Filed 9/16/19 In re D.A. CA2/4

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

In re D.A., a Person Coming Under the Juvenile Court Law.	B295265 (Los Angeles County Super. Ct. Nos. CK73107/ CK73107A
LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. J.A., Defendant and Appellant.	

APPEAL from orders of the Superior Court of Los Angeles County, Daniel Zeke Zeidler, Judge. Affirmed.

Mitchell Keiter, under appointment by the Court of Appeal, for Defendant and Appellant.

Mary C. Wickham, County Counsel, Kristine P. Miles, Assistant County Counsel, and Brian Mahler, Deputy County Counsel, for Plaintiff and Respondent.

INTRODUCTION

Jose A. (father) challenges two juvenile court orders relating to his son, D.: [F]irst, an order denying his request to reinstate reunification services and to provide unmonitored visitation under Welfare and Institutions Code section 388,[1] and second, an order terminating his parental rights under section 366.26.

Over the course of the case, father's visitation was sporadic, and although D. was happy to see father when he visited, father never took on a parental role or demonstrated that he was capable of managing D.'s special needs. Thus, we find that the trial court did not err in denying father's request to reinstate reunification services, and in finding that a permanency plan of adoption by D.'s foster family was in D.'s best interests.

FACTUAL AND PROCEDURAL BACKGROUND

A. Detention

1. *Referral*

The detention report dated February 15, 2017 discussed how D., born in November 2007, came to the attention of the Los Angeles County Department of Children and Family Services (DCFS) in October 2016. A DCFS children's social worker (CSW) received a referral for neglect regarding D. on October 12, 2016. The caller said D. was unattended, out of control, and "constantly running in and out of the home unsupervised." The caller

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

reported that D. was in the care of father, who traveled for a living as a truck driver, and was often left with paternal grandmother, who was terminally ill with cancer. When father was home he played video games for extended periods of time, leaving D. unattended.

The CSW went to the home the same day; D., father, and paternal grandmother were at the home. Father denied the reports, and said that D., who had autism, was typically calm and did not have behavior problems. Father said that D. had been living with him "for a while," and had previously been living with D.'s mother (mother). A letter from mother dated September 30, 2016, purported to give father custody over D. Father said that mother had D. enrolled in services, which were listed in the report as "speech therapy, regional center etc." Father and paternal grandmother said they were "unaware if the mother continued services" for D. Father said he had not enrolled D. in school because the schools were "ending their school year soon," but said he would enroll D. for the following year. Father also stated that he was working on securing a new residence. He said he works for a day or two at a time, and a family friend, Pablo, comes to stay with paternal grandmother and D. while he is away. Paternal grandmother reported that although she was ill, she was able to help care for D. Paternal grandmother had no concerns about father's care of D. D. was dressed appropriately with no visible marks or bruises.

The CSW noted that a 2010 exit order from a prior juvenile court case, discussed below, granted mother sole physical and legal custody of D., and allowed father and paternal grandmother monitored visitation. When the CSW brought this court order to father's attention, noting that father was in violation of the order

by having custody of D., father said he would file something to get the custody arrangement changed.

The CSW contacted mother, who said she had given father custody because she was preparing to enter the military. Mother expressed no concerns about D. living with father. Another family member said that mother "has been allegedly going into the army for some time." The family member also said that father did not take an active role in caring for D., that father relied on paternal grandmother even though she was getting sicker, and that D. was not in school or enrolled in any services.

2. *Prior history*

The prior juvenile court case, active from 2008 to 2010, sustained allegations of domestic violence between the parents that placed D. at risk. In May 2008, when D. was approximately six months old, DCFS alleged that D. was subjected to general neglect and emotional abuse, stating that mother and father were engaged in a domestic dispute in which mother allegedly threatened to kill herself and D., and father locked mother in a room. Mother was hospitalized on a psychiatric hold. The detention report stated, "Allegation of Emotional abuse is Substantiated. Child is detained with the father."

A referral in January 2010, which apparently occurred while the 2008 juvenile court case was still open, alleged another domestic violence altercation between mother and father, in which there was a "tug-o-war" over D., who sustained scratches on his face. Father was arrested. He was on probation for domestic violence at the time, and being involved in another incident of domestic violence violated a condition of his probation. Allegations of emotional and physical abuse and general neglect by father were substantiated.

