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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

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

RIVERSIDE COUNTY DEPARTMENT
OF PUBLIC SOCIAL SERVICES,

Plaintiff and Respondent,

v.

V.P.,

Defendant and Appellant.

E055793

(Super.Ct.No. SWJ1100183)

OPINION

APPEAL from the Superior Court of Riverside County. John M. Monterosso,
Judge. Affirmed.

Christopher R. Booth, under appointment by the Court of Appeal, for Defendant
and Appellant.

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

Defendant and appellant V.P. (mother) appeals an order terminating her parental rights to N.M. She contends that the juvenile court erroneously denied her petition for modification of an order denying her reunification services (Welf. & Inst. Code, § 388),¹ and erroneously failed to apply the beneficial parental relationship exception to the statutory preference for adoption (§ 366.26, subd. (c)(1)(B)(i)).

We will affirm the judgment.

FACTUAL AND PROCEDURAL HISTORY

On March 16, 2011, N.M., then 17 months old, was hospitalized, suffering from dehydration and pneumonia. When a doctor examined N.M., she observed bruises on the child's forehead and both cheeks, with soft tissue swelling on the right temporal area. She had a healed tear of the frenulum and small abrasions on both lips. She also had patterned bruises on both thighs and bruises on the right knee and left leg. The doctor also noted extensive Mongolian spots on her back and buttocks, but no bruising in those areas.² The back of the child's head was flattened (plagiocephalic), and a CT scan showed mild diffuse brain atrophy. The doctor stated that the flattening could be hereditary, or it could be the result of leaving the child lying supine for prolonged periods. The bruises on N.M.'s forehead and shin could have resulted from a fall, as

¹ All statutory citations refer to the Welfare and Institutions Code unless another code is specified.

² Mongolian spots are flat blue or blue-gray birthmarks which may be mistaken for bruises. They typically occur on the lower back and buttocks. (Mongolian blue spots: MedlinePlus Medical Encyclopedia (May 2011) <<http://www.nlm.nih.gov/medlineplus/ency/article/001472.htm>> [as of Oct. 29, 2012].)

mother reported, but the others appeared to have been inflicted. Mother also admitted having shaken the child. The doctor reported that N.M. was developmentally delayed, associated with the mild brain atrophy as shown by a CT scan. The doctor stated that the developmental delay could be hereditary, secondary to inadequate stimulation or secondary to head trauma. However, the CT scan revealed no bleeding, masses or skull fractures, and an MRI was negative. The doctor opined that returning N.M. to “an unchanged environment” could further jeopardize the child’s health and expose her to potential further injury and/or death. She reported her findings to the Riverside County Department of Public Social Services (DPSS).

A DPSS social worker contacted mother at her residence later that day. Mother and her boyfriend, A.M., rented a room in a house which was occupied by 17 people. Mother’s two older daughters lived with their paternal grandmother because there was not enough room for them in the single room which mother occupied with N.M., her boyfriend A.M. and her four-month-old son with A.M., J.M.³

Mother reported that she had taken J.M. to a doctor for an eye infection and an upper respiratory infection. The social worker observed that J.M. was “filthy dirty,” with long, dirty and unkempt fingernails and toenails. He had thick green mucous coming out of his nose and a thick white discharge from his eyes. Mother did not suction or wipe his nose or wash his eyes or face. She fed him formula which had been standing

³ The older daughters were in a voluntary legal guardianship with the paternal grandmother.

unrefrigerated for two hours. He was later hospitalized with conjunctivitis, an upper respiratory infection and head lice.

Mother admitted that she had shaken N.M. on March 9, when both children were crying and would not stop. She said that after she shook her, N.M. immediately stopped crying and went to sleep. She said, "I think I hurt her." On March 12, N.M. was unresponsive when mother talked to her, so she shook her again.

The social worker spoke to N.M.'s pediatrician, who reported that N.M. did not have any bruises when she was seen on March 14, two days before she was hospitalized. The pediatrician reported that N.M. was not meeting her age-appropriate milestones and that mother, too, was developmentally delayed.⁴

DPSS filed a petition pursuant to section 300 on March 18, 2011 as to both N.M. and J.M.⁵ The children were detained and placed together in foster care. At the jurisdiction/disposition hearing, the court sustained the allegation that while in mother's care, N.M. suffered serious physical harm inflicted nonaccidentally by a parent or

⁴ The detention report states that mother's sister also told the social worker that mother was "delayed," and the social worker stated that mother "appears to be delayed." Except for a brief reference in the forensic pediatric consultation report attached to the addendum report, this information does not appear in the reports which were admitted into evidence at the section 388/366.26 hearing and was not discussed at the hearing.

