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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

In re S.A. et al., Persons  
Coming Under the Juvenile  
Court Law.

B286279  
(Los Angeles County  
Super. Ct. No. CK94363)

LOS ANGELES COUNTY  
DEPARTMENT OF  
CHILDREN AND FAMILY  
SERVICES,

Plaintiff and Respondent,

v.

CEDRIC A.,

Defendant and Appellant.

APPEAL from orders of the Superior Court of Los Angeles County, Teresa Sullivan, Juvenile Court Judge. Affirmed.

Mary C. Wickham, County Counsel, R. Keith Davis, Assistant County Counsel, and Tracey F. Dodds, Principal Deputy County Counsel, for Plaintiff and Appellant.

Neale B. Gold, under appointment by the Court of Appeal, for Defendant and Appellant.

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## INTRODUCTION

In this appeal from the orders of the juvenile court terminating his parental rights to the four youngest of his eight children (Welf. & Inst. Code, § 366.26),<sup>1</sup> Cedric A. contends that the court abused its discretion in denying his section 388 petition for modification seeking an investigation into the retraction by his eldest son M. of M.'s jurisdictional allegations. We conclude the retraction is immaterial and affirm.

## FACTUAL AND PROCEDURAL BACKGROUND

1. *The lengthy dependency of M., Virginia, K., Addison, Hannah, Catherine, Sariah, and S.A.*

This dependency has been the subject of two previous opinions (*In re M.A.* (Apr. 2014, B248359) [nonpub. opn.]; *In re K.A.* (Nov. 2017, B276063) [nonpub. opn.]) and so we refer to the earlier opinions for facts not discussed here. In early 2013, the juvenile court declared all eight children dependents under section 300, subdivisions (b), (d), and (j), removed them from Cedric's custody, and limited his ability to make educational decisions for son K. At the time, the family was living with their paternal aunt and uncle, the A.s, and so the Department of Children and Family Services (the Department) directed Cedric to move out of the A. house. (*In re K.A.*, *supra.*)

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<sup>1</sup> All further statutory references are to the Welfare and Institutions Code, unless otherwise noted.

In 2014, we affirmed the jurisdictional and dispositional orders because the record contained substantial evidence based on statements made by the paternal aunt and the children M., Virginia, and Catherine, that father physically abused the children (§ 300, subd. (b)) when the family lived in Texas, and “ ‘inappropriately sexually touched’ ” then five-year-old daughter Catherine (*id.*, subd. (d)), which conduct put all eight children at risk of harm (*id.*, subd. (j)). (*In re M.A.*, *supra*, B248359.)

In 2017, the juvenile court denied Cedric’s request for a continuance of the section 366.26 hearing for two of his older sons. At the hearing, the court appointed the maternal aunt Lillian G. their guardian, and set a visitation schedule for Cedric and the boys. We affirmed that order. (*In re K.A.*, *supra*, B276063.) Both of our opinions are final and, as Cedric acknowledges, are law of the case. (See *A.H. v. Superior Court* (2013) 219 Cal.App.4th 1379, 1386.)

## *2. The modification petition at issue in this appeal*

The selection and implementation hearing (§ 366.26) for the younger four children, Hannah, Catherine, Sariah, and S.A., was originally scheduled to take place in early 2016. Several continuances were necessitated both because Cedric was not prepared, and because the paternal uncle’s health problems delayed finalization of a permanent plan.

In May 2017, Cedric filed the instant section 388 petition for modification. He sought an investigation into whether the four girls were being sexually abused by the A.s and requested return of the children to his custody and resumption of reunification services, which had terminated in May 2014. As new evidence, Cedric submitted a letter from his now 21-year-old

son M., disavowing the allegations M. made in 2012 that Cedric sexually abused his daughters. Cedric argued that the change of order would be in the children's best interest because it would protect them from sexual abuse and because M. recanted.

In his email to Cedric, attached to the section 388 petition, M. stated, "I do not believe my father was or is a child molester, [I] believe at the time my vision was clouded by my image of my father." Declining to "speak for" his sister Virginia, M. asserted that some of his siblings made allegations because he did, although they could not differentiate truth from falsehood. M. stated that he fabricated evidence against Cedric and that "a lot of accusations were fabricated to make the case stronger and we're *[sic]* the imagination of some grieving children . . . ."

Cedric also submitted his own declaration in which he stated he had "always maintained that I did not sexually abuse my children." Based on reports from M., who had moved out of that house three years earlier and was living in Texas, Cedric feared that the A.s were sexually abusing the girls. Cedric claimed his first priority was to remove the girls from the A.s' custody and then "to try to clear my name one last time." The juvenile court granted Cedric a hearing on his modification petition.

The social worker conducted an investigation of the A. household and determined that Cedric's allegations of sexual abuse there were unfounded because the children denied it and indicated they were happy and did not want to leave the A.s. The Department opined that it would be "detrimentally damaging" to return the children to Cedric's custody because he provided no evidence that he had completed his court-ordered services and he had not seen the children since August 2013. In a last minute

information for the court, the Department related statements from Catherine's Court Appointed Special Advocate (CASA) that when the social worker conducting the investigation told the children that Cedric wanted to regain custody of them, Catherine's response was "oh hell no!" Catherine was "extremely upset for several days" thereafter. The child told CASA that she wanted to be adopted because she has found her home with the A.s. Sariah's CASA indicated that the Department's investigation disrupted the household for several days. The A.s "are two of the most resilient people CASA has ever met." "More impressive is the love this family has for one another; Sariah loves her home and family and that is very clear during CASA home visits. Sariah has expressed a strong desire to be their adopted daughter." It was apparent to the social worker that the A.s had a safe, fun, and loving home.

