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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

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

SONOMA COUNTY HUMAN  
SERVICES DEPARTMENT,

Plaintiff and Respondent,

v.

ROBERT S. et al.,

Defendants and Appellants.

A142536

(Sonoma County  
Super. Ct. No. 4165-DEP)

Robert S. (father) and Wendy B. (mother) appeal from the juvenile court’s order denying father’s petition for modification, pursuant to Welfare and Institutions Code section 388,<sup>1</sup> and terminating their parental rights, pursuant to section 366.26, with respect to their daughter, L.B. On appeal, father contends the juvenile court abused its discretion when it denied his section 388 petition for modification without a hearing.<sup>2</sup> We shall affirm the juvenile court’s order as to father and shall dismiss mother’s appeal.

<sup>1</sup> All further statutory references are to the Welfare and Institutions Code unless otherwise indicated.

<sup>2</sup> On December 23, 2014, mother’s appellate counsel filed a no issues statement pursuant to *In Re Sade C.* (1996) 13 Cal.4th 952. Mother has joined in the arguments raised in father’s opening brief.

## FACTUAL AND PROCEDURAL BACKGROUND

On April 15, 2013, the Sonoma County Human Services Department (Department) filed an original petition alleging that L.B. (then four days old) came with the provisions of section 300, subdivision (b), due to both parents' history of substance abuse and mother's untreated mental health issues. Following an April 16 detention hearing, the juvenile court ordered L.B. detained. After mother explained that she and father were not married and had never lived together and that father's name was not on L.B.'s birth certificate, the court named father an alleged father and ordered paternity testing.

In a jurisdiction/disposition report filed on May 3, 2013, the social worker reported that L.B. had been placed in an emergency foster home.

Mother had told the social worker that she had been a good student until she had brain surgery to remove a tumor at age 15, after which she was a “ ‘totally different person.’ ” She began to have seizures and memory loss and school became a struggle for her. She then gave up on herself, dropped out of school, started drinking alcohol and using methamphetamine. By age 22, mother's drug use had become a problem and, after she started dating father, they both were serious drug users. Mother also told the social worker that there had been two incidents of domestic violence with father. Police reports regarding the incidents reflected that they occurred in 2012 and that mother had requested a restraining order against father in January 2013.<sup>3</sup>

The social worker had called father to schedule an appointment to meet with him about the case. He could not commit to a date due to being busy at work. Although the social worker asked him to call back with some possible times, he did not do so. During an earlier interview, however, father had told a social worker that he did not use drugs and denied any domestic violence in his relationship with mother. Father also had an

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<sup>3</sup> A police report regarding one of the incidents stated that L.B.'s maternal grandmother had reported that there were prior incidents of domestic violence between father and mother that had not been reported.

extensive criminal history, including convictions for burglary, infliction of corporal injury on a spouse or cohabitant, possession of a controlled substance, driving with a suspended license, possession of a dangerous weapon, and possession of unlawful paraphernalia. He had also violated probation numerous times.

Mother had participated in only two visits with L.B. Father was given the opportunity to visit with L.B. while mother was visiting, but had not yet done so. The social worker further noted that, although both parents had agreed to drug test after the April 16, 2013 hearing, only mother had done so; the result was negative. The social worker had asked mother to drug test again on May 1, but she failed to do so.

The Department recommended that reunification services be provided to mother. It did not recommend reunification services for father due to his designation as an alleged father and also because he had not been cooperative with the Department, had failed to schedule an interview with the social worker, and had consistently denied any substance abuse or domestic violence in his relationship with mother.

On May 15, 2013, the Department changed its recommendation as to mother and requested that she be denied reunification services. At a June 20 hearing, counsel for the Department reported that mother had left a residential substance abuse treatment program, which she had entered in May. In addition, the Department had received DNA results showing father to be L.B.'s biological father.

On June 25, 2013, the juvenile court held the contested jurisdictional hearing. First, however, the court heard testimony from father related to his request for presumed father status. The court denied the request, finding that father had not taken "sufficient action to raise him to the level of a presumed father."

