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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT

In re NICHOLAS S., a Minor.

MERCEDES S.,

Petitioner and Respondent,

v.

RICHARD S.,

Objector and Appellant.

F064132

(Super. Ct. No. AT-3005)

OPINION

APPEAL from a judgment of the Superior Court of Kern County. John D. Oglesby, Judge.

Marsha F. Levine, under appointment by the Court of Appeal, for Objector and Appellant.

Bobby L. Cloud, Jr. for Petitioner and Respondent.

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Mercedes S. (mother) petitioned the trial court to free Nicholas S. (the minor) from the parental custody and control of his father, Richard S. (father). The petition was based on father's recent felony conviction for assaulting his nine-year-old stepson with a stun gun. After a contested hearing at which father testified his use of the stun gun was accidental, the court granted mother's petition and terminated father's parental rights. Father appeals and we affirm the order terminating parental rights based on the court's finding that the facts underlying father's felony conviction were of such a nature as to prove his unfitness to have future custody and control of the minor. (Fam. Code, § 7825.)¹

FACTUAL AND PROCEDURAL BACKGROUND

On April 1, 2011, mother filed her petition seeking to terminate father's parental rights on the ground he had been convicted of a felony and served a prison term after using a stun gun to inflict injury on his nine-year-old stepson. The three-year-old minor was allegedly present in the home when the assault occurred.

On May 4, 2011, the court ordered Family Court Services Investigator Susan Amon to investigate and file a written report as to mother's petition. (See § 7850.) The investigator's report was filed with the court on June 21, 2011.

According to the investigator's report, mother and father married in 2007, and their divorce was final in January 2011. Mother also had a child (father's stepson) from a previous relationship born in June 2000.

The investigator's report detailed father's criminal history, which included numerous arrests and several convictions, including the most recent November 30, 2010, conviction for felony assault with a stun gun. (Pen. Code, § 244.5, subd. (b).)

The investigator interviewed father on May 18, 2011. Father told the investigator he loved his stepson and regretted hurting him by using a stun gun on him. Father said he pled no contest to a charge of assault with a stun gun and served prison time. Father reported he was currently on parole and under the treatment of a psychologist.

¹ Further statutory references are to the Family Code unless otherwise specified.

The investigator reviewed and summarized the police report of father's April 28, 2010, arrest for child abuse and using a stun gun on a person. According to the police report, the contents of which were summarized in the investigator's report, the officer questioned father in response to a referral from child protective services. Upon questioning, father showed the officer a 1000-volt stun gun and said he used it on his stepson. When asked why he would use a stun gun on a nine-year-old child, father replied, "I was mad because he didn't pick up the dog shit." Father told the officer he used the stun gun on his stepson three times. Father said his stepson was asleep and he woke him up with the stun gun and then stunned him again twice.

After father was booked at the police station and read his *Miranda*² rights, the officer asked father again if he had used a stun gun on his stepson and father said that he had. When asked why, father replied, "I'm jealous of him because [mother] shows more attention to him than she does the baby." When asked if he felt badly about what he did, father said, "Yes, I feel bad. I've felt bad since I did it. You know, he's just a kid."

After father was arrested for using a stun gun on his stepson, mother obtained a three-year restraining order protecting her and the children from father. On March 28, 2011, father was granted supervised visitation with the minor, twice per month, with the visitation schedule to begin in April 2011.

The investigator's report included positive reports concerning father's supervised visits with the minor and his performance on parole, including his successful completion of domestic violence, parenting, and substance abuse programs. Father also consistently tested negative for controlled substances.

The investigator concluded by recommending that the court grant mother's petition to terminate father's parental rights. While acknowledging father's positive performance in rehabilitation programs following his release from custody, the investigator opined, "the facts of his crime still remain heinous and of such a nature that ... the crime makes him unfit to have future custody and control of [the minor]" and

² *Miranda v. Arizona* (1966) 384 U.S. 436.

concluded “[t]here is no guarantee he will not act in this manner again with another child.”

