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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

In re JAYDEN T., a Person Coming Under
the Juvenile Court Law.

ORANGE COUNTY SOCIAL SERVICES
AGENCY,

Plaintiff and Respondent,

v.

CORINA R.,

Defendant and Appellant.

G049812

(Super. Ct. No. DP023978)

O P I N I O N

Appeal from orders of the Superior Court of Orange County, Caryl Lee,
Judge. Affirmed.

Jacob I. Olson, under appointment by the Court of Appeal, for Defendant
and Appellant.

Nicholas S. Chrisos, County Counsel, Karen L. Christensen and Jeannie Su,
Deputy County Counsel, for Plaintiff and Respondent.

* * *

Corina R. (mother) appeals from orders summarily denying her motion for modification of the court's prior order denying her reunification services, and terminating her parental rights to her son, Jayden T. She does not attack the termination order directly, but argues instead that the court abused its discretion by refusing to grant a continuance of the hearing at which her rights were terminated so that she could obtain further evidence to support her late-filed request to modify the court's prior orders denying her reunification services and placing Jayden in the custody of his maternal grandparents. She also argues the court erred by denying her an evidentiary hearing on the modification request. We find both claims unpersuasive, and affirm the orders.

FACTS

Jayden was detained by the Orange County Social Services Agency (SSA) shortly after his birth in July 2013. His three older siblings had been removed from parental custody approximately a year earlier, and placed with their paternal grandparents, based on both parents' history of drug abuse and domestic violence, as well as the father's criminal history. The youngest of those siblings tested positive for methamphetamine at birth in June 2012.

Jayden did not test positive for methamphetamine at birth, but mother admitted she had used methamphetamine throughout most of her pregnancy, ceasing only two months prior to his birth when Jayden's father was incarcerated and she entered an emergency shelter for pregnant women in need of drug treatment. Before entering the shelter, mother received no prenatal care and made no significant effort to comply with the reunification plan for her older children. Instead, she was focused on spending time with the children's father prior to his incarceration and abusing drugs with him. She was dropped from at least two drug treatment programs due to her failure to comply. She concealed her pregnancy from both family members and SSA.

Approximately a week after his birth, Jayden was placed with his maternal grandparents. On July 26 and August 7, mother tested positive for opiates. On August 4, the court terminated reunification services for mother's older children.

SSA filed a petition alleging Jayden should be declared a dependent of the court based on counts alleging failure to protect (Welf. & Inst. Code, § 300, subd. (b); all further statutory references are to this code) and abuse of siblings (§ 300, subd. (j).) SSA also recommended denial of reunification services based on section 361.5, subdivision (b)(10), which allows a denial of services in cases when a parent has already failed to reunify with the child's sibling, and section 361.5, subdivision (b)(13), which allows a denial of services when a parent with a history of chronic drug abuse has failed or refused to comply with a program of drug or alcohol treatment described in a dependency case plan on at least two prior occasions.

On August 29, mother submitted on the petition and the court found the allegations of the petition were true. The court adjudicated Jayden a dependent and set the case for a dispositional hearing on October 8.

Mother again tested positive for opiates three times in September and she was terminated from her perinatal drug program after testing positive for hydrocodone.

At the dispositional hearing on October 8, Jayden's father waived any right to participate in reunification services. Mother, however, did not appear and her counsel sought a 30-day continuance, explaining mother had contacted her that morning with the news she had checked herself into "Victory Outreach," a inpatient drug program and was on a 30-day lockdown. The court granted that continuance. Three days later, mother reported she had left Victory Outreach, which proved to be a bible-based support group, rather than a drug treatment program. Mother explained she was on the wait list for two other inpatient drug programs and was participating in an outpatient program. Mother tested positive for cocaine on October 23.

On November 7, all parties, including mother, stipulated to a dispositional order, including a provision that reunification services need not be provided to her pursuant to section 361.5, subdivisions (b)(10) and (13). The parties also stipulated to approval of the case plan set forth in SSA's report, including a visitation schedule allowing mother monitored visitation with Jayden five times per week, and for the court to order funding for mother to continue wearing a "drug patch" until the section 366.26 hearing.

The court entered an order consistent with the parties' stipulation and scheduled the section 366.26 hearing for March 6, 2014, four months hence.

Between the jurisdictional hearing and the section 366.26 hearing, Jayden remained in the care of his maternal grandparents. SSA reported he was strongly bonded to them and viewed them as parent figures. They were committed to adopting him. Jayden visited with his siblings on a near-weekly basis.

Mother continued to visit with Jayden steadily, for a total of 10 hours per week. The visits were monitored by the maternal grandparents, who reported mother was very appropriate. The social worker also observed visitation, reporting that mother "displayed a tender and gentle caring" for Jayden.

Mother also appeared to remain drug free following the dispositional hearing, and she had achieved five months without any positive drug tests by the time of the section 366.26 hearing.

Despite mother's commendable effort, SSA recommended the court terminate parental rights and free Jayden for adoption. It did not view mother's recent string of negative drug tests as establishing her long-term sobriety, and it reasoned Jayden was not only highly adoptable, but very likely to be adopted by the maternal grandparents with whom he was already bonded.