At the jurisdiction hearing that followed, mother testified that she had left her residential drug treatment program a few days before the hearing, but regretted doing so. She had not used drugs or alcohol for some 30 days, and hoped to enter a new residential

treatment program soon. While she was in the treatment program, she had twice-weekly visitation with L.B.

At the conclusion of the hearing, the juvenile court found the allegations of the petition to be true and also found, by clear and convincing evidence, that L.B. should be removed from her parents' physical custody. The court further ordered that no reunification services would be provided to either parent, based on a bypass of services for mother and on father's biological father status. The court then set the matter for a section 366.26 hearing.

On July 3, 2013, father filed a section 388 petition requesting a change in the court's order regarding his parental status from biological father to presumed father, and that the court order reunification services. He alleged that circumstances had changed because he and mother had signed a declaration of paternity.

On July 17, 2013, after all parties agreed that the petition should be granted, the court declared father a presumed father and ordered that reunification services be provided to him. Father's case plan required him to participate in a domestic violence program, substance abuse testing, a substance abuse evaluation, substance abuse treatment, and visitation.<sup>4</sup>

In an Oral Update report, filed on October 15, 2013, the social worker reported that father was regularly participating in group therapy with the Drug Abuse Alternative Center (DAAC). Father had stated that he did not have a substance abuse problem, although he had struggled with alcohol in the past. He had failed to complete drug testing, despite the Department's requests for both random and scheduled testing. Father had also stated that he did not have a domestic violence issue. He had been terminated from Nonviolent Alternatives (NOVA). The program's social worker did not believe he

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<sup>4</sup> On September 9, 2013, father filed a notice of appeal from the court's July 17, 2013 orders. This court dismissed the appeal after appellate counsel filed a no issues statement. (*Sonoma County Human Services Department v. R.S.* (A139728).)

would benefit from participation in the program because he “was dishonest and not taking responsibility for his behaviors”; he also became “defensive and argumentative” when she addressed her concerns with him. He had since admitted that he had issues with “ ‘expressing anger appropriately.’ ” At father’s request, he had recently been referred to the Teaching Nonviolence program and individual therapy. Father was regularly attending his weekly supervised visits with L.B., and had met with a parent educator three times.

While commending father for his efforts, the social worker was nonetheless “gravely concerned” that father was “in denial and/or minimizing” the behaviors that led to his involvement in the dependency system. She noted that he continued to deny having any problems with substance abuse or domestic violence. “Three months into this case plan, the Department does not even know if [father] is sober as he has failed to participate in urinalysis testing.”

L.B., who was six months old, was in a concurrent placement, i.e., a foster placement that was also a prospective adoptive home. The foster parents described her as “delightful, inquisitive and extremely social.”

On October 17, 2013, the court held a hearing on the Department’s update. Father’s counsel told the court that father had difficulty participating in drug testing due to his work schedule, and said that father would submit to drug testing after the hearing.

On October 30, 2013, counsel for L.B. filed a section 388 petition requesting that the court terminate father’s reunification services and set the matter for a section 366.26 hearing. The petition alleged changed circumstances in that father had not complied with or made substantial progress in his case plan. In addition, the petition noted that father had voluntarily drug tested on the day of the October 17 hearing, and the results were positive for methamphetamine.

At the November 22, 2013 hearing on the section 388 petition, Social Worker Marie Szatlocky testified that father had been regularly attending substance abuse

counseling at DAAC, although the social worker believed he was not really engaging with the program. The DAAC counselors were “shocked” to hear that father had tested positive for methamphetamine because he had not disclosed methamphetamine use, either currently or in the past. Szatlocky further testified that the Department had asked father to drug test 25 times, but he had only done so twice, on October 17 after a court hearing, when he tested positive for methamphetamine, and on November 5, when he prearranged a test and tested “clean of substances.” She was concerned about father’s failure to drug test, his testing positive, and his lying to the Department and DAAC about his substance abuse.

Regarding father’s domestic violence treatment, Szatlocky testified that he was terminated from the NOVA program on August 12, 2013, due to his perceived dishonesty about his domestic violence, and his denial and defensiveness when questioned. Father was then referred to the Teaching Nonviolence program, where he attended an orientation. However, he failed to participate in a group interview that was part of the intake process, and was therefore not admitted to the program. The Department had also referred father to individual therapy, and he had twice met with a therapist.

