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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

In re M.A., et al., Persons Coming Under
the Juvenile Court Law.

RIVERSIDE COUNTY DEPARTMENT
OF PUBLIC SOCIAL SERVICES,
Plaintiff and Respondent,

v.

J.A., et al.,
Defendants and Appellants.

E063878

(Super.Ct.No. SWJ1400464)

OPINION

APPEAL from the Superior Court of Riverside County. Timothy F. Freer, Judge.

Affirmed.

Linda Rehm, under appointment by the Court of Appeal, for Defendant and
Appellant J.A (father).

Lisa A. Raneri, under appointment by the Court of Appeal, for Defendant and
Appellant A.S. (mother).

Gregory P. Priamos, County Counsel, and Julie Koons Jarvi, Deputy County Counsel, for Plaintiff and Respondent.

Appellants (“mother” and “father”) are the parents of two children, M.A. and J.A., who were, respectively, ages three and one-half and almost two years at the time of the challenged orders. Father purports to appeal from the juvenile court’s order of June 9, 2015, denying his form JV-180 petition to change a court order pursuant to Welfare and Institutions Code section 388.¹ In her appeal, mother argues solely that, should father prevail in his appeal, then mother’s parental rights must also be reinstated. For the reasons discussed below, we affirm the juvenile court’s order denying father’s section 388 petition.

FACTS AND PROCEDURE

Detention – May/June 2014

This case began on May 30, 2014, when the Riverside County Department of Public Social Services (DPSS) sent a social worker to the home of the children’s great aunt on a referral alleging general neglect regarding another child in the home, along with an unnamed infant and toddler. The social worker saw the two children, then ages two and 11 months, at the home and inquired about their parents. The great aunt stated she had been taking care of the children since J.A. was born because the parents were homeless and abused illegal drugs. She further stated the parents visited occasionally on

¹ All section references are to the Welfare and Institutions Code unless otherwise indicated.

weekends, including the previous day. The great aunt stated she did not know how to contact the parents. M.A. had a severe, untreated sunburn that left her back red and blistered. The great aunt stated this happened when she left her teenage grandchildren in charge of the two children.

The parents arrived at the home while the social worker was present. They attempted to leave the home with the children. The children were taken into protective custody.

On June 3, 2014, DPSS filed a section 300 petition as to both children, alleging pursuant to subdivision (b) that the parents failed to protect the children because mother abuses drugs, father abuses drugs, the parents are unable to provide the children with a stable living environment, and father has unresolved anger issues. The court ordered the children detained on June 4.

Jurisdiction – July 2014

In the jurisdiction and disposition report, DPSS reported that father had numerous arrests and convictions for drug possession, driving under the influence, driving with a suspended license and theft-related offenses. At the time of the detention, the parents were abusing methamphetamine on a daily basis together and were living in their car. The parents' drug problem had been ongoing for several years. Father stated he began using marijuana at age nine and methamphetamine at age eleven. He stated he got off drugs when he was about 18 years old, and was clean for about eight years, but relapsed about four years earlier when he began a relationship with mother. The social worker

began to assess several relatives for placement of the children, but outstanding criminal and child protection issues prevented such placement. The parents were visiting with the children once or twice per week. The visits went well, but the parents sometimes brought along other family members and claimed they had permission from DPSS. The parents began services with the Family Preservation Program, but admitted they used methamphetamine together once after beginning the program, as their last “hoo-rah.”

On July 7, 2014, DPSS filed an amended petition, in which it struck the allegations that the parents are unable to provide the children with a stable living environment and that father has unresolved anger issues. DPSS added an allegation that the parents had left the children with caregivers for long periods of time and failed to provide the children with food, clothing, shelter or medical treatment. Also on that date the parents waived their rights and the juvenile court took jurisdiction of the children

Six-Month Review – July 2014-February 2015

In the report filed for the six-month review, dated January 5, 2015, DPSS recommended the court terminate reunification services to both parents, set a section 366.26 permanent plan selection and implementation hearing, and reduce visitation to once per month. DPSS reported that both children were doing well in their foster placement and had no medical, developmental or emotional issues. Father enrolled in the Family Preservation Court Program on June 18, 2014. He was discharged on September 11 because he was arrested and incarcerated. Father re-enrolled on November 21, but was terminated on December 5 after he went “MIA.” Father tested positive for drugs

upon enrollment on June 18, but tested negative throughout the end of June, all of July, and the very beginning of August. He did not drug test after August 5. The parents last visited with the children on September 7,² and at that time ceased regular contact with DPSS. The parents remained homeless.

