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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

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

TULARE COUNTY HEALTH AND HUMAN
SERVICES AGENCY,

Plaintiff and Respondent,

v.

JOHN E.,

Defendant and Appellant.

F063252

(Super. Ct. No. JJV060153A)

OPINION

APPEAL from orders of the Superior Court of Tulare County. Charlotte A. Wittig, Commissioner.

Darlene Azevedo Kelly, under appointment by the Court of Appeal, for Defendant and Appellant.

Kathleen Bales-Lange, County Counsel, John A. Rozum and Jason Chu, Deputy County Counsel, for Plaintiff and Respondent.

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John E. (father) appeals from a court order denying his Welfare and Institutions Code section 388¹ modification petition seeking reunification services and visitation with his son Austin and from a later judgment terminating his parental rights to his son under section 366.26. At the core of father’s claims is his contention that the Tulare County Health and Human Services Agency (the agency) deprived him of his statutory and court ordered visitation rights, that the court failed to ensure those rights, and that counsel was ineffective for failing to enforce those rights—the consequence of which he could not establish the “continuing beneficial relationship” exception to termination of his parental rights. He also contends the court erred when it denied his petition for modification because it was the juvenile court’s “last opportunity to protect [his] due process rights,” by failing to reinstate reunification services before termination of his parental rights. Finding no merit in father’s contentions, we affirm the orders.

FACTUAL AND PROCEDURAL BACKGROUND

In December of 2005, three-year-old Austin was adjudged a dependent of the juvenile court due to father’s homelessness and substance abuse. Father received family reunification services. After he completed substance abuse treatment and testing, he completed parenting education and counseling and was awarded sole physical custody of Austin. Dependency jurisdiction terminated in April of 2007.

In December of 2009, Austin, now seven years of age, was detained by the agency after a maternal aunt called the agency with concerns for his safety. A month earlier, in November of 2009, father had left Austin at the child’s stepmother’s house, “holding a cell phone, car keys and an overnight bag” The stepmother then offered to turn over care for Austin to the aunt, explaining that father was homeless and using methamphetamine. The aunt did not really know Austin as she had not seen him in two years, but she agreed to care for him.

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

Father picked up Austin from the aunt's house three days after she took him in. Father returned with Austin on Thanksgiving and explained that he was homeless and wanted the aunt to care for Austin. The aunt asked for written consent from father so that she could enroll Austin in school, but father refused. Father then left with Austin, but returned the following Monday and left Austin with the aunt. The aunt described father as acting "really weird" and asking for money.

At the time, Austin's mother was incarcerated for substance abuse related charges and was serving a one-year sentence.

The agency filed a section 300 petition on December 4, 2009, after the aunt was not able to care for Austin.

December 7, 2009, Detention Hearing

Although he was in custody at the time for drug related charges, father attended the detention hearing on December 7, 2009. Father was appointed counsel and completed a "NOTIFICATION OF MAILING ADDRESS" (JV-140) on which father listed "Main Jail" as his mailing address. He verbally acknowledged signing the form to the court. The form included the following printed statement:

**"TO THE PARENT OR GUARDIAN OF THE ABOVE NAMED CHILD:
[¶] YOU ARE REQUIRED TO PROVIDE YOUR PERMANENT MAILING ADDRESS TO THE COURT. The court, the clerk, and the social services agency to probation department will send all documents and notices to the mailing [a]ddress provided, until and unless you notify the court or the social worker or probation officer on your case of your new mailing address. [¶] Notice of the new mailing address must be provided in writing. [¶] This form is provided for notification of your mailing address or a change of mailing address."** (Original boldface.)

At the detention hearing, the juvenile court gave the following oral advisement to father and Austin's mother:

"You are each advised you have an obligation to notify the social worker in writing if you wish to use a different mailing address. All notices about this case will be sent to you at the addresses given until such time as the

social worker receives written notice of a different address. [¶] Do you each understand your obligation in that regard? Sir?”

Father responded, “Yes.”

Father did not contest the detention hearing, and Austin was detained. At the hearing, the juvenile court verbally ordered that father and Austin’s mother, while incarcerated, were to receive “reasonable” visits, “supervised by the agency or their designee and consistent with the rules of the facility in which the parents are housed.”

The juvenile court suspended father’s right to make medical, dental, mental health, and educational decisions for Austin while father was incarcerated. The court explained to father, “Once you’re released from custody you need to immediately notify the social worker of your whereabouts [and] those rights will be vested back to you.” Father acknowledged that he understood.

