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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

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

LOS ANGELES COUNTY  
DEPARTMENT OF CHILDREN  
AND FAMILY SERVICES,

Plaintiff and Respondent,

v.

Darrell C.,

Defendant and Appellant.

B278330

(Los Angeles County  
Super. Ct. No. CK04469)

APPEAL from orders of the Superior Court of Los Angeles County. Karin Borzakian and Robin R. Kesler, Juvenile Court Referees. Affirmed.

Lori A. Fields, under appointment by the Court of Appeal, for Defendant and Appellant.

Mary C. Wickham, County Counsel, R. Keith Davis, Assistant County Counsel, and Tracey F. Dodds, Principal Deputy County Counsel, for Plaintiff and Respondent.

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Defendant and appellant Darrell C. (father) appeals from the juvenile court's orders denying his petition pursuant to Welfare and Institutions Code section 388<sup>1</sup> and terminating parental rights to his daughter, S.M. Father, who was adjudged an alleged father at the detention, adjudication and disposition hearings, contends the court erred by failing to make a paternity finding when he first appeared in court more than a year later and filed a form JV-505 request. He further contends the court abused its discretion in thereafter summarily denying his section 388 petition and terminating his parental rights.

We affirm.

#### **FACTUAL AND PROCEDURAL BACKGROUND**

We summarize only those facts material to the contentions raised by father on appeal, as well as some additional facts for context.

Andrea M. (mother)<sup>2</sup> gave birth to S.M. in November 2013. At the time of delivery, mother had a positive toxicology screen, but denied using drugs when asked by hospital staff. A referral was made to the Los Angeles County Department of Children and Family Services (Department). Mother has a long history with the Department dating back to the early 1990's. Mother failed to reunify with all nine of her other children (from different fathers), primarily because of a long-term substance abuse problem with methamphetamines and heroin.

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<sup>1</sup> All further undesignated section references are to the Welfare and Institutions Code.

<sup>2</sup> Mother is not a party to this appeal.

When the social worker arrived at mother's home to investigate the referral, father was there and denied living in the home. Father refused to provide the social worker with his address of record. Father admitted he knew mother had smoked marijuana throughout her pregnancy. Mother said father did "not want to have anything to do with [S.M.]." She said that she and father had agreed she would get pregnant because she wanted another baby since the Department had taken her other children away, but father did not want to be involved with the child. Mother denied smoking while pregnant. S.M. was subsequently detained on December 27, 2013, pursuant to a removal order, and placed in foster care. S.M.'s clothing smelled strongly of cigarette smoke when the social worker took her from mother's home.

The Department reported that mother refused to provide any contact information for father, but did say he had two other children with another woman. Upon investigation, the Department discovered that father had a pending case in the juvenile court related to his two other children. The mother in that proceeding had reported that father had physically attacked her in her home, held a knife to her throat, and threatened to kill her, and those allegations were sustained by the court in that proceeding.

The Department filed a petition pursuant to section 300 alleging, among other facts, mother's failure to protect S.M. due to her long-term substance abuse problem, and father's knowledge of mother's illicit drug use and failure to protect the child.

At the January 2, 2014 detention hearing, father was not present. The court acknowledged mother's statement that father

was the biological father. Father is not identified on S.M.'s birth certificate. No father is listed on S.M.'s birth certificate. Father was found to be the alleged father of S.M. and the Department was ordered to perform a due diligence search as to his current whereabouts and give appropriate notice.

The court ordered that if father contacted the Department, he was to be given monitored visitation with S.M. The court ordered mother was to be given referrals for counseling and drug rehabilitation and make herself available for random drug testing.

In the March 2014 jurisdiction and disposition report, the Department reported on an interview of father that took place after detention. He reiterated he knew mother had used marijuana during her pregnancy, but said it was only a couple of times to help her manage pain related to Hepatitis-C. Father said he did not think it was a big deal because there is "no proof that marijuana affects children." When asked if he thought he could care for S.M., father responded "I can barely provide for myself." Father believed S.M. should be placed with the maternal grandparents. Father was reported to act appropriately with S.M. when he attended mother's visits with the child. He admitted he had a criminal history, including an assault charge and some drug possession charges, but he was not willing to be fingerprinted.

At the jurisdiction and disposition hearing on March 13, 2014, mother entered a plea of no contest. Father was not present. The court sustained the petition. As to disposition, counsel for S.M. requested a contest to challenge the provision of any services to mother or father. The hearing was continued to May 6, 2014.

