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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

In re PRISCILLA B., a Person Coming Under the Juvenile Court Law.	
ORANGE COUNTY SOCIAL SERVICES AGENCY, Plaintiff and Respondent, v. MARIA T., Defendant and Appellant.	G041680 (Super. Ct. No. DP015033) O P I N I O N

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

Janette Freeman Cochran, 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 Minor.

* * *

The mother appeals from the juvenile court's rulings under Welfare and Institutions Code sections 388 and 366.26. (All statutory references are to the Welfare and Institutions Code.) We find that none of her contentions has merit and affirm the orders.

I

FACTS

On March 26, 2007, the police took then four-month-old Priscilla B. into protective custody after an officer made a traffic stop and took the driver and Maria T., the mother, into custody for bench warrants. Priscilla's father was in Chino State Prison.

The father's criminal record takes four pages of single-spaced typing to list. The mother's record consists primarily of drug offenses.

At the 6-, 12-, and 18-month review hearings, the court found return of Priscilla to her parents would create a substantial risk of detriment to her physical or emotional well-being. On October 23, 2008, the court ordered reunification services terminated and ordered a hearing under Welfare and Institutions section 366.22.

Priscilla was placed with more than one caregiver, but showed marked improvement once she was placed with her present caregiver. The social worker noted: "The child's health appears to have shown marked improvement. When the child was first placed in the home of the caregiver, the child's face and body appeared mildly sunken and her hair appeared thin. Currently, the child's face has filled out and her hair looks healthy and full. The child has remained healthy. [¶] By July 13, 2008, the child's appearance had dramatically improved since being placed with the caregiver. Her healthy appearance is a testament to the radical improvement in the level of care that Priscilla is now receiving. Further, the child is growing very attached to the caregiver." Also reported to the court was that Priscilla's vocabulary and development were expanding: "She currently has a vocabulary of approximately fifty words. She walks,

runs, climbs and exhibits all of the physical activity of a normal and healthy nineteen-month-old girl."

Elaborating about the prospective adoptive parents and their family, the social worker reported to the court: "The prospective adoptive parents have three adopted children ages 13, 12 and 7, and have two biological children, ages 6 and 3. The prospective adoptive parents established a loving and stable home for themselves and for their children. The couple is open and supportive of one another; the family appears to be a stable and quiet family system. The family has good communication skills and a positive decision making process. The family system is integrated into the community; they speak of strong involvement at church and in their neighborhood."

The mother filed a motion under section 388 and the court set a hearing on the motion. Prior to the hearing, Orange County Social Services Agency (SSA) reported to the court that Priscilla appears "well adjusted and securely attached to her prospective adoptive parents." SSA's report also states: "the mother struggles with employment and is usually working one temporary part-time position or another. She is no longer working at Macy's, and is working only one day per week. Most recently, she reported that she only has $150.00 in her savings account and, by her own account, 'I am just barely hanging on.'"

In August 2008, the mother missed a drug test. She claimed she could not get a ride to get the test, but she had been provided with bus passes. The mother's counselor told SSA that she "attended one Relapse Prevention session in December 2008, and then never returned." She was terminated from the program. SSA also reported dissatisfaction with the mother's housing situation. The social worker noted the "mother's current circumstances do not demonstrate that she has the capacity to effectively provide a safe and stable environment for the child."

The social worker concluded: "Therefore, there is no reason to suggest that Priscilla should reside with this parent." SSA recommended that parental rights be terminated and that the court find that adoption is in Priscilla's best interest.

Regarding visitation, the mother testified that "as more time goes by, it seems like she doesn't want to connect with me no more." The mother added: "It's more like a day care, like a visit, you know." SSA reported that "the nature of the visitation varied widely from 'make-up visits where the child didn't cry and was fine' to 'child went to mom, then back to foster mom, and did not want to do visit.'"

At the end of the hearing, the court stated: "With respect to the changed circumstances prong of the 388 petition test, the evidence showed that the mother is making good progress and is currently committed to living a sober lifestyle. And the court commends her for that. [¶] And the evidence further showed that she is attending AA meetings and is drug testing and has completed perinatal treatment program. [¶] However, the evidence showed that the mother had stopped attending the perinatal after care relapse prevention program, and further that the mother had only been tested once in the last two months, and that there was no evidence to corroborate the testing or the results. [¶] [I]n this case the mother has been committed to sober lifestyle for at most a few months and has shown, in the court's opinion, by the evidence, changing circumstances and not a changed circumstance. [¶] So the court finds that petitioner has failed to meet the first prong of the 388 test. [¶] With respect to the second prong, the best interests of the child requirement, the evidence showed that mother currently does not have a place to care for the child, so that prong under 388 is also unmet. [¶] So therefore, the 388 petition is denied."

Following the hearing under section 388, the court proceeded into the hearing under section 366.26, and considered all of the evidence submitted in the section 388 hearing for the subsequent hearing. The court found by clear and convincing evidence it is likely Priscilla will be adopted and that the provisions under section 366.26,

former subdivisions (c)(1)(A), (c)(1)(B)(i-vi), now subdivision (c)(1)(B)(i) do not apply. Parental rights were terminated as to both parents.

