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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

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

ORANGE COUNTY SOCIAL SERVICES
AGENCY,

Plaintiff and Respondent,

v.

C.G.,

Defendant and Appellant.

G050239

(Super. Ct. Nos. DP016781,
DP016782, DP023284 & DP023285)

O P I N I O N

Appeal from postjudgment orders of the Superior Court of Orange County,
Deborah C. Servino, Judge. Affirmed.

Pamela Rae Tripp, 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.

No appearance for the Minors.

* * *

Defendant C.G. (mother) appeals from an order denying her Welfare and Institutions Code section 388 (all further statutory references are to this code) petition to obtain family reunification services. She also appeals an order granting the section 388 petition of plaintiff Orange County Social Services Agency (SSA) to reduce visitation with her four children, now ages eight and a half, six and a half, three, and two, respectively.¹ Mother claims the court erred in denying her petition without a hearing because she had shown both changed circumstances and benefit to the children. She also argues there was insufficient evidence of both of those factors to support the order reducing her visitation, thereby violating her due process rights. We disagree with these contentions and affirm the postjudgment orders.

FACTS AND PROCEDURAL HISTORY

As alleged in the petition, in November 2012 the children were taken into custody. Mother had just given birth to child 4 at a friend's home in Tijuana. She did not want to deliver at the hospital because she was afraid the baby would be taken from her. That day mother then took child 4 to the hospital where the two of them tested positive for amphetamines. Mother admitted she had used methamphetamines during her pregnancy, as recently as a few days before the birth. Mother had a history of drug abuse and depression.

The three oldest children had had scabies for six months, suffering with rashes and open sores. Mother had not taken them to the doctor, also for fear they would be taken from her custody. For a week before child 4 was born, mother and the children

¹ Because all of the children's names start with the same initial and some have the same last name, for their privacy and for ease of reference we refer to the children as child 1, child 2, child 3, and child 4, from oldest to youngest, and refer to all four collectively as the children.

were living in a rented room swarming with cockroaches, containing piles of dirty clothes, and without food.

At that time the whereabouts of the father of child 1 was unknown. J.C., the father of the other three children (father),² was incarcerated on drug-related charges. Mother and father have a history of domestic violence.

Mother has prior experience with the dependency system. In 2008, the two oldest children were taken into custody after mother gave birth to child 2, when both mother and the baby tested positive for amphetamine/methamphetamine. Mother had an ongoing substance abuse problem at least as far back as 2003 and knew she put child 2 at risk when she used drugs during her pregnancy.

Mother successfully participated in reunification services, including drug and alcohol treatment, counseling, and parenting classes. The dependency proceeding was terminated and custody of the children was returned to mother in April 2010.

After an inconclusive referral in July 2010 for general neglect, in September 2010 mother was arrested on charges of domestic violence and child endangerment after she and father were in a physical altercation, causing mother to drop child 2. When mother and father later met with SSA, they agreed to participate in family services. SSA's involvement ended in December 2011.

In the jurisdiction/disposition report, SSA recommended no reunification services be provided to mother or father. As to mother, it cited the facts sustained in the petition. In addition, it pointed out mother had little prenatal care for child 4, who, after her birth required hospitalization. The report explained mother had not benefited from her previous 21 months of family services, and noted her "unresolved substance abuse

² Although father is not a party to this appeal, he is a party to the underlying action and has appealed the termination of parental rights in a related appeal, *In re A.C.*, No. G050535.

problem is an ongoing issue that places the children at risk of harm if returned to her care.”

As to father, he too had had the same reunification services as mother. He had a 2012 conviction for possession of illegal drugs and paraphernalia and “a lengthy criminal history,” including a manslaughter conviction in 2005, which he had “denied” or “minimized” when interviewed in connection with this action.

At the hearing, mother and father pleaded no contest to the allegations in the petition as set out above. The dependency petition was sustained on failure to protect (§ 300, subd. (b)(1)) and abuse of siblings (§ 300, subd. (j)), as to child 3 and child 4, due to the prior dependency proceeding for child 1 and child 2.

Beginning in January 2013, mother enrolled in a 9-to-12-month, four-phase substance abuse outpatient program, that includes drug counseling, individual therapy, a 12-step program, and scheduled drug tests. At the time of the disposition hearing in March she had almost completed the first phase, except for one missed drug test. At the disposition hearing, the court declared the children dependents and denied reunification services under section 361.5. Mother and father were each given six hours of visitation, to decrease to four if there were two unexcused absences in a month.

Mother continued to progress in her program until November when she had a positive drug test, which she denied, and by December it could not be confirmed whether she was still participating in her program. Mother agreed to sign a release so her counselor could discuss this with the social worker. In addition, from the middle to the end of 2013 father was doing well in substance abuse counseling programs.

