

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

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

SAN BERNARDINO COUNTY
CHILDREN AND FAMILY SERVICES,

Plaintiff and Respondent,

v.

C.B. et al.,

Defendants and Appellants.

E056453

(Super.Ct.No. J232389)

OPINION

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

Donna P. Chirco, under appointment by the Court of Appeal, for Defendant and
Appellant C.B.

Merrill Lee Toole, under appointment by the Court of Appeal, for Defendant and
Appellant A.S.

Jean-Rene Basle, County Counsel, and Regina A. Coleman, Deputy County Counsel, for Plaintiff and Respondent.

A.S. (mother) and C.B. (father) appeal an order terminating their parental rights to K.B. and denying mother's petition for modification of a prior order. We will affirm the judgment.

FACTUAL AND PROCEDURAL HISTORY

Eight-month-old K.B. was detained at Loma Linda University Medical Center on April 16, 2010, because he had suffered a skull fracture. The fracture pattern was not typical for accidental events. However, there was no evidence that either parent had caused the injury, and following investigation, San Bernardino County Children and Family Services (CFS) concluded that he had most likely been injured while in the care of family or friends. Father, who was 18 years old, did not live with mother and K.B. Mother, who was 17 years old, usually left K.B. in the care of her guardian while she went to school.¹ On one occasion, when mother's guardian was ill, mother allowed K.B. to stay with a friend of her mother. It was later discovered that the friend had an arrest record for felony child abuse and endangerment.

A petition pursuant to Welfare and Institutions Code section 300² was filed on April 20, 2010. It alleged that K.B. had been physically abused and suffered a skull

¹ Mother's mother was incarcerated at Chowchilla State Prison, and mother lived with the mother of a friend, who was her legal guardian.

² All statutory citations refer to the Welfare and Institutions Code.

fracture while in the parents' care and custody and that the parents had failed to protect him. K.B. was released from the hospital on April 23, 2010, and placed in foster care. The juvenile court ordered that he not be placed with any relative pending the jurisdiction and disposition hearing. Reunification services were ordered for both parents.

At the jurisdiction and disposition hearing, the court found the allegations of the petition true and declared K.B. a dependent. K.B. was placed in the home of a paternal cousin.³ The court found that the parents had complied with the initial services ordered at the detention hearing and had made progress in alleviating the underlying reasons for the removal. The court found father to be the presumed father, and ordered further reunification services and supervised visitation for both parents.

By the time of the six-month review hearing, mother was participating in the Transitional Housing Program Plus (THP+), which provided a "safe living environment for young adults transitioning from foster care into independent living." Mother's former guardian was participating in the program along with her and served as mother's host family. Through the program, mother hoped to maintain stable housing, learn to budget and use a bank account, and develop her skills in maintaining a home. Father, who had

³ Although the cousin was initially made the child's primary caregiver, the court later made the cousin's mother the primary caregiver, in that the cousin was 19 years old, lived with her mother and worked during the day, and her mother would in any event be providing the majority of the child's care. After a supplemental petition pursuant to section 387 was filed, K.B. was removed from the aunt's care because she allowed mother to be with K.B. without supervision. The aunt found it too difficult to enforce the court's order for no unsupervised visitation because she was "family" and agreed with the decision to remove him from her home. K.B. was then placed in a licensed foster home.

two prior robbery convictions, had violated his probation and was incarcerated at Glen Helen Rehabilitation Center. Father had also been visiting before he was incarcerated. He intended to complete his services as soon as he was eligible to do so, during the last two months of his incarceration.

K.B. had been removed from his former foster home because the foster mother's smoking was causing him respiratory problems. He was developing normally and was adjusting well to his new placement.

Mother had completed a 12-week course in parenting children under six and was receiving individual counseling. She was visiting K.B. regularly twice a week for one hour each time. Her "parent partner" stated that mother had made substantial progress in her interaction with K.B., but she was not certain that mother would be able to handle him alone yet. She felt that mother needed to become more "parent orientated" and more confident as a parent. The social worker agreed that mother had not yet exhibited the ability to care for K.B. on her own. The social worker also observed that mother had great difficulty in asserting herself in her parental role. For example, mother did not bring it to the social worker's attention when the previous foster mother failed to bring K.B. on time for visits. Mother said she "just didn't want to say anything." The social worker noted that while mother loved K.B. and longed for his return, she also wanted to behave in an age-appropriate manner, i.e., stay out late with friends and go to parties. She also displayed age-appropriate "resistance in following directives from authority figures, inability to arrive to school on time, and difficulty in maintaining her living space

clean and orderly.” However, CFS believed that ultimately returning K.B. to her care was plausible and that father would also be able to acquire the necessary parenting skills when he was able to complete his reunification plan.

At the review hearing, the court found that there was a substantial probability that K.B. would be returned to his parents within the statutory time frame and ordered continued reunification services.

For the 12-month review hearing, CFS reported that although mother continued to comply with her case plan, she still did not demonstrate the skills needed to be able to care for K.B. on her own. The social worker reported that mother was resistant to suggestions that she participate in additional services in order to develop her parenting skills further. Mother had also missed several recent visits and did not appear to understand the need to visit consistently and on time. She also continued to struggle with setting boundaries for K.B. and dealing with him when he became temperamental. Nevertheless, the social worker recommended continuing services to mother to allow her additional time to develop her skills.