II

DISCUSSION

Section 388 Petition

The mother contends the juvenile court abused its discretion when it denied the mother's section 388 petition. She claims she met her burden to prove changed circumstances and she also proved the best interests requirement of section 388.

"Any parent or other person having an interest in a child who is a dependent child of the juvenile court . . . may, upon grounds of change of circumstances or new evidence, petition the court . . . for a hearing to change, modify, or set aside any order [the] court previously made . . . ." (§ 388, subd. (a).) 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. [Citation.]" (*In re Zachary G.* (1999) 77 Cal.App.4th 799, 806.)

"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. [Citation.] A trial court exceeds the limits of legal discretion by making an arbitrary, capricious or patently absurd determination. [Citation.]" (*In re Shirley K.* (2006) 140 Cal.App.4th 65, 71.)

Here there was evidence the mother missed a drug test several months earlier and was terminated from her relapse prevention program weeks before the section 388 hearing. She did not have a steady job. Her housing situation was unstable.

The mother argues *In re Casey D.* (1999) 70 Cal.App.4th 38, does not support the juvenile court's ruling. But in *Casey D.* the juvenile court found nine months of sobriety amounted to changed circumstances. (*Id.* at p. 45.) There was no similar

finding here. Indeed, the juvenile court commended the mother for changing, but specifically found she had not yet changed.

Regarding the best interests of Priscilla, the mother points to *In re Kimberly F.* (1997) 56 Cal.App.4th 519. *Kimberly F.* states that "the strength of a child's bond to his or her present caretakers, and the length of time a child has been in the dependency system in relationship to the parental bond are also vital." (*Id.* at p. 531.) Here, Priscilla has been living away from the mother most of her life, and is "securely attached" to her custodial parents.

Under the circumstances described in the record before us, the mother is in the process of changing, but has not yet changed and Priscilla is blossoming with her committed custodial parents. We cannot conclude the juvenile court abused its discretion when it denied the mother's petition under section 388.

Benefit Exception

The mother argues the trial court erred by refusing to apply section 366.26, subdivision (c)(1)(B)(i) (former subdivision (c)(1)(A)), typically known as the benefit exception. We review findings as to the section 366.26 exceptions under the substantial evidence rule. (*In re Autumn H.* (1994) 27 Cal.App.4th 567, 576.) "[W]e presume in favor of the order, considering the evidence in the light most favorable to the prevailing party, giving the prevailing party the benefit of every reasonable inference and resolving all conflicts in support of the order. [Citations.]" (*Ibid.*)

Once the juvenile court determines that there is no probability of reunification, adoption is the preferred permanent plan. (§ 366.26; *In re Edward R.* (1993) 12 Cal.App.4th 116, 122.) Should the court find it likely that the child will be adopted if parental rights are terminated, the burden shifts to the parent or parents opposing adoption to demonstrate that termination would be detrimental to the child

under one of four statutory exceptions. (*In re Tabatha G.* (1996) 45 Cal.App.4th 1159, 1164.)

One of these is the benefit exception, which requires an affirmative showing by the parent that termination would be detrimental to the child because the parent has maintained regular visitation and contact and the child would benefit from continuing the relationship. (§ 366.26, subd. (c)(1)(B)(i).) The parent must prove a substantive positive emotional attachment such that the child would be "greatly harmed" if deprived of the parent-child relationship. (*In re Autumn H., supra,* 27 Cal.App.4th at p. 575.) Moreover, the court must find that the strength of the parent-child relationship outweighs the potential benefit of adoption. (*Ibid.*) The showing is difficult to make when the parent has never moved beyond supervised visitation. (*In re Casey D., supra*, 70 Cal.App.4th at p. 51.)

The first prong of the benefit exception is regular visitation and contact in a parental role. (*In re Beatrice M.* (1994) 29 Cal.App.4th 1411, 1420.) Respondent does not contest the trial court's finding that the mother met the first prong of the exception. The second prong of the exception, however, is far more troublesome for the mother. The court must determine whether a child would benefit from continuing the relationship with the parent, balancing "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. If severing the natural parent/child relationship would deprive the child of a substantial, positive emotional attachment such that the child would be greatly harmed, the preference for adoption is overcome and the natural parent's rights are not terminated." (*In re Autumn H., supra,* 27 Cal.App.4th at p. 575.)

There was more than substantial evidence from which the court could conclude that any benefit to Priscilla would be outweighed by a permanent, stable home. She had developed a strong bond with her caretakers, who were willing to adopt her. The evidence did not suggest that Priscilla had such a strong emotional connection to the

mother that she would suffer "great harm" if it was severed. Indeed, the evidence supported a conclusion that the mother was not more than a "'friendly visitor'" to Priscilla. (*In re Autumn H., supra,* 27 Cal.App.4th at p. 576.) The court, therefore, did not err in concluding that the benefit exception did not apply.

III

DISPOSITION

The orders of the juvenile court are affirmed.

MOORE, J.

WE CONCUR:

BEDSWORTH, ACTING P. J.

ARONSON, J.