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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

In re H.F. et al., Persons Coming Under the
Juvenile Court Law.

STANISLAUS COUNTY COMMUNITY
SERVICES AGENCY,

Plaintiff and Respondent,

v.

CHRISTINE F.,

Defendant and Appellant.

F063722

(Super. Ct. Nos. 515821, 515822)

OPINION

APPEAL from a judgment of the Superior Court of Stanislaus County. Ann Q.
Ameral, Judge.

Janette Freeman Cochran, under appointment by the Court of Appeal, for
Defendant and Appellant.

John P. Doering, County Counsel, and Carrie M. Stephens, Deputy County
Counsel, for Plaintiff and Respondent.

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Christine F. (mother) is the mother of four children found to be dependents of the
juvenile court. At the six-month review hearing, the court terminated jurisdiction

services and set a hearing pursuant to Welfare and Institutions Code section 366.26¹ to terminate mother's parental rights. Four months later, prior to the section 366.26 hearing, mother filed a petition for modification pursuant to section 388, seeking to reopen reunification services for her two youngest children. The juvenile court denied the section 388 petition without a hearing, and proceeded with the section 366.26 hearing. Mother appealed from the denial of the section 388 petition and we affirmed. (Case No. F063259.) This appeal follows the summary denial of a second section 388 petition filed after a section 366.26 hearing, but before a ruling on the section 366.26 hearing. Mother also contests the findings and orders of the section 366.26 hearing terminating her parental rights and establishing adoption as the permanent plan for her two youngest children. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Mother has four children; the youngest two, H. and A., are the subject of this appeal. The fathers of H. and A. are unknown.

When A. was born in January 2010, both A. and mother tested positive for methamphetamine. Mother admitted using the drug two days before A.'s birth. She also admitted to being a convicted drug felon and that she was arrested in 2007 for child endangerment. Mother, who was 29, admitted using methamphetamine since she was 15.

Mother agreed to, but did not immediately begin, voluntary services. She continued to use methamphetamine. In February 2010, mother placed her four children with various friends and family: B., age 11, was placed with her grandmother; S., age four, and A., age one month, were placed with mother's aunt; and H., age two, was left with family friends who had maintained almost constant custody of her since birth. When the children were placed with the voluntary caretakers, it became immediately apparent that the children's medical and dental care had been neglected. H. had a high

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

fever, but mother had failed to provide the caretaker with either a Medi-Cal card or an authorization for consent to medical care, so the caretaker was unable to obtain medical treatment for her.

During the six-month voluntary service period, mother was arrested twice. Mother claimed she got herself arrested because it was the only way to maintain sobriety. Both times after she left jail she again began using methamphetamine. She entered a residential drug treatment program in June of 2010 and graduated a month later, but immediately relapsed.

In July of 2010, the Stanislaus County Community Services Agency (the agency) filed a section 300, subdivision (b) petition alleging that voluntary services had been unsuccessful and that, due to her drug use and criminal behavior, mother was unable to care for her children. At the time of the detention hearing, B. remained with her grandmother and S. was placed with his father. H. was allowed to remain with family friends who had cared for her most of her life. A. was placed in foster care.

In August of 2010, S. was found to be a dependent of the court, was placed with his father, and jurisdiction as to him was dismissed. In September of 2010, mother waived her rights and submitted on the petition and reports. The matter was set for a contested disposition hearing.

The addendum report filed in anticipation of the disposition hearing requested a clinical assessment of mother to determine whether there was a mental health component to her inability to remain drug free and parent her children. The report also noted mother's continued desire to have A. placed with an aunt. But according to the report, the aunt was unable to pass the background investigation, she had ongoing contact with appellant, and she was no longer interested in placement of A.

In October of 2010, the juvenile court declared the remaining three minors to be dependents. B. remained with her grandmother, but services were ordered for mother and B.'s father who was being released from prison. Services for B. were ordered for a year

because she was over the age of three and was not placed with her siblings. Services for A. and H. were limited to six months. Services consisted of visitation, a parenting class, individual counseling, random drug tests, and substance abuse assessment and appropriate treatment.

An interim review report prepared in November of 2010 stated that mother had entered and completed a residential treatment program, but had failed to appear for her aftercare program. The children were doing well in their placements.