The hearing on Cedric's modification petition was continued by the juvenile court to enable M., Cedric's witness who was in the military in Texas, to attend. M. was never able to attend but Cedric appeared telephonically in August 2017.

At the hearing, the court considered Cedric's petition and attachments A through I, consisting of M.'s retraction, a series of texts in December 2016 with M., a report of the allocation of police services for March 4, 2012, and Cedric's declaration, along with the record, and argument. The court denied the modification petition. The court then found by clear and convincing evidence that Hannah, Catherine, Sariah, and S.A. were adoptable and that no exception to adoption applied. After the court terminated Cedric's parental rights, he filed this appeal.

## DISCUSSION

Under section 388, Cedric had the burden at the hearing to show, by a preponderance of the evidence, a genuine change of circumstances or new evidence such that placing the children with him was in the children's best interest. (§ 388, subd. (b)(1); *In re Stephanie M.* (1994) 7 Cal.4th 295, 317; *In re D.B.* (2013) 217 Cal.App.4th 1080, 1089.) The petition is addressed to the juvenile court's sound discretion, and on appeal, the decision will be disturbed only when there is a clear abuse of that discretion. (*In re Stephanie M.*, at p. 318.)

"[T]he term 'new evidence' in section 388 means *material* evidence that, with due diligence, the party could not have presented at the dependency proceeding at which the order, sought to be modified or set aside, was entered." (*In re H.S.* (2010) 188 Cal.App.4th 103, 105, italics added; accord, *In re D.B.*, *supra*, 217 Cal.App.4th at p. 1093.) Cedric presented some new evidence in the form of M.'s December 2016 email recanting statements he made before the jurisdiction hearing in 2012.<sup>2</sup>

But, M.'s retraction is not material<sup>3</sup> because, contrary to Cedric's assertion, the statements he made in 2012 were not "*primarily* used to sustain the jurisdictional allegations of sexual

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<sup>2</sup> The other evidence submitted by Cedric, such as the allocation of police services report, attachment G, the Facebook group conversation, exhibit H, and the email from mother, exhibit I, all predate the initiation of this dependency. These attachments do not constitute new evidence as they certainly could have been obtained earlier.

<sup>3</sup> Nor are the text messages, attachments B through F, material as they contain nothing but opinion of the authors.

abuse back in 2013.” (Italics added.) As we explained before, “[t]he sexual abuse that triggered this dependency was perpetrated by father on Catherine . . . *as revealed by*” the paternal aunt, Virginia, and Catherine, as well as M. (§ 300, subds. (b) & (j); *In re K.A.*, *supra*, B276063.) M. did not claim that Virginia manufactured allegations and he said nothing about the paternal aunt’s evidence. M. did not testify at the jurisdiction hearing; Catherine did. The juvenile court also had the Department’s reports which indicated that Catherine told Virginia, the social worker, and the forensic interviewer about the abuse. M.’s belief that his siblings did not understand the difference between truth and falsehood does not undermine the contrary conclusions of the juvenile court when it heard Catherine testify and assessed her credibility and reviewed the record. Therefore, M.’s retraction of his statements is immaterial as it in no way undermines the evidence from Catherine and Virginia on which the juvenile court relied when it sustained the petition. Moreover, the sexual abuse allegations aside, jurisdiction remains valid based on a different subdivision of section 300, namely father’s physical abuse of the children (§300, subd. (b)), which finding was not addressed by M.’s retraction. (*In re Jonathan B.* (1992) 5 Cal.App.4th 873, 875 [“The reviewing court may affirm a juvenile court judgment if the evidence supports the decision on any one of several grounds”].)

Nor has Cedric demonstrated the second prong of his burden, namely that the change he sought was in the best interest of the children. He argues “it is in the girls’ best interests to know they have a father who did not sexually abuse them.” We are hard pressed to comprehend how M.’s recantation of his own statements would serve the best interest of Catherine

and Virginia. A reversal of the long-standing sexual abuse findings on the basis of M.'s recantation alone would devalue Catherine's personal experience with Cedric's abuse and undermine what Virginia saw. Such a result would be particularly repugnant to the girls, given their recent, strong, negative responses to the social worker's announcement that Cedric wanted to regain custody of them.

We reject Cedric's repeated assertion that the children's interest would be "best served by investigating the recantation and eliminating unsupported sexual abuse allegations." Cedric's burden at the hearing is to show best interest by a preponderance of the evidence. (*In re Stephanie M.*, *supra*, 7 Cal.4th at p. 317; *In re D.B.*, *supra*, 217 Cal.App.4th at p. 1089.) As the juvenile court noted, there has already been an inordinate amount of time over the five years since the dependency began devoted to investigating this family. Cedric does not carry his burden by arguing that the children's best interest would be served by conducting yet another inquiry.

Reunification services were terminated in May 2014 (*In re K.A.*, *supra*, B276063) after which the juvenile court's focus shifted away from Cedric's interests, which are no longer paramount, to the children's need for permanency and stability. (*B.B. v. Superior Court* (2016) 6 Cal.App.5th 563, 573.) Four years later, these children still have not obtained permanency or stability because of continuances requested by Cedric and because the Department needed time to finalize the children's placement. Delaying that permanency more simply to allow another investigation to clear prejudice to Cedric is antithetical to the best interest of the children.



As the result of our opinion affirming the denial of Cedric's section 388 petition, we need not address his further contention that reversal of that ruling requires a reversal of the order terminating his parental rights.

**DISPOSITION**

The orders appealed from are affirmed.

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KALRA, J.\*

We concur:

EDMON, P. J.

LAVIN, J.

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\* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.