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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

In re B.H., a Person Coming Under the
Juvenile Court Law.

ORANGE COUNTY SOCIAL SERVICES
AGENCY,

Plaintiff and Respondent,

v.

T.H.,

Defendant and Respondent;

A.S. et al.,

Objectors and Appellants.

G051578

(consol. with G051903)

(Super. Ct. No. DP023587)

O P I N I O N

Appeals from orders of the Superior Court of Orange County, Gary Bischoff, Temporary Judge. (Pursuant to Cal. Const., art. VI, § 21.) Affirmed. Request for judicial notice. Granted.

Lauren K. Johnson, under appointment by the Court of Appeal, for
Objectors and Appellants.

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

Marsha F. Levine, under appointment by the Court of Appeal, for Defendant and Respondent.

No appearance for Minor.

* * *

INTRODUCTION

In February 2015, the juvenile court granted A.S. and H.S. (appellants) de facto parent status as to then two-year-old B.H. In the first of their two consolidated appeals, appellants challenge the court's orders (1) liberalizing visitation between B.H. and her mother, E.H. (Mother), and father, T.H. (Father) (collectively referred to as the parents); and (2) summarily denying appellants' Welfare and Institutions Code section 388 petition requesting that the parents' visitation remain supervised without overnight visits and that B.H. remain placed with appellants. (All further statutory references are to the Welfare and Institutions Code unless otherwise specified.) In their second appeal, appellants challenge the orders vacating the permanency hearing that had been scheduled as to B.H, and granting the parents' section 388 petitions requesting that B.H. be returned to their physical custody.

We affirm. None of the orders challenged by appellants constituted an abuse of discretion.

BACKGROUND

In March 2013, the Orange County Social Services Agency (SSA) filed a juvenile dependency petition which, as amended in April 2013 (the amended petition), alleged, inter alia, that then 11-day-old B.H. came within the jurisdiction of the juvenile court under section 300, subdivisions (b) (failure to protect) and (j) (abuse of sibling). The amended petition alleged that at the time B.H. was born, Mother had three other children for whom parental rights had been terminated. B.H. has three additional siblings

who were then current dependents of the Orange County Juvenile Court and were placed in out-of-home care under a plan of family reunification. Mother had a history of substance abuse. Father had suffered a traumatic brain injury for which he required medication. Both the parents had a criminal history.

In March 2013, the juvenile court ordered B.H. detained. She was placed in the home of appellants, with whom B.H.'s dependent siblings already resided.

In April 2013, the parents each pleaded no contest to the allegations of the amended petition. The juvenile court found the allegations true by a preponderance of the evidence and sustained the amended petition. The court declared B.H. a dependent child of the Orange County Juvenile Court under section 360, subdivision (d) and ordered family reunification services and visitation.

In November 2014, the juvenile court terminated reunification services and set a permanency hearing as to B.H. Pursuant to a stipulated agreement, the court ordered that the parents each sign releases of information from his or her treating doctors and doctors who prescribed him or her medication, and further ordered that, upon SSA's verification of each of the parents' diagnoses and prescribed medications, SSA would begin a weekly three-hour unmonitored visit. The court ordered SSA to complete a home evaluation of the parents' home and to refer the parents for Wraparound services and in-home parenting. As to B.H.'s dependent siblings, the juvenile court terminated parental rights.

In December 2014, the parents had one three-hour unsupervised visit and one three-hour supervised visit each week. Later that month, the court authorized all visits to be unmonitored and set a hearing regarding the status of visitation and the possibility of overnight visits. In January 2015, the court authorized one overnight visit with the parents each week.

In early February 2015, the juvenile court set a hearing for later in the month to address a potential trial release of B.H. to the parents. The court also granted

appellants' motion for de facto parent status as to B.H. SSA filed a section 388 petition seeking an order restricting the parents' visitation to supervised visitation because of concerns that Mother had not taken medication prescribed for her bipolar disorder diagnosis.

On February 11, 2015, pending a hearing on whether SSA's section 388 petition made a prima facie showing, the court ordered visitation to be supervised. Eight days later, after the parents produced evidence that Mother was no longer being prescribed the bipolar medication, the court denied SSA's section 388 petition and vacated its order restricting visitation.

