Filed 7/26/12 In re M.R. 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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 M.R. et al., Persons Coming Under the Juvenile Court Law.	B237260 (Los Angeles County Super. Ct. No. CK82163)
LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. FRANCISCO A. NUNEZ, Defendant and Appellant.	

APPEAL from an order of the Superior Court of Los Angeles County, Valerie Skeba, Juvenile Court Referee. Affirmed.

Robert McLaughlin, under appointment by the Court of Appeal, for Defendant and Appellant.

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

A father, claiming a denial of due process and asserting that the order he sought would promote his biological child's best interests, filed a petition requesting that the juvenile court vacate its existing orders and return a dependency action to the jurisdictional phase. Following a hearing on the petition, the court found the father failed to show changed circumstances by virtue of inadequate notice, or that the proposed order would serve the child's best interests and denied the petition. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

This is the story of two different Francisco Nunezes.

On May 4, 2010, respondent Department of Children and Family Services (DCFS) took then four-month-old M.R. and her nine-year-old half sister Priscilla R. into protective custody after receiving a referral that the children's mother, Maribel R-O. (mother), who had been living with the two children in the home of their maternal grandparents, had been evicted from the grandparents' home, had failed to provide for her children's welfare and was an illegal drug user. Mother was arrested for being under the influence of drugs; M.R. was in her care at the time. DCFS's investigation revealed that mother had three other children living in legal guardianships with paternal relatives, and the family had two prior referrals for mother's substance abuse issues. Priscilla told DCFS she had always lived with her maternal grandparents.

Mother told DCFS that M.R.'s biological father was "Francisco Nunez" She denied having any "further identifying information" about Francisco Nunez, whose whereabouts were unknown. Mother said Francisco Nunez knew about M.R., but "had not had any contact with her, was not present at her birth, and was not listed on [her] birth certificate."

On May 7,[1] DCFS filed a dependency petition on behalf of M.R. and Priscilla, pursuant to Welfare and Institutions Code section 300, subdivisions (b) and (g),[2] based

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[1] Undesignated date references are to 2010.

[2] Further statutory references are to the Welfare and Institutions Code.

on mother's history of drug abuse, her inability to make an appropriate plan for the children's ongoing care and supervision, and the failure of M.R.'s father to provide his child with the necessities of life. DCFS identified "Francisco Nunez" as M.R.'s father.[3] On that same date, the juvenile court detained M.R. and determined her father's whereabouts were unknown.

In a paternity questionnaire completed on May 17 mother identified M.R.'s father as "Francisco Nunez." She said he was in his early thirties, she thought he was incarcerated in state prison, that she and he had never married and did not live together at the time of M.R.'s conception or birth, that Francisco Nunez never held himself out as M.R.'s father, and that he never signed any papers establishing paternity. At a hearing conducted the same day, mother (or her attorney) informed the court she thought Francisco Nunez was born in March or May, but she did not know his date of birth or middle name. Mother was married to Jose Luis O. when both M.R. and Priscilla were born. The juvenile court found "Francisco Nunez" to be M.R.'s alleged father, and ordered DCFS to present evidence of its due diligence in attempting to find him.

In an interview with DCFS on June 15, mother said M.R.'s biological father lived on Arlene Street in Hawaiian Gardens, "around the block" from the child's maternal grandparents. Mother believed Francisco Nunez was in jail, and did not know if he had been released. She thought he was in his 30's and had been born sometime in March, but did not know his birthdate. Mother never had a relationship with Francisco Nunez. She was sure he was M.R.'s father, even though he had denied paternity, had not provided financial support for M.R. and never took a DNA test.

In its jurisdiction and disposition report filed on July 1, DCFS indicated it had located (but had not yet interviewed) a 23-year-old man named Francisco J. Nunez (who was born in September 1987), who was in prison in Sacramento. A DCFS due diligence

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[3] Another man, who is not a party to this appeal and who is not related to M.R., was named as Priscilla's father.

report regarding "Francisco Nunez" indicated that the agency had searched or initiated searches for M.R.'s father through multiple sources, including the Parent Locater, the Welfare Case Management Information System, the LEADERS/Single Index, and the Child Welfare Services/Case Management System. DCFS had also conducted searches through telephonic listings and birth certificates and criminal records had been requested through the Department of Justice. None of the searches yielded productive information because DCFS lacked any identifying information, such as the father's birth date, social security number, or the names or addresses of relatives or friends.

