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**COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT**

In re JESSE C. et al., Persons Coming
Under the Juvenile Court Law.

FRESNO COUNTY DEPARTMENT OF
SOCIAL SERVICES,

Plaintiff and Respondent,

v.

ANGEL H.,

Defendant and Appellant.

F063015

(Super. Ct. Nos. 02CEJ300221-1,
02CEJ300221-2, 02CEJ300221-3)

OPINION

THE COURT*

APPEAL from orders of the Superior Court of Fresno County. Mary Dolas,
Temporary Judge. (Pursuant to Cal. Const., art. VI, § 21.)

Monica Vogelmann, under appointment by the Court of Appeal, for Defendant
and Appellant.

Kevin Briggs, County Counsel, and William G. Smith, Deputy County Counsel,
for Plaintiff and Respondent.

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* Before Gomes, Acting P.J., Kane, J., and Franson, J.

INTRODUCTION

Angel H. (mother) appeals from the juvenile court's orders denying her petition pursuant to Welfare and Institutions Code section 388¹ and terminating her parental rights pursuant to section 366.26 as to her children, Jesse C., David J., and E.C. Mother contends the juvenile court abused its discretion in denying her section 388 petition. She also argues the juvenile court erred in failing to find that the beneficial parent-child relationship exception is applicable to her case. We reject these contentions and affirm the juvenile court's orders.

FACTS AND PROCEEDINGS

Earlier Proceedings

On November 14, 2006, a petition was filed pursuant to section 300, subdivisions (a) and (b), by the department of social services (department) alleging that E.C., then five months old, suffered subdural hematoma and retinal hemorrhages as a result of shaken baby syndrome caused by her father. The petition alleged that mother failed to protect E.C., abused methamphetamine and marijuana, and placed her children at serious risk of physical harm.

At the jurisdiction hearing on February 7, 2007, the court found true allegations that mother's substance abuse, and her denial that E.C.'s father harmed E.C., constituted a failure to protect her children. At the disposition hearing on July 12, 2007, the court found mother had made significant progress toward alleviating the causes necessitating the children's placement and ordered services for mother.

By January 2008, mother had completed parenting classes and a mental health evaluation. Although mother had a relapse with methamphetamine, she took responsibility for her actions, re-enrolled for an additional 60 days of substance abuse

¹ All statutory references are to the Welfare and Institutions Code.

treatment, and attended out-patient substance abuse services. On June 10, 2008, the court followed the department's recommendation and ordered the termination of mother's reunification services. The court placed the children with mother under family maintenance services.

On December 10, 2008, the department filed a supplemental petition pursuant to section 387 alleging that mother had allowed E.C.'s father to reside back in the home with the children, again subjecting the children to the risk of harm. At the jurisdiction hearing on January 8, 2009, the court found the allegation true. After the disposition hearing in March 2009, the court found that supervision of the minors by the court as dependents was necessary. Mother would keep the children in her care and receive family maintenance services.

In November 2009, the department reported that mother was in full compliance with her case plan and recommended continued family maintenance services. In February 2010, the department recommended that mother be awarded sole custody of the children, family maintenance services be terminated, and the dependency be dismissed as to all minors.

On March 8, 2010, however, a new supplemental petition was filed. The children were again detained. Following mediation, the petition was amended on April 15, 2010. The amended petition stated that despite receiving extensive services, mother suffered from a substance abuse problem with alcohol that negatively affected her ability to provide her children with adequate care, protection, and supervision. Mother admitted drinking beer in February 2010 and was involved in an incident of domestic violence. The children were at risk of serious harm or injury because mother had adults in her home who were not cleared by the department. One of these was an adult male who was a frequent visitor and around the children. Mother claimed this male was a cousin, rather than a boyfriend. The boyfriend committed an act of domestic violence on mother, who suffered a wound to the left side of her eye.

At the jurisdiction hearing, mother waived the right to a contested hearing. The court adopted the mediation agreement, which included the amended allegations of the petition. The court found the minors to be dependents of the court pursuant to sections 356 and 387 and ordered that the case be set for a disposition hearing.

