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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

In re T.L., a Person Coming Under the
Juvenile Court Law.

SAN BERNARDINO COUNTY
DEPARTMENT OF CHILDREN'S
SERVICES,

Plaintiff and Respondent,

v.

C.C. et al.,

Defendants and Appellants.

E064745

(Super.Ct.No. J249238)

O P I N I O N

APPEAL from the Superior Court of San Bernardino County. Steven A. Mapes,
Judge. Affirmed.

Amy Z. Tobin, under appointment by the Court of Appeal, for Defendant and
Appellant, C.C.

Daniel G. Rooney, under appointment by the Court of Appeal, for Defendant and
Appellant, P.F.

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

On November 3, 2015, the juvenile court denied defendant and appellant, P.F.'s (Father), Welfare and Institutions Code section 388¹ petition and terminated Father's and defendant and appellant, C.C.'s (Mother), parental rights. On appeal, Father contends the juvenile court erred by denying his petition. Mother adopts Father's argument to the extent it may benefit her. We affirm.

I. FACTUAL AND PROCEDURAL HISTORY²

On April 30, 2013, a social worker received and investigated a referral reflecting that Mother and her daughter, T.L. (Minor), born in April 2013, had both tested positive for methamphetamine at Minor's birth. One of Mother's sons had previously tested positive for Valium at birth. Mother reported having a volatile relationship with A.L., the alleged father; she had obtained a restraining order against him. Mother had three prior dependency cases with respect to her two sons; Mother's services as to her sons had been terminated on May 10, 2005.

Mother and A.L. had an open dependency case in Los Angeles with respect to Mother's other daughter; that case was based on Mother's chronic substance abuse.

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

² Three prior appeals in the instant juvenile dependency proceeding have been resolved by this court. The records in case Nos. E061719, E062267, and E063741 have been included in the record in this appellate case.

Mother had a criminal history, including convictions for trespass, theft, several instances of forgery of medical prescriptions, second degree burglary, receiving stolen property, being under the influence of a controlled substance, and possession of controlled substances.

Personnel with plaintiff and respondent, San Bernardino County Children and Family Services (CFS), filed a juvenile dependency petition alleging, as to Mother, that she had a long-term chronic substance abuse problem (B-1), had engaged in domestic violence (B-4), reunification services as to Mother's two sons had previously been terminated (J-6), and that Mother had failed to make adequate progress toward reunification with her other daughter in the dependency case in Los Angeles (J-7). The whereabouts of A.L. were unknown.

On May 3, 2013, the juvenile court detained Minor. It was noted that A.L. was not listed on the birth certificate. Mother stated that she believed A.L. was Minor's biological father because she had not been with any other men at the time of Minor's conception.

In the jurisdictional and dispositional report filed on May 22, 2013, the social worker noted Mother had disclosed that Father may be Minor's biological father. He was not listed on Minor's birth certificate either. During the reporting period, Mother tested negative for controlled substances on two occasions. CFS recommended Mother receive reunification services.

In an information to the court filed on June 25, 2013, the social worker reported that Mother tested negative for controlled substances on three occasions, regularly attended Narcotics Anonymous/Alcoholics Anonymous meetings, and obtained a restraining order against A.L. She also enrolled in a domestic violence and parenting program. On July 30, 2013, the juvenile court found the allegations against Mother true, removed Minor, denied reunification services to the absent fathers, and granted reunification services for Mother.

A packet filed on October 23, 2013, reflected Mother completed a program of 16 sessions of anger management, 16 sessions of life skills, 16 sessions of self-care, five-and-a-half months of outpatient drug and alcohol treatment, 12 sessions of parenting, tested negative on four additional drug tests, and enrolled in a domestic violence program. A status review report filed on January 22, 2014, reflected Mother completed domestic violence, individual therapy, and aftercare programs. She consistently tested negative for drugs. CFS recommended return of Minor to Mother's custody with family maintenance services (FMS). On January 30, 2014, the court returned Minor to Mother with FMS.

In a status review report filed on July 21, 2014, the social worker noted that Mother continued to drug test negatively. However, Mother failed to complete an aftercare program from which she was terminated for lack of participation. Nevertheless, the social worker recommended Minor remain in Mother's care with FMS.

In a detention report dated July 28, 2014, the social worker reported that on July 23, 2014, Mother was arrested in a vehicle with Minor after methamphetamine and hypodermic needles were found in her purse. Mother denied the objects were hers and stated they must have fallen into her purse. CFS filed a supplemental juvenile dependency petition in which it was alleged Mother had been arrested for transportation or sales of methamphetamine and had left Minor without a caregiver (S-1). The court detained Minor on July 8, 2014.

In the jurisdictional and dispositional report filed on August 13, 2014, the social worker reported Mother disclosed texting Father four months earlier to let him know he may be Minor's father. On August 7, 2014, the social worker called Father. Father reported Mother began texting him regarding Minor six or seven months earlier. Mother now stated she believed Father was Minor's biological father. Mother tested negative for drugs on July 28, 2014. The social worker recommended that the court deny Mother reunification services and set the section 366.26 hearing.