On the same day the court denied SSA's section 388 petition, appellants filed a section 388 petition requesting that parental visitation remain monitored and not include overnights, and that B.H. remain in their "physical care and custody." In support of their petition, appellants produced evidence of the bonds between them and B.H. and between B.H. and her three siblings who were placed with appellants, and evidence of how B.H. has thrived in their care.

The juvenile court summarily denied appellants' section 388 petition. The court's minute order stated: "Court believes that the petition does fail to state a change in circumstances and so the court is going to find that the request is not sustainable, nor has there been a change in circumstances and that it does not propose an order which would promote the best interest of the child and as a result, the court will deny the request for a hearing." The court further stated: "Court considered all aspects of the concerns that everyone had. The parents have had the child for trial releases for three days at a time, the social worker had made unannounced visits to ensure the child is being properly cared for and despite the concerns that SSA have and their failure to be able to fully interview mother's doctor, there is no evidence that the trial releases are placing the child at risk." The court ordered a seven-day trial release of B.H. to the parents, to begin the following

day. Appellants appealed (case No. G051578). This court summarily denied appellants' petition for a writ of mandate/prohibition and request for an immediate stay.

Upon the expiration of the seven-day trial release, the court ordered the parents' trial visit to continue. The court also granted SSA's motion to continue the permanency hearing.

In March 2015, Father filed a motion to continue the permanency hearing. His motion was supported by his attorney's declaration stating that B.H. had been in the parents' "exclusive" care for two weeks. The parents are currently responsible for the minor's daily physical and emotional needs. The parents are currently attend[ing] weekly therapy The minor has been attending the conjoint counseling sessions with the parents for the last two weeks. [The therapist] has been able to observe the interactions between the parents and the minor during their weekly sessions." The attorney's declaration continued: "It is in B[H.]'s best interest to continue the Section 366.26 hearing and allow the prior negotiated agreement to continue. The parents are complying with the terms of the negotiated agreement, and the minor is safe in the parent[s]' care. The parent[s] represent that their full compliance and appropriate parenting at this time is a showing of 'good cause' to support this request. An additional two[]weeks will allow the parent[s] to continue in their services and demonstrate to the Court their ability to appropriately parent B[H.]."

The juvenile court granted Father's motion and continued the permanency hearing to the end of March.

Father filed two more motions to further continue the permanency hearing, supported by Father's counsel's declarations, each of which asserted that B.H. had been continuously in the parents' exclusive care, and that the parents continued to be responsible for her physical and emotional needs and attended weekly therapy and conjoint counseling sessions with B.H. In his declaration, Father's counsel stated that the parents had participated in, cooperated with, and benefited from Wraparound services,

and that SSA continued to visit the parents' home. In one declaration, Father's attorney stated that the parents took B.H. for her two-year checkup with her new pediatrician, who reported B.H. was healthy and gaining weight. A March 2015 SSA report stated that, during a social worker's home visit to the parents' residence, B.H. was clean and appropriately dressed and appeared happy to see the parents when they entered her room. The report further stated the parents were both "very affectionate" with B.H. and "she was loving towards them[; t]he home was clean and it did not appear that any other people were living in the home."

The court granted the motions for a continuance of the permanency hearing.

In May 2015, the parents each filed a section 388 petition requesting that the court vacate the permanency hearing and that B.H. be returned to their custody under a plan of family maintenance, in light of their successful 60-day visit with B.H. Father asserted that while the court had found, in November 2014, that there was a substantial risk to place B.H. in the parents' care, "there is no longer a substantial risk to B[H.]'s physical well-being if custody is returned to the parent[s]."

Mother offered evidence from the parents' therapist that Mother's physician had discontinued her prescription several months earlier because the physician had not observed Mother showing symptoms of bipolar disorder. The therapist stated that she had never seen Mother showing bipolar symptoms. The therapist also stated that she had observed the parents to be "very attentive to [B.H.'s] needs and can redirect her fairly easily." She stated, "B[H.] appears very happy in current living situation with her birth parents. Both [of the parents] show her affection as well as appropriate discipline. B[H.] appears to listen well to them."

