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

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

KERN COUNTY DEPARTMENT OF HUMAN
SERVICES,

Plaintiff and Respondent,

v.

M.V.,

Defendant and Appellant.

F068813

(Super. Ct. No. JD128558-01)

OPINION

THE COURT*

APPEAL from orders of the Superior Court of Kern County. Louis L. Vega,
Judge.

Monica Vogelmann, under appointment by the Court of Appeal, for Defendant
and Appellant.

Theresa A. Goldner, County Counsel, Elizabeth M. Giesick, Deputy County
Counsel, for Plaintiff and Respondent.

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* Before Hill, P. J., Cornell, J. and Franson, J.

M.V. (father)¹ appeals juvenile court orders summarily denying his petition for modification under Welfare and Institutions Code, section 388² and terminating his parental rights to his daughter L.C. (minor) under section 366.26. Father contends the court abused its discretion in summarily denying his modification petition. Alternatively, he contends his counsel was ineffective in bringing the petition. Father also claims the court erred in declining to apply the beneficial parent-child relationship exception to termination of parental rights. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

In April 2012, the three-year-old minor and her younger half-sister were taken into protective custody after their mother E.H. (mother), a methamphetamine-user, abandoned them for several days with a babysitter. The babysitter eventually brought the children to the sheriff's substation, explaining she had been unable to contact mother.³

The Kern County Department of Human Services (department) filed a petition in the juvenile court under section 300, subdivision (b), alleging that the minor was at a substantial risk of harm due to mother's methamphetamine use and mother's behavior in repeatedly leaving the minor with others for days at a time without supplies or means of contacting mother. The court detained the minor in a foster home with her half-sister.

At the jurisdiction and disposition hearings, the court sustained the allegations of the petition, declared the minor a dependent and removed her from mother's custody. Father, with whom the minor was placed in June 2012, was declared the minor's presumed father and ordered family maintenance services. Reunification services and supervised visits were ordered for mother.

¹ In this opinion, certain persons are identified by initials or by status in accordance with our Supreme Court's policy regarding protective nondisclosure. No disrespect is intended.

² All further statutory references are to the Welfare and Institutions Code.

³ Mother and the minor's half-sister are not subjects of this appeal.

In August 2012, the minor was again taken into protective custody and placed in the foster home with her half-sister. The department filed petitions under sections 342 and 387, alleging the minor was at substantial risk of harm due to father's inability to protect her from family violence in the home. The petitions contained the following supporting facts:

“On August 16, 2012, the parents, [father], and [mother], were involved in a violent altercation at the EZ 8 Motel The mother and father became involved in a ‘wrestling match’ over a cellular telephone on the balcony of their room while the child was in the room. [Father] grabbed the mother by the throat and when she did not release the telephone, he struck her four times in the face with a closed fist. Later when she was pounding on the motel door to get inside, [father] opened the door and grabbed her by the throat. The mother slapped him on the face and he raised his right arm and clinched his right fist at which time the child attempted to intervene. [Father] struck the child in the face with the back of his opened left hand. [Father] picked the mother up by the throat and slammed her face on top of the bed and struck her four times with a closed fist in the back of the head. The child was present during the altercation. The mother attempted to grab the child and [father] struck the mother again with a closed fist in the face. [Father] then fled with the child.”

The petitions further alleged that the minor was at a substantial risk of harm due to father's failure to protect her from the actions of mother. Since June 16, 2012, mother had been staying in father's home and caring for the minor at least three times a week. Finally, the petitions alleged the minor had been left without provisions for support because father failed to make appropriate arrangements for the minor's care before becoming incarcerated.

At the continued jurisdiction/disposition hearing in November 2012, the court sustained the petitions, removed the minor from father's custody, and ordered reunification services and supervised visits for father. The court ordered father to participate in counseling for substance abuse, failure to protect, and domestic violence as a perpetrator and to submit to random drug testing.

In its social study for the 12-month review hearing, the department recommended the court terminate reunification services to father. The department reported that father had been incarcerated since his arrest in August 2012, and received a three-year sentence in April 2013. It was therefore unlikely father would be able to complete his case plan in the next six months. Although father completed a parenting and neglect program and participated in substance abuse counseling and domestic violence classes while incarcerated, he did not have access—and would not have access until his release—to court-approved programs necessary to complete the failure-to-protect and domestic-violence-as-perpetrator counseling components of his case plan. The department was also unable to conduct random drug tests of father while he was incarcerated.