On July 1, mother pleaded no contest to the allegations of an amended petition,[4] which was sustained as to her pursuant to section 300, subdivision (b). The court found the girls' fathers had been improperly noticed, and held the counts against them in abeyance. Mother was given reunification services.

On July 1, Francisco J. Nunez wrote to DCFS claiming he was Priscilla's father, but denying paternity of M.R.. He said he had been incarcerated for five years. On August 2, mother told DCFS she was certain that "Francisco Nunez" was M.R.'s father. She said he had been in and out of jail, and was out of jail when she became pregnant with M.R.. Mother said there "is no possibility" that Francisco Nunez could be Priscilla's father. On August 5, DCFS conducted a telephonic interview with F.J.N. regarding the children's paternity during which Francisco J. Nunez said he "could be" M.R.'s father but that he didn't think he was. He also said he was "not sure" whether he consented to having his name on M.R.'s birth certificate, but did "hold [himself] out as the father and accept[ed] this child openly in [his] home." Francisco J. Nunez readily claimed paternity of Priscilla. Francisco J. Nunez said he had last seen mother in late 2009/early 2010, about the time M.R. was born.

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[4] The petition was amended in June to add allegations—irrelevant here—against Priscilla's alleged father.

In its report for the September 1 jurisdictional hearing DCFS identified Francisco J. Nunez as M.R.'s alleged father. The agency recommended that the court order a paternity test for and make paternity findings as to Francisco J. Nunez, and also recommended that he be denied reunification services due to the length of his incarceration. Francisco J. Nunez appeared at the September 1 hearing and informed the juvenile court he could not be M.R.'s biological father because he had been incarcerated since 2005, although he believed that he was Priscilla's father. The court found that Francisco J. Nunez was not M.R.'s father, but found that he was Priscilla's alleged father and dismissed counts related to the children's fathers. DCFS made no further effort to locate M.R.'s biological father.

In early December, DCFS reported that mother was homeless and sleeping in a box on the lawn at maternal grandparents' home. She had not complied with the court-ordered plan, and had made no effort to contact the children who remained placed together, and were doing well, in a foster home. DCFS recommended that the court terminate mother's reunification services.

The first mention of appellant Francisco A. Nunez came in an addendum report DCFS filed in early February 2011. According to the girls' maternal grandmother, mother went on New Year's day to visit appellant (born in March 1979), who was her boyfriend, a gang member, drug user, and a dealer. Mother and appellant argued and appellant doused mother with a flammable liquid and set her afire. Appellant had allegedly fled to Mexico. Mother suffered burns on over 60 percent of her body from the incident, and was left disfigured, severely disabled and unable to talk for more than short periods or to care for herself. Appellant was apprehended in Mexico, extradited and charged in February 2011 with attempted murder.

The maternal grandmother told DCFS that appellant had "always resided" at 11819 Civic Center Drive in Hawaiian Gardens, the same address at which he allegedly

tried to kill mother.[5] After discovering that the maternal grandparents had made several poor judgment calls (not relevant here), and told numerous untruths in order to obtain custody of the children themselves, DCFS recommended again that mother's reunification services be terminated and that the juvenile court find that adoption to be the permanent plan that would best promote the children's interests. Reunification services were terminated in February 2011, and the matter was set for a selection and implementation (section 366.26) hearing.

In its June 2011 report for the section 366.26 hearing DCFS noted that both girls had been placed together with the same foster mother since early May 2010, appeared to be loved and well cared for, and were adoptable. DCFS identified appellant, by then in custody, as M.R.'s alleged father.

Appellant made his initial appearance in this action at the June 2, 2011 section 366.26 hearing. He told the court he did not know if he was M.R.'s biological father and requested a DNA test. The juvenile court found appellant to be M.R.'s alleged father. Appellant's request for a paternity test was denied, although the court later ordered a DNA test on its own motion due to "the complexities in this case."

In mid-August, Priscilla, who had no bond with and had consistently refused to visit mother since June 2011, told DCFS she wanted to be adopted by her caregiver, to whom she looked to as a mother figure. Mother, in turn, told DCFS she did not want to see the girls anymore and said she believed it was in their best interest to be adopted. The children's foster mother was ready to proceed with adoption and told DCFS she loved the girls "as [sic] they were her own daughters."

