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

In re JEREMIAH D., a Person Coming Under the
Juvenile Court Law.

KERN COUNTY DEPARTMENT OF HUMAN
SERVICES,

Plaintiff and Respondent,

v.

LARRY B.,

Defendant and Appellant.

F064411

(Super. Ct. No. JD122689-00)

OPINION

THE COURT*

APPEAL from orders of the Superior Court of Kern County. Louie L. Vega,
Commissioner.

Janette Freeman Cochran, under appointment by the Court of Appeal, for
Defendant and Appellant.

Theresa A. Goldner, County Counsel and Paul Blackhurst, Deputy County
Counsel, for Plaintiff and Respondent.

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* Before Kane, Acting P.J., Detjen, J. and Franson, J.

Larry B. appeals from the juvenile court's orders denying his petition filed under Welfare and Institutions Code section 388¹ (hereafter "section 388 petition") as to his four-year-old son, Jeremiah, and terminating his parental rights to Jeremiah under section 366.26. Larry contends the juvenile court erred by denying his section 388 petition because he proved that circumstances had changed such that it would serve Jeremiah's best interest to order reunification services or place Jeremiah in his custody. Larry asserts that the juvenile court's error in denying his section 388 petition requires reversal of its order terminating his parental rights as to Jeremiah. We affirm the judgment.

PROCEDURAL AND FACTUAL SUMMARY

In November 2009, then two-year-old Jeremiah and his four-year-old half-sister (hereafter "the sister") were removed from Larry and the children's mother because the mother used methamphetamine while caring for them, failed to treat her mental illness, and physically assaulted Larry in their presence. The Kern County Department of Human Services (department) filed an original dependency petition on the children's behalf alleging these facts under section 300, subdivision (b), along with an allegation that Larry knew or should have known of the mother's methamphetamine use and untreated mental illness and failed to protect the children from her. The petition also alleged under section 300, subdivision (j) that in 1992 Larry's five children were placed under the jurisdiction of the juvenile court because of his substance abuse and domestic violence. Larry received reunification services, which included domestic violence as a perpetrator, substance abuse counseling, and random drug testing. However, he failed to complete his services and in 2000 all five children were adopted by their maternal aunt.

In November 2009, the juvenile court ordered Jeremiah and his sister detained, declared Larry to be Jeremiah's presumed father and Nicholas D. to be the sister's

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

presumed father. The juvenile court ordered the department to provide reunification services and two-hour weekly supervised visitation for Larry. The department gave Larry a copy of an initial case plan that recommended he participate in anger management counseling, counseling for failure to protect Jeremiah from domestic violence, and substance abuse counseling if he tested positive for drugs or failed to test. The department placed the children together in foster care.

According to the department, in a supplemental report filed for the dispositional hearing, Larry was dropped from anger management class in January 2010 for non-attendance. He was required to drug test five times from late December 2009 to mid-February 2010. Of those, he tested negative three times and failed to test twice, resulting in presumptive positive results.

In February 2010, the juvenile court ordered the children removed from the mother's custody and ordered reunification services for her. In March 2010, the juvenile court conducted the dispositional hearing as to Larry and Nicholas. Larry, through his attorney, informed the juvenile court that he was not dropped from anger management for non-attendance. Rather, his attorney stated that he completed anger management and parenting, but did not pay for the courses. Consequently, he was not issued certificates of completion. In addition, Larry was enrolled in, but not yet attending, domestic violence classes. He asked the juvenile court to provide him reunification services. Instead, the juvenile court denied Larry reunification services pursuant to section 361.5, subdivisions (b)(10) and (11). The court also denied Nicholas reunification services as to the sister. Larry did not appeal from the juvenile court's dispositional order denying him services.

Over the course of the ensuing year, the mother sufficiently progressed in her reunification services that, at the 12-month review hearing in January 2011, the juvenile court returned the children to her custody under family maintenance. Meanwhile, from October 2010 to June 2011, Larry was incarcerated for a felony probation violation resulting from his use of methamphetamine.