At the continued May 6 disposition hearing, S.M.'s counsel agreed to drop her contest and allow mother to continue to receive reunification services in light of the fact she had tested negative several times. Counsel for S.M. maintained her request that father be denied reunification services since he was an alleged father only, had never been the custodial parent, was not seeking custody, and had failed to appear in court despite notice. The court found father was not entitled to reunification services pursuant to section 361.5, subdivision (a), because he was not a statutorily presumed father.

In November 2014, the Department reported that father was present at mother's monitored visits with S.M., and that father had yet to say "what role" he will play in S.M.'s life, or to make any commitment regarding S.M.'s support or care. Mother again told the social worker that father does not live with her, but rather, with his grandmother in Lancaster. It was also reported that mother tested positive for methamphetamines in June.

In January 2015, the Department reported that father had recently stopped attending visits with mother. Mother had been arrested for driving on a suspended license.

Almost a year after disposition, father made his first appearance at the review hearing held March 18, 2015. An attorney appeared with father and advised the court she was available for appointment if the court so ordered. Father filed a JV-505 form requesting appointment of counsel and declaring he believed he was S.M.'s father. Father requested a judgment of parentage, claiming he had been present at S.M.'s birth, had been visiting with her, had told friends and family that she was his daughter, and had provided money for food and clothing.

The court directed the Department to make the appropriate inquiries to determine whether father had any Indian heritage and to verify father's address of record. The court also noted that father had previously been found to be an alleged father only, indicating that father would have "to file a [section] 388 [petition] if he wants to change that ruling." The court noted that as an alleged father only, father was not entitled to reunification services.

As to mother, the court ordered reunification services to continue, but expressed its concerns about the Department's report that the social worker had received text messages from mother's phone (apparently inadvertently) that reflected an effort to purchase illegal drugs. Mother, who was not present at the hearing, apparently denied she sent the messages.

On August 11, 2015, the court terminated reunification services for mother and set the permanency planning hearing for December 8, 2015.

At the request of the Department, the section 366.26 hearing was continued from December 8 to April 5, 2016 because the adoptive home study for S.M.'s caregivers (Mr. and Mrs. A.) had not been completed. The A.'s had expressed their commitment to adopt S.M.

The court held a review hearing on February 25, 2016, at which father made his second appearance in court (erroneously referred to in the record as his first appearance). Counsel specially appeared with father. The court ordered father back for the section 366.26 hearing on April 5, 2016. The court further found that the Department had complied with the case plan, had made reasonable efforts to return S.M. home, and was taking the necessary steps to finalize a permanent plan of adoption for S.M.

The minute order for April 5, 2016, states that father was personally given notice of the continuance of the section 366.26 hearing to June 10, 2016.

The Department reported in June 2016 that the adoptive home study for Mr. and Mrs. A. was approved. At the June 10 hearing, the court set the contested section 366.26 hearing for August 25, 2016.

On August 19, 2016, father filed his section 388 petition requesting the court to change its previous order finding him to be an alleged father only. Father requested the court declare him to be S.M.'s presumed father and award him custody. In the petition, father stated "I have reached a point where I am able to provide for [S.M.]." Father further stated that the requested change was in S.M.'s best interest because "[s]he would achieve permanency with her biological father and be afforded contact with her extended family." The petition did not allege any facts demonstrating he qualified to be declared a presumed father.

On August 23, 2016, the court denied father's petition, without a hearing, finding that no new facts had been presented and father had not shown it was in S.M.'s best interest to grant the requested relief.

In a status review report, the Department reported that S.M.'s weekly monitored visits with mother and father generally went well, but S.M. "never has a problem leaving" when the visits are over. It was further reported that S.M. was "thriving" in the home of Mr. and Mrs. A., who had both demonstrated a willingness to "lovingly monitor" some of her "quirky" behaviors related to her mild developmental delays.

On August 25, 2016, the parties, including father, appeared as noticed for the contested section 366.26 hearing. Father's

counsel stated that father was visiting with S.M., “although sporadically,” and objected to the termination of his parental rights. Mother requested the opportunity to testify and the court continued the hearing to October 6, 2016.

At the October 6 hearing, both mother and father testified. Father said he visited with S.M. and mother twice a week for two hours each. He said he missed some visits due to conflicts with work. Father said he loves his daughter and she “deserve[d]” to be with family. At the conclusion of the hearing, the court found that S.M. was likely to be adopted, that neither father nor mother had demonstrated any exception to the statutory preference for adoption, and therefore terminated parental rights.

