Filed 1/22/13 In re Peter G. CA2/1

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

In re PETER G., a Person Coming Under the Juvenile Court Law.	B242560 (Los Angeles County Super. Ct. No. CK12557)
LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. CHRISTOPHER G., Defendant and Appellant.	

APPEAL from orders of the Superior Court of Los Angeles County. Amy M. Pellman, Judge. Affirmed.

Jack A. Love, under appointment by the Court of Appeal, for Defendant and Appellant.

John F. Krattli, County Counsel, James M. Owens, Assistant County Counsel, and Navid Nakhjavani, Deputy County Counsel, for Plaintiff and Respondent.

Christopher G. (Father) appeals from the juvenile court's May 22, 2012 orders denying his Welfare and Institutions Code section 388 petition and terminating his parental rights over Peter G., born in June 2010.[1] Father contends that the court abused its discretion in denying his section 388 petition because he demonstrated a change of circumstances such that a change in placement would be in the best interests of Peter and that the court erred in terminating his parental rights because the beneficial parent-child relationship exception applied. Susan G. (Mother) filed a letter brief under *In re Sade C.* (1996) 13 Cal.4th 952 and *In re Phoenix H.* (2009) 47 Cal.4th 835. Father adopts by reference Mother's arguments, but in a separate order filed on January 15, 2013, we dismissed Mother's appeal. We disagree with Father's contentions and affirm the orders.

BACKGROUND

On September 1, 2010, the Los Angeles County Department of Children and Family Services (DCFS) filed a petition pursuant to section 300, subdivision (b) (failure to protect) on behalf of Peter. As amended and sustained, paragraphs b-2 and b-3 of the petition alleged under section 300, subdivision (b) that Mother and Father have unresolved histories of substance abuse.

The events leading to the filing of the petition are as follows. Mother's parental rights had been terminated previously as to her two children, born in 1988 and 1993, based on domestic violence between Mother and her former husband and substance abuse by Mother. Peter was born six weeks premature. Mother's toxicology results were positive for amphetamines, methamphetamines, marijuana, and opiates two weeks before Peter's birth. Mother did not have a medical marijuana prescription but admitted she had smoked marijuana for migraines six weeks prior to Peter's delivery. Although Peter's toxicology tests at birth were negative, he was considered a "Prenatally Substance Exposed Infant" and treated with methadone for withdrawal symptoms.

Mother exhibited volatile and violent behavior, threatening to kill whoever took Peter away from her. Although in July 2010 Father tested positive for marijuana, Peter

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

was released to his care under a safety plan. DCFS noted a bond between Peter and Father during a visit on July 30, 2010. Mother tested positive for methamphetamine, amphetamines, and marijuana on August 17, 2010. Father tested positive for methamphetamine, amphetamines, and marijuana on September 10, 2010, and admitted to DCFS that he used drugs. Peter was then detained from Father and placed in foster care. The juvenile court ordered DCFS to provide Mother and Father with referrals for inpatient and outpatient drug treatment programs and ordered random drug testing for Mother and Father. Father's subsequent monitored visits were reported to be appropriate, although Father sometimes fell asleep during the visits.

Father unsuccessfully attempted to participate in five different drug treatment programs from October 7, 2010, to October 26, 2011, as follows. Father enrolled for weekly individual counseling and parenting classes at Calvary Chapel. Between September 2010 and January 2011, Father had three positive tests for methamphetamine, amphetamine, and marijuana, and failed to drug test seven times. On June 8, 2011, after Mother and Father were informed that they needed to start over at the Calvary Chapel program because of their frequent absences, Mother became "'very violent.'" Father and Mother stopped attending the program. Father enrolled in The Gary Center from October 7, 2010 to July 19, 2011, but his progress was "inconsistent" and he either tested positive in random drug tests or did not show.

