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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

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

KINGS COUNTY HUMAN SERVICES
AGENCY,

Plaintiff and Respondent,

v.

G.H.,

Defendant and Appellant.

F070419

(Super. Ct. No. 09JD0079)

OPINION

APPEAL from an order of the Superior Court of Kings County. Jennifer Giuliani,
Judge.

Gino de Solenni, under appointment by the Court of Appeal, for Defendant and
Appellant.

Colleen Carlson, County Counsel, and Risé A. Donlon, Deputy County Counsel,
for Plaintiff and Respondent.

G.H. (father) appeals from the juvenile court's order under Welfare and Institutions Code section 366.26¹ selecting a permanent plan of guardianship over termination of parental rights and adoption for his eight-year-old daughter, M.C.² Father contends: (1) the juvenile court abused its discretion in denying his petition under section 388 to reinstate reunification services; and (2) there was insufficient evidence to support the court's finding that it was likely M.C. would be adopted if parental rights were terminated. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

In June 2012, M.C. and five of her half-siblings (not subjects of this appeal) were taken into protective custody after father was arrested for committing domestic violence against his girlfriend and for violating parole.

In August 2012, the juvenile court exercised its dependency jurisdiction over M.C. (§ 300, subds. (b) & (g)), ordered her removed from parental custody, and granted father reunification services.³ Father's case plan required him to complete a domestic violence program, a parenting program, and an anger management program. Father was also required to complete a mental health assessment and follow the resulting recommendations.

In January 2013, father was arrested on a warrant for violating Penal Code section 71 (threatening a school officer/employee) and, in February 2013, was sentenced to a two-year prison term and incarcerated in Wasco State Prison. Father's reunification services were subsequently terminated at the 12-month review hearing in June 2013. The

¹ Further statutory references are to the Welfare and Institutions Code unless otherwise specified.

² In this opinion, certain persons are identified by initials, abbreviated names and/or by status in accordance with our Supreme Court's policy regarding protective nondisclosure. No disrespect is intended.

³ M.C.'s mother has not been involved in her life and was not offered reunification services.

juvenile court in turn set a section 366.26 hearing to select and implement a permanent plan for M.C.

At the first section 366.26 hearing, which occurred in November 2013, the juvenile court found that it was not likely M.C. would be adopted and selected a permanent plan of foster care with the permanency goal of independent living.

In June 2014, father filed a section 388 petition requesting that the juvenile court order family maintenance or reunification services on the ground that, since his release from prison, he had independently engaged services through the Kings View mental health clinic and was currently participating in programs required by his original case plan. Father further alleged that such order would benefit M.C. because his children had “indicated to social workers that they would like to maintain a relationship with their father.”

In August 2014, the Kings County Human Services Agency (the agency) filed a report recommending that the juvenile court deny father’s section 388 petition. The agency reported that M.C. currently resided in a foster home, where she had been placed in September 2013. Although M.C. initially had trouble following rules and understanding boundaries, the foster parents reported that she was now adjusting well in their home and they were considering adopting her and wanted to pursue a legal guardianship.

The agency further reported that, after his release from prison, father enrolled himself in Kings View in March 2014. But he did not start individual therapy until April 2014, and group classes until May 2014. Father was reportedly doing well in his anger management and parenting classes. However, he was not participating in any classes pertaining to domestic violence.

The report also detailed M.C.’s distress about the idea of being placed in father’s care. In April 2014, M.C. cried after her monthly supervised visit with father and told her foster parents she “didn’t want to go with her dad.” When the social worker spoke

privately with M.C., M.C. told the social worker she did not want to live with father and wanted to stay in her current placement. Father had apparently made statements during his visits that he was “working on getting all his children back.” M.C. wanted the social worker to tell father she did not want to live with him. The social worker asked M.C. to write father a letter and attached the letter to the report. In the letter, M.C. told father she did not want to go with him and wanted to stay at the house where she was currently placed.