Szatlocky also testified that father had been consistent with visitation, once reunification services started. He had also met with Parent Educator Karen Church eight times. Church had said that father was “gentle and careful” when handling L.B., but she was concerned that he had a difficult time reading her cues. Church also described him as having “a unique style of interacting with his daughter that involves him almost constantly speaking to her but not always engaging with her.” L.B. was “thriving” in her concurrent foster home.

Szatlocky testified that father was “very vague” about his relationship with mother, although they had been observed together on three occasions in the past five to six weeks. This was a concern because mother had been bypassed for reunification

services and it was uncertain whether father could protect L.B. from mother. Mother and father also had a history of domestic violence.

Szatlocky thought it was unlikely that L.B. would reunify with father because he had not addressed his substance abuse or domestic violence issues; the Department also had concerns about his relationship with mother. She believed it would be in L.B.'s best interest to terminate father's reunification services early, given his lack of commitment to and follow-through with services and his failure to address the issues that brought him into the dependency system.

At the conclusion of the hearing, the juvenile court granted the section 388 petition and set the matter for a section 366.26 hearing. The court found that L.B.'s best interests would be promoted by the requested modification and that the request stated both a material change of circumstance and new evidence. The court further found that there was "clear and convincing evidence that father's action or inaction creates a substantial likelihood that reunification will not occur, including but not limited to father's failure to participate regularly and make substantial progress in the court ordered treatment plan."<sup>5</sup>

In the report prepared for the section 366.26 hearing, filed on March 10, 2014, the social worker reported that father had consistently participated in weekly supervised visits with L.B. through November 2013. In December 2013, visits were reduced to every other week and, in February 2014, visits were further reduced to every three weeks. Parent Educator Karen Church, who worked with father during visits, had reported that father read the assignments she had given him and seemed interested in learning how to care for L.B. Still, he was "often uncertain about how to soothe [L.B.], maybe partly because she does not yet seem to feel entirely comfortable with him." The foster-adopt parents had expressed concern to the family reunification social worker about L.B. crying

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<sup>5</sup> On December 5, 2013, father filed a notice of intent to file a petition for extraordinary writ. The record was stricken, however, after father failed to file a timely writ petition. (*R.S. v. Superior Court* (A140450).)

when she saw father. They believed he came on too strong, which would startle her and make her cry. An effort was therefore made to help L.B. transition into the visits slowly.

Mother had participated in supervised visits in May and June 2013, but had not visited with L.B. since June 12. The social worker also noted that L.B. had an adult paternal half sister, but it did not appear that they had had any contact.

L.B., who was now 11 months old, was healthy and developmentally on track, and she presented as a content and happy infant. She had developed a close relationship with both of her foster-adopt parents, with whom she had lived since she was five weeks old. She looked to them for comfort and reassurance and was thriving in the “safe, consistent and nurturing environment” they were providing. The foster-adopt parents were very committed to caring for L.B., had expressed a desire to adopt her, and had an approved home study. The social worker believed L.B. had “substantial emotional ties” to the foster-adopt parents, that she would benefit from establishment of a permanent relationship with them, and that removal from their care “would be seriously detrimental to [her] well being.” The social worker concluded that L.B. was likely to be adopted, and that it would be in her best interest for the court to terminate parental rights and to order a permanent plan of adoption.

On March 19, 2014, father filed a section 388 petition requesting either that L.B. be returned to his care, with family maintenance services, or that visitation be increased and that he be provided with reunification services. The changed circumstances alleged by father included (1) his receipt of a certificate showing that he had successfully completed 24 sessions in the alcohol and drug education group at DAAC, which was 12 more sessions than had been required under his prior case plan; (2) he had remained clean and sober, and had tested clean on November 5, 2013; (3) after reunification services were terminated, he had continued to meet with a therapist, with whom he was working on anger management, domestic violence, and issues from his past; (4) after reunification services were terminated, he had also continued to see Parent Educator Karen Church,

who apparently had noted in an attached, unsigned document that he was consistently engaged with L.B. and the parent educator, that he had read and was willing to discuss all of the assigned material, and had completed nine visits with excellent attendance between September 9, 2013 and November 26, 2013, when the case was closed; and (5) he was employed and had suitable housing and could therefore parent L.B. “right now.”