Allegations of neglect and abuse were reported again in January and April 2012, involving ongoing domestic violence and issues with other adults in the family home. These allegations were deemed unfounded. An allegation in May 2013, when D. was about five and a half, stated that D. had not had medical or dental care in two years, his teeth were rotting, he had been diagnosed with probable autism but parents never followed up, and he was nearly nonverbal. DCFS found that D. had last seen a pediatrician in April 2012, and mother "attempted to have child seen by a dentist in January 2013, however, due to the child's 'uncooperative' behaviors and the lack of dental insurance the examination was not completed." DCFS deemed the allegation of neglect unfounded.

An allegation in April 2016 stated that father has an "extensive history of sexual abuse" and he was recently seen fondling a small child. The allegation was deemed inconclusive.

3. *Detention*

The detention report does not contain any entries from November 2, 2016 until January 18, 2017, on which it states that a new CSW was assigned to the case. In February 2017, a school tracer showed that D. had not been enrolled in school since September 23, 2016. The new CSW met with father and D. on February 3, 2017. Father reported that D. had been with mother for the last six months or so, and mother had only recently returned D. to father. Father stated that D. was not receiving any services, and he could not enroll D. in school because he did not have legal custody. Father did not know when D. last had a medical exam. D. appeared well-groomed and healthy, and the home was clean without safety issues.

The CSW spoke with father and mother several more times in February 2017, and told them that D. needed to be enrolled in school and should be receiving services for his special needs. Father and mother each repeatedly told the CSW that they would have the custody order changed, but the order remained in place. A CLETS[2] report showed that father had two convictions for statutory rape, two convictions for corporal injury to a spouse, and convictions for several driving-related offenses.

On February 10, 2017, mother and father told the CSW that D. had been enrolled in school. The same day, the juvenile court issued a removal order, and DCFS placed D. with paternal great-grandmother. On February 15, 2017, DCFS filed a juvenile dependency petition under section 300, section (b), for neglect. The original petition is not in the record on appeal. The petition, as amended, alleged that D. has autism spectrum disorder and requires treatment and special education services. It alleged that mother and father "have failed to provide the child with those services to address his needs," including failing to re-enroll D. in regional center services and failing to enroll him in school. Mother and father's failure "to provide the child with such services to address his special needs places the child at risk."

At the detention hearing on February 15, 2017, the court found a prima facie case for detaining D. D. remained with his paternal great-grandmother, and the court granted both parents monitored visitation. The court ordered family reunification services, and ordered that D. be enrolled in school. D. was moved to foster care on March 9, 2017, because paternal great-grandmother lived in senior housing that did not allow children, and she was not able to transfer to a child-friendly unit.

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[2] California Law Enforcement Telecommunication System.

B. Adjudication

The jurisdiction/disposition report dated April 3, 2017 stated that D. was living in foster care. Regarding the allegations, father stated that he had been planning to enroll D. in school after a planned move, but "complications came up" with the move, and paternal grandmother was diagnosed with cancer. Father also said he attempted to have the custody order changed in court, but DCFS removed D. before the change could be made. As of March 15, 2017, father had visited D. once. D. stated that he would like to live with father.

Father moved into a new one-bedroom apartment with his girlfriend on March 12, 2017. The home had working utilities and food in the refrigerator. Father said he was researching local schools to see which ones would suit D.'s needs. Father enrolled in parenting classes.

DCFS recommended that D. remain in foster care, noting that mother and father "did not meet the child's education and developmental needs." DCFS also noted that mother and father were in violation of the prior court's custody and visitation order, and "per the status review report dated 05/24/2010, the father was not in compliance with the court ordered services during the prior open case." DCFS recommended that the petition be sustained.

At the adjudication hearing on April 3, 2017, both parents pled no contest to the allegations (as amended) in the petition. The court found D. to be a person described by section 300, subdivision (b). The court ordered monitored visitation for parents, one hour twice per week, and gave DCFS permission to liberalize visitation or to file a home-of-parent request.

C. October 2, 2017 review hearing

An interim review report dated July 10, 2017 stated that as of June 16, mother had not enrolled in any court-ordered programs, stating that it was "not a priority" for her. Mother stated that she enjoyed visiting D., and she wanted him to live with father. Father had been taking parenting classes and planned to enroll in individual counseling. D.'s foster mother reported that father had visited D. once on March 3 by attending a doctor's visit. Father also visited on June 17, 2017. No other visits with father are documented in the record. The foster mother reported that father does not call D., but that D. asks for father often and "lights up" when father visits. DCFS stated that father was in partial compliance with the court order, and recommended that the court continue reunification services.

