Filed 1/4/13 In re B.G. CA2/4

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

In re B.G. et al., Persons Coming Under the Juvenile Court Law.	B239056
LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. C.C. and DARIO G., Defendants and Appellants,	(Los Angeles County Super. Ct. No. CK24658)

APPEALS from orders of the Superior Court of Los Angeles County, Albert Garcia, Referee. Affirmed.

Christina Gabrielidis Lechman, under appointment by the Court of Appeal, for Defendant and Appellant C.C.

Joseph D. MacKenzie, under appointment by the Court of Appeal, for Defendant and Appellant Dario G.

John F. Krattli, County Counsel, James M. Owens, Assistant County Counsel, Stephen D. Watson, Associate County Counsel for Plaintiff and Respondent.

B.G. is the subject of these dependency appeals. In one, Dario G., her father (Father), seeks reversal of the trial court order denying his Welfare and Institutions Code section 388[1] motion for reconsideration of the order terminating reunification services. If that order is overturned, he argues, the section 322.26 order terminating his parental rights also must be reversed. C.C. (Mother) appeals the order terminating her parental rights, arguing that if Father's appeal is successful, the order terminating her parental rights also must be reversed. We find no abuse of discretion with respect to the trial court's denial of Father's section 388 motion. Consequently, we shall affirm the orders from which these appeals have been taken.[2]

FACTUAL AND PROCEDURAL SUMMARY

B.G. came to the attention of the Los Angeles County Department of Children and Family Services (DCFS or the Department) as the result of a toxicology scan taken shortly after her birth, in July 2010. The scan showed the presence of amphetamine, methamphetamine, and benzodiazepine. Mother acknowledged ingesting methamphetamine and other drugs throughout her pregnancy with B.G., including on the day of her birth. B.G. was born prematurely at 29 weeks and weighed only 3 pounds, 3 ounces. She was placed in the hospital's neonatal intensive care unit, and she remained hospitalized until September 2010. As a result of the scan, B.G. was detained at the hospital and the Department filed a petition under section 300.

The juvenile court sustained the petition, declaring B.G. to be a dependent child. The order was based on the showing of drug use by Mother and alcohol and substance abuse by Father. B.G. was removed from her parents' physical custody, and reunification services were ordered for the parents.

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

[2] These orders are appealable. (§ 395.)

By then, the family was familiar to DCFS due to other dependency proceedings. Mother's parental rights over another child, Natalie C., were terminated in 1998 after the child's sibling was murdered by a man (not Father in this case) who was Mother's boyfriend at the time. Mother's four other minor children, Cesar C., Dario G., Jr., Diana G., and Brandon C., were dependents due to physical altercations between Father and Mother in their presence, and Mother's drug use. The cases of these four children were still proceeding when B.G., too, became a dependent of the court.

Neither parent performed well during the reunification process, although Mother's record is far worse than Father's. Mother was terminated from programs at least twice and frequently tested positive for substance abuse or simply failed to show up for testing. She was homeless and for much of the time was living with Father in an abandoned building. As we have discussed, Mother raises no issue on appeal with respect to her own suitability, but argues only that the order terminating her parental rights must be reversed if we reverse the similar order as to Father.

Father's performance during the reunification period also was problematic. He tested positive on two occasions and, on several others, failed to test at all. He also was homeless and living in an abandoned building. His participation in case plan programs was described in a DCFS report as "poor", "inconsistent", "slow" and "needed improvement." An alcohol reviewing specialist described his performance as just going through the motions, and he had shown little improvement. With respect to his marijuana use, Father stated that he had a medical marijuana card but would not renew it once it expired on January 27, 2011. But he tested positive for marijuana after that date.

Father exercised his court-ordered obligation and right to visit with B.G. He often would stay only for a short time, briefly hold the child then hand her off to someone else, and not play with her. No bonding with him was evident. He completed a 90-day substance abuse program, then repeated it. But, as his attorney acknowledged, he did not complete programs in alcohol abuse or domestic violence.

On one occasion during the dependency period Father struck Mother with his fist in the presence of two of their children.

Father was still homeless when he filed his section 388 petition. He finally found and rented an apartment on a month-to-month lease, due to begin on February 1, 2012.

During almost all of the reunification period B.G. was thriving in the home of her foster parents. DCFS found no relatives who were willing to take and care for the child. At the permanent plan hearing on November 16, 2011 the court found that adoption was the appropriate plan for B.G. (as well as for the four other minors). As the children's attorney summarized at the section 388 hearing, B.G. was "in a safe, stable adoptive placement with an approved home study. The caretakers show up to almost every single hearing, and they are ready, willing, and eager to adopt B.G."