In 2014, the children were in three separate foster homes, with child 2 and child 3 together. Visits generally went well. The children seemed happy to see mother and father. Mother helped child 1 and child 2 do homework. Parents brought food and toys. They were affectionate and loving and sometimes disciplined the children if necessary. Discipline was inconsistent and lacked follow through.

In January 2014, child 2 and child 3 had to be removed from their foster placement. Mother told the foster father, “I want you to return the kids and if you don’t return the kids you’re going to have problems and you’ll have to then pay for the consequences.” After mother denied making the statement, child 2, who was present, reported mother told the foster father, “If you don’t give [child 2 and child 3] back, I’m going to call the police.” The foster parents explained that, in light of mother’s threat, they could not continue custody of the children. Child 2 and child 3 were moved to another foster home.

In February 2014, SSA filed a section 388 petition to reduce parents’ visitation from six hours to three hours a week. Marisa Leon, the social worker, stated that, based on reports from the foster parents and visitation monitors, and her own observations, the visits were detrimental. Mother “looked over” the children for bruises or other marks and questioned them if she found even a small mark, demanding to know the source. If the child did not know, mother would continue to question him or her, making the child anxious or stressed.

Child 2 told Leon mother said she would call the police if Leon did not give her and child 3 back. This was in addition to mother’s comments to child 2’s prior foster parent to the same effect. Child 2 told the new foster parents she will have to move to a new home once mother gets mad. Child 2 was repeatedly anxious during the visits, as well as before and after. She was constantly afraid mother will be mad. She did not play for fear of getting hurt and incurring mother’s anger and because mother told her to care for child 3. Though she felt neglected during visits, she was afraid to say anything lest mother “put her in time out.”

Mother scolded her for calling her foster mother “mom.” Mother was upset about the children’s relationships with their foster parents, who themselves were concerned about mother’s threats to the former caretaker.

Parents often brought unhealthy food, i.e., candy, cookies, chips and the like, causing stomach problems for the two younger children, often for days. The sugar caused child 2 and child 3 to be cranky and hyper. Parents generally had not heeded the direction to bring healthier foods.

Child 1, who was dealing with issues in therapy, acted out during visits because mother did not let him play with others but instead wanted him next to her unless he was with father. Child 4 seemed to have no bond to parents.

In March, pending a full hearing, the court reduced visitation to one three-hour visit a week.

An addendum report in April explained that child 2 was experiencing “divided loyalties” to mother and her foster mother, resulting in anxiety, sleeplessness, and soiling herself. According to her therapist, she was worried and afraid, sometimes crying herself to sleep, and suffering nightmares about loss and fear.

Father, who had pending charges of possession of a firearm and narcotics, was arrested for missing a court date and remained incarcerated. Shortly thereafter mother ended a visit 90 minutes early on an unsubstantiated charge the children were misbehaving. She cancelled a visit the next week as well. Monitors reported mother had difficulty caring for the children by herself.

Child 2 continued to resist visits, fearing mother’s anger and indifference. Monitors observed mother favored child 3, the foster parents having to correct his sense of entitlement. Child 4 “clings” to her foster mother at the beginning of the visits and runs to her at the end.

Although mother had been in contact with the children by phone, generally calling child 1 every day, once the calls began interfering with the children’s daily living, they were limited. When mother could not observe the limits and phone calls were no longer allowed, mother disregarded the order and continued to call, sometimes late at

night after the children were in bed. Once, when she did not get an answer, she called six times.

The children began visiting with each other outside of formal visitation and responded very positively. His foster parents had “never seen [child 1] so happy,” and the foster parents of child 2 and child 3 reported they are “overjoyed” when they know child 1 would be coming to see them.

In April 2014, mother filed a section 388 petition, seeking return of the children to her custody, or, alternatively, reunification services. The basis was her progress in her drug and parenting program, she was drug free, and had a “significant parent-child relationship with the children” that should continue. The court found she had not made a prima facie case of changed circumstances or that her request was in the best interests of the children and summarily denied the petition.

The court then commenced a combined permanency hearing and a hearing on SSA’s section 388 petition. Leon testified the children were adoptable and there were prospective adoptive parents willing to take all four children. They did not want to take custody of the children until after parental rights were terminated because they were afraid of how parents would behave toward them. They have had four or more overnight visits over the weekend with the three oldest children that have been very successful.

In the several visits Leon had monitored since May 2013, at times the children had not been properly supervised, requiring her to intervene. The children were sometimes given age-inappropriate food causing a risk of choking. Some of the food upset the children’s stomachs and made them hyper. Mother and father argued over how to parent the children.