At the commencement of the section 366.26 hearing, mother presented the court with what her attorney acknowledged was a somewhat abbreviated motion under

section 388, seeking a change of the court's earlier order denying mother reunification services. She requested that the court order reunification services be offered to her or, in the alternative, that Jayden be placed in her custody. The motion was supported by mother's sworn statement, expressed in conclusory fashion, that she had "made substantial progress" in her drug and alcohol abuse program, which she had been participating in since October 2013. She was set to graduate in April. She also stated, again in conclusory fashion, that she had "obtained a job and driver's license."

Mother's attorney asked the court to continue the section 366.26 hearing for one week, so that mother could obtain additional evidence to support her motion. Specifically, the attorney explained she had spoken with mother's drug program counselor just that morning, and the counselor had "really good things to say about mother and her progress in the program." The attorney expressed "hope . . . that with some additional time I would be able to obtain a letter that memorialized what was said to me." She also stated she would "like to be able to submit a formal declaration to the 388 motion, as well, that is not attached to this current . . . form." The attorney argued that continuing the hearing would not "be any detriment to [Jayden, who] is currently placed with the maternal grandparents. There is . . . nothing that would change in the life of the child if we continued this matter one week to allow [mother] the opportunity to really present a more formal 388 form."

Mother's attorney also argued that even if the hearing was not continued, the court should nonetheless schedule an evidentiary hearing on mother's section 388 motion because the evidence already before the court stated a "prima facie showing that there is a change in circumstance and that I should be entitled [to] a hearing to present the court with evidence regarding [mother's] change in circumstance."

All other parties at the hearing, including father, objected to the continuance. SSA noted that mother had several months' notice of the section 366.26 hearing, and thus plenty of opportunity to prepare and file her section 388 motion in

advance of the hearing. There was no justification for waiting until the day of the hearing to make her request. Jayden's counsel added that in light of Jayden's young age, it is particularly important to make a determination as to his permanent plan. Mother's counsel responded by pointing out that in order to counter an expected assertion that mother's circumstances were merely "changing," rather than actually *changed*, it was necessary to wait until "close to the .26 [hearing]" to seek relief.

The court denied the continuance, noting the section 366.26 hearing had been set "for quite awhile" and there was nothing to suggest mother's section 388 motion could not have been filed in advance. The court pointed out that the certificate of mother's completion of a 10-week "personal empowerment program," which was the only document attached as evidence in support of her motion, had been executed more than a month earlier.

The court also ruled that mother's motion, in its current form, did not make a *prima facie* showing that would justify a change in the prior order denying her reunification services. The court agreed with SSA that mother's recent string of negative drug tests, while encouraging, was not sufficient to establish that her years-long history of drug abuse had been addressed. The court emphasized that mother had not yet even completed her substance abuse program. Thus, as mother's attorney anticipated, the court concluded that the evidence before it suggested that while mother's circumstances were "changing," they could not yet be characterized as changed. Consequently, the court denied mother's section 388 hearing without scheduling an evidentiary hearing.

The court then proceeded to the substance of the section 366.26 hearing. Mother's counsel conceded that Jayden was adoptable and that the maternal grandparents appeared ready and able to adopt him. But she nonetheless argued for an alternative plan of guardianship, which she portrayed as offering Jayden the same "permanence" with his maternal grandparents that adoption offered, with the added benefit of maintaining his legal relationship with mother. Both SSA and Jayden's counsel argued in favor of

terminating parental rights, thus freeing Jayden to be adopted by his grandparents. The court agreed and ordered termination of mother's parental rights.

DISCUSSION

1. Denial of Continuance

Mother first argues the court erred by denying her request to continue the section 366.26 hearing for a week, to give her additional time to gather evidence in support of the section 388 motion she filed on the day of the hearing. We review the court's denial of a continuance for an abuse of discretion (*In re Elijah V.* (2005) 127 Cal.App.4th 576, 585), and we find no such abuse here.

First, as SSA points out, mother failed to comply with the procedural requirements set forth in section 352, subdivision (a), for seeking a continuance of the hearing. That provision specifies that a party seeking a continuance must file written notice of the request *at least two court days* before the date set for the hearing, along with a supporting declaration showing the continuance is necessary. (§ 352, subd. (a).) Rather than doing either of those things, mother simply requested the continuance orally, as the hearing commenced, without any evidentiary support for it. And while section 352, subdivision (a) also allows the court to entertain such an oral motion for "good cause," mother established none here. In fact, the only suggestion of emergent circumstances was the contention of mother's attorney that she had only just spoken with mother's drug program counselor earlier that morning. Significantly, however, mother's attorney made no claim that she had made any effort to speak with the counselor previously.