The juvenile court questioned father about Austin’s educational needs. Father said that he suspected Austin had “some learning disorders,” but he was uncertain whether he was being evaluated at school. Father recently met with Austin’s school principal and signed some documents, but he was unsure if any testing had been done on him. According to father, he had enrolled Austin in counseling, but “it didn’t take too well” because father did not have a place to stay.

January 7, 2010, Jurisdiction and Disposition Hearings

The jurisdiction and disposition hearings were held on January 7, 2010. Father was present. Father’s counsel stated that he had no evidence to present. An exchange between the juvenile court and father indicated that father agreed with counsel. The court then found the section 300 petition true on all counts.

As for disposition, the agency recommended that father be denied reunification services because of his failure to address his history of substance abuse. In denying

reunification services, the juvenile court found section 361.5, subdivision (b)(13)² applicable, in that father had not made reasonable efforts to treat his substance abuse and had not proven that reunification with Austin was in Austin's best interests.

The juvenile court again addressed the issue of visitation. Father's counsel requested that the court order reasonable visitation, with a minimum of once a month, if authorized by the penal institution. The court stated that, as to both parents, it was:

“adopting an order for a reasonable schedule of visitation that will appear in the minutes, that the visits for both parents will be supervised by the agency or their designee. Should either parent be out of custody the agency has discretion to require testing as a condition of visitation. Visits will be in accordance with the rules of any facility in which either parent is housed.”

In the minutes, the visitation order is outlined as follows:

“The parents are granted reasonable visits supervised by the Agency or designee in accordance with the rules of the facility where the parents are housed. Upon the parents' release from custody, the Agency is granted discretion to require the parents to test as a condition of visits.”

The juvenile court indicated that adoption was the permanent plan goal for Austin. Father's counsel requested, and the juvenile court granted, a bonding study be prepared in anticipation of the upcoming section 366.26 hearing. The agency did not object to the bonding study.

The juvenile court orally ordered father's counsel to review the written advisement of appeal and rehearing rights with father, which was then signed by both father and counsel. The court ordered that father be served with “Notice of Necessity to Seek Writ Review” and, at the hearing, stated that father was “being served in the courtroom at this time,” although this form is not evident in the record. The court also advised father that

² Section 361.5, subdivision (b)(13) provides, in relevant part, that reunification services need not be provided to a parent who has a history of prior drug abuse and has resisted prior court-ordered treatment within a specified period of time.

the “Notice of Intent to File Writ Petition and Request for Record” must be filed “within seven days of today’s date.” Father did not pursue a writ petition.

A section 366.26 termination of parental rights hearing was set for April 30, 2010.

Bonding Study

Following a disagreement between father’s counsel and county counsel as to who was to pay for the bonding study, the agency filed a motion seeking clarification. The motion was heard on January 12, 2010, and the juvenile court ordered that the agency obtain the bonding study.

The agency then requested rehearing before the presiding judge of the juvenile court, which was set for March 9, 2010. In lieu of a rehearing, the parties stipulated that a bonding study was not required for the section 366.26 hearing. But, pursuant to the stipulation, the agency was to provide a study and report addressing the parent-child relationship between father and Austin. The report was to specifically address section 366.26, subdivision (c)(1)(B)(i), which provides a defense to termination of parental rights if “termination would be detrimental to the child” due to the parent having “maintained regular visitation and contact with the child and the child would benefit from continuing the relationship.” The presiding judge accepted the stipulation.

Adoption Assessment

In preparation of an adoption assessment report, in mid-March 2010 a social worker learned that father had transferred from the Visalia main jail on February 11, 2010, to North Kern State Prison, with a June 20, 2011, release date. On March 15, 2010, father’s counsel completed a transportation order form (JV-450) for the April 30 section 366.26 hearing that listed father’s address as North Kern State Prison, which was then crossed out and “MCCF Golden State” written in. Father completed a “Waiver of Right to Be Present at Hearing ...” (JV-450) on April 19, 2010, which was faxed from “Golden

State MCCF.”³ Father failed, however, to complete a JV-140 form to update the agency or the juvenile court as to either the North Kern State Prison or Golden State MCCF address changes.