At a hearing on May 18, 2011 the court terminated reunification services. Father's attorney advised the court that he would file a section 388 petition for reconsideration of that order based on changed circumstances and announced that he would contest the section 366.26 hearing on termination of parental rights. He filed the petition on November 15, 2011, the day before the date then set for the section 366.26 hearings. The court ordered that the hearings be held on January 11, 2012, to coincide with the hearing on adoption as the appropriate plan for B.G.

At that hearing, Father testified to completion of the 90-day outpatient program for substance abuse, and presented evidence of negative tests taken in that program. He also testified that he could not recall the last time he had used illegal substances. Nor could he recall the name of his substance abuse counselor, or the name of the employer for whom he said he had worked for the previous two years.

Father's attorney told the court that Father had completed the 90-day substance abuse program, but acknowledged that he had not sufficiently addressed the problem of alcohol abuse. Nevertheless, he argued that there had been a change of circumstances sufficient to justify granting of reconsideration under section 388. B.G.'s counsel argued against granting the motion for reconsideration, as did counsel for DCFS. Mother's counsel did not take a position.

The trial court found that Father had made some progress, but had not met his burden in showing changed circumstances such as to warrant granting reconsideration,

and that it was not in B.G.'s best interests to grant the motion. The motion for reconsideration was denied. The court proceeded to the section 366.26 contested hearing. It issued its order terminating parental rights. The court also found that B.G. was likely to be adopted and that no statutory exception applied. It entered its order terminating parental rights.

Father filed his Notice of Appeal on January 20, 2012; Mother filed her appeal on January 11, 2012.

DISCUSSION

In pertinent part, section 388 provides: "(a) Any parent or other person having an interest in a dependent child of the juvenile court . . . may, upon grounds of change of circumstance or new evidence, petition the court in the same action in which the child was found to be a dependent child of the juvenile court . . . for a hearing to change, modify, or set aside any order of court previously made . . . . The petition shall be verified and . . . shall set forth in concise language any change of circumstance or new evidence that is alleged to require the change of order . . . ¶ (d) If it appears that the best interests of the child may be promoted by the proposed change of order, . . . the court shall order that a hearing be held . . . ." (See also Cal. Rules of Court, rule 5.570.)

This motion, often referred to as a petition for reconsideration, is addressed to the sound discretion of the trial court, whose decision will be upheld absent abuse of discretion. (*In re Josiah S.* (2002) 102 Cal.App.4th 403, 419; *In re A.S.* (2009) 180 Cal.App.4th 351, 358.) And, as with other dependency decisions, the principal consideration is the best interests of the child. (*In re Stephanie M.* (1994) 7 Cal.4th 295, 317 (*Stephanie M.); In re Jackson W.* (2010) 184 Cal.App.4th 247, 260; *In re Angel B.* (2002) 97 Cal.App.4th 454, 464; *In re Amber M.* (2002) 103 Cal.App.4th 681, 685.)

In *Stephanie M.* our Supreme Court described the test for abuse of discretion in familiar terms with respect to that standard: "'The appropriate test . . . 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 discretion

for that of the trial court.'" (7 Cal.4th at pp. 318–319, quoting *Walker v. Superior Court* (1991) 53 Cal.3d 257, 272.)

The facts and circumstances of this case show no abuse of discretion under this test. First, Father has not had actual custody of B.G. for a single day of her life. Dependency proceedings were commenced days after her birth. From that time through the trial court decisions from which these appeals are taken, she was either at the hospital or in foster care. Second, she is thriving in the care of her foster parents, who wish to adopt her and have been approved for that purpose. Next, she is bonded with them and not with Father. Finally, while Father has made some progress—in the trial court's words, he has "done something"—his performance in reunification has been deficient. Besides failing to promptly complete, or in some cases, to complete at all, the programs assigned as part of his case plan, he continued to engage in substance abuse and angry outbursts, and remained unable to provide a home or otherwise care for the child. From this record, it is plain that it would be a tragedy if B.G., who is now two and a half years old, were uprooted from the only family she has known and who wish to adopt her, and relegated to the delay and uncertainty of further reunification services.

DISPOSITION

The orders from which the appeals in this case are taken are affirmed.

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EPSTEIN, P. J.

We concur:

WILLHITE, J.

MANELLA, J.