At the October 21, 2011, contested hearing, the court admitted the investigator’s report into evidence. When asked about the police report summarized in the investigator’s report, father testified he was “aware what the police report said.” However, he could not remember what he told the police nor could he recall making any of the statements attributed to him in the police report. Father explained that when the police arrived to question him, he “was under the influence of ... prescription narcotics—morphine, Valium, and Xanax.” Father confirmed he was also under the influence of these medications at the time of the stun gun incident.³

According to father’s testimony, his use of the stun gun on his stepson was entirely accidental and unintentional. Father explained that, around 12:15 or 12:30 a.m., his dog woke him up by barking and standing at the foot of the bed.⁴ Father initially grabbed a handgun but then exchanged it for the stun gun. As father walked down the hallway, his stepson suddenly came running towards him from the kitchen. Father testified: “I did not purposely intend to squeeze the trigger. Out of fear, I did squeeze the trigger.”

Father did not realize that the person running towards him in the hallway was his stepson until the child yelled out after being stunned and father flipped on the hallway light. Father, who had medical training as a paramedic, checked his stepson for physical injury. At that time, father saw no marks, only redness. Father asked his stepson if he was alright. The child said that it hurt, but he was alright, and went back to bed.

³ Father further testified that he was taking the prescription medications for anxiety, depression, and fibromyalgia. Mother, who was a registered nurse, was aware he was taking the medications and never expressed any concern about him caring for the children while on the medications.

⁴ In his testimony, father explained that his dog was “actually a Rhodesian Ridgeback mixed with wolf” and “a search and rescue dog with the fire department.” Father confirmed the dog was highly trained and would not bark without cause.

Father described the stun gun as having two prongs and testified the stun gun “was turned on one time, but it left six marks” near his stepson’s “collarbone area.” Father maintained he only triggered the stun gun once but described it as “continuous movement.”

Father further testified that the minor was in bed when the stun gun incident occurred and was not awakened by it. Mother was at work at the time and father did not tell her what happened. To father’s knowledge, his stepson never told mother about the incident. The incident came to light because someone at the child’s school saw the marks on him.

Father acknowledged that, from the time his stepson became part of his life in 2007, they “did not have a real good relationship.” Although father loved his stepson and tried to be a “father figure” to the child, even looking into adopting him at one point, father was never successful in forming a bond with his stepson. Father described his stepson as “a normal boy” with “disciplinary issues.” Father also testified that his stepson “was not usually truthful.”

When mother’s counsel asked father how he could protect the minor in the future from an incident like the one involving his stepson, this exchange followed:

“A. Since I got out of custody of the State in December, I have attended anger management, parenting skills, relationship classes, and seven months rehabilitation, which I’m still continuing rehab. I’m almost done with anger management. I graduated top of the class for parenting. I would not harm my son. I’m no longer on any medications that are—that would interfere with my daily living.

“Q. Would you have harmed your son before you took these classes?

“A. I don’t believe I would. No. At the time—the incident that happened was an accident. I would not purposely harm anyone, nor my son.”

Mother was the only other witness besides father to testify at the contested hearing. Mother testified that she was a registered nurse and worked in the emergency

department at Kern Medical Center. She learned about the stun gun incident several days after it occurred, when child protective services and police officers came to her house. Upon learning of the incident, she examined her son and took him to his pediatrician.

Mother testified she had observed no negative effects from the minor's supervised visits with father. The minor did not complain about the visits when he came home and sometimes said he had a good time. Mother, however, testified she would not allow the minor to see father if the court terminated his parental rights.

At the end of the hearing, the court stated that its tentative ruling was to grant mother's petition to terminate father's parental rights. The court explained the reasons for its ruling, in part, as follows:

“The wounds that the child suffered are consistent with [father's] explanation [to the police]. Child was lying in bed. Throat area is exposed above the pajamas, the area where you would hit most people. I think you'd be reluctant to tase the child in the face. The most easily reachable part for the child in bed is going to be in the neck area, around the collarbone.

