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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

In re N.M. et al., Persons Coming Under
the Juvenile Court Law.

SAN BERNARDINO COUNTY
CHILDREN AND FAMILY SERVICES,

Plaintiff and Respondent,

v.

R.M.,

Defendant and Appellant.

E062433

(Super.Ct.No. J251467-69)

OPINION

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

Michele Anne Cella, under appointment by the Court of Appeal, for Defendant and Appellant.

Jean-Rene Basle, County Counsel, and Danielle E. Wuchenich, Deputy County Counsel, for Plaintiff and Respondent.

I

INTRODUCTION

Mother and father's substance abuse led to the San Bernardino County Department of Children and Family Services (CFS) removing their three children from their home. Father appeals¹ the juvenile court order summarily dismissing his petition under Welfare and Institutions Code section 388² to set aside the order terminating reunification services (section 388 petition). Father also appeals the juvenile court order rejecting the parental benefit exception to adoption (§ 366.26, subd. (c)(1)(B)(i)), and terminating his parental rights to A.M. (nine years old), I.M. (four years old), and N.M. (two years old) (collectively, the children).

Father contends the juvenile court erred in summarily denying his section 388 petition and finding the parental benefit exception did not apply. We conclude the juvenile court did not err and affirm the judgment.

II

FACTS AND PROCEDURAL BACKGROUND

Parents and their children came to the attention of CFS in May 2012, when N.M. tested positive at birth for methamphetamines. N.M. was born premature, with right hip dysplasia, club feet, spastic cerebral palsy, and hearing and vision impairment. A.M. and I.M. were born with muscular dystrophy. From June 2012 until September 2012, the

¹ Mother is not a party to this appeal.

² Unless otherwise noted, all statutory references are to the Welfare and Institutions Code.

family participated in a voluntary family maintenance program, which ended when CFS concluded father, but not mother, was adequately meeting the children's needs.

In August 2013, CFS received a referral alleging mother and father (parents) were both using methamphetamine and father had brought I.M. to the hospital because I.M. was acting strangely. Father stated at the hospital that mother cared for the children during the day while under the influence of methamphetamine. Father acknowledged he had begun using methamphetamine as well. He said he used it twice a week and was willing to seek treatment but did not feel drugs were a problem for him.

On September 11, 2013, a county social worker visited parents' home. Mother was distant and did not appear to be genuine in agreeing to begin participating in drug rehabilitation. Father indicated he was willing to receive treatment and wanted to work on his family. He said he had recently quit his job so that he could focus on the children, after he found mother passed out when she was supposed to be supervising the children. The social worker noted parents were paranoid that the other might be cheating and their arguing led to physical altercations. Parents had previously signed up for counseling at Inland Behavioral Health Services (IBHS) but failed to show up for their intake interviews. On September 30, 2013, the children were detained in their paternal grandfather's home.

Juvenile Dependency Petition and Detention Hearing

In October 2013, CFS filed juvenile dependency petitions on behalf of the children under section 300, subdivision (b) (petition). The petition alleged parents abused

substances and engaged in domestic violence. Mother suffered from mental health issues and father failed to protect the children from mother by leaving them with her.

At the detention hearing, the juvenile court ordered the children detained and placed with their paternal grandparents (grandparents). The court also ordered CFS to provide parents with reunification services and authorized supervised visitation once a week for one hour.

Jurisdiction/Disposition Hearing

CFS reported in its jurisdiction/disposition report filed in October 2013, that a CFS social worker interviewed parents on October 15, 2013. Mother stated she used drugs on and off, and had used methamphetamine earlier that week. She attributed her drug use to her grandparents dying, stress, and being “weak-minded.” She said father always “thinks for me.” Mother had used methamphetamine since the age of 17. She had previously received substance abuse services from Kaiser. CFS had also previously offered her substance abuse services, but mother was unable to overcome her addiction. Mother stated she suffered from depression but was not receiving any treatment for it.

Parents confirmed they had engaged in domestic violence, which they described as yelling and arguing regarding infidelity and jealousy. Although father acknowledged he used drugs, he denied he was addicted or that his drug use affected the children. Father began using methamphetamine when he was 19 years old. He said he quit when A.M. was born but began again in January 2012, to help him stay up all night to ensure mother was not cheating on him. Father had never received any drug treatment. CFS had previously offered him treatment on multiple occasions but he never followed through

with treatment. Father acknowledged he had a conviction for grand theft auto, which he said was related to his drug use. Father said that, while working seven days a week, 10 to 12 hours a day, he rarely was involved with or provided care for his family. This is why he quit his job two months earlier. He did not graduate from high school but attended carpentry school. Mother completed high school and was unemployed. Parents married in 2010. The CFS social worker concluded parents were bonded with the children and concerned for their well-being but did not have insight into how parents' drug abuse affected their children.

