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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

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

SAN DIEGO COUNTY HEALTH AND  
HUMAN SERVICES AGENCY,

Plaintiff and Respondent,

v.

ANTOINE C.,

Defendant and Appellant.

D063507

(Super. Ct. No. J514413D)

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

Neil R. Trop, under appointment by the Court of Appeal, for Defendant and  
Appellant.

Thomas E. Montgomery, County Counsel, John E. Philips, Chief Deputy County  
Counsel and Paula J. Roach, Deputy County Counsel, for Plaintiff and Respondent.

Antoine C. appeals following the summary denial of his modification petition (Welf. & Inst. Code, § 388)<sup>1</sup> in the juvenile dependency case of his daughter, M.C. Antoine contends that the court erred in denying him an evidentiary hearing on his petition, in which he requested reunification services. Antoine also contends that the delay in establishing his paternity deprived him of the opportunity to participate meaningfully in the case. We affirm.

### BACKGROUND

Antoine and Lynn H. (the parents) began dating in 2005. In 2008, Lynn gave birth to their first child together (the sibling). Beginning in March 2010, Antoine physically abused Lynn's two older children (the half siblings). In June, the parents exposed the half siblings to domestic violence. Also in June, Antoine and Lynn left the sibling inadequately supervised and she fell from a second story window, sustaining serious injuries. The court ordered one of the half siblings placed with his father and in January 2012, terminated parental rights as to the other half sibling and the sibling.

In July 2012, Lynn gave birth to M.C. A few days later, the San Diego County Health and Human Services Agency (the Agency) filed a dependency petition on behalf of M.C. The petition named Antoine as M.C.'s alleged father and was based on the following events. In April, while Lynn was seven months pregnant, Antoine threw her into a brick wall and punched her in the stomach. Antoine was arrested, but was

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

subsequently released from custody. Lynn tested presumptively positive for methamphetamine at M.C.'s birth and admitted having used drugs during the pregnancy.

M.C. was detained with a nonrelative extended family member who was caring for the sibling and one of the half siblings. At the time of the detention hearing in late July 2012, Antoine was on informal probation in Orange County. He lived a transient lifestyle and his whereabouts were unknown. Lynn said that Antoine was staying with his mother in Ohio. The court found that the Agency had conducted a reasonable search for Antoine, and ordered the Agency to continue the search, to provide notice to Antoine and to offer him voluntary services. The court set a jurisdictional and dispositional hearing for August 15.

On August 13, 2012, the Agency located Antoine in jail in Orange County. On August 15, the court again found that the Agency had conducted a reasonable search for Antoine. The court appointed counsel for Antoine and noted that it might take five weeks to have Antoine produced from jail. Antoine's counsel asked that the next hearing be delayed for five weeks. The court set a settlement conference for September 20, found that there were exceptional circumstances for setting the dispositional hearing beyond the 60-day limit (§ 352, subd. (b)) and set a jurisdictional and dispositional hearing for September 25.<sup>2</sup>

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<sup>2</sup> The court issued orders for Antoine's appearance at the September 20 hearing and at three later hearings. Antoine participated by telephone on September 20 and at all subsequent hearings except at the last hearing on February 6, 2013.

On September 4, 2012, M.C. was moved to the home of a relative in the San Diego area. At the September 20 settlement conference, Antoine's counsel stated that Antoine was "seeking to elevate his status through a paternity test to that of a biological father." Counsel also provided the names of two of Antoine's relatives as possible caregivers. The court ordered the Agency to facilitate a paternity test for Antoine and authorized Laboratory Corporation of America (LabCorp) personnel to obtain a DNA sample from Antoine at the jail in Orange County. Counsel also asked that the jurisdictional and dispositional hearing be delayed until after the court received the results of the paternity test. The court denied that request as to the jurisdictional hearing, but granted the request as to the dispositional hearing. The court entered true findings on the petition, set a dispositional hearing for October 31 and vacated the September 25 hearing date.