In April 2011, the department took Jeremiah and his sister into protective custody because of their mother's continuing methamphetamine use and filed a supplemental dependency petition (§ 387) seeking their removal.

In August 2011, the juvenile court conducted the dispositional hearing on the supplemental petition. Larry appeared and, through his attorney, informed the juvenile court that he was enrolled in all of his classes and would complete everything in October 2011. He also asked the juvenile court to authorize him to drug test and said he would do so at his own expense. The juvenile court denied his request, terminated the mother's reunification services, and set a section 366.26 hearing for December 2011. Neither Larry nor the mother challenged the juvenile court's setting order by writ petition.

The section 366.26 hearing was continued and ultimately conducted in February 2012 following a hearing on a section 388 petition Larry filed in December 2011. In his section 388 petition, Larry informed the juvenile court that he completed a program in parenting and neglect education in October 2011 and was enrolled in other classes, which he hoped to complete before the section 366.26 hearing. In addition, he asserted that his visits with the children went well and that he was drug testing and would be able to present negative results at the section 366.26 hearing. Larry asked the juvenile court to order family reunification or family maintenance services for him or to dismiss dependency jurisdiction and place Jeremiah in his care, stating that to do so would serve Jeremiah's best interest by solidifying their relationship and creating a family unit.

In December 2011, a social worker interviewed Larry in response to his section 388 petition. Larry was living in a two-bedroom apartment with his sister, brother-in-law and 10-year-old nephew. Larry said that the garage could be converted into a bedroom for his nephew and he and Jeremiah could share a bedroom. Larry told the social worker that he was unemployed but assisted his sister and brother-in-law in their jobs as janitor and gardener respectively. He said his driver's license was revoked for driving under the

influence so he used public transportation. He received medication and weekly therapy for his anger through the parole outpatient clinic.

Larry explained to the social worker that he did not pursue reunification sooner because he thought that Jeremiah would be better off with his mother. However, when he realized that she was not going to reunify with Jeremiah, he enrolled in the parenting and neglect program and planned to enroll in anger management classes.

After investigating Larry's circumstances, the department recommended against granting his section 388 petition. In its report on the matter, the department informed the juvenile court that Larry had not enrolled in an anger management program or any of the additional counseling recommended in his initial case plan. In addition, he did not have stable housing, employment and basic necessities for the children. Further, according to the adoption social worker, Jeremiah did not have a significant bond or attachment to Larry or share a parent-child relationship with him. The department also informed the juvenile court that the prospective adoptive parents wanted to adopt both children.

In February 2012, at a combined hearing, the juvenile court heard argument pertaining to Larry's section 388 petition. Larry, through counsel, informed the juvenile court that he enrolled in anger management classes earlier in the month and argued that it would be detrimental to the children to terminate his parental rights.

Following argument, the juvenile court denied Larry's section 388 petition after finding that Larry's circumstances had not changed since it denied him reunification services and that providing Larry reunification services would not serve Jeremiah's best interests. The juvenile court proceeded to adjudicate the section 366.26 hearing and terminated parental rights as to the mother, Larry and Nicholas. This appeal ensued.

DISCUSSION

Any party may petition the juvenile court to modify or set aside a prior dependency order pursuant to section 388 on grounds of changed circumstance or new evidence. (§ 388, subd. (a).) The party bringing the section 388 petition must also show

the proposed change is in the best interests of the child. (*In re Stephanie M.* (1994) 7 Cal.4th 295, 317.) Section 388 provides a means for the court to address a legitimate change of circumstances even at the permanency planning stage while protecting a child's need for prompt resolution of his or her custody status. (*In re Marilyn H.* (1993) 5 Cal.4th 295, 309.) Whether the juvenile court *should* modify a previously made order rests within its discretion and its determination will not be disturbed absent a clear abuse of discretion. (*In re Stephanie M., supra*, at p. 318.)

