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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA**

**FOURTH APPELLATE DISTRICT**

**DIVISION TWO**

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

SAN BERNARDINO COUNTY  
CHILDREN AND FAMILY SERVICES,

Plaintiff and Respondent,

v.

R.D.,

Defendant and Appellant.

E063952

(Super.Ct.No. J242803-04)

OPINION

APPEAL from the Superior Court of San Bernardino County. Cheryl C. Kersey,  
Judge. Affirmed.

Patti L. Dikes, under appointment by the Court of Appeal, for Defendant and  
Appellant.

Jean-Rene Basle, County Counsel, and Dawn M. Messer, Deputy County Counsel,  
for Plaintiff and Respondent.

This case involves teenage minors M.D. and A.D., whose mother passed away during the dependency proceedings and whose father, R.D., lives in Louisiana and repeatedly failed to reunify with the children. Father appeals from the juvenile court's denial of his second Welfare and Institutions Code section 388<sup>1</sup> petition.

Father has an extensive criminal record, including possession of cocaine in 2008 and forcible rape of a juvenile in 1982. During the proceedings, father tested positive twice for cocaine and once for alcohol. Father was afforded additional services and given multiple opportunities to reunify with his two children from 2012 to 2015, but he was consistently uncooperative regarding drug tests and refused to admit he had ever taken drugs or committed rape.

On July 7, 2015, the juvenile court denied father's modification petition and set the section 366.26 hearing. Father contends the court erred in denying his second section 388 petition without an evidentiary hearing. We affirm.

## I

### FACTUAL AND PROCEDURAL BACKGROUND

#### A. *The Section 300 Petitions, Jurisdiction, and Disposition*

Plaintiff and respondent, San Bernardino County Children and Family Services (CFS), took M.D. and his younger sister A.D. into protective custody on February 3,

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

2012, when their biological mother, T.D., was found unconscious by her neighbor and transported to the hospital. Because there were no relatives available to care for the children, CFS placed them with foster mother, K.D. At the time, M.D. was 10 years old and A.D. was nine.

After mother's release from the hospital, she told the social worker that 10 years ago she had been diagnosed with stomach cancer, but it had been in remission. Mother took several medications for pain and depression, including Norco, Topamax, Morphine, Naproxen, and Ambien. She had become unconscious as a result of accidentally taking Ambien with another medication.

CFS filed section 300 petitions on behalf of M.D. and A.D., alleging that under section 300, subdivisions (b) and (g), mother was unable to provide adequate parental care and supervision due to her use of pain medication for cancer without respite care. At the detention hearing, the court returned the children to mother, with CFS supervision. Mother and the foster mother chose to maintain contact and create a friendship in the interests of the children.

In its jurisdiction/disposition report, CFS recommended that the children remain in mother's custody with supervision and that reunification services be provided to father, who was living in Louisiana and had not spoken to the children in two years. Mother's cancer was terminal and she was also suffering from spina bifida and a rare blood disease. Mother had been admitted to the hospital in 2011 for a Vicodin overdose and

her doctor believed she may have a substance abuse problem. A search of her criminal history revealed four arrests for driving under the influence in 2011.

Mother told the social worker that father had previously been physically and verbally aggressive with her and had “put her in the hospital.” She and father had engaged in acts of domestic violence in the presence of the children.

In a telephone interview, father told the social worker that he had not seen or spoken to his children in over two years because mother forbade him to do so. He denied engaging in any domestic violence with mother and “adamantly denied” having a criminal history. He also denied any history of substance abuse. However, after contacting a Louisiana sheriff’s department, the social worker learned that father had an extensive criminal history, including charges of criminal neglect of family in 2002, domestic violence battery and resisting an officer in 2005, domestic abuse battery and battery on a police officer in 2006, violation of protective orders in 2006, and possession of cocaine in 2006. The social worker again asked father about his criminal and substance abuse history and he “repeatedly denied” both.

CFS filed first amended petitions on behalf of the children, adding allegations of domestic violence between the parents and father’s substance abuse. Shortly thereafter, mother again became unconscious while the children were in her care. CFS placed the children with the same foster mother as before and filed a second amended petition adding an allegation regarding mother’s second incident of unconsciousness. CFS

recommended that the children remain in foster care with reunification services provided to both parents. On April 13, 2012, the court ordered the children detained.