The visits were stressful, especially to child 1 and child 2. Child 1 became more defiant. Child 2 had begun to resist visiting. She was afraid to play lest she got a bruise or scratch, causing mother to get angry. Child 2 was also afraid mother would have her moved from her current foster family.

In Leon's opinion, visits did not promote the children's well-being. The court granted SSA's request to modify its section 388 petition to request once a month visits.

Leon resumed her testimony, essentially repeating what she had included in the petition. She also testified reduction in visits would lessen the children's anxiety and they could focus on being children.

Leon testified it was important to see if mother could manage all of her children together to get a sense of her ability as a parent. In Leon's opinion, mother had difficulty dealing with all four children when father was not present.

In her testimony, mother denied anyone talked to her about what foods to bring or that she argued with father. She had rules for the children and disciplined them when necessary. She interacted with the children, engaging in activities. The children enjoyed the visits because they had "a bond that you can't break." Visitation should continue because "we love each other."

Finding Leon's testimony credible, the court ruled the visits were "proving to be destabilizing for the children, causing stress and anxiety." It found it was in the children's best interests to limit visits to one hour per month and granted the petition.

DISCUSSION

1. The Court Properly Denied Mother's Section 388 Petition.

To prevail on a section 388 petition, a parent must show by a preponderance of the evidence both changed circumstances and that the requested modification would be in the best interest of the child. (*In re Zachary G.* (1999) 77 Cal.App.4th 799, 806.) To merit a hearing, a prima facie case of both elements must be presented. (*Ibid.*) "If the liberally construed allegations of the petition do not show changed circumstances such that the child's best interests will be promoted by the proposed change of order, the dependency court need not order a hearing." (*In re Anthony W.* (2001) 87 Cal.App.4th 246, 250.)

We review denial of a hearing on a petition under section 388 for abuse of discretion. (*In re Anthony W.*, *supra*, 87 Cal.App.4th at p. 250.) We affirm the order unless it ““exceeded the bounds of reason. When two or more inferences can reasonably be deduced from the facts, the reviewing court has no authority to substitute its decision for that of the trial court.”” (*In re Brittany K.* (2005)127 Cal.App.4th 1497, 1505.) The trial court’s decision will not be disturbed unless the court ““has exceeded the limits of legal discretion by making an arbitrary, capricious, or patently absurd determination [citations].” [Citations.]” (*In re Stephanie M.* (1994) 7 Cal.4th 295, 318.)

Here, the record validates denial of the petition. Mother claims she made her prima facie case by showing regular visitation and that she “was attending a full substance abuse program with testing.” She highlights the fact she had completed the first three of the four phases of her substance abuse program and had had negative drug tests. She had also completed a parenting class, was attending therapy sessions, and, according to the counselor, was doing ““very well.””

These acts and accomplishments are all positive, and we commend mother for her efforts and progress. But attending and making progress in a program do not equate to a change of circumstances.

Mother had three more months in the substance abuse program. In addition, she was on the verge of starting a six-month residential treatment program. And while she had been sober for some months, the period of sobriety is too short to ensure it is a permanent change. (E.g., *In re Clifton B.* (2000) 81 Cal.App.4th 415, 423 [father’s seven months of sobriety not new in light of history of drug use]; *In re Kimberly F.* (1997) 56 Cal.App.4th 519, 531, fn. 9 [“It is the nature of addiction that one must be ‘clean’ for a much longer period than 120 days to show real reform”].)

Mother points out that she successfully completed her plan in connection with the dependency action closed in 2010. But this does not inure to her benefit. In

fact, it raises significant concerns. She was unable to remain drug free, despite the fact she completed a drug program only two years prior.

Mother knew about the dangers of using drugs at all, much less when pregnant, and yet she used methamphetamine during her pregnancy with child 4. Given her self-admitted addiction to methamphetamine since age 13, her short period of sobriety is no guarantee she will not relapse again.

Relying on *In re Marilyn H.* (1993) 5 Cal.4th 295, 309 mother claims that “where a parent completed a reformation in the short, final period after the termination of reunification services,” under section 388, the court can modify its order denying services. However mother has not “completed a reformation.”

In sum, at best, mother showed changing circumstances. In fact, mother herself said she was “changing [her] life.” “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 . . . might be able to reunify at some future point, does not promote stability for the child or the child’s best interests. [Citation.] “[C]hildhood does not wait for the parent to become adequate.” [Citation.]” (*In re Casey D.* (1999) 70 Cal.App.4th 38, 47.)

Because mother failed to show a change of circumstances, we need not even reach the issue of the best interest of the children. (§ 388, subd. (a).) In sum, the court properly exercised its discretion and mother’s due process rights were not violated.