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[5] Appellant asserts that he lived only .11 miles from the maternal grandparents' home and could easily have been found if DCFS looked for him. But there is no indication that, before January 2011, DCFS had any information other than that he lived "around the block" from the grandparents' home on Arlene Street (a location at which, according to appellant, he did not live and which does not exist in Hawaiian Gardens).

On September 9, 2011, based on the results of a DNA test, the juvenile court found that appellant was M.R.'s biological father. Up to that point, appellant had made no effort to contact M.R. or DCFS.

On October 3, 2011, appellant filed a section 388 petition requesting the juvenile court vacate the section 366.26 hearing and its jurisdictional and dispositional orders, and remand the matter for a jurisdictional hearing due to DCFS's failure to provide him proper notice of the dependency proceedings. He claimed the proposed modification would serve M.R.'s best interest because she would benefit from an adjudication based on all material facts and circumstances, with participation of all interested parties, and by knowing her biological father and having him in her life. The court set appellant's petition for hearing on November 3, 2011.

On October 7, 2011, DCFS filed a section 342 petition alleging M.R. was a child described by section 300, subdivision (b), due to appellant's violent attack on mother in January 2011, and his incarceration for attempted murder. In October DCFS informed the court that the district attorney planned to seek the maximum sentence in appellant's criminal action. DCFS also informed the court that M.R.'s placement continued to be appropriate and that her caregiver was committed to adopting the toddler.

On November 3, 2011, the court denied appellant's section 388 petition due to his failure to demonstrate a denial of due process, an adequate change of circumstances or that the modification he sought would be in M.R.'s best interest. The court dismissed the section 342 petition. The court subsequently denied appellant's request for a contested section 366.26 hearing.

DISCUSSION

Appellant contends the juvenile court erred when it denied his petition and accompanying *Ansley* motion.[6] This contention has no merit.

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[6] The motion attached to the section 388 petition was based on *Ansley v. Superior Court* (1986) 185 Cal.App.3d 477 (*Ansley*), and sought vacation of the jurisdictional and

1. Standard of review

"Section 388 allows a parent or other person with an interest in a dependent child to petition the juvenile court to change, modify, or set aside any previous order. (§ 388, subd. (a).) 'Section 388 provides the "escape mechanism" that . . . must be built into the process to allow the court to consider new information.' [Citations.] The petitioner has the burden of showing by a preponderance of the evidence (1) that there is new evidence or a change of circumstances and (2) that the proposed modification would be in the best interests of the child. [Citations.] That is, '[i]t is not enough for [the petitioner] to show just a genuine change of circumstances under the statute. The [petitioner] must show that the undoing of the prior order would be in the best interests of the child. [Citation.]' [Citation.]" (*In re Mickel O.* (2011) 197 Cal.App.4th 586, 615, italics omitted.) "In considering whether the petitioner has made the requisite showing, the juvenile court may consider the entire factual and procedural history of the case." (*Id*. at p. 616.) "However, the change of circumstances or new evidence must be of such significant nature that it requires a setting aside or modification of the challenged prior order." (*Ansley*, *supra*, 185 Cal.App.3d at p. 485; *In re Casey D.* (1999) 70 Cal.App.4th 38, 47.)

We review a juvenile court's denial of a section 388 petition for abuse of discretion. We will not disturb the juvenile court's decision unless that "'"court has exceeded the limits of [judicial] discretion by making an arbitrary, capricious, or patently absurd determination."'" (*In re Stephanie M.* (1994) 7 Cal.4th 295, 318; *In re E.S.* (2011) 196 Cal.App.4th 1329, 1335.)

"A section 388 motion is a proper vehicle to raise a due process challenge based on lack of notice." (*Justice P.*, *supra*, 123 Cal.App.4th at p. 189.) There is no due process violation if DCFS has made a good faith effort to provide notice to a parent who is transient or whose whereabouts have been unknown for most of the proceedings. (*In*

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dispositional orders due to a lack of proper notice and is considered under the same standard. (*Id*. at p. 481; *In re Justice P*. (2004) 123 Cal.App.4th 181, 189 (*Justice P*.).)

re Melinda J. (1991) 234 Cal.App.3d 1413, 1418–1419; see also *Mullane v. Central Hanover Bank & Trust Co.* (1950) 339 U.S. 306, 317 [70 S.Ct. 652, 94 L.Ed. 865] ["in the case of persons missing or unknown, employment of an indirect and even a probably futile means of notification is all that the situation permits and creates no constitutional bar to a final decree foreclosing their rights"].)