At the jurisdiction and disposition hearing in November 2013, the court found true the petition allegations that father suffered from substance abuse, which adversely impacted his ability to provide care and support for the children, and father failed to supervise and protect the children from mother's conduct and behavior. The court did not find true the domestic violence allegations. The court ordered the children dependents of the court, removed from parents' care, and to remain with grandparents. The court also ordered parents to participate in reunification services, including a domestic violence program and counseling. Visitation was continued at once a week for two hours or twice a week for one hour.

Six-Month Status Review Hearing

CFS recommended in its six-month status review report, filed in May 2014, that the court terminate reunification services and set a section 366.26 hearing. The social worker reported that parents did not have any insight into how their drug abuse affected their family and had not made any effort to engage in reunification services. Parents also

had not demonstrated an ability to responsibly care for their three children who had special needs, with their health anticipated to deteriorate over time. They required numerous doctors' visits and special treatments. Mother completed an IBHS intake appointment in December 2013 but never returned to the program, and tested positive for drugs twice in March 2014 and once in April 2014. Mother did not work and was in poor health, with diabetes.

Father reportedly had also not been compliant with his case plan. He believed he did not have a drug problem. Father had not engaged in services even though he was given numerous referrals. Father completed an intake appointment at IBHS but was terminated because he did not regularly attend parenting classes. Father failed to drug test in December 2013, January 2014, and March 2014. Father worked full time at a 7-Eleven store, and said he used drugs to stay awake during his graveyard shift.

Parents were fairly consistent in participating in weekly supervised visitation, although they arrived late a couple of times and did not show up to a few visits. Parents have acted appropriately during visits and the children were happy to see them. N.M. needed two surgeries and the children were not meeting their developmental milestones.

At the six-month status review hearing in June 2014, the court found parents had not complied with their case plans or participated in services. The court terminated reunification services and set a section 366.26 permanency planning hearing. The court continued visitation as previously ordered.

Section 366.26 Hearing and Section 388 Petition Hearing

CFS reported in its section 366.26 hearing report, filed in September 2014, that the children were clients of Inland Regional Center and were not meeting their developmental milestones. Parents continued to participate in weekly supervised visits with the children. The children reportedly enjoyed the visits but were closely bonded with their caregivers, grandparents, with whom they had lived since September 30, 2013. Grandparents wanted to adopt the children if reunification failed. Grandparents were willing to allow the children to maintain a relationship with parents as long as visits were appropriate and not in grandparents' home.

In November 2014, father filed a section 388 petition (form JV-180), seeking to change the order on June 6, 2014, and reinstate reunification services. Father alleged changed circumstances, consisting of father engaging in individual therapy and enrolling in IBHS substance abuse services. Father also had completed a parenting program. Father believed reinstating reunification services was in the children's best interests because he loved his children, he visited them regularly, the visits went well, and he shared a strong bond with his children. Father believed the children wanted to return to parents' home.

Attached to father's section 388 petition was a September 2014 IBHS report stating that on June 19, 2014, father enrolled in IBHS, which included instruction on parenting, coping and social skills, substance abuse relapse prevention, and drug testing. Father's participation was good. He drug tested negative three times, twice in August 2014 and once in September 2014.

Also attached to father's section 388 petition was a September 2014 IBHS letter stating that father had enrolled in IBHS's Wholeness & Enrichment Center outpatient program, in which parents attended six individual therapy sessions, with their last session on September 25, 2014. There was also a certificate showing father had completed a parenting course in January 2014, before the June 6, 2014 order terminating reunification services.

On November 4, 2014, the juvenile court entered an order summarily denying father's section 388 petition, stating the request was denied because the "[r]equest merely shows some further effort by father which does not rise to a change of circumstances nor that the best interest of the children will be served."

During the section 366.26 hearing on November 21, 2014, father's attorney requested the court to apply the parental benefit exception to adoption (§ 366.26, subd. (c)(1)(B)(i)). The court found the exception did not apply and the children were likely to be adopted. Father's attorney stated father did not object to termination of parental rights but requested the court to consider ordering guardianship instead of adoption. The juvenile court terminated parental rights to the children and ordered a permanent plan of adoption.

III

DENIAL OF FATHER'S SECTION 388 PETITION

Father contends the juvenile court abused its discretion in summarily denying his section 388 petition without a hearing. Father filed his section 388 petition 18 days before the section 366.26 hearing. The day after father filed his section 388 petition, the

juvenile court summarily denied it, concluding father had not shown changed circumstances or that granting the petition was in the children's best interests.

