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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION SEVEN

In re B.O.,

a Person Coming Under the Juvenile
Court Law.

B242150

(Los Angeles County
Super. Ct. No. CK82663)

LOS ANGELES COUNTY
DEPARTMENT OF CHILDREN AND
FAMILY SERVICES,

Plaintiff and Respondent,

v.

VICTOR R.,

Defendant and Appellant.

APPEAL from orders of the Superior Court of Los Angeles County, Robert Stevenson, Juvenile Court Referee. Affirmed.

Matthew I. Thue, under appointment by the Court of Appeal, for Defendant and Appellant.

John F. Krattli, County Counsel, James M. Owens, Assistant County Counsel, and Kimberly A. Roura, Senior Associate County Counsel, for Plaintiff and Respondent.

INTRODUCTION

Victor R. appeals from the order denying his petition to change a court order (Welf. & Inst. Code, § 388¹) and the order terminating his parental rights over his daughter, B.O. (§ 366.26). He contends the juvenile court abused its discretion in denying his petition and, consequently, the order terminating his parental rights also must be reversed. We affirm both orders.

BACKGROUND

Victor R. (Father) is B.O.'s natural father.² Rachael O. (Mother) is her mother.³ Father has two adult children from a prior marriage. Father and Mother are not married, and their relationship was a tumultuous one, fraught with domestic violence. Mother and Father were not together during the vast majority of these proceedings.

Mother has a history of traumatic brain injury, psychiatric illness, including hospitalizations, and failure to remain compliant with her medication. She suffers from schizoaffective disorder, depressive disorder and substance abuse. Father suffers from a mood disorder and has a lengthy criminal history and a 24-year history of substance abuse, including the use of alcohol, cocaine and heroin.

A. Prior Dependency Proceedings

Mother's two older children, Angelina O. and Joseph O., were the subjects of juvenile dependency proceedings in Riverside County. Angelina, who is not Father's

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

² Court-ordered DNA testing confirmed this fact.

³ Mother is not a party to this appeal. As such, we limit the facts to those pertinent to the resolution of the issues raised by Father.

child, was detained after allegations of domestic violence by Father against Mother and allegations of general neglect were sustained. Mother's parental rights were terminated after she failed to reunify with Angelina, who was adopted by her maternal grandparents.

Joseph was born after Angelina was adopted. He was detained after Mother had a psychotic break. Father denied that Joseph O. was his child.⁴ Father refused to cooperate with Riverside County Child Protective Services and failed to submit to court ordered paternity tests. No reunification services were ordered for Father based upon his status as an alleged father. Mother failed to reunify with Joseph, who also was adopted by his maternal grandparents.

B. *Current Proceedings*

1. B.O. is Taken into Protective Custody

Three days after B.O. was born, DCFS took her into protective custody and placed her in foster care. While in the hospital, Mother had exhibited emotional instability and confusion. She had been staying in a shelter and did not have provisions for B.O.

According to Father, Mother did not have any mental health issues and did not need medication or therapy. He claimed that she intentionally exhibited symptoms in order to get sympathy from her parents. Father denied any history of domestic violence or drug use. Father initially denied any criminal history. When the dependency investigator asked if he had ever been arrested, Father said he had a criminal history from the 1980's and the early 1990's. His criminal history shows several arrests and convictions, including several domestic violence and drug-related convictions as recently as 2009.

⁴ Father acknowledged that he told a Department of Children and Family Services (DCFS) investigator that he told the juvenile court in Riverside that he was Joseph's father because Mother asked him "to 'step up' as the child's father. He reported that he chose to do so because he loved mother."

2. Section 300 Petition is Filed

On June 15, 2010, DCFS filed a section 300 petition on behalf of B.O. ~(1 CT 1)~ It alleged that B.O. was a dependent child under subdivision (b) (failure to protect) due to, among other things, Mother's mental health problems and history of substance abuse (methamphetamines) and Father's knowledge of Mother's mental health issues and his failure to take action to protect B.O. DCFS further alleged that Mother failed to reunify with B.O.'s older siblings. The juvenile court ordered B.O. detained and monitored visitation for the parents.

