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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

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

SAN BERNARDINO COUNTY
CHILDREN AND FAMILY SERVICES,

Plaintiff and Respondent,

v.

J.S.,

Defendant and Appellant.

E055785

(Super.Ct.No. J239338)

OPINION

APPEAL from the Superior Court of San Bernardino County. Christopher B. Marshall, Judge. Affirmed.

Jacob I. Olson, under appointment by the Court of Appeal, for Defendant and Appellant.

Jean-Rene Basle, County Counsel, and Adam E. Ebright, Deputy County Counsel, for Plaintiff and Respondent.

J.S. (the mother) is the mother of S.S. (sometimes the child). She appeals from an order summarily denying her “changed circumstances” petition (Welf. & Inst. Code, § 388), arguing that she was entitled to a hearing on it. She also appeals from an order, made at the same time, terminating parental rights to S.S, arguing that the juvenile court should have applied the “beneficial parental relationship” exception. (Welf. & Inst. Code, § 366.26, subd. (c)(1)(B)(i).) Both contentions are frivolous. Accordingly, we will affirm.

I

FACTUAL AND PROCEDURAL BACKGROUND

In 2008, when the child was born, both she and the mother tested positive for methamphetamine. Earlier, three older children had been removed from the mother’s custody, and her parental rights to them had been terminated.

San Bernardino County Children and Family Services (the Department) provided the mother with voluntary services, including inpatient drug treatment, until 2009, when she left the state.

In June 2011, when the child was two, the Department received a report that the mother was committing prostitution and using methamphetamine. When a social worker investigated, the mother denied prostitution but admitted using both methamphetamine and heroin. She also admitted that the child had pinkeye as well as head lice. At all relevant times, the father was incarcerated.

The Department detained the child and filed a dependency petition concerning her. She was promptly placed in a foster home.

In September 2011, at the jurisdictional/dispositional hearing, the juvenile court found jurisdiction based on failure to protect (Welf. & Inst. Code, § 300, subd. (b)) and, solely with respect to the father, failure to support (*id.*, subd. (g)). It denied reunification services and set a hearing pursuant to Welfare and Institutions Code section 366.26 (section 366.26).

In January 2012, the child was placed with a prospective adoptive mother, who had already adopted two of the child's three older siblings.

Later in January 2012, the mother filed a petition pursuant to Welfare and Institutions Code section 388 (section 388). The juvenile court set it on the date already set for the section 366.26 hearing.

In February 2012, at the section 388 hearing, the juvenile court summarily denied the petition. At the section 366.26 hearing, it found that the child was adoptable and that termination would not be detrimental. Accordingly, it terminated parental rights.

II

SECTION 388 PETITION

A. *Additional Factual and Procedural Background.*

The mother's section 388 petition asked the juvenile court to grant her reunification services and to liberalize her visitation. As changed circumstances, it

alleged that she had successfully completed an inpatient substance abuse program, had started an outpatient program, and was attending 12-step meetings.

In connection with the section 388 petition, the juvenile court also considered three specified social worker's reports. These showed that the mother had a 17-year history of abusing drugs, including methamphetamine and heroin. She had already completed at least four inpatient substance abuse programs; she had enrolled in two additional programs that she did not complete.

The child had been in her prospective adoptive placement for about a month and had already formed a bond with the prospective adoptive mother.

After hearing argument, the juvenile court denied the section 388 petition without an evidentiary hearing. It explained, “[T]he Court doesn’t find that there is a change of circumstances and doesn’t find . . . that this would be in the best interest of the child.”

B. *Analysis.*

Section 388, subdivision (a), as relevant here, provides: “Any parent . . . may, upon grounds of change of circumstance or new evidence, petition the court in the same action in which the child was found to be a dependent child of the juvenile court . . . for a hearing to change, modify, or set aside any order of court previously made”

“Not every change in circumstance can justify modification of a prior order. [Citation.] The change in circumstances must relate to the purpose of the order and be such that the modification of the prior order is appropriate. [Citation.] In other words, the problem that initially brought the child within the dependency system must be

removed or ameliorated. [Citation.] The change in circumstances or new evidence must be of such significant nature that it requires a setting aside or modification of the challenged order. [Citation.]” (*In re A.A.* (2012) 203 Cal.App.4th 597, 612 [Fourth Dist., Div. Two].)

“Whether [the petitioner] made a prima facie showing entitling [the petitioner] to a hearing depends on the facts alleged in [the] petition, as well as the facts established as without dispute by the [dependency] court’s own file’ [Citation.]” (*In re B.C.* (2011) 192 Cal.App.4th 129, 141.)