2. DCFS exercised due diligence in its efforts to locate and notify M.R.'s father

A child welfare agency is required to act with reasonable diligence to locate a missing parent. (*David B. v. Superior Court* (1994) 21 Cal.App.4th 1010, 1019.) Reasonable diligence encompasses a thorough, systematic investigation conducted in good faith. (*In re Arlyne A.* (2000) 85 Cal.App.4th 591, 598.) As noted above, due process is not violated if DCFS makes a good faith effort to notify a parent whose whereabouts are unknown for most of the proceedings. (*In re Melinda J., supra*, 234 Cal.App.3d at pp. 1418–1419; *Justice P., supra*, 123 Cal.App.4th at p. 188.) The courts assess due diligence based on what has been done to try to locate a parent, not on what might have been done differently. (*People v. Diaz* (2002) 95 Cal.App.4th 695, 706.)

Appellant contends that DCFS failed to use reasonable diligence to find or notify him of these proceedings. The juvenile court rejected that contention. At the outset of the action mother identified M.R.'s father only as "Francisco Nunez," a man with whom neither she nor her children had any contact or ongoing relationship and about whom she knew (or at least revealed) very little. She denied having any more identifying information, other than her belief that M.R.'s father was born in March or May, was in his early 30's and was in prison. Using extremely limited information, DCFS initiated a broad and systematic search of appropriate records systems and databases, and conducted interviews of mother and the children's maternal grandmother, who gave DCFS conflicting information about where appellant lived.

By the end of June, based only the minimal information it received, DCFS was able to locate a man named Francisco J. Nunez in state prison with the same name mother had given the agency. Francisco J. Nunez knew mother and had last seen or spoken to her in late 2009 or early 2010, around the time M.R. was born. At first, Francisco J.

Nunez also said it was possible he was M.R.'s biological father, as he had been in and out of jail since 2001, and mother was unequivocal that Francisco Nunez was M.R.'s father. Francisco J. Nunez was several years younger than the man mother identified as her baby's father. But mother had been indefinite about the father's age or birthdate and, based on the match between the name, the incarceration, the fact that Francisco J. Nunez knew mother and claimed or at least acknowledged the possibility of paternity of the children, the court found that DCFS justifiably believed it had found the right person. DCFS had no real reason to believe otherwise until September 2010 when, in contradiction of his earlier equivocal statements, Francisco J. Nunez definitively informed the court he could not be M.R.'s biological father because he had been incarcerated since 2005. DCFS did not learn of the existence of another Francisco Nunez with whom mother was acquainted—appellant—until about four months later, after he tried to set her on fire. Without the benefit of hindsight, we do not believe that DCFS failed to exercise due diligence because it failed to understand that mother's children may each have had a different father who shared not only virtually identical names, but had also had similarly fleeting relationships with mother, and nothing in the record suggests that the failure to recognize this mistake was an act of bad faith by DCFS.

Once DCFS knew of his existence and he had been apprehended and returned to the United States in February, appellant was notified of these proceedings and counsel was appointed for him. Even then, however, appellant made no effort to establish his parental status or to begin to form a relationship with M.R.. As the court observed, although appellant initially appeared in this action in June 2011, he waited until October 2011 and after a DNA test established his paternity, to indicate any interest in asserting his parental rights.

Under all the circumstances, the juvenile court found that DCFS exerted reasonable diligence in its efforts to locate the man whom it believed was M.R.'s biological father. DCFS had no reason to know differently simply because it ultimately turned out that two men shared the same first and surnames (but had different middle names), and that each man had a sexual relationship with mother and knew her children.

The child welfare agency must act with diligence to locate a missing parent. (See, e.g., *David B. v. Superior Court*, *supra*, 21 Cal.App.4th at p. 1016.) Reasonable diligence denotes a thorough, systematic investigation and an inquiry conducted in good faith. (*In re Arlyne A.*, *supra*, 85 Cal.App.4th at p. 598.) The juvenile court found this test satisfied.