On October 8, 2012, the Agency faxed to LabCorp a request for paternity testing and a copy of the court's September 20 order. LabCorp did not respond. On October 10, social worker Tammy Burmeister called LabCorp. A LabCorp employee told the social worker that LabCorp had received the fax on October 8 and that "a hold had been put on the request." The employee further stated that she had "lifted the hold . . . and that a fax confirming the tests would be sent to . . . Burmeister within 24 to 48 hours." By October 29, the Agency had not received the confirmation, and Burmeister called LabCorp again. A different LabCorp employee stated "that no test had been done as [LabCorp] needed an original copy of the court order . . . ." The employee instructed Burmeister to mail the order "to the facility that would do the test in Orange County." On October 29, the

Agency mailed the order to Specimen Specialists of America, Inc. (SSA), LabCorp's subcontractor.

At the October 31, 2012, dispositional hearing, Antoine's attorney asked for a continuance to allow the Agency to complete paternity testing. The court found that there were exceptional circumstances for holding the dispositional hearing beyond the 60-day limit (§ 352, subd. (b)) and set a settlement conference for December 6 and a contested dispositional hearing for December 13. The court ordered the Agency to "move heaven and earth to get the paternity testing done."

On November 21, 2012, LabCorp informed Burmeister "that a worker attempted to test [Antoine] on [November 15] but was turned away . . . because the [jail] was requiring a court order from Orange County, that the San Diego County order would not gain the lab worker entry." On November 21 and November 29, "Burmeister attempted to contact Deputy Larson and the Sergeant of the Day at [the jail] to confirm their policy, [but] neither returned the calls." On December 4, Burmeister reached Deputy Pridnow at the jail. Pridnow stated that the order from the San Diego court was acceptable; the lab worker had been denied access to the jail because he was employed by SSA and did not have LabCorp identification. On December 4, Burmeister contacted LabCorp. A LabCorp employee said "that they had previously issued a [LabCorp] badge to the SSA employee who went to [the jail] but they were unsure if it was still the same employee assigned to the facility." The LabCorp employee promised to "issue a new badge and send a worker out to [the jail] by the end of the week if they got prompt response from

SSA about who their [jail] worker was." In a report filed on December 6, the Agency requested an amended order for paternity testing at the jail by LabCorp or SSA.

On December 6, 2012, Antoine's attorney requested a continuance "to sometime in mid[-]January" to allow the paternity test to take place. The court denied the continuance request and confirmed the December 13 trial date. The court granted the Agency's request for an amended order for paternity testing and ordered the Agency to send the amended order to the jail by overnight mail.

On December 7, 2012, social worker Rachel Swaykos sent the court's order to the jail by overnight mail. That day, SSA stated that the SSA employee who would conduct the paternity test had been issued a LabCorp identification and that a new test date would be scheduled. On December 10, Swaykos called SSA to request a new test date. Swaykos did not receive a return call. On December 12, Swaykos again called SSA. Christina Cernucan of SSA stated that "the tester had again attempted entry into [the jail] on [November 30 ] and was turned away because the court order for the test was from San Diego County and not from Orange County." Cernucan stated that SSA had again asked for permission to enter the jail, and a deputy sheriff had "granted [SSA] a onetime exception." On December 13, Cernucan stated that a sample had been collected from Antoine.

On December 13, 2012, Antoine's attorney asked the court to continue the dispositional hearing pending the court's receipt of the paternity test results, so that Antoine could establish standing to request services and the evaluation of relative placements. The court denied the request, noting that the six-month date was on or

around January 25, 2013. The court found that Antoine would suffer no prejudice, reasoning that if he were found to be the biological father, he could file a section 388 petition requesting services. The court declared M.C. a dependent and ordered her removed from Lynn's custody. The court found that it would be detrimental to place M.C. with Antoine and ordered her placed with a relative. The court stated that Antoine was not entitled to services because he was an alleged father, and set a section 366.26 hearing for April 10.

On January 8, 2013, the court received the paternity test results, which showed a 99.99 percent probability that Antoine was the biological father. By January 23, the Agency had sent Antoine a letter informing him of the results and asking which of his relatives he would like the court to consider for placement.