Under section 388, a juvenile court order may be changed or set aside "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 Zachary G.* (1999) 77 Cal.App.4th 799, 806 (*Zachary G.*) "[I]f the liberally construed allegations of the petition do not make a prima facie showing of changed circumstances and that the proposed change would promote the best interests of the child, the court need not order a hearing on the petition." (*Ibid.*; § 388, subd. (d) ["If it appears that the best interests of the child . . . may be promoted by the proposed change of order, . . . the court shall order that a hearing be held"]) The prima facie requirement is not met "unless the facts alleged, if supported by evidence given credit at the hearing, would sustain a favorable decision on the petition." (*Zachary G.*, at p. 806.) We review the court's order denying a hearing for abuse of discretion. (*Id.* at p. 808.)

Father contends the juvenile court should have held a hearing on his section 388 petition because he established a prima facie showing of changed circumstances and that the proposed change would promote the best interests of the child. Father alleged his changed circumstances consisted of father engaging in individual therapy and enrolling in IBHS substance abuse services. Father also alleged he completed a parenting course but this does not constitute a changed circumstance because it occurred before the June 6, 2014 order terminating reunification service.

We need not decide whether the court erred in finding there was no prima facie showing of changed circumstances because father failed to make a prima facie showing that granting the section 388 petition and reinstating reunification services was in the children's best interests. Here, the primary consideration in determining the children's best interests is the goal of assuring stability and continuity. (*In re Stephanie M.* (1994) 7 Cal.4th 295, 317; *In re Angel B.* (2002) 97 Cal.App.4th 454, 464 (*Angel B.*) "When custody continues over a significant period, the child's need for continuity and stability assumes an increasingly important role. [Citation.] That need often will dictate the conclusion that maintenance of the current arrangement would be in the best interests of that child. [Citation.] Thus, one moving for a change of placement bears the burden of proof to show, by a preponderance of the evidence that there is new evidence or that there are changed circumstances that may mean a change of placement is in the best interest of the child. [Citations.]" (*Angel B., supra*, 97 Cal.App.4th at p. 464.)

This is a difficult burden to meet when reunification services have been terminated. This is because, "[a]fter the termination of reunification services, a parent's interest in the care, custody and companionship of the child is no longer paramount. [Citation.] Rather, at this point, the focus shifts to the needs of the child for permanency and stability. [Citation.]" (*Angel B., supra*, 97 Cal.App.4th at p. 464.) There is a rebuttable presumption continued foster care is in the child's best interest. (*Ibid.*) Such presumption applies with even greater strength when adoption is the permanent plan. During a hearing on a section 388 petition after termination of reunification services, the

juvenile court must recognize this shift of focus in determining the ultimate question before it of what is in the best interest of the child. (*Angel B.*, at p. 464.)

At the time of the hearing on the section 388 petition, after termination of services and shortly before the section 366.26 hearing, the children's interest in stability was the court's foremost concern, outweighing any interest in reunification. The prospect of an additional six months of reunification to see if father would and could do what he was required to do to regain custody would not have promoted stability for the children, and thus would not have promoted their best interests. (*Angel B.*, *supra*, 97 Cal.App.4th at p. 464.) The juvenile dependency proceedings were initiated in September 2013. Father failed to take advantage of reunification services offered and attempt to reunify with the children until June 2014. Until then, he denied he had a drug problem and did not make any effort to rehabilitate. This resulted in termination of reunification services in June 2014.

It was not until June 2014, after services were terminated that father finally enrolled in the IBHS rehabilitation program and counseling. At the time of the hearing on father's section 388 petition on November 4, 2014, father had been attending IBHS classes and counseling for only about four months. The juvenile court reasonably concluded that, under such circumstances, father had not made a prima facie showing of changed circumstances or that reinstating reunification services would have promoted stability for the children and been in their best interests. (*Angel B.*, *supra*, 97 Cal.App.4th at p. 464.)

In *Angel B.*, *supra*, 97 Cal.App.4th 454, the court rejected the mother's contention the juvenile court erred in denying her section 388 petition without holding a hearing. The mother in *Angel B.* had a long history of drug abuse, unsuccessful rehabilitation attempts and failure to reunify with another child. After the mother was denied reunification services, she began to improve, enrolling in a treatment program, testing clean for four months, completing various classes and obtaining employment. Regular visits with her child also went well. (*Id.* at p. 459.) Nevertheless, when she filed her section 388 petition for reunification services, the court summarily denied her petition without a hearing. The Court of Appeal affirmed, finding no abuse of discretion in the juvenile court refusing to hold a hearing. (*Id.* at p. 462.)

