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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

In re M.V., a Person Coming Under
the Juvenile Court Law.

SACRAMENTO COUNTY DEPARTMENT OF
HEALTH AND HUMAN SERVICES,

Plaintiff and Respondent,

v.

JAMES V.,

Defendant and Appellant.

C068133

(Super. Ct. No. JD228343)

Appellant James V., the father of the minor M.V., appeals from the juvenile court's orders terminating his parental rights and denying his petition for modification. (Welf. & Inst. Code, §§ 395, 388, 366.26.)¹ He contends the juvenile court erred in

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

denying his petition for modification and in failing to apply the parent-child relationship exception to adoption. We shall affirm.

FACTUAL AND PROCEDURAL BACKGROUND

The minor (born April 2002) was placed in protective custody by the Sacramento County Department of Health and Human Services (DHHS) in September 2010 after the minor's mother was arrested for assaulting her boyfriend. The minor was placed with her adult half sister L.C. and her husband.

The parents have an extensive child welfare history involving drug and alcohol abuse, as well as domestic violence. Mother's and father's parental rights for the minor's siblings were terminated in a 1999 dependency action due to the parents' substance abuse and domestic violence.

In September 2008, DHHS filed a dependency petition regarding the minor, alleging jurisdiction under section 300, subdivisions (b) (failure to protect) and (j) (abuse of sibling) based on the parents' continued drug and alcohol abuse and the prior termination of parental rights. The parents had participated in voluntary services through the informal supervision program since November 2007. While father's progress was satisfactory, mother's was minimal, having tested positive for methamphetamine and alcohol in April, May and July 2008. The minor related incidents of domestic violence between the parents, as well as their continued consumption of alcohol.

Father was incarcerated at the time of the October 2008 jurisdiction and disposition report. He admitted using alcohol as recently as August 2008. He was open to services, and attended A.A. and N.A. meetings at jail. Father admitted first using methamphetamine when he was 15 or 16 years old. He stopped using methamphetamines when he was 29 in 2001, and stayed clean for six years before relapsing with mother in 2007.

Father described his relationship with the minor as "really good." He had sole care of the minor for about two months after mother was arrested in December 2008. DHHS noted the minor did well in father's care.

The juvenile court sustained the petition in January 2009, placed the minor with the parents, and ordered services, including a treatment program and drug court. After the parents separated in February 2009, the minor lived with mother while father saw her three days a week.

Father was very open and cooperative with the social worker, but used methamphetamine in April 2009 and was incarcerated twice between September 2008 and July 2009. Father agreed to a corrective action plan, which included additional drug treatment, more testing, and attending a 12-step program three times a week. He had already completed a 12-class series on substance abuse when he relapsed. His counselor, Dr. Shirley Rowland, who had worked with father since October 2008, recommended additional treatment.

The parents were given an additional six months of services in July 2009. The parents were divorced by December 2009. The dependency was terminated by the juvenile court in January 2010, with physical custody to mother and joint legal custody for the parents.

In July 2010, the minor's half sibling L.C. filed a probate guardianship petition on behalf of the minor, alleging the parents continued to use alcohol and controlled substances. The probate court denied a temporary guardianship petition because of a current child welfare referral.

DHHS filed a new dependency petition in September 2010, alleging jurisdiction under section 300, subdivisions (b) and (j) on the basis of the parents' continued substance abuse problems, mother's domestic violence with her boyfriend, and the parents' child welfare history. The minor was detained later that month.

The November 2010 jurisdiction and disposition report related an interview with father in which he admitted leaving a stash of marijuana in the minor's bedroom in September 2010 while doing yard work in the apartment complex. A friend gave father the marijuana, which father intended to sell because he no longer used the drug. Father also admitted to occasionally drinking beer, but denied having a substance abuse problem. He had been doing well in his substance abuse program until he relapsed in February or March 2010, and started drinking beer

every other day. The minor told the social worker that her father drinks, but on a moderate basis.

The minor felt safe living with her half sibling L.C. She requested visitation with both parents; the parents had not made themselves available for visits.

In December 2010, the juvenile court sustained the petition and denied services to the parents pursuant to section 361.5, subdivision (b) (13).

The April 2011 selection and implementation report related that father's monthly visits went well, and the minor enjoyed spending time with him. The minor's caretakers, L.C. and her husband, expressed their desire to adopt the minor, and were referred to adoption home study in March 2011. The minor was agreeable to adoption, and seemed to enjoy the love and stability offered in her half sibling's home. The report also noted that father had been enrolled in a residential drug treatment program since December 2010.

Father filed a petition for modification (§ 388) in April 2011, seeking custody of the minor or six months of reunification services. He alleged as changed circumstances his ongoing participation in treatment for drug and alcohol abuse.

In an addendum report filed later that month, DHHS noted the minor continued to "thrive" in her placement with L.C., and had just recently started calling her prospective adoptive

parents "mom" and "dad." L.C. "wholeheartedly" wanted to adopt the minor.

