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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

In re A.B., a Person Coming
Under the Juvenile Court Law.

LOS ANGELES COUNTY
DEPARTMENT OF CHILDREN
AND FAMILY SERVICES,

Plaintiff and Respondent,

v.

T.H.

Defendant and Appellant.

B290838

(Los Angeles County
Super. Ct. No. DK15312A)

APPEAL from orders of the Superior Court of Los Angeles
County, Robin R. Kesler, Judge. Affirmed.

Jacques Alexander Love, under appointment by the Court
of Appeal, for Defendant and Appellant.

Mary C. Wickham, County Counsel, Kristine P. Miles,
Assistant County Counsel, and Peter Ferrera, Principal Deputy
County Counsel, for Plaintiff and Respondent.

INTRODUCTION

The juvenile court terminated family reunification services for T.H., father of Anthony B. One year later, T.H. filed a petition pursuant to section 388 of the Welfare and Institutions Code¹ to reinstate those services. The juvenile court denied the petition, finding there was no change of circumstances or new evidence to warrant reinstatement. The court also concluded it was not in the best interest of then two-year-old Anthony B. to reinstate reunification services for T.H. T.H. appeals. Finding no abuse of discretion, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

A. *Petition and Detention*

On January 23, 2016, the Los Angeles County Department of Children and Family Services (DCFS) received a referral from a hospital worker who alleged Anthony B. was born “in medical distress” and was in immediate risk of general neglect. Anthony was about to be released to his homeless mother who had substance abuse problems; had been convicted of being under the influence of a controlled substance and possession of unlawful paraphernalia; had a history of nine psychiatric hospitalizations; and was not taking her prescribed medication for bipolar disorder and depression.² DCFS took Anthony into protective custody, after assessing it could not assure his safety given Mother’s history and current circumstances.

¹ All further statutory references are to the Welfare and Institutions Code unless otherwise indicated.

² Mother is not a party to this appeal.

On January 27, 2016, DCFS filed a petition alleging Anthony came within the jurisdiction of the juvenile court under section 300. The petition alleged Mother's "mental and emotional problems" had rendered her "incapable of providing regular care and supervision" to Anthony, placing him "at risk of serious physical harm and damage."

At the detention hearing on January 27, 2016, the court ordered Anthony detained from the parents and released to extended family members. Mother told the court she believed Anthony's father was a man named Danny; the court found Danny to be the alleged father and ordered DCFS to use due diligence to locate him.

On May 4, 2016, T.H. appeared in court and stated he was Anthony's father. The court deemed him an alleged father and ordered paternity testing. The test showed T.H. was in fact Anthony's biological father.

T.H. (Father) told the DCFS social worker he was married and resided at a studio apartment with his wife³; he wanted custody of Anthony and would complete a home assessment and undergo a background check. DCFS learned Father had been arrested for battery in 2004 and on two separate occasions in 1994.

On May 21, 2016, DCFS assessed Father's home, "did not notice any safety hazards," and noted that a space larger than the studio apartment may help the family "not feel so enclosed in."

³ Father's wife had a history of involvement with DCFS, and "her biological child was taken away from her years ago." DCFS also reported that Father's wife has an "extensive criminal history for prior drug use and prostitution."

On May 31, 2016, the court ordered monitored visitation for Father—once a week for three to four hours per visit. Starting June 2016, Father began participating in weekly visits with Anthony, then a few months old. Although Father stated he took parenting classes, the social worker noted “when baby Anthony would become fussy and cry, [F]ather would not know what to do and kept grabbing toys and placing them in front of the baby[‘s] face.” The social worker also noted Father “seems to need more parenting education” in regard to gastroesophageal reflux disease (GERD), which afflicted Anthony. Father bounced Anthony up and down after feeding him, but “due to [GERD], he can’t be bounced after feeding.”

On June 16, 2016, Mother called the DCFS social worker and said she “did not believe she was in a good place or stable enough to have custody” of Anthony at this time and said she would like him to be placed for adoption; she agreed to appear in court to sign the paperwork necessary to relinquish her parental rights.