⁵ J.M. is not a party to this appeal. His father received reunification services, and J.M. remained in foster care as of the date of the hearing on termination of mother's parental rights. Because the two children were at different stages of their dependency, they were not considered a sibling set. N.M.'s father, who had been deported, is also not a party to this appeal.

guardian, including but not limited to bruising on her legs and thighs and bruising on two planes of her face, and that mother had admitted to shaking the child on at least two occasions. (§ 300, subd. (a).) It also sustained the allegations that the child was at risk of serious physical harm, in that mother neglected the child's well-being by failing to provide adequate and appropriate medical attention, resulting in the hospitalization.

The court denied reunification services for mother pursuant to section 361.5, subdivision (b)(6), finding that N.M. had suffered severe physical harm and that reunification was not in the child's best interest.⁶ The court set a hearing to terminate parental rights and to determine a permanent plan for N.M. The court ordered continued supervised visitation for mother.

Mother filed a notice of intent to file a writ petition, pursuant to California Rules of Court, rule 8.450, but later withdrew it.

When N.M. was first placed in foster care, she did not walk. She had poor communication skills and preferred to play alone. Before the section 366.26 hearing, she had begun to walk and talk and had developed her fine and gross motor skills. After she was placed into a prospective adoptive home on November 21, 2011, her communication skills improved further. She had begun receiving services from Inland Regional Center,

⁶ Section 361.5, subdivision (b) provides that reunification services need not be provided if the court determines, by clear and convincing evidence, "(6) That the child has been adjudicated a dependent pursuant to any subdivision of Section 300 as a result of severe sexual abuse or the infliction of severe physical harm to the child, a sibling, or a half sibling by a parent or guardian, as defined in this subdivision, and the court makes a factual finding that it would not benefit the child to pursue reunification services with the offending parent or guardian."

including speech therapy. She was learning many age-appropriate skills and had begun to socialize and to become much more verbal and affectionate.

Mother visited N.M. and J.M. consistently. However, the DPSS social worker who testified at the hearing stated that she was generally passive during the visits, and did not engage N.M. in stimulating play or interact with her verbally. Even during later visits, when she did interact more with N.M., the social worker opined that she did not adequately engage the child or stimulate her in an age-appropriate manner. J.M.'s father visited at the same time as mother, as the two children were in the same foster home. Visitation monitors observed that N.M. appeared to be more bonded with J.M.'s father than with mother. He interacted far more with N.M. during visits than mother did. N.M. would immediately run to him and was bright and affectionate with him.

Before the section 366.26 hearing, mother filed a petition pursuant to section 388 to modify the order denying her reunification services. She provided documentation that showed that she had completed a parenting course, an anger management program and a domestic violence program. She had also engaged in counseling. She admitted shaking N.M. and said she had felt remorseful ever since it happened. She asserted that reunification was in the child's best interest because she had learned better parenting skills.

The court set a hearing on the modification petition for the same date as the section 366.26 hearing. The court denied the petition. It then terminated parental rights and selected adoption as the permanent plan.

Mother filed a timely notice of appeal.

LEGAL ANALYSIS

1.

THE COURT PROPERLY DENIED THE SECTION 388 PETITION

Mother filed a petition pursuant to section 388, seeking the opportunity for reunification services with the ultimate goal of reunification with N.M. She contended that she had learned better parenting skills through the courses she had taken. The juvenile court denied the petition because, despite mother's commendable efforts at educating herself, she did not seek education in the areas most relevant to the specific issues in her case, i.e., child battering, dealing with infants and toddlers, and most importantly, dealing with N.M.'s developmental and medical issues.⁷ Moreover, the court was deeply troubled by mother's apparent lack of maternal instinct as reflected by her failure to recognize, without having to be told, that shaking a baby or small child is dangerous and can result in brain injury or death, as well as by her failure to notice her daughter's developmental delay. The court further observed that the description of mother's conduct during visitation showed that she was more a passive observer than an engaged and engaging participant.