In an addendum report filed February 4, 2005, DPSS updated the juvenile court, as requested, on the parent's physical residence and on assessment of relatives for placement of the children. The parents apparently had a one-hour visit with the children sometime in December, another on January 6, 2015, and again on January 17. However, a visit planned for January 21 was cancelled because the parents did not drug test. The last three visits in January were also cancelled because the parents twice tested positive for methamphetamine and failed to show for the last drug test. The parents were unable to show that they were living anywhere other than their car.

At the review hearing held on February 9, 2015, the juvenile court terminated reunification services to the parents, set a section 366.26 hearing and reduced visitation to once per month.

Section 388 Petition and Section 366.26 Hearing – February-June 2015

In the report prepared for the section 366.26 hearing, DPSS recommended terminating mother and father's parental rights and selecting adoption as the most appropriate permanent plan. The children had been placed together in a prospective

² It appears from the record that the parents also had one visit sometime in November of 2014.

adoptive home on February 26. They were reportedly doing well in the home and had established a bond with their prospective adoptive parents, calling them “mommy and daddy.” Father began visiting with the children again on March 18, during a one-hour visit at his drug treatment facility. J.A. held onto the prospective adoptive parents for most of the visit, separating a few times to go over to his sister M.A. and father, before returning. M.A. did not remember that father was her father, and asked him if he had any kids. After the visit, the prospective adoptive parents reported that M.A. asked a lot of questions and seemed confused about who her parents were. She “had a difficult time emotionally” for the next few days and stated that she was afraid of being taken away.

On April 1, the children had another visit with father at his treatment facility, supervised by a social worker. The children would not leave the car until the prospective adoptive parents walked them into the building. M.A. was crying. The children initially refused to separate from the prospective adoptive parents, especially J.A. About halfway through the visit J.A. started to play with his sister. When father took the children outside to play, J.A. kept pointing to the building, saying “mama” and wanting to return. M.A. had a somewhat easier time and gave father a hug and kiss.

On May 7 the children visited with both parents at the DPSS office. The children refused to go into the play room without the prospective adoptive parents. The children played with the toys the parents brought for them, but both, especially J.A., kept returning to the prospective adoptive parents for reassurance. At the end of the visit, the children did not seem to mind separating from the parents and simply said “bye.” The

prospective adoptive parents reported that, once again, M.A. “had a rough few days” after the visit, in that she feared someone would come to take her away, she clung to the prospective adoptive parents and she had a hard time falling asleep.

Father had recently begun to complete services, but admitted using methamphetamines as recently as January 24, 2015. Mother was less successful in both regards.

On June 9, 2015, father filed a section 388 petition asking the juvenile court to reinstate his reunification services. Father reported he had completed an inpatient substance abuse program, a parenting class and anger management, and had “consistently tested negative for controlled substances.” Regarding how the requested order would be better for the child, father stated he had “demonstrated an extended period of sobriety and made active efforts to ameliorate the issues identified by the petition filed on 6/4/2014.” Father attached 17 pages of supporting documents. On that date mother also filed a section 388 petition, which is not a subject of this appeal. Also on that date the court held a hearing on both petitions. Neither mother nor father put on additional evidence. After hearing argument from the parties, the court denied both petitions, finding that neither parent had established a change of circumstances. The court then went on to hold the section 366.26 selection and implementation hearing, at which it terminated the parental rights of both mother and father and selected adoption as the permanent plan for the children.

Father filed a notice of appeal on June 22, 2015, in which he listed the findings and orders appealed from as “Termination of Parental Rights.” Mother filed a substantially similar notice of appeal on July 20, 2015.

DISCUSSION

We Liberally Construe the Notice of Appeal

DPSS argues that this court should not liberally construe father’s notice of appeal to encompass the separately-appealable order denying his section 388 petition. We disagree with this argument. *In re Madison W.* (2006) 141 Cal.App.4th 1447 (*Madison W.*) is directly on point. There, the Fifth District Court of Appeal announced it would “henceforth liberally construe” a parent’s notice of appeal from an order terminating parental rights to encompass an order denying the parent’s section 388 petition, provided the order on the section 388 petition was made within 60 days of the date the notice of appeal was filed. (*Id.* at p. 1451.) The reasons for this rule are sound and its requirements are satisfied here.