On July 8, 2010, DCFS filed a first amended petition, and the court dismissed the original petition. The amended petition added allegations pursuant to subdivision (b) of section 300 that Mother and Father have a history of domestic violence and that Father has a "24-year unresolved history of substance abuse."

Despite the order for monitored visitation, Father did not initially visit with B.O. He did show up unannounced to one of Mother's visits, however. Mother's demeanor drastically changed when he arrived. She became introverted and meek. When Mother declined Father's offer of some food, Father began shoving food in Mother's mouth. After the meeting, Father was observed screaming at Mother, who became very submissive. Mother said she was fearful of Father.

It was not until August 3, 2010 that Father had his first visit with B.O. Father said he would now make himself available for visits and that he was happy for the chance to parent a baby since his other children were adults.

On September 13, 2010, Father was arrested. He was charged with two felony counts of possession of a controlled substance, one felony count of grand theft of a firearm and one misdemeanor count of failure to appear following a written promise to appear. The court released Father on his own recognizance on November 10, 2010. Prior to his arrest, Father had been testing negative for drugs and had been receiving methadone treatments.

3. Jurisdiction and Disposition Hearings

On December 15, 2010, the juvenile court adjudicated the matter.⁵ It sustained all counts of the first amended petition and declared B.O. a dependent child pursuant to subdivision (b) of section 300. Pursuant to section 361.5, subdivision (b)(10) and (11), the juvenile ordered that Mother receive no family reunification services. The court ordered services for Father. Specifically, Father was ordered to attend a drug rehabilitation program with random drug testing, parent education and individual counseling to address issues including mental health issues and domestic violence. The court also granted Father two one-hour visits per week.

4. Six-Month Review Hearing

A six-month review hearing (§ 366.21, subd. (e)) was held on June 15, 2011. The juvenile court denied Father's request for a contested hearing, finding that Father was not in compliance with his case plan and that B.O. could not be returned to Father within six months, terminated Father's reunification services, and scheduled a selection and implementation hearing (§ 366.26). The court also granted the request of B.O.'s foster parents for de facto parent status.

The next day, the juvenile court placed the matter on calendar to reverse its denial of Father's request for a contested hearing. It vacated its findings and the order setting a section 366.26 hearing, and it set the matter for contest on August 18, 2011.

On July 1, 2011, during a supervised visit, the social worker told Father he had two more months of services. The social worker explained that DCFS would be able to liberalize his visitation after just one more month of negative drug tests.

On July 28, 2011, the social worker went to meet Father at Royal Palms Recovery Center. The social worker spoke to Father's counselor and learned for the first time that Father had been discharged from the program on June 17, 2011, because he had tested

⁵ Father waived his trial rights.

positive for alcohol on June 17 after being in the program for 61 days. Royal Palms Recovery Center would accept Father back after 30 days, however. Father did not enter another treatment program. The social worker re-enrolled Father in random drug testing on August 9, 2011.

Father testified at the contested review hearing held on August 18. He stated that when he left court on June 15, 2011, he believed “that my rights were terminated. I didn’t have nothing left. That my child was gone.” Father explained that he relapsed because he gave up and thought he lost his child. His attorney called him the next day and told him he had been granted a hearing. It was only two weeks before the August 18 hearing that he learned he had been afforded two additional months of reunification services. Father could not explain his failure to reenter a program, however, other than he just gave up.

The juvenile court again found that Father was not in compliance with his case plan and that B.O. could not be returned to Father within six months, terminated Father’s reunification services, and scheduled a selection and implementation hearing (§ 366.26).

5. Section 388 Petition

On November 14, 2011, prior to the date set for the section 366.26 hearing, Father filed a section 388 petition, seeking modification of the juvenile court’s August 18, 2011 order terminating his family reunification services and granting him two monitored visits per week. Father asked the court to reinstate family reunification services and to issue a home of parent order, placing B.O. with him. In the alternative, Father asked for unmonitored visits of increasing duration over time.