The adoption assessment report was prepared on March 26, 2010. It stated that Austin did “not enjoy[] being in foster care,” and that he exhibited “oppositional and defiant attitude and behavior, stealing both at school and at home, often refuses to do homework, consistent tantrums, especially when instructed to return the items that he steals.” Austin described his father in negative terms. He was aware that his father was in jail and thought he did better there than at home. Austin told the social worker that he would like to live with his mother or his “Aunt Missy,” but with his father only if those two options did not work out. According to the social worker, he was not able to observe interaction between Austin and father because North Kern State Prison did not allow for contact visits. The social worker concluded, after two separate interviews with Austin, that he was “consistent in voicing no significant desire to be with his father.”

Termination of Parental Rights Proceedings

In the 366.26 WIC Report prepared on April 7, 2010, in anticipation of the April 30, 2010, section 366.26 hearing, the agency recommended adoption for Austin but, due to Austin’s behavior, requested that it be allowed 180 days to find an adoptive home. Austin’s behavior and grades had improved since he entered foster care. Austin told the social worker that he enjoyed both living with his foster parents and his school. The report stated that father had not received visits with Austin while he was incarcerated because North Kern State Prison did not allow contact visits.

The section 366.26 hearing was held on April 30, 2010. Father did not attend, having previously filed a waiver of his appearance. The juvenile court adopted the

³ We infer from the record that neither the agency nor the juvenile court knew or appreciated that father was transferred to Golden State MCCF on April 8, 2010, until April 2011.

recommendation of the social worker and, inter alia, ordered that father was to have visits with Austin once a month for one hour and, so long as father was incarcerated, the visits were to occur “in accordance with the rules of the facility or institution where the parent ... is located and visits shall be supervised until further order of the court.”

The section 366.26 hearing was continued for six months to October 8, 2010. In preparation for that hearing, the agency mailed father, at North Kern State Prison, a “NOTICE OF HEARING ON SELECTION OF A PERMANENT PLAN” (JV-300) on August 12, 2010. The record shows that father eventually received the notice at Golden State MCCF and, in his written response dated August 30, he stated his desire to attend the hearing, to be represented by counsel, and his opposition to termination of his parental rights. On the top of his one page response, a return address for father at Golden State MCCF was clearly stamped.⁴

In its report of September 28, 2010, in anticipation of the October 8 termination hearing, the agency described Austin as thriving in foster care and having made significant improvement in school. But Austin’s foster parents were only willing to provide transitional care for him and were not willing to adopt him. The only nonrelative adoptive homes available were hundreds of miles outside of the county. The agency concluded that the permanency plan should take into consideration Austin’s emotional roots in the area, his desire to reside with his family (particularly his maternal aunt), and his consistent participation in therapy. The agency recommended that Austin’s permanent plan be adoption with his aunt, however, she was having difficulty obtaining a home large enough to qualify for his placement. The report stated that father was not visiting with Austin as the social worker had contacted the penal institution where he assumed father was located and was informed that father was not allowed contact visits.⁵

⁴ See footnote 3, ante.

⁵ See footnote 3, ante.

Father attended the October 8, 2010, section 366.26 hearing, although he was still in custody. The record for that hearing does not indicate where he was housed at the time. Following a requested *Marsden*⁶ hearing, the juvenile court addressed section 366.26 and expressed concerns about Austin's adoptability, noting only his aunt's desire to adopt him. Father's counsel argued against termination of parental rights because it was uncertain that Austin was adoptable and father would be out of prison "within the next year." The hearing was continued for two weeks to allow a report from Austin's therapist.

Father, still in custody at an unstated institution, was present at the continued section 366.26 hearing held October 21, 2010. Father asked and was allowed to represent himself, at which point he requested a continuance to read the therapist's report and visit the law library. Father was told the hearing could be trailed "to this afternoon at 1:30" to allow him to read the report, but he elected instead to have counsel reappointed. The therapist's report stated that Austin "has a positive relationship with his foster parents," that he "follows rules and expectations both at home and at school," and that he needed "a stable and nurturing environment in order to continuing progressing appropriately."

