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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

In re A.S. et al., Persons Coming Under the
Juvenile Court Law.

ORANGE COUNTY SOCIAL SERVICES
AGENCY,

Plaintiff and Respondent,

v.

M.O.,

Defendant and Appellant.

G045651

(Super. Ct. Nos. DP019991,
DP019992, & DP019993)

OPINION

Appeal from orders of the Superior Court of Orange County, Gary G. Bischoff, Temporary Judge. (Pursuant to Cal. Const., art. VI, § 21.) Affirmed.

Arthur J. LaCilento, under appointment by the Court of Appeal, for Defendant and Appellant.

Nicholas S. Chrisos, County Counsel, Karen L. Christensen and Aurelio Torre, Deputy County Counsel, for Plaintiff and Respondent.

* * *

M.O. (mother) appeals from the juvenile court's orders denying her modification petition under Welfare and Institutions Code section 388 (all further statutory references are to this code unless noted), and terminating her parental rights (§ 366.26). Mother argues the juvenile court abused its discretion by denying the section 388 petition without an evidentiary hearing, and erred in finding inapplicable the continuing benefit exception to termination of parental rights. Finding no basis to overturn the orders, we affirm.

I

FACTUAL AND PROCEDURAL BACKGROUND

In July 2010, the Orange County Social Services Agency (SSA) filed a petition alleging A.S. (born January 2001), David S. (born September 2002), and D.S. (born December 2009) had suffered, or were at substantial risk of suffering serious physical harm or illness as a result of the parents' failure or inability to supervise or protect them, and by the parents' inability to provide regular care for the children due to their parents' mental illness, developmental disability, or substance abuse. (§ 300, subd. (b).) Specifically, the petition alleged that on May 26, 2010, mother disclosed having suicidal thoughts and "all she wanted to do was sleep." She also had an unresolved substance abuse problem. In June 2010, she left a six-month residential drug treatment program after less than a month. She refused to disclose the whereabouts of the children. The children's father, who had a history of drug-related and other criminal behavior, was in prison.

Mother appeared with the children at the detention hearing July 7, and the juvenile court ordered the children to be taken into protective custody. The court directed SSA to prepare a case plan and provide reunification services. The court also authorized funds for random drug and alcohol testing, and permitted mother to have twice weekly

monitored visitation. SSA subsequently placed the children in the home of a paternal aunt.

According to SSA's report for the jurisdiction hearing, mother acknowledged she grew depressed after father was committed to prison. She drank alcohol, had suicidal thoughts and neglected the children, but she denied she wanted to harm the children. Mother, currently age 24, met the children's father when she was 13 years old and he was age 26. They never married. She had not graduated from high school and currently did not have a job. Father drank and consumed drugs and often went out with friends. Mother acknowledged drinking since age 13, but stated she did not have a drinking problem and "can stop at any time." She admitted at least one incident of domestic violence that occurred when the couple lived in Mexico. Mother was currently in a relationship with another man.

The paternal aunt reported mother would leave the children with father for days without saying where she was going. She also reported mother was capable of committing violent acts against father. The maternal grandmother reported mother had been hospitalized at age 13 when she ran into oncoming traffic, apparently because of threats and domestic violence committed by the maternal grandfather against the maternal grandmother. The maternal grandmother reported she witnessed mother attempt to suffocate D.S. while intoxicated.

The social worker arranged random drug testing and provided mother with referrals for substance abuse treatment, in home parenting/coaching, parent education, individual counseling, and a bus pass. Mother participated in the development of a case plan and agreed to participate in the services and activities outlined.

On July 8, mother was a passenger in a car where one of the occupants possessed a small quantity of methamphetamine and a drug pipe. Mother was in possession of a fraudulent social security card and had outstanding arrest warrants for driving without a license and resisting arrest. Later in July, mother tested positive for

amphetamines on three occasions. She also tested positive for marijuana on one of those occasions.

Mother missed a drug test on July 31. SSA considered a missed test as the equivalent of a positive test. She tested positive for amphetamines on August 2. Mother claimed she had enrolled in a drug treatment program, but could not name the facility. When mother visited the children on August 14, she appeared “disheveled, sad, and distant.” She had only visited the children on one occasion between July 8 and August 14. In the meantime, father had been released from prison and deported to Mexico.

In late August 2010, mother pleaded no contest to the petition as amended. The court found custody with the parents would be detrimental, and approved the case plan and reunification services.