The report filed in anticipation of the six-month review hearing recommended that services for mother as to H. and A. be terminated. Mother was noncompliant with all aspects of her reunification plan. She failed to set up her parenting class and counseling sessions, she drug tested dirty, and she had not re-entered drug treatment. Mother's visits with the children were sporadic. She was hesitant to visit the children alone and abruptly left one visit without saying good-bye to the children because she did not want to attend a Team Decision Meeting to be held that day. Mother remained homeless and had no means to care for her children. A. was bonding with his foster parents and calling them "mama" and "dada." There was no update on how H. was doing, except that her development was "normal for her age."

At the April 14, 2011, six-month review hearing, the juvenile court terminated services to mother regarding H. and A. and set a section 366.26 termination of parental rights hearing for August 11, 2011. Services were continued for B. At that time, mother had been assessed at Nirvana, a treatment facility, and had tested positive for methamphetamine, marijuana, and alcohol. She was on a two-week wait list for a bed at the facility. The court noted its disappointment with mother's "lack of progress," her failure to maintain sobriety after completing treatment, and her failure to attend "even the first day of outpatient treatment."

The August 1, 2011, report filed in anticipation of the August 11 section 366.26 hearing stated that H.'s caretakers had been providing for her care most of her life, had

been her official placement for over a year, and that they wished to adopt her. A.'s foster parents also wished to adopt him. He had been placed with them since he was six months old and had "only known his current caregivers as his parents due to his young age." The agency recommended that mother's parental rights be terminated and H. and A. be placed for adoption with their current caregivers. The contested section 366.26 hearing was eventually scheduled for September 6, 2011.

On August 23, 2011, mother filed a section 388 petition seeking to reopen reunification services for H. and A. In it she alleged that, as of August 18, 2011, she had been clean for 95 days, she lived in a clean and sober living center, she attended First Step outpatient program, attended Narcotics Anonymous regularly, and continued to visit the children and that the visits "go well." She attached letters from providers to substantiate these allegations. Specifically, mother alleged:

"It is in the children's best interests to reunify with a parent when at [*sic*] possible, as this request will allow them the opportunity to be returned to their mother. Moreover, the ultimate goal for dependency court is to return children to a parent, and mother can provide the safe & stable permanent home for children if given additional time. The children have, and will, benefit from continued contact with mother & other siblings."

The petition noted that the social worker and A.'s attorney disagreed with this request.

On August 25, 2011, the juvenile court summarily denied the petition without a hearing, checking the box which indicates, "The proposed change of order, recognition of sibling relationships, or termination of jurisdiction does not promote the best interest of the child." We affirmed the ruling of the juvenile court. (Case No. F063259.)

A contested section 366.26 hearing was held on September 6 and 7, 2011. At the hearing, B. testified that she visits her siblings at the agency offices when her mother visits them, but she was not sure how often that was. She did not want H. and A. adopted because she might not be able to see them. B. did not remember when H. was born, but

agreed that she had only lived with her for a little more than a year. B. had only lived in the same house with A. for two months. She saw him occasionally at church.

Tina R., A.'s foster and proposed adoptive mother, testified that she had observed visits between appellant and her children. At the visits, H. was clingy, cried and threw fits and wanted to go home with mother. H. and A. played together "a little bit" during visits, but A. did not necessarily realize H. was his sibling. Tina explained that she and mother had been friends since they were kids and went to the same church together.

Steve B., H.'s caretaker and proposed adoptive parent, testified that H. had been living with him and his wife "off and on" since birth and full time since she was placed there by Child Protective Services. She calls his wife "mommy" and calls her biological mother, whom she asked about occasionally, "mommy Chris."

The adoptions social worker testified that both H. and A. were considered adoptable based on their general characteristics of being young and healthy. When she observed the two together, they played with toys "near each other, kind of parallel play," and there was nothing to indicate a relationship between the two.

Mother testified that she did not place any of the children with friends until about June of 2010. During the reunification period, she missed two visits because she was ill and she also missed visits while she was incarcerated from May through July of 2011. According to mother, H. clinged to her during visits, A. would come to her when told to, and H. and A. "recognize[d]" each other at visits.