The juvenile court noted Austin's "severe mental health and emotional issues" and his "instability in his very young life," but that he was "doing well" due to his "stable, nurturing placement." The court agreed with the agency that it would be best to find a family in the area where Austin already had a support system. It then found that, "because of the lack of a specific adoptive family or a specific plan and given his past history, there is not clear and convincing evidence that [Austin] is adoptable." The court stated that adoption would remain a goal and that efforts to find an adoptive home should continue. The court also found that "the parental exception standard" had not been met,

⁶ *People v. Marsden* (1970) 2 Cal.3d 118 (*Marsden*). During the *Marsden* hearing, father complained about the lack of a bonding study, and not seeing his son, while other inmates had weekly visits.

and that, if an adoptable home had been available at that point, the court would be proceeding with the adoption plan.

The juvenile court then ordered that Austin's permanent plan be a planned permanent living arrangement with his foster parents with a goal of adoption. The agency was told that, if it found a suitable adoptive placement prior to the next court date (the Mar. 23, 2011, § 366.3 status review hearing), it could file a section 388⁷ modification petition.

At the conclusion of the continued section 366.26 hearing, county counsel explained that the proposed findings and orders did not include recommended visits for father because the agency had anticipated termination of father's parental rights. The juvenile court responded, "The reality is the father is not allowed visits, that is very clear from the social worker's report."⁸

Section 366.3 Status Review Hearing

On March 1, 2011, the agency mailed notice of a March 23, 2011, section 366.3 post-permanent plan review hearing to father at North Kern State Prison, the mailing address listed on the status review report. The record does not disclose whether the notice was forwarded to, or received by, father.

The agency report prepared in anticipation of the hearing noted some regression in Austin's behavior since his discharge from therapy in September of 2010. Resumption of therapy in December of 2010 appeared to help. The report stated that Austin continued to ask for his mother, his father, and his aunt. But the report by a court-appointed special advocate stated that Austin had not mentioned his father in a "very long time."

⁷ Section 388 provides that a parent or anyone having an interest in a dependent child may, upon grounds of change of circumstance or new evidence, petition the juvenile court for a hearing to change, modify, or set aside a previously made order of the court.

⁸ See footnote 3, ante.

According to the agency report, the maternal aunt who had previously expressed an interest in adopting Austin fell out of contact with the agency. For this reason, the agency recommended that Austin's permanent plan remain a planned permanent living arrangement with his foster parents with a goal of adoption.

Father did not attend the March 23 section 366.3 permanent plan review hearing and other counsel stood in for father's original counsel. The juvenile court did not modify Austin's permanent plan. The court found visitation with father to be detrimental to Austin, but invited father's counsel to file a section 388 petition upon father's release from custody. The court also indicated a willingness to discuss visitation at the next hearing, should father be released at that time. A section 366.3 plan review hearing was set for August 31, 2011.

The Agency's Section 388 Petition for Modification

On May 20, 2011, the agency filed a section 388 permanent plan modification petition after it located a prospective adoptive home for Austin. The agency asked that the juvenile court vacate the pending section 366.3 plan review hearing and set a section 366.26 parental termination hearing instead. The court set the section 388 hearing for May 31, 2011. Father received notice of both the section 388 petition and the section 366.26 hearing at the Golden State MCCF address, from the agency. The proof of service for these pleadings reflected father's address at the Golden State MCCF facility.

Father did not attend the section 388 plan modification hearing on May 31, 2011, but his counsel did. The agency's section 388 petition stated that transitional visits had begun between Austin and the prospective adoptive parents and that adoption would offer Austin "the highest level of permanency." Austin's counsel was in agreement with the agency's section 388 petition. Father's counsel opposed, however, the setting of a section 366.26 hearing. According to counsel, father would be released from incarceration on June 5, 2011, and asked that the court address the issue at the scheduled August 31 section 366.3 permanent plan review hearing.

The juvenile court granted the section 388 petition, modifying the permanent plan to adoption, vacated the section 366.3 plan review hearing set for August 31, 2011, and set a contested section 366.26 termination of parental rights hearing for September 1, 2011. The court ordered the court clerk to serve each parent with the “Notice of Necessity to Seek Writ Review,” which was served on father at Golden State MCCF.

Father’s Section 388 Petition for Reunification Services and Visitation

After his release from custody on June 3, 2011, father filed a section 388 modification petition on July 6, 2011, requesting reunification services and visitation with Austin. In the petition, father stated that he had been released from prison, he had obtained permanent and adequate housing, and he was employed full time. Father explained that, while he was incarcerated, he attended available substance abuse counseling, participated in parenting education, and he had not used controlled substances while incarcerated or since his release. A hearing on the section 388 petition was set for August 2, 2011.