Ruling after the disposition hearing on July 22, 2010, the court ordered the children's temporary placement with the child welfare agency. The court found reasonable efforts had been made to prevent the children's removal from mother, and mother's progress toward alleviating the causes necessitating removal had been minimal. The court further found pursuant to section 366.26 that the specific goal for the children was adoption, appointed legal guardianship, or permanent placement with a relative. The court terminated further family maintenance services to mother and allowed mother to have supervised visitation.

Hearing on Modification Petition and Termination of Parental Rights

In May 2011, the department filed a report for the section 366.26 hearing stating that the children were placed with risk adopt foster parents. The original date for the section 366.26 hearing was in November 2010, but the department obtained a continuance to locate a permanent home for the children. The social worker reported that the two oldest children were developmentally on target and were diagnosed with ADHD. Both were taking medication. The prospective adoptive mother reported that both older children struggle with their homework, but she was able to help them complete it with no difficulty. The youngest child was suffering from a mild case of shaken baby syndrome, but likes all animals and enjoys playing with dolls. The prospective adoptive mother described her as a sweet, loving, playful child.

The social worker stated that the children do not suffer from major behavioral or medical concerns. The children are all cute, charming, and well behaved. They are young and generally adoptable. The children are well adapted and adjusted to their prospective adoptive parents. The prospective adoptive parents "would love to continue

to provide the care and support for all three children as part of their permanent family members under the plan of adoption.” The prospective adoptive parents provide excellent structure for all three children. The prospective adoptive parents have excellent engagement skills and understand what is required to stimulate the children’s growth. They are calm and logical in handling the children’s issues.

Mother participated in supervised visits for an hour twice a month with all three children, who still refer to her as mom.² Mother was consistent, reporting for her visits regularly. Mother was appropriate during visits and interacted with all three children equally. The oldest child was hesitant to hug mother. The two younger children would sit on mother’s lap during visits. Mother has always been calm and pleasant during visits. Mother engaged with all three children, played board games and colored with them, and praised the children.

Evaluating the question of the children’s need for stability and continuity, the social worker noted the children had been placed with the prospective adoptive parents since February 2011 and appeared to have a significant parent-child relationship with them. The children are bonded to their caregivers and love their daily routines. The children are well-adjusted with their prospective adoptive parents. Both prospective adoptive parents are employed. The social worker believed all three children would benefit from a plan of adoption.

The social worker reviewed the history of this case, noting that the children were removed from mother twice before and mother had received services. The social worker explained that the oldest child spent most of his life in foster care. The other two children also spent a great deal of time in foster care. Though mother had reunified with the children in the past, she failed in reunification. The children appear to have a parent-

² Mother’s younger sibling inquired about placement of the children, but had not completed the requirements for the relative home approval process.

child relationship with their prospective adoptive parents, are well bonded with them, and would benefit from the permanency of adoption. The department recommended adoption be selected as the children's permanent plan.

On June 2, 2011, mother filed a petition pursuant to section 388 seeking family maintenance services and/or family reunification services. Mother stated she completed an inpatient substance abuse treatment program and received individual therapy. Mother stated she was single, had not consumed alcohol since February 2010, and had not used methamphetamine since July 2007. Mother alleged she had ameliorated the issues that brought her before the court, and her children wish to return to her care.

Mother attached a handwritten note acknowledging her past problems with drug and alcohol addiction, but explaining that she had overcome these problems a year ago. Mother stated she received services in the past. Mother stated she is not now the person she was when she came into the system. Mother reviewed the circumstances surrounding her drinking and the domestic violence that occurred in February 2010. Mother explained that she did not own a lot, but loved her children and felt she was teaching them good things. Mother fed the children three square meals every day. Mother said her children always ask her when they can come home and she has to change the subject. Mother believes it will benefit her children for them to come home.

The department filed a response to mother's petition stating that it continued to recommend adoption as the most appropriate permanent plan for all three children. The department stated that the children continued to bond with their prospective adoptive parents, who meet the children's needs and have expressed their willingness to adopt the children. The department remained opposed to mother's petition reinstating her maintenance and family reunification services because these services had been provided to mother and she failed to successfully reunify with her children.

