Filed 3/28/12 In re Sarah M. CA2/1

**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

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| In re SARAH M., a Person Coming Under the Juvenile Court Law. | B235125<br>(Los Angeles County<br>Super. Ct. No. CK77957) |
| LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES,<br><br>Plaintiff and Respondent,<br><br>v.<br><br>JUAN C.,<br><br>Defendant and Appellant. | |

APPEAL from an order of the Superior Court of Los Angeles County. Stephen Marpet, Juvenile Court Referee. Affirmed.

William Hook, under appointment by the Court of Appeal, for Defendant and Appellant.

Andrea Sheridan Ordin, County Counsel, James M. Owens, Assistant County Counsel and Aileen Wong, Deputy County Counsel, for Plaintiff and Respondent.

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Juan C. appeals from an order of the juvenile court terminating his parental rights with respect to his daughter Sarah. He contends the court erred in summarily denying his petition seeking "presumed father" status and in refusing to hold a contested selection and implementation hearing to determine the application of the "parent-child relationship" exception to termination of parental rights. We find no merit to these contentions and affirm the order.

## FACTS AND PROCEEDINGS BELOW

Sarah, born in September 2006, was abandoned by her mother in June 2009.[1] In July 2009 the Department of Children and Family Services (DCFS) filed a petition alleging Sarah came within the juvenile court's jurisdiction because Mother left her with relatives without making plans for her care and supervision and because Mother recently used alcohol and marijuana while caring for Sarah. (Welf. & Inst. Code, § 300, subds. (b) and (g).)[2] The court ordered Sarah detained and placed with her maternal aunt where she has resided ever since. Later that month, DCFS initiated a search for Sarah's father. Based on information it received from Sarah's aunt, DCFS contacted Juan C. to determine if he was the father.

There is conflicting evidence as to whether Juan knew or should have known that he was Sarah's father before DCFS contacted him in October 2009. It is undisputed, however, that once he was contacted Juan agreed to a paternity test and stated that he and his family would like to develop a relationship with Sarah should the test confirm his paternity. Juan, now age 23, appeared at the jurisdictional hearing later that month. The court ordered a paternity test for Juan and found in the meantime that he was an "alleged father." The court found that Sarah was a dependent child of the court, could not safely be returned to the custody of her mother and continued her placement with her aunt. The court awarded monitored visits.

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1 The mother, who was 20 years old in 2009, is not a party to this appeal.

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

At the disposition hearing in December 2009, DCFS informed the court that the paternity test showed Juan was Sarah's father. Juan asked the court to recognize him as Sarah's "presumed father" but the court denied the request. Instead the court declared him Sarah's "biological alleged father." The court refused to order reunification services for Juan because it didn't believe that Juan "needs any services . . . ." but allowed Juan continued reasonable monitored visits.

Beginning in December 2009 Juan visited Sarah for an hour and a half once a week. These visits usually took place at the aunt's home but once a month the aunt and Sarah would meet Juan at a mall or playground or other mutually agreed location. The aunt reported the visits went well and Sarah felt comfortable visiting with her father.

On May 25, 2010, Juan filed a section 388 petition asking the court to grant him "presumed father" status based on his regular visits with Sarah since learning that he was her father and the "good relationship" between them. On May 28, 2010, the court denied the petition without a hearing on the grounds it did not present new evidence or a change of circumstances and did not show how the change would promote Sarah's best interests. Juan did not seek review of this order.

In June 2010, DCFS reported that Juan was visiting Sarah more frequently due to a change in his employment. Juan and Sarah often went on outings to the zoo, the park or the aquarium. Juan also called Sarah once or twice a week. DCFS also reported that Juan maintained frequent contacts with Sarah's assigned worker and that Sarah's visits with Juan were "going well" and Sarah "is becoming more comfortable with her father" and that she "enjoys spending time with [him]." The court ordered unmonitored day visits. On these visits Juan frequently took Sarah to his home where he lived with his mother, father and sisters.

In its next report on October 2010, the DCFS informed the court that Juan was visiting Sarah for three and a half hours on Mondays and all day on Saturdays. The Department also reported that Juan and Sarah's mother had "recently re-established a romantic relationship."