At the beginning of the August 2 section 388 modification petition hearing, father asked that his counsel be relieved, complaining that his attorney did not adequately represent him. After a *Marsden* hearing, appointed counsel was substituted, and the section 388 hearing was continued to August 11, 2011.⁹ The section 366.26 contested termination hearing remained set for September 1, 2011.

The agency filed an opposition to father’s section 388 modification petition, stating that Austin had made a very smooth transition to the prospective adoptive home since he was placed there on July 1, 2011. Both the prospective adoptive parents and Austin’s prior foster parents reported that Austin had not asked to visit with father and

⁹ At the *Marsden* hearing, the juvenile court, in granting the motion, stated that it was not finding counsel “was deficient in any way in his representation” of appellant, but instead that appellant and counsel could no longer “communicate well,” which would affect counsel’s ability to adequately represent appellant.

that the only time he mentioned him was in reference to the instability he had experienced while living with him. Austin had not seen his father since December 2, 2009, and the agency opined that introducing visits with father could disrupt the stability of Austin's placement. The agency was particularly concerned with father's history of substance abuse and his short period of sobriety.

Father testified at the August 11, 2011, section 388 hearing, stating that he entered Golden State MCCF on April 8, 2010, and was released on June 3, 2011. While there, he participated in weekly "celebrate recovery," parenting, and anger management classes. He described "celebrate recovery" as a book you "work through the steps." He described his current employment as consisting of "a couple of days a week" "[n]ot too steady." He testified that he last used a controlled substance "[p]robably like 20 months ago." But he was unable to explain what he had learned from his completion of a substance abuse program when Austin was first detained in 2005. When asked by Austin's counsel what he had learned in the substance abuse program during his recent incarceration, father stated he did not know. When asked if had learned anything at all, father said, "No, maybe not."

Father claimed that he did not know he was entitled to visitation with Austin until he received two letters from the social worker in March and April of 2011 while he was incarcerated at Golden State MCCF. But he acknowledged that he was aware that other inmates received contact visits. And after he received the letters, he wrote one letter to the social worker. In response, the social worker wrote back and asked him to write a letter to Austin, which he did.

Father's new counsel urged the juvenile court to grant father's request for visitation and family reunification services. According to counsel, father had not seen Austin since December of 2009 because the agency never complied with the juvenile court's visitation order.

County counsel argued that suspending contact between father and Austin was not necessarily based on the lack of contact between the two, but rather the life Austin had lived while in father's care. Counsel also argued that, because father was unable to explain what he had learned from participating in services while incarcerated, recently and in the past, it did not appear that father had benefited from those services. Finally, counsel argued that Austin had spent over three years in foster care and over "half of his life in a situation where he was subjected to his parents['] drug use and to neglect."

The juvenile court denied father's section 388 modification petition, finding that there was not sufficient evidence of a change of circumstances and that the proposed modification was not in Austin's best interest. The section 366.26 termination hearing remained set for September 1, 2011.

Section 366.26 Parental Rights Termination Hearing

At the section 366.26 termination hearing, eventually held on September 6, 2011, father testified that he entered Golden State MCCF on April 8, 2010, and was released on June 3, 2011. He again testified that he did not know he was ordered to have visitation with Austin until he received two "packets" from the social worker two to three months prior to his release from Golden State MCCF. According to father, one of the packets was mailed to Delano State Prison (formally known as the North Kern State Prison) in September 2010, but it did not reach him until April 2011, seven months after it was received at Delano State Prison. Once father was aware he was entitled to visits, he wrote a letter to the social worker, who contacted father in reply.

Father's counsel argued that father was unaware of the April 30, 2010, order by the juvenile court that he have visitation with Austin and that the agency was negligent for failing to give father notice of the order. Counsel argued that the exception to

termination of parental rights under section 366.26, subdivision (c)(2)¹⁰ applied because the agency, by not providing father with visitation, failed to make reasonable efforts or services for father.

The juvenile court, however, construed father's argument as invoking the exception to termination of parental rights under section 366.26, subdivision (c)(1)(B)(i).¹¹ Giving father the benefit of the doubt on the visitation issue, the juvenile court nonetheless found father had not established that Austin would benefit from continuing the parent-child relationship. The juvenile court found Austin was likely to be adopted and terminated father's parental rights.