On cross-examination, mother admitted that she had allowed H. to stay with Steve B. and his wife since her birth, but that she was often present as well. She also admitted that she placed the children with friends in February, not June, of 2010. Mother claimed that, even though she placed A. with her aunt, mother still provided care for him. She placed the children with others because she was incarcerated twice and using methamphetamines.

The matter was taken under submission for a written ruling by the court.

On October 24, 2011, mother filed a second 388 modification petition. In this petition, mother sought either return of H. and A. or reopening of services. According to the petition, she was still living in the Redwoods clean and sober facility and alleged that she continued to test clean. Under the section of the form asking why the requested order would be better for the child, appellant alleged, as she had in her first petition:

“It is in the children’s best interests to reunify with a parent when at [*sic*] possible, as this request will allow them the opportunity to be returned to their mother. Moreover, the ultimate goal for dependency court is to return children to a parent, and mother can provide the safe & stable permanent home for children if given additional time. The children have, and will, benefit from continued contact with mother & other siblings.”

County counsel, the social worker, and counsel for H. and A. all disagreed with the request by mother.

On October 28, 2011, the juvenile court filed its written ruling on the section 366.26 hearing, finding that H. and A. were both adoptable. In its ruling, the juvenile court found that mother had not met her burden of demonstrating that either the beneficial parent-child relationship or sibling relationship exceptions to adoption as the preferred permanent plan were applicable. The juvenile court terminated mother’s parental rights and established adoption as the permanent plan for H. and A. On the same day, the juvenile court summarily denied the second section 388 petition, citing as its reason, “Parental rights have been terminated.”

Mother contests both the summary denial of her section 388 petition and termination of her parental rights.

DISCUSSION

I. Denial of Section 388 Petition

Mother contends that the juvenile court abused its discretion when it denied her section 388 petition filed October 24, 2011, without an evidentiary hearing. Specifically, she contends that the juvenile court’s reason for denying the petition, because “parental

rights have been terminated,” was not valid. While mother filed the section 388 petition after the section 366.26 hearing, mother contends the petition was timely because the court had not yet issued its ruling terminating her rights. We find no abuse of discretion in the juvenile court’s summary denial of her section 388 petition.

Mother provides no authority for her position, but there is case authority which states that a section 388 petition “may be filed at any time *before* the section 366.26 hearing.” (*In re Baby Boy L.* (1994) 24 Cal.App.4th 596, 609, italics added.) And the California Supreme Court has stated that the right to petition in accordance with section 388 *before the section 366.26 hearing* was an important aspect of parental due process under the state’s dependency law. (*In re Marilyn H.* (1993) 5 Cal.4th 295, 309.)

The reasoning for this timeline is critical. Up until the time that a section 366.26 hearing is set, a parent’s interest in reunification is given precedence over the child’s need for stability and permanency. (*In re Marilyn H., supra*, 5 Cal.4th at p. 310.) By the time the section 366.26 hearing is set, however, focus shifts to the needs of the child for permanency and stability. (*In re Marilyn H., supra*, at p. 309.)

Here, while mother filed a second section 388 petition before the juvenile court’s ruling on the section 366.26 hearing, it was more than a month after the contested section 366.26 hearing was held. Mother’s request to reopen reunification services or return the children to her was therefore untimely.

Even assuming *arguendo* that the petition was timely filed and the juvenile court should have chosen to address the petition before ruling on the submitted section 366.26 hearing, we find no abuse of discretion in the juvenile court’s summary denial of the petition. (*In re Brittany K.* (2005) 127 Cal.App.4th 1497, 1505 [the juvenile courts determination to deny a section 388 petition without a hearing is reviewed for abuse of discretion].)

“Under section 388,^[2] a parent may petition the court to change, modify, or set aside a previous court order. The petitioning party has the burden of showing, by a preponderance of the evidence, that there is a change of circumstances or new evidence, and the proposed modification is in the minor’s best interests. [Citations.]” (*In re S.M.* (2004) 118 Cal.App.4th 1108, 1119.)

