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

In re M.T. et al., Persons Coming Under the
Juvenile Court Law.

TULARE COUNTY HEALTH AND
HUMAN SERVICES AGENCY,

Plaintiff and Respondent,

v.

MIGUEL T.,

Defendant and Appellant.

F064738

(Super. Ct. Nos. JJV057956B
& JJV057956C)

OPINION

THE COURT*

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

Leslie A. Barry, under appointment by the Court of Appeal, for Defendant and Appellant.

Kathleen Bales-Lang, County Counsel, John A. Rozum and Amy-Marie Costa, Deputy County Counsel, for Plaintiff and Respondent.

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

INTRODUCTION

Miguel T. (father) appeals from the juvenile court's orders summarily denying his petition pursuant to Welfare and Institutions Code section 388,¹ finding that the beneficial parent-child relationship exception is inapplicable to his case, and terminating his parental rights to his sons, M.T. and J.T. We reject father's contentions and affirm the juvenile court's orders.

FACTS AND PROCEEDINGS

Background

At 4:30 p.m. on October 2, 2011, father was arrested for child endangerment when M.T., then five years old and autistic, was found wandering unattended down a busy street and nearly struck by a motorist. The investigating officer had received a similar call on September 4, 2011, concerning the same child who was found about a quarter of a mile from home and seen wandering around a pool unsupervised. Regarding the earlier incident, father told investigators he had been playing an Xbox and M.T. wandered away. No formal allegations were brought against father for the September 2011 incident.

During the October 2, 2011, incident, a woman conducting a yard sale saw M.T. leave the yard and begin to walk across a busy street. As M.T. was standing in the street, he saw an oncoming car, became frightened, and ran to the yellow divider on the road. A neighbor ran over to M.T. and took him out of the street. After father was arrested, an investigating officer went to father's home and found it sparsely furnished. The two-year-old, J.T., was sleeping on the floor behind the entertainment center next to the dog.

There was an air mattress on the floor and the other rooms were empty. The officer found that all of the windows of the parents' home were secured and locked. Because of the height of the windows and the locking mechanisms in relation to M.T.'s

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

height, the officer did not believe it was possible for M.T. to unlock the windows on his own.

Father told investigators that he had been sleeping. Father went to the back bathroom and found an open window and believed M.T. crawled out of the open window. Both parents denied currently using drugs. A social worker, however, noticed what appeared to be sores from methamphetamine use on the mother's face. The mother refused to take a drug test when asked if she would do so by the social worker. Father failed to show for random drug testing on October 13, 2011, October 25, 2011, and November 7, 2011. In April 2004, the mother and father's young daughter, E.T., was found wandering unsupervised by a busy highway. Services to the parents were terminated in 2005 for the parents' noncompliance with their court-ordered case plan.

A petition was filed pursuant to section 300 on October 4, 2011, by the Tulare County Health and Human Services Agency (agency), alleging that the mother and father failed to adequately protect M.T. from being in unsupervised places leading to a substantial risk of him suffering physical harm. The parent's conduct also placed J.T. at serious risk of physical harm. The petition further alleged the children's clothes were soiled with dirt and grime and that M.T. was wearing a dirty diaper. The children also suffered from being physically dirty, cuts and bruises on their legs and feet, and bug bites on their arms and legs. Both children had a strong, foul smelling odor due to the parents' neglect. The petition alleged that in 2005, the court terminated family reunification services for the parents as to their daughter E.T. for the parents' failure to comply with their court-ordered case plan and that M.T. and J.T. were at similar risk as E.T. due to the parents' neglect. M.T. and J.T. were detained on October 5, 2011.

The parents have several other children. Four of them, between the ages of one and nine, live with a great aunt. The great aunt did not have a legal guardianship for two of these children, J.H., age five, and A.H., age one, and had adopted the other two. E.T., who was 11 years of age when the instant petition was filed, is under a legal

guardianship. A first amended petition was filed on October 31, 2011, adding J.H. and A.H. as dependents pursuant to section 300. The amended petition alleged that father was the presumed father of M.T. and J.T., but only the alleged father of J.H. and A.H.

Jurisdiction and Disposition Hearings

After continuances, a contested jurisdiction hearing was held on November 21, 2011. The mother testified that on October 2, 2011, she arrived home at around 5:00 p.m. and started doing her homework. She was waiting for father and the children to come home. By 11:30 that evening, the mother drove to a friend's home looking for father but he was not there. The mother went to the police station and learned that father had been arrested.

According to the mother, the family was in the process of moving to a new home four blocks away from their previous residence. Father and the children were in the new residence. The mother was still packing things at the old residence the morning and early afternoon of October 2nd.