On September 8, 2011, father filed a notice of appeal. On November 1, 2011, this court granted father's motion that his appeal be construed to include an appeal of the juvenile court's order denying his section 388 petition on August 11, 2011.

DISCUSSION

I. VISITATION ORDER

Father contends in numerous ways that his fundamental liberty interest in parenting his child, protected under the due process clauses of the federal and state Constitutions, as well as his statutory rights to visit his child, were violated because the juvenile court impermissibly delegated to the agency the determination whether visits would occur, that the agency abdicated its duty to provide those visits, and that the court

¹⁰ Section 366.26, subdivision (c)(2) provides, in relevant part, that parental rights will not be terminated if the court finds that reasonable efforts were not made or that reasonable services were not provided.

¹¹ Section 366.26, subdivision (c)(1)(B)(i) provides, in relevant part, that if the juvenile court finds it is likely the child will be adopted, the court "shall terminate parental rights unless either of the following applies: [¶] ... [¶] The court finds a compelling reason for determining that termination would be detrimental to the child due to one or more of the following circumstances: [¶] The parents have maintained regular visitation and contact with the child and the child would benefit from continuing the relationship."

failed to enforce its visitation order. Father also argues that counsel was ineffective by failing to ensure that the court-ordered visits occurred and by failing to pursue a bonding study. Father's claims lack merit because we find that he has waived and/or forfeited his right to contest the issues.

As argued by father, had the agency arranged for visitation while he was incarcerated, had counsel made certain those visits occurred, and had counsel pursued a bonding study, he would have been able to establish the statutory exception to termination of parental rights under section 366.26, subdivision (c)(1)(B)(i), which applies when termination would be detrimental to the child because the parent has maintained regular visitation and the child would benefit from continuing the relationship. According to father, although contact visits were not allowed while he was at North Kern State Prison, neither the agency nor counsel made an attempt to facilitate telephone or written contact between him and Austin. He argues further that he was only at North Kern State Prison for two months, after which he was moved to Golden State MCCF where contact visits were allowed, but still no contacts took place.

The dispositional order in a dependency proceeding is the appealable "judgment." (§ 395; *In re Meranda P.* (1997) 56 Cal.App.4th 1143, 1150.) All subsequent orders are directly appealable without limitation, except for orders setting a section 366.26 hearing, which are subject to writ review and the limitations outlined in section 366.26, subdivision (l). (*In re Jesse W.* (2001) 93 Cal.App.4th 349, 355; Cal. Rules of Court, rule 8.450.) A consequence of section 395 is that an unappealed disposition or postdisposition order is final and binding and may not be attacked on appeal from a later appealable order. (*In re Meranda P.*, *supra*, at p. 1150.) Therefore, an appeal of the most recent order entered in a dependency matter may not challenge prior orders for which the statutory time for filing an appeal has passed. (*Steven J. v. Superior Court* (1995) 35 Cal.App.4th 798, 811.)

The waiver rule also applies to claims of ineffective assistance of counsel. “[I]f a parent, for whatever reason, has failed to timely and appropriately raise a claim about the existence or quality of counsel received at a proceeding antedating the [section 366.26] hearing, we will apply the waiver rule to foreclose the parent from raising such an objection on appeal from the termination order.” (*In re Meranda P.*, *supra*, 56 Cal.App.4th at p. 1160.)

Here, father appeals from the August 11, 2011, order denying his section 388 modification petition and the September 6, 2011, section 366.26 order terminating his parental rights. But visitation and the bonding study were ordered in January 2010, and father was either present at every hearing thereafter or was represented by counsel at each hearing. Yet he did not make any attempt to enforce, complain about, or challenge any order or lack of compliance with any visitation or bonding study order, although he was advised numerous times verbally and in writing of his appeal and rehearing rights and writ advisements. He never sought appropriate relief. It is father’s burden to pursue his appellate rights, not counsel’s. (*In re Cathina W.* (1998) 68 Cal.App.4th 716, 723.)