The social study reflected that during his incarceration father had regularly participated in monthly supervised visits with the minor. The visits were enjoyable for both father and the minor. Father would read and play games with the minor. Although the department considered the visits to be of adequate quality, it observed father would sometimes make promises to the minor about when he would be released and join her at home. The minor's caretakers reported that after visits with father, the minor's tantrum behaviors would increase and she would have incidents of encopresis and enuresis.

In a supplemental social study written on June 20, 2013, the department reported that father was released from the Lerdo Detentional Facility (Lerdo) on April 28, 2013, and remained on an ankle monitor. On May 8, 2013, father tested positive for methamphetamine. Additionally, father had failed to enroll in a program for domestic violence as a perpetrator, which was a 52-week course, or a program for failure to protect, which was a 26-week course. Attached to the social study was a letter advising father his failure to enroll in a 52-week program within 30 days of his release could result in forfeiture of credit he received for 17 weeks based on his participation in a domestic violence program while incarcerated.

At the 12-month review hearing on June 27, 2013, the court terminated reunification services to father and set a section 366.26 hearing in October 2013. In its social study for the section 336.26 hearing, the department reported that the minor's prospective adoptive parents were committed to adopting the minor and had adopted her half-sister in September 2013. When the minor was placed in their home in August 2012, she displayed some defiance and aggression towards her sister. But the minor's negative behaviors "greatly reduced" after mental health services were initiated and prison visits with father stopped.

The adoption social worker was of the opinion that the benefits of adoption and maintaining the minor's relationship with her sister outweighed any potential negative consequences from termination of father's parental rights. Although father consistently visited the minor, the visits were pleasant, and the minor had some degree of attachment to him, the minor had also developed an attachment to her prospective adoptive parents and relied on them to meet her daily physical and emotional needs.

When the adoption social worker spoke with the minor in August 2013, it was unclear the extent to which the minor understood the meaning of adoption. The minor indicated she liked living with her prospective adoptive parents. She also liked her half-sister and the parents of her prospective adoptive parents, whom she regarded as grandparents. But then she told the social worker she loved father and wanted to live with him, and father had told her she would soon be coming home with him. The social worker asked the minor where she would want to live if she could live anywhere in the whole world. The minor replied, "If I stay here it's okay, and if I stay with my dad it's okay."

Father appeared at the section 366.26 hearing in October 2013 with a new counsel retained to replace his court-appointed counsel. The court granted father's request for a continuance and set a new hearing date of November 18, 2013.

Father's counsel indicated that if he were to file a section 388 petition for modification, he would do so by November 1, 2013. The parties agreed this was an acceptable deadline for filing a modification petition.

On November 15, 2013, father filed a section 388 petition for modification, seeking to have the minor returned to his custody. At the continued section 366.26 hearing on November 18, 2013, the modification petition was located and reviewed by the court, as well as by counsel for the minor and the department, who had not yet received copies of the petition. After considering the arguments of counsel, the court denied the petition without an evidentiary hearing, finding father had failed to make a prima facie showing of changed circumstances.

The matter then proceeded to the section 366.26 hearing. Father testified that although he was "in and out" of incarceration during the beginning stages of the minor's life, he and the minor had a "strong bond." Father explained that after the minor was born, she came home with him and he raised her until he was incarcerated and she went to live with other relatives. In the last three months since his release from Lerdo, he had not missed one visit with the minor. During the visits, the minor was "ecstatic" and she would tell him details from her life she saved during the week to share only with him. During the two-hour visits, father would interact with the minor and they would engage in many activities, including coloring, playing, and talking.

On cross-examination, father testified that between the times the minor was born in May 2009 and when she first came back into his life in April 2012, he was in custody twice for a total of 16 months.

After considering the evidence and listening to the arguments of counsel, the court terminated parental rights and freed the minor for adoption. The court explained:

"This is a child that presented significant issues to the caretakers. And they have supported this child's need for therapy and to where the child is stable.

[¶] ...[O]ne of the questions posed to this minor by the adoption social worker was if you could live anywhere in the world, where would that be? And she apparently is reported to have said, if I stay here, it's okay. If I stay with my dad, it's okay. So this is a stable placement. She's with a family that is committed to adoption. She is adoptable. [¶] At best, the father's position is changing. [¶] And as to the mother, that would be the best characterization we could put to her situation So there's no applicable exception the court can find for proceeding with the recommendations that have been submitted by the department to at this time free this child up for adoption.”