A status review report dated October 2, 2017 stated that D. remained in foster care, and had good relationships with his foster family. D. had an individual education program (IEP) in school, and had begun services with the regional center. Mother was not in compliance with the case plan, and stated that she did not feel the need to participate in services because her goal was to have D. reunify with father. She regularly had two-hour visits with D. on Saturdays.

Father was in partial compliance with the case plan. He started attended parenting classes, but he had only completed six sessions of an 18-session course, and he had not attended any classes since June. He had not attended individual counseling because he did not timely complete the intake process. Father also did not make himself available for a DCFS child and family team meeting. At home visits with the CSW, the CSW noted that father "is always engaged in playing video games upon this

CSW's arrival." The status review report also stated that father "continues to provide [the foster mother] with excuses for why he is unable to be consistent with his monitored visitation." Father's visits with D. were sporadic, with only one visit in July and one in August. The foster mother reported that father did not call D.

DCFS recommended that D. remain in foster care due to mother's noncompliance and father's partial compliance with court orders. DCFS also deemed a risk of future neglect "very high" in light of "the limited progress" toward "providing a safe, nurturing, structured, and supportive home environment for a child with special needs." D.'s foster family expressed an interest in legal guardianship for D. At the review hearing on October 2, 2017, the court found that mother's compliance with the case plan was nonexistent, and father's compliance was partial. The court ordered continued reunification services. The court set a review hearing for April 3, 2018.

D. April 2, 2018 review hearing

A status review report dated April 2, 2018 stated that D., now age 10, remained in his foster home. He had "adjusted well to his placement with" the foster family, and he was "securely bonded to the [foster] family as evidenced by [D.] being comfortable in the family's presence." He had "difficulty expressing his wants and needs," but was improving. He was in fourth grade, attended special education classes, and had an IEP. D. had high-functioning autism and a language disorder, and he was reading at a kindergarten level. D.'s foster parents stated that they would be willing to adopt D. if he was unable to return to father's care.

The foster mother reported that father had become more consistent with his visits and calls to D., but the status review

report also stated that father "struggled with visiting the child consistently and calling the child." Father worked as a truck driver and was gone for several days at a time. The foster mother stated that father visited two to three times per month, and was generally appropriate with D. D. was clearly happy to see father during visits. Father had completed his parenting classes, but he was "unable to articulate the insight he gained from the course." Father said he was committed to reunifying with D.

Father and his girlfriend had separated, and father was looking for new housing. Father had not attended D.'s medical or dental appointments. Father also did not follow up on issues relating to D.'s education, despite continuing to hold educational rights for D. The status review report stated, "Father has been informed several times that the school requires father's authorization to initiate the progress [*sic*] for [D.] to be placed in a specialized school for children with autism." DCFS deemed father in partial compliance with the case plan. DCFS stated, "[W]hile father has made some progress, he continues to lack insight into surrounding case issues." It also stated that "father has not clearly demonstrated that he is capable of meeting the child's educational, emotional, and physical needs." DCFS was considering liberalizing father's visits to unmonitored day visits.

Mother did not make herself available to DCFS, and there was no indication that she was working to comply with court orders. Mother had visited D. only once in October, and had not visited thereafter. A CLETS report indicated that mother was arrested in December 2017 and sentenced to 36 days in jail. DCFS recommended that the court terminate reunification services for mother.

At the April 2, 2018 review hearing, the court found that father was in substantial compliance with the case plan, and mother's progress was nonexistent. The court found that continued reunification services were warranted due to father's progress. The court set a hearing under section 366.22 for August 10, 2018. The hearing date was later moved to August 14, then September 11, 2018.

E. September 11, 2018 permanency review hearing

A status review report dated August 14, 2018 stated that in May 2018, "father's frequency in visitation declined and he stopped participating in individual therapy sessions." Father missed visits on May 5, 12, 19, and 26, and June 9, 23, and 30. No information is included about visits in July or August. The status review report stated that "father's lack of frequent visitation is having a detrimental impact" on D., who "frequently inquires about father['s] whereabouts and will ask his caregiver why father is not visiting him." An IEP meeting summary dated April 30, 2018 noted that father intended to give education rights to the foster mother.

Father had not made himself available for face-to-face visits with the CSW. The CSW attempted to contact father on June 18 to tell him that D. suffered a serious burn on his hand, but father did not call back until July 3, when father called to ask about unmonitored visitation, not D.'s injury. DCFS stated that father "continues to lack insight surrounding case issues," and "father continues to lack adequate knowledge on how to care for a special needs child." DCFS deemed the risk of future abuse or neglect "very high," and recommended that reunification services be terminated. Mother remained unavailable to DCFS, and had not complied with the case plan.