In addition, to the extent father claims his due process rights were violated by the agency’s failure to arrange visits, we reject this contention as well. Certainly the agency has an obligation to comply with and effectuate juvenile court orders, and there are some circumstances under which failure to provide for visitation for an incarcerated parent has been found to be unreasonable. (See *In re Ronell A.* (1996) 44 Cal.App.4th 1352, 1364, citing cases.) But none of those circumstances exist here. Father was thoroughly advised to keep the agency and the juvenile court updated, in writing, of his mailing address, but he failed to do so. He was told several times in open court of ordered visitations with Austin in accordance with the facility in which he was detained. While in prison where contact visits were not allowed, he never asked the agency to arrange telephone visits or written contact with Austin, and at no time during his incarceration did he complain to the juvenile court that the agency was not providing adequate visitation, despite

numerous hearings at which he was either present in person or represented by counsel.¹² A parent may not sit idly by when he or she perceives an inadequacy in visitation, and “[i]t was not the [agency’s] responsibility to ‘take the parent by the hand’ to ensure [the parent] maintained regular visitation.” (*Los Angeles County Dept. of Children, etc. Services v. Superior Court* (1997) 60 Cal.App.4th 1088, 1092.)

In sum, father did not appeal or seek to enforce any of the earlier orders and did not seek writ review of the order setting the section 366.26 hearing. With the exception of his complaints about his attorney’s representation of him in October 2010, father never complained of his lack of visitation with his son, never requested the agency arrange prison visitation, or complained to the juvenile court about any perceived failure by the agency to facilitate visitation until he filed his section 388 petition requesting reunification services and visitation in July 2011. Father testified at his section 388 modification hearing that he was entitled to visitation. The record is clear that he was, at a minimum, advised by the court on December 7, 2009, and January 7, 2010, of his right to visitation with his son. He cannot now lay at the door of the agency or the juvenile court his inability to establish the exception to termination of parental rights that can sometimes flow from maintaining regular visitation and contact with dependent children. With this in mind, we address father’s claims that the court erred in denying his section 388 petition and in terminating his parental rights.

II. SECTION 388 PETITION

Father, relying on *In re Hunter S.* (2006) 142 Cal.App.4th 1497 (*Hunter S.*), contends that the juvenile court abused its discretion in denying his section 388 petition requesting reunification services and visitation with Austin, because it was the juvenile court’s “last opportunity to protect ... father’s due process rights.” (Boldface omitted.) We disagree.

¹² See footnote 6, ante.

A parent may petition the juvenile court to change, modify, or set aside any previous order made in the dependency proceeding based on changed circumstances. (§ 388, subd. (a); *In re Marilyn H.* (1993) 5 Cal.4th 295, 305.) But, “[i]t is not enough for a parent to show *just* a genuine change of circumstances under the statute.” (*In re Kimberly F.* (1997) 56 Cal.App.4th 519, 529.) The parent must show that the undoing of the prior order would be in the best interests of the child at the time the request is made. (*Ibid.*; see § 388; *In re Stephanie M.* (1994) 7 Cal.4th 295, 317-318.)

A juvenile court’s denial of a section 388 petition is reviewed under an abuse of discretion standard. (*In re Stephanie M., supra*, 7 Cal.4th at p. 318.) “““The appropriate test for abuse of discretion is whether the trial court 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.]” (*Id.* at pp. 318-319.)

Father testified at the August 11, 2011, section 388 hearing that he was no longer incarcerated, that he had obtained stable and permanent housing with his sister, that he was employed part-time, and that he had been sober for nearly 20 months. Father testified that, while incarcerated, he participated in weekly hour-long meetings to address substance abuse, anger management, and parenting education. But when questioned what he had learned from the substance abuse component of the weekly program, father said, “I just don’t know.”

The agency’s evidence at the time of the section 388 hearing was that Austin had made a smooth transition to prospective adoptive parents and he had not asked to visit his father, whom he last saw in December of 2009. The only mention Austin made of his father was in reference to the instability Austin experienced when he lived with him. The agency argued that introducing visits with father could disrupt Austin’s stability, especially in light of father’s history of substance abuse.

In denying father’s section 388 petition, the juvenile court stated:

“In order to grant the father’s request, the Court must find that there has been both a change of circumstance and that the proposed modification is in the best interest of the child. [¶] As to the initial finding, whether there has been a change of circumstance, there really has not been a change of circumstance in this matter. The father took some classes in prison. It does not appear that he has really benefited from those classes. While he states he has been clean and sober, he presents no evidence to substantiate that other than his own testimony. These petitions, as counsel argued, are fairly similar as to the reasons of detention to begin with. There simply has not been sufficient time or evidence—time for the father to establish that he has made the changes or evidence that he has changed as to the original causes for detention. [¶] The Court is finding that there has not been a change of circumstance. [¶] Even if the Court were able to find there has been a change of circumstance, we are not at a point where the Court must look to the best interest of the father. This is not about the father. The Court has no doubt that [father] loves this child. But this is not about what’s best for dad; this is about what is best for Austin. And there has not been a sufficient showing that reopening services again or commencing visitation would be in the best interest of the child.”