In October 2010, Juan and Sarah's mother went out on a date. Juan got drunk and he and mother got into a loud argument in front of the mother's home. Neighbors called the police. Juan was not arrested but a few days later he checked himself into the Dream Center, an alcohol treatment facility. As a result of this incident the DCFS filed an amended petition in November 2010 alleging Juan's abuse of alcohol.

In February 2011, the court conducted an 18-month review and a jurisdictional hearing on the amended petition involving Juan's alcoholism. At the hearing DCFS reported that Juan had not had any contact with Sarah from late October 2010, when he voluntarily checked into the Dream Center through late January 2011 when he voluntarily checked out. Father could have made telephone calls to Sarah from the Dream Center after he had been there for 30 days and could have called and visited her after he checked himself out in late January 2011. The DCFS worker reported that Sarah told her: "'My dad did not call me on Christmas'" and "got teary eyed." When the worker asked Juan why he stopped calling and visiting Sarah he replied: "'I don't really know why, but I just wasn't ready to call her. I guess I just wanted to work on my personal issues.'" The court sustained the petition as to Juan and set the matter for a selection and implementation hearing in June 2011.

In preparation for the June 2011 hearing, DCFS reported that Juan resumed his visits with Sarah for two hours a week. The DCFS worker observed that "Sarah enjoys playing by herself and with her caregivers. Sarah is a very social child and she frequently smiles and laughs." In contrast, the caregivers reported that when Juan visits "Sarah stays away from the father and there is little effort from the father to warm up to Sarah to build a bond between them." They added that Juan "does not know how to interact with Sara[h]." The DCFS report also stated that Sarah "has adjusted well and is thriving" in her placement with her maternal aunt and uncle whom she has known since birth and where she has been living since her mother abandoned her two years earlier. The aunt and uncle were reported to be "interested in permanency with [Sarah] and are pursuing adoption" and DCFS foresaw no impediment to their doing so. Finally, according to the

report, "The caretakers stated that even if they were awarded permanency, they would not keep Sara[h] away from her biological parents [and] are willing to allow Sarah to continue visiting her parents." Sarah and her caretakers are "strongly bonded," DCFS reported.

On June 8, 2011, Juan filed another section 388 petition. He asked the court to take the selection and implementation hearing off calendar, change his status from "biological" to "presumed" father and order family reunification services for him and Sarah. The court again denied the petition without a hearing on the grounds it failed to present new evidence or show a change of circumstance and failed to show the requested changes would be in Sarah's best interests.

At the June 2011 proceeding, the court denied Juan's request for a contested selection and implementation hearing on the ground "[h]e's an alleged father only [and] [h]is visits have been nothing more than monitored [therefore] there's just no way he can rise to the level of [the parent-child relationship] exception" to termination of parental rights. The court terminated Juan's parental rights and Juan filed a timely appeal.

## DISCUSSION

### I. THE COURT PROPERLY DENIED JUAN'S MODIFICATION PETITION

Juan contends that because his section 388 petition showed he was entitled to "presumed father" status and family reunification services the court erred in denying his petition without a hearing. We do not agree that the petition made out a prima facie case for elevating Juan's status to that of "presumed father."

A parent who petitions to modify a dependency court order under section 388 must show, by a preponderance of the evidence, both changed circumstances or new evidence *and* that the modification would be in the child's best interest.[3]

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[3] Section 388, subdivision (a) provides, in pertinent part, "Any parent or other person having an interest in a child who is a dependent child of the juvenile court . . . may, upon grounds of change of circumstance or new evidence, petition the court . . . to change, modify, or set aside any order of court previously made. . . ."

"A petition for modification must be liberally construed in favor of its sufficiency." (Cal. Rules of Court, rule 5.570(a).) If, however, "the petition fails to state a change of circumstance or new evidence that may require a change of order or termination of jurisdiction, or that the requested modification would promote the best interest of the child," the court may deny the application ex parte. (Cal. Rules of Court, rule 5.570(d).) In other words, "[t]he 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 Mary G.* (2007) 151 Cal.App.4th 184, 205.) The petition's allegations must be specific regarding the evidence to be presented and must not be conclusory. (*In re Anthony W.* (2001) 87 Cal.App.4th 246, 250.) On review, we will not disturb the court's determination that the petition did not make out a prima facie case unless the determination is "'"arbitrary, capricious, or patently absurd."'" (*In re Mary G.*, *supra*, 151 Cal.App.4th at p. 205.) With these requirements in mind, we determine that Juan's petition failed to make the required prima facie showing that he should be granted "presumed father" status because he failed to show how granting that status so late in the dependency proceedings and in Sarah's life would be in her best interests.