But even if we assume mother's last-minute oral request was somehow justified by circumstances beyond her control, we would still conclude she failed to demonstrate good cause for the continuance itself. "Continuances are discouraged in dependency cases" (*In re Giovanni F.* (2010) 184 Cal.App.4th 594, 604), and while

mother's attorney did assert it was necessary to file her section 388 motion "close to the .26 [hearing]" so as to best make out the claim that her circumstances had *changed* – rather than were merely *changing* – she failed to explain why the exact same motion would have been perceived as materially less persuasive if filed a mere week or two earlier.

And perhaps more significant, mother's attorney also failed to make any specific representation regarding the additional evidence that would have been forthcoming if the continuance she sought was granted. Instead, she merely informed the court that mother's drug program counselor had "really good things to say about mother and her progress in the program" when they had spoken on the phone that morning and then expressed "hope" that with additional time she would be able to get a letter from the counselor. Mother's attorney did not even claim the counselor had actually *agreed* to provide a letter. And the attorney's statement that she would also like the opportunity to "submit a formal declaration" in support of the motion was similarly insufficient as a justification for continuance, as she offered no hint about the proposed content such a declaration might include. In short, mother failed to demonstrate that if the court were to grant her a continuance, she would be able to produce additional evidence which would be likely to affect the outcome of her section 388 petition.

For all of these reasons, we could not say the court abused its discretion by denying mother's request for a continuance.

2. *Denial of Evidentiary Hearing*

Section 388 provides that any party can petition the court to modify or revoke a prior order in a dependency case based on a showing of a material change in circumstances or new evidence, and if the court determines the party has made a prima facie showing of the changed circumstance or new evidence, and the proposed modification or revocation appears to be in the child's best interests, it shall order a

hearing on the petition. (§ 388, subds. (a), (d); *In re Mickel O.* (2011) 197 Cal.App.4th 586, 615 [“[I]t is not enough for [the petitioner] to show *just* a genuine change of circumstances under the statute. The [petitioner] must show that the undoing of the prior order would be in the best interests of the child”].) “A ‘prima facie’ showing refers to those facts which will sustain a favorable decision if the evidence submitted in support of the allegations by the petitioner is credited.” (*In re Edward H.* (1996) 43 Cal.App.4th 584, 593.)

Mother claims she made such a prima facie showing here, and thus the court erred by refusing to schedule a hearing on her petition. We disagree. As the trial court concluded, the evidence offered by mother fell short of demonstrating that her chronic drug dependency – the primary problem underlying this dependency – had been resolved. A necessary change in circumstance means something more than that a parent has finally decided to *begin* tackling the problems underlying the dependency. (See *In re Baby Boy L.* (1994) 24 Cal.App.4th 596, 610 [noting that “at the eleventh hour and the fifty-ninth minute, [mother] offered a bare scintilla of proof that she was *beginning* to rehabilitate”].) As explained in *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.” (See *In re Mickel O.*, *supra*, 197 Cal.App.4th at p. 615 [“the petitioner must show *changed*, not changing, circumstances”].) Here, as the trial court noted, when mother presented her section 388 petition, she had yet to even complete a single drug program. And while she was then enrolled in such a program, and anticipated graduating soon, she had previously dropped out of several others. It would be difficult, to say the least, to conclude that mother’s drug problem was convincingly resolved even before she had successfully completed a drug treatment program.

And although we agree that mother's sustained participation in a drug program, along with her five-month string of clean drug tests, was a significant positive development, we also note it was not the first time she had been able to achieve such short-term success. She also did so during the final months of her pregnancy with Jayden, only to resume her drug abuse after he was born. Under these circumstances we cannot conclude the trial court erred in concluding mother's petition failed to demonstrate she had yet achieved a material change in circumstances.

Moreover, even if we assumed that mother's progress in addressing her drug problem would qualify as a sufficient change in circumstance, we would still conclude the petition was deficient for failing to demonstrate how it would be in Jayden's best interests to commence a reunification process. In considering Jayden's interests in this context, we must give substantial weight to his need for a prompt resolution of his custody status and a stable environment. "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." (*In re Stephanie M.* (1994) 7 Cal.4th 295, 317.)

In her written petition, mother simply claimed it would be in Jayden's best interests to reunify with her because the two had developed a significant bond during her 10 hours of visitation with him each week. But that assertion implicitly ignores the fact that mother's 10 hours per week with Jayden was only a small fraction of the time his maternal grandparents had spent forming their own parental bonds with him from the time he was just a week old. There is simply no basis to conclude that mother's bond with Jayden would be the more significant one. And at the hearing, mother offered no additional argument on this point. Instead, she simply contended that Jayden, who would presumably remain in his grandparent's custody, would *not be harmed* by delaying the proceedings while she was given the opportunity to reunify. Not so. Because this case

had proceeded to the point of a section 366.26 hearing, Jayden's need for permanency and stability was paramount. (*In re Marilyn H.* (1993) 5 Cal.4th 295, 309.)

Consequently, anything which interfered with that goal was presumptively harmful. We find no error in the court's summary denial of mother's section 388 petition.

DISPOSITION

The orders are affirmed.

RYLAARSDAM, ACTING P. J.

WE CONCUR:

BEDSWORTH, J.

ARONSON, J.