The minor's therapist told the social worker she would be very concerned about maintaining the case under a plan of family reunification as it would be highly confusing to the minor. While the minor wanted to see her father, the therapist said it would be "devastating" for her to reunify with father and have him fail once again.

At a contested hearing on the petition for modification, Christy Howell, father's counselor at "The Effort" drug treatment program, testified that "he was very open and willing to change his life," which was a key component to successful treatment. Father was in the program for almost four months, during which he attended every meeting, complied with the program's rules, and never tested positive.

Father would call and check in even after he left the program. He was using the skill set he learned at The Effort, and he had been clean and sober for five months. While she was aware of his relapses, Howell believed father could remain clean so long as he applied the tools he acquired at The Effort.

Father testified that he shared a strong bond with the minor, having been part of her life since she was born. Admitting his prior relapses, father said his most recent recovery was different because he now had a support group. He could stay clean this time because, unlike his previous efforts, father had a 12-step program.

Father recently completed parenting and life skills classes. The life skills class taught him how to cope with his stress and personal issues alongside his addiction. The 14-session parenting class taught him positive discipline, why children misbehave, and why some children act as they do.

After graduating from The Effort, father went to the "Mather Community Campus" (Mather), a structured environment that offered mental health and employment programs. He could stay there for two years, and the minor could reside there if placed with him.

Father felt reunification with the minor was in her best interests. Asked why, father replied, "Because she needs a father. I mean, I know her mom ain't there, but I miss my daughter so much. You know, it hurts me not being around her. I know I can take care of her [and] support her and give her the nourishing that she needs." Father also related how it hurts him to see the minor say "I miss you Daddy. I want to come home" at the end of visits, and that the minor was his "last shot" after losing his other children.

Father's sponsor, Shade Adkins, was a graduate of The Effort program who sponsored residents. He had been father's sponsor for about four months. Father was doing "well" and his attendance at Mather was "a very good step in the right direction."

Dr. Rowland had treated defendant for substance abuse since October 2008. She was out of communication with father before

his most recent relapse, but treated him since then. According to Rowland, father's previous relapses were due to "major crises in his life and feeling extreme stress." In Rowland's opinion, father now had the tools to stay clean and sober, which he did not have when he failed in 2008. In addition, father's problematic relationship with mother was less of a concern now as he was ready to let go of the relationship.

Dr. Rowland saw the minor with father four to five times a year. The minor was very comfortable with father.

A DHHS family service worker testified that the minor called father "dad." She was excited when she first saw him on visits, and hugged him when he arrived. During visits they talked, read, and played games together. The minor "appeared comfortable" and was "affectionate" with father.

Father may have tried to discuss mother during a visit, but the family service worker redirected him. During a March 2011 visit, he told the family service worker he wanted to give a card from mother to the minor. The family service worker gave the card to the minor's caregiver, after obtaining approval from the social worker.

The juvenile court denied the petition for modification, finding that father failed to establish changed circumstances or that the petition was in the minor's best interests.

At the section 366.26 hearing, father's counsel argued the beneficial parent-child relationship exception to adoption was

applicable. The juvenile court rejected the argument and terminated parental rights.

DISCUSSION

I. Parent-child Relationship Exception to Adoption

Father claims the juvenile court erred in failing to find the beneficial parent-child relationship exception to adoption. We disagree.

At a hearing under section 366.26, if the juvenile court finds by clear and convincing evidence that a minor is likely to be adopted, the court must terminate parental rights and order the minor placed for adoption unless "[t]he court finds a compelling reason for determining that termination would be detrimental" due to one of the statutorily enumerated exceptions. (§ 366.26, subd. (c)(1)(B).)

Section 366.26, subdivision (c)(1)(B)(i) provides an exception to adoption when "[t]he parents have maintained regular visitation and contact with the child and the child would benefit from continuing the relationship."

The parent has the burden of establishing an exception to termination of parental rights. (*In re Zachary G.* (1999) 77 Cal.App.4th 799, 809.) "Because a section 366.26 hearing occurs only after the court has repeatedly found the parent unable to meet the child's needs, it is only in an extraordinary case that preservation of the parent's rights will prevail over

the Legislature's preference for adoptive placement." (*In re Jasmine D.* (2000) 78 Cal.App.4th 1339, 1350.)

The juvenile court's ruling declining to find an exception to adoption must be affirmed if it is supported by substantial evidence. (*In re Zachary G.*, *supra*, 77 Cal.App.4th at p. 809; *In re Derek W.* (1999) 73 Cal.App.4th 823, 827; *In re Autumn H.* (1994) 27 Cal.App.4th 567, 576.) "On review of the sufficiency of the evidence, we 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." (*Autumn H.*, at p. 576.)