Despite being in and out of the dependency system since 2002 and completing all court-ordered services and classes, mother continued to make poor lifestyle choices

which caused her to fail to reunify with her children. The department noted that the children had been in foster care most of their lives and needed to have a permanent home with a family willing to provide them with stability. Although mother regularly visited the children, she was not able to provide for their daily needs.

On July 7, 2011, the court considered mother's section 388 petition and conducted a section 366.26 hearing. The department submitted the matter on its reports and previous court orders. Mother's counsel called mother and the two oldest children to testify. Mother stated that she participated in services throughout the case. Mother explained that she learned better discipline techniques than yelling and how to get the children to do chores. Mother learned how to be a better parent from parenting classes. Mother learned how to keep a schedule with the children.

Mother helped her oldest child with his homework. Mother implemented things that she learned from her parenting classes during visitations, but noted that the children were very aware they were being watched. The children did sometimes have little outbursts. Mother described how she mediated disputes between her children. Mother also explained that the children asked her all the time about coming home, but she had to deflect their questions because she was not allowed to talk about that topic.

Mother stated that the last time she drank alcohol was in March 2010. Mother completed a 90-day inpatient program, attends A.A. meetings, stays in contact with her sponsor, and went to therapy. Mother had a full-time job, was subject to random drug testing at her job, and did not have a significant other. Mother said that she learned from previous reunification services and was now a totally different person than when she first entered the system. When the domestic violence incident occurred, mother did not see any warning signs. Mother believed she could provide a safe home for her children.

Mother explained that her children would benefit emotionally by being with her because she is their mother and she has the patience to deal with their fits and crying. Mother loves her children. When asked why having a new chance to be with her children

would be different than in the past, mother replied that she “started to get clean and stuff” and no longer wanted drugs and alcohol in her life.

Although mother had taken classes for anger management and domestic violence, she still had another domestic violence incident in 2010. After this incident, mother went into a residential program. Mother acknowledged that alcohol was involved in the 2010 domestic violence incident.

Mother was involved with an outpatient aftercare program that offered additional resources to assist parents with a variety of issues such as domestic violence, substance abuse, housing, and child care. When asked if she had taken advantage of those resources, mother replied that she had already attended two classes for domestic violence, three anger management classes, and three parenting classes. Mother then said: “I’ve done this stuff so many times, I really didn’t see what would – what I would benefit more from doing these classes.”

Jesse testified that mother treats them nice. If given the opportunity, Jesse would live with mother. When asked if he would prefer to be with mother rather than his current placement, Jesse replied that he did not know. Jesse thought mother took good care of him and he would be sad if he could not see her again. David testified that he looked forward to visits from mother. If he had a choice of where to live, David was not sure where it would be. David would like to see mother more often and would also like to live with her.

On July 21, 2011, the court noted that mother carried the burden of proof on her section 388 petition and had to show changed circumstances and that a modification would be in the best interests of the children. The court ruled that mother failed to meet her burden of establishing that returning the children to her on a family maintenance plan, or ordering further services, would be in the children’s best interests. The court found that mother always completes her programs only to have the children removed from her later. The court was concerned that at this stage of the proceedings, it was necessary to

insure the children received stability and continuity in their care. The court found conflict and uncertainty in the children's testimony. The court denied mother's petition.

On the issue of whether the children would benefit from a continuing parent-child relationship, the court found that mother again had the burden of proof to show that the exception should apply to this case. The court noted there was evidence mother maintained regular visits with the children and she had shown the ability to participate in and to complete classes. Concerning whether the extent of mother's relationship was such that the children would benefit from continuing it, the court found mother did not show that she would provide the stability, structure, and permanence the children needed.

The court further found that terminating mother's parental rights would not be detrimental to the children. The court noted it was sad that the children had never really left the foster care system since Jesse became involved with the department back in 2002. Although mother received all of the services that were provided, and in spite of all of the support mother was given, the children remained in the system and have not had continuity, permanence, or stability. The court found that even when the children were returned to mother, they were removed again and their lives continued being disrupted and their futures unstable. The court terminated mother's parental rights and ordered adoption as the plan for the children.

