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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

In re S.C., a Person Coming Under the
Juvenile Court Law.

2d Juv. No. B246811
(Super. Ct. No. J1395863)
(Santa Barbara County)

SANTA BARBARA COUNTY CHILD
PROTECTIVE SERVICES,

Plaintiff and Respondent,

v.

GARY L.,

Defendant and Appellant.

Gary L. (father) appeals the juvenile court's orders denying his modification petition seeking reunification services and visitation with his minor daughter S.C. (Welf. & Inst. Code,¹ § 388), and terminating his parental rights with adoption selected as the permanent plan (§ 366.26). Father contends the court erred in denying his modification petition without a hearing, and in denying his request to continue the section 366.26 hearing. We affirm.

¹ All statutory references are to the Welfare and Institutions Code.

FACTS AND PROCEDURAL HISTORY

S.C. tested positive for methamphetamine when she was born in March 2012 and was detained shortly thereafter. Santa Barbara County Child Protective Services (CPS) filed a section 300 petition alleging that S.C.'s mother, who suffers from schizoaffective disorder and depression and is HIV positive, was unable to care for the child due to her illegal drug use and failure to take her prescribed medications.² The petition further alleged that mother had identified father as S.C.'s biological father and stated that he did not want to be involved in the child's life.

Father did not attend the detention hearing on April 3, 2012. CPS subsequently attempted to contact him by telephone. On April 16, 2012, father returned the social worker's calls and left her a voicemail message. Three days later, mother called the social worker and asked if father could attend her next scheduled visit with S.C. The social worker told mother that father had to directly contact the social worker if he wanted to visit the child. The social worker attempted to speak with father that same day by calling the telephone number mother had given her, but the number had been disconnected. Four days later, mother called the social worker again and asked if father could attend her next visit with S.C. The social worker reiterated that father had to contact her directly. Father did not do so.

On April 27, 2012, mother told the social worker that she had seen father and he had not asked about S.C. S.C. was released from the neonatal intensive care unit and placed with her prospective adoptive parents.

Father did not attend the May 2012 jurisdiction and disposition hearing. CPS subsequently conducted a due diligence search and found father's father, who stated that father was homeless and was using his mailing address. On May 21, 2012, CPS received a return receipt signed by father indicating he had received certified mail from CPS at his father 's address.

² Mother is not a party to this appeal.

Mother set the matter for a contested hearing. Father attended mother's trial confirmation hearing on May 31, 2012. Mother settled her contest with amendments to the section 300 petition and the matter was set for a six-month review hearing.

Father declined to sign a declaration of parentage and requested DNA testing. On August 13, 2012, the court declared father to be S.C.'s biological father after tests confirmed his paternity. The court set the matter for a visitation review on August 20, 2012, and informed father that he had to file a section 388 petition if he wanted reunification services or visits.

Father did not attend the August 20th hearing. Father's attorney informed the court that he had lost contact with father. CPS recommended that no services or visitation be ordered for father, noting that he had expressed no interest in the child and had never requested visits. The social worker stated that she did not receive any response to telephone messages she left for father on July 9, July 11, and August 14, 2012. When the social worker left a message stating that she had the results of father's paternity test, however, he immediately called her back. CPS further noted that S.C. had medical issues and was "extremely tired" and "crankier" than usual following mother's visits, and offered that "[a]dding additional visits with [father], with whom she has no relationship, would only increase the discomfort and stress of the baby." In accordance with CPS's uncontested report, the court declined to grant father reunification services or visitation.

On September 28, 2012, mother obtained an emergency protective order against father based on allegations that he had grabbed her by the throat, placed his hand on her face, and told her to "shut up." The police officer who responded to mother's report observed a healing scratch on her face and bruising on her arm.

Father and mother both appeared at the November 26, 2012, six-month review hearing and were ordered to return for a trial confirmation hearing on December 13, 2012. On December 13, father's attorney filed a section 388 petition (form JV-180) requesting that the court order reunification services for father or grant him visitation. In an attachment to the petition, counsel stated that father had requested visitation during a meeting with the social worker on August 16, 2012, and CPS "deferred the issue with

[father], he states, on more than one occasion[.]" Counsel acknowledged that father had no contact with him from October 4, 2012, until November 26, 2012, yet offered that father "did apparently contact the social worker to inquire about the status of the case." Counsel also offered that although father did not have his own residence and was unemployed, "he stays with the paternal grandfather on a consistent basis, and uses that address for his mailing address." Counsel also conveyed father's belief that mother's allegations of domestic abuse were irrelevant to the proceedings because the district attorney had declined to prosecute him. Finally, counsel offered "that both paternal grandparents put themselves forward as placement options for the child" and that the paternal grandfather also requested visitation. S.C.'s attorney opposed the petition.

