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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

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

SAN DIEGO COUNTY HEALTH AND
HUMAN SERVICES AGENCY,

Plaintiff and Respondent,

v.

DONALD M.,

Defendant and Appellant.

D063408

(Super. Ct. No. J518250B)

APPEAL from orders of the Superior Court of San Diego County, Carol Isackson,
Judge. Affirmed.

Monica Vogelmann, under appointment by the Court of Appeal, for Defendant
and Appellant.

Thomas E. Montgomery, County Counsel, John E. Philips, Chief Deputy County
Counsel and Dana C. Shoffner, Deputy County Counsel, for Plaintiff and Respondent.

Donald M. appeals orders denying his Welfare and Institutions Code¹ section 388 petition and terminating his parental rights to his daughter, E.M. He contends the court abused its discretion by summarily denying his petition. We affirm the orders.

FACTUAL AND PROCEDURAL BACKGROUND

On October 4, 2011, the San Diego County Health and Human Services Agency (the Agency) petitioned on behalf of two-year-old E.M under section 300, subdivision (b), alleging she was at substantial risk of harm because drugs and drug paraphernalia were found accessible to her in the family home. A few days earlier, law enforcement officers had executed a search warrant at the house because they had information Donald was selling drugs from there. At the time of the search, however, neither Donald nor E.M.'s mother, M.B., were present. Fifteen other adults plus E.M. and two other children were in the house. A room near where E.M. slept smelled of methamphetamine.

The social worker reported there had been numerous past child welfare referrals involving the family. Most had been deemed unfounded but, in 2006 and 2007, M.B. had participated in voluntary services related to domestic violence and methamphetamine use. Donald told the social worker he did not live in the house where the drugs were found, but all of the people there used drugs. He denied using drugs and said he last smoked marijuana in 2007-2008. He did not appear at the detention hearing. The court ordered E.M. detained and ordered supervised visits for Donald.

¹ Statutory references are to the Welfare and Institutions Code.

Donald said he wanted M.B. to do what was necessary to regain custody of E.M. He had a criminal history dating to 1987 that included several theft related crimes. He said he needed to take care of a warrant and planned to turn himself in.

Donald attended one visit with E.M., but he did not attend the jurisdictional/ dispositional hearing in December 2011. The court found the allegations of the petition to be true, declared E.M. a dependent child of the court and ordered reunification services for M.B.

Donald was incarcerated for burglary from January 2012 to April 2012. In early April, he asked about visiting E.M. He then appeared in court at a special hearing and requested custody of E.M. The court appointed counsel for him and ordered liberal supervised visits.

The social worker reported that when she met with Donald in May 2012, he appeared to be under the influence of drugs and admitted using marijuana. He said he was willing to do whatever was asked of him to regain custody of E.M. He said he was homeless, but in support of M.B. he had been staying at the house where the drug raid had occurred. At a special hearing on May 14, the court ordered services for him.

In July 2012, M.B. gave birth to a new baby. Both she and the baby tested positive for methamphetamine, and she admitted using the drug during her pregnancy. M.B. had not followed through with her services plan and had missed numerous visits with E.M. The new baby was detained in foster care. Donald said he was no longer residing in the house where the drug raid had occurred.

At the six-month review hearing on July 24, 2012, the court found reasonable services had been provided, but neither parent had made substantial progress in reunification. It terminated services and set a section 366.26 hearing.

The social worker reported Donald visited E.M. fairly regularly and they had appropriate visits, but he was struggling in his daily life. He said he was through with women and wanted to live by himself, but he continued to live with a girlfriend. Donald has another child, D.M., with a different mother. In August 2012, after a report that D.M.'s mother was homeless, the family court granted temporary joint custody of D.M. to D.M.'s mother and Donald.

The social worker assessed E.M. as adoptable. Her caregivers want to adopt her along with her older brother, to whom E.M. is bonded. In addition, numerous other families want to adopt a child with E.M.'s characteristics.

On November 19, 2012, the court appointed a new attorney for Donald. The court denied the attorney's request to grant Donald custody of E.M. On December 19, the attorney reported he intended to file a section 388 petition, but had lost contact with Donald.

On January 4, 2013, Donald filed a section 388 petition, requesting the court vacate the section 366.26 hearing and place E.M. with him. He argued the family court had awarded him custody of D.M. and he was providing excellent care, he would have his own place to live in two weeks, he had tested clean since 2012, he and E.M. had a strong bond and he would provide a lifetime of care.

The court found Donald had not made a prima facie showing to warrant a hearing on his section 388 petition. It summarily denied the petition. It noted it had no information that Donald was participating in the services of his reunification plan, and no information on his custody of D.M. It found Donald had become involved late in the dependency proceedings and had not occupied a parental role in E.M.'s life.

At the section 366.26 hearing, after considering the evidence and argument by counsel, the court found E.M. was adoptable and neither parent had shown a statutory exception to termination of parental rights and adoption. It terminated parental rights to E.M. and referred the matter for adoption.

DISCUSSION

Donald contends the court abused its discretion by summarily denying his section 388 petition.

Section 388 provides in part:

"(a)(1) 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 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 or to terminate the jurisdiction of the court. . . . [¶] . . . [¶]

"(d) If it appears that the best interests of the child may . . . be promoted by the proposed change of order, . . . the court shall order that a hearing be held"

To obtain the relief sought in a section 388 petition, the petitioner must show both a change of circumstances or new evidence and that the change sought is in the child's best interests. (§ 388; Cal. Rules of Court, rule 5.570; *In re Michael B.* (1992) 8

Cal.App.4th 1698, 1703.) A petition is liberally construed in favor of its sufficiency. (*In re Angel B.* (2002) 97 Cal.App.4th 454, 461.) " " "The parent need only make a prima facie showing to trigger the right to proceed by way of a full hearing." " " (*In re Aljamie D.* (2000) 84 Cal.App.4th 424, 432.) The petitioner bears the burden of proof, however, to make both showings. (*In re Stephanie M.* (1994) 7 Cal.4th 295, 317.) The juvenile court has discretion to summarily deny a petition if the moving party has not met the threshold burden of proof. (*In re Jasmon O.* (1994) 8 Cal.4th 398, 415.)

Donald has not shown the court abused its discretion by summarily denying his petition. He provided no information or documentation of any orders or reports regarding whether he had been granted legal or physical custody of D.M. and whether the custody is temporary or permanent. He did not inform the court of any details of the care he was providing to D.M. His assertion that he would have his own place to live in two weeks was presented without verification or further information about the residence. As the court stated, this assertion at best showed changing—not changed—circumstances. As to Donald's contention he had tested clean on probation, he again did not attach documentation of drug tests or a statement from his probation officer to support his claim. Moreover, he did not present any documentation showing he had addressed the protective issues of E.M.'s dependency case by participating in the services of his reunification plan.

In addition, Donald did not make any showing that placing E.M. with him would serve her best interests. The focus at the time of the hearing was E.M.'s need for stability and permanence. Donald struggled in his daily life and did not show he would be able to

provide adequate, consistent care for her. Although E.M. and Donald shared a relationship and she enjoyed spending time with him, their bond was not so strong that the benefits she gained from it would outweigh the benefits of adoption. The court did not err by finding Donald had not made a prima facie showing on his section 388 petition.

DISPOSITION

The orders are affirmed.

McDONALD, J.

WE CONCUR:

BENKE, Acting P. J.

O'ROURKE, J.