Meanwhile, on December 8, 2010, the court ordered Father to attend a drug rehabilitation program with random drug testing; parent education; individual counseling to address case issues, including family dysfunction; and Narcotics Anonymous. Father was advised by The Gary Center to enroll in an inpatient program called Cactus Garden Opportunity House Incorporated due to his "'relapse behaviors'" triggered by his unhealthy relationship with Mother. DCFS reported in May 2011 that Father had not submitted to any drug tests after he had tested positive in October 2010. Subsequently in May 2011, Father had three negative tests and was allowed unmonitored visits. On June 29, 2011, Father told DCFS that he had enrolled in the Cactus Garden program but later stated he left the program on July 13, 2011. Father enrolled in an outpatient

program called Come to Him Ministries that had 12-step meetings, but was not a drug program. DCFS advised Father that he had to enroll in a drug program. From May 2011 to September 2011, Father missed eight drug tests and tested positive for methamphetamine, marijuana, and amphetamines in July and August 2011. Father enrolled in A Better Me drug program on August 22, 2011. Father was discharged from services at A Better Me after he did not show up on September 12, 2011, at Socorro Residential Program, to which A Better Me had referred him. Father enrolled in an inpatient program, Positive Steps/Cider House on October 17, 2011, where he tested positive for tetrahydrocannabinol. After a visit by Mother, who was "belligerent" and "disruptive" on October 25, 2011, Father left Positive Steps/Cider House without permission on October 26, 2011, and was discharged thereafter. Paternal grandmother later picked up Father's belongings from Positive Steps/Cider House and told the staff that Father was "with" Mother.

DCFS reported that although Father appeared to love Peter and shower him with affection during visits, Father's actions were not consistent and he did not seem to know how to interact with Peter. DCFS also reported that Father had not demonstrated an ability to provide for Peter's emotional, physical, and mental needs in a safe environment. On one occasion, after Peter had finished eating and drinking, Father threw him in the air and initially refused directions to stop throwing him after Peter appeared nauseous. During visits, Father and Mother made inappropriate comments. For instance, while Peter was sitting in a toy car, they referred to "being pulled over by the police for DUI." Additionally, Father had missed visits and sometimes fell asleep during his visits with Peter. And although Father realized that "[Mother makes] things worse for him and Peter," he stated he could not get through to her and continued to make excuses for Mother's behavior.

On November 29, 2011, the juvenile court terminated Father's family reunification services. At that hearing, Father's counsel did not inform the court that Father was participating in any program. Rather, Father's counsel told the court that Father was

withdrawing his contest and not opposing DCFS's recommendation to terminate his services, which was based on Father's failure to participate in a drug treatment program.

Meanwhile, Peter had been placed with prospective adoptive parents since June 2011, with whom he had bonded strongly and received appropriate care.

Father did not visit Peter from the time reunification services were terminated until April 2012. On March 29, 2012, Father filed a section 388 petition, stating as a change of circumstances that he had completed parenting, individual counseling, and group counseling programs at Family Outreach and Community Intervention Services. He stated he had been testing negative since October 12, 2011. Father requested Peter be returned to his care, or in the alternative, the juvenile court order Father six more months of reunification services with unmonitored visits. Father stated the change would be in the best interests of Peter because Peter and Father are bonded and have positive visits; DCFS has "found that the quality [of the visits] is good"; and Father is "clean and sober and can provide a stable and loving home" for Peter.

On April 12, 2012, Chris Villa, registered addiction specialist and regional director of Family Outreach, informed DCFS that Father and Mother had completed 24 weeks of programs. Villa stated that "no services were provided by a licensed clinician" and that Father had last been tested "'a couple of months ago'" and the test was "'clean.'" Family Outreach did not use a urinalysis test, but used urine-dip tests, which consisted of dipping test strips into the client's urine. On April 18, 2012, Villa stated that in August or September 2011, he had attempted unsuccessfully to contact DCFS, but did not "'make big of an effort to get in touch with [DCFS] . . . I knew this was coming.'" A letter dated March 16, 2012, from Villa to DCFS stated that Father had completed a substance abuse treatment program, including weekly group meetings, biweekly individual sessions, and random urine analysis for 24 weeks. It stated that Father had begun sessions on October 12, 2011; had completed 10 weeks of a parenting program; was very cooperative with "his" counselor and staff; and had "tested negative for illicit drugs since the onset of his program."

DCFS reported its concerns about Father's participation in the Family Outreach program because the dates conflicted with his enrollment in the inpatient program Positive Steps/Cider House; Villa did not contact DCFS; Villa did not give DCFS specific information regarding the type of parenting program or curriculum; and the services described in the letter did not address the "parents' case related issues and their ongoing couples dynamics." DCFS stated "the information provided is too general to validate that [Father] is now aware of sober living." DCFS reported that Father's nickname for Peter was "'weirdo'"; Father did not bring snacks for Peter during visits; and Father was unable to redirect Peter's aggressive behavior in trying to slap and kick Father. DCFS reported that Father was more concerned about Mother's best interests than Peter's, and that he used Mother's behavior as an excuse to keep using drugs.