The mother stated that M.T. suffers from autism and he leaves the home from time to time. The mother usually catches him before he exits the home. M.T. has in the past opened windows and screens to get outside the house. When the mother returned home on October 2nd at 5:00 p.m., the screen was off the bathroom window but the window was closed. The mother explained that the children had been bathed the night before and J.T. only had a single mosquito bite.

Father testified that the incident involving M.T. occurred after he and the two boys took a nap beginning at 11:00 a.m. Father woke up when J.T. began making a loud noise and was hitting him on the head with a bottle. Father realized M.T. was gone from the home and found the bathroom window cracked open and the screen was off. Father went outside after closing the door so J.T. would not go outside and found M.T. in 30 to 40 seconds. Father could not retrieve M.T. because he was immediately placed under arrest by police officers.

Father believed his children “looked pretty clean” that day and he gave them baths “practically [every day].” According to father, J.H. and A.H. never resided with him and were never in his care or custody.

Amanda Silvas, a social worker for the agency, testified that on October 2, 2011, she responded to a call from police officers concerning M.T. Silvas found M.T. to be wearing a soiled T-shirt and shorts. His face, arms, and legs were filthy dirty. M.T.’s feet were black with dirt as were his hands and fingernails. M.T. also smelled bad from a bowel movement in his diaper.

J.T. was also wearing soiled clothing and a soiled diaper. J.T.’s arms and legs were dirty. J.T. was dirty from head to toe. It did not appear that either child’s hair had been recently washed. Both children were suffering from multiple bug bites, some of which were infected. When Silvas was retrieving J.T., she noticed a large bruise under his chin. The court found all of the allegations in the petition concerning father to be true.²

Prior to the disposition hearing, Court Appointed Special Advocates (CASA) submitted a report on behalf of M.T. and J.T. The children’s foster mother reported that the children see their parents for one hour of supervised visitation twice a week. The foster mother told CASA that both children were taken to the doctor because they had diaper rash and a skin infection. M.T. and J.T. were evaluated by the Central Valley Regional Center (CVRC). Testing revealed that M.T. suffered from moderate mental retardation, significant developmental delays, and a diagnosis of autism. M.T.’s Global Assessment of Functioning test score was 50, an indication he had very serious problems. M.T. was delayed in all areas and was not receiving intervention for his needs.

² The court did not find true the allegations that the mother was neglectful due to father’s failure to adequately protect M.T. and J.T.

The foster mother described M.T. as well behaved, although she has to constantly watch him because he opens the door and runs away. The foster mother installed a lock on the door to prevent M.T. from running away. According to the foster mother, M.T. does not play with other children but stands nearby and watches them play. M.T. is nonverbal with a very limited vocabulary.

The foster mother described J.T. as well behaved, although at times he can be aggressive and possessive. J.T. also does not play with other children. J.T. will intentionally break toys. The foster mother explained that she was not interested in keeping the children permanently but was willing to care for them until an adoptive home became available. The children did cry after their visits with their parents were over.

The agency submitted an adoption assessment for the children. Although the children had some developmental delays, it was determined that they were both adoptable. There was a relative being assessed for placement who was interested in adopting M.T. and J.T. The agency submitted a report recommending that J.H. and A.H. be placed in a legal guardianship with their aunt. The agency also recommended that no services be provided to the parents as to M.T. and J.T. pursuant to section 361.5, subdivision (b)(10).

At the disposition hearing on December 7, 2011, the parties presented no further evidence. The parents agreed to a guardianship being placed on J.H. and A.H. and waived reunification services as to those children. The court ordered a guardianship for J.H. and A.H. and made a finding that section 361.5, subdivision (b)(10) was applicable to M.T. and J.T. The court found the parents had not made reasonable efforts to treat their problems and that reunification was not in the children's best interests. The court set the matter for a section 366.26 hearing.

Section 366.26 Termination Hearing

The agency's report for the termination hearing noted that the children had been placed in the home of their prospective adoptive parents, the aunt and uncle who had

adopted some of their other siblings. A psychological examination of M.T. had been completed in addition to his assessment by CVRC that showed M.T. suffered from deficits in social interactions, play, and communication. M.T. was diagnosed with autistic disorder. He also had cognitive and adaptive functioning in the “significantly delayed range.” J.T. also had delays in cognitive, expressive, and receptive language and fine motor domains. He was eligible for Early Start services through CRVC.