The juvenile court vacated the permanency hearing and granted the parents' section 388 petitions requesting B.H. be returned to their custody, finding that a change of circumstances had been shown. The court ordered a family maintenance plan for the parents.

Appellants filed a second notice of appeal from the order granting the parents' section 388 petitions and vacating the permanency hearing (case No. G051903). This court granted appellants' motion to consolidate their two appeals.¹

REQUEST FOR JUDICIAL NOTICE

On November 25, 2015, SSA filed a request that, pursuant to Evidence Code sections 452, subdivision (d)(1) and 459, subdivision (a), and rule 8.252 of the California Rules of Court, this court take judicial notice of the juvenile court's minute order dated November 4, 2015. In that order, the juvenile court stated it "has no evidence that suggests that continued supervision in this matter is warranted or called for." The juvenile court stated it would adopt SSA's recommendation, as set forth in a report dated November 4, 2015, and terminate dependent child proceedings at that time.

"As a general rule, an order terminating juvenile court jurisdiction renders an appeal from a previous order in the dependency proceedings moot. [Citation.] However, dismissal for mootness in such circumstances is not automatic, but 'must be decided on a case-by-case basis.' [Citations.] [¶] 'An issue is not moot if the purported error infects the outcome of subsequent proceedings.'" (*In re C.C.* (2009) 172 Cal.App.4th 1481, 1488.)

¹ We are aware of rule 8.416(e)(1) of the California Rules of Court, which shortens the time for briefing in appeals from judgments or appealable orders in all juvenile dependency cases of, inter alia, the superior courts of Orange County "[t]o permit determination of the appeal within 250 days after the notice of appeal is filed" In this case, appeal No. G051578 was consolidated with the later-filed appeal, case No. G051903. In addition, and, as discussed *post*, in November 2015, the juvenile court terminated its dependency jurisdiction as to B.H., necessitating supplemental briefing as to the impact of that order on these appeals. Appellants thereafter appealed from the order terminating dependency jurisdiction; that appeal is currently pending in this court (case No. G052956). These events have understandably and unavoidably impacted the process of the resolution of the consolidated appeals, so that our opinion in these consolidated appeals was filed a brief time period beyond the 250-day target applicable to them.

We invited SSA to file a supplemental letter brief which addressed, with citations to pertinent legal authority, the legal impact the juvenile court's November 4, 2015 minute order might have on the resolution of the issues presented in these consolidated appeals. We invited any party to file a supplemental brief responding to SSA's supplemental brief. SSA and appellants each filed a supplemental letter brief.

In appellants' supplemental brief and attached declaration, appellants' counsel stated that appellants have filed an appeal from the juvenile court's order of November 4, 2015. We grant SSA's request and take judicial notice of that minute order. On our own motion, we also take judicial notice of appellants' notice of appeal from the November 4, 2015 order, filed on December 17, 2015. (Evid. Code §§ 452, subd. (d)(1), 459, subd. (a).) In light of the pendency of the appellants' latest appeal, the matter of the termination of dependency proceedings is not final. We therefore address appellants' contentions raised in their consolidated appeals on the merits.

DISCUSSION

I.

THE FIRST APPEAL

In appeal No. G051578, appellants contend the juvenile court erred by (1) modifying the parents' visitation order after the court had terminated reunification services and (2) summarily denying appellants' section 388 petition. Appellants' contentions are without merit.

A.

The Juvenile Court Had Authority to Modify the Parents' Visitation with B.H.

Appellants argue the juvenile court's order "liberalizing the parents' visitation" after reunification services had been terminated "was without statutory authority and the parties had no notice of a hearing at which the court would do so." Section 366.21, subdivision (h) provides that after reunification services are terminated, the juvenile court "shall continue to permit the parent or legal guardian to visit the child

pending the [permanency] hearing unless it finds that visitation would be detrimental to the child.” Section 362.1, subdivision (a)(1)(B) vests broad authority in the juvenile court to order visitation between a parent and a child.