“His explanation on the witness stand that this child was running at him in the dark reflects that he happened to tase him in the collar area in responding to the alerted dog, I think I'm convinced by [mother's counsel's] examination and evidence in and of itself, regardless of this other statement, that doesn't strike me as being credible. If I look at this statement and this admission at the time that it was made of a year and a half ago, where someone would intentionally out of frustration and substance abuse, go in, wake a child up with a stun gun, stun him whether once or three times, I think becomes irrelevant because he was upset at him for not picking up the dog feces, he was jealous because this child was given more attention than his own natural child, to me renders him by clear and convincing evidence that he's unfit as a parent. And I will grant the Petition.”

The court continued the matter to give the parties the opportunity to submit posttrial briefing on the issues of the admissibility of hearsay statements contained in the investigator's report (namely, the investigator's summary of the police report detailing

the stun gun incident) and the relevancy of evidence of father's postconviction rehabilitation efforts to the court's determination of parental fitness under section 7825.

After listening to extensive argument by counsel at a hearing on December 2, 2011, the court adopted its tentative ruling to grant mother's petition to free the minor from father's custody and control. The court added the following to its reasons for terminating father's parental rights:

"I am concerned with a felony use repeatedly of the [stun gun] on a child, not [the minor], but still a child that was in [father's] care and custody that obviously he cared for, for a poor reason, and with his inability at this time to reconcile the statement that he gave originally to law enforcement and to come up with an explanation now that tries to paint him in a better light.

"I think it's a tenet of rehabilitation and certainly of something the Court considers in criminal matters whether someone is rehabilitated, and even in dealing with addiction issues is whether someone is willing to come to grips with the underlying problem that they have of this impulse control which sometimes results in poor decision-making, and I do not find that [father] has demonstrated by his story now that he has come to grips with the reasons that led to his use of the [stun gun] upon [his stepson]."

DISCUSSION

Father contends the court erred in terminating his parental rights under section 7825. He argues the court's finding of unfitness is unsupported by substantial evidence. He also argues the court failed to give due consideration to his postconviction rehabilitation efforts. These arguments are unpersuasive.

Section 7825 permits termination of parental rights upon a finding that a parent is unfit because of the nature of the felony of which he or she stands convicted.

Subdivision (a) of section 7825 provides:

"(a) A proceeding under this part may be brought where both of the following requirements are satisfied:

"(1) The child is one whose parent or parents are convicted of a felony.

“(2) The facts of the crime of which the parent or parents were convicted are of such a nature as to prove the unfitness of the parent or parents to have the future custody and control of the child....”

Proof of the elements of section 7825 must be by clear and convincing evidence. (§ 7821; *Cynthia D. v. Superior Court* (1993) 5 Cal.4th 242, 252-253; *In re Terry E.* (1986) 180 Cal.App.3d 932, 948 [both cases address language found in former Civ. Code, § 232, subd. (a)(4), which is identical to § 7825, subd. (a)].) “Unfitness” under section 7825 means the “probability that the parent will fail in a substantial degree to discharge parental duties toward the child. [Citations.]” (*In re Christina P.* (1985) 175 Cal.App.3d 115, 133.) Thus, to justify a decision that a parent is unfit as the result of a felony conviction not involving the minor, the conviction “must be one which unambiguously shows depravity of the parent sufficient to support the conclusion he or she will probably fail to discharge parental duties toward the child. [Citation.]” (*Id.* at p. 134.)

It is the trial court’s duty to determine whether the plaintiff has satisfied his or her burden of proof under section 7825. It is the appellate court’s duty to determine whether substantial evidence supports the trial court’s findings. (*In re Robert J.* (1982) 129 Cal.App.3d 894, 901.) If there is, we must affirm the judgment. (*In re Terry E., supra*, 180 Cal.App.3d at p. 949.)

In his sufficiency of the evidence challenge, father’s primary contention is that mother failed to meet her burden of proof under section 7825 by not calling the police officer who questioned father concerning the stun gun incident, but relied instead on hearsay statements contained in the investigator’s report. Father also contends the court’s reliance on such statements to support its determination of parental unfitness improperly shifted the burden of proof on the petition.