DISCUSSION

Mother argues the court abused its discretion in denying her section 388 petition. Mother also argues the court erred in finding that the parent-child beneficial relationship exception for termination of parental rights did not apply to this case. We find both contentions to be without merit and affirm the orders of the juvenile court.

Section 388 Petition

It was mother's burden of proof to show there was new evidence or there were changed circumstances that made a change of the children's placement in their best interest. It was mother's burden of proof by a preponderance of the evidence to show

there was new evidence or changed circumstances that called for a change of the previous order denying reunification and that reunification services would be in the children's best interest. (§ 388; *In re Stephanie M.* (1994) 7 Cal.4th 295, 317 (*Stephanie M.*))

The parent bears the burden of showing in a section 388 petition both a change of circumstance exists *and* that the proposed change is in the best interests of the child. A petition only alleging changed circumstances, which would lead to a delay in the selection of a permanent home to see if a parent could eventually reunify with a child at some future point, does not promote stability for the child or the child's best interests. (*In re Casey D.* (1999) 70 Cal.App.4th 38, 47.) As the moving party, it was mother's burden of proof by a preponderance of the evidence to show there was new evidence or there were changed circumstances that called for a change of the previous order denying reunification and that reunification services would be in the children's best interest. (§ 388; *Stephanie M.*, *supra*, 7 Cal.4th at p. 317.)

Respondent accurately points out that although mother was able to participate in, and to complete, treatment programs, she was consistently unable to apply the skills she was supposed to learn in those programs. Mother's drug and alcohol abuse left her youngest child the victim in 2006, at five months old, of shaken baby syndrome and left mother the victim of domestic violence in 2010. Mother testified that she had started to get clean and no longer wanted drugs and alcohol in her life. Given mother's long history of substance abuse, mother's recent history of being clean demonstrates her circumstances were beginning to change, not that they have changed.³ Mother failed to meet her burden of proof by showing changed circumstances, or that granting the petition would be in the best interests of her children.

³ A showing of changing, rather than changed circumstances, is insufficient to warrant a hearing on a section 388 petition. (*In re Carl R.* (2005) 128 Cal.App.4th 1051, 1072.)

Mother testified that she went to a private agency for support. Although the agency provided family reunification services, mother acknowledged that she did not seek those services because she had already taken multiple classes in anger management, parenting, and domestic violence, as well as receiving therapy. Mother testified that she did not see what she would benefit from taking additional classes. The very purpose of mother's petition, however, was to continue with family reunification and/or maintenance services. Mother admitted, however, that additional classes and services would not be beneficial. Clearly the juvenile court did not abuse its discretion in denying mother's petition.

To understand the element of best interests in the context of a section 388 petition, we look to the Supreme Court's decision in *Stephanie M.* After the termination of reunification services, a parent's interest in the care, custody, and companionship of his or her child is no longer paramount. Rather, the focus shifts, once reunification efforts end, to the child's needs for permanency and stability; there is, in fact, a rebuttable presumption that continued out-of-home care is in the best interests of the child. (*Stephanie M., supra*, 7 Cal.4th at p. 317.) A court conducting a modification hearing at this stage of the proceedings must recognize this shift of focus in determining the ultimate question before it, that is, the best interests of the child. (*Ibid.*) Notably, both here and in the juvenile court, mother ignores her children's need for permanence and stability in advocating her position. Neither the juvenile court nor this court, however, may do so.

Parental Benefit Exception

Mother argues that because of the close relationship she has to her children, the parental benefit exception to termination of parental rights (§ 366.26, subd. (c)(1)(B)(i)) should have been applied in this case because terminating her parental rights would be detrimental to the children.