The parents consistently kept their visits twice a week for one hour. Father missed one visit due to illness. The visits appeared to go well overall. The children smiled upon seeing their parents and had difficult transitions when the parents left. During a visit in late December 2011, father did not initiate any contact with either child. During a visit in early February 2012, the mother was hesitant to change M.T.’s diaper. M.T. did not interact with father during this visit. During a visit later in February 2012, the parents met the children at a park for J.T.’s birthday. J.T. kept trying to run toward the road. When the parents retrieved him, he became upset and screamed. This occurred several times. The caretaker took J.T. to the car where he calmed down. When J.T. returned and saw his mother, he ran back toward the road again. The parents were unable to control or redirect J.T.’s behavior.

During a visit at the end of February 2012, M.T. was watching a movie and did not pay attention to his parents. J.T. took a stuffed giraffe from M.T. The parents told J.T. he needed to share. J.T. became upset, knocked over a play table, and hid behind a chair. The parents failed to redirect J.T. The children were very happy to see their caretaker at the end of the visit. The caretaker told the social worker that she has a difficult time getting J.T. to come to the visits.

The social worker noted that at the time of M.T.’s removal, the parents had not yet enrolled him into school. J.T. had begun to vocalize more and was trying to imitate sounds. While the children recognize their parents by smiling and initiating physical contact during visits, they spend much of the visiting time watching movies. When given

the opportunity to visit with the children in a park, the parents were unable to manage J.T.'s behavior. The children have significant delays. Even so, the relative caregivers are willing to adopt them because they both have good physical health.

The social worker recommended termination of court ordered visits and that any further visitation should be at the discretion of the agency or the caregivers. The social worker recommended that the parental rights of both parents be terminated.

On April 2, 2012, father filed a petition pursuant to section 388 to change the court's order denying him reunification services. Father attached a photograph of him holding the children and a certificate indicating that he had completed a parenting course. Father stated in the petition that he had attended IEP meetings, completed an online parenting course, enrolled in parenting classes, and maintained a relationship with his children through regular and consistent visitation. Father stated that the changes he was requesting would better his children's lives because the children had resided with him their entire lives and know father and the mother as their parents. Father sought the return of his children, or alternatively, to be offered reunification services.

The section 366.26 hearing was conducted on April 12, 2012. The court found that father had not made a sufficient showing of a change of circumstance or shown that it would be in the best interests of the children to modify the court's prior orders. The court denied father's section 388 petition.

The mother testified that she was still very close to M.T. She clothed and fed him and he would constantly hug her. The mother visited the children twice a week for one hour since they were detained. The mother stated that in a typical visit she played with J.T. first because he was always so excited to see her. Most of the visits occurred at the agency. The mother explained that she only had difficulty controlling J.T. during the birthday visit at the park because the visit was more emotional for him. The mother felt she had a bond with J.T.

Father's counsel argued that continued contact with the parents would be in the children's best interests and requested the court not to terminate parental rights. The court noted that in determining whether to terminate parental rights, it had to look to the relationship between the parents and the children and determine if severing that relationship would deprive the children of a substantial, positive emotional attachment such that the children would be greatly harmed.

The court found that although the parents clearly love the children, the evidence before the court led it to conclude that a new and secure long-term placement outweighed any benefit to continuing the parent-child relationship. The court found the children would not be greatly harmed by terminating the parental relationship and terminated the parental rights of both parents.

DISCUSSION

Section 388 Petition

Father contends the court erred in summarily denying his section 388 petition without conducting a full hearing because he made a prima facie showing that his circumstances had changed. We disagree.

A parent may petition the juvenile court to vacate or modify a previous order on grounds of change of circumstance or new evidence. (§ 388, subd. (a).) The parent must also show that the proposed change would promote the best interests of the child. (§ 388, subd. (d); Cal. Rules of Court, rule 5.570; *In re Stephanie M.* (1994) 7 Cal.4th 295, 317 (*Stephanie M.*))

A court must liberally construe such a petition in favor of its sufficiency. (*In re Marilyn H.* (1993) 5 Cal.4th 295, 309 (*Marilyn H.*)) Section 388 requires, however, that a petitioner make a prima facie showing of both elements to trigger an evidentiary hearing on the petition. (*In re Zachary G.* (1999) 77 Cal.App.4th 799, 806; see also *Marilyn H.*, at p. 310.) For instance, if a parent makes a prima facie showing of changed circumstances or new evidence sufficient to satisfy the first prong under section 388, a

court may deny a section 388 petition without an evidentiary hearing if the parent does not make a prima facie showing that the relief sought would promote the child's best interests. (*In re Justice P.* (2004) 123 Cal.App.4th 181, 189.)