B. *Jurisdiction and Disposition*

During the jurisdictional and dispositional hearing on July 6, 2016, the court found Father to be Anthony’s presumed father. The court declared Anthony a dependent child of the court under section 300, subdivision (b), and ordered Anthony into foster placement. The court increased monitored visitation for Father to twice per week, three hours per visit. The court also ordered reunification services and ordered Father to participate in parenting education for infants and individual counseling to address case issues. The court ordered Father to take 10 random drug tests; if Father tested positive or missed a drug test, he would then be required to complete a substance abuse program.

C. *Post-Disposition Progress and Review Hearings*

In its progress report filed October 5, 2016, DCFS reported Anthony's current caretakers were unable to continue caring for him. Anthony was then placed with Mr. and Mrs. M. Mother had not visited Anthony since the July 6, 2016 disposition hearing and she had not responded to DCFS's efforts to communicate with her.

1. January 4, 2017: 6-Month Review Hearing

DCFS recommended it was in Anthony's best interest to continue to be placed with the M.'s. While placed with Mr. and Mrs. M., Anthony reached developmental milestones and showed a "positive relationship" with his caregivers. The social worker had observed Anthony "happy" with Mrs. M. and reported he had "a great bonding relationship" with the M.'s.

Father continued to visit Anthony and he completed another parenting course. When asked by the social worker what he had learned in his parenting courses, Father "had difficulty explaining what he had learned"; however, "[a]fter much prodding and reframing of the question, [F]ather finally indicated that he learned about changing diapers, how to place the child in the car seat, and the three main reasons why babies cry." The social worker reported Father "over feed[s] Anthony and does not seem to notice when Anthony has had enough to eat." Sometimes, Father "did not change the child's diaper even though it was obvious the diaper was soiled and had to be told to do so." Also, Father was observed having trouble changing Anthony's diaper, as he "often place[d] it on backwards" and continued to do so even "after being immediately instructed as to proper application." Additionally, Father did not properly secure and

restrain Anthony in his car seat despite being given “repeated, step by step instruction[s].”

Father had met with Anthony’s pediatrician for information about GERD. The pediatrician recommended Father take basic infant CPR training and first aid training.

Father completed eight random drug and alcohol tests with negative test results. He failed to appear for scheduled drug testing on August 8 and 26, 2018.

When the social worker tried to schedule another home assessment appointment in August, September, October, and November of 2016, Father “refused to allow entrance into his home for assessment” because his home was “not ready” and his wife “was ‘OCD.’” Father informed the social worker the home assessment could take place after December 11, 2016.

DCFS reported Father was “partially in compliance” with the case plan, as he continued to visit Anthony and participate in some services, but failed to complete the infant CPR and first aid courses and refused to allow the social worker to conduct a home assessment for more than four months. Further, the M.’s had expressed their “reoccurring concerns during [F]ather’s monitored visitation,” as Father’s attention is “on his cellular device rather than interacting or having contact with Anthony.” Further, Father continued to struggle with basic baby care such as feeding, changing diapers, tending to Anthony’s sensitive skin, and placing Anthony in the car seat.

As Mother’s whereabouts remained unknown, the court terminated reunification services for her. The court found Father was in “partial compliance with the case plan,” and ordered continued family reunification services for Father; the court also ordered DCFS to “look into providing Father with hands on

parenting class” and to “assist Father with CPR class.” Finally, the court found the child’s placement with the M.’s was “necessary and appropriate,” Anthony “cannot be returned to the physical custody of the parent(s) . . . , and there exists no substantial probability [that Anthony] will be returned within six months.”

A month after the six-month review hearing, the M.’s filed for de facto parent status.