DISCUSSION

I. Section 388 Modification Petition

Father contends he made a sufficient prima facie showing to support an evidentiary hearing on his section 388 petition for modification and therefore the juvenile court abused its discretion in denying the petition without a hearing. Alternatively, he claims his counsel was ineffective in failing to file a timely petition and in failing to include documentation of the “numerous amount of classes and certificates” he had completed.⁴

A. Applicable Legal Principles

A party may petition the court under section 388 to change, modify or set aside a previous court order. The petitioning party has the burden of showing, by a preponderance of the evidence, that (1) there is a change of circumstances or new evidence, and (2) the proposed change is in the child's best interests. (§ 388; *In re Jasmon O.* (1994) 8 Cal.4th 398, 415; *In re Casey D.* (1999) 70 Cal.App.4th 38, 47.) The petition “must be liberally construed in favor of its sufficiency.” (Cal. Rules of Court, rule 5.570(a); *In re Marilyn H.* (1993) 5 Cal.4th 295, 309.) “The parent need only make a

⁴ Father's quotation is from the November 18, 2013 hearing. In explaining why he filed late the section 388 modification petition, father's counsel stated: “My client has had a numerous amount of classes and certificates he's completed, and we needed to gather all that information before we filed our motion.”

prima facie showing to trigger the right to proceed by way of a full hearing.” (*In re Marilyn H.*, at p. 310.) “[I]f the petition presents any evidence that a hearing would promote the best interests of the child, the court will order the hearing.” [Citation.]” (*In re Jasmon O.*, at p. 415.) If, however, “the liberally construed allegations of the petition do not make a prima facie showing of changed circumstances and that the proposed change would promote the best interests of the child, the court need not order a hearing on the petition. [Citations.] The prima facie requirement is not met unless the facts alleged, if supported by evidence given credit at the hearing, would sustain a favorable decision on the petition.” (*In re Zachary G.* (1999) 77 Cal.App.4th 799, 806.) In determining whether the petition makes the necessary showing, the court may consider the entire factual and procedural history of the case. (*In re Justice P.* (2004) 123 Cal.App.4th 181, 188-189.)

B. Analysis

Here, the modification petition alleged father’s circumstances had changed because, since the last order was made, he had completed 17 parenting classes and had tested negative on all his drug screenings. Father’s counsel also presented the court with two certificates at the November 18, 2013 hearing. Copies of these certificates were not attached to the petition but, based on the comments of the court and counsel during the hearing, they appear to have been the same certificates attached to the department’s supplemental social study for the 12-month review hearing, reflecting father had completed during his incarceration 108 hours of parenting and neglect education and 72 hours of substance abuse education. In addition, father’s counsel informed the court that father was currently enrolled in a 52-week domestic violence program and the program had given father credit for the classes he took while incarcerated. The court stated: “Accepting what has been submitted on face value, if best, it would indicate a changing circumstances, not changed.”

The court did not abuse its discretion in finding father failed to make a prima facie showing of a change in circumstances because father's modification petition and supporting facts showed at most his circumstances were "changing," but had not changed. (*In re Casey D.*, *supra*, 70 Cal.App.4th at p. 47.) Father asserts the allegation he had tested negative on all his drug screenings was a "significant change" from the last hearing when he was reported to have a positive test for methamphetamine after his release from Lerdo. But "[n]ot every change in circumstance can justify modification of a prior order." (*In re A.A.* (2012) 203 Cal.App.4th 597, 612.) Instead, "the problem that initially brought the child within the dependency system must be removed or ameliorated." (*Ibid.*; *In re B.D.* (2008) 159 Cal.App.4th 1218, 1230.) In the instant case, the minor was removed from father's custody due to his participation in domestic violence and failure to protect the minor from mother. When he presented his modification petition seeking return of the minor to his custody, father was "almost halfway" through the required 52-week program for domestic violence and he made no claim to have enrolled in the required failure-to-protect program. Thus, father failed to make a prima facie showing he had changed the circumstances that prevented him from reunifying with the minor and resulted in the termination of his reunification services. (See *In re A.A.*, at p. 612 [incarcerated mother did not show changed circumstances where, despite completing various services and programs, she was still serving a prison sentence]; *In re Kimberly F.* (1997) 56 Cal.App.4th 519, 532 [in evaluating changed circumstances, one criterion court should consider is seriousness of problem that led to dependency and reason for continuation of that problem].)