Father’s hearsay challenge to the investigator’s report is unsupported by statutory and decisional law. Under section 7851, the investigator must provide “to the court a written report of the investigation with a recommendation of the proper disposition to be

made in the proceeding in the best interest of the child.” (§ 7851, subd. (a).)

Section 7851 requires the court to “receive the report in evidence” and to “read and consider its contents in rendering the court’s judgment.” (§ 7851, subd. (d).)

Section 7851 continues without substantive change language in former Civil Code section 233. (See Cal. Law Rev. Com. com., 29G West’s Ann. Fam. Code (2004 ed.) foll. § 7851, p. 419; Stats. 1981, ch. 810, § 1, pp. 3143-3144.)

California cases indicate that, in proceedings to free a child from a parent’s custody and control, due process requires that the parent receive a copy of the investigation report (see *In re Linda W.* (1989) 209 Cal.App.3d 222, 227 [former Civ. Code, § 233]) and the parent be given “the opportunity to cross-examine the investigative officer *and* the sources from which that person obtained the information inserted into the report. [Citation.]” (*In re Gary U.* (1982) 136 Cal.App.3d 494, 501 [former Civ. Code, § 233]; see *In re George G.* (1977) 68 Cal.App.3d 146, 156-158.) “[T]hese reports necessarily contain hearsay and even multiple hearsay. Nevertheless, the Court of Appeal has consistently held that as long as a meaningful opportunity to cross-examine and controvert the contents of the report is afforded, such reports constitute competent evidence upon which a court may base its findings. [Citations.]” (*In re Malinda S.* (1990) 51 Cal.3d 368, 379 [analogizing to former Civ. Code, § 233 in finding “a hearsay exception for social studies” prepared under Welf. & Inst. Code, § 281], superseded by statute on other grounds.)

In light of this precedent, we reject father’s hearsay challenges to the court’s reliance on the investigator’s report in making its determination of parental unfitness. Father has not shown he was denied a meaningful opportunity to cross-examine either the investigator or the sources of information contained in the investigator’s report. While father complains he was not served with a copy of the police report summarized in the investigator’s report, the police report number (i.e., “***Bakersfield Police report No. GO 2010-86983***”) was conspicuously highlighted by the investigator in her report.

Father, who has been represented by counsel throughout the proceedings, does not explain why he was unable to obtain a copy of the report or examine the authoring police officer if it was his desire to do so. In short, the court properly admitted and considered the contents of the investigator's report in rendering its decision on mother's petition.

Father contends "even if the incident had occurred in the manner described in the police report, it is respectfully submitted that this was not such a heinous crime so as to justify such a drastic remedy as termination of parental rights, particularly in light of [father's] post-offense rehabilitative efforts"

Viewing the evidence in the light most favorable to the judgment, as we must, we find the evidence was sufficient to support the court's finding of parental unfitness in this case. As father himself points out, at the time of the offense, he was the primary caretaker for both the minor and his stepson when mother was at work. Father occupied this caretaking role the night he went into his stepson's bedroom while the child was sleeping and deliberately fired a 1000-volt stun gun at the child three times, leaving six injuries to his collarbone area. While we can imagine no possible justification for such an attack on a vulnerable child, we cannot fail to observe that the reasons father later offered to the police for his conduct were strikingly petty and malicious. The court reasonably found the evidence of father's rehabilitation unpersuasive in light of father's failure to accept responsibility for his actions by claiming that his use of the stun gun was accidental, a claim the court reasonably rejected as lacking credibility.

In short, the facts surrounding father's felony conviction for assaulting a young child in his care with a stun gun, coupled with his denial of the true nature of his conduct, establish that the nature of the felony conviction is "one which unambiguously shows depravity of the parent sufficient to support the conclusion he or she will probably fail to discharge parental duties toward the child. [Citation.]" (*In re Christina P.*, *supra*, 175 Cal.App.3d at p. 134.)

DISPOSITION

The order freeing the minor from the custody and control of father pursuant to section 7825 is affirmed.

Kane, J.

WE CONCUR:

Cornell, Acting P.J.

Detjen, J.