A last-minute information filed September 5, 2018 stated that father had completed 12 sessions of individual therapy from January to August 2018, with a four-month gap between March and July. Father's therapist said she was confident that father had the skills necessary to adequately care for D., and he demonstrated insight that D. had special needs and required special services. The last-minute information noted that father had been in special education classes in high school, and "father does not appear to be functioning at a level that would keep [D.] safe."[3] It also stated that father struggled with completing the court-ordered case plan, and "father has not clearly demonstrated sufficient insight to care for a child with special needs." Father had not visited D. regularly, and "failed to take accountability for his lack of visitation and continues to blame others and make excuses." The therapist stated that she was "working with father to decrease making statements that appear to be excuses."

DCFS also stated that it was "unable to assess father's current living circumstances due to father's reluctance to have the department meet with him in his home." Although it was "evident that father loves and cares" for D., "father does not appear to have the capacity to care for [D.] as evidenced by father's inability to follow-through and his inability to understand what is expected of him, even when instructions are simplified and reiterated to him numerous times." DCFS recommended that reunification services be terminated, and that the court set a section 366.26 hearing.

At the section 366.22 review hearing on September 11, 2018, father testified that he regularly visits D. on Fridays or

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[3] In a letter dated September 10, 2018, the therapist made clear that she was not the source of this statement.

Saturdays. When the judge asked about the gap in visits from April to August, father said he had been depressed and homeless, but individual counseling taught him that there are resources available to him. Father stated that he had never had unmonitored visits with D. Father also said that D. sometimes has autism-related meltdowns, and stated that he is able to calm D. down by talking to him and removing triggers. Father said his understanding of autism when the case was initiated was very limited, but he had learned more.

Father testified that the social worker had been to his current residence. Father also said there were multiple people in his life who could care for D. while father worked. Father recognized that D. needed his IEP, school services such as counseling, and the services of the regional center. When asked what services D. was receiving through the regional center, however, father said he did not know. Father also said he never received a message from the social worker about D.'s burned hand.

The CSW disputed father's testimony that she had visited father's home. She testified that father told her in mid-July that he moved, and she tried to set up a visit to assess the home. Father "was not available," and offered to meet the CSW at the office instead.

DCFS argued that reunification services should be terminated. It pointed out that in the previous case that was pending from 2008 to 2010 due to domestic violence between the parents, father did not comply with the case plan and the court terminated reunification services. When the court terminated jurisdiction, it gave mother sole physical and legal custody, with monitored visitation for father. D.'s living with father at the

initiation of the instant case was a violation of that court order. D. had not been enrolled in school or other services despite his needs. Now, 18 months into the second juvenile court case, father was "just beginning to do what he needs to do." In the middle of the case, father "dropped out" because he was depressed, suggesting that he was not ready to care for a special needs child while attending to his own needs.

Father's counsel argued that father's absence in May and June was justified due to his depression and homelessness, and the fact that father returned to individual counseling showed that he was serious about reunifying with D. The therapist indicated in her letter that father was working on his issues and gaining insight. Father had also completed parenting classes, contacted people who could care for D. while father worked, and was enthusiastic about helping D. progress in his education and services. Father's counsel asked that D. be returned to father's care immediately. Mother's counsel joined father's request.[4]

Counsel for D. joined DCFS's arguments. She stated that father had never inquired about what kinds of behavioral and speech therapy services D. was receiving, which showed that he did not have a solid understanding of D.'s needs. Counsel also stated that the services are listed in the court reports, and although father was served with the reports, he still did not know what services D. received.

The court found that returning D. to the parents' care would pose a substantial risk to D.'s physical and/or mental

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[4] Mother's counsel acknowledged that mother had not been in contact with anyone about the case in recent months, and that this request was based on mother's past representation that she wanted D. to live with father.

health, and there was a continuing need for the current placement. The court found by clear and convincing evidence that reasonable reunification services had been provided to father, and father's progress had been "substantial." The court also said that although father had been largely in compliance with the case plan in April, he became inconsistent in his visits and he never progressed beyond having monitored visitation with D. The court stated that D. could not be placed with father because father "is still only having monitored visits, does not know what services the child is receiving through [the] regional center, [and] has not followed through with having his home assessed." The court terminated reunification services, gave DCFS discretion to liberalize father's visits, and set a section 366.26 permanency planning hearing for January 7, 2019.