The court in *Angel B.* acknowledged the petition showed the mother was doing well, "in the sense that she has remained sober, completed various classes, obtained employment, and visited regularly with [the child]." (*Angel B.*, *supra*, 97 Cal.App.4th at pp. 464-465.) The court also assumed for purposes of the appeal "that this time her resolve *is* different, and that she will, in fact, be able to remain sober, remain employed, become self-supporting and obtain housing." (*Id.* at p. 465.) Nevertheless, the court concluded "such facts are not legally sufficient to require a hearing on her section 388 petition." (*Ibid.*) The court explained: "[T]here is a rebuttable presumption that, in the absence of continuing reunification services, stability in an existing placement is in the best interest of the child, particularly when such placement is leading to adoption by the long-term caretakers. [Citation.] To rebut that presumption, a parent must make some

factual showing that the best interests of the child would be served by modification.”

(*Ibid.*) The mother in *Angel B.* did not make such a showing. Nor did father here.

Father’s section 388 petition stated only that he believed granting his section 388 petition was in the children’s best interests because he loved his children, he visited them regularly, the visits went well, he shared a strong bond with his children, and he believed the children wanted to return to parents’ home. Other than the statement father visited the children regularly, his allegations are conclusory, not a factual showing that reinstating reunification services would promote the children’s best interests. (*In re Ramone R.* (2005) 132 Cal.App.4th 1339, 1348, 1349 [“allegations of her [section 388] petition were to be liberally construed, but conclusory claims are insufficient to require a hearing.”].)

Father’s petition offered no evidence of the nature of his own bond or that the children wanted to live with parents (see *Angel B.*, *supra*, 97 Cal.App.4th at p. 465 [the mother’s petition, denied without a hearing, stated that she had bonded with the child, who was happy to see her and reached for her on their visits.]). We conclude father made no prima facie showing that the children’s best interests would be served by placing them with father. The juvenile court therefore did not abuse its discretion in summarily denying father’s section 388 petition without a hearing.

IV

THE PARENTAL BENEFIT EXCEPTION TO ADOPTION

Father contends the juvenile court erred in rejecting the parental benefit exception to adoption (§ 366.26, subd. (c)(1)(B)(i)). We conclude there was no error.

A. Applicable Law

At the section 366.26 hearing, the juvenile court's task is to select and implement a permanent plan for the dependent child. When there is no probability of reunification with a parent, adoption is the preferred permanent plan. (§ 366.26, subd. (b)(1); *In re Marina S.* (2005) 132 Cal.App.4th 158, 164.) If the juvenile court finds by clear and convincing evidence that a child is likely to be adopted, the juvenile court must terminate parental rights, unless one of several statutory exceptions applies. (§ 366.26, subd. (c)(1); *Marina S.*, at p. 164.)

Under section 366.26, subdivision (c)(1)(B)(i), the parent relationship exception may apply when a parent has “maintained regular visitation and contact with the child and the child would benefit from continuing the relationship.” (§ 366.26, subd. (c)(1)(B)(i); see *In re Derek W.* (1999) 73 Cal.App.4th 823, 826 [“parent has the burden to show that the statutory exception applies.”].) The parent has the burden of showing either that “(1) continuation of the parent-child relationship will 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 [citation] or (2) termination of the parental relationship would be detrimental to the child.” (*Angel B.*, *supra*, 97 Cal.App.4th at p. 466.)

No matter how loving and frequent the contact, and notwithstanding the existence of an “emotional bond” with the child, “the parents must show that they occupy ‘a parental role’ in the child’s life.” (*In re Andrea R.* (1999) 75 Cal.App.4th 1093, 1108; *In re Beatrice M.* (1994) 29 Cal.App.4th 1411, 1418-1419.) The relationship that gives rise

to this exception to the statutory preference for adoption “characteristically aris[es] from day-to-day interaction, companionship and shared experiences. Day-to-day contact is not necessarily required, although it is typical in a parent-child relationship.” (*In re Casey D.* (1999) 70 Cal.App.4th 38, 51.) To overcome the preference for adoption, the parent must show that severing the parent-child relationship “would deprive the child of a *substantial*, positive emotional attachment such that the child would be *greatly* harmed. [Citations.] A biological parent who has failed to reunify with an adoptable child may not derail an adoption merely by showing the child would derive *some* benefit from continuing a relationship maintained during periods of visitation with the parent. [Citation.]” (*Angel B., supra*, 97 Cal.App.4th at p. 466.)