The petition for modification under section 388 must contain a “concise statement of any change of circumstance or new evidence that requires changing the [prior] order” (Cal. Rules of Court, rule 5.570(a)(7).) The parent seeking modification must “make a prima facie showing to trigger the right to proceed by way of a full hearing. [Citation.]” (*In re Marilyn H., supra*, 5 Cal.4th at p. 310.) “There are two parts to the prima facie showing: The parent must demonstrate (1) a genuine change of circumstances or new evidence, and that (2) revoking the previous order would be in the best interests of the children. [Citation.]” (*In re Anthony W.* (2001) 87 Cal.App.4th 246, 250.)

When determining whether the petition makes the necessary showing, the juvenile court must liberally construe it in favor of its sufficiency. (*In re Daijah T.* (2000) 83 Cal.App.4th 666, 672.) Section 388 specifies that the court must order a hearing to be held, “[i]f it appears that the best interests of the child may be promoted by the proposed change of order” (§ 388, subd. (d).) “The prima facie requirement is not met unless the facts alleged, if supported by evidence given credit at the hearing, would sustain a

² Section 388, subdivision (a) reads, in relevant part: “Any parent or other person having an interest in a child ... may, upon grounds of change of circumstances or new evidence, petition the court in the same action in which the child was found to be a dependent child of the juvenile court ... for a hearing to change, modify, or set aside any order of court previously made or to terminate the jurisdiction of the court. The petition shall be verified and ... shall set forth in concise language any change of circumstance or new evidence which are alleged to require the change of order or termination of jurisdiction.”

favorable decision on the petition.’ [Citations.]” (*In re Brittany K.*, *supra*, 127 Cal.App.4th at p. 1505.)

In the present matter, mother did not make a prima facie showing entitling her to a hearing on the petition. Mother’s petition stated that she remained at Redwood Family Center’s clean and sober residence, she was compliant with their program, she completed “Nirvana’s day treatment and moved into Nirvana IOP,” she remained motivated in her recovery and was testing clean, she continued to attend Narcotics Anonymous meetings, she completed the parenting group sessions at Sierra Vista, and she completed half of her individual parenting sessions. The petition also mentioned that mother continued to receive reunification services for B., and was currently getting overnight visits with her at Redwoods. Mother attached two documents from providers to substantiate these allegations.

While each of the steps taken by mother are positive ones, when “determining whether the petition makes the necessary showing, the court may consider the entire factual and procedural history of the case.” (*In re Justice P.* (2004) 123 Cal.App.4th 181, 189.) Here, the juvenile court had before it evidence of mother’s long time substance abuse, her repeated attempts to get sober, her repeated relapses, and her repeated tendency to hand the care of her children over to others. It also had before it evidence that mother waited until the “last minute” to begin making the necessary changes. Thus, even if these allegations are accepted at face value, the fact that mother is continuing in her recovery from drug abuse does not suffice to meet her burden of establishing a prima facie case of changed circumstances. Given the severity of mother’s drug use and history of relapse, as well as abandoning her children when parenting becomes too overwhelming, the juvenile court could reasonably find that these short-term gains were not particularly compelling. (See *In re Clifton B.* (2000) 81 Cal.App.4th 415, 423 [“[father’s] seven months of sobriety since his relapse ..., while commendable, was nothing new”].)

Moreover, mother's conclusory statements in her section 388 petition that "[i]t is in the children's best interests to reunify with a parent," that she could provide "the safe & stable permanent home for [the] children if given additional time," and that "[t]he children have, and will, benefit from continued contact with mother & other siblings," do not, by themselves, support a finding that the children's best interests would have been promoted by granting her additional reunification services. No mention is made of the minors' progress or mother's relationship with them. The petition failed to address in any way the strength of the relative bonds of the minors to mother or to their prospective adoptive parents.

"At this point in the proceedings, on the eve of the selection and implementation hearing, the children's interest in stability was the court's foremost concern, outweighing any interest mother may have in reunification." (*In re Anthony W.*, *supra*, 87 Cal.App.4th at pp. 251-252; see *In re Aaron R.* (2005) 130 Cal.App.4th 697, 706 [petitioner's conclusory allegation that she had formed a bond with child held insufficient "to rebut the mass of evidence in the record indicating that [the child] was thriving under [his prospective adoptive mother's] care"].)

H. and A. had never really been parented by mother. H. was left by her mother more often than not with her current caretakers from the time she was born until she was officially placed with them by the agency in 2010. At age four, her proposed adoptive family was the family she had known all her life. Mother placed A. with a relative at age one month and he had been with his current proposed adoptive parents for over a year.