Antoine filed his section 388 petition on February 6, 2013. At the hearing that day, he was not present either in person or by telephone. The court attempted to arrange for Antoine to appear by telephone, but the attempt was unsuccessful because there was an emergency at the jail (not involving Antoine). Antoine's attorney objected to proceeding with the hearing in Antoine's absence. The court found that Antoine was the biological father, entered a judgment of paternity and summarily denied the section 388 petition. While the court was stating its reasons for the denial, a jail counselor, who was still on the telephone with the court clerk, informed the clerk that Antoine could come to the telephone immediately. The court responded, "It's not necessary. Tell them we appreciate their effort. Thank you. I will let our clerk get off the phone."

## THE SECTION 388 PETITION

Section 388 allows the juvenile court to modify an order if a parent establishes, by a preponderance of the evidence, that changed circumstances exist and that the proposed change would promote the child's best interests. (*In re Zachary G.* (1999) 77 Cal.App.4th 799, 806.) The petition should be liberally construed in favor of granting a hearing, but "[t]he 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." (*Ibid.*) "In determining whether the petition makes the necessary showing, the court may consider the entire factual and procedural history of the case." (*In re Justice P.* (2004) 123 Cal.App.4th 181, 189.) We review the summary denial of a section 388 petition for abuse of discretion. (*In re Zachary G.*, at p. 808; *In re Jeremy W.* (1992) 3 Cal.App.4th 1407, 1413; *In re Aljamie D.* (2000) 84 Cal.App.4th 424, 433.)

As circumstances that had changed since the time the court denied reunification services and set the section 366.26 hearing, Antoine's petition alleged that the paternity finding gave him standing to request services; he had been sentenced; and his prison release date was April 10, 2014, "within the time frame parents are permitted statutorily to participate in services." The petition alleged that granting services would be in M.C.'s best interests because she "has not had the opportunity to participate in reunification services with either parent" and M.C. should "have the opportunity to be raised by a parent."

To obtain a hearing on a section 388 petition, the parent must make a prima facie showing both that circumstances have changed and that the proposed modification would

be in the minor's best interests. (*In re Zachary G.*, *supra*, 77 Cal.App.4th at p. 806; *In re Justice P.*, *supra*, 123 Cal.App.4th at p. 188.) Antoine made no showing that granting the petition would be in M.C.'s best interests. Indeed, his proffered reasons are meaningless. The reasons that Antoine proffered, i.e., that it would be in M.C.'s best interests to participate in services with a parent and to be raised by a parent, could be proffered by virtually any parent in any dependency case. "The presumption favoring natural parents by itself does not satisfy the best interests prong of section 388." (*In re Justice P.*, at p. 192.) Further, Antoine had histories of violence, crime and child abuse and had failed to reunify with the sibling. M.C. had been in the dependency system for her entire life and Antoine had never even met her. When reunification services have been denied, the focus is on the child's need for permanency and stability. (See *In re Stephanie M.* (1994) 7 Cal.4th 295, 317.)

As to Antoine's alleged changed circumstances, the fact that he had been sentenced was irrelevant. His status as biological father did not give him standing to request services. "[O]nly a presumed, not a mere biological, father is a 'parent' entitled to receive reunification services . . . ." (*In re Zacharia D.* (1993) 6 Cal.4th 435, 451.)

There is no indication in the record of any factor that would enable Antoine to achieve the status of a presumed father. The record does not reveal whether necessary services would be available to Antoine in prison, and his alleged release date would be within the reunification period only if that period (§§ 361.5, subs. (a)(1)(B), (a)(3) & 361.49) were extended beyond the 18-month date, a virtual impossibility in this case (§ 366.22, subd. (b)).

The court did not abuse its discretion by summarily denying the section 388 petition.<sup>3</sup>

#### PATERNITY

Approximately 12 weeks elapsed between Antoine's request for paternity testing and the test. The court did not receive the test results until nearly four weeks after the test. LabCorp, the Orange County jail and the Agency were each responsible for some of the delay. While the lengthy delay is unquestionably unfortunate, we conclude that it does not require reversal of the judgment.