At the December 13, 2012, hearing, the court denied father's section 388 petition on the ground that he had failed to allege either changed circumstances or that the requested modification would be in the child's best interests. The court proceeded to terminate mother's reunification services and set the matter for a section 366.26 permanency planning hearing on March 25, 2013.

In its section 366.26 report, CPS stated that S.C. had been with her prospective adoptive parents in Fresno ever since her discharge from the hospital, was likely to be adopted, and was happy and secure in the placement. The social worker reported that S.C.'s paternal grandmother had called her on February 14, 2013, and requested visitation. The social worker told the paternal grandmother that any visits would have to take place in Fresno. The paternal grandmother replied that she would contact the social worker when she was ready for a visit, but she never did so.

Father appeared at the section 366.26 hearing and the matter was set for a trial confirmation conference on April 18, 2013. The court notified counsel, "I'll require the offer of proof be filed by the 11th of April." At the request of S.C.'s attorney, the court ordered that mother's visits be discontinued on the ground that further visits would be "detrimental" to the child.

When father appeared at the April 18th hearing, his attorney conceded that he had no grounds for an offer of proof because he had not visited S.C. Father's attorney

made an oral request for a one-week continuance "to provide [CPS] with the opportunity to provide a reason to this court as to whether or not this grandmother has actually been investigated as a potential relative placement or not, and if not, why." In making the request, counsel conceded that she did not know whether the paternal grandmother had requested placement. The court denied the request for a continuance, terminated father and mother's parental rights to S.C., and selected adoption as the child's permanent plan. Father timely appealed. On CPS's motion, we consolidated father's appeals for purposes of briefing, argument, and decision.

DISCUSSION

The Section 388 Petition

Father contends the juvenile court erred in denying his section 388 modification petition without a hearing. We disagree.

Section 388 allows a parent of a dependent child to petition the juvenile court to change, modify, or set aside any previous order of the juvenile court. To prevail on a section 388 petition, the parent must demonstrate that new evidence exists or circumstances have changed such that the proposed modification would be in the child's best interests. (*In re Marcelo B.* (2012) 209 Cal.App.4th 635, 641–642.) The court may summarily deny the petition without a hearing if the petitioner fails to make a prima facie showing of both elements. (Cal. Rules of Court, rule 5.570(d); *In re Marcelo B.*, *supra*, at p. 642.) "A 'prima facie' showing refers to those facts which will sustain a favorable decision if the evidence submitted in support of the allegations . . . is credited." (*In re Edward H.* (1996) 43 Cal.App.4th 584, 593, citing *College Hospital Inc. v. Superior Court* (1994) 8 Cal.4th 704, 719, fn. 6.) "In determining whether the petition makes the necessary showing, the court may consider the entire factual and procedural history of the case. [Citation.]" (*In re Jackson W.* (2010) 184 Cal.App.4th 247, 258.)

We review a juvenile court's summary denial of a section 388 petition for abuse of discretion. (*In re Angel B.* (2002) 97 Cal.App.4th 454, 460.) "An abuse of discretion occurs when the juvenile court has exceeded the bounds of reason by making an arbitrary, capricious or patently absurd determination." (*In re Marcelo B.*, *supra*, 209

Cal.App.4th at p. 642.) If the petition fails to make the required prima facie showing, summary denial of the petition without a hearing does not violate the petitioner's due process rights. (*Angel B.*, at p. 461.)

The trial court did not abuse its discretion in denying father's section 388 petition without a hearing because father failed to make the prima facie showing necessary to trigger such a hearing. Father waited four months before he sought to modify the order denying him reunification services or visitation. Only a week after the order was entered, the issue of father's entitlement to services and visitation was addressed again at a hearing of which father was notified but chose not to attend. The report CPS prepared for that hearing stated that father had never requested visitation and had ignored all of the social worker's telephone calls, except for the call relating to the results of the paternity test. To the extent father disputes the accuracy of those representations, he forfeited the right to do so by failing to appear at the hearing or appeal the order resulting therefrom, which has long since become final. (See *Steve J. v. Superior Court* (1995) 35 Cal.App.4th 798, 811 ["A challenge to the most recent order entered in a dependency matter may not challenge prior orders for which the statutory time for filing an appeal has passed"].)

In any event, even if we were to accept the legally unsupported assertion that father and the paternal grandfather's belated interest in being a part of S.C.'s life amounts to either new evidence or changed circumstances, the petition failed to make a prima facie showing that granting father services or visitation would be in the child's best interests. In arguing otherwise, father essentially offers that "[a]s [S.C.'s] natural parent, Father would have conferred a benefit to [S.C.]; this benefit would have included getting to know her expanded family — including her paternal grandfather. Further, services would have assured that [S.C.] was getting the best version of Father available to her." But this sort of theoretical "benefit" could be said to exist in every case. In evaluating a child's best interests under section 388, relevant factors include (1) the seriousness of the reason for the dependency in the first place; (2) the extent to which the concern has been addressed; and (3) the relative bonds between the child and the parents and the child and

the present caretakers. (*In re Kimberly F.* (1997) 56 Cal.App.4th 519, 530-532.) Father makes no meaningful effort to demonstrate that any of these factors weigh in his favor.