A prima facie showing refers to those facts that will sustain a favorable decision if the evidence submitted in support of the petitioner's allegations is credited. (*In re Edward H.* (1996) 43 Cal.App.4th 584, 593.) Consequently, section 388 petitions with general, conclusory allegations do not suffice. Otherwise, the decision to grant a hearing on a section 388 petition would be nothing more than a pointless formality. (*In re Edward H.*, at p. 593.) To obtain a hearing, successful petitions include declarations, certificates or other attachments, which demonstrate the showing the petitioner will make. (*In re Anthony W.* (2001) 87 Cal.App.4th 246, 250-251.)

The petition executed by father failed to make a prima facie showing of either changed circumstances or the children's best interests. At most, it included a single family photograph and certificate supporting the petition's claim that father completed an online parenting course. This course was not completed until approximately four months after the children had been detained. Although the petition alleged that father had enrolled in additional parenting classes, there was no indication that he had completed a single class, much less an entire additional course. Father's allegations of changed circumstances were otherwise conclusory.³

Father ignores the law regarding what constitutes a prima facie showing. He cites *In re Hashem H.* (1996) 45 Cal.App.4th 1791, 1799 (*Hashem H.*) for the basic proposition that a section 388 petition must be liberally construed. In *Hashem H.*, the

³ A showing of changing, rather than changed circumstances, is insufficient to warrant a hearing on a section 388 petition. (*In re Carl R.* (2005) 128 Cal.App.4th 1051, 1072.) Even if father's allegations in the petition could be construed as changing circumstances, his allegations do not arise to changed circumstances.

petitioning parent described her continuous participation in therapy and attached her therapist's letter describing the parent's progress in therapy and ability to care for her child. (*Hashem, H.*, at p. 1796.) The trial court, however, denied her a hearing. In reversing the denial, the *Hashem H.* court observed the therapist's letter demonstrated the availability of admissible evidence of changed circumstances. (*Id.* at p. 1799.) Here, in contrast to *Hashem H.*, there was no therapist letter or other evidence to demonstrate the availability of admissible evidence in support of the petition's allegations of changed circumstances.

The petition failed to take into account the children's interests on the eve of the section 366.26 hearing. Once reunification efforts have been terminated, the child's interest in stability and permanency is a juvenile court's primary concern, outweighing a parent's interest in reunification. (*Marilyn H., supra*, 5 Cal.4th at p. 309.) Children have a fundamental independent interest in belonging to a family unit and they have compelling rights to be protected from abuse and neglect and to have a placement that is stable, permanent, and that allows the caretaker to make a full emotional commitment to the child. (*Id.* at p. 306.) Here, there was no showing that reopening reunification services for father would advance the children's interest in stability. The juvenile court did not err in failing to conduct a hearing on father's section 388 petition.

Parental Benefit Exception

Father argues that because of the close relationship he had to his children, the parental benefit exception to termination of parental rights (§ 366.26, subd. (c)(1)(B)(i)) should have been applied in this case because terminating his parental rights would be detrimental to the children. Father argues the juvenile court impliedly found beneficial parent-child relationships with the children. Father maintains that the only reasonable inference from the evidence was that the children would be greatly harmed if his relationship with them ended and the juvenile court abused its discretion in failing to apply the beneficial parent-child relationship exception.

Appellate courts have interpreted the phrase “benefit from continuing the relationship” to refer to a parent-child relationship that promotes the well-being of the child to such an extent as to outweigh the benefits the child would gain in a permanent home with adoptive parents. Courts balance the strength and quality of the natural parent-child relationship against the security and sense of belonging the new family would provide. If severing the natural parent-child relationship would deprive the child of a substantial, positive emotional attachment so that the child would be greatly harmed, only then is the preference for adoption overcome and the parents’ rights are not terminated. (*In re L.Y.L.* (2002) 101 Cal.App.4th 942, 953-954 (*L.Y.L.*); *In re Autumn H.* (1994) 27 Cal.App.4th 567, 575.)

To meet the burden of proof for this exception, the parent must show more than frequent and loving contact or pleasant visits. (*L.Y.L.*, *supra*, 101 Cal.App.4th at pp. 953-954.) The relationship arises from day-to-day interaction, companionship, and shared experiences. The parent must show he or she occupies a parental role in the child’s life that results in a significant, positive emotional attachment from child to parent. (*Id.* at p. 954.) We review the juvenile court’s findings concerning the parental benefit exception under the deferential abuse of discretion standard. (*In re Aaliyah R.* (2006) 136 Cal.App.4th 437, 449; *In re Jasmine D.* (2000) 78 Cal.App.4th 1339, 1351.)