Antoine contends that the delay in paternity testing and the court's refusal to continue the dispositional hearing prevented him from preserving his relationship with M.C. and denied him due process. He argues that he was deprived of the opportunities to receive services before the dispositional hearing, to participate in that hearing and to have his relatives receive preferential placement consideration. We conclude that any error was harmless.

At the detention hearing, the court ordered the Agency to provide voluntary services to Antoine if he were located. He was located approximately two weeks later in jail in Orange County. The jail, not the court, controlled Antoine's access to services. There is no evidence what services, if any, were available at the jail. By February 2013, Antoine had been moved temporarily to a prison where Alcoholics Anonymous and

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<sup>3</sup> Antoine's arguments that "[t]he court imposed a higher burden of proof than is required" and deprived him of due process by summarily denying his petition are without merit.

Narcotics Anonymous meetings were available. There is no evidence that any other services were available there, or at any other institution.

The court may order reunification services for a biological father "if the court determines that the services will benefit the child." (§ 361.5, subd. (a).) If the court had found Antoine to be the biological father by the time of the dispositional hearing, there is no possibility that the court would have found that services for Antoine would have benefited M.C. Antoine had physically abused the half siblings and exposed them to domestic violence. As a result of his inadequate supervision, the sibling had sustained serious injuries, and Antoine had failed to reunify with her. While Lynn was pregnant with M.C., Antoine had thrown Lynn into a brick wall and punched her in the stomach.

Nor was Antoine deprived of any benefits of the relative placement preference. Section 361.3 gives "preferential consideration" to placement requests by certain relatives upon the child's removal from the parent's physical custody at the dispositional hearing.

(§ 361.3, subds. (a) & (c)); *In re Lauren R.* (2007) 148 Cal.App.4th 841, 854.)

" 'Preferential consideration' means that the relative seeking placement shall be the first placement to be considered and investigated." (§ 361.3, subd. (c)(1).) "Preferential consideration 'does not create an evidentiary presumption in favor of a relative, but merely places the relative at the head of the line when the court is determining which placement is in the child's best interests.' [Citation.]" (*In re Antonio G.* (2007) 159 Cal.App.4th 369, 376.) Antoine could have offered relative placement possibilities earlier in the case. However, by the time he provided the names of his out-of-state relatives, M.C. had been living for two weeks in the home of a relative in the San Diego

area and by the time of the dispositional hearing, M.C. had been living in the home for more than three months, and the relative wished to care for M.C. permanently.

At Antoine's request, the court twice delayed the dispositional hearing beyond the statutory deadline (§ 352, subd. (b)). The court properly denied Antoine's two subsequent requests. There were no further "exceptional circumstances" to justify another continuance of the dispositional hearing to a date more than 60 days beyond the detention hearing. (§ 352, subd. (b).) Further, "no continuance shall be granted that is contrary to the interest of the minor. In considering the minor's interests, the 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. [¶] Continuances shall be granted only upon a showing of good cause . . . ." (§ 352, subd. (a).)

#### CUMULATIVE ERROR

In addition to the alleged errors discussed above, Antoine argues that his trial counsel had difficulties contacting him. Counsel mentioned these difficulties at hearings on September 20 and October 31, 2012. In addition to continuing both hearings, the court issued orders to the Orange County jail to facilitate telephone communication between Antoine and counsel. By the time of the February 6, 2013, hearing, the communication problems had been resolved.

Antoine also argues that he had no opportunity to present evidence concerning the domestic violence allegations. He asserts that if he had been present at the February 6, 2013, hearing, even telephonically, he would have told the court why he qualified for

presumed father status and why it would benefit M.C. for him to receive reunification services as a biological father. Antoine could have presented this information in a declaration. He did not do so.

There was no cumulative error.

#### DISPOSITION

The order summarily denying the section 388 petition is affirmed.

AARON, J.

WE CONCUR:

HUFFMAN, Acting P. J.

O'ROURKE, J.