“Section 388 petitions ‘are to be liberally construed in favor of granting a hearing to consider the [petitioner]’s request. [Citations.] The [petitioner] need only make a prima facie showing to trigger the right to proceed by way of a full hearing.’ [Citation.] ‘A “prima facie” showing refers to those facts which will sustain a favorable decision if the evidence submitted in support of the allegations by the petitioner is credited.’ [Citation.]” (*In re B.C., supra*, 192 Cal.App.4th at p. 141; see also § 388, subd. (d).)

“We review a denial of a Welfare and Institutions Code section 388 petition for abuse of discretion. [Citation.]” (*In re B.C., supra*, 192 Cal.App.4th at p. 141.)

“It is only common sense that in considering whether a juvenile court abuses its discretion in denying a section 388 motion, the gravity of the problem leading to the dependency, and the reason that problem was not overcome by the final review, must be taken into account.” (*In re Kimberly F.* (1997) 56 Cal.App.4th 519, 531, fn. omitted.) The *Kimberly F.* court “doubt[ed]” that “the parent who loses custody of a child because

of the consumption of illegal drugs and whose compliance with a reunification plan is incomplete during the reunification period” could “*ever* show a sufficient change of circumstances to warrant granting a section 388 motion. . . . It is the nature of addiction that one must be ‘clean’ for a much longer period . . . to show real reform.” (*Ibid.*, fn. 9, italics added.)

For example, in *In re Amber M.* (2002) 103 Cal.App.4th 681 the appellate court concluded that it was not an abuse of discretion to deny the mother’s section 388 petition, in part because she had a 17-year history of drug abuse, had relapsed twice previously, and had been clean for only about a year. (*Id.* at pp. 685-687.) Likewise, in *In re C.J.W.* (2007) 157 Cal.App.4th 1075 [Fourth Dist., Div. Two], this court concluded that it was not an abuse of discretion to deny the parents’ section 388 petitions, given that they had extensive histories of drug use, they had failed to reunify with other children, and “[t]heir recent efforts at rehabilitation were only three months old” (*Id.* at p. 1081.)

Here, identically, the mother had an extensive substance abuse history and a record of failure in treatment programs. Indeed, given that she had completed four previous inpatient substance abuse programs, the fact that she completed a fifth was not really a changed circumstance at all.

The mother had gone into drug treatment only about five months earlier. As the trial court noted, she had finished inpatient treatment in December 2011, yet she had not enrolled in outpatient treatment until February 2011 — less than two weeks before the section 366.26 hearing. Moreover, while her 12-step attendance had been regular as long

as she was in inpatient treatment, she failed to show that it had continued thereafter. On January 25, 2011, when she filed her section 388 petition, the attached sign-in sheets showed no attendance later than December 17, 2011. At the social worker's request, she promised to submit more recent sign-in sheets, but she failed to do so. And she never showed that she was, in fact, clean; she did not offer any evidence of drug testing. The juvenile court could reasonably conclude that this failed to meet the mother's burden.

In addition, the assertedly changed circumstances were irrelevant to the order that the mother sought to change. The mother did not claim that she had already become entitled, through her own efforts, to have the child returned to her custody. Rather, she sought reunification services. The juvenile court had denied reunification services under (among other subdivisions) Welfare and Institutions Code section 361.5, subdivision (b)(13). Thus, it found that she had a chronic history drug abuse and had both (a) resisted prior court-ordered treatment for this problem and (b) failed or refused to comply with a program of drug treatment required by her case plan on at least two prior occasions. This subdivision looks strictly at past failure; present success is irrelevant. Because this subdivision applied, the mother simply was not entitled to reunification services — not even if she was Betty Ford.

We therefore conclude that the juvenile court did not abuse its discretion by summarily denying the mother's section 388 petition.

III

THE BENEFICIAL PARENTAL RELATIONSHIP EXCEPTION

A. *Additional Factual and Procedural Background.*

The evidence before the juvenile court at the section 366.26 hearing consisted of four specified social worker's reports, plus the oral testimony of the mother and the social worker. We confine our review to this evidence (see § 366.26, subd. (c)(1)), which showed the following.

The child was 2 years 10 months old when she was removed. She had bonded with her initial foster mother. She had called her "mommy," viewed her as her mother, and interacted with her as a daughter with a mother.

In January 2012, the child was placed with the prospective adoptive mother. The prospective adoptive mother had already adopted two of the child's older siblings. Within days, the child was "comfortable" with the prospective adoptive mother and showed a "rudimentary attachment" to her. Within a month, she had adjusted well and had formed a bond. She appeared to be "happy, secure and comfortable" She called the prospective adoptive mother "Mom."

The mother had been visiting for an hour a week. The child called her "Mommy" and would hug and kiss her. The mother testified that, during visits, the child would say, "Mommy, I want to go home," and sometimes the child would cry "really bad." According to the social worker, however, when visits ended, the child was not distressed. In the social worker's opinion, the child did not regard the mother as her mother.