Regarding M.C.’s current situation, the agency reported it was not in M.C.’s best interest to be returned to father. M.C. was in an appropriate placement that was meeting her needs. In June 2014, M.C. expressed her desire to be adopted by her current caregivers. When asked if she understood what that meant, M.C. “nodded yes and stated she is not going to live with her dad.” M.C. also indicated she understood she would no longer have visits with father. M.C. reportedly had a close bond and relationship with her foster parents, who wanted her to grow to be a loving and productive adult.

The agency noted that when M.C. entered into foster care, she suffered from trauma and displayed behavioral, social, and emotional issues, and that these had disrupted placements. But once father was incarcerated, M.C.’s issues began to dissipate and she became stabilized in her placement. Since father’s release, his monthly, one-hour supervised visits had confused M.C. into thinking she was going to be returned to him, which created anxiety for M.C. The visits had affected her emotional, psychological, and social well-being and threatened to disrupt the stability of her current placement.

Additionally, father had an extensive criminal history, including domestic violence. He also had a long history with the child welfare system. Dating back to 2001, father had 24 referrals to the agency and had previously had children in the child welfare system who had either been adopted or reunified with their mothers. Although father was receiving services from Kings View, he had not addressed the problems that led to the

initial removal of his children in that he was not receiving services to address his history of domestic violence.

The Section 366.26 Hearing

The second section 366.26 hearing commenced on October 7, 2014. Two clinicians and father's personal therapist from Kings View testified that father had been attending personal therapy sessions and had successfully completed his parenting and anger management classes.⁴

The clinician who taught the parenting class testified that, although the topic of domestic violence sometimes came up in class, she did not teach the effects of domestic violence on children. That subject was addressed in a different class and had never been part of the parenting class. The clinician who taught the anger management class testified that the anger management class was different from the domestic violence class.

Father's personal therapist from Kings View testified that he had seen father a total of seven times between April and October 2014. According to the therapist's testimony, father had a diagnosis of intermittent explosive disorder and expressive disorder, not otherwise specified, and that the typical length of treatment for the disorder was six months to one year. Father had missed four of his scheduled therapy sessions; he canceled one session and was a no-show for the other three. Of the seven sessions father had attended, two were cut short to around 15 or 20 minutes because one day he came late, and the other time, he came on the wrong day and the clinic "squeezed him in, for a check in."

The therapist further testified that, while there might be some overlap, taking the anger management class was not the same as taking the domestic violence class. The therapist explained:

⁴ Several of father's children testified at the hearing, but their testimony is not relevant to the issues father raises on appeal.

“Well, domestic violence typically involves some anger and loss of control so there would be a slight overlap; however, there can be quite a different dynamic in domestic violence. So some people are, for example, only violent with their partner. And, so that would be half of the group, just a general estimate, I would say half of the material might be overlapped and half of it might be a unique one to another.”

The section 366.26 hearing continued on November 8, 2014. Father testified, *inter alia*, that he did not inquire at Kings View about taking a domestic violence class but was willing to take one and would do so if the court reinstated reunification services. When asked if any part of his anger management class pertained to domestic violence, father testified: “I would say no. Maybe just like relationships period in the world. As far as one-on-one partnership I would say no.” Father also confirmed that he did not talk about domestic violence with his therapist, explaining: “I don’t have no domestic issues to talk about right now so we never talk about anything in the past or nothing that happened yesterday. That never came up.”

Although father admittedly pled guilty to inflicting corporal injury on a spouse or cohabitant in December 2012, he denied inflicting injury on anyone. According to father, “[i]t was a lie” and he only pled guilty to receive probation. Father confirmed he had two prior felony convictions for domestic violence in the 1990’s, but testified, “I’ve never done domestic violence counseling in my life.”

After listening to the witnesses’ testimony and arguments of counsel, the juvenile court denied father’s section 388 petition to reinstate reunification services, explaining:

“The recitation by counsel of what the law is with regard to the filing of a 388 petition is correct. The first requirement or the first prong to the test is that the Court must find there has been a change of circumstance or new evidence. Although there is a suggestion by [father’s counsel] that there has been changed circumstance, I don’t believe that the Court can make a finding that attending a 16-week parenting class and a 16-week anger management class results in a change of circumstances based upon the actual issue that the Court must review which is the looking at the

resolution of the issues that led to the children being removed and those being addressed.