In a supporting declaration, Father explained that from April 8, 2011 until June 17, 2011, he was enrolled at Royal Palms Recovery Center. On June 15, 2011, the date the court initially terminated his family reunification services, “I had a relapse. I had been testing negative for alcohol during this entire period. I lost all hope of reuniting with my daughter and relapsed.” In a letter dated July 28, 2011, Father’s counselor at Royal

Palms documented that Father left the program on June 17, 2011. He was discharged after his test results showed he was intoxicated from alcohol.

Father further declared that he had tested negative for drugs and alcohol since his discharge from Royal Palms Recovery Center. He was participating in DCFS testing and paying for his own tests to show his commitment to reunifying with his daughter. He also stated that he entered an outpatient program for drug and alcohol treatment on October 4, 2011 at the Los Angeles Centers for Alcohol and Drug Abuse (L.A. CADA). On November 9, his program director, Lydia De Leon (De Leon), executed a letter documenting his admission into the program. On November 11, Father received a certificate evidencing the completion of a parenting program at L.A. CADA.

Father also declared that he was attending individual counseling at the Arcadia Mental Health Center. According to his therapist, Father had been a client of the center since February 22, 2011. He was diagnosed with a mood disorder. He received regular medication support services and monthly case management/mental health support services. Father was reported to be “fully compliant” and his “condition appears stable.” The therapist further noted that Father appeared motivated and responsive during his treatment sessions.

Finally, Father urged that it was in B.O.’s best interest to reunify with him so that she would know him, his extended family, her culture and to feel unconditional family love. He emphasized that he consistently visited B.O. She “plays with me and hugs me and loves her family. I have witnessed her cry when I leave.” Father’s sister, Gina R., who often accompanied Father on visits, provided a supporting declaration in which she stated B.O. “is always excited to see her father” and “always has a big smile on her face when she sees [him].” When Father arrives, B.O. “runs right to [him] and calls him ‘Daddy.’” In Gina R.’s view, B.O. has a “very strong bond” with Father.⁶

The juvenile court granted Father a hearing on his section 388 petition.

⁶ Gina R. also recounted B.O.’s experiences with other family members.

A hearing on Father's section 388 petition was held on February 2, 2012, April 26 and 27, 2012. Father introduced documentary evidence of clean drug tests and his attendance at Alcoholics Anonymous. He also called his counselor from L.A. CADA, De Leon, to testify. De Leon first met Father in August 2011. He enrolled in parenting classes on September 9, 2011, and in a drug and alcohol abuse program on October 4, 2011. Father had inquired about the substance abuse program in August, but there was a waiting list for entry into the program. De Leon told Father that he could attend without enrolling, and Father did so.

De Leon further testified that Father had a diagnosis of polysubstance abuse, meaning that he used different substances—alcohol, cocaine and heroin. She could not say with certainty that Father would not relapse.

Father's adult daughter, Jennifer R., testified that she has always had a relationship with her father. Since B.O.'s birth, she had seen Father under the influence of alcohol about 10 times but had not seen him drink in about a year. She noted that after B.O. was born and the juvenile court first ordered him to attend classes, Father always said he did not want to go. Later, however, he began to share the information he learned in his classes. His attitude when describing his substance abuse classes had become "[v]ery positive."

Jennifer R. visited with B.O. about 20 times over a two-year period. Other family members also visited with B.O. Jennifer described Father as very loving with B.O.

Father testified that he has been in rehab five times. His longest stretch of sobriety was 19 months in 1998 and 1999. He relapsed because he was not ready to quit at that time. He explained that there comes a time when a person wants to stop "when you're tired and just beat up of all the stuff that goes on with the use of alcohol and the use of drugs." For him, this occurred about a year and a half earlier and he became "really serious" about ending his substance abuse. He noted that his sobriety date was November 2011 but admitted he relapsed in April 2011 while at Royal Palms Recovery Center. Father also testified that he had been in Alcoholics Anonymous for two years and had a sponsor.