On May 14, 2012, the police responded to a call from mother's neighbor and found mother unconscious and nonresponsive in her home. She was later pronounced dead. The children remained placed with K.D., the foster mother.

In another telephone interview, father acknowledged having "some" criminal history, but claimed it included "nothing that was serious enough to keep him from having his children back." In the jurisdiction/disposition report for the second amended petitions, the social worker reported that father had left the children with mother despite knowing about mother's health problems and CFS involvement. Additionally, father's adult son had contacted the social worker and told her that he did not think father was a good parent when he was growing up and that he did not want M.D. and A.D. to have an experience similar to his.

On May 23, 2012, CFS filed third amended petitions alleging father had engaged in domestic violence with mother and had negligently failed to protect the children from mother's conduct.

At the jurisdiction/disposition hearing on June 18, 2012, the court sustained the allegation against father under section 300, subdivision (b) that he engaged in domestic violence against mother and dismissed the other allegations in the third amended petitions. The court ordered that the children remain placed with foster mother K.D.; that

CFS provide family reunification services to father; and that father submit to random drug testing. The court authorized supervised visits once a week for father and also authorized CFS to initiate a Louisiana placement evaluation under the Interstate Compact on the Placement of Children (ICPC).

B. *Six-Month Status Review*

In the six-month status review report, CFS recommended continued reunification services for father. CFS also recommended that the children remain in foster care, as they enjoyed living in K.D.'s home and father's ICPC evaluation was still pending.

Father worked in the offshore oil industry and his schedule consisted of two weeks on and two weeks off. During the two weeks father was working, he lived on an offshore vessel. Father had completed parenting and anger management classes. He submitted to two drug tests (December 7 and 11, 2012), both of which were negative. An in-person visit with father, supervised by the foster mother, went well. Father was also consistent with weekly telephone visits.

At the six-month review hearing, the court continued placement of the children in the foster home and increased father's visits to four hours a week. The court authorized CFS to place the children with father as soon as Louisiana approved placement under the ICPC.

C. *Twelve-Month Status Review*

In the 12-month status review report, CFS recommended continued reunification services for father and continued foster care for the children. Louisiana had completed its ICPC evaluation and denied placement, stating that the “Lafayette Parish Department of Children and Family Services did an FBI criminal [b]ackground on [father] and due to his extensive criminal history the agency could not consider him as a placement for his children.” After learning of the results of the evaluation, father told the social worker he had not engaged in criminal activity in the past 10 years.

Father was consistent with his weekly telephone visits during this period and the two supervised in-person visits went well. M.D. and A.D. wanted to live with father, but if they could not do so they preferred staying with their foster mother because they had lived with her for over a year and had developed a bond with her.

At the 12-month status review hearing on June 13, 2013, the court continued the children in foster care and authorized extended visits for father at his home in Louisiana. Father submitted to a drug test on June 13, 2013, the day before the children came out for a 29-day visit. The test was positive for cocaine.

Due to this change in circumstances, the social worker visited father’s home for an assessment. The social worker observed that both children appeared to have adjusted well to their new surroundings. M.D. and A.D. said they were very happy in the home

and happy to be around family. The home, which belonged to father's third wife, was in a nice, upscale area of Louisiana.

Father was working offshore at the time of the assessment, but the social worker was able to reach him by telephone. He stated that the drug test was incorrect and denied that he had a drug problem. He ultimately admitted he had been charged with possession of cocaine in 2008, but said the charges had been dismissed. According to father's criminal record, he had pled guilty to the charge and was given probation.

On June 28, 2013, the children were placed with father's wife's brother after a relative assessment unit approved his home.

On July 5, 2013, father tested positive for alcohol. On July 8, 2013, he tested positive for cocaine. When the social worker met with him on July 16, he denied using drugs. In an addendum report, CFS recommended terminating reunification services and ordering a permanent plan for the children.

At the contested 12-month status review hearing on August 5, 2013, the court terminated father's reunification services and ordered as the permanent plan placement with a fit and willing nonrelated extended family member.