""[C]hildhood does not wait for the parent to become adequate." [Citation.]" (*In re Casey D.* (1999) 70 Cal.App.4th 38, 47.) "A petition which alleges merely changing circumstances and would mean delaying the selection of a permanent home for a child to see if a parent, who has repeatedly failed to reunify with the child, might be able to reunify at some future point, does not promote stability for the child or the child's best interests. [Citation.]" (*Ibid.*)

The juvenile court did not abuse its discretion in summarily denying mother's section 388 petition.

II. Termination of Parental Rights

Mother also appeals from an order of the juvenile court terminating her parental rights to H. and A. and selecting adoption as the permanent plan. (§ 366.26.) Specifically, she challenges the sufficiency of the evidence to support the juvenile court's findings that the beneficial parent-child relationship exception to adoption (§ 366.26, subd. (c)(1)(B)(i)) and the sibling relationship exception to adoption (§ 366.26, subd. (c)(1)(B)(v)) did not apply. We disagree and affirm.

The issue of sufficiency of the evidence in dependency cases is governed by the same rules that apply to other appeals; if there is substantial evidence to support the findings of the juvenile court, we uphold those findings. (*In re N. S.* (2002) 97 Cal.App.4th 167, 172; *In re Brandon C.* (1999) 71 Cal.App.4th 1530, 1534.) We do not evaluate the credibility of witnesses, reweigh the evidence, or resolve evidentiary conflicts. Instead, we draw all reasonable inferences in support of the findings, consider the record favorably to the juvenile court's order, and affirm the order if it is supported by substantial evidence, even if there is conflicting evidence. (*In re Heather A.* (1996) 52 Cal.App.4th 183, 193; *In re Matthew S.* (1988) 201 Cal.App.3d 315, 321.) The appellant has the burden of showing that there is not substantial evidence to support the finding or order. (*In re L. Y. L.* (2002) 101 Cal.App.4th 942, 947.)

If a dependent child is adoptable³, the juvenile court must terminate parental rights at the section 366.26 hearing, unless the parent establishes the existence of a statutory exception. (§ 366.26, subd. (c)(1); *In re Helen W.* (2007) 150 Cal.App.4th 71, 80-81.) Mother claims two of those exceptions are applicable here. The first is if the parent has "maintained regular visitation and contact with the child and the child would benefit from

³ Mother does not contest the juvenile court's finding that H. and A. are adoptable.

continuing the relationship.” (§ 366.26, subd. (c)(1)(B)(i).) The other is if “[t]here would be substantial interference with a child’s sibling relationship, taking into consideration the nature and extent of the relationship, including, but not limited to, whether the child was raised with a sibling in the same home, whether the child shared significant common experiences or has existing close and strong bonds with a sibling, and whether ongoing contact is in the child’s best interest, including the child’s long-term emotional interest, as compared to the benefit of legal permanence through adoption.” (§ 366.26, subd. (c)(1)(B)(v).)

Here, as to the parent-child relationship exception, there was evidence before the juvenile court that mother had, when she was not incarcerated, maintained visitation with H. and A. But mother was required to show more than frequent and loving contact or pleasant visits with H. and A. “[C]ontact between parent and child will always ‘confer some incidental benefit to the child,’ but that is insufficient to meet the standard.” (*In re C.F.* (2011) 193 Cal.App.4th 549, 559, quoting *In re Autumn H.* (1994) 27 Cal.App.4th 567, 575.) The beneficial parent-child relationship also required mother to show that she shared a relationship with H. and A. that “promotes the well-being of the child to such a degree as to outweigh the well-being the child would gain in a permanent home with new, adoptive parents.” (*In re Autumn H.*, *supra*, at p. 575.)

In determining whether the beneficial parent-child relationship exception applies, the court takes into consideration “[t]he age of the child, the portion of the child’s life spent in the parent’s custody, the ‘positive’ or ‘negative’ effect of interaction between parent and child, and the child’s particular needs” (*In re Autumn H.*, *supra*, 27 Cal.App.4th at p. 576.) “[T]he court balances the strength and quality of the natural parent[-]child relationship in a tenuous placement against the security and the sense of belonging a new family would confer.” (*Id.* at p. 575.)