Father alleged that the requested relief would be in L.B.’s best interests because he had attended all visits, had developed a strong bond with her, laughed and played with her, was able to read her cues, fed her, changed her diaper, all of which showed he could take care of her without supervision “and could easily take care of her overnight.” He further noted that he had raised another daughter from the age of one; that daughter was now 20 and was doing very well.

On March 19, 2014, the court denied father’s section 388 petition without a hearing after finding that the request did not state new evidence or a change of circumstances and that the proposed change of order did not promote L.B.’s best interest.

At the contested section 366.26 hearing, which took place on May 5, 2014, Social Worker Simone Boerner testified that she had taken over the case in December 2013, and had reviewed all of the prior notes on the case. During the last couple of visits, father had learned to read L.B.’s cues better and to be more patient in approaching her at the start of visits. Father had been disappointed when the number of visits was reduced.

Mother testified about a recent visit, in which L.B. had warmed up to her right away. Mother had successfully comforted her when she cried and L.B. knew who she was.

Father testified that he first visited with L.B. two or three times in late April or May, when she was three weeks old. Father believed he could read L.B.’s cues and had been able to soothe her when she cried, even during the first three or four months of visits. Although he used to startle her at the beginning of visits, L.B. had warmed up to him and was now happy to see him. She had not been upset at the beginning of visits

since the previous August. Father believed he and L.B. had a bond because they adored each other and she was sad when they said goodbye. He believed it would be harmful for L.B. to end that bond because she had become attached to him and he wanted to be in her life.

Boerner testified in rebuttal that L.B. had had such a hard time transitioning into visits with father that the foster mother had to accompany her into the visitation room to enable her to be comfortable. In March 2014, Boerner had suggested that the foster mother begin trying to make the transition in the lobby. Boerner disagreed with father's statement that problems with visits had stopped in August 2013. She testified that the problems with the visits "never stopped," that L.B. continued to have to transition to visits with father as she would with a babysitter.

Boerner did not believe L.B. had a parent/child relationship with father because she was still insecure at the beginning of visits and needed reassurance to go into the visitation room with him. She had not seen L.B. having any difficulty leaving the visits with father and returning to the foster mother. Boerner had seen father calm L.B. once when she was getting fussy, but she believed that L.B. looked to the foster parents for comfort.

At the conclusion of the section 366.26 hearing, the juvenile court found by clear and convincing evidence that it was likely that L.B. would be adopted and that termination of parental rights would not be detrimental to her. The court ordered adoption as the permanent plan and terminated the parental rights of both parents.

Each parent filed a notice of appeal from the court's orders.

## **DISCUSSION**

Father contends the juvenile court abused its discretion when it denied his section 388 petition for modification without a hearing.

Under section 388, "[a]ny 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

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 . . . for a hearing to change, modify, or set aside any order of court previously made . . . .” (§ 388, subd. (a)(1).) “If it appears that the best interests of the child . . . may be promoted by the proposed change of order,” the juvenile court “shall” order a hearing. (§ 388, subd. (d).)

To trigger the right to a hearing on a section 388 petition, a parent need only make a prima facie showing that (1) new evidence or changed circumstances exist and (2) the proposed change would promote the best interests of the child. (*In re Mary G.* (2007) 151 Cal.App.4th 184, 205.) “ ‘[T]he petition should be liberally construed in favor of granting a hearing to consider the parent’s request.’ [Citation.] [¶] ‘However, if the liberally construed allegations of the petition do not make a prima facie showing of changed circumstances and that the proposed change would promote the best interests of the child, the court need not order a hearing on the petition. [Citations.] The prima facie requirement is not met unless the facts alleged, if supported by evidence given credit at the hearing, would sustain a favorable decision on the petition.’ [Citation.]” (*Ibid.*)

“After the termination of reunification services, the parents’ interest in the care, custody and companionship of the child are no longer paramount. Rather, at this point ‘the focus shifts to the needs of the child for permanency and stability’ [citation], and in fact, there is a rebuttable presumption that continued foster care is in the best interests of the child. [Citation.] A court hearing a motion for change of placement at this stage of the proceedings must recognize this shift of focus in determining the ultimate question before it, that is, the best interests of the child.” (*In re Stephanie M.* (1994) 7 Cal.4th 295, 317, quoting *In re Marilyn H.* (1993) 5 Cal.4th 295, 309.)