D. *Revised Permanent Plan*

On September 11, 2013, CFS filed a supplemental petition alleging the relative caretaker, father's wife's brother, could no longer care for the children. CFS recommended placing the children with K.D., their prior foster mother. The children

reported they were very excited to live with her again. The court placed the children with K.D. and father continued to have weekly telephone visits.

At the permanent plan review hearing on January 13, 2014, the court ordered a permanent plan of placement with the foster mother and a specific goal of independent living with the identification of an adult to serve as a lifelong connection with the children.

E. *Father's First Section 388 Petition*

On June 17, 2014, father filed a section 388 petition seeking to modify the court's August 5, 2013 order terminating reunification services. Father asked the court to place the minors in his care and dismiss the case. He attached to his petition a certificate of completion of an eight-hour online parenting class on October 9, 2012 and a certificate of completion of a substance abuse treatment program on March 20, 2014.

On July 25, 2014, the court heard argument on father's petition. CFS requested that the petition be denied because the substance abuse treatment program father completed did not include drug testing, and therefore CFS was unable to confirm he was not using drugs. CFS had asked father to submit to additional drug tests, but he was unwilling to go to the same testing agency that had produced the three positive results. Father had failed to appear at three tests, scheduled for July 11, 14, and 17, 2014. He submitted to the court a negative test from July 22, 2014, from a company of his choosing.

The court denied father's petition in its entirety; however, it ordered CFS to provide father reunification services under the children's permanency plan. The court informed father that these services were his last chance to reunify with his children, stating: "For the next six months while the kids are in PPLA . . . if you test *regularly* on the color system and you are not positive and if you fail to test, [but] you are working at the time and you have some evidence that you are working, then . . . the children can transition back to you."

F. *Additional Services*

In a January 14, 2015 postpermanent plan status review report, CFS recommended terminating father's services. Father had not submitted to any drug tests during the additional reunification period. Because father refused to go to the testing center that had produced the positive results, the social worker had attempted to find another site near him. During November and December 2014, the test site CFS had found was not administering tests, and CFS had not been able to locate another site.

Father's telephone visits were no longer regular. He called the children once or twice a month but only asked to speak to M.D. Both A.D. and the foster mother reported that father was mean to A.D. when he spoke to her on the telephone. Additionally, father sent expensive gifts to M.D. and sent A.D. cheaper and inappropriate gifts. Father had not requested any in-person visits.

At that point, the children had been living with the foster mother for three years and had adjusted well. They wanted to be adopted by her if they could not live with father.

In a March 9, 2015 addendum report, CFS recommended setting a section 366.26 hearing for adoption. Having received additional criminal history from Louisiana, CFS learned that father had been convicted of forcible rape/carnal knowledge of a juvenile in 1982. This was the reason Louisiana had denied placement.

According to the foster mother, father had been telling the children they were going home to Louisiana with him. This had negative impacts on the children's behavior and stress levels. Because M.D. wanted to go to Louisiana and A.D. did not, the children had been getting into trouble at school and fighting with each other.

Before father's in-person visit on January 21, 2015, the social worker advised him not to talk about the case with the children. In response, father yelled at the social worker in front of the children. During his visit, father submitted to a drug test (on January 21, 2015) and the results were negative. The social worker left messages for father to call her to set up additional testing dates, but father never returned her calls.

G. *The Contested Permanent Planning Hearing*

On March 9, 2015, the court held a contested hearing to determine whether to set a section 366.26 hearing. The court heard testimony from father and the social worker.

Father testified that he had never used an illegal substance in his entire life. He also testified that CFS had not set up any drug testing during the reunification period. He admitted he had pled guilty to possession of cocaine, but claimed he used to only sell drugs, not use them. He also denied the forcible rape of a juvenile charge and said it had been “thrown out of court because there was . . . no evidence.” Father denied any favoritism or differential treatment between the children.

The social worker testified that she had informed father after the previous hearing that she had located a testing site in Louisiana. She had asked him to let her know his work schedule so she could set up testing, but he never returned her telephone calls.

After hearing testimony and argument, the court observed that father was extremely “stubborn” and had squandered the multiple chances it had given him to reunify with his children. The court found that father was in “severe denial” about his 1982 rape conviction and his drug history. The court also found that placement with father was not in the children’s best interest based on his inconsistent visits and telephone calls, as well as his inappropriate behavior of showing favoritism towards M.D. and promising the children they would be coming to live with him.

