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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

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

SAN BERNARDINO COUNTY
CHILDREN AND FAMILY SERVICES,

Plaintiff and Respondent,

v.

D.C.,

Defendant and Appellant.

E055736

(Super.Ct.Nos. J238575, CK72240
& JD117866)

OPINION

APPEAL from the Superior Court of San Bernardino County. Cheryl C. Kersey,
Judge. Affirmed.

Hassan Gorguinpour, under appointment by the Court of Appeal, for Defendant
and Appellant.

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

Mother lost custody of G.L. in 2008, when G.L. was five weeks old, due to neglect and chronic substance use. The Los Angeles County Juvenile Court asserted jurisdiction for the reunification period, but the case was transferred to San Bernardino after mother's services were terminated and when the court awarded placement to father, following a successful Welfare and Institutions Code¹ section 388 petition in 2010. After the transfer to San Bernardino, father lost custody in 2011 due to his substance abuse and G.L. was placed with relatives who wanted to adopt her. In the meantime, mother completed a substance abuse treatment program and other components of the previously terminated service plan, and sought reinstatement of services by way of a section 388 petition. The juvenile court denied the petition and terminated parental rights after an evidentiary hearing. Mother appealed.

On appeal, mother's sole argument is that the court applied the wrong burden of proof in denying her petition to modify the prior order. We conclude the court improperly applied the clear and convincing evidence standard to mother's section 388 petition, but that denial of the petition would have been a reasonable exercise of discretion even under the preponderance of evidence burden of proof. We therefore affirm.

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

BACKGROUND

G.L. was born in April 2008. When she was five weeks of age, mother drove to pick up G.L.'s teenaged half-sibling with G.L. in the car. The teenager recognized that her mother was intoxicated and refused to go with mother. The older child attempted to call 911, but mother grabbed the cell phone and threw it away from the car. When mother went to retrieve the cell phone, the older child took G.L. from the vehicle. Mother drove away, leaving the two children on the side of the road in a sand storm in Ridgecrest, California.

On May 22, 2008, the Kern County social services agency² filed a dependency petition as to G.L. alleging mother's inability or failure to supervise or protect the minor and her inability to provide regular care due to mother's substance abuse, within the meaning of section 300, subdivision (b). Mother submitted on the reports at the jurisdiction hearing, and the court made true findings as to the allegations of the petition, and ordered the matter transferred to Los Angeles County, which was mother's then county of residence.

Following the transfer, the Los Angeles County Juvenile Court conducted the disposition hearing as to the petition against the mother, along with a jurisdictional hearing on a subsequent petition (§ 342), containing allegations against father. The court removed custody of G.L. from the mother and placed her in the home of a maternal great-

² Due to the involvement of three separate social services agencies over the lengthy history of this case, we will use "SSA" as a generic reference.

aunt. Mother was ordered to participate in reunification services which included drug rehabilitation with random testing, parent education, an alcohol program with random testing, and counseling.

During the initial six-month review period, mother visited regularly, but she made no progress in her substance abuse issues. She enrolled in a recovery program in May 2008, but was discharged in July due to inability to pay. She rejected the social worker's suggestion that she enroll in a residential treatment program because she did not want to be locked down. Of the 10 drug tests she submitted between July and August of 2008, seven were negative, two were diluted, and one was positive for opiates.

In December 2008, mother requested that G.L. be placed with her in a treatment program sponsored by the National Council on Alcoholism and Drug Dependency program (NCADD), and the matter was calendared for a special hearing. After submitting an interim report on January 5, 2009, the social worker learned that mother had been terminated from that program without notifying SSA. Further, the program did not have accommodations to meet the needs of mother and child. Mother continued to take prescription medication, such as Vicodin (an opiate), Prozac, and Ativan, which showed up on drug tests. At the six-month review hearing, held on January 6, 2009, the court continued the dependency upon a finding that mother was in partial compliance with the case plan.