In *Hunter S.*, on which father relies, the juvenile court ordered visitation between mother and son. However, the son did not want to visit mother and the court refused to force him to do so, despite mother repeatedly asking the court, both during the reunification period and after services were terminated, to require the child to attend visitation under any circumstances the court deemed appropriate. (*Hunter S.*, *supra*, 142 Cal.App.4th at pp. 1501-1502.) On the eve of the section 366.26 hearing to terminate her parental rights, mother filed a section 388 petition, asking that visits be ordered and claiming she had been prejudiced by the court’s failure to enforce its own visitation order. (*Hunter S.*, *supra*, at pp. 1503-1504.) The court denied the petition, but the appellate court reversed, finding that the trial court had impermissibly delegated to the child the power to determine visits, and because the section 388 petition represented the court’s last opportunity to correct its error and protect mother’s rights. (*Hunter S.*, *supra*, at p. 1506.) But here, as chronicled in detail in part I, *ante*, father failed to keep the agency informed of his whereabouts and he made no mention of his lack of visitation

with Austin until he filed his section 388 petition two months before the September 6, 2011, section 366.26 hearing.

We disagree with father's claim that the juvenile court's conclusions were an abuse of discretion. To the contrary, as is evident from the court's reasoning in denying the motion, "[a]fter 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; see also *In re Marilyn H.*, *supra*, 5 Cal.4th at pp. 302, 309.) The juvenile court here properly focused on the child's interests, rather than [father's] interest[s]." (*In re Stephanie M.*, *supra*, at p. 323.)

The juvenile court did not abuse its discretion in denying father's section 388 petition.

III. TERMINATION OF PARENTAL RIGHTS

Father contends that his parental rights could not be terminated at the section 366.26 hearing because the court failed to provide reasonable services, in the form of visitation, to him. As discussed more fully in part I, *ante*, we disagree, and we will not discuss the visitation issue further. Instead, we find that the juvenile court properly terminated father's parental rights.

A court may terminate parental rights only if it determines by clear and convincing evidence that the minor is likely to be adopted. (§ 366.26, subd. (c)(1).) The statute requires clear and convincing evidence of the likelihood adoption will be realized within a reasonable time. (*In re B.D.* (2008) 159 Cal.App.4th 1218, 1231; *In re Zeth S.* (2003) 31 Cal.4th 396, 406.) In determining adoptability, the focus is on whether a child's age, physical condition, and emotional state will create difficulty in locating a family willing to adopt. (*In re David H.* (1995) 33 Cal.App.4th 368, 378.) To be considered adoptable,

a minor need not be in a prospective adoptive home and there need not be a prospective adoptive parent ““waiting in the wings.”” (*In re Sarah M.* (1994) 22 Cal.App.4th 1642, 1649.) Nevertheless, “the fact that a prospective adoptive parent has expressed interest in adopting the minor is evidence that the minor’s age, physical condition, mental state, and other matters relating to the child are not likely to dissuade individuals from adopting the minor. In other words, a prospective adoptive parent’s willingness to adopt generally indicates the minor is likely to be adopted within a reasonable time either by the prospective adoptive parent *or by some other family.*” (*Id.* at pp. 1649-1650, original italics.)

At the time of the section 366.26 hearing, Austin was in a prospective adoptive home. Although Austin had some history of “negative behaviors with regard to stealing,” his behavior had improved and he had made progress to the point that he was discharged from therapy. The juvenile court had before it evidence that Austin was placed in his prospective adoptive home on July 1, 2011, that he made a “smooth transition,” that he “already feels like he is part of the family,” and that he “expressed his desire to be adopted.” The juvenile court found Austin to be adoptable and that the likely date by which the agency would finalize the permanent plan was September 1, 2012. Substantial evidence supports the juvenile court’s finding that Austin is adoptable, and we reject father’s argument that the juvenile court erred in terminating his parental rights.

DISPOSITION

The order denying father's section 388 modification petition and the judgment terminating father's parental rights under section 366.26 are affirmed.

Franson, J.

WE CONCUR:

Gomes, Acting P.J.

Kane, J.