2. July 5, 2017: 12-Month Review Hearing

In its status review report dated July 5, 2017, DCFS reported Father completed a non-certified CPR class in March 2017. DCFS also reported that during at least some of the substance abuse sessions, Father continued to joke about drug addiction and made inappropriate statements to the other participants, despite being told by the instructor not to. The instructor stated Father “thinks highly of himself and does not believe he has any problems”; according to the instructor, Father’s “cognitive understanding and behavior exhibited is detrimental to the group sessions.”

DCFS reported Father began participating in parent-child interaction therapy (PCIT); however, the PCIT therapist stated that Father continued to bring the wrong baby wipes for Anthony, even though he has been told several times that Anthony required organic wipes due to his sensitive skin. The therapist also stated Father required “a lot of prompting” and the therapist stepped in many times to help guide Father in his interactions with Anthony. The therapist observed Father did not notice Anthony’s rash, and concentrated on taking pictures of Anthony rather than following the therapist’s instructions. DCFS also reported Father stated he would enroll in individual

counseling, but he was not receptive to the social worker's efforts to provide him with appropriate resources to complete the court-ordered treatment.

At the 12-month review hearing on July 5, 2017, DCFS recommended the court terminate family reunification services as to Father. DCFS reported Father refused to take advantage of the full three hours of visitation time available to him on Sundays and visited about an hour to an hour and a half only. In addition, Father sent text messages to the M.'s, asking them to lie to DCFS and state Father participated in the full three hours of visitation. Father also sent text messages to the M.'s, stating "they are completing visits 'his way, not [the social worker's] way.'" Moreover, Father continued to struggle with Anthony's basic needs, such as "feeding, changing diaper[s], looking out for safety hazards, tending to Anthony's sensitive skin, diet, and placing him in a car seat." The PCIT therapist stated Father was "not focused," was not paying attention to Anthony's triggers, and "did not appear to engage with the child" during his visit with Anthony in June 2017.

The M.'s were no longer willing to monitor Father's visits, as Father sent inappropriate and intimidating messages to Mr. and Mrs. M. via social media and text message, causing them to feel threatened.⁴ Stating Father was "unstable," the therapist temporarily cancelled the therapy sessions. Further visitation by Father was to be monitored by the social worker.

⁴ Father posted an image of Mrs. M. in a social media post and stated Mr. M. would rather adopt "cute babies" instead of impregnating Mrs. M. again. Father insulted the appearance of the M.'s biological son and called the M.'s, the social worker, and the therapist explicit names.

The family reunification program specialist sent a letter to DCFS stating Father is “in non-compliance with program requirements due to his lack of 12 step meeting attendance” and having “missed testing . . . on more than one occasion.” The specialist also stated Father “makes inappropriate jokes . . . even after being asked to stop.”

Nonetheless, the court ordered DCFS to continue providing family reunification services to Father. The court ordered him to “stay away from the foster parents [*sic*] home” and not to contact them or use social media to communicate with or about them.

3. August 8, 2017: Section 366.21(f) Hearing

DCFS reported Father had been having monitored visits with Anthony on Fridays from 6:00 p.m. to 7:00 p.m. and had brought food that was inappropriate for his son, then age one, including Lean Cuisine meals and foods with gluten, which caused Anthony to have an upset stomach. The therapist also stated Father continued to struggle with basic baby care, such as feeding and changing diapers.

Despite the juvenile court’s prior orders, Father continued to post graphic statements about the M.’s and the social worker on Facebook. He gave “unsolicited advice to [Anthony’s] foster parents to seek fertility treatments” and made “threats of deportation” toward the social worker. DCFS reiterated its earlier recommendation to terminate reunification services for Father.