In *Madison W.*, the order denying the section 388 petition was made three days before the order terminating parental rights, and both orders were made within the 60-day period preceding the filing of the parent’s notice of appeal. The parent and her counsel failed to reference the section 388 order in the parent’s notice of appeal but challenged the section 388 order on appeal. The social services agency disputed the court’s jurisdiction to address the section 388 issue, given the terms of the notice of appeal. Without condoning counsel’s failure to cite the section 388 order in the notice of appeal,

the court reasoned that the rule of liberal construction should apply. The court pointed out that the section 388 order was appealable; the notice of appeal was entitled to liberal construction; the appellate court's jurisdiction depended upon a timely notice of appeal; the notice of appeal would have been timely as to the section 388 order had the notice referred to the order; and respondent was not prejudiced. The court also noted it would be better to avoid associated claims of ineffective assistance and the judicial resources that would otherwise be expended in deciding such claims. (*Madison W.*, *supra*, 141 Cal.App.4th at pp. 1450-1451.)

Here, the order denying father's section 388 petition was made on the same date as the order terminating his parental rights and both orders were made within 60 days of the date father filed his notice of appeal. For the reasons discussed in *Madison W.*, we liberally construe the notice of appeal as encompassing the order denying father's section 388 petition.

The Juvenile Court Did Not Err When it Denied Father's Section 388 Petition

Section 388 allows the parent of a dependent child to petition the juvenile court to change, modify, or set aside a previous order of the court. Under the statute, the parent has the burden of establishing by a preponderance of the evidence that (1) there is new evidence or changed circumstances justifying the proposed change of order, and (2) the change would promote the best interest of the child. (*In re Stephanie M.* (1994) 7 Cal.4th 295, 317; § 388, subs. (a), (b).) The decision to grant or deny the petition is addressed to the sound discretion of the juvenile court, and its denial of the petition will not be

overturned on appeal unless an abuse of discretion is shown. (*In re S.J.* (2008) 167 Cal.App.4th 953, 959-960 [Fourth Dist., Div. Two].)

“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.]” (*In re Stephanie M., supra*, 7 Cal.4th at p. 317, quoting *In re Marilyn H.* (1993) 5 Cal.4th 295, 309.) Still, “[s]ection 388 plays a critical role in the dependency scheme. Even after family reunification services are terminated and the focus has shifted from returning the child to his parent’s custody, section 388 serves as an ‘escape mechanism’ to ensure that new evidence may be considered before the actual, final termination of parental rights. [Citation.] It ‘provides a means for the court to address a legitimate change of circumstances’ and affords a parent her final opportunity to reinstate reunification services before the issue of custody is finally resolved.” (*In re Hunter S.* (2006) 142 Cal.App.4th 1497, 1506.) “To support a section 388 petition, the change in circumstances must be substantial.” (*In re Ernesto R.* (2014) 230 Cal.App.4th 219, 223.)

The court’s findings in this case are supported by the record and its conclusion that father had not established a change of circumstances is not an abuse of discretion. On the

date of the hearing, father had been drug-free for the months of February,³ March, April and May, plus nine days in June. Of that time, father had been in an inpatient drug treatment facility for about six weeks, which he successfully completed. Father had then been participating in an outpatient program for the two months prior to the hearing. Given father's longstanding drug addiction compared with his relatively brief amount of time in recovery, his failure to complete drug treatment on two separate tries during the first six months of the dependency, and his continued homelessness and relationship with mother, who had to date been less successful than father in beginning to address her longstanding drug addiction, we cannot say that the juvenile court abused its discretion when it found that father had not met his burden to establish a substantial change in circumstances.

Because we affirm the juvenile court's denial of father's section 388 petition, we need not address's mother's arguments that her parental rights should also be restored.

DISPOSITION

The juvenile court's order denying father's section 388 petition is affirmed.

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RAMIREZ

P. J.

We concur:

³ Father entered inpatient drug treatment on February 24, 2015. He last admitted to using methamphetamine on January 24.

McKINSTER
J.

CODRINGTON
J.