“The standard of appellate review of custody and visitation orders is the deferential abuse of discretion test. [Citation.] The precise measure is whether the trial court could have reasonably concluded that the order in question advanced the ‘best interest’ of the child.” (*In re Marriage of Burgess* (1996) 13 Cal.4th 25, 32; see *Los Angeles County Dept. of Children & Family Services v. Superior Court* (2006) 145 Cal.App.4th 692, 699, fn. 6.) A juvenile court abuses its discretion when its orders are capricious, arbitrary, or patently absurd. (*In re Stephanie M.* (1994) 7 Cal.4th 295, 318.)

At the hearing on SSA’s section 388 motion to restrict visitation, after noting the evidence before the court showed that concerns regarding Mother’s prescribed medication had been resolved, the court stated: “The court sees no need to continue to restrict visitation [¶] The court will vacate its orders from February 11, which restricted the visitation beyond the prior orders. The prior orders will remain in full force and effect at this time.”

In their opening brief, appellants argue the juvenile court’s orders liberalizing the parents’ visitation from November 12, 2014 through February 24, 2015 “were contrary to the preference for permanency for the child.” Appellants argue, “the court acted without statutory authority—and without requiring the filing of a section 388 petition—to make these orders. This was reversible error.”

In its respondent’s brief, SSA states that although “SSA disagreed with the trial release, SSA acknowledges that the court had discretion to order it. Though SSA believed the parents had breached the November 12, 2014 stipulated agreement . . . , the court believed otherwise If that agreement was still in effect, then the parties at the time of that agreement stipulated to continuing certain services to give the parents a chance to reunify with B[.H.], including contemplating increasing visitation. . . . In

addition, the court has broad discretion to fashion visitation orders even after reunification services are terminated, as long as the child's safety is not jeopardized. [Citation.] The court found that the child had been returning from unsupervised weekend visits safely.”

The juvenile court did not abuse its discretion by liberalizing visitation between the parents and B.H. Substantial evidence supported the court's finding that the reason for restricting visitation, namely, whether Mother was failing to take prescribed medication, had been resolved. Appellants do not cite any legal authority supporting their argument that the court could only modify visitation through a section 388 petition. We find no error.

B.

The Juvenile Court Did Not Abuse Its Discretion by Summarily Denying Appellants' Section 388 Petition.

“The grant or denial of a section 388 petition is committed to the sound discretion of the trial court and will not be disturbed on appeal unless an abuse of discretion is clearly established.” (*In re Shirley K.* (2006) 140 Cal.App.4th 65, 71.) We may not reweigh the evidence or substitute our judgment for that of the juvenile court. (*In re Stephanie M., supra*, 7 Cal.4th at p. 319.) 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 juvenile 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., supra*, at p. 318.)

To succeed on a section 388 petition, a parent must show changed circumstances establishing that the proposed modification would be in the best interests of the child. (*In re Kimberly F.* (1997) 56 Cal.App.4th 519, 526.) “The parent seeking

modification [through a section 388 petition] must ‘make a prima facie showing to trigger the right to proceed by way of a full hearing. [Citation.]’ [Citations.] 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.] 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.)

The juvenile court denied appellants’ section 388 petition on the grounds the petition failed to state a change of circumstances and did not propose an order that would promote B.H.’s best interest. The juvenile court did not abuse its discretion in concluding appellants failed to make a showing of any change of circumstances or any new evidence within the meaning of section 388.

Appellants asserted the following change of circumstances or new evidence in support of their section 388 petition: “The parents were supposed to have a six hour visit on Sunday, February 15, 2015. However, the parents got in an argument with the monitor and left the facility with out [*sic*] visiting with the minor. The minor has special needs that are being addressed and treated by the current caretakers. The minor is bonded with her siblings.”

In their opening brief, appellants assert that a declaration filed in support of their section 388 petition showed additional evidence of a change of circumstances by stating (1) during one overnight visit, B.H. became ill, and appellants picked up B.H. because they did not believe the parents could handle the situation; and (2) appellants reported B.H. experienced “behavior[al] and sleep changes” and weight loss after the parents’ visitation became unsupervised.

We have reviewed appellants’ section 388 petition, memorandum of points and authorities, and supporting evidence. The juvenile court did not abuse its discretion

by concluding that appellants' petition and proffered evidence did not rise to the level of a change of circumstances within the meaning of section 388 to state a prima facie case. The petition fails to show evidence the juvenile court's orders liberalizing visitation and allowing overnight visits should be changed because of a change of circumstances.