This appeal followed.

## **DISCUSSION**

### **1. The Section 388 Petition**

#### **a. Timeliness and standard of review**

Father’s section 388 petition requested a change in the court’s paternity ruling finding him to be an alleged father only. Father timely appealed from the court’s denial of his section 388 petition in August 2016. However, the Department argues that to the extent father attempts to challenge the court’s “original” paternity findings at the January 2, 2014 detention hearing and the March 18, 2015 review hearing, father’s appeal is untimely.

“Dependency appeals are governed by section 395, which provides in relevant part: “A judgment in a proceeding under [s]ection 300 may be appealed from in the same manner as any final judgment, and any subsequent order may be appealed from as from an order after judgment . . . .” [¶] This statute makes the dispositional order in a dependency proceeding the appealable “judgment.” [Citation.] Therefore, all subsequent



orders are directly appealable without limitation . . . .

[Citations.] A consequence of section 395 is that an unappealed disposition or postdisposition order is final and binding and may not be attacked on an appeal from a later appealable order.’

[Citation.] This ‘waiver rule’ holds ‘that an appellate court in a dependency proceeding may not inquire into the merits of a prior final appealable order,’ even when the issues raised involve important constitutional and statutory rights.” (*In re Z.S.* (2015) 235 Cal.App.4th 754, 769-770; accord, *In re Meranda P.* (1997) 56 Cal.App.4th 1143, 1149-1150.)

“The purpose of this rule is to balance the parents’ interest in the care and custody of their children with the children’s interest in the expeditious resolution of their custody status.” (*In re T.G.* (2015) 242 Cal.App.4th 976, 984; see also *In re Zeth S.* (2003) 31 Cal.4th 396, 405-406 [“Various provisions of the statutory scheme strictly control the timing and manner of appeal or writ review of the critical findings and orders that can culminate in an order terminating parental rights, their primary goal being to expedite finality and thereby achieve permanency for the child.”].)

We agree that father’s appeal may not challenge the juvenile court’s ruling on January 2, 2014, declaring him an alleged father, and on March 18, 2015, directing him to file a section 388 petition to seek a change of his paternal status, because he did not timely appeal either of those orders.

We review an order on a section 388 petition for abuse of discretion. (*In re Stephanie M.* (1994) 7 Cal.4th 295, 318-319 (*Stephanie M.*); accord, *In re Jasmon O.* (1994) 8 Cal.4th 398, 415-416 [resolution of a section 388 petition is committed to the sound discretion of the juvenile court; court’s ruling will not be

overturned on appeal “in the absence of a clear abuse of discretion”].) Moreover, a hearing on a section 388 petition need only “be held if it appears that the best interests of the child may be promoted by the proposed change of order, which necessarily contemplates that a court need not order a hearing if this element is absent from the showing made by the petition.” (*In re Zachary G.*(1999) 77 Cal.App.4th 799, 806-807; accord, *Cesar V. v. Superior Court* (2001) 91 Cal.App.4th 1023, 1035-1036 (*Cesar V.*).)

**b. The court correctly denied father’s request for a change in status to presumed father**

As the petitioning party, father bore the burden of proving that new evidence or changed circumstances demonstrated it was in the best interests of S.M. for the court to order a change in father’s status from alleged father to presumed father. (*Stephanie M., supra*, 7 Cal.4th at p. 325.) Father contends the court abused its discretion in denying his petition without an evidentiary hearing, and failing to revisit its earlier rulings, including the court’s March 18, 2015 failure to act on father’s request for a judgment of parentage other than by directing him to file a section 388 petition. We disagree.

The juvenile court had a mandatory statutory duty to inquire about S.M.’s parentage under section 316.2. “Section 316.2, subdivision (a) requires the court to inquire as to the identity of all presumed or alleged fathers, at the detention hearing or as soon after as practicable.” (*In re Kobe A.* (2007) 146 Cal.App.4th 1113, 1120 (*Kobe A.*); accord, *In re Marcos G.* (2010) 182 Cal.App.4th 369, 383-384 (*Marcos G.*).)

The juvenile court discharged its duty of inquiry at the detention hearing. Mother reported that father was the

biological father of S.M. Father was not listed on S.M.'s birth certificate. Father had refused to give the social worker his current address and mother reported that father did not live with her and wanted nothing to do with S.M. The court found father to be an alleged father and ordered the Department to perform a due diligence search as to father's current address to give appropriate notice.