Where the issue on appeal turns on a failure of proof, the question for a reviewing court is whether the evidence compels a finding in favor of the appellant as a matter of law. The issue is whether the appellant’s evidence was uncontradicted, unimpeached, and of such weight as to leave no room for a judicial determination that it was insufficient to support a finding. (*In re Bailey J.* (2010) 189 Cal.App.4th 1308, 1314; *In re I.W.* (2009) 180 Cal.App.4th 1517, 1528 (*I.W.*.)

We review the record in the light most favorable to the judgment. (*In re Misako R.* (1991) 2 Cal.App.4th 538, 545.) When a court rejects a detriment claim and terminates parental rights, the appellate issue is whether the juvenile court abused its

discretion in so doing. (*In re Jasmine D.*, *supra*, 78 Cal.App.4th at p. 1351.) To conclude there was an abuse of discretion, the proof offered must be uncontradicted and unimpeached so that discretion could be exercised in only one way, compelling a finding in the appellant's favor as a matter of law. (*Roesch v. De Mota* (1944) 24 Cal.2d 563, 570-571; *I.W.*, *supra*, 180 Cal.App.4th at p. 1528.)

Father claims he made a compelling showing that he visited the children, they still loved him, and "there was no compelling reason to find that termination of [his] parental rights would be detrimental to the children." In father's view, his maintenance of true parent-child relationships with both children warranted a finding that termination would be detrimental. Father relies on his reading of *In re S.B.* (2008) 164 Cal.App.4th 289 (*S.B.*) and *In re Amber M.* (2002) 103 Cal.App.4th 681 (*Amber M.*) to support his claim. We are neither factually nor legally persuaded by father's argument.

Father made few efforts to correct the problems which led to the children's removal, despite the court's order denying him services. He waited over four months to take and complete an internet parenting course and then enrolled in new courses on the eve of the termination hearing. Although father consistently kept his schedule of two hourly visitations per week, missing only one visit due to illness, there was testimony that the children did not always interact with him. The children would watch movies rather than do things with father. Both parents struggled to control J.T.'s behavior when they visited him at a local park. The children were very happy to see their caregiver at the end of the visit. The caretaker told the social worker that she had a difficult time getting J.T. to come to the visits.

As respondent points out, father and the mother did nothing to help M.T. with his diagnosis of autism. M.T. turned six years old during these proceedings and only spoke a handful of words. The parents were aware of this diagnosis prior to M.T.'s dependency because they informed the social worker of his diagnosis at the beginning of the dependency proceedings. The parents failed to enroll M.T. into school. Both children

were found in a filthy condition and both children suffered significant developmental delays. We agree with respondent that father's inability to control J.T., to seek help for M.T.'s autism, and both children's developmental delays show that father's relationship with his children was not beneficial. We therefore reject father's argument that the juvenile court impliedly found that he had a beneficial parent-child relationship with the children.

Neither *S.B.*, nor *Amber M.*, stand for the proposition that a parent's effort to reunify coupled with regular, pleasant, and affectionate visits, compels a finding that termination would be detrimental to the child. The appellate court, in both cases, did mention the parent's effort as evidence of his or her devotion to the children. (*S.B.*, *supra*, 164 Cal.App.4th at p. 300; *Amber M.*, *supra*, 103 Cal.App.4th at p. 690.) The parent's effort and devotion, however, was not the linchpin to either decision. Notably, in both cases, there was uncontroverted third-party evidence, including expert opinion, of a strong attachment between the parent and the children and the potential for harm to the children. (*S.B.*, *supra*, 164 Cal.App.4th at pp. 295-296; *Amber M.*, *supra*, 103 Cal.App.4th at pp. 689-690.) In this case, father presented no such evidence.

As the juvenile court observed, there is little doubt father loves his children. The parent-child relationship, however, must arise from day-to-day interaction, companionship, and shared experiences. The parent must show he or she occupies a parental role in the child's life that results in a significant, positive emotional attachment from child to parent. A parent must also seek help for a child with a condition like autism rather than to ignore it.

Father failed to demonstrate at the section 366.26 hearing that he occupied a true parental role with his children that resulted in a significant, positive emotional attachment of the children to him. Father failed to show that the juvenile court abused its discretion in rejecting the application of the parental benefit exception to his case. The juvenile

court did not err in failing to apply the parental benefit exception to this case or in terminating father's parental rights.

DISPOSITION

The court's orders denying father's petition pursuant to Welfare and Institutions Code section 388 and terminating his parental rights pursuant to Welfare and Institutions Code section 366.26 are affirmed.