This case is therefore factually distinguishable from *In re Jasmon O.* (1994) 8 Cal.4th 398, 415, cited by appellants in their opening brief, in which the California Supreme Court held, inter alia, that a section 388 petition made a prima facie showing of a change in circumstances. In that case, the petition alleged that an order transitioning a child to return to her father should be changed in light of evidence that "the father was failing to comply with the court-ordered transition plan, that there was still no adequate parent-child relationship (despite months of effort during the transition plan), and that the child had alleged an act of sexual abuse." (*Ibid.*) Appellants' section 388 petition did not allege the parents were failing to comply with the juvenile court's orders, B.H. lacked a bond or a parent-child relationship with the parents, or there was an outstanding allegation of sexual abuse.

The court did not err by summarily denying appellants' section 388 petition.

II.

THE SECOND APPEAL

In appeal No. G051903, appellants contend the juvenile court erred by vacating the permanency hearing and granting the parents' section 388 petitions to return B.H. to the parents. Appellants contend the petitions did not show changed circumstances and the requested order that B.H. be returned to the parents was not in B.H.'s best interests. For the reasons discussed *post*, we conclude the juvenile court did not abuse its discretion.

At the hearing on the petitions in May 2015, the juvenile court explained its ruling as follows: "Everybody got together and made a deal here and the reason they did

that was at the time they did it, everybody thought that this was going to be best for this child, and it was remarkable that the parents have come forward and they've done a darn good job. And if what I read is correct here, the child is doing well in their home and they are parenting this child and you know, as I say, the proof is in the pudding and we've got a situation here where this child is being well cared for. [¶] I have no evidence that suggests that the argument related to primary attachment applies here. It seems that the child is well attached to the parents, looking at what we have in the reports, and there's been nothing brought to the court's attention to suggest that the current placement is hazardous to the child. The court thinks that this seems like a very successful situation. Everybody got together in good faith. It's—I think the parents surprised some people by how well they've done and so I think that there—perhaps the opposition is a little shocked and that's why they still quite can't get their head entirely around it, but it looks like it's well done.”

In their opening brief, appellants do not challenge any of the court's above quoted findings as being without evidentiary support. In arguing the parents' section 388 petitions did not show a change of circumstances or the return of B.H. to their care would be in her best interest, appellants point to instances of the parents' conduct, which prompted the court to terminate reunification services and set a permanency hearing in the first place. The change of circumstances, here, however is how the parents, particularly since November 2014, resolved Mother's bipolar medication issue, provided B.H. a suitable home, successfully participated in increasing liberalized visitation through a trial release, demonstrated they could care for B.H., and developed a bond with her.

Although SSA opposed the parents' section 388 petitions in the juvenile court, in its respondent's brief, SSA states it acknowledges the juvenile court had the discretion to grant the parents' section 388 petitions. SSA further states: “Appellants clearly care a great deal about B[.H.] and urge this Court to focus on the evidence causing them concern for her in her parents' care. But the court was entitled to give the evidence

in favor of returning B[H.] to parental custody more weight. [Citation.] [¶] The court could reasonably consider that the parents' adequate care for B[H.] for over two months on a trial release . . . and the documentation of Mother no longer suffering bipolar symptoms . . . constituted a 'changed circumstance' of the problems that led to the dependency of the child having been resolved or eliminated. [Citation.] [¶] In addition, the court could reasonably have found that B[H.] remaining with her parents best advanced her need for stability and permanency. The court could reasonably have found Appellants' reports as to how B[H.] was bonded to them and would suffer detriment if removed from their care and how she reacted negatively after parental visits . . . were outweighed by the social worker's, the Wraparound service provider's and the parents' reports that B[H.] was doing well in the parents' care during the trial release."

On this record, we cannot conclude the juvenile court abused its discretion in granting the parents' section 388 petitions. Although we affirm the court's orders, we applaud appellants for their devotion to B.H. and the loving care they have provided her throughout these dependency proceedings.

DISPOSITION

The orders are affirmed.

FYBEL, J.

WE CONCUR:

BEDSWORTH, ACTING P. J.

MOORE, J.