F. January 7, 2019 section 366.26 hearing

A section 366.26 report filed on October 31, 2018 stated that father asked the CSW for unmonitored visitation. The CSW told father that due to his inconsistent visitation, DCFS was not considering liberalizing visitation to unmonitored visits. Father said that he had asked the foster family to consider legal guardianship rather than adoption.

An interim review report filed November 5, 2018 stated that the foster family that had been caring for D. since February 2017 had been approved to adopt him. The family was willing to have D. maintain contact with his birth family members. D. was closely bonded with the foster family, and said he likes living with them. DCFS recommended terminating parental rights and implementing a plan for adoption.

On December 24, 2018, father filed a request to change a court order (§ 388), asking that reunification services be

reinstated, and that father be given unmonitored visitation. Father stated that he and D. shared a close bond, and that father had been attentive to D.'s medical and dental needs. Father submitted a declaration stating that he maintains regular phone contact with D., he visits D. regularly, and D. is always happy to see him. Father said he understood D.'s autism and knew how to calm him when he gets upset. Father also stated that he knew D. was receiving speech therapy and had an IEP in school, and said that he looked into getting a 504 plan for D. Father acknowledged that "[d]uring the months of May and June, I missed a couple [of] visits due to many things," including his work as a truck driver. He said that he had arranged a work schedule and child care so he was fully prepared to have D. returned to him.

The court denied father's request as to reunification services, stating that father did not offer any new evidence or show a change of circumstances. The court ordered a hearing as to father's request for unmonitored visits. The hearing was set for January 7, 2019, the same day as the permanency planning hearing.

A last-minute information filed on January 4, 2019 stated that father visited D. twice in October, twice in November (one planned visit was cancelled by the caregiver), and six times in December. Each visit lasted one hour. The foster mother reported that father was appropriate during visits, and "father appears to love and care for" D. However, father did not inquire about D.'s social and academic development or his progress in special services. Father also made promises to purchase things for D. if he returned to live with him, such as a PlayStation or video games. "Such false promises appear to cause [D.] to become

uneasy and he will repeatedly express the desire to live with father so he can receive [the] gifts promised to him." DCFS asked that father's request for unmonitored visitation be denied, because the inconsistent visitation was an "ongoing concern since the inception of the case" and father has not shown the ability to comply with the requirements of monitored visitation.

At the hearing on January 7, the court considered father's request for a change in court order. D.'s counsel asserted that father had not demonstrated a change in circumstances, and father showed a pattern of not following through on visitation, which affected D. Father's counsel stated that father regularly visits and has regular phone contact with D., and his declaration showed that he was familiar with the services D. was receiving. Father's counsel stated that it was in D.'s best interest to have unmonitored visits because father and D. had a strong bond. DCFS joined the arguments of D.'s counsel, stated that father's declaration discussed a 504 plan that would provide D. with more limited services than the current IEP, and noted that father's visits had been consistent for only one month. The court denied father's request, stating that father had not shown a sufficient change in circumstances or that it would be in D.'s best interests to liberalize father's visits "based upon the inconsistency in the visits, the promises being made, and where we're at at this point."

The court then proceeded with the section 366.26 hearing. Father objected to the termination of parental rights, stating that there was a bond between father and D. Counsel for D. stated that the benefits of permanency outweighed the parental bond. The court found that the relationship between father and D. did not outweigh the benefits of permanence for D. The court also

found that D. was adoptable, and terminated parental rights. The court gave the caretakers discretion to permit ongoing contact with parents. Father timely appealed.

DISCUSSION

On appeal, father asserts two errors. He contends that the juvenile court erred in denying his section 388 petition. He also contends that the court erred in terminating parental rights, in that it failed to consider "the statutorily required evidence of the child's preference." We consider each of these arguments.

A. Section 388 petition

The scope of father's challenge to the section 388 ruling is unclear. In his section 388 request, father asked that the court reinstate reunification services and order unmonitored visitation. The court denied the request for reunification services without a hearing, and denied the request for unmonitored visitation after a hearing. In his briefing on appeal, father asserts that the court "erred in denying his section 388 petition seeking unmonitored visitation." However, father also mentions that the "court found no statutory basis for ordering additional reunification services," without contending that this was error. DCFS asserts in its respondent's brief that both aspects of the court's ruling were correct. In an abundance of caution, we assume that father intended to challenge both aspects of the court's order.