2. *The Court Did Not Abuse Its Discretion in Granting SSA’s Section 388 Petition.*

The court ordered no reunification services be provided to mother pursuant to section 361.5, subdivision (b)(13), which states services may be denied where a parent “has a history of extensive, abusive, and chronic use of drugs or alcohol and has resisted prior court-ordered treatment for this problem during a three-year period immediately prior to the filing of the petition that brought that child to the court’s attention”

Within this framework, the court had discretion to deny all visitation. (§ 361.5, subd. (f);

In re J.N. (2006) 138 Cal.App.4th 450, 458, 459 [court has broad discretion to deny visitation where no services ordered].)

As SSA points out, mother was not entitled to any visitation at all, even without a finding of detriment. (See *In re Chantal S.* (1996) 13 Cal.4th 196, 214 [limited visitation order not prejudicial or violation of parent's rights where visitation "amounts to a windfall"].) And mother concedes the court did not need to find detriment.

The record supports the court's exercise of discretion to limit visitation. The social worker agreed the children seemed to enjoy the visits. Mother also claims she helped them with homework, played games, appropriately disciplined them, and was loving toward them.

But as set out above in detail, the evidence also demonstrates the difficulties the visits caused the children. Moreover, mother had difficulty managing the four children when father was not present. And, mother's threats to one foster mother she would pay the consequences or to call the police if the children were not returned to her, not only frightened child 2, it caused loss of the placement. It also delayed placement with the prospective adoptive parents.

The social worker was of the opinion the visits did "not promote the well being of [the] children." Limiting visitation would reduce their stress and anxiety. The children would "be able to focus more so on their day-to-day lives[, f]ocus on what children their ages should be focusing on . . . basically just be kids."

Mother argues the testimony of the social worker conflicted with her own and with evidence from logs of other visitation monitors, who recorded positive visits. She also asserts the social worker "participated in a systematic plan to sever the parent[-] child relationship completely in the hope that if these children could forget about their mother, they would be more amenable to being adopted."

Mother provides absolutely no evidence in support of this alleged plan. Moreover, the rest of her argument raises credibility questions, of which the trial court is

the arbiter. We do not reweigh its decisions. (*In re Casey D.*, *supra*, 70 Cal.App.4th at pp. 52-53.) The court found the social worker credible. And it was entitled to rely on her testimony and opinion. (See *In re Beatrice M.* (1994) 29 Cal.App.4th 1411, 1420-1421.) Likewise, mother's assertion the weight of the positive evidence of her visits with the children outweighs the social worker's evidence to the contrary fails. We review only for abuse of discretion; we do not reweigh evidence. (*In re Stephanie M.*, *supra*, 7 Cal.4th at pp. 318-319.)

Finally, we reject mother's contention that had her visitation not been reduced to one hour per month she would have been in a better position to avoid termination of her parental rights. Under section 366.26, subdivision (b), the first choice at a permanency hearing is to terminate parental rights and order the child placed for adoption. Termination of services is a sufficient basis to terminate parental rights unless there is a compelling reason showing termination would be detrimental to the child due to one of the statutory reasons. (*In re Celine R.* (2003) 31 Cal.4th 45, 53.) One of those reasons is the so-called benefit exception in section 366.26, on which mother relies. That provides an exception to adoption where parents have "maintained regular visitation and contact with the child and the child would benefit from continuing the relationship." (§ 366.26, subd. (c)(1)(B)(i).)

But even her six hours a month of supervised visitation would likely not suffice to satisfy the requirements of the benefit exception, which is applied only in "exceptional circumstances." (*In re Celine R.*, *supra*, 31 Cal.4th at p. 53.)

In re Hunter S. (2006) 142 Cal.App.4th 1497, on which mother relies, is inapt. There, for two years during family reunification, the court refused to enforce mother's ordered visitation rights without any finding of detriment. It then terminated parental rights, finding no exception under section 366.26, subdivision (c).

The court of appeal reversed, holding the court erred in denying a section 388 petition to reinstate services and in ordering termination of parental rights, because it

used the lack of visitation and a close relationship as the basis for its ruling it was not in the child's best interest to grant the petition. (*In re Hunter S.*, *supra*, 142 Cal.App.4th at p. 1505.)

Contrast that with our case where mother had no reunification services and yet had monitored visitation throughout the proceedings until the court properly reduced it as the case was being concluded.

In conclusion, the court properly exercised its discretion in reducing the visitation.

DISPOSITION

The postjudgment orders are affirmed.

THOMPSON, J.

WE CONCUR:

ARONSON, ACTING P. J.

FYBEL, J.