In December 2010, the social worker received a call from mother’s boyfriend stating she had suffered a relapse. The boyfriend and maternal grandmother wanted mother to enter inpatient rehabilitation. The social worker and the boyfriend located mother with a man who allegedly supplied mother with drugs. When confronted, mother admitted using methamphetamine the day before and initially refused to return to the maternal grandmother’s home, but eventually agreed to get her belongings and stay with a friend. The social worker agreed to refer mother to outpatient and inpatient drug programs.

The maternal grandmother reported mother spent nights away from home on three occasions in late December and early January. She missed drug testing on January 10. Mother “had no answers” when asked about her missed and positive drug tests, and stated she was still on a waiting list for an inpatient facility. The social worker told mother she must refrain from drug usage, and asked her to analyze the “triggers” causing her to abuse drugs, and to discuss this with her therapist.

Mother phoned the social worker on February 3 stating she felt desperate and did not understand why she was still on a waiting list to enter drug rehabilitation. She admitted using alcohol that day, and stated she was distraught about breaking up with her boyfriend. The social worker spoke with mother's perinatal program counselor, who stated mother had tested positive for methamphetamine that morning.

Mother completed a parenting course in late October 2010 and received favorable comments. Mother attended and participated in anger management sessions, and was described as "honest and open," although she stopped attending after entering a recovery group through her church. Mother's individual therapist reported mother had missed several appointments. Although mother remained upset over breaking up with her boyfriend, her physical appearance had improved and she was now "more presentable and open to talk[ing] about her issues." Mother had not "show[n] any signs of hurting herself or others," and the therapist and mother had "intensively go[ne] over coping mechanisms, healthy relationships, and positive interaction with her children."

The nurse at the perinatal program reported she was contemplating terminating mother because she "appeared to not be serious about her program." Mother had multiple missed and positive tests and had been unable to complete the first phase of the four-part program because she "did not do the homework and participate with groups."

Although mother did show up for most of her visits with the children, "the quality of the visits were [sic] not very productive." Mother had difficulty redirecting the boys, who did not appear to see her in a parental role. Mother would bring "'goodies'" to the visit and "bribe the children to get them to listen to her." Mother became easily frustrated with David while helping him with his homework.

In February, mother was living in a church-sponsored recovery home in Anaheim where residents "receive spiritual counseling for their addiction." The social worker advised mother she must still comply with drug testing and other services and the

facility's director agreed he would assist mother in complying with her case plan. But the director explained the recovery home was "not a substance abuse program and does not have licensed counselors." Upon learning this, the social worker advised mother she would need to enroll in a substance abuse program to satisfy her case plan requirements. Mother missed three appointments with her therapist and required a new referral. The perinatal program anticipated discharging mother at the end of the month.

In early March, mother advised the social worker she had moved back to Dana Point, and had reapplied for the perinatal program. She was admitted and claimed to have progressed to phase two after testing free of drugs for a month. She participated in other services and claimed she was committed to "reunifying with her children" Mother no longer saw her boyfriend because other people told her he was involved with drugs. The social worker learned mother had tested positive for methamphetamine on February 28.

Mother admitted the relapse. The social worker informed mother she was changing the recommendation because mother would not "complete her program within six months to be able to start a trial visit with her children." Mother again tested positive for methamphetamine on March 3, and missed a test on March 12. The social worker expressed concern "about the mother's recent relapse, positive and missed tests, and credibility, since she went back home and started using, yet expressed to the undersigned that she was committed and willing to complete her" case plan.

Mother continued to have difficulty meeting her case plan requirements. She did complete a 20-week anger management program, and her therapist reported mother had shown no sign of depression. She also appeared "very eager about her new pregnancy." But she missed a drug test on April 7, and had not enrolled on the waiting list at the inpatient drug facility referred by the social worker. Mother did not return phone calls, and the maternal grandmother had not heard from her for two weeks. Mother missed drug tests on April 8, 11, and 14, and cancelled several visits. She did

attend a visit on April 16. The caretaker was upset the children were hiding candy obtained from mother during visits, noting the “children’s teeth [were] full of cavities” and they needed “a lot of dental work.” As of April 20, mother was interviewed and placed on the waiting list at the inpatient drug facility, and would receive higher priority because she was pregnant.

At the six-month review hearing on April 22, the juvenile court found continued supervision was necessary, return of the children to the parents would be detrimental, and mother’s progress with the case plan had been moderate. The court terminated reunification services, stating it could not find a substantial probability the children would be returned home within six months. It scheduled a section 366.26 hearing for August 15, 2011.

In her report for the section 366.26 hearing, the social worker noted permanency planning assessments had been completed for the children, and given their “characteristics and attributes it is likely that [they] will be adopted.” The caregivers, the paternal aunt and her husband, expressed a desire to adopt the children, who felt loved and cared for by their aunt and uncle.