Shantrinia Nelson (Nelson), a DCFS human services aide, monitored Father's visits for about 20 months, during which Father missed four or five visits. According to Nelson, B.O. reached for Father and smiled when he arrived for visits. A couple of times, B.O. cried because she did not want Father to leave, and she tried to walk after him. Father, who often came to visits with other family members, fed B.O. and changed her diaper and clothes. Nelson also recalled family visits without Father.

After entertaining the arguments of counsel and considering all the evidence, the juvenile court denied Father's section 388 petition, stating: "This is an unfortunate case, and I certainly do admire the father for his courage and everything he's been doing to try to change his life and become sober. I found him to be credible. I'm not finding that he was not credible. I'm not applying the evidence to his credibility with respect to his being convicted of a felony. I found his testimony to be credible. The problem is, as was filed in the first amended petition, this is an unresolved history, a 25-year history of polysubstance abuse. And father was very upfront when he testified that this was his fifth program that he was in. And his longest time of sobriety, my notes indicate 19 months, and then he relapsed. This has been a much shorter period of time of sobriety for the father. As he indicated, he's now given to his life that's peaceful for him, and I think that's a good place for him to be, but I have to be concerned about what's in the best interest of this toddler who's almost three years of age.

"On the first prong of the findings the court needs to make, I'm finding by preponderance of the evidence that the father . . . has made changes, but these are continuing changes. I know that the argument is there's always — when you're sober and you're in this situation, you're always going to be in a recovery mode. I understand that. But within a couple — I feel, based upon this long history of polysubstance abuse that his time of recovery now is relatively short. When I look at that against the 19 months before when he was sober, and then he, again, became — he relapsed and was using, I'm not going to find today that father has met his burden of proof by preponderance of the evidence for a change in circumstances. Even if I did find that to be true, I don't find that the father has met his burden of proof with respect to the best

interest of the child to change an order to home-of-parent father. This was a case where he has not been in reunification services for some time. I have a child who's almost three. I don't know where your legal basis is for your argument that 24 months would be appropriate. It's not appropriate.

“The child, at this point in time, when I've terminated [family reunification] services, the focus does change to the permanency for the child. And even though it's preponderance of the evidence, I don't believe that father has shown that it would be in the best interest of his young child to return home on a home-of-parent order or to order unmonitored visitation. The father in the history of this case — and it's not just the department who has to recommend it, the court has never ordered unmonitored visitation for the father. There were a lot of domestic violence issues in this case. There's this polysubstance abuse issue. There's the five substance abuse programs that father's been involved in. And I know that you and your family love to see [B.O.] The fact that [she] looks at you and tries to walk after you after you've seen her, that doesn't indicate to the court that there's a sufficient bond for best interest that would — that you've demonstrated would be in the best interest to grant any of your prayers in your 388 petition. You have been consistent — that's good — but I don't believe you've met your burden of proof. So I'm going to deny your 388 petition”

Later, the juvenile court clarified that the child was approximately 22 months old but noted that would not in any way change its analysis of the case.

6. Section 366.26 Hearing

In preparation for the section 366.26 hearing, DCFS reported that it was highly likely that B.O. would be adopted. She had been placed with her current caregivers when she was three days old and had been with them ever since. B.O. was thriving in their care. The couple adored B.O. and “they appear to be highly bonded.” The caregivers have provided B.O. with a “healthy, stable and nurturing family life” and want to adopt her. DCFS recommended that the juvenile court terminate Mother's and Father's parental rights thereby freeing B.O. for adoption.

At the contested section 366.26 hearing, Father testified regarding his continued visitation with B.O. After a consideration of the evidence and the arguments of counsel, the juvenile court acknowledged “that Father certainly has worked hard and he’s tried to make visitation his number 1 priority.” The court noted, however, that Father never had unmonitored visitation with B.O. due in large part to Father’s efforts during the time he was granted reunification services.

The court found by clear and convincing evidence that B.O. was adoptable. It also found that it would be detrimental to return B.O. to her parents and that it would not be detrimental to B.O. if parental rights were terminated. The court could not conclude that the relationship between Father and B.O. was so significant that it outweighed the long term benefits of adoption. The court aptly noted that the relationship necessary to preserve the parent/child relationship had to be more than that of “just a friend.”