During the hearing on August 8, 2017, the court terminated family reunification services for Father, and scheduled a section 366.26 hearing to select and implement a

permanent placement plan for Anthony, which the court found “necessary and appropriate.”⁵

4. December 12, 2017: Initial 366.26 Hearing

DCFS informed the court that since the last court date of August 8, 2017, Father sent the social worker a total of 74 emails, giving “unsolicited advice” about the M.’s, calling the M.’s “con-artists,” threatening to have the social worker deported, using race as a form of discrimination, threatening to file lawsuits for collusion, and threatening to have the juvenile court judge dismissed. The court admonished Father for his inappropriate messages and instructed him “to be respectful of [the] social worker regardless and no matter what”

DCFS reported Anthony continued to reside with the M.’s⁶ and that the most viable permanent plan for Anthony was adoption by the M.’s who reported they were “committed to providing Anthony with a loving, stable, and permanent home.” The M.’s submitted all of the paperwork necessary to complete their adoption home study. The social worker observed that Anthony “appear[ed] very content in his current home” and “looks to his caregivers for guidance, support, and hugs.”

The court continued the 366.26 hearing to April 9, 2018.

⁵ On August 8, 2017, following the setting of the section 366.26 hearing, Father filed a Notice of Intent to File Writ Petition to challenge the juvenile court’s orders made August 8, 2017. This court summarily denied the petition on October 18, 2017, in case number B284555.

⁶ By the initial section 366.26 hearing, Anthony—then 23 months old—had resided with Mr. and Mrs. M. for 14 months.

D. *Father's Section 388 Petition and the June 19, 2018
Combined Sections 388 and 366.26 Hearing.*

Father filed a section 388 petition on April 9, 2018, requesting the juvenile court grant him “full custody” of Anthony or “weekend overnight visits,” or in the alternative, reinstate family reunification services. In his petition, Father stated the requested order is in Anthony’s best interest because “[it is] better for a child to be with his parent[] rather than a non relative” and because he “ha[s] done everything the judge has requested.” The petition included a letter dated April 2, 2018 from Father’s therapist, stating Father participated in 11 sessions of individual counseling and that it was recommended he attend five more; however, Father provided no proof he had completed those additional sessions.

In its response to Father’s section 388 petition, DCFS argued that although Father was in partial compliance with the case plan, he had not “made any changes in his behavior to demonstrate his ability to care for the child.” DCFS recommended Father participate in a psychological evaluation.

Father continued to visit Anthony consistently; however, he voluntarily reduced his visits from six hours a week to one hour and declined to make up any cancelled visits. Additionally, although Father completed multiple parenting programs, he continued to struggle with understanding and implementing what he had learned. Father continued to bring non-organic baby wipes and on one occasion brought expired food for Anthony. Anthony’s caregivers informed the social worker Anthony had tantrums prior to Father’s visits and the visits “take a toll on the child emotionally.”

On June 19, 2018, at the combined hearing on Father's section 388 petition and the permanency plan, DCFS reported Anthony had developed a "positive relationship" with Mr. and Mrs. M. and "appeared bonded" with them. Anthony's needs continued to be met by the M.'s, who improved Anthony's GERD symptoms and met all of his dietary needs.

Father argued he "completed everything [DCFS] asked of him," maintained "consistent visitation," and was "very, very bonded to the child." He believed the "substantial progress in his parenting and his ability to care for the child . . . is a changed circumstance" warranting the court's granting of his section 388 petition. Lastly, Father argued that Anthony "should be with his biological parents not just because they're the biological [*sic*] but because of the consistent contact that has been made" by Father.

The court denied Father's section 388 petition. The court noted it had not received new information from Father confirming he completed the additional five sessions of individual counseling, and had not received drug test results from Father since the termination of reunification services nearly a year before. The court stated Father's behavior and threats towards Anthony's current caregivers gave the court "grave concern of Father's mental health and his ability to be an appropriate parent." The court also noted that Father "does not ask for the makeup visits even though they've been offered." Although Father had weekly visitation with Anthony for two years, the court stated that it had never progressed to unmonitored visits. The court held it "not in the best interest of the child . . . to regrant services or to offer custody of the child."