At the May 22, 2012 section 388 hearing, Father testified that he had found the Family Outreach program on his own. He stated that on October 12, 2011, he had enrolled in Family Outreach; he had finished a drug program a month and a half prior; he was sober; he had drug tested randomly throughout the program but did not have copies of the tests; he did not provide test results to the social worker; and he did not give "any other documents" to DCFS because the social worker would "just throw them away." He did not bring any "clean" tests to the hearing because "[t]hose tests are not my obligation to keep track." He said he attended programs thrice weekly, including parenting, group, and individual counseling. He stated that Villa was his individual counselor. When questioned by the juvenile court, Father could not remember most of the steps of the 12-step N.A. program; said that he did not have a sponsor; and called the meetings a "class." Father claimed that he did not visit Peter between October 2011 and April 2012 because the social worker had told him he could not visit Peter after termination of reunification services. After he realized he could visit Peter, his visits were consistent; Peter called him "Dad"; and they had fun together during their visits. Mother also testified as to her section 388 petition, but "stormed out of the courtroom" during the hearing, calling the juvenile court's comments "a lie." Counsel stipulated that the social worker would testify "that at no point she told the parents that their visits were cancelled."

The juvenile court stated that it found both Father and Mother not to be credible. It noted that Father had tested positive for drugs during the time he claimed to be sober. The court commented that Father's calling the 12-step meetings "classes" was unusual and Father should have been able to remember most of the steps of the program, if he been attending meetings thrice weekly. The court concluded Father had not attended three meetings a week and denied Father's section 388 petition. The court determined Peter to be adoptable; there was a family willing to adopt him; it would be detrimental to return Peter to Mother and Father; and there was no exception to adoption. The court terminated Mother's and Father's parental rights.

Father appealed from the juvenile court's orders denying his section 388 petition and terminating his parental rights.

DISCUSSION

A. The juvenile court did not abuse its discretion in denying Father's section 388 petition

Father contends that after reunification services were terminated, he demonstrated a change in circumstances by completing a six-month intensive treatment program at Family Outreach that included a substance abuse program, a parenting program, individual counseling, and drug testing. He contends he had tested clean from the time he started the program. Father also contends granting the section 388 petition was in the best interests of Peter because he no longer had a drug problem; Peter had been bonded closely to Father while he was in Father's custody; and Peter was happy to see Father at the last few visits. We disagree and conclude the juvenile court did not abuse its discretion in denying Father's section 388 petition.

Section 388, subdivision (a) provides, "Any parent or other person having an interest in a child who is a dependent child of the juvenile court or the child himself or herself through a properly appointed guardian may, upon grounds of change of circumstance or new evidence, petition the court . . . to change, modify, or set aside any order of court previously made or to terminate the jurisdiction of the court."

"At a hearing on a motion for change of placement, the burden of proof is on the moving party to show by a preponderance of the evidence that there is new evidence or that there are changed circumstances that make a change of placement in the best interests of the child." (*In re Stephanie M.* (1994) 7 Cal.4th 295, 317.) "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 interests of the child. [Citation.] A court hearing a motion for change of placement at this stage of the proceedings must recognize this shift of focus in determining the ultimate question before it, that is, the best interests of the child." (*Ibid*.) "This determination [is] committed to the sound discretion of the juvenile court, and the trial court's ruling should not be disturbed on appeal unless an abuse of discretion is clearly established." (*Id*. at p. 318.) And, "up until the time the section 366.26 hearing is set, the parent's interest in reunification is given precedence over the child's need for stability and permanency." (*In re Marilyn H*. (1993) 5 Cal.4th 295, 310.) After termination of reunification services, it is presumed that continued care is in the best interests of the child. (*Ibid*.)

We conclude the juvenile court acted within its discretion in determining a change of placement was not in Peter's best interests. Father had a long history of drug addiction and had tested positive for methamphetamines, amphetamines, and marijuana from September 2010 to October 2011. Father failed to complete five programs from October 7, 2010, to October 26, 2011, for inconsistent attendance, failure to enroll in a referred inpatient program, and leaving an inpatient program without permission. Yet Father claims that after the court terminated reunification services in November 2011, he successfully completed a six-month intensive treatment program at Family Outreach, where he had tested drug-free from the time he enrolled on October 12, 2011.