In any event, father failed to make a prima facie showing that returning the minor to his custody would serve the minor's best interests. Although the minor loved father, enjoyed visits with him, and occasionally expressed a desire to live with him, "[t]he presumption favoring natural parents by itself does not satisfy the best interests prong of

section 388.” (*In re Justice P.*, *supra*, 123 Cal.App.4th at p. 192.) Father’s frequent absences due to incarceration caused uncertainty and instability in the minor’s life. The minor was happy and stable in the home of caregivers who were committed to adopting her and who had already adopted her half-sister. Where, as here, reunification services have been terminated, a parent’s “interest in the care, custody and companionship of the child [is] 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.” (*In re Stephanie M.* (1994) 7 Cal.4th 295, 317; *In re C.J.W.* (2007) 157 Cal.App.4th 1075, 1081 [summary denial of section 388 petition was proper where there was no showing of how the children’s best interests would be served by depriving them of a permanent stable home in exchange for an uncertain future].) The proper focus of this case was the minor’s need for stability, continuity and permanency, regardless of father’s interest in reunification. (*In re Stephanie M.*, at pp. 317-318; *In re Brittany K.* (2005) 127 Cal.App.4th 1497, 1507.)

Because the liberally construed allegations of the petition and supporting facts he presented would not have sustained a favorable decision on the section 388 petition, father was not entitled to an evidentiary hearing. (*In re Zachary G.*, *supra*, 77 Cal.App.4th at p. 808; *In re Mary G.* (2007) 151 Cal.App.4th 184, 205-206.)

We also reject father’s claim his statutory right to competent counsel (§ 317.5, subd. (a)) was violated by his retained counsel’s failure to file a timely section 388 modification petition and supporting certificates.⁵ To prevail on a claim of ineffective assistance of counsel in this context, a parent must establish “[1] that counsel failed to act

⁵ Because father’s ineffective assistance of counsel claim is easily resolved on the merits, we find it unnecessary to address the department’s argument that father forfeited the claim by relinquishing his right to court-appointed counsel and privately retaining counsel.

in a manner to be expected of reasonably competent attorneys practicing in the field of juvenile dependency law” and “[2] the claimed error was prejudicial.” (*In re Kristin H.* (1996) 46 Cal.App.4th 1635, 1667-1668.) Father’s claim fails because he cannot demonstrate prejudice; i.e. “that it is ‘reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error.’ [Citation.]” (*In re Kristin H.*, at p. 1668.)

Although the juvenile court expressed irritation with father’s counsel for filing late the modification petition, there is no indication the late filing had any effect on the court’s ruling or that the court would have rendered a more favorable ruling had the petition been filed two weeks earlier. Nor has father demonstrated a reasonable probability of a more favorable ruling had his counsel attached copies of all the certificates he had received from programs he had completed while incarcerated. It was undisputed father had completed numerous hours of parenting and neglect education. This was not a new or changed circumstance but one that was before the court at the time of the 12-month review hearing when the court terminated father’s reunification services. As already discussed, he presented no allegation or evidence that he had changed the main circumstances leading to the minor’s removal from his custody or that returning the minor to his custody would be in the child’s best interests.

II. Beneficial Parent-child Relationship Exception

Father challenges the sufficiency of the evidence to support the juvenile court’s finding the beneficial parent-child relationship exception did not apply to preclude termination of his parental rights. He asserts that despite the obstacles of his incarceration, he maintained regular and consistent contact with the minor. He also stresses that he occupied a parental role in the minor’s life and formed a bond with her before dependency proceedings were initiated and did not just start visiting her afterwards as in many cases.

A. *Applicable Legal Principles*

The purpose of a section 366.26 hearing is to select and implement a permanent plan for the dependent child. (*In re S.B.* (2009) 46 Cal.4th 529, 532.) The Legislature’s preferred permanent plan is adoption. (*In re D.M.* (2012) 205 Cal.App.4th 283, 290.) “At a section 366.26 hearing, the court must terminate parental rights and free the child for adoption if [1] it determines by clear and convincing evidence the child is adoptable within a reasonable time, and [2] the parents have not shown that termination of parental rights would be detrimental to the child under any of the statutory exceptions to adoption found in section 366.26, subdivision (c)(1)(B)(i) through (vi). (§ 366.26, subd. (c)(1).)” (*In re D.M.*, *supra*, 205 Cal.App.4th at p. 290.)