Section 388, subdivision (a)(1) states that a parent "may, upon grounds of change of circumstance or new evidence, petition the court . . . for a hearing to change, modify, or set aside any order of court previously made." The petition "shall set forth in concise language any change of circumstance or new evidence that is alleged to require the change of order." (§ 388, subd. (a)(1).) We review the court's order on a section 388 petition for

an abuse of discretion. (*In re Alayah J.* (2017) 9 Cal.App.5th 469, 478.) "'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.'" (*In re Stephanie M.* (1994) 7 Cal.4th 295, 318-319 (*Stephanie M.*).)

Father filed his section 388 request after the court ordered that reunification services be terminated. "After the termination of reunification services, the parents' interest in the care, custody and companionship of the child are 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 interest of the child." (*Stephanie M., supra*, 7 Cal.4th at p. 317.) A parent filing a section 388 petition after reunification services have been terminated "has the burden to establish changed circumstances to justify changed orders that will promote the best interests of the child." (*In re J.P.* (2017) 15 Cal.App.5th 789, 800.)

Father asserts that there were changed circumstances because father had learned about the services D. was receiving, and "[i]nsofar as the court initially terminated reunification services because Father did not know about [D.]'s services, that ground no longer applied by the time father filed the section 388 petition." Father acknowledges that "DCFS had still not yet assessed Father's home, nor upgraded Father to unmonitored visitation." Father argues, however, that this was DCFS's fault, and "a petition cannot be denied simply due to DCFS'[s] actions, or lack thereof."

DCFS points out that when the court terminated reunification services in September 2018, it found that father's inconsistent visitation was an issue. Nevertheless, father continued being inconsistent with his visits in October and November. During this time, the foster mother noted that father did not ask about D.'s services or academic progress.

Father's petition and the evidence presented at the hearing did not show changed circumstances. Father had not reunified with D. in the earlier juvenile court case, and had not progressed beyond monitored visitation in the nearly two years this case was pending. At best, father showed that he began to take an interest in D.'s specific developmental needs only after reunification services had ended. Father still had not made his home available for assessment, and he did not demonstrate consistency in visiting D. "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.)

Father also did not show that reinstating reunification services or providing unmonitored visitation would serve D.'s best interests, and he did not overcome the rebuttable presumption that continued foster care was in the best interest of D. (*Stephanie M., supra*, 7 Cal.4th at p. 317.) At this stage of the proceedings, the child's best interests "are not to further delay permanency and stability in favor of rewarding [a parent for] hard work and efforts to reunify." (*In re J.C.* (2014) 226 Cal.App.4th 503, 527.) Father made no showing that additional reunification services or unmonitored visitation would advance

D.'s need for permanency and stability. He also does not argue on appeal that such a showing was made.

Instead, father asserts that we should apply the three-factor test set out in *In re Kimberly F.* (1997) 56 Cal.App.4th 519, 530-532 (*Kimberly F.*).[5] That test is not applicable here. The same court that decided *Kimberly F.* later stated that the three factors articulated in that case "do not take into account the Supreme Court's analysis in *Stephanie M.*" (*In re J.C., supra,* 226 Cal.App.4th at p. 527), in which the Supreme Court made clear that after reunification services have been terminated, the focus shifts to the child's permanency and stability. (*Stephanie M., supra*, 7 Cal.4th at p. 317.) As *Stephanie M.* is applicable under the circumstances of this case, we do not apply the *Kimberly F.* factors.

Continuing reunification services for father would undermine D.'s permanency and stability. The case had been ongoing for nearly two years by the time of the section 388 hearing, father had never progressed beyond monitored visits in the earlier juvenile court case or the present case, D. was happy and thriving with his foster family, and his foster family wanted to adopt him, thus providing a permanent placement for him. The juvenile court did not err in finding that extending

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[5] *Kimberly F.* states that in determining the best interests of the child for purposes of a section 388 request, the juvenile court should consider "(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.*, *supra*, 56 Cal.App.4th at p. 532.)

reunification services for father, thereby delaying permanency for D., would not have been in D.'s best interests.

Father also challenges the court's denial of unmonitored visitation, but he made no showing that unmonitored visitation would serve D.'s best interests. To the contrary, evidence showed that father's visitation was inconsistent throughout the case. In addition, the foster mother observed that father promised to buy D. a PlayStation and video games if D. came to live with him, and D. got upset that these promises never materialized. The evidence does not support a finding that it would have been in D.'s best interests to have unmonitored visitation with father. The court therefore did not abuse its discretion in denying father's section 388 petition.

B. Section 366.26 order

Section 366.26, subdivision (c)(1) states, "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." However, there is a "parental benefit exception" in subdivision (c)(1)(B)(i) of this statute, which states that parental rights may not be terminated when the "court finds a compelling reason for determining that termination would be detrimental to the child" due to the fact that the parent 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).) Here, father asserts that the parental benefit exception barred termination of his parental rights. We disagree.