Based on the information provided to the court in the Department's detention report and by mother at the hearing, the court correctly determined father to be an alleged father. "A man who may be the father of a child, but whose biological paternity has not been established, or, in the alternative, has not achieved presumed father status, is an 'alleged' father.'" (*Kobe A.*, *supra*, 146 Cal.App.4th at p. 1120.)

As an alleged father only, father had limited rights. "Due process for an alleged father requires only that he be given notice and an opportunity to appear and assert a position and attempt to change his paternity status, in accordance with [the] procedures set out in section 316.2." (*Kobe A.*, *supra*, 146 Cal.App.4th at p. 1120.) An alleged father "is not entitled to appointed counsel or to reunification services." (*Ibid.*) The court made no error in not appointing counsel to represent father at the detention or disposition hearings, neither of which was attended by father despite notice, or in declining to order reunification services to father.

Over the next year, the Department reported that father attended some of mother's monitored visits with S.M., but still had not made a commitment to the type of role he intended to play, if any, in S.M.'s life. When asked if he was willing to care for S.M., father said "I can barely provide for myself." Father told

the social worker he thought S.M. should be placed with the maternal grandparents. Father admitted to a criminal history but refused to be fingerprinted or provide further details to the social worker to enable the Department to complete an assessment of his fitness as a custodial parent. Despite knowledge of the proceedings, father made no effort to appear in juvenile court and assert his rights.

Finally, on March 18, 2015, almost a year after disposition, father made his *first appearance* and filed a JV-505 declaration requesting a change in status to presumed father. The court told father he had to file a section 388 petition to obtain a new order on paternity.

Thereafter, father failed to take any further action until after another year had passed. On August 19, 2016, father filed his section 388 petition, stating only that he was now in a position to care for S.M. and she deserved to be with her biological family, and offering no new facts in support of a claim that he was entitled to be declared a presumed father. S.M., who had been detained shortly after birth, was now almost three years old and thriving in the home of her prospective adoptive parents.

The court summarily denied father's section 388 petition finding no new facts or changed circumstances and no showing that a change in paternity status for father was in S.M.'s best interest. Father has failed to show any abuse of discretion by the court in so ordering.

Father's section 388 petition was presented *a year after the reunification period had ended* and two years eight months after S.M. was first detained. Where, as here, reunification services have been terminated and the dependency proceedings have

reached the section 366.26 hearing, adoption is the preferred permanent plan decreed by the Legislature. (§ 366.26, subd. (b).) The parent's "interest in the care, custody and companionship of the child [is] no longer paramount." (*Stephanie M., supra*, 7 Cal.4th at p. 317.) Instead, the court's focus, given the stage of the proceedings, is on the dependent child's need for stability and permanency. (*Ibid.*)

Father contends the court's failure to conduct an evidentiary hearing on his petition to allow a full opportunity to address the paternity question compounded the court's earlier failure to discharge its mandatory duty to address his March 18, 2015 request for a judgment of paternity. When a person files a timely form JV-505 request for a judgment of parentage, the court must determine if the person is a biological parent and whether the person is a presumed parent. We may not consider father's claim that the court erred by not acting on his JV-505 request because father did not file a timely appeal from the court's order of March 18, 2015, that he had to file a section 388 petition.

Any error would be harmless in any event. (See, e.g., *Marcos G., supra*, 182 Cal.App.4th at pp. 382-383 [finding harmless error where alleged father not given proper notice of his right to attempt to change status from alleged father to presumed father]; *Kobe A., supra*, 146 Cal.App.4th at pp. 1122-1123 [same].)

The court accepted mother's statement that father is the biological parent of S.M. The factual record discussed above demonstrates there is no evidence that would qualify father as a presumed father within the meaning of Family Code section 7611. Father was not prejudiced by the juvenile court's

failure to reconsider its paternity determination in March 2015 when father filed the JV-505 form.

**2. The Termination of Parental Rights**

Father did not raise any arguments contesting the termination of his parental rights, other than his argument that the court erred in denying his section 388 petition. Because we reject that argument, father has failed to demonstrate any reversible error in the court's termination of parental rights.

**DISPOSITION**

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

GRIMES, J.

WE CONCUR:

FLIER, Acting P. J.

SORTINO, J.\*

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\* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.