Appellate courts have interpreted the phrase “benefit from continuing the relationship” to refer to a parent-child relationship that promotes the well-being of the child to such an extent as to outweigh the benefits the child would gain in a permanent home with adoptive parents. Courts balance the strength and quality of the natural parent-child relationship against the security and sense of belonging the new family would provide. If severing the natural parent-child relationship would deprive the child of a substantial, positive emotional attachment so that the child would be greatly harmed, only then is the preference for adoption overcome and the parents’ rights are not terminated. (*In re L.Y.L.* (2002) 101 Cal.App.4th 942, 953-954 (*L.Y.L.*); *In re Autumn H.* (1994) 27 Cal.App.4th 567, 575.)

To meet the burden of proof for this exception, the parent must show more than frequent and loving contact or pleasant visits. (*L.Y.L.*, *supra*, 101 Cal.App.4th at pp. 953-954.) The relationship arises from day-to-day interaction, companionship, and shared experiences. The parent must show he or she occupies a parental role in the child’s life that results in a significant, positive, emotional attachment from child to parent. (*Id.* at p. 954.) We review the juvenile court’s findings concerning the parental benefit exception under the deferential abuse of discretion standard. (*In re Aaliyah R.* (2006) 136 Cal.App.4th 437, 449; *In re Jasmine D.* (2000) 78 Cal.App.4th 1339, 1351.)

Where the issue on appeal turns on a failure of proof, the question for a reviewing court is whether the evidence compels a finding in favor of the appellant as a matter of law. The issue is whether the appellant’s evidence was uncontradicted, unimpeached, and of such weight as to leave no room for a judicial determination that it was insufficient to support a finding. (*In re Bailey J.* (2010) 189 Cal.App.4th 1308, 1314; *In re I.W.* (2009) 180 Cal.App.4th 1517, 1528.)

We review the record in the light most favorable to the judgment. (*In re Misako R.* (1991) 2 Cal.App.4th 538, 545.) The power of the appellate court begins and ends with a determination as to whether there is any substantial evidence, contradicted or

uncontradicted, which supports the conclusion reached by the trier of fact. When two or more inferences can be reasonably deduced from the facts, the reviewing court is without power to substitute its deductions for those of the trial court. (*Crawford v. Southern Pacific Co.* (1935) 3 Cal.2d 427, 429; *Steele v. Youthful Offender Parole Bd.* (2008) 162 Cal.App.4th 1241, 1251-1252.) This is the rule even if the reviewing justices may have ruled differently or reached a different result. (*People ex rel. Monterey Mushrooms, Inc. v. Thompson* (2006) 136 Cal.App.4th 24, 36; *Hales v. Snowden* (1937) 19 Cal.App.2d 366, 371.)

Mother argues that her positive relationship with her children is long-standing and profound. Mother asserts that she has had a close and loving relationship with her children, even after their removal from her home. Mother points to evidence that Jesse wanted more visits with her and David testified that he wanted to live with mother again.

Mother ignores the great length of time the children were in foster care due to her substance and alcohol abuse. Mother also ignores the multiple abusive relationships she has had and the physical abuse she and the youngest child have suffered. Jesse was ambivalent in his testimony concerning whether he wanted to live again with mother, saying he did not know if he preferred living with his prospective adoptive parents. Although David testified that he wanted to live with mother again, when asked if he had a choice of where to live, David did not know.

There is no doubt that mother loves her children and that they also have love for her. The parent-child relationship, however, must arise from day-to-day interaction, companionship, and shared experiences. The parent must show he or she occupies a parental role in the child's life that results in a significant, positive, emotional attachment from child to parent. Mother failed to demonstrate at the section 366.26 hearing that she occupied a true parental role with her children that resulted in a significant, positive emotional attachment of the children to her. Mother failed to show that the juvenile court abused its discretion in rejecting the application of the parental benefit exception to her

case.⁴ The juvenile court did not err in failing to apply the parental benefit exception to this case or in terminating mother's parental rights.

DISPOSITION

The court's orders denying mother's petition pursuant to Welfare and Institutions Code section 388 and terminating her parental rights pursuant to Welfare and Institutions Code section 366.26 are affirmed.

⁴ Although we do not apply the substantial evidence test argued by mother, we note that there was substantial evidence to support the juvenile court's rejection of the parental benefit exception.