We review a summary denial of a hearing on a section 388 petition for an abuse of discretion. (*In re A.S.* (2009) 180 Cal.App.4th 351, 358.)

### A. *Changed Circumstances*

The changed circumstances alleged in father's section 388 petition were primarily based on his continued participation with DAAC, the parent educator, and his individual therapist, all of which had been part of his original case plan and regarding which the juvenile court was aware.<sup>6</sup> While commendable, these continued activities did not demonstrate changed circumstances. (See *In re Mary G.*, *supra*, 151 Cal.App.4th at p. 206 [“ ‘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’ ”].)

Moreover, that father had received a certificate of completion from DAAC was not in itself sufficient to show changed circumstances, particularly since the social worker had previously testified that she did not believe that father was really engaging with the program and there was evidence that he had denied using drugs. The only evidence father offered in support of his claim that he had remained clean and sober was his second and final drug test, which he took on November 5, 2013, over four months before father filed his section 388 petition. He presented no evidence whatsoever to support his claim that he had not used drugs since that date. As the appellate court stated in *In re Edward H.* (1996) 43 Cal.App.4th 584, 593, “[i]f a petitioner could get by with general, conclusory allegations, there would be no need for an initial determination by the juvenile court about whether an evidentiary hearing was warranted. In such circumstances, the decision to grant a hearing on a section 388 petition would be nothing more than a pointless formality.” (Accord, *In re Anthony W.* (2001) 87 Cal.App.4th 246, 250-251 [“Successful petitions have included declarations or other attachments which

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<sup>6</sup> We also observe that the report from the parent educator that father attached to his petition actually reflects that his case was closed on November 26, 2013, the day after his reunification services were terminated.

demonstrate the showing the petitioner will make at a hearing of the change in circumstances or new evidence”].)

Furthermore, even assuming father had been drug-free for up to five months, that alone would not have been sufficient to demonstrate changed circumstances justifying the relief he sought, especially given his failure to even acknowledge his drug abuse or otherwise comply with his case plan before reunification services were terminated. (See, e.g., *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”]; accord, *In re Mary G.*, *supra*, 151 Cal.App.4th at p. 206 [“Given the severity of [mother’s] drug problem the court could reasonably find her sobriety between March and the date of the hearing, June 20, was not particularly compelling”].) Indeed, the court in *In re Kimberly F.*, expressed doubt that a “parent who loses custody of a child because of the consumption of illegal drugs and whose compliance with a reunification plan is incomplete during the reunification period” “could ever show a sufficient change of circumstances to warrant granting a section 388 motion.” (*Id.* at p. 531, fn. 9.)

Finally, father’s claim that he was employed and had suitable housing, and therefore could parent L.B. “right now,” was plainly conclusory and insufficient to make a prima facie showing of changed circumstances. (See *In re Anthony W.*, *supra*, 87 Cal.App.4th at pp. 250-251; *In re Edward H.*, *supra*, 43 Cal.App.4th at p. 593.)

For all of these reasons, we reject father’s assertion that the juvenile court abused its discretion by failing to liberally construe his petition in favor of its sufficiency or credit the information he provided showing changed circumstances. (See *In re Mary G.*, *supra*, 151 Cal.App.4th at p. 205.)

### **B. L.B.’s Best Interests**

Even had father made a prima facie showing of changed circumstances, we conclude the juvenile court properly found that he failed to make the required showing that the proposed change would benefit L.B. There was nothing in father’s petition, nor

any independent evidence, indicating that it would be in L.B.'s best interests to place her adoption on hold so that father could again attempt reunification services. L.B. had never lived with father. Although he clearly cared about L.B. and she had grown more comfortable with him during supervised visits, there is no evidence that she has an attachment to him that would overcome her interest in stability and permanency. Instead, the evidence in the record reflects that L.B. lived with her foster-adopt parents since she was five weeks old and the social worker believed that she had "substantial emotional ties" to them, that she would benefit from establishment of a permanent relationship with them, and that removal from their care "would be seriously detrimental to [her] well being."