We determine that the court did not abuse its discretion in concluding Father's testimony and the letter from Family Outreach that he had tested clean for drugs and had completed parenting, individual counseling, and a drug program were not credible

evidence of a change in circumstances. (*In re Precious D.* (2010) 189 Cal.App.4th 1251, 1259 [“‘“[I]ssues of fact and credibility are questions for the trier of fact.”’”].) Father testified that on October 12, 2011, he had enrolled in Family Outreach, which he had found not through referral, but on his own. He claimed to have attended parenting, individual counseling, and 12-step N.A. meetings three times a week. But from October 17, 2011, through October 26, 2011, Father had been enrolled as an inpatient at Positive Steps/Cider House, where he had tested positive for tetrahydrocannabinol, and therefore could not have begun the program with Family Outreach on October 12, 2011. Also, Father did not have copies of his purported negative drug test results and did not provide drug test results to DCFS. And Father called the 12-step meetings “classes,” did not remember most of the steps, and did not have a sponsor. Further, while Villa stated that Father had drug tested “‘a couple of months ago’” and that the test was “‘clean,’” he did not provide evidence of clean drug tests to DCFS. In addition, although Father claimed Villa was his individual counselor, the letter from Villa referred to Father’s being cooperative with “his” counselor and staff. That is, Villa did not corroborate that he was Father’s individual counselor. As DCFS noted, Villa did not give specific information regarding the type of parenting program and the services described in the letter did not address Mother’s and Father’s case-related issues.

In addition, when the juvenile court terminated Father’s family reunification services on November 29, 2011, Father’s counsel did not inform the court that Father was participating in services provided by Family Outreach. Rather, Father’s counsel told the court that Father was withdrawing his contest and not opposing DCFS’s recommendation to terminate services, which was based on Father’s failure to participate in a drug treatment program.

Thus, the evidence supports the court’s determination Father had not completed satisfactorily a substance abuse program, a parenting program, individual counseling, and drug testing through Family Outreach, and we conclude the juvenile court did not abuse its discretion in determining that Father had not established a change of circumstances.

We also determine that because Father did not establish a change in circumstances, he could not show that a change of placement was in the best interests of Peter. "Although the specific factors a court must consider vary with each case, each child's best interests would necessarily involve eliminating the specific factors that required placement outside the parent's home [citation], here, Mother's drug addiction." (*In re Angel B.* (2002) 97 Cal.App.4th 454, 463–464.) Additionally, the goal of assuring stability and continuity is taken into consideration when determining the child's best interest. (*Id*. at p. 464.)

As stated, Father failed to establish that he had complied with the juvenile court's orders to complete a substance abuse program, parenting classes, individual counseling, and submit to random drug testing. Thus, the court acted within its discretion in rejecting Father's argument that granting the section 388 petition was in the best interests of Peter because Father no longer had a drug problem. What is more, Peter had been detained from Mother and Father from the time he was four months old. He had lived with his prospective adoptive parents, who provided appropriate care for him, for almost two years at the time of the section 388 petition. Further, Peter and his prospective adoptive parents were closely bonded.

Accordingly, we conclude that the juvenile court did not abuse its discretion in denying Father's section 388 petition.

B. Substantial evidence supports the juvenile court's order terminating parental rights

Father contends that the parental relationship exception to termination of parental rights applied because he visited Peter consistently twice weekly during the initial 14 months of the case; when Father learned he could still visit Peter six months after reunification services were terminated, he was consistent with visitation; Father appropriately cared for Peter during visits; and Peter and Father were strongly bonded. We disagree.

Once the juvenile court has determined by clear and convincing evidence "that it is likely the child will be adopted, the court shall terminate parental rights and order the

child placed for adoption." (§ 366.26, subd. (c)(1).) "Adoption, where possible, is the permanent plan preferred by the Legislature. [Citations.] 'Only if adoption is not possible, or if there are countervailing circumstances, or if it is not in the child's best interests are other, less permanent plans, such as guardianship or long-term foster care considered.' [Citation.]" (*In re Autumn H.* (1994) 27 Cal.App.4th 567, 573–574.) If the court finds a compelling reason for determining that termination would be detrimental to the minor, the court shall not terminate parental rights but shall order legal guardianship or long-term foster care for the minor. (§ 366.26, subd. (c)(4)(A).) Section 366.26, subdivision (c)(1)(B) sets forth six circumstances where the court may forgo adoption and retain parental rights. One of the reasons is if "[t]he parents have maintained regular visitation and contact with the child and the child would benefit from continuing the relationship." (§ 366.26, subd. (c)(1)(B)(i).)