Under this exception, the parent bears the burden of showing by a preponderance of the evidence that the termination of parental rights would be detrimental to the child. (*In re*

Anthony B. (2015) 239 Cal.App.4th 389, 395; *In re Caden C.* (2019) 34 Cal.App.5th 87, 104.) "We apply the substantial evidence standard of review to the factual issue of the existence of a beneficial parental relationship, and the abuse of discretion standard to the determination of whether there is a compelling reason for finding that termination would be detrimental to the child." (*In re Anthony B., supra,* 239 Cal.App.4th at p. 395.)

The parental benefit exception "can only be found when the parents have maintained regular visitation and contact with the child and the child would benefit from continuing the relationship." (*In re Anthony B.*, *supra*, 239 Cal.App.4th at p. 395.) The record makes clear that father did not maintain regular visitation with D. Over the two-year span of the case, father's visits were inconsistent. "Sporadic visitation is insufficient to satisfy the first prong of the parent-child relationship exception to adoption." (*In re C.F.* (2011) 193 Cal.App.4th 549, 554.) For that reason alone, father cannot meet the requirements of the parental benefit exception.

In addition to consistency, "[a] parent must show more than frequent and loving contact or pleasant visits. . . . The parent must show he or she occupies a parental role in the child's life, resulting in a significant, positive, emotional attachment between child and parent." (*In re C.F., supra,* 193 Cal.App.4th at p. 555; see also *In re Elizabeth M.* (1997) 52 Cal.App.4th 318, 324 [that a parent occupies a "pleasant place" in a child's life is "insufficient to deny a child [a] secure and permanent home."].) Father has also not met this burden. Father never progressed to unmonitored visitation, he did not attend D.'s medical and dental appointments, he did not know what services D. was receiving, and he did not ask D.'s caregivers about D.'s academic progress.

Thus, father was not serving in a parental role as it pertained to D. day-to-day needs, special needs, or development.

Father does not address the issues of visitation or a parental role in his brief on appeal. Instead, father argues that the juvenile court erred by failing to take D.'s preference into account when making its ruling.[6] Father asserts that DCFS "failed to communicate with" D. about his wishes, and therefore the court "overlook[ed] the statutorily required evidence of the child's preference." Father did not raise this issue at the hearing, and therefore any contention of error on this basis has been forfeited. (See *In re Erik P.* (2002) 104 Cal.App.4th 395, 403 [parent must raise any relevant exception at the § 366.26 hearing or forfeit the right to raise the exception on appeal].)

Even addressing the substance of father's argument, we find no error. Father relies on *In re Leo M.* (1993) 19 Cal.App.4th 1583 (*Leo M.*), which rejected an argument similar to the one father makes here. In that case, the mother argued that the juvenile court failed to consider her five-year-old son's wishes in reaching its determination under section 366.26. (*Id.* at p. 1590.) The court held that a direct statement of the child's wishes was not required, and in the absence of such a statement, "it may still be possible to explore the minor's feelings regarding his/her biological parents, foster parents, and prospective adoptive parents, if any, as well as his/her current living arrangements."

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[6] Father does not cite section 366.26, subdivision (h)(1), which states, "At all proceedings under this section, the court shall consider the wishes of the child and shall act in the best interests of the child," and specifies how such testimony shall be taken. As father does not assert that the trial court failed to comply with this procedure, we do not consider that subdivision here.

(*Id*. at p. 1592.) The court stated that "no direct evidence of Leo's specific preferences was presented. Nor was any attempt made by the court to interview the minor to learn of his feelings towards appellant, his prospective adoptive parents (who also happen to be his foster parents), or his thoughts on living with his prospective adoptive parents on a permanent basis. . . . However, while the record contains no direct evidence of Leo's thoughts on this matter, it does include ample evidence from which his feelings can be inferred." (*Id*. at p. 1593.) Leo had a "substantial bond with his foster parents," and barely knew his mother. (*Ibid*.) The court concluded that there was "a reasonable and compelling inference on this evidence that Leo would prefer to live with the only mother and father he has acknowledged. Further, there is nothing before us to support the conclusion that not taking direct evidence of Leo's wishes was an abuse of discretion or was prejudicial under the circumstances of this case." (*Id*. at p. 1594.)

