwise indicated.

<sup>2</sup> Recognizing that the issue was forfeited, mother filed a companion petition for writ of habeas corpus (case No. E056257), where she raises ineffective assistance of counsel for the failure to file a writ petition and the failure to submit the results of a hair follicle test (of questionable foundation and authenticity) conducted after the children

*[footnote continued on next page]*

## BACKGROUND

On May 13, 2009, 18-month-old S.F. was detained when the child was found wandering a busy street intersection at midnight; the parents were unaware she had left the residence. The parents were arrested the same day for being under the influence of controlled substances and the parents admitted engaging in domestic violence in the child's presence. Both parents had a history of drug use and drug-related arrests, and both tested positive for methamphetamine.

A juvenile dependency petition was filed alleging neglect (§ 300, subd. (b)) due to lack of supervision and the parents' history of drug abuse and domestic violence. The court sustained the petition, declared S.F. a dependent and removed her from her parents' custody. The court authorized placement with mother under the conditions that mother remain in compliance with the case plan, cooperate with the social worker, and submit a hair follicle test. The case plan required the parents to stay free from illegal drugs, participate in random drug testing, counseling, parenting education, and an approved substance abuse program.

At the time of the six-month review, mother was in jail in Orange County on drug and theft related charges. Mother was not in compliance with her case plan; she had not submitted to the court-ordered hair follicle testing or the random drug testing. The

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*[footnote continued from previous page]*

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were detained on the second petition when mother admitted to relapsing. We deny the petition by separate order.

Department of Mental Health recommended that mother enroll in an inpatient substance abuse program for at least 30 days. However, both parents visited S.F. regularly.

In January 2010, the social worker submitted an addendum report indicating that mother was pregnant with another child and that she had begun participating in services while in custody. A hair follicle test in January 2010 was negative for drugs on mother's part, but an on-demand drug test showed father had been drinking and using drugs. Because mother was testing clean, the court extended reunification services for another six months at the six-month review hearing held on February 9, 2010.

On April 28, 2010, a new dependency petition was filed respecting the child, A.F., who was born a week earlier. Toxicology screens of both mother and child were negative. However, father tested positive for methamphetamine use. A.F. was detained as to father, but mother was permitted to retain physical custody. On June 2, 2010, the juvenile court sustained the allegations of an amended petition as to A.F., ordering family maintenance services for mother and reunification services for father.

On June 23, 2010, S.F. was returned to her mother's physical custody, subject to continued family maintenance services. The return of S.F. was also conditioned upon mother's agreement that father would not reside with mother. Mother's maintenance services included a substance abuse prevention program. On January 4, 2011, the dependency proceedings as to both children were terminated, with orders granting sole physical and legal custody of the children to mother.

On June 28, 2011 the dependency was reactivated upon the filing of a new petition

after the parents engaged in domestic violence and used drugs. The parents had been arrested for child endangerment after father threatened to kill mother, having knives in his possession, and mother tried to stop father from leaving the home by blocking a moving vehicle with her baby in her arms. Mother was acting “out of it.”

Mother admitted to the social worker that she had relapsed and had used methamphetamine two months earlier; she had used methamphetamine as recently as a week before the incident that resulted in the reactivation of dependency proceedings. Father’s saliva was tested for drugs and the results were positive for methamphetamine use and marijuana. Mother’s saliva test results were inconclusive because she did not provide a testable sample. On June 29, 2011, the court detained the children in foster care and the court ordered mother to submit to a hair follicle test. Both S.F., now three years old, and A.F., now 14 months old, were detained out of home.

On July 7, 2011, the Department of Public Social Services (DPSS) sent mother a referral for a substance abuse assessment. When the social worker explained to mother the recommendation for substance abuse treatment and other services, mother informed the social worker that she did not feel that DPSS’s involvement was needed and did not feel any services were needed. As of July 11, 2011, mother had not submitted a hair follicle sample for testing and had not responded to the social worker’s request to arrange an interview. On July 21, 2011, the court again ordered mother to submit to a hair follicle test. As a consequence of the parents’ noncompliance, DPSS submitted an addendum report recommending a denial of reunification services on August 17, 2011.