In May, the social worker advised mother, who was now at the inpatient drug facility, SSA was moving forward with permanency for the children and mother was not to mislead the children that they would return to her care. Mother began to cry and stated she did not know the court had terminated services. The social worker encouraged mother to make her visits productive and not to bring her new boyfriend. Nevertheless, mother’s boyfriend accompanied her when visiting the children. During visits, mother did “not really interact with” the boys, who spent time with the boyfriend while she “mostly watches” D.S.

In her section 366.26 report, the social worker noted mother had completed a 90-day detoxification program but had not yet completed the perinatal substance abuse program and it could not be determined “if the mother will maintain sobriety due to her

long history of substance abuse.” The worker cited mother’s positive alcohol test on March 29, and the missed tests in April during mother’s current pregnancy. The social worker noted mother had not provided “financial and emotional stability for the children due to her history of drug issues. Further the quality of [her] visits has generally been limited, marked by limited productive interactions, the mother’s inattention, and lack of discipline when needed.”

A few days before the section 366.26 hearing, mother submitted a modification request to change the order terminating reunification services (see § 388). Counsel argued mother had successfully completed the 90-day residential program, had immediately entered the outpatient perinatal drug program, was “doing really well right now” and would “like to receive further reunification services” until January 2012. The court denied the request without a hearing. It noted mother had begun treatment and apparently had an apartment, but there was “nothing here to indicate that the mother is addressing or has addressed the psychiatric issues which . . . are part of the basis” for jurisdiction. The court also stated “truly, this is at the very beginning of any kind of treatment program,” observing “at best, [there] are changing circumstances, not changed circumstances,” and there was no showing the relief requested would “be in the children’s best interest.”

Mother testified at the section 366.26 hearing she “became an inpatient in a 91-day program” and had “learned many things.” She “learned how to address my feelings and how to handle them and also learn to prioritize those things in my life and I also learned how to stay clean. I had never had a sponsor before. I never knew that I had to go through certain steps so that I could stay clean and also to manage my anger and how to address my triggers.” Mother testified she loved her children and wanted to be part of their lives. She attended the perinatal program three times a week since July 28 and was tested for drugs twice per week. She also attended Alcoholics Anonymous meetings.

Mother saw her children twice a week for two hours. Mother testified older son A.S. was “hopeful that he will be coming home” He asked her if they would go “surfing or to the pool like before” He called her “mom,” and they had a mother-son relationship. David liked to “joke around a lot.” Mother and he played, and she asked him how he was doing in school and what his dreams were. She thought their relationship was a “good one.” D.S., 20 months old, was usually asleep when mother arrived for visits. When she awoke, she came to mother, they played, and she “just want[ed] to stay” with mother, and cried when mother left visits. Mother believed it would harm the children to terminate her parental rights because “they know me as their mom,” and she worried the caretakers would limit her contact with the children if they adopted them. She concluded, “I know that I did wrong and I do accept the fact , but I was under the influence of alcohol and drugs. My mind wasn’t all there. And now I am aware of what I did and I would like the court to consider that and give me another opportunity.”

The juvenile court found the children were likely to be adopted and termination of parental rights would not be detrimental. (See § 366.26, subd. (c)(1)(A) & (B).) The court noted “mother has not been entirely consistent with her visitation” and the visits were “not of a parental nature” and “[while] we do have some playing and so forth, but clearly, . . . the mother has real problems with being able to apply parenting skills that she had learned. [¶] She’s easily impatient” and “[d]idn’t seem to have control . . . to provide the discipline So it, really, does not appear that we have a relationship between the . . . children and the mother which outweighs . . . the benefit that they’ll achieve by way of adoption.”

II

DISCUSSION

A. *The Juvenile Court Did Not Abuse Its Discretion in Denying Mother's Section 388 Petition*

Mother contends the juvenile court erred by denying her section 388 petition without a full evidentiary hearing. At the time of the order in this case, section 388 provided, “(a) *Any parent or other person having an interest in a child who is a dependent child of the juvenile court or the child himself or herself through a properly appointed guardian may, upon grounds of change of circumstance 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 or in which a guardianship was ordered pursuant to Section 360 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, if made by a person other than the child, shall state the petitioner’s relationship to or interest in the child and shall set forth in concise language any change of circumstance or new evidence that are alleged to require the change of order or termination of jurisdiction.*” (Italics added.) Subdivision (d) of section 388 provided, “*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 and shall give prior notice, or cause prior notice to be given, to the persons and by the means prescribed by Section 386, and, in those instances in which the means of giving notice is not prescribed by those sections, then by means the court prescribes.*” (Italics added.)