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.* (2000) 78 Cal.App.4th 1339, 1350; see *In re K.P.* (2012) 203 Cal.App.4th 614, 621.) The juvenile court may consider the relationship between a parent and a child in the context of a dependency setting, but the overriding concern is whether the benefit gained by continuing the relationship between the biological parent and the child outweighs the benefit conferred by adoption. (*In re Lukas B.* (2000) 79 Cal.App.4th 1145, 1155-1156; *In re Autumn H.* (1991) 27 Cal.App.4th 567, 575.)

B. Standard of Review

California courts have disagreed as to the applicable standard of review for an appellate challenge to a juvenile court ruling rejecting a claim that an adoption exception applies. Most courts have applied the substantial evidence standard of review. We agree with the view expressed in the recent decision, *In re K.P.*, *supra*, 203 Cal.App.4th at pages 621-622, “the review of an adoption exception incorporates both the substantial evidence and the abuse of discretion standards of review. . . . [W]hether an adoption exception applies involves two component determinations: a factual and a discretionary one. The first determination—most commonly whether a beneficial parental or sibling relationship exists . . . is, because of its factual nature, properly reviewed for substantial evidence. [Citation.] The second determination in the exception analysis is whether the existence of that relationship or other specified statutory circumstance constitutes ‘a compelling reason for determining that termination would be detrimental to the child.’ [Citations.] This “quintessentially” discretionary decision, which calls for the juvenile court to determine the *importance* of the relationship in terms of the detrimental impact that its severance can be expected to have on the child and to weigh that against the benefit to the child of adoption,’ is appropriately reviewed under the deferential abuse of discretion standard. [Citation.]” (*In re K.P.*, *supra*, 203 Cal.App.4th at pp. 621-622, quoting *In re Bailey J.* (2010) 189 Cal.App.4th 1308, 1314-1315.) We likewise apply the composite standard of review here.

C. Discussion

Father has not demonstrated that his relationship with the children was so significant that its termination would cause the children detriment or that his relationship outweighs the well-being the children would gain in a permanent, stable home with grandparents. (*Angel B., supra*, 97 Cal.App.4th at p. 466.) From the time of removal of the children from parents in September 2013, until termination of reunification services in mid-June 2014, father failed to make any effort to reunify with the children. During that time, father did not engage in any reunification services. Father also reportedly did not demonstrate an ability to responsibly care for the children, who had special needs. The children required numerous doctors' visits and special treatments and it is anticipated their health will deteriorate over time. Father did not attend any of the children's medical appointments. Also, although father, for the most part, consistently visited the children, his visits were supervised and were, at most, twice a week for one hour.

The children were young when they were removed from parents. N.M. was only one year old, I.M. was three years old, and A.M. was seven years old. After the children's removal from father, the children spent over one year living with grandparents. This was a substantial portion of N.M. and I.M.'s life; one half of N.M.'s lifespan and one-third of I.M.'s life. Furthermore, father indicated during his interview in October 2013, that during most of the time the family was together, he was working long hours and was not home. He indicated that he had worked for the past eight years to support his family and believed his drug use during that time had not affected his family's well-being because he was never home due to working seven days a week, 10 to 12 hours a

day at the 7-Eleven store. Father told the CFS social worker that “he was hardly involved with his family and rarely provided day-to-day care for them.” Father mentioned he spent several hours a day with his children but said he did not consider this enough time with his family. He therefore quit his job at the 7-Eleven store about a month before removal of his children (around August 2013).

The evidence shows father was not around the children much, serving in a parental role, until about a month before the children were removed from parents, and after the children were removed, father did not even make an effort to reunify with them for about nine months. By this time reunification services had been terminated and the children had been living with grandparents, who provided for their many needs, including what they needed most, a stable, loving home. According to the CFS social worker, although the children enjoyed father’s visits, the children were closely bonded with grandparents. The children reportedly were happy, healthy and well cared for by grandparents, who wished to adopt them. Grandparents were also willing to allow the children to maintain a relationship with parents.

Father has not established that, at the time of termination of his parental rights, his emotional attachment with his children was that of parent and child, rather than one of being a friendly visitor or friendly nonparent relative. (*Angel B., supra*, 97 Cal.App.4th at p. 468.) While the evidence indicated that father acted lovingly and appropriately with the children during visits, father failed to establish that the children’s relationship with him was so significant that its termination would cause the children any detriment. The juvenile court therefore did not err in rejecting the parental benefit exception to adoption.

V

DISPOSITION

The judgment is affirmed.

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CODRINGTON
J.

We concur:

HOLLENHORST
Acting P. J.

MILLER
J.