As to the section 366.26 hearing, the court found by clear and convincing evidence that Anthony was adoptable, Father did not maintain regular visitation with Anthony, and Father had not established a bond with him. The court further found any benefit accruing to the child from his relationship with Father was “outweighed by the physical and emotional benefit the child will receive through the permanency and stability of adoption” and adoption was in the best interests of the child. The court found it would be “detrimental to the child to be returned to the parents” and “no exception to adoption appl[ies].” Mother’s and Father’s parental rights were ordered terminated.

Father timely appealed.

DISCUSSION

Father argues the juvenile court abused its discretion in denying his section 388 petition without giving him the opportunity to participate in additional reunification services after Father “essentially completed his case plan”—which Father contends is a change of circumstance. He further argues reinstatement of family reunification services for Father was in Anthony’s best interests. We disagree.

A. *Standard of Review*

Under section 388, subdivision (a)(1), a parent “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 court shall grant such a hearing “[i]f it appears that the best interests of the child . . . may be promoted by the proposed change of order.” (*Id.*, subd. (d).) We review an order denying a

section 388 petition for abuse of discretion. (*In re Stephanie M.* (1994) 7 Cal.4th 295, 318; *In re Alayah J.* (2017) 9 Cal.App.5th 469, 478.) “Whether a previously made order should be modified rests within the dependency court’s discretion, and its determination will not be disturbed on appeal unless an abuse of discretion is clearly established.” (*In re Michael B.* (1992) 8 Cal.App.4th 1698, 1704.) The appropriate test is whether the trial court has “exceeded the bounds of reason” in denying a section 388 petition, and a reviewing court may not disturb that decision unless it made “an arbitrary, capricious or patently absurd determination.” (*In re Marcelo B.* (2012) 209 Cal.App.4th 635, 642.)

B. *Denial of Father’s Section 388 Petition Was Not an Abuse of Discretion*

“A parent’s interest in the companionship, care, custody and management of his children is a compelling one, ranked among the most basic of civil rights.” (*In re Marilyn H.* (1993) 5 Cal.4th 295, 306.) Likewise, the welfare of a child “is a compelling state interest that a state has not only a right, but a duty, to protect.” (*Id.* at p. 307.) In most cases, when a child has been removed due to abuse or neglect, the state should provide the parent with services to assist him or her in overcoming the problems that led to removal. (*Id.* at p. 308.) However, once a court has terminated reunification services for a parent whose child has been removed from his or her care, the court must shift its focus to “the needs of the child for permanency and stability.” (*Id.* at p. 309.) From that point on, there is a “rebuttable presumption that continued foster care is in the best interests of the child.” (*In re Stephanie M., supra*, 7 Cal.4th at p. 317.)

Thus, “after reunification services have terminated, a parent’s [section 388] petition for either an order returning custody or reopening reunification efforts must establish how such a change will advance the child’s need for permanency and stability.” (*In re J.C.* (2014) 226 Cal.App.4th 503, 527.) Section 388 “provides a means for the court to address a legitimate change of circumstances while protecting the child’s need for prompt resolution of his custody status.” (*In re Marilyn H.*, *supra*, 5 Cal.4th at p. 309.)

“The factors to be considered in evaluating the child’s best interests under section 388 are: (1) the seriousness of the problem that led to the dependency and the reason for any continuation of that problem; (2) the strength of the child’s bond with his or her new caretakers compared with the strength of the child’s bond with the parent, and (3) the degree to which the problem leading to the dependency may be easily removed or ameliorated, and the degree to which it actually has been.” (*In re Ernesto R.* (2014) 230 Cal.App.4th 219, 224.) In determining a child’s best interest, a “primary consideration” is “the goal of assuring stability and continuity.” (*In re Stephanie M.*, *supra*, 7 Cal.4th at p. 317.) “‘When custody continues over a significant period, the child’s need for continuity and stability assumes an increasingly important role. That need will often dictate the conclusion that maintenance of the current arrangement would be in the best interests of that child.’” (*Ibid.*) The court must consider “the strength of the existing bond between the parent and child” as well as “the strength of a child’s bond to his or her present caretakers, and the length of time a child has been in the dependency system in relationship to the parental bond.” (*In re Kimberly F.* (1997) 56 Cal.App.4th 519, 531.)