The parental relationship must be more than "'frequent and loving contact.'" (*In re Cliffton B.* (2000) 81 Cal.App.4th 415, 424.) "[T]he court balances the strength and quality of the natural parent/child relationship in a tenuous placement against the security and the sense of belonging a new family would confer. If severing the natural parent/child relationship would deprive the child of a substantial, positive emotional attachment such that the child would be greatly harmed, the preference for adoption is overcome and the natural parent's rights are not terminated." (*In re Autumn H.*, *supra*, 27 Cal.App.4th at p. 575.) "The exception must be examined on a case-by-case basis, taking into account the many variables which affect a parent/child bond. The age of the child, the portion of the child's life spent in the parent's custody, the 'positive' or 'negative' effect of interaction between parent and child, and the child's particular needs are some of the variables which logically affect a parent/child bond." (*Id.* at pp. 575–576 [substantial evidence supported the juvenile court's order terminating parental rights where relationship was one of friendship and termination of relationship would not be detrimental to the minor, who had been a dependent for three-quarters of her young life and needed a stable, permanent home].)

"When contesting termination of parental rights under the statutory exception that the parent has maintained regular visitation with the child and the child will benefit from continuing the relationship, the parent has the burden of showing either that (1) continuation of the parent-child relationship will promote the well-being of the child to such a degree as to outweigh the well-being the child would gain in a permanent home with new, adoptive parents [citation] or (2) termination of the parental relationship would be detrimental to the child. [Citation]." (*In re Angel B.*, *supra*, 97 Cal.App.4th at p. 466.)

"[T]he juvenile court's decision whether an adoption exception applies involves two component determinations: a factual and a discretionary one. The first determination—most commonly whether a beneficial parental or sibling relationship exists, although section 366.26 does contain other exceptions—is, because of its factual nature, properly reviewed for substantial evidence. [Citation.] The second determination in the exception analysis is whether the existence of that relationship or other specified statutory circumstance constitutes 'a compelling reason for determining that termination would be detrimental to the child.' (§ 366.26, subd. (c)(1)(B); [citation].) This '"quintessentially" discretionary decision, which calls for the juvenile court to determine the *importance* of the relationship in terms of the detrimental impact that its severance can be expected to have on the child and to weigh that against the benefit to the child of adoption,' is appropriately reviewed under the deferential abuse of discretion standard. [Citation.]" (*In re K.P.* (2012) 203 Cal.App.4th 614, 622.)

As we explain, we conclude Father failed to show that the benefit to Peter from continuing the relationship with Father outweighed the benefits he would receive from the permanence of being adopted. In early visits, Father and Peter had a good bond. But, while Father had a loving relationship with Peter, he did not occupy a parental role in his life. There is no evidence that Father attended any of Peter's doctor's appointments; called the prospective adoptive parents to inquire about Peter's well-being; or brought Peter snacks during his visits. And although DCFS reported that Father appeared to love Peter, he did not seem to be able to care properly for him. On one occasion, Father threw Peter in the air immediately after he ate and drank, causing him to become nauseous, but

refused to stop at DCFS's initial request. Also, Father and Mother made inappropriate comments in front of Peter, referring to "being pulled over by the police for DUI." And Father fell asleep during visits with Peter. Although Father realized that "[Mother makes] things worse for him and Peter," he continued to make excuses for Mother's behavior and seemed to put her interests above Peter's interests.

Nevertheless, Father argues that there is a positive parent-child relationship between him and Peter, with whom he interacted appropriately. Father states that after resuming visitation with Peter in April 2012, his visits were consistent and Peter was happy to see him. But Father cannot show more than frequent and loving contact with Peter in his role as a friendly visitor. Further, Peter had been removed from parental custody when he was four months old and has spent most of his life with his prospective adoptive parents, with whom he had bonded and who provided appropriate and adequate care for him and a nurturing environment.

Accordingly, we conclude that Father failed to show that termination of parental rights would result in a detriment that would outweigh Peter's need for a permanent, stable home.

DISPOSITION

The juvenile court's orders denying Father's Welfare and Institutions Code section 388 petition and terminating his parental rights are affirmed.

NOT TO BE PUBLISHED.

MALLANO, P. J.

We concur:

CHANEY, J.

JOHNSON, J.