It is important to recall that at this point in the proceedings, where the juvenile court makes this determination, the child’s interest in a permanent home is paramount. It

is an extraordinary case where preservation of a parent's rights at this juncture would prevail over the Legislature's preference for adoptive placement. (*In re Jasmine D.* (2000) 78 Cal.App.4th 1339, 1350.) This is not one of those extraordinary cases.

There was substantial evidence that H. and A. would benefit more from the permanency of adoption than they would from maintaining a legal relationship with mother. Although mother may have been appropriate and pleasant during visits with H. and A., there was nothing to indicate that H. and A. had a "substantial, positive emotional attachment" to mother, or that they would be greatly harmed if this relationship was severed. (*In re Autumn H., supra*, 27 Cal.App.4th at p. 575.)

In an attempt to establish the existence of a beneficial relationship, mother points to the fact that she cared for H. until she was almost two years old before she "allowed [H.] to stay with Mr. and Mrs. B." She also notes her weekly visits with H. in which H. was very affectionate with mother and always wanted to go home with her. As for A., mother argues that she cared for him until he was six weeks old before voluntarily placing him with her aunt, and, even while he was there, she was his primary caregiver, feeding and changing him. Mother also points to the fact that A. referred to her as "mommy" and went to her when told to "go to mommy."

But while mother may have visited H. and A. there was no evidence that mother occupied a parental role with either child. Although H. was two years old when the petition was filed, H. had already lived most of her life with family friends. As for A., he was placed with family and then friends when he was less than two months old. Although mother claims to have cared for him when she first placed him with an aunt, she was actively using methamphetamines at the time and continued to do so until well into the dependency proceedings. And, as the court stated in its ruling, both children "seem to be thriving in their current placements." This is substantial evidence to support the juvenile court's finding that the benefit of H. and A.'s existing relationship with

mother does not outweigh the well-being H. and A. would gain in a permanent home with new, adoptive parents.

As for the sibling relationship exception, the parent must show the existence of a significant sibling relationship, the severance of which would be detrimental to the child. (*In re L. Y. L.*, *supra*, 101 Cal.App.4th at p. 952; see also *In re Celine R.* (2003) 31 Cal.4th 45, 54.) The sibling relationship exception permits the trial court to consider possible detriment to the child being considered for adoption, but not detriment to a sibling of that child. (*In re Celine R.*, *supra*, at p. 54.) In other words, the court may not prevent a child from being adopted “solely because of the effect the adoption may have on a sibling.” (*Id.* at pp. 49-50.) If the parent makes this showing then the juvenile court balances the benefit to the child of continuing the sibling relationship against the benefit of adoption. (*In re L. Y. L.*, *supra*, at pp. 952-953.)

The record supports the determination by the juvenile court that termination of parental rights would not be detrimental to H. and A. based on substantial interference with their relationship with each other and with B. Mother argues that H., A., and B. all recognize each other, asked about each other, and had a good relationship, and that H. and A. would each suffer a significant loss if the court permanently severed their relationship with each other and with B. While the juvenile court acknowledged that B. “clearly loves her siblings,” it recognized that that factor is not determinative. The record shows that the children lived with each other for only a very short period of time and there is no evidence that they shared common experiences or had a close emotional sibling bond which would result in detriment if terminated.

Nor can mother show that termination of parental rights would interfere with visitation between the siblings. The evidence demonstrated that the families caring for mother’s children had all been family friends and acquaintances of hers for a significant amount of time and that they had incidental contact with each other in the community. No evidence was presented to demonstrate that this would end with adoption.

Here, the record suggests the benefits of adoption for H. and A. outweigh the benefits of continuing their sibling relationship, even assuming there will be some interference with that relationship. (*In re L. Y. L.*, *supra*, 101 Cal.App.4th at pp. 951-953.) Considering all the pertinent factors, the record supports the court's finding that adoption would not be detrimental to the minors. Accordingly, we reject mother's claim to the contrary.

DISPOSITION

The orders denying mother's section 388 petition and terminating her parental rights are affirmed.

Franson, J.

WE CONCUR:

Wiseman, Acting P.J.

Poochigian, J.