In this appeal, Father believes his completion of a substance abuse program, continued participation in PCIT and individual counseling, and consistent visitation with Anthony—all done on his own after the court’s termination of reunification services to Father—constitute changed circumstances and “new evidence to meet the first prong of section 388.”

We disagree. Although we commend Father for his renewed persistence in attending individual counseling sessions and a substance abuse program, he has not demonstrated or established the relevant changed circumstance that the juvenile court was looking for, that is, whether Father had made substantial progress in his ability to meet Anthony’s basic needs and to provide care. Father continued to struggle with understanding and implementing the things he was taught multiple times—how to feed Anthony, what to feed Anthony, how and when to change Anthony’s diapers, and understanding Anthony’s special health requirements. He continued to bring non-organic baby wipes for Anthony even though he knew Anthony’s sensitive skin required organic wipes. Father brought Lean Cuisine meals as food suitable for a one-and-a-half-year-old baby. He brought food with gluten after being advised gluten upset Anthony’s stomach. The DCFS social worker and the M’s assessed Father did not demonstrate the ability to care for Anthony outside a monitored setting, and we agree. Father did not demonstrate any substantial progress or improvement in his ability to care for Anthony, and thus, the court’s determination that there were no changed circumstances or new evidence warranting reinstatement of reunification services for Father was not an abuse of discretion.

An analysis of the factors set out above in *In re Kimberly F.* supports the court's exercise of discretion. First, Anthony was brought to the attention of DCFS immediately after his birth because he had no parent who could care for him safely. Father came forward and acknowledged his paternity, but his two-year track record while under court supervision showed he could not independently care for Anthony safely in Mother's absence. He spent on average one monitored hour per week with Anthony and even in that hour, he could not feed or diaper Anthony properly when exercising his own judgment. He could never progress safely to unmonitored visitation. Second, Father believed he and Anthony had a strong attachment, but even after a year of visitation, Anthony cried in distress and threw tantrums before his visits with Father, behavior inconsistent with a strong bond and consistent with the caregivers' assessment that the visits took a toll on the child emotionally. However, Anthony was observed to have formed a strong attachment to the M.'s, as he was residing with them for more than two years. The record provides that Anthony's GERD symptoms improved while in the care of the M.'s, and that all of his emotional, physical, and educational needs were being met.

And, third, after two years of testing, counseling, and education, Father was not much farther along in his basic parenting skills than he was when he started. The problem that Father was not a safe caregiver at the most basic levels had not been ameliorated. Based on the record, there was a disconnect—Father was either unable to retain the information he was taught or was unable to implement what he learned when taking care of Anthony. Nothing had materially changed to warrant granting the section 388 petition.

A primary consideration in determining a child's best interest is "the goal of assuring stability and continuity." (*In re Stephanie M.*, *supra*, 7 Cal.4th at p. 317.) The juvenile court provided Father with reunification services for more than a year, even after DCFS recommended termination of those services. By the time the combined sections 388 and 366.26 hearing took place, almost another whole year had passed. After having spent over two years with the M.'s in their home, Anthony was entitled to stability and continuity as he grew into a toddler. The court's decision to move forward with adoption allowed Anthony to continue to reside safely with the same family and at the same home in which he had been residing for most of his young life. Based on Father's two-year track record, there was no reason to delay Anthony's chance at stability, continuity, and safety any longer.

The juvenile court did not abuse its discretion in weighing the harm from terminating Father's relationship with Anthony against the benefit of being adopted by the M.'s, and finding the latter course of action was in Anthony's best interests. We cannot find the juvenile court's decision arbitrary or capricious.

DISPOSITION

The findings and orders denying Father's section 388 petition are affirmed.

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STRATTON, J.

We concur:

GRIMES, Acting P. J.

WILEY, J.