"In dependency proceedings, fathers are divided into four categories: de facto fathers, alleged fathers, natural [i.e., biological] fathers and presumed fathers. . . . [¶] Presumed father status ranks highest. Only a 'statutorily presumed father' is entitled to reunification services under Welfare and Institutions Code section 361.5, subdivision (a) and custody of his child under Welfare and Institutions Code section 361.2" (*In re Jerry P.* (2002) 95 Cal.App.4th 793, 801, fn. omitted.)

Juan based his entitlement to "presumed father" status on Family Code section 7611, subdivision (d), which defines a "presumed father" to include a man who "receives the child into his home and openly holds out the child as his natural child." The petition alleged that Juan "has consistently held himself out as the father [of Sarah]." The petition did not allege that Juan had received Sarah into his home but

there was evidence in the record that he had done so. In any event, we do not affirm the denial of the petition because of technical pleading defects but because the petition failed to make a prima facie showing that awarding Juan "presumed father" status—with the attendant delays in a permanent plan for Sarah—would be in Sarah's best interests.

At the time Juan filed his section 388 petition in June 2011, Sarah was almost five years old and had never been under Juan's care and supervision overnight much less on a sustained basis. Since the age of two Sarah had lived with her aunt and uncle who wished to adopt her and where she was "thriving." At this point in the dependency proceedings, on the eve of the selection and implementation hearing, Sarah's interest in stability outweighed any interest Juan may have had in reunification. (*In re Anthony W.*, *supra*, 87 Cal.App.4th 246, 251-252.) Juan's explanation of why it would be in Sarah's best interest to cancel the selection and implementation hearing and award him reunification services consisted of the conclusory statement that "Sarah has a good relationship with her biological father [and] she should have an opportunity to be raised in his care." Even if we must credit the allegation that Juan and Sarah have a "good relationship," (cf. *In re Aaron R.* (2005) 130 Cal.App.4th 697, 706) the court could reasonably conclude that a "good relationship," was not a sufficient reason to delay making a permanent plan for Sarah. What Juan was asking for was essentially a chance to mature and learn to be a parent for Sarah. Sarah, however, should not wait indefinitely for Juan to become an adequate parent when she has relative caretakers who desire to adopt her and will allow Juan to continue to have contact with Sarah.

In summary, no matter how liberally the petition is construed, it falls short of showing how further delay in setting a permanent plan for Sarah would be in her best interest.

## II. THE COURT PROPERLY DENIED A CONTESTED SELECTION AND IMPLEMENTATION HEARING

Juan maintains that the court erred in refusing to conduct a contested hearing to determine whether the parent-child relationship exception to the termination of parental rights applied in this case. The decision whether to grant a contested hearing is reviewed

for abuse of discretion. (*In re Stephanie M.* (1994) 7 Cal.4th 295, 318.) We find no abuse of discretion here.

Section 366.26 provides an exception to the general legislative preference for adoption when the court finds a "compelling reason" for determining that termination of parental rights "would be detrimental to the child." (§ 366.26, subd. (c)(1)(B).) Juan contends that the compelling reason in this case is that he has "maintained regular visitation and contact with the child and the child would benefit from continuing the relationship." (§ 366.26, subd. (c)(1)(B)(i).) He argues he made a sufficient offer of proof to entitle him to a contested hearing on the issue. We disagree.

The undisputed evidence shows that Juan did not maintain "regular visitation and contact" with Sarah. After establishing a pattern of regular visits and a close relationship with her, Juan suddenly dropped out of her life from late October 2010 through late January 2011 while he worked on his "'personal issues.'" He did not call or visit Sarah once during that period.

Based on this record, we cannot say that the court abused its discretion when it concluded that "[t]here's just no way [Juan] can rise to the level of [the parent-child relationship] exception."

**DISPOSITION**

The order terminating parental rights is affirmed.

NOT TO BE PUBLISHED.

ROTHSCHILD, J.

We concur:

MALLANO, P. J.

JOHNSON, J.