Father also compares this case to *In re Scott B*. (2010) 188 Cal.App.4th 452 (*Scott B*.), which bears some similarity to this case. The child, Scott, was mildly autistic and had other special needs; mother had trouble caring for him effectively, and Scott was found wandering alone after running away. Before detention, Scott was "very withdrawn, practically non-verbal, did not express his feelings with words but instead would growl and thrash about, lacked social skills and struggled with social interaction, did not attend school on a regular basis, and lacked adequate toilet training." (*Id*. at p. 457.) After living with his foster family, Scott "had become 'quite verbal and expressive,' appeared to be comfortable with the adults in his life, was seeing to his own hygiene and personal care, was interacting well with

the other children in the home, and was attached to his foster sister." (*Ibid.*) Nevertheless, throughout the case Scott consistently stated that he wanted to live with his mother, and at times he threatened to run away if he were adopted. After a four-year period of DCFS involvement, the juvenile court interviewed Scott as part of the section 366.26 hearing. During this interview, "Scott spontaneously stated that he wanted to be adopted so that he, Mother and the foster family could all 'go somewhere fun.' Asked what it means if someone is adopted, Scott answered: 'I forget.'" (*Id.* at p. 466.) The juvenile court found that the parental benefit exception did not apply, and terminated mother's parental rights. Mother appealed.

The Court of Appeal reversed, finding that the parental benefit exception applied. (*Scott B., supra*, 188 Cal.App.4th at p. 470.) The court noted that mother had been very consistent in her visitation with Scott, and that before his detention Scott had lived his entire life with mother. (*Id.* at p. 471.) Scott's spontaneous statements to the court about adoption showed that he did not understand how adoption worked: "He emotionally accepted adoption because he believes that adoption means Mother will be included to some extent in the foster family's activities. [¶] It is clear that Scott did not understand that his foster mother would have the right to cut off his contacts with Mother if she adopted him." (*Id.* at pp. 471-472.) Moreover, the court appointed special advocate "opined, and the record clearly shows, that it would be detrimental to Scott for his relationship with Mother to be disrupted." (*Id.* at p. 472.)

Father compares the instant case to *Scott B.*, stating that "Scott, like [D.], had a strong attachment to the parent. [Citation.] If Father's occasional missed visits had a 'detrimental

impact' on [D.], a fortiori, cutting out Father from his life entirely would hurt him even more." Here, however, D.'s attachment to father cannot be compared to Scott's attachment to his mother. While Scott had lived with his mother most of his life, D. only lived with father for a matter of months before detention. Prior to that, father failed to reunify with D. in the prior juvenile court case, and was provided only monitored visitation for seven years before this case began. After detention, father's visits to D. were inconsistent. Thus, unlike the mother in *Scott B.*, here father was not a consistent and steadying presence in the child's life. In addition, the record does not suggest that D. repeatedly requested that he live with father, as the child did in *Scott B.* when he vehemently resisted adoption through most of the case, and threatened to run away if that occurred.

Importantly, *Scott B.* does not support father's argument that a juvenile court's failure to take a child's wishes into account constitutes reversible error. To the contrary, the *Scott B.* court explicitly acknowledged that an 11-year-old's concept of adoption and termination of parental rights is limited, and a child's stated wishes may not reflect the child's best interests. Moreover, the record does not make clear that D. would have been able to make a meaningful statement about adoption or father's parental rights. D. had autism and language delays, and the section 366.26 report stated that he "had difficulty controlling his emotions and expressing his feelings appropriately." However, as in *Leo M.*, there was evidence in the record from which D.'s wishes could be inferred. The reports stated that D. was well-adjusted and thriving in the foster family's home, and he was bonded to the foster family. Although D. was clearly happy to see father at visits, when D. expressed a desire to live with father,

that desire was attributed to father's promise of a PlayStation and video games.

We find this case to be more similar to *Leo M.*, in that the record supports the juvenile court's finding that the stability of adoption was in D.'s best interests, and nothing supports a finding that failing to interview D. was prejudicial under the circumstances. (*Leo M., supra,* 19 Cal.App.4th at p. 1594; see also *In re Christopher L.* (2006) 143 Cal.App.4th 1326, 1334 ["Evidence of a child's wishes may . . . appear in the Agency's reports."].) And as discussed above, father did not meet the primary requirements for a parental benefit exception. Thus, even if the court erred in failing to take D.'s wishes into account, father has not demonstrated that such an error was prejudicial under the circumstances.

DISPOSITION

The juvenile court's orders are affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

COLLINS, J.

We concur:

WILLHITE, ACTING P.J.

CURREY, J.