The juvenile court found that the mother had visited regularly. However, it also found that she was more of a “friendly visit[or]” than a “true parent[.]” It concluded that termination would not be detrimental.

B. *Analysis.*

As a general rule, at a section 366.26 hearing, if the juvenile court finds that the child is adoptable, it must terminate parental rights. (§ 366.26, subs. (b)(1) & (c)(1).) This rule, however, is subject to a number of statutory exceptions. (*Id.*, subd. (c)(1)(A), (1)(B)(i)-(1)(B)(vi).) One of these is the beneficial parental relationship exception, which applies when “termination would be detrimental to the child” because “[t]he parents have maintained regular visitation and contact with the child and the child would benefit from continuing the relationship.” (*Id.*, subd. (c)(1)(B)(i).) ““The burden falls to the parent to show that the termination of parental rights would be detrimental to the child under one of the exceptions. [Citation.]’ [Citations.]” (*In re C.B.* (2010) 190 Cal.App.4th 102, 122.)

“[C]ourt[s] ha[ve] interpreted the phrase ‘benefit from continuing the relationship’ in section 366.26, subdivision (c)(1)(B)(i) to refer 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.' [Citation.]" (*In re C.F.* (2011) 193 Cal.App.4th 549, 555.)

To invoke the beneficial parental relationship exception, "[a] parent must show more than frequent and loving contact or pleasant visits. [Citation.] 'Interaction between natural parent and child will always confer some incidental benefit to the child. . . . The relationship arises from the day-to-day interaction, companionship and shared experiences.' [Citation.] The parent must show he or she occupies a parental role in the child's life, resulting in a significant, positive, emotional attachment between child and parent. [Citations.] Further, . . . the parent must show the child would suffer detriment if his or her relationship with the parent were terminated. [Citation.]" (*In re C.F., supra*, 193 Cal.App.4th at p. 555, fn. omitted.)

"We review the trial court's findings for substantial evidence. [Citation.]" (*In re Dakota H.* (2005) 132 Cal.App.4th 212, 228; see also *In re Bailey J.* (2010) 189 Cal.App.4th 1308, 1314-1315.) "'On review of the sufficiency of the evidence, we presume in favor of the order, 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.' [Citation.]" (*In re C.F., supra*, 193 Cal.App.4th at p. 553.) Thus, "a challenge to a juvenile court's finding that there is no beneficial relationship amounts to a contention that the 'undisputed facts lead to only one conclusion.' [Citation.] Unless the undisputed facts established the existence of a

beneficial parental . . . relationship, a substantial evidence challenge to this component of the juvenile court's determination cannot succeed." (*Bailey J.*, at p. 1314.)

Here, there was absolutely no evidence that the child would be harmed by termination of parental rights — much less “greatly harmed.” When the mother was asked directly how termination would be detrimental to the child, she answered, “I am her mother. I provide for her. I take care of her. I protect her. I am her mother. I show her love. I’m her bear. She is my cub.” The child had been removed, however, precisely because the mother did *not* provide for her, take care of her, or protect her. The prospective adoptive mother was at least equally capable of protecting and providing for the child.

While the mother did visit regularly, the evidence did not show a “substantial” or “significant” positive emotional attachment. At best, it showed “pleasant visits.”

The mother notes that the child called her “Mommy.” However, the child also called the prospective adoptive mother “Mom.” Earlier, she had called the initial foster mother “Mommy.” In the social worker’s opinion, the child did not view the mother as filling the maternal role in her life.

The mother also claims that the child “would sometimes ‘cry really bad’ *when visits concluded.*” (Italics added.) Not so. The social worker specifically testified that, at the end of visits, the child was *not* distressed. When the mother was on the stand, she volunteered — her answer was not responsive to the question — that sometimes, the child cried “like really bad” *during* visits. However, she did not testify that this happened

at the *end* of the visits. On this record, the juvenile court was not compelled to conclude that the child cried because she was attached to the mother. Three-year-olds cry. That’s what they do.

The mother simply asks us to presume, based on social sciences literature, that the child had formed a “significant bond” with her during the “formative years.” This is a generalization. It is not necessarily true in a family where the mother is constantly seeking and using methamphetamine. Even if true, it does not necessarily preclude the child from going on to form an equally significant bond with a caring adoptive parent. And finally, it is no substitute for *evidence*.

We therefore conclude that the juvenile court did not err by finding that the beneficial relationship exception did not apply. Indeed, it would have erred if it had found that the exception *did* apply.

IV

DISPOSITION

The orders appealed from are affirmed.

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RICHLI
J.

We concur:

RAMIREZ
P. J.

CODRINGTON
J.