Father asserts he has a strong, well-established bond with the minor that justifies applying the exception. He notes the minor was excited to see him on visits, was very comfortable with him during visits, and, according to his testimony, called him "dad" at the end of visits. Father also relies on the therapist's 2008 report, which finds the minor bonded to father, and statements from the minor that she missed father and wanted to maintain contact with him. From this, father concludes severing the parental bond will greatly harm the minor.

Father's argument overlooks significant evidence showing how terminating parental rights is in the minor's best interests. The most recent statement from her therapist expressed much concern about continuing the case, as it would be confusing to the minor, and another failed reunification would

be devastating to her. The minor spent considerable time (two years) in the dependency system, and, in light of his history, father's chances for reunification were inherently risky. In short, continuing the parental relationship presented a genuine risk to the minor. Since applying the exception to adoption risked harming the minor, substantial evidence supports the juvenile court's finding that father had not met his burden in establishing his was one of the extraordinary cases justifying the exception to adoption.²

II. The Section 388 Petition

Father contends it was an abuse of discretion for the juvenile court to deny his section 388 petition.

Section 388 permits a modification of a dependency order if a change of circumstance or new evidence is shown and if the proposed modification is in the minor's best interests. (*In re Kimberly F.* (1997) 56 Cal.App.4th 519, 526 (*Kimberly F.*)). The petitioning party has the burden of proof by a preponderance of the evidence. (*In re Casey D.* (1999) 70 Cal.App.4th 38, 48.)

² The parties point out that other courts apply a different standard of review regarding exceptions to adoption. (See, e.g., *In re Jasmine D.*, *supra*, 78 Cal.App.4th at p. 1351 [abuse of discretion]; *In re I.W.* (2009) 180 Cal.App.4th 1517, 1528 ["whether the evidence compels a finding in favor of the appellant as a matter of law"].) Since there is little practical difference between the abuse of discretion and substantial evidence standards (see *Jasmine D.*, *supra*, 78 Cal.App.4th at p. 1351) and, since the standard in *I.W.* is worse for father, the result here would be the same under any standard.

One of the functions of section 388 is to provide "an 'escape mechanism' when parents complete a reformation in the short, final period after the termination of reunification services but before the actual termination of parental rights." (*Kimberly F.*, *supra*, 56 Cal.App.4th at p. 528, citing *In re Marilyn H.* (1993) 5 Cal.4th 295, 309.) "Even after the focus has shifted from reunification, the scheme provides a means for the court to address a legitimate change of circumstances while protecting the child's need for prompt resolution of [her] custody status." (*Marilyn H.*, at p. 309.)

The child's best interests are of paramount consideration when a modification petition is brought after the termination of reunification services. (*In re Stephanie M.* (1994) 7 Cal.4th 295, 317.) In assessing the best interests of the child, the juvenile court looks not to the parent's interests in reunification but to the needs of the child for permanence and stability. (*In re Marilyn H.*, *supra*, 5 Cal.4th at p. 309.) "[W]hen a child has been placed in foster care because of parental neglect or incapacity, after an extended period of foster care, it is within the court's discretion to decide that a child's interest in stability has come to outweigh the natural parent's interest in the care, custody and companionship of the child." (*In re Jasmon O.* (1994) 8 Cal.4th 398, 419.)

A modification petition "is addressed to the sound discretion of the juvenile court and its decision will not be disturbed on appeal in the absence of a clear abuse of

discretion.” (*In re Jasmon O.*, *supra*, 8 Cal.4th at p. 415.)

“It is rare that the denial of a section 388 [petition] merits reversal as an abuse of discretion” (*Kimberly F.*, *supra*, 56 Cal.App.4th at p. 522.)

Father asserts “[t]he record presents compelling evidence [he] was well on the way to fully resolving his substance abuse problem.” He finds significance in the fact that his most recent effort was his first residential drug treatment. Also, father notes testimony from his counselor that he was “very open and willing to change his life,” and that he flourished during his four months in the program—never missing a meeting, obeying all the rules, and always testing negative, a performance the juvenile court acknowledged as “superb.”

The problem with father’s argument is the nature of what he is trying to overcome: his drug and alcohol addiction, his history of relapses, and his comparatively short period of sobriety. *Kimberly F.* suggested it was unlikely that a parent who lost custody because of a drug problem could prevail on a section 388 petition, because “[i]t is the nature of addiction that one must be ‘clean’ for a much longer period than 120 days to show real reform.” (*Kimberly F.*, *supra*, 56 Cal.App.4th at p. 531, fn. 9.) In light of father’s history of relapses from treatment, an extra month of sobriety does not make a difference. Since the evidence shows father presented changing rather than changed circumstances, it was not an abuse of

discretion for the juvenile court to deny his petition. (*In re Casey D., supra*, 70 Cal.App.4th at pp. 48-49.)

DISPOSITION

The orders of the juvenile court are affirmed.

_____ BUTZ _____, J.

We concur:

_____ HULL _____, Acting P. J.

_____ MAURO _____, J.