At the jurisdictional and dispositional hearing on August 18, 2014, Father made his first appearance. The court ordered a paternity test for Father. Mother testified she pled guilty to misdemeanor possession of a controlled substance with respect to her arrest. She had reenrolled in all programs.

The court found the S-1 allegation true. "[T]he court believes the mother relapsed." The court removed Minor, denied Mother reunification services, and set the

section 366.26 hearing. The court stayed visitation for Father pending the results of the paternity test.

On August 18, 2014, both parents filed notices of intent to file extraordinary writs. On September 24, 2014, this court dismissed Mother's petition pursuant to a no issue letter filed by Mother's attorney. On October 3, 2014, we dismissed Father's petition for failure to file a petition.

On October 15, 2014, Mother filed a section 388 petition requesting return of Minor to her care or reinstatement of reunification services and increased visitation. She alleged the completion of an outpatient drug program as changed circumstances and her significant bond with Minor as the basis for the requested change being in the best interest of Minor. On October 17, 2014, the court denied Mother's petition, finding it did not state new evidence or a change of circumstances.

An information to the court filed on October 22, 2014, reflected Father's paternity test was positive. On October 30, 2014, Father filed a section 388 petition requesting "return" of Minor to his care or reunification services. He indicated he had provided financial support to Mother and Minor, had raised two other children, was a former Marine, owned a restaurant and bar in New York City, and could provide a secure and stable home for Minor.

Also on October 30, 2014, Mother filed a notice of appeal from the order denying her section 388 petition. On March 5, 2015, we dismissed the appeal as abandoned.

On November 14, 2014, CFS filed a response to Father's section 388 petition. Father reported that it had been over seven months since he had seen Minor. During his first supervised visit on November 6, 2014, Father displayed some initial difficulty responding to Minor; however, toward the end of visitation, the two were interacting.

The social worker recommended Father be offered reunification services. The social worker had explained to Father that because Minor was under the age of three, if Father did not "reunify" with Minor within six months, Minor would be placed for adoption. Father agreed to participate in parenting classes, random drug testing, and 12-step meetings.

On November 18, 2014, the court deemed Father Minor's biological father, vacated the section 366.26 hearing and granted Father reunification services under a planned permanent living arrangement (PPLA) rather than pursuant to section 366.21, subdivision (e). "If the father fails to reunify within the next six months or show some kind of substantial probability [of] reunification, then the [section] [366].26 hearing will have to be reset."

In the status review report filed on May 11, 2015, the social worker recommended that Father continue to receive reunification services under the PPLA. Father drug tested negative on five occasions, but failed to show for another five drug tests. It was reported that the parents would sometimes come to visits and sometimes not. Similarly, the parents would sometimes stay for the entire visit and sometimes leave early.

At the hearing on June 9, 2015, after hearing from Father's counsel, the court stated: "What you're arguing is that—is that the minor should be in PPLA status without any time limit because the father would still like to visit or maybe go to counseling, and that is not a legal basis to deny permanency to the minor. In fact, the services, when they're offered by virtue of the [section] 388 [petition], the Court would expect that the father would complete a case plan and be ready or have a recommendation for return and maintenance. And instead what I have is a recommendation to continue services, testing, so that the father can continue to get his life together in whatever way so he is acceptable as a parent. That is what I'm getting. But services under PPLA are not indefinite. Father was advised this is six months, and that is all that's going to happen today for Father."

The court found Father had failed to participate regularly and make substantive progress in his case plan. It terminated Father's reunification services and set the section 366.26 hearing.

On June 9, 2015, the parents filed notices of intent to file petitions for extraordinary writs. On July 16, 2015, we dismissed Mother's petition as abandoned pursuant to Mother's attorney's filing of a no issue letter. Father argued that the court erred in not "returning" Minor to his custody or granting him additional time for reunification services. In an opinion filed on September 10, 2015, we denied the petition, holding that substantial evidence supported the court's determinations that Father did not make substantial progress in his case plan, the proposed modification was not in Minor's best interest, and that Father was only entitled to six months of services.

On August 31, 2015, Father filed an additional section 388 petition requesting a home study and return of Minor to his care. Father complained about what he deemed material misstatements of fact in the response to his previous section 388 petition filed by CFS on November 12, 2014. On September 2, 2015, the court denied Father's petition without an evidentiary hearing, finding it did not state new evidence or a change of circumstances.

On October 1, 2015, Mother filed a section 388 petition requesting immediate return of Minor to her care or, in the alternative, the provision of services to Mother with increased visitation. Mother alleged she had completed a drug treatment program, had remained sober for over a year, and that there was a beneficial bond between she and Minor. On the same date, the court ordered a hearing on Mother's petition.

In the section 366.26 report filed on October 2, 2015, CFS recommended termination of the parents' parental rights. The social worker observed Minor had been placed in the adoptive home on January 23, 2015, was "extremely comfortable" there, and "would benefit from remaining in th[e] home for the purposes of permanency."