Larry contends the juvenile court abused its discretion when it denied his section 388 petition. He argues he established a change of circumstances by completing parenting and neglect education, enrolling in other classes, drug testing, and consistently visiting Jeremiah. Relying on the factors set forth in *In re Kimberly F.* (1997) 56 Cal.App.4th 519, 528 (*Kimberly F.*), Larry asserts the evidence shows it was in Jeremiah's best interests to modify the prior order denying reunification services.

We conclude the juvenile court properly ruled in denying Larry's section 388 petition. First, Larry failed to establish a legitimate change of circumstances. In March 2010, the juvenile court denied him reunification services under section 361.5, subdivisions (b)(10) and (11)² because his substance abuse and domestic violence caused him to lose custody of Jeremiah's siblings and he did not subsequently resolve those problems. During the six or seven months following the juvenile court's denial order,

² Section 361.5, subdivisions (b)(10) and (11) provide in relevant part:

“(b) Reunification services need not be provided to a parent ... when the court finds, by clear and convincing evidence ...: [¶] ... [¶] (10) [t]hat the court ordered termination of reunification services for any siblings ... of the child because the parent ... failed to reunify with the sibling ... [and the] parent ... has not subsequently made a reasonable effort to treat the problems that led to removal of the sibling ... of that child from that parent...[;] [¶] (11) [t]hat the parental rights of a parent over any sibling ... of the child had been permanently severed, ... [and the] parent has not subsequently made a reasonable effort to treat the problems that led to removal of the sibling ... of that child from the parent.”

Larry made no effort to address his substance abuse and/or domestic violence. To the contrary, he used methamphetamine resulting in his imprisonment. After his release from custody, Larry drug tested and participated in individual therapy, which included discussions about his anger, however, these were conditions of Larry's parole rather than a personal choice to change for the sake of his child. On that evidence, the juvenile court could reasonably reject Larry's argument that a legitimate change of circumstances occurred following its denial of reunification services.

Additionally, Larry failed to show that providing him reunification services or returning Jeremiah to his custody would be in Jeremiah's best interest. In *Kimberly F.*, the appellate court identified three principle factors relevant to the juvenile court's evaluation of best interests in the context of a section 388 petition: (1) the seriousness of the problem that necessitated dependency and the reason the problem continued; (2) the strength of relative bonds between the dependent child to the parent and caretakers; and (3) the degree to which the problem may be easily removed and the degree to which it actually has been. (*Kimberly F.*, *supra*, 56 Cal.App.4th at p. 532.)

Applying the *Kimberly F.* factors, Larry contends that providing him reunification services would serve Jeremiah's best interest. Specifically, Larry contends that his failure to protect Jeremiah from the mother's substance abuse, mental illness and spousal abuse was not so serious as to warrant denying reunification. Additionally, Larry contends that he and Jeremiah had a significant relationship as evidenced by their positive and affectionate interactions during visitation. Finally, Larry contends that any problems related to Jeremiah's removal were resolved.

We concur with the juvenile court's evaluation of Jeremiah's best interest. Though the problem that necessitated Jeremiah's removal may not be as grave as others, Larry perpetuated the problem, in part, by continuing his drug use which, according to the record, ceased only because he was incarcerated and then monitored as a function of parole. As to the strength of the parent/child bond, no such bond existed according to the

adoption social worker. Jeremiah enjoyed visiting with Larry but had no difficulty separating from him at the end of visits which, in the social worker's opinion, indicated a "significant lack of attachment" as well. Finally, though Larry was addressing his substance abuse and anger issues, he had not resolved them despite ample opportunity to do so.

We conclude on this record that the juvenile court did not abuse its discretion in denying Larry's section 388 petition and affirm.

DISPOSITION

The juvenile court's orders issued on February 16, 2012, denying Larry's section 388 petition and terminating his parental rights as to Jeremiah, are affirmed.