The court terminated Father’s and Mother’s parental rights and then transferred the care, custody and control of B.O. to DCFS for adoptive planning and placement. It also designated the de facto parents as the prospective adoptive parents. This appeal followed.

DISCUSSION

A. Section 388 Petition

Father challenges the order denying his section 388 petition. As observed in *In re A.A.* (2012) 203 Cal.App.4th 597 at pages 611-612, “[a] juvenile court order may be changed, modified or set aside under section 388 if the petitioner establishes by a preponderance of the evidence that (1) new evidence or changed circumstances exist and (2) the proposed change would promote the best interests of the child. [Citation.] The parent bears the burden to show both a legitimate change of circumstances and that undoing the prior order would be in the best interest of the child. [Citation.] Generally, the petitioner must show by a preponderance of the evidence that the child’s welfare requires the modification sought. [Citation.]

“Not every change in circumstance can justify modification of a prior order. [Citation.] The change in circumstances must relate to the purpose of the order and be such that the modification of the prior order is appropriate. [Citations.] In other words, the problem that initially brought the child within the dependency system must be removed or ameliorated. [Citations.] The change in circumstances or new evidence must be of such significant nature that it requires a setting aside or modification of the challenged order. [Citations.]

“In evaluating whether the petitioner has met his or her burden to show changed circumstances, the trial 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. [Citation.] The petition is addressed to the sound discretion of the juvenile court, and its decision will not be overturned on appeal in the absence of a clear abuse of discretion. [Citations.]” (Accord, *In re Mickel O.* (2011) 197 Cal.App.4th 586, 615-616.) Discretion is abused when the court’s ruling is arbitrary or capricious or exceeds the bounds of reason. (*In re Stephanie M.* (1994) 7 Cal.4th 295, 318.) Rarely does the denial of a section 388 petition require reversal. (*In re Amber M.* (2002) 103 Cal.App.4th 681, 685-686.)

Unquestionably, Father is to be commended for his efforts to ameliorate the reasons giving rise to juvenile court jurisdiction. The court acted well within its discretion, however, in concluding that these efforts did not establish the requisite change in circumstances. Rather, they demonstrated changing circumstances, which is not enough. (*In re Mickel O., supra*, 197 Cal.App.4th at p. 615 [changed, not changing, circumstances must be demonstrated to justify modification of a juvenile court order].)

Father has a 24-year history of substance abuse during which he has been to rehab a total of five times. His longest period of sobriety was 19 months in 1998 and 1999. While Father had been enjoying sobriety again, he relapsed the moment his reunification services were terminated in June. Six months in a drug treatment program, with five

months of sobriety, did not prove that Father's circumstances had changed. (*In re Mickel O.*, *supra*, 197 Cal.App.4th at p. 615.)

The juvenile court also acted well within its discretion in finding that Father did not establish that the changes he proposed were in B.O.'s best interests. Once the trial court terminated Father's family reunification services, his interest in the care, custody and companionship of his daughter ceased to be paramount. The overriding concern became B.O.'s need for permanency and stability. (*In re Stephanie M.*, *supra*, 7 Cal.4th at p. 317.)

B.O. was placed in the home of her de facto parents when she was only three days old. It is the only home she has ever known. She is bonded to her caregivers and is thriving in their loving home. In addition, Father has never had unmonitored visits with B.O. There simply was no basis upon which to reinstitute reunification services, order B.O. placed in the home of Father or to order unmonitored visitation. To do so would be a step backwards and contrary to B.O.'s need for permanency and stability.

B. Termination of Parental Rights

Apart from the denial of his section 388 petition, Father does not assert any additional basis for reversal of the order terminating his parental rights. Because we have concluded that the juvenile court did not abuse its discretion in denying Father's section 388 petition, we conclude that Father has failed to demonstrate that the order terminating his parental rights should be reversed.

DISPOSITION

The orders are affirmed.

JACKSON, J.

We concur:

PERLUSS, P. J.

ZELON, J.