“The children were removed because of domestic violence issues. Arguably he may not have been sent to prison with regard to domestic violence issues but that is the reason why the children were removed. He testified today there have been three felony arrests for domestic violence issues and convictions that have resulted from those domestic violence issues. Yet he has not completed any domestic violence classes. The suggestion by [father’s counsel] that the components of domestic violence were somehow addressed in the anger management class that was taken certainly is not persuasive to the Court. It was testified to by two of her witnesses that a domestic violence class is different from an anger management class. [The Kings View witnesses] indicated that those are two separate classes and although some of the things may overlap in those classes there is a specific issue with regard to the domestic violence class or specific issues related to the domestic violence class that are not addressed in the anger management class.

“I cannot find based upon the information that there has been a change of circumstance. I believe there is a changing circumstance. It is to be commended that [father] understands that when he was released from custody that he needed to take steps to bring himself back before the Court and find himself in a position where he could, in fact, address the Court as to the return of his children and/or the request for implementation of further reunification services. But based upon what the Court has before it, it cannot find there has been a change of circumstance.

“Even if I could, that would take me to the second prong and that is that the proposed change would promote the best interest of the children. Again, the Court would struggle with making that finding because the Court is required to determine how the change in court order would advance the children’s needs for permanency and stability. And the request for reunification services or returning the children home does not address the need for the children’s permanency and stability.

“I listened to the children testify ... and I believe there is no question in my mind that [father] loves his children and that all of his children love him very, very much. However, the difficult decision that the Court has to make is to not look at what the children actually want but it’s actually what is in the children’s best interest and that Supreme Court has been very clear that the issue of permanency and stability for the children is what is paramount when we get to this stage.

“...This time [father is] before the Court and his family reunification services have been terminated. So we find ourselves in a situation where his interests and the family interest to reunify are kind of divergent. The children have the right to have permanency and that is paramount, not [father’s] right to reunify with his children. That occurs at the time when family reunification services are terminated and the children are moved into sort of a permanent plan track based upon what the California law is. [¶] ... [¶]

“The Court is going to deny the [section 388 petition] based upon the fact I don’t believe there have been changed circumstances but there are changing circumstances which are sufficient at this time to warrant a modification to the Court’s order.... [¶] ... [¶]

“I will find that there has not been a change of circumstance. I will find that the best interest of the children is not promoted by the order requested in the ... Section 388 petition.”

DISCUSSION

I. Section 388 Petition

Any parent or other interested 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)(1).) The party bringing a section 388 petition has the burden to prove that the proposed change is in the best interests of the child. (*In re Stephanie M.* (1994) 7 Cal.4th 295, 317 (*Stephanie M.*))

After the termination of family reunification services, a parent’s interest in the care, custody, and companionship of her children 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.” (*Stephanie M., supra*, 7 Cal.4th at p. 317.) A court deciding a section 388 petition “at this stage of the proceedings must recognize this shift of focus in determining the ultimate question before it, that is, the best interests of the child.” (*Stephanie M.*, at p. 317.) Further, “[a] petition which alleges merely changing circumstances and would mean delaying the selection of a permanent home for a child to

see if a parent, who has repeatedly failed to reunify with the child, might be able to reunify at some future point, does not promote stability for the child or the child's best interests." (*In re Casey D.* (1999) 70 Cal.App.4th 38, 47.)

We review a juvenile court's decision on a section 388 petition for an abuse of discretion. (*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." (*Id.* at pp. 318–319.)

Contrary to his assertions on appeal, father did not show a genuine change of circumstances and therefore the juvenile court did not abuse its discretion in finding that father had only demonstrated changing circumstances. Although father completed the parenting and anger management components of his case plan, he failed to complete or enroll in a domestic violence program. This failure was significant because father's commission of domestic violence was the primary basis for M.C.'s dependency. Notwithstanding father's suggestion that the parenting and anger management classes sufficiently addressed his domestic violence issues, the evidence presented at the section 366.26 hearing, including father's own testimony, established they were distinctly separate programs.