A person filing a section 388 petition has the burden to show by a preponderance of the evidence that there is new evidence or that there are changed circumstances that

⁷ The court and DPSS were skeptical of mother's efforts in part because one of the courses she took was designed to help parents learn to deal with adolescents rather than toddlers.

make modification of a prior order in the best interests of the child. (*In re Stephanie M.* (1994) 7 Cal.4th 295, 317.)

Mother contends that she met her burden of proving changed circumstances because she demonstrated remorse for having shaken N.M. and demonstrated a “quantum leap” in her parenting skills, as reflected in her completion of parenting classes, an anger management course and counseling.

When a party who had the burden of proof on an issue challenges a finding which reflects the trier of fact’s rejection of that party’s evidence, “the question for a reviewing court becomes whether the evidence *compels* a finding in favor of the appellant as a matter of law. [Citations.] Specifically, the question becomes whether the appellant’s evidence was (1) ‘uncontradicted and unimpeached’ and (2) ‘of such a character and weight as to leave no room for a judicial determination that it was insufficient to support [the] finding.’ [Citation.]” (*In re I.W.* (2009) 180 Cal.App.4th 1517, 1528, italics added.) Stated another way, mother’s challenge to the juvenile court’s finding that no change in circumstance had occurred amounts to a contention that the “undisputed facts lead to only one conclusion,” (*id.* at p. 1529; see also *In re Bailey J.* (2010) 189 Cal.App.4th 1308, 1314), i.e., that a change in circumstances *did* occur.

The evidence mother relies on to contend that the juvenile court should have found changed circumstances is by no means undisputed, nor is it of such weight and character as to “leave no room for a judicial determination that it was insufficient to support [the] finding.’ [Citation.]” (*In re I.W., supra*, 180 Cal.App.4th at p. 1528.) In particular,

although both DPSS and the court acknowledged that mother had completed the classes, neither was persuaded that she truly benefitted from them. The most serious concern for the court was mother's ability to care for N.M.'s needs. The social worker testified that she did not believe, based on her observations, that mother had the insight to ask the right questions or know whom to ask in order to provide the care required by N.M.'s developmental delay. She did not believe that parenting classes would enable mother to develop that insight.

The social worker also testified that although reports from the visitation monitors showed that mother interacted more with N.M. during more recent visits than she had at first, mother's interactions were still not adequate to meet N.M.'s need for stimulation. She testified that children N.M.'s age need a lot of "back and forth" interaction, both physical and verbal, but that even in the more recent visits, mother did not adequately interact verbally with N.M. or stimulate her in an age-appropriate manner. She believed that mother tried, but simply did not know how to interact or bond with her daughter. The social worker acknowledged that mother did manage to engage and interact with N.M. at some visits, but she nevertheless did not believe that mother's lack of insight into her daughter's needs would be rectified by parenting classes to the point that N.M. would be safe in mother's care. The reports from the parenting class show that mother was attentive but passive in the classes as well, and the social worker believed that mother was merely going through the motions.

As an example of mother's failure to internalize the lessons she claimed to have learned, the social worker testified that although in her declaration in support of the petition, mother stated that one skill she had learned was how to deal with it when children were fighting over a toy, the DPSS worker who supervised a visit on December 22, 2011—two months before the hearing—reported that when N.M. and J.M. were fighting over a toy, ““mother seemed limited in her ability to understand this or do anything to prevent it. She would simply comfort the children when it happened.”” From this, the social worker concluded that mother had not internalized what she had learned and had not benefitted from the courses she took.

Mother's failure to alert either DPSS or the foster mother to N.M.'s history of seizures also bears out the court's concern about mother's ability to provide adequate care. On December 24, 2011, N.M. had a seizure and the prospective adoptive mother took her to the emergency room. When she told mother about the seizure, mother asked if a seizure is when the eyes roll back and the child turns purple and stops breathing. When the prospective adoptive mother confirmed that that is a seizure, mother replied that N.M. had had three previous seizures. She had not provided that information as part of N.M.'s medical history. And, when she next visited with N.M., she did not ask the prospective adoptive mother any questions about the seizure or about N.M.'s current status.