Due diligence is assessed by what the agency did to try to locate a parent, not by what it could have done differently. In the context of due diligence to procure a witness for criminal trial, if the record shows a substantial good faith effort was made, a defendant's ability to conceive, especially with the benefit of hindsight, of other avenues the prosecution might have explored, does not render the actual effort unreasonable. (*People v. Diaz*, *supra*, 95 Cal.App.4th at p. 706.) The fact that information DCFS obtained later in the proceeding was instrumental in locating M.R.'s biological father, does not necessarily render the agency's prior investigation deficient. Our review of the record convinces us that the juvenile court did not abuse its discretion when it found that DCFS exercised due diligence in attempting to locate appellant.

3. Appellant's proposed modification would not further M.R.'s best interests.

Even if we were to conclude that DCFS failed to exercise due diligence in its early searches for appellant, we would nevertheless conclude the juvenile court properly denied the section 388 motion. Appellant failed to shoulder his burden of establishing that granting the petition and returning these proceedings to square one would be in M.R.'s best interests. (*Justice P.*, *supra*, 123 Cal.App.4th at p. 188.) The lynchpin of section 388 is the requisite showing that the relief sought will promote the best interests of the child. (*In re Zachary G.* (1999) 77 Cal.App.4th 799, 807.)

Appellant's petition alleged that the requested modification was in M.R.'s best interests because he had not yet had an opportunity to participate in the proceedings, and that she would somehow benefit from their shared biology. The latter contention is easily disposed of. "The presumption favoring natural parents by itself does not satisfy the best interests prong of section 388." (*Justice P.*, *supra*, 123 Cal.App.4th at p. 192.) Were we to accept the general assertion that familiarity and association with (but not necessarily

even being raised by) one's biological family is inherently better than being raised by an adoptive family, the second prong of section 388 would be meaningless, because being raised by one's biological family would always be in a child's best interests. We decline to adopt such a reading of section 388.

In addition, the relief appellant seeks—vacation of jurisdictional findings and dispositional orders to essentially begin the case again—would result in an extremely lengthy delay and unnecessarily postpone permanency and stability for a child who has been in foster care since she was four months old and who is now approaching her third birthday. Moreover, M.R. has never had any contact or relationship with her biological father, who is incarcerated on charges of having tried to kill her mother and is in no position to obtain custody. Under these circumstances, vacating jurisdictional findings solely for the purpose of effectuating notice would needlessly promote form over function and significantly delay permanency for M.R. which is clearly not in her best interest. The law is clear. By the time a dependency action reaches the permanency planning phase, a child's interest in and right to permanency and stability—not a parent's interest in reunification—is paramount. (*In re Marilyn H.* (1993) 5 Cal.4th 295, 307, 309–310.)

Unlike *Ansley*, on which appellant relies, this is not a case in which DCFS made no effort to find M.R.'s father. (*Ansley*, *supra*, 185 Cal.App.3d at p. 481.) Here, as discussed above, DCFS employed due diligence and expended reasonable efforts in an attempt to locate appellant in order to give him notice. Moreover, "the very nature of determining a child's best interests calls for a case-by-case analysis, not a mechanical rule. [¶] The automatic rule . . . bas[ed on] . . . *Ansle*y . . . is not in keeping with section 388 as interpreted in case law." (*Justice P.*, *supra*, 123 Cal.App.4th at p. 191.) *Ansley* was decided under a statutory scheme which often went on for years, and which was quite unlike the currently governing streamlined 18-month legislative framework which "recognizes the child's interest in having a stable and permanent home is paramount once the parents' interest in reunification is no longer an issue." (*Ibid*.)

M.R. was four months old when taken into protective custody. Appellant, currently incarcerated on charges of attempted murder, has never met M.R. or acknowledged her as his child, has never provided for her support, and has never sought to establish his parental status with the juvenile court. Vacating the juvenile court's jurisdictional findings solely for the purpose of effectuating notice to appellant would significantly delay M.R.'s chances of achieving the stability and permanency she needs and deserves. In the case of a section 388 petition based on a notice violation, as elsewhere, parents must make the requisite showing that the child's best interests will be promoted by the proposed modification. (*Justice P., supra*, 123 Cal.App.4th at p. 192.) Appellant did not come close to making such a showing.

The court acted well within its discretion in finding appellant failed to demonstrate it would be in M.R.'s best interests to grant relief under section 388.

DISPOSITION

The order is affirmed.

NOT TO BE PUBLISHED.

JOHNSON, J.

We concur:

ROTHSCHILD, Acting P. J.

CHANEY, J.