On August 25, 2011, the date set for the jurisdictional hearing, mother's counsel informed the court she had taken her own hair follicle test but did not go to the testing arranged by DPSS. Mother presented a receipt which purported to show she had appeared for the hair follicle test arranged by DPSS, but DPSS had no record of mother's appearance on the date arranged for the test. County counsel informed the court that the testing facility did not have a technician by the name of the person on mother's paperwork and indicated that the receipt had been doctored. The social worker later determined that mother had not participated in a hair follicle test at the referral provider arranged by DPSS in July or August of 2011. The court therefore continued the jurisdiction hearing to September 26, 2011, in order to determine if mother's documents were altered.

The social worker submitted an addendum report on September 21, 2011, to provide additional information regarding the hair follicle test for the jurisdictional hearing. The social worker learned that there was no record of mother submitting a hair sample for testing and the name of the technician to whom mother claimed to have provided the sample was not an employee of the testing facility. Mother had not completed an assessment with the substance abuse program provider and had not enrolled in therapy for domestic violence.

The jurisdiction hearing proceeded on September 26, 2011, but mother left prior to the hearing to retain private counsel. Counsel informed the court that mother had issues with his handling of the case but that he did not believe it had risen to the level of a

conflict of interest. Counsel also requested a one-day continuance to confirm whether mother had undergone a hair follicle test, informing the court mother had been there to provide him with an email which looked official, purporting to be from Quest Diagnostics, indicating negative test results for the collection date of July 14 or July 15. The court denied the continuance.

The court sustained the petition and found both children came within section 300, subdivision (b), declaring them to be dependents of the court. The court removed custody of the children from the parents and made a finding that reunification services were not in the best interests of the minor pursuant to section 361.5, subdivision (b)(13). The court also set a hearing pursuant to section 366.26 for the selection and implementation of a permanent plan.

On September 28, 2011, the court served mother with a notice of the setting of the section 366.26 hearing and advised her of the need to seek an extraordinary writ to preserve any right to review.<sup>3</sup> On October 11, 2011, mother filed a notice of intent to file a writ petition. However, no writ petition was ever filed, resulting in a dismissal of the petition-related proceedings that had been initiated.<sup>4</sup>

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<sup>3</sup> The notice incorrectly states that the hearing was held on September 28, 2011, (the date of the notice) rather than September 26, 2011. However, since mother was present at court before the hearing was called, and because the incorrect date provided two additional days within which to file the notice of intent to file a petition for extraordinary writ, she was not prejudiced by the mistake.

<sup>4</sup> We take judicial notice of our order dated December 8, 2011, in the case of *C.H. v. Superior Court*, E054688. (Evid. Code, §§ 452, subd. (d), 459.)

On January 5, 2012, DPSS submitted its report for the section 366.26 hearing, and on January 13, 2012, it filed an addendum with an adoption assessment. On February 2, 2012, the date of the section 366.26 hearing, mother filed a petition to modify the prior court order denying services. (Request to Change Court Order, JV-180, § 388.) As grounds for the requested modification, mother alleged she had enrolled in programs at MFI Recovery Center seven days after the court had denied services to mother and that she had completed the program on her own. The documentation attached to her petition showed she signed for treatment programs through MFI Recovery Center on October 3, 2011, and had attended eleven 12-step meetings between October and December.

Father also filed a section 388 petition on the same date. His petition asserted he had completed a parenting program, attended anger management classes, and visited regularly. The court found that the parents' circumstances had not changed and denied both parents' petitions.

The court then found it was likely the children will be adopted and terminated parental rights. Both parents appealed.

## **DISCUSSION**

### **1. Mother's Challenge to the Denial of Reunification Services Was Forfeited.**

Mother argues that the juvenile court erred in denying reunification services at the disposition hearing. DPSS argues mother forfeited this argument by failing to file a writ petition following the disposition hearing. We agree.