California Rules of Court, rule 5.570 specifies the “petition . . . must be liberally construed in favor of its sufficiency.” But a change of order presupposes a change of circumstances. Thus, “[a] juvenile court order may be changed, modified or set aside under section 388 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.) A parent “need only make a prima facie showing of these elements to trigger the right to a hearing” (*Ibid.*) The “prima facie requirement is not met unless the facts alleged . . . would sustain a favorable decision on the petition.” (*Id.* at p. 806; see *In re Alexis W.* (1999) 71 Cal.App.4th 28, 36 [party seeking modification “has the burden of showing not only that circumstances have changed, but that [proposed change] would be in the child’s best interests”].) No hearing is required where the parent’s petition does not demonstrate how a change in the order would be in the best interest of the children. (*In re Anthony W.* (2001) 87 Cal.App.4th 246, 251.) A “mere prima facie showing of changing — we hesitate to say, ‘changed’ — circumstances [i]s not enough to require or justify a hearing” (*In re Baby Boy L.* (1994) 24 Cal.App.4th 596, 610.) In particular, proof that a parent is simply “*beginning to rehabilitate*” a serious drug problem is not enough to warrant a hearing. (*Ibid.*, original italics.)

Factors circumscribing the juvenile court’s discretion in evaluating a modification petition and in informing our review are: “(1) [T]he seriousness of the problem which led to the dependency, and the reason for any continuation of that problem; (2) the strength of relative bonds between the dependent children to *both* parent and caretakers; and (3) the degree to which the problem may be easily removed or ameliorated, and the degree to which it actually has been.” (*In re Kimberly F.* (1997) 56 Cal.App.4th 519, 532, original italics.) Also, as our Supreme Court has explained, “[A] primary consideration in determining the child’s best interests is the goal of assuring stability and continuity. [Citation.] ‘When custody continues over a significant period, the child’s need for continuity and stability assumes an increasingly important role. That need will often dictate the conclusion that maintenance of the current arrangement would be in the best interests of that child.’ [Citations.]” (*In re Stephanie M.* (1994) 7 Cal.4th 295, 317 (*Stephanie M.*).

The juvenile court has the discretion “whether to provide a hearing on a petition alleging changed circumstances.” (*In re Aljamie D.* (2000) 84 Cal.App.4th 424, 431 (*Aljamie D.*) The court may deny the petition ex parte if it fails to state a change of circumstance or fails to offer new evidence that the requested modification would promote the best interest of the child. On appeal from denial of a modification petition, the ““reviewing court will not disturb [the juvenile court’s] decision unless the . . . court has exceeded the limits of legal discretion by making an arbitrary, capricious, or patently absurd determination [citations].”” (*Stephanie M., supra*, 7 Cal.4th at p. 318.)

Mother argues “despite some negative reports from the [s]ocial [w]orker, [she] had substantially complied with her case plan. [She] completed [a]nger [m]anagement classes, [p]arenting [c]lasses, a 90[-]day [i]npatient [p]rogram, AA meetings, obtained a sponsor and made substantial progress in [i]ndividual [c]ounseling. [She] actively engaged in mental health services despite the court’s findings that [she] did not address mental health issues.”

Here, the juvenile court reasonably classified mother’s petition as demonstrating at best changing, rather than changed circumstances. Given her longstanding difficulties with substance abuse, including abuse of alcohol since age 13, mother’s completion of an initial detoxification phase of a drug program for methamphetamine addiction did not demonstrate she was likely to remain drug free. Unlike the parent in *Aljamie D.*, mother had not established a significant period of sobriety. Mother was only *beginning* to rehabilitate a serious drug problem, which was not enough to warrant a hearing. At the time she filed her modification petition, reunification efforts had been terminated for four months, and the focus had shifted to achieving permanency. The children felt loved and cared for by their aunt and uncle and did not express a strong desire to live with mother. Moreover, as recounted above and noted by the juvenile court, despite mother’s participation in various classes and

programs, the visitation reports showed mother often failed to apply the lessons presumably taught. The children's best interests did not lie in upsetting their newfound stability by reinstating reunification efforts. The juvenile court therefore did not abuse its discretion by denying the section 388 petition without a hearing.