The court found that father was resistant to treatment and terminated services. The court set the section 366.26 hearing.

H. *The Section 366.26 Hearing and Father's Second Section 388 Petition*

In its section 366.26 report, CFS recommended termination of father's parental rights and a permanent plan of adoption. The children's foster mother, K.D., was the prospective adoptive parent. K.D. had told the social worker, "I love [the children] with all my heart. I want the best for them and a place for them to call home." K.D. had two adult children who were "very excited" about the adoption because they had known M.D. and A.D. for over three years and felt they were "already a part of the family." CFS believed it was in the children's best interest to be adopted by their foster mother because she is a "loving, caring, and nurturing individual" who "has demonstrated she can meet all of their medical, psychological, education[al], and emotional needs."

CFS reported that M.D., who was then 14, was developmentally age appropriate. He was in individual therapy for grief, loss, and self-esteem, and was working on the anger he felt toward his "birth father due to the past abuse . . . observed towards the birth mother." A.D., who was then 12, had a seizure disorder and was legally blind. She had developmental delays and a special learning disability, for which she attended a special day school. A.D. was receiving services from Inland Regional Center and was also receiving counseling for grief, loss, and self-esteem.

Both M.D. and A.D. desired to be adopted. In the approximately four months since the March 9, 2015 hearing, father had called the children three times, and each call lasted only a few minutes.

The court held the section 366.26 hearing on July 7, 2015. That same day, father filed a second section 388 petition. Like his first petition, this petition sought to modify the court's August 5, 2013 order terminating reunification services, to return the children to his care, and to dismiss the case. Father attached the same two certificates of completion that he had attached to his first petition (i.e., for the online parenting class from 2012 and the substance abuse treatment program from 2014). The new evidence father attached to his petition was a letter from the licensed addiction counselor who had administered the 2014 program, which stated that the counselor had requested father take two random drug tests in 2015. The results of the tests (March 11, 2015 and June 5, 2015) were negative. In the counselor's opinion, father did not suffer from addiction or "abuse mood altering substances." Father's petition alleged that return of the children to his care would be in their best interests because he "has maintained regular contact" and shares a strong bond with them.

After hearing argument, the court denied the petition. The court found that father's submission of only two clean tests over the year since he was given additional reunification services did not constitute a "prima facie showing for a change of circumstances." The court also found that granting an evidentiary hearing on the petition was not in the best interests of the children.

The court continued the section 366.26 hearing to July 31, 2015, and father timely appealed the denial of his section 388 petition.

## II

### DISCUSSION

Father contends the court abused its discretion in denying his second section 388 petition without an evidentiary hearing. We disagree.

“The juvenile court’s determination to deny a section 388 petition without a hearing is reviewed for abuse of discretion. [Citations.] We must uphold the juvenile court’s denial of [a] section 388 petition unless we can determine from the record that its decisions “ ‘exceeded the bounds of reason. When two or more inferences can reasonably be deduced from the facts, the reviewing court has no authority to substitute its decision for that of the trial court.’ ” [Citations.]” (*In re Brittany K.* (2005) 127 Cal.App.4th 1497, 1505.)

In order to obtain a hearing on his section 388 petition, father had to allege a “ ‘change of circumstance or new evidence that requires changing the [juvenile court’s] order,’ ” as well as make a prima facie “showing that it was in the minors’ best interests for the court to return them to [his] custody.” (*In re Brittany K., supra*, 127 Cal.App.4th at pp. 1505-1507.) In his first section 388 petition, father alleged that he completed an eight-hour online parenting class in 2012 and a substance abuse treatment program in 2014. The court denied the petition, but nevertheless gave father additional reunification services under the children’s permanent plan, with the objective that he demonstrate he was not using drugs by submitting clean tests. Father did not appeal the court’s denial of

his first petition. Thus, with regard to father's second petition, he was required, "*at a minimum*, to make a prima facie showing that [he] had made sufficient improvements in [his] own personal circumstances, attitudes and outlook such that [he] could now be considered an appropriate placement for the minors." (*In re Brittany K.*, at p. 1506.)