At the 12-month review hearing, the court again ordered continued reunification services, finding that mother had made substantial progress toward alleviating the need for placement. The court ordered unsupervised visitation for mother a minimum of twice a week for a minimum of two hours each time.

For the 18-month review, CFS recommended termination of services to both parents. Father did not complete his case plan and had not contacted the social worker

following his release from Glen Helen Rehabilitation Center. Mother had cooperated with CFS and had continued to participate in her case plan, but she continued to have difficulty asserting herself in her parental role and failed to demonstrate that she made K.B.'s current and future needs a priority. She continued to be inconsistent in visitation and had not demonstrated an ability to maintain a suitable home environment. Despite the support provided through the THP+ program, including support from a case manager whose function was to assist mother in transitioning to independent living, mother had failed to benefit from the program. Because she did not abide by program rules, she was being considered for termination from the program. The case manager reported that mother stayed away from the apartment provided by the program, she did not maintain the apartment properly, she failed to pay her utility bills, and she did not pay her share of costs despite being provided with a monthly check by the program. Her therapist reported that although mother loved K.B., she was “just very 19,” i.e., too immature to embrace her role as a parent.

At the contested hearing, additional evidence showed that mother had begun missing visits with K.B., even though the foster mother brought him to mother's apartment for visits. She had missed 12 visits in the last six months. Mother also complained about the difficulty of having to get up early to take the bus to school. The social worker asked how she would cope with it when she had K.B. with her. Mother replied that she “knew” she could do it once K.B. was returned to her. The social worker wanted to see her cope with her daily life before the child was returned to her, in order

avoid further trauma to the child if mother was not able to cope. The social worker testified that there was a bond between mother and K.B. and that mother had made some changes and experienced some growth, but that she had not made K.B. her priority. The evidence also showed that although the program provided mother with both financial support and the support of a coach, mother failed to maintain a stable household and failed to keep the apartment up to the standard necessary if K.B. were returned to her.

The evidence also showed that mother had left the THP+ program and had moved in with her aunt without having the aunt's home assessed as a suitable residence. She had apparently been living with the aunt to a great extent while she was in the THP+ program, in violation of the program's rules.

The court found that mother had shown poor judgment by leaving the THP+ program when she was on the verge of having K.B. returned to her and that she had not demonstrated the ability to provide a suitable and stable home for K.B. The court found that it was not safe to return K.B. to mother at that time and terminated reunification services. The court set a hearing to terminate parental rights pursuant to section 366.26. Both parents were present and were advised of writ requirements.⁴

Before the section 366.26 hearing, mother filed a petition for modification of the prior order, seeking to have K.B. returned to her on family maintenance or reinstatement of reunification services. The court denied the petition and terminated parental rights.

⁴ We take judicial notice that we dismissed this court's case No. E055311, A.S. v. *Superior Court*, because the petitioner failed to file a timely notice of intent.

(We discuss the section 388 petition and the section 366.26 hearing in more detail below.) The parents filed timely notices of appeal.⁵

LEGAL ANALYSIS

1.

THE COURT PROPERLY DENIED THE SECTION 388 PETITION

Section 388 provides that the juvenile court may, in its discretion, modify a prior order on the request of any interested person, if the court finds both new evidence or a material change in circumstances justifying modification of the order and that the requested modification would be in the child’s best interests. 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 make modification of a prior order in the best interests of the child. (*In re Stephanie M.* (1994) 7 Cal.4th 295, 317.)

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

⁵ In his opening brief, father joins in mother’s arguments and makes none of his own.

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.

Mother contends that she met her burden of proving changed circumstances because by the time of the hearing, she had obtained housing on her own, she was employed and had a plan for free child care if K.B. were returned to her, and she had continued to visit with K.B. unsupervised and there had been no issues regarding visitation. She contends, in effect, that this evidence addressed all of the court's prior concerns. However, at the hearing on the section 388 petition, the court stated that mother's housing issue, while important, was not the primary reason the court terminated services. Rather, the court stated that it had terminated services primarily because mother had failed to demonstrate a mature commitment to filling a parental role in K.B.'s life. Mother does not address that issue. Moreover, 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.) For one thing, CFS expressed concern that mother would not be able to afford the rent on her new apartment. She had previously had a roommate to share expenses, and now she did not. In addition, CFS was concerned that father was present at mother's apartment during a recent unannounced visit and appeared

to be living there. No one else was present, but there was a distinct aroma of marijuana in the apartment. Moreover, mother was then pregnant and due to deliver her second child within a short time. Mother's ability to care for one child was questionable, and there was no reason to think that she could care for an infant and a toddler.

Based on the totality of the evidence, we conclude that mother failed to demonstrate changed circumstances which mandated a finding that reinstating reunification or returning K.B. to her on family maintenance was in K.B.'s best interests. Accordingly, mother's challenge to the court's ruling on her section 388 petition fails. (*In re I.W.*, *supra*, 180 Cal.App.4th at p. 1528.)

2.

THE COURT PROPERLY FOUND THAT 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.)

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 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, mother contends that the evidence shows that she shared a parent/child bond with K.B. which was strengthened through visitation. She notes that K.B. called her "Mommy." Even if we assume that mother and K.B. shared some degree of a parent/child bond and that the relationship conferred some degree of benefit on K.B., 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 K.B. (*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.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

MCKINSTER
J.

We concur:

RAMIREZ
P. J.

MILLER
J.