To avoid termination of parental rights under the beneficial parent-child relationship exception, the juvenile court must find “a compelling reason for determining that termination would be detrimental to the child due to [the circumstance that the] parents have maintained regular visitation and contact with the child and the child would benefit from continuing the relationship.” (§ 366.26, subd. (c)(1)(B)(i).) It is the parent’s burden to prove the exception applies. (*In re Autumn H.* (1994) 27 Cal.App.4th 567, 574 (*Autumn H.*).

The Court of Appeal in *Autumn H.*, *supra*, defined a beneficial relationship as one that “promotes the well-being of the child to such a degree as to outweigh the well-being the child would gain in a permanent home with new, adoptive parents.” (27 Cal.App.4th at p. 575.) “[T]he court balances the strength and quality of the natural parent/child relationship in a tenuous placement against the security and the sense of belonging a new family would confer. If severing the natural parent/child relationship would deprive the child of a substantial, positive emotional attachment such that the child would be greatly harmed, the preference for adoption is overcome and the natural parent’s rights are not terminated.” (*Ibid.*)

A parent must show more than frequent and loving contact or pleasant visits for the exception to apply. (*In re C.F.* (2011) 193 Cal.App.4th 549, 555; *In re C.B.* (2010) 190 Cal.App.4th 102, 126; *In re I.W.* (2009) 180 Cal.App.4th 1517, 1527.) “The parent must show he or she occupies a parental role in the child’s life, resulting in a significant, positive, emotional attachment between child and parent. [Citations.] Further, to establish the section 366.26, subdivision (c)(1)(B)(i) exception the parent must show the child would suffer detriment if his or her relationship with the parent were terminated. [Citation.]” (*In re C.F., supra*, 193 Cal.App.4th at p. 555.)

There is a split of authority concerning the standard of review in this context. “Most courts have applied the substantial evidence standard” (*In re K.P.* (2012) 203 Cal.App.4th 614, 621), while “at least one court has concluded that it is properly reviewed for an abuse of discretion” (*ibid.*). A third approach “incorporates both ... standards” (*ibid.*), reviewing for substantial evidence “whether a beneficial parental ... relationship exists” (*id.* at p. 622), and for abuse of discretion “whether the existence of that relationship ... constitutes ‘a compelling reason for determining that termination would be detrimental to the child[]’” (*ibid.*). Under any of these approaches, the juvenile court here properly rejected the beneficial parent-child relationship exception and terminated father’s parental rights.

B. Analysis

The record shows father regularly visited the minor. However, he did not meet his burden of showing he had a beneficial parent-child relationship with the minor so as to overcome the legislative preference for adoption. Despite his assertions that he occupied a parental bond and formed a strong bond with the minor before she became a dependent of the juvenile court, the record shows father never parented the minor for any significant length of time but was, in his own words, “in and out” of incarceration since her birth and spent almost half of the first three years of the minor’s life in custody. Each time father

was incarcerated, he left the minor to rely on others to meet her daily needs, including mother, whose neglectful behavior resulted in the initiation of these dependency proceedings. After the minor was removed from mother's custody, she was only in father's care for a short period of time before he was once again incarcerated this time due to an incident of domestic violence involving physical abuse of not only mother but also the minor.

By the time of the section 366.26 hearing, the minor had spent over a year living with her prospective adoptive parents and her half-sister. The prospective adoptive parents met the minor's daily needs and facilitated mental health treatment leading to positive changes in the minor's behavior. Although there was evidence the minor enjoyed visiting with father, there was also evidence she would display an increase in negative behaviors after visits with him. And although the minor expressed that she loved and wished to reside with father, the record indicates she was equally attached to her prospective adoptive family and was "okay" living with either them or father. On this record, the juvenile court reasonably could find the minor's need for permanency outweighed the benefits she would derive from a continued relationship with father. The court did not err in declining to apply the beneficial parent-relationship exception to the termination of parental rights.

DISPOSITION

The orders denying father's section 388 petition and terminating parental rights are affirmed.