Based on this evidence, it is clear that mother's evidence does not compel the conclusion that her circumstances had changed. Accordingly, her challenge to the court's

ruling on this prong of her section 388 petition fails. (*In re Bailey J., supra*, 189 Cal.App.4th at p. 1314.) Because mother has not succeeded in challenging the court's ruling on the changed circumstances prong, we need not address the second prong, i.e., whether modification of the order denying services was in N.M.'s best interest.

2.

THE BENEFICIAL PARENTAL RELATIONSHIP EXCEPTION DOES NOT APPLY

After termination of reunification services, the focus of juvenile dependency proceedings is on the child's needs, including his or her need for a stable, permanent home. Consequently, the statutory preference for a permanent plan for a dependent child is adoption, and if the court finds that the child is adoptable and is reasonably likely to be adopted, the court must terminate parental rights and order the child placed for adoption unless one of the exceptions provided for in section 366.26, subdivision (c) applies.

(§ 366.26, subd. (c); *In re Celine R.* (2003) 31 Cal.4th 45, 53.)⁸

Section 366.26, subdivision (c)(1)(B) provides that even if the court finds that the child is adoptable and that there is a reasonable likelihood that the child will be adopted, the court may nevertheless decline to terminate parental rights if it finds a "compelling reason for determining that termination would be detrimental to the child" including the

⁸ Mother contends that the permanence of adoption is illusory because an adoptive parent can abandon a child, just as a natural parent can. That may be true, but we must abide by the Legislature's enunciated preference for adoption once reunification has failed. (*In re Celine R., supra*, 31 Cal.4th at p. 53.)

following: “The parents have maintained regular visitation and contact with the child and the child would benefit from continuing the relationship.” (§ 366.36, subd. (c)(1)(B)(i).)

In order to prevail in asserting the parental relationship exception, the parent must demonstrate both that he or she has maintained regular visitation and contact with the child and that a continued parent-child relationship would “promote[] 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. . . . 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; see *In re S.B.* (2008) 164 Cal.App.4th 289, 297.) “[T]he parent must show more than frequent and loving contact, an emotional bond with the child, or pleasant visits . . . the parent must prove he or she occupies a parental role in the child’s life [Citations.]” (*In re Dakota H.* (2005) 132 Cal.App.4th 212, 229.) The parent must also show more than a relationship which may be beneficial to the child to some degree but does not meet the child’s need for a parent. (*In re Jasmine D.* (2000) 78 Cal.App.4th 1339, 1348.)

The burden of proof is on the party seeking to establish one of the exceptions to the adoption preference. (*In re I.W., supra*, 180 Cal.App.4th at p. 1527.) Accordingly, unless the evidence compels a finding in mother’s favor, her challenge to the court’s

finding that the exception does not apply must fail. (*In re Bailey J., supra*, 189 Cal.App.4th at p. 1314.)

Here, it is undisputed that mother visited regularly and frequently with N.M. Mother focuses her argument on the evidence which showed that she was much more engaged with N.M. during visits and was much more attuned to N.M.'s physical and emotional needs than the social worker represented to the court. She also points out that a normal two year old will show independence and explore her environment on her own rather than being "joined at the hip" to her parent. Accordingly, N.M.'s interest in playing with the toys or other children present during visits should not be seen as evidence that she lacked a "fierce" bond with mother. She also relies on law review articles which discuss the value of a child's bond to his or her biological parents. Even if we assume that mother and N.M. shared some degree of a parent/child bond, and that the relationship conferred some degree of benefit on N.M., however, this evidence does not compel the conclusion that the bond was of such depth and strength that severing the relationship would result in serious detriment to N.M. (*In re Autumn H., supra*, 27 Cal.App.4th at p. 575.) Moreover, "[b]ecause a section 366.26 hearing occurs only after the court has repeatedly found the parent unable to meet the child's needs, it is only in an extraordinary case that preservation of the parent's rights will prevail over the Legislature's preference for adoptive placement." (*In re Jasmine D. supra*, 78 Cal.App.4th at p. 1350.) Mother has not persuaded us that this is such an extraordinary

case, or that the juvenile court abused its discretion in not finding a compelling reason not to terminate parental rights. (*In re Bailey J.*, *supra*, 189 Cal.App.4th at p. 1315.)

DISPOSITION

The order terminating parental rights is affirmed.

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MCKINSTER
Acting P. J.

We concur:

RICHLI
J.

CODRINGTON
J.