Father has failed to make such a showing. He was given two lengthy chances to demonstrate to the court that he did not use drugs. His first chance consisted of over a year of reunification services (from jurisdiction in June 2012 to termination of services in August 2013), during which time he took a total of seven tests. Three of those tests were positive, one for alcohol and two for cocaine. After these positive tests, father became uncooperative with CFS. He refused to test at the same location that produced the positive results and refused to return the social worker's calls to schedule new tests.

Given the fact that father had pled guilty to possession of cocaine in 2008 and had two positive tests for cocaine in 2013, the court could reasonably conclude he had a substance abuse problem. However, throughout the dependency proceedings father stubbornly maintained that he had never taken drugs in his life. Despite father's obstinacy and minimal effort, the court gave him a second chance to submit to random testing and demonstrate that he did not use drugs.

The only effort father made in the year between his first and second petitions was to take two drug tests at a place and time of his choosing and obtain an opinion letter from the counselor who administered the substance abuse program he completed a year

before. When viewed alongside the minimal effort father put forth during the initial reunification period, the court did not abuse its discretion in determining that father's attempt to demonstrate he did not use drugs was a case of too little, too late.

Furthermore, father's drug issues were not the court's only concern for the well-being of the children. The court also believed father was in "severe denial" about his extensive criminal record. Significantly, father was convicted of forcible rape of a juvenile in 1982, and instead of admitting his conviction and showing the court that he had changed, he claimed the charge had been dismissed for lack of evidence.

The court was also concerned with father's inappropriate behavior towards the children. His promises that M.D. and A.D. were going to live with him and his callous treatment of A.D. were significant factors in the court's finding that placement with father would not be in the children's best interests. Father's contention to the contrary, based on the allegation that he had maintained regular contact with the children is contradicted by evidence in the record. While father may have called the children every week at the outset of reunification services, in the four months leading up to his second section 388 petition he had made only a few brief telephone calls and had not requested any in-person visits.

In reviewing the juvenile court's determination, we bear in mind the fact that, "[i]n any custody determination, a primary consideration in determining the child's best interests is the goal of assuring stability and continuity. [Citation.] 'When custody

continues over a significant period, the child’s need for continuity and stability assumes an increasingly important role. That need will often dictate the conclusion that maintenance of the current arrangement would be in the best interests of that child.’ [Citations.] [¶] . . . [¶] 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.] A court hearing a motion for change of placement at this stage of the proceedings must recognize this shift of focus in determining the ultimate question before it, that is, the best interests of the child.” (*In re Brittany K.*, *supra*, 127 Cal.App.4th at p. 1505, quoting *In re Stephanie M.* (1994) 7 Cal.4th 295, 317.) In this case, M.D. and A.D. had spent over three years in the care of their foster mother, K.D., who unconditionally loved the children and wanted to adopt them. Likewise, M.D. and A.D. wanted to be adopted by the foster mother. We thus conclude the court acted reasonably in determining that father had not made a prima facie showing that he had changed or that placement with him was in the children’s best interest.

We reject father’s argument that the juvenile court erred in relying on Louisiana’s denial of placement as the reason for denying his petition. Father argues that the ICPC applies only to out-of-state placement with foster or adoptive parents—not parents—and

thus cannot form the basis of the court's refusal to place the children with him. While it is true that a California court need not comply with the provisions of the ICPC in order to place a California child with a parent living in another state, father is mistaken that Louisiana's denial was the reason the court refused to place the children with him. "[N]othing in the ICPC prevents the use of an ICPC evaluation as a means of gathering information before placing a child with [an out-of-state] parent." (*In re John M.* (2006) 141 Cal.App.4th 1564, 1572.)

Here, the court viewed the results of Louisiana's placement evaluation, i.e., that father had been convicted of forcible rape of a juvenile, as one factor among many supporting its determination that placement with father was not in the children's best interests. Father's 1982 conviction was not the dispositive factor in the court's denial of his petition. The record demonstrated that father failed to make an honest effort to drug test regularly and remained in denial of his drug abuse and criminal history throughout the proceedings. The record also supports a finding that the limited contact the children had with father in the months leading up to the court's ruling was more negative than positive. We find no error in the court's denial of father's second section 388 petition.

III

DISPOSITION

The judgment is affirmed.

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CODRINGTON  
J.

We concur:

RAMIREZ  
P. J.

McKINSTER  
J.