By March, 2009, the social worker submitted a report for father's six-month review hearing in which the worker recounted that the parents were "program-hopping,"

and were not serious about regaining custody. Mother had missed some drug tests and counseling sessions; of the three tests submitted by mother in December 2008 and January 2009, two were negative for drugs and alcohol, but one was positive for opiates. Mother also failed to provide proof of attendance at Alcoholics Anonymous (AA) meetings, although she did complete a parenting class.

In June 2009, the social worker reported that mother was in partial compliance with her case plan: she had attended 28 sessions of outpatient treatment between February and June 2009, but missed nine sessions, and her participation was considered marginal. Mother had submitted 11 drug tests during this period, and of these, nine were negative, but two were positive for opiates. The 12-month review hearing was held on July 29, 2009. G.L. was maintained in placement with her maternal great-aunt and mother's services were terminated because she had not made significant progress. The court identified a permanent plan of permanent placement with the great-aunt and scheduled a hearing pursuant to section 366.26. The court also ordered mother to remain on the list for random drug testing.

On January 28, 2010, father filed a petition to modify (§ 388) the prior order setting a section 366.26 hearing and seeking further reunification services. The social worker's interim report submitted in response to the petition noted mother's progress, indicating mother had completed 16 sessions of after care as well as a six-week parenting class, and had requested an inpatient drug program. However, she admitted she was taking Klonopin, a benzodiazepine, but was not under the supervision of a psychiatrist.

On March 29, 2010, the court granted father's petition, and ordered an additional six months of services to father. The section 366.26 hearing was taken off calendar.

On December 17, 2010, the social worker reported that father had completed all programs and recommended that G.L. be returned to his custody, notwithstanding mother's allegations that he was using drugs and alcohol. The report also noted that mother had tested negative on two drug tests, but that she had failed to show up for eight other scheduled tests between March and September 2010. In addition to the recommendation for placement with father, the social worker recommended transfer of the case to San Bernardino because the father now lived in that county.

On February 1, 2011, the court found father was in compliance with the case plan and ordered G.L. placed in his home under a family maintenance plan. In April 2011, the case was transferred to San Bernardino County.

In July 2011, the social worker reported that although father had been clean and sober for one and one-half years, he had relapsed between December 2010 and April 2011 by taking prescription pain medication. The paternal grandmother, with whom father and G.L. resided, reported seeing beer cans in father's room and learned that father had started drinking between March 2011 and June 2011. Notwithstanding the relapse, SSA recommended maintaining G.L. in placement with father because he agreed to attend an outpatient drug program and agreed to submit drug tests.

On July 21, 2011, SSA filed a supplemental petition (§ 387) alleging that the previous disposition had been ineffective because father had failed to drug test and did

not participate in the drug program. The minor was detained with the paternal grandparents. On August 30, 2011, the court made true findings on the supplemental (§ 387) petition, removed custody from father, terminated services, and ordered a hearing pursuant to section 366.26.

In January 2012, SSA submitted a report recommending termination of parental rights. The report noted that the paternal grandparents lived in a large multifamily residence where a paternal aunt and uncle also lived. The paternal aunt and uncle had been actively involved with G.L.'s care and they were interested in adopting her, while the grandparents preferred to remain grandparents. The social worker recommended adoption by the paternal aunt and uncle.

On January 27, 2012, mother filed a modification petition (§ 388) to seek reinstatement of reunification services. The petition alleged that mother had completed an inpatient substance abuse program, obtained individual counseling and currently resided in a sober living facility. The court ordered an evidentiary hearing on the petition. At the hearing, mother testified that she had been clean since April 6, 2011, that she completed a six-month inpatient program at Stepping Stones, had attended AA meetings daily since April 2011, and that she was currently in a sober living home. She acknowledged that her sober living home did not have accommodations for children, but was aware that the sister facility was intended for women with children. Since leaving the inpatient program, mother has been sober for four and one-half months.