At this point, after the termination of reunification services, the focus has shifted to L.B.'s need for permanency and stability. (*In re Stephanie M.*, *supra*, 7 Cal.4th at p. 317.) As the appellate court stated in a similar context in *In re Anthony W.*, *supra*, 87 Cal.App.4th at page 252: "Mother made no showing how it would be [in] the children's best interest to continue reunification services, to remove them from their comfortable and secure placement to live with mother who has a long history of drug addiction and a recurring pattern of domestic violence . . . . The children should not be made to wait indefinitely for mother to become an adequate parent." Here too, even as we acknowledge father's love for and desire to parent L.B., at this stage of the proceedings, it is L.B.'s need for permanency rather than father's interest in her "care, custody and companionship" that is paramount. (*In re Stephanie M.*, at p. 317.)

Father argues that we should look to *In re Kimberly F.*, *supra*, 56 Cal.App.4th 519 for guidance in determining L.B.'s best interests. In that case, the appellate court set forth a number of factors for the juvenile court to consider, including "the seriousness of the problem leading to dependency and the reason that problem was not overcome; the strength of relative bonds between the dependent children [and] both parent and caretakers; the degree to which the problem may be easily removed or ameliorated; and the degree to which it actually has been." (*In re J.C.* (2014) 226 Cal.App.4th 503, 527,

citing *In re Kimberly F.* at pp. 530-532.) *Kimberly F.* has been criticized, however, for its focus on the interests of the parent. In *In re J.C.*, at page 527, the appellate court declined “to apply the *Kimberly F.* factors if for no other reason than they do not take into account the Supreme Court’s analysis in *Stephanie M.*, applicable after reunification efforts have been terminated. As stated by one treatise, ‘[I]n such circumstances, the approach of the court in the case of . . . *Kimberly F.* . . . may not be appropriate since it fails to give full consideration to this shift in focus.’ (Seiser & Kumli, *Cal. Juvenile Courts Practice and Procedure* (2014) § 2.140[5], p. 2-473.)”

Contrary to father’s claim, this plainly is *not* a case in which the juvenile court was unable “to avoid the temptation of subjectively comparing the household and upbringing offered by the natural parent or parents with that of the caretakers.” (Compare *In re Kimberly F.*, *supra*, 56 Cal.App.4th at pp. 529-530 [appellate court warned against turning best interests test into “ ‘better household’ ” test while ignoring “all familial attachments and bonds between father, mother, sister and brother” ]; *In re Cheryl E.* (1984) 161 Cal.App.3d 587, 606-607 [“we cannot encourage, under the guise of ‘best interests’ or ‘home stability,’ the arbitrary determination by a governmental agent that a well-educated ‘professional’ couple will be better parents than ‘red-necked hillbillies’ . . . who are on welfare and have six other children”].) Instead, this is a case in which L.B.’s best interests, which are now paramount, plainly lie in remaining with her foster-adopt parents, with whom she shares a strong bond and with whom she has lived for nearly all of her short life. (See *In re Stephanie M.*, *supra*, 7 Cal.4th at p. 317; see also *In re Zachary G.* (1999) 77 Cal.App.4th 799, 808 [neither mother’s allegations nor independent evidence showed that it was in child’s best interests to be removed from only home he had known and deprived of stability of a permanent home, to be returned to a parent who remained at risk of regression].)

The court did not abuse its discretion when it found that father had not made a prima facie showing that granting his section 388 petition would be in L.B.’s best interests. (See *In re Mary G.*, *supra*, 151 Cal.App.4th at p. 205.)

## **DISPOSITION**

The order is affirmed as to father. Mother's appeal is dismissed. (See *In re Sade C.*, *supra*, 13 Cal.4th at p. 994.)

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Kline, P.J.

We concur:

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Richman, J.

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Miller, J.