Father also relies on *In re Kimberly F.* (1997) 56 Cal.App.4th 519 (*Kimberly F.*), in which the 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 which led to the dependency, and the reason for any continuation of that problem; (2) the strength of relative bonds between the dependent children to both parent and caretakers; and (3) the degree to which the problem may be easily removed or ameliorated, and the degree to which it actually has been." (*Kimberly F.*, at p. 532, italics omitted.)

The facts of this case are easily distinguishable from the facts of *Kimberly F.* First, in *Kimberly F.*, the court concluded that the reason for the dependency—a dirty home—“was not as serious as other, more typical reasons for dependency jurisdiction, such as ... illegal drug use” (*Kimberly F.*, *supra*, 56 Cal.App.4th at p. 522.) Here, the reasons for the dependency included serious domestic violence issues of which father remained in denial at the time of the hearing. Second, in *Kimberly F.*, the petitioning mother demonstrated an undisputedly strong bond with her children and also had a substantial amount of unmonitored visitation. (*Id.* at p. 532.) In this case, the evidence strongly indicated the *absence of a bond* between father and M.C. in that she repeatedly expressed that she did not want to live with father, including in a letter she wrote to him. Further, father did not have substantial or unmonitored visitation, seeing M.C. in supervised visitation only once a month. Moreover, M.C. exhibited emotional and behavioral issues after visits with father that threatened the stability of her current placement. Third, in *Kimberly F.*, the unsanitary conditions that led to removal had been eliminated, and the appellate court rejected the juvenile court’s other rationale for denying the mother’s section 388 motion—the mother’s alleged “narcissistic personality.” (*Kimberly F.*, at p. 533 [observing this was description of human personality, not mental illness].) Here, father failed to show the problems that led to M.C.’s dependency had been eliminated as he failed to participate and saw no need to participate in services addressing his longstanding issues with domestic violence.

Under all these circumstances, we cannot say the juvenile court abused its discretion in denying father’s section 388 petition, which sought reinstatement of family reunification services.

II. Adoptability Finding

Father’s other contention on appeal is that there was insufficient evidence to support the juvenile court’s finding that M.C. was likely to be adopted when it selected guardianship as her permanent plan but did not order termination of parental rights

pursuant to section 366.26, subdivision (c)(1)(B)(iv). We agree with the agency's argument that we need not reach this issue because father has failed to show he was aggrieved by the court's finding. (See *In re D.M.* (2012) 205 Cal.App.4th 283, 293–294 [“To be aggrieved, a party must have a *legally cognizable interest* that is injuriously affected by the court's decision. [Citation.] The injury must be immediate and substantial, and not nominal or remote.”].)

Section 366.26 provides, in relevant part:

“If the court determines..., by a clear and convincing standard, that it is likely the child will be adopted, the court shall terminate parental rights and order the child placed for adoption.... Under these circumstances, the court shall terminate parental rights unless either of the following applies: [¶] ... [¶]

“(B) 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: [¶] ... [¶]

“(iv) The child is living with a foster parent ... who is unable or unwilling to adopt the child because of exceptional circumstances, that do not include an unwillingness to accept legal or financial responsibility for the child, but who is willing and capable of providing the child with a stable and permanent environment and the removal of the child from the physical custody of his or her foster parent ... would be detrimental to the emotional well-being of the child.” (§ 366.26, subd. (c)(1)(B)(iv).)

Father complains that the agency did not present sufficient evidence concerning M.C.'s adoptability and therefore the juvenile court erred in finding that it was likely she would be adopted for purposes of applying the exception to termination of parental rights contained in subdivision (c)(1)(B)(iv) of section 366.26, set forth above. Father suggests but fails to explain exactly how a prior finding of a likelihood of adoption would prejudice him in subsequent proceedings, particularly where the juvenile court ultimately found that termination of parental rights would be detrimental and established legal guardianship as the permanent plan. Whether the court found M.C. likely was adoptable

in October 2014 will shed no light on whether she is likely to be adopted at some future date and has no effect on subsequent proceedings.

DISPOSITION

The order selecting legal guardianship as M.C.'s permanent plan is affirmed.

HILL, P.J.

WE CONCUR:

KANE, J.

SMITH, J.