At the conclusion of the evidence, county counsel argued that the petition should

be denied because mother needed to show by clear and convincing evidence that it is in the best interest of the minor to change the prior order. The court denied the section 388 petition. In so ruling, the court stated: “So the Court will deny your request under 388. It is established by clear and convincing [*sic*] the right for reunification services.” The court then proceeded with the section 366.26 hearing, where it found by clear and convincing evidence that the minor was adoptable and terminated parental rights.

Mother appealed.

DISCUSSION

Mother challenges the denial of her section 388 petition on the ground that the juvenile court erroneously applied the clear and convincing evidence burden of proof in determining that mother had failed to establish the elements necessary for modification of a prior order. We review the denial of a section 388 petition for abuse of discretion. (*In re Jasmon O.* (1994) 8 Cal.4th 398, 415-415; *In re Stephanie M.* (1994) 7 Cal.4th 295, 318; *In re S.J.* (2008) 167 Cal.App.4th 953, 959.)

The appropriate test for abuse of discretion is whether the trial court exceeded the bounds of reason. (*In re Stephanie M., supra*, 7 Cal.4th at pp. 318-319.) When two or more inferences can reasonably be deduced from the facts, the reviewing court has no authority to substitute its decision for that of the trial court. (*In re Daniel C.* (2006) 141 Cal.App.4th 1438, 1445, quoting *In re Stephanie M., supra*.) We agree that the court referred to the wrong burden of proof, but even under the proper burden of proof, reversal is not required.

a. Preliminary Matters

Before considering the merits, we address county counsel’s argument that mother’s failure to object to county counsel’s argument, in which the attorney representing SSA argued that “[m]other needs to show by clear and convincing [*sic*] that it’s in the best interest of the minor to change the prior Court order,” constitutes invited error and forfeits the claim. It is true that mother failed to object, but we have discretion to decide the issue. (*In re Sheena K.* (2007) 40 Cal.4th 875, 884.)

We also point out that the forfeiture doctrine is distinguishable from the invited error doctrine and that mother did not invite the error. The doctrine of waiver (or forfeiture) ordinarily prevents a party from arguing for the first time on appeal questions that were not presented to the trial court. (*In re Riva M.* (1991) 235 Cal.App.3d 403, 411-412.) The doctrine of invited error prevents a party from asserting an alleged error as grounds for reversal when the party through its own conduct induced the commission of the error. (*In re Karla C.* (2010) 186 Cal.App.4th 1236, 1267, citing *County of Los Angeles v. Southern Cal. Edison Co.* (2003) 112 Cal.App.4th 1108, 1118.)

It was county counsel who introduced the clear and convincing burden during arguments at the time of the hearing. Mother did not invite error.

b. Burden of Proof at Section 388 Hearings.

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 changed circumstances exist, and (2) the proposed change would promote the best

interests of the child. (*In re Stephanie M.*, *supra*, 7 Cal.4th at pp. 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 A.A.* (2012) 203 Cal.App.4th 597, 612; *In re B.D.* (2008) 159 Cal.App.4th 1218, 1228.)

There is no authority supporting the notion that a parent must show by clear and convincing evidence that it is in the best interests of the minor to change the prior order.³ To the contrary, the weight of authority supports the position that the petitioner requesting modification has the burden of proof requiring a preponderance of the evidence to show that the child's welfare requires such a modification. (*In re Jasmon O.*, *supra*, 8 Cal.4th at p. 415; *In re C.J.W.* (2007) 157 Cal.App.4th 1075, 1079-1080; *In re Daniel C.*, *supra*, 141 Cal.App.4th at p. 1445.)

In the present case, the record reflects that the juvenile court misspoke the burden of proof after county counsel had argued that mother was required to show by clear and convincing evidence that the proposed modification would be in the child's best interest. This was error, but does not require reversal.

³ County counsel may have been referring to the fact that a higher burden of proof applies when the SSA seeks to remove a child from the child's home by way of a section 388 petition. (See *In re M.V.* (2006) 146 Cal.App.4th 1048, 1057, citing *In re Michael D.* (1996) 51 Cal.App.4th 1074, 1084.) This case does not involve a removal of the child from the child's home.