On October 23, 2015, CFS filed a response to the section 388 petition requesting that the court deny the relief requested. The social worker noted that Minor referred to the prospective adoptive parents as "mom" and "dad" and that it would be detrimental to Minor if "removed from the stable and loving home of" the prospective adoptive parents. On October 28, 2015, despite its previous order, the court denied Mother's section 388 petition without holding a hearing.

On November 3, 2015, Father filed a third section 388 petition requesting that Minor be allowed to live with him. Father alleged as changed circumstances the content of visitation supervision logs covering his visits with Minor between February 5 and October 14, 2015, which reflected positively on the visitation, noting that Minor was “engrossed” by Father and “extremely excited to see” him. Father alleged the relief requested was in Minor’s best interest because there was no risk in “returning” Minor to Father and that Father would do anything required of him by the court.

At the scheduled section 366.26 hearing that same day, the parents requested a continuance because they had not received the detailed visitation logs until the day before. Counsel for CFS noted there was no need for the logs because the visitation supervisor was present and could testify as to the contents therein. Moreover, counsel noted the visitation logs prior to termination of Father’s reunification services on June 9, 2015, were irrelevant. Furthermore, counsel noted that Father reported nothing in his petition about completing services since his reunification services had been terminated.

The court ruled: “Well, as far as the [section] 388 [petition] goes, I am not convinced—the prima facie has been met of a change of circumstances. I did look over it now what has been presented to the Court, and frankly I think I had a [section] 388 [petition] like this before on this case where it is basically indicating things they weren’t purported to be, and this is more of that. There are a few additional visits past the June date, but nothing in my mind that raises to level of granting a [section] 388 [petition]. So

I'm denying the [section] 388 petition.” After a section 366.26 hearing, the court terminated the parents’ parental rights.

II. DISCUSSION

Father contends the court abused its discretion by denying his petition because he had presented new evidence consisting of the detailed visitation logs which reflected positively on his interactions with Minor, the rational inference of which was that the requested relief was in Minor’s best interest. We disagree.

“To prevail on a section 388 petition, the moving party must establish that (1) new evidence or changed circumstances exist, and (2) the proposed change would promote the best interests of the child. [Citation.]” (*In re J.T.* (2014) 228 Cal.App.4th 953, 965.)

“Under section 388, a party ‘need only make a prima facie showing to trigger the right to proceed by way of a full hearing.’ [Citation.] The prima facie showing is not met unless the facts alleged, if supported by evidence given credit at the hearing, would sustain a favorable decision on the petition. [Citation.] In determining whether the petition makes the necessary showing, the court may consider the entire factual and procedural history of the case. [Citation.] The petition must be liberally construed in favor of its sufficiency. [Citations.]” (*In re J.P.* (2014) 229 Cal.App.4th 108, 127.)

“We review a summary denial of a hearing on a modification petition for abuse of discretion. [Citation.] Under this standard of review, we will not disturb the decision of the trial court unless the trial court exceeded the limits of legal discretion by making an

arbitrary, capricious or patently absurd determination. [Citation.]” (*In re A.S.* (2009) 180 Cal.App.4th 351, 358.)

Here, the proffered visitation logs were only “new” evidence in the sense that they were previously unavailable to Father and contained more detailed information regarding Father’s visits with Minor. However, they were not new evidence such as to rise to the status of showing a change of circumstances, because they merely reflected more detailed information on what was already noted in the social worker’s report, i.e., that visitation between Father and Minor went very well.

Moreover, while Father’s visits with Minor beginning in November 2014 were weekly, they were reduced to once monthly after his reunification services were terminated in June 2015. Thus, Father had only had five visits with minor in the five months since the issuance of the order which he sought to modify.

Even considering the evidence of the detailed visitation logs and the visitation supervisor’s testimony, the court characterized Father’s visitation with Minor as “play dates, for lack of a better word. As other cases have stated, by a very caring and loving adult who obviously cares and loves them, but not the same as parent-child bond.” Indeed, Minor had never lived with Father and Father had not even known of the existence of Minor for approximately the first year of Minor’s life.

Furthermore, the primary, if not sole, basis upon which the court terminated Father’s reunification services was his failure to complete his services. As part of his reunification services, Father agreed to participate in random drug testing, but failed to

show for five tests. Yet, Father failed to allege in his petition that he continued to participate in or had completed his services. Thus, Father failed to allege a change of circumstances warranting a hearing on his section 388 petition.

Finally, Father failed to show the requested modification was in Minor's best interest. As the social worker noted, it would be detrimental for Minor to be removed from the care of the prospective adoptive parents with whom he had been placed more than 11 months earlier. Thus, Father failed to state a prima facie case for relief.

III. DISPOSITION

The judgment is affirmed.

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McKINSTER
J.

We concur:

RAMIREZ
P. J.

CODRINGTON
J.