The dispositional order by which reunification services were denied and a hearing pursuant to section 366.26 was scheduled is not appealable. (§ 366.26, subd. (l)(2); *In re Charmice G.* (1998) 66 Cal.App.4th 659, 670; *Wanda B. v. Superior Court* (1996) 41 Cal.App.4th 1391, 1395.) When a dispositional order denies reunification services and sets a section 366.26 hearing, it may be reviewed only by way of writ petition. (*In re Athena P.* (2002) 103 Cal.App.4th 617, 625.) The failure to take a writ from a nonappealable dispositional order waives any challenge to it. (*In re T.W.* (2011) 197 Cal.App.4th 723, 729, citing *Athena P.*, at p. 625.)

After the disposition, mother filed a notice of intent to file a writ petition. (*C.H. v. Superior Court of Riverside County*, E054688.) The record was certified and filed on October 25, 2011, but no writ petition was filed within the statutory period. We sent a notice to mother's counsel on November 22, 2011, regarding the default, but still no writ petition was filed. On December 8, 2011, we dismissed the petition.<sup>5</sup> Any challenges to the dispositional order denying reunification services and setting the section 366.26 hearing have been forfeited.

## **2. Denial of the Mother's 388 Petition Was Not an Abuse of Discretion.**

Mother argues the court should have granted her section 388 petition. We disagree.

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 evidence or

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<sup>5</sup> See footnote 4.

changed circumstances exist, and (2) the proposed change would promote the best interests of the child. (*In re Stephanie M.* (1994) 7 Cal.4th 295, 316-317.) The parent bears the burden to show both a legitimate change of circumstances and that undoing the prior order would be in the best interest of the child. (*In re Kimberly F.* (1997) 56 Cal.App.4th 519, 529.) Generally, the petitioner must show by a preponderance of the evidence that the child's welfare requires the modification sought. (*In re B.D.* (2008) 159 Cal.App.4th 1218, 1228.)

In evaluating whether the petitioner has met his or her burden to show changed circumstances, the trial court should consider: (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.*, *supra*, 56 Cal.App.4th at p. 532.)

The petition is addressed to the sound discretion of the juvenile court, and its decision will not be overturned on appeal in the absence of a clear abuse of discretion. (*In re Stephanie M.*, *supra*, 7 Cal.4th at p. 318; *In re A.A.* (2012) 203 Cal.App.4th 597, 612 [Fourth Dist., Div. Two].)

We find no abuse of discretion. At the time the court reactivated the dependency in June 2011, mother had admitted to relapsing in her use of methamphetamines, which, by her own admission, was not limited to a single occasion. Between June 2011 and

September 2011, when the court conducted the combined jurisdictional and dispositional hearing, mother refused to cooperate or communicate with the social worker and failed to submit a hair sample for hair follicle testing, although she was expressly ordered to do so by the court, more than once.

Mother purportedly submitted a hair sample to her own testing facility, but DPSS could not confirm that fact, and the results mother proffered were reported by a person unknown to the laboratory. This caused the social worker and the court to doubt the validity of the results. The exhibit attached to mother's habeas petition suffers from the same lack of evidentiary foundation. Thus, up through September 26, 2011, when the court denied reunification services, there was no evidence mother was clean and sober, willing to cooperate with reunification services, or committed to rehabilitation.

Mother did not enroll in any programs until October 3, 2011, after services were denied and only four months before the hearing to terminate parental rights. She did not submit proof of completion of the program at the time of the hearing. Assuming mother was clean and sober for the four months between October 2011 and February 2, 2012, when she filed her section 388 petition, her enrollment was insufficient to show changed circumstances. After all, mother had previously shown she could remain clean and sober for months at a time, but "still succumbed the temptation of illegal drugs." (See *In re Clifton B.* (2000) 81 Cal.App.4th 415, 423-424.) As the reviewing court observed in *In re Kimberly F.*, *supra*, 56 Cal.App.4th at page 531, footnote 9, "It is the nature of addiction that one must be 'clean' for a much longer period than 120 days to show real

reform.”