Not every change in circumstance can justify modification of a prior order. (*In re A.A.*, *supra*, 203 Cal.App.4th at p. 612.) The change in circumstances must relate to the purpose of the order and be such that the modification of the prior order is appropriate. (*Ibid.*; *In re S.R.* (2009) 173 Cal.App.4th 864, 870.) In other words, the problem that initially brought the child within the dependency system must be removed or ameliorated. (*In re A.A.*, *supra*, 203 Cal.App.4th at p. 612.) In evaluating whether the petitioner has met his or her burden to show changed circumstances, the trial court considers (1) the seriousness of the problem that led to the dependency and the reason for any continuation of that problem; (2) the strength of relative bonds between the dependent child to both the parent and the 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.)

We also must bear in mind that after the termination of reunification services, a parent's interest in the care, custody and companionship of the child is no longer paramount. (*In re Stephanie M.*, *supra*, 7 Cal.4th at p. 317.) Rather, at this point, the focus shifts to the needs of the child for permanency and stability. (*In re Angel B.* (2002) 97 Cal.App.4th 454, 464.) When custody continues over a significant period, the child's need for continuity and stability assumes an increasingly important role. (*Ibid.*, citing *In re Stephanie M.*, *supra*, 7 Cal.4th at p. 317.) A court hearing a petition for modification must recognize this shift in focus in determining what is in the best interests of the child. (*In re Aaliyah R.* (2006) 136 Cal.App.4th 437, 448-449; *In re Edward H.* (1996) 43

Cal.App.4th 584.) There is a rebuttable presumption that continued foster care is in the child's best interests and that presumption is more difficult to overcome when the permanent plan is adoption. (*In re Aaliyah R.*, at pp. 448-449.)

Here, after four years of dependency jurisdiction over G.L., mother has finally participated in a substance abuse program, completing the inpatient part of the program and attending counseling sessions, as well as parenting classes. As one of the most difficult problems to overcome, we do not trivialize this monumental feat. However, the inpatient program was six months in duration and mother was still in a sober living program, so she still had work to do on her substance abuse problem of longstanding. Circumstances were not yet changed. The court reasonably determined that mother's situation was still changing, and it was too early to declare that the problems that led to the dependency had been overcome. (See *In re Casey D.* (1999) 70 Cal.App.4th 38, 47.)

Additionally, while the reports of visits with the child were positive, there was no showing how the best interests of G.L. would be served by depriving her of a permanent stable home in exchange for an uncertain future. (*In re C.J.W.*, *supra*, 157 Cal.App.4th at p. 1081.) G.L. has been removed from mother's custody since she was one month old and has spent almost her entire life placed with relatives. She has been in the home of her paternal grandparents, where her current adoptive parents also live, for over a year. A modification of the prior order would threaten her stability.

The petition alleged merely changing circumstances, since mother is not ready to assume custody of G.L.. While the court applied the wrong burden of proof, the result

would have been the same under any standard, even under a federal constitutional standard. The lack of changed circumstances (as opposed to changing circumstances) and the absence of any showing how the proposed change would benefit the minor render any error harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24 [87 S.Ct. 824, 17 L.Ed.2d 705]). We do not need to remand the matter to the juvenile court for a new hearing because even under the preponderance of evidence burden of proof, mother's petition would have been denied.

A modification of the prior order would mean delaying the selection of a permanent home for a child to see if mother might be able to reunify at some future point, and does not promote her stability or her best interests. (*In re Mary G.* (2007) 151 Cal.App.4th 184, 206.) The error did not result in a miscarriage of justice. (*In re N.V.* (2010) 189 Cal.App.4th 25, 31.) There was no abuse of discretion.

DISPOSITION

The judgment is affirmed.

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RAMIREZ

P. J.

We concur:

HOLLENHORST

J.

KING

J.