B. *The Juvenile Court Did Not Err By Declining to Apply the Continuing Benefit Exception*

Mother also contends the juvenile court should have declined to terminate parental rights because the evidence demonstrated the children would have benefitted from continuing their relationship with her. Section 366.26 provides that after reunification efforts have failed and the court finds the child is likely to be adopted, "the court shall terminate parental rights" (§ 366.26, subd. (c)(1)) unless specified circumstances exist. One exception is where "[t]he court finds a compelling reason for determining that termination would be detrimental" because "[t]he parents have maintained regular visitation and contact with the child and the child would benefit from continuing the relationship." (§ 366.26, (c)(1)(B)(i).) "[T]he burden is on the party seeking to establish the existence of one of the section 366.26, subdivision (c)(1) exceptions to produce that evidence." (*In re Megan S.*(2002) 104 Cal.App.4th 247, 252.)

The statutory exception requires the child "benefit from continuing the relationship." (§ 366.26, subd. (c)(1)(B)(i).) The benefit exception "does not permit a parent who has failed to reunify with an adoptable child to derail an adoption merely by showing the child would derive some benefit from continuing a relationship maintained during periods of visitation with the parent." (*In re Jasmine D.* (2000) 78 Cal.App.4th 1339, 1348 (*Jasmine D.*)). To the contrary, once the mandated period for reunification has passed the parent bears the burden of proving that termination of parental rights will be detrimental to the child. (*Id.* at p. 1350.) After reunification efforts end, the Legislature's preferred permanent plan calls for termination of parental rights and

subsequent adoption. (*In re Jose V.* (1996) 50 Cal.App.4th 1792, 1799; *In re Cody W.* (1994) 31 Cal.App.4th 221, 227–231.) “Adoption is the Legislature’s first choice because it gives the child the best chance at . . . commitment from a responsible caretaker. [Citations.]” (*Jasmine D.*, at p. 1348.) Thus, the benefit prong of section 366.26, subdivision (c)(1)(B)(i), is satisfied only if “the relationship 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.* (1994) 27 Cal.App.4th 567, 575.) “In other words, the 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.” (*Ibid.*) The court’s balancing of competing considerations must be performed on a case-by-case basis, taking into account variables such as the child’s age, “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. [Citation.] . . .” (*Jasmine D.*, at pp. 1349–1350; *Autumn H.*, at pp. 575–576.)

We will not disturb the juvenile court’s balancing of interests unless the order is not supported by substantial evidence (*In re Clifton B.* (2000) 81 Cal.App.4th 415, 425), or the court abused its discretion (*Jasmine D.*, *supra*, 78 Cal.App.4th at p. 1351; see *In re Bailey J.* (2010) 189 Cal.App.4th 1308, 1314 [substantial evidence standard of review applies to existence of a beneficial parental or sibling relationship; abuse of discretion standard applies to whether existence of relationship constitutes a compelling reason for determining that termination would be detrimental]; see *In re C.B.* (2010) 190 Cal.App.4th 102, 123) [“the trial court’s findings of fact are reviewed for substantial evidence, its conclusions of law are reviewed de novo, and its application of the law to the facts is reversible only if arbitrary and capricious”].)

Mother argues she “maintained regular contact with her children” by “visit[ing] two times per week” and once weekly while she was at the drug rehabilitation

facility. She notes the children, at least her boys, “spent the majority of their lives with” her and 10-year-old A.S. “was sad when [mother] had to leave the visits and he wanted to live with her.” She says seven-year-old David had lived with her most of his life and wanted to live with her. Finally, she notes 20-month old D.S. “called her Mom and wanted to be held by her.” Mother states she was “clean and sober,” she had “turned her life over to a higher power,” she was actively participating in “AA and outpatient programs,” and had completed parenting and anger management programs, attended counseling, and took “responsibility for her past actions.” She had “stable housing and does not associate with third parties which caused her to use alcohol and drugs.”

The evidence, recounted above, supports the trial court’s conclusion the potential benefits of adoption outweighed maintaining the existing relationship. Mother’s recent positive steps toward sobriety and maturity were encouraging. Given her long history of substance abuse, however, mother’s short period of sobriety did not demonstrate she could remain drug free. During visits, mother did “not really interact with the” boys, who spent time with the boyfriend while she “mostly watches” D.S. She had difficulty redirecting the boys, became frustrated when assisting David with his homework, and the boys did not appear to view her in a parental role. Perhaps because she was a child herself when she met the children’s father and began having children, mother’s parenting skills had not matured, notwithstanding a year of parenting courses and other services. Her focus appeared to be on the men in her life, rather than her children. Accordingly, substantial evidence supports the juvenile court’s finding the children would not benefit from continuing their relationship with mother.

III

DISPOSITION

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

ARONSON, J.

WE CONCUR:

O'LEARY, P. J.

IKOLA, J.