Father also downplays the significance of the court's finding that he was merely a biological father and not a presumed father, another finding he is precluded from challenging in this appeal. Instead of promptly assuming a parental role, he denied paternity for several months and made no effort to be involved in the child's life.

Although he asserts that he told the social worker he wanted reunification services and visitation soon after he learned of the results of the paternity test, he was also notified that he had to file a section 388 petition in order to obtain either services or visitation. After being so informed, father failed to maintain contact with his attorney and was the subject of a protective order mother obtained based on allegations of domestic violence. When he finally filed his section 388 petition four months after the fact, he simply offered that he had previously requested services and visitation on at least two occasions. By his own admission, he was essentially living a transient lifestyle and was unemployed. The record also reflects his lengthy criminal history, which includes prior convictions for illegal drug use and domestic violence. Father makes no mention of the significant bond that S.C. has formed with her prospective adoptive parents, with whom she has been living virtually her entire life. Father, by contrast, has *no* bond with the child, due to his delay in seeking to form such a bond. In light of this evidence, the court did not abuse its discretion in denying father's section 388 petition without a hearing.³

³ Father cites *In re X.S.* (2010) 190 Cal.App.4th 1154, in support of his assertion that "there is nothing legally wrong in delaying seeking reunification services until learning for sure that one is the child's biological father." The case does not stand for such a proposition. In *X.S.*, the issue was whether the father's belated assertion of his parental rights was proper grounds for a dependency allegation of substantial risk of physical harm under section 300, subdivision (b). (*Id.* at pp. 1160-1161.) Here, the issue is whether father's belated assertion of his rights supports a finding that reunification services or visitation would not be in the child's best interests. The answer to the former issue is no (*ibid.*), while the answer to the latter is yes (*In re Sarah C.* (1992) 8 Cal.App.4th 964, 976-977).

Denial of Motion to Continue Section 366.26 Hearing

Father claims the court erred in denying his request for a one-week continuance of the 366.26 hearing. We disagree.

"Section 352 provides that a continuance [in a dependency proceeding] shall be granted only on a showing of good cause and shall not be granted if it is contrary to the minor's best interests. '[T]he court shall give substantial weight to a minor's need for prompt resolution of his or her custody status, the need to provide children with stable environments, and the damage to a minor of prolonged temporary placements.' (§ 352, subd. (a).) Continuances are discouraged [citation] and we reverse an order denying a continuance only on a showing of an abuse of discretion [citation]." (*In re Ninfa S.* (1998) 62 Cal.App.4th 808, 810-811.)

At the outset of the section 366.26 hearing, father requested that the matter be continued for one week so that CPS could determine whether S.C. should be placed with the paternal grandmother pursuant to the relative placement preference mandate of section 361.3. The court correctly found that the relative placement preference did not apply in this instance. Section 361.3, which provides that "preferential consideration shall be given to a request by a relative of the [removed] child for placement of the child with the relative" (at subd. (a)), initially comes into play at the dispositional hearing. After the dispositional hearing is held, however, relatives are entitled to preferential placement consideration only when the child's existing placement fails: "Subsequent to the [disposition] hearing conducted pursuant to Section 358, whenever a *new* placement of the child must be made, consideration for placement shall again be given as described in this section to relatives who have not been found to be unsuitable and who will fulfill the child's reunification or permanent plan requirements." (§ 361.3, subd. (d), italics added.)

S.C.'s disposition hearing was held in May 2012. Prior to that hearing, the paternal grandmother made no request that the child be placed with her. When father's counsel raised the issue at the section 366.26 hearing, S.C. was secure in her longstanding placement with her prospective adoptive parents. The relative placement preference

provided under section 361.3 thus did not apply. Father's assertion that the adoption might not take place is pure speculation. In any event, if S.C. should require a new placement in the future, the paternal grandmother (and any other relatives requesting placement) would be given preferential consideration under section 361.3 and would be evaluated for suitability at that time.

The judgment is affirmed.

NOT TO BE PUBLISHED.

PERREN, J.

We concur:

GILBERT, P. J.

YEGAN, J.

Arthur A. Garcia, Judge
Superior Court County of Santa Barbara

Cristina Gabrielidis, under appointment by the Court of Appeal, for
Appellant.

Dennis A. Marshall, County Counsel, Toni Lorien, Deputy Counsel, for
Respondent.