The juvenile court correctly concluded that mother was in the process of changing her circumstances, but they were not changed.

**3. There Is Substantial Evidence to Support the Trial Court’s Findings at the Section 366.26 Hearing.**

Both parents argue that their parental rights should not have been terminated due to the existence of a beneficial parent-child relationship. We disagree.

Section 366.26, subdivision (c)(1), provides that if the court determines, based on the [adoption] assessment and any other relevant evidence, that it is likely the child will be adopted, the court shall terminate parental rights and order the child placed for adoption. Once the court determines the child is likely to be adopted, the burden shifts to the parent to show that termination of parental rights would be detrimental to the child under one of the exceptions listed in section 366.26, subdivision (c)(1). (*In re C.F.* (2011) 193 Cal.App.4th 549, 553.) One such exception applies if termination of parental rights would be detrimental to the child because 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).)

We review the court’s findings on this issue under the substantial evidence standard of review. (*In re Michael G.* (2012) 203 Cal.App.4th 580, 589; *In re Autumn H.* (1994) 27 Cal.App.4th 567, 576.) We thus presume in favor of the judgment, considering the evidence in the light most favorable to the prevailing party, giving the prevailing

party the benefit of every reasonable inference and resolving all conflicts in support of the order. (*In re C.F.*, *supra*, 193 Cal.App.4th at p. 553; *Autumn H.*, at p. 576.)

The phrase “benefit from continuing the relationship” in section 366.26, subdivision (c)(1)(B)(i), 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 re Autumn H.*, *supra*, 27 Cal.App.4th at p. 575.) However, “frequent and loving contact” with the child is not enough to sustain a finding that the exception would apply, when the parents have “not occupied a parental role in relation to them at any time during their lives.” (*In re Beatrice M.* (1994) 29 Cal.App.4th 1411, 1418-1419.)

A parent is not required to show that child has a “primary attachment” to the parent, or to show the parent and the child have maintained day-to-day contact. (*In re S.B.* (2008) 164 Cal.App.4th 289, 299; *In re Casey D.* (1999) 70 Cal.App.4th 38, 51.) Instead, the court determines whether the parent has maintained a parental relationship, or an emotionally significant relationship, with the child, through consistent contact and visitation. (*In re S.B.*, at pp. 298, 300-301.)

Here, the parents appear to have satisfied the first prong of the exception—maintaining regular visitation and contact with the children. There is ample evidence that the parents visited regularly, behaved appropriately, and that the children enjoyed the visits. S.F. was reportedly bonded to her parents as well as her extended family members. S.F. liked living with her grandmother, the prospective adoptive parent, but

missed her parents. There is no information in the reports regarding a bond between A.F. and her parents or her caretaker. Nevertheless, the parents did not satisfy their burden of showing that the visits constituted “a compelling reason for determining that termination would be detrimental to the child,” or that the child would benefit from continuing the relationship. (§ 366.26, subd. (c)(1)(B)(i).)

A termination order is not subject to reversal whenever there is “some measure of benefit” in continued contact between parent and child. (*In re C.B.* (2010) 190 Cal.App.4th 102, 125, quoting *In re Jason J.* (2009) 175 Cal.App.4th 922, 937.) Despite the reports evidencing a bond between S.F. and her parents, the record shows the prospective adoptive mother has a well-established, loving and caring relationship with both children. There was no evidence presented that the parent-child relationship was so strong that severance of the bond would be detrimental to the children, or outweigh the benefit the child would gain in a stable, permanent, adoptive home.

There is substantial evidence to support the judgment.

#### DISPOSITION

The judgment is affirmed.

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RAMIREZ

P. J.

We concur:

McKINSTER

J.

MILLER

J.