Filed 1/2/20 In re R.G. CA2/4

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

In re R.G., a Person Coming Under the Juvenile Court Law.	B294586 c/w B295882 (Los Angeles County Super. Ct. Nos. DK13949, DK13949C)
LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. D.B., Defendant and Appellant.	

APPEAL from orders of the Superior Court of Los Angeles County, Brett Bianco, Judge. Affirmed.

Jane Winer, under appointment by the Court of Appeal, for Defendant and Appellant.

Mary C. Wickham, County Counsel, Kristine P. Miles, Assistant County Counsel, and Stephanie Jo Reagan, Deputy County Counsel, for Plaintiff and Respondent.

Appellant D.B. is the biological father of minor R. He appeared in juvenile dependency proceedings concerning R. after the court already had declared R.'s stepfather her presumed father. Appellant secured visitation with R. and sought presumed father status. After appellant moved to Florida and largely curtailed his visits with R., the court terminated appellant's visitation at R.'s request. It also denied appellant's requests for presumed father status and ultimately terminated his parental rights to R.

In these consolidated appeals, appellant contends the court abused its discretion by granting R.'s Welfare and Institutions Code section 388[1] motion to terminate his visits with her. He further contends the court erred by denying his second section 388 motion seeking presumed father status and by terminating his parental rights pursuant to section 366.26. We affirm the challenged orders.

FACTUAL AND PROCEDURAL HISTORY

Initial Petition

Mother J.H., her long-term partner, K.G., and their two children, M. and S., began receiving voluntary family maintenance services from the Los Angeles Department of Children and Family Services (DCFS) in late 2014. Mother and K.G. were not living together at that time and did not resume living together until early 2015, after mother became pregnant

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

with R.

In late September 2015, when mother was approximately seven months pregnant with R., DCFS filed a juvenile dependency petition concerning M. and S. under section 300. Mother gave birth to R. while that petition was pending. The court ultimately sustained a single section 300, subdivision (b) allegation concerning M. and S. on December 30, 2015. M. and S. became dependents of the court but remained placed with mother and K.G.

DCFS filed a dependency petition concerning R. on February 5, 2016. In connection with that petition, K.G. filed a parentage questionnaire and statement identifying himself as R.'s father. The court found K.G. was R.'s presumed father on February 5, 2016.

The court sustained a single section 300, subdivision (b) allegation involving R. on March 1, 2016 and declared R. a dependent of the court at that time. Like M. and S., R. remained placed with mother and K.G. The court ordered family maintenance services.

Mother and K.G. initially made good progress with their case plan. In a status review report dated July 20, 2016, DCFS recommended that jurisdiction be terminated. The children's counsel requested a contest on the issue of terminating jurisdiction, however, and the court continued the matter to September 16, 2016 for a contested hearing.

Supplemental Petition

In a supplemental review report filed September 9, 2016, DCFS changed its recommendation. The report noted that mother and K.G. had become noncompliant with the family's case plan, and DCFS had received a "risk alert" after mother was

attacked by one of the several rescue dogs she was temporarily keeping in the home. After the contested hearing, the court concluded that jurisdiction remained appropriate.

Prior to the next review hearing, which the court scheduled for December 16, 2016, DCFS received a referral that S., then 3, had almost drowned after falling off a boat while in K.G.'s care. While it was investigating that referral, DCFS found mother under the influence of alcohol while the children were under her care. DCFS became further concerned when mother and K.G. provided varying explanations for a bruise near R.'s left eye and made R. unavailable for a scheduled home visit. DCFS filed a supplemental section 387 petition concerning all three children on December 16, 2016; mother and K.G. pled no contest to an amended section 387 allegation on March 1, 2017. The court detained the children from mother and K.G., and DCFS placed them with their maternal grandmother (MGM).

Appellant Becomes Involved

In an interim review report dated December 21, 2016, DCFS reported that appellant had contacted DCFS. According to the report, appellant told a social worker that mother "called him a few days ago and reported to him that he may [be] the father" of R. Appellant told the social worker he was willing to take a paternity test and care for R. if she was his child.

Appellant appeared at the March 1, 2017 hearing on the supplemental petition but was not permitted to remain present for the confidential proceedings. He filed a statement regarding parentage that same day. He again indicated a willingness to take a paternity test and asserted that he had "picture evidence of Facebook messages from the mother claiming I am the biological father," which he claimed he was provided in December

2016. The court appointed counsel for appellant and allowed him to appear in the case on March 14, 2017.

On April 24, 2017, DCFS filed a last-minute information documenting its initial investigation into appellant's claim of parentage. According to that document, a social worker spoke with mother on April 4, 2017. Mother reported that appellant could be R.'s biological father, but she considered K.G. to be R.'s father because he had been present through mother's pregnancy and R.'s birth, and had raised R. Mother opined that appellant was "not an appropriate parent" for R. because mother was afraid of him and he had not made any effort to be a part of R.'s life. The social worker also spoke to MGM, "who reported that she is aware that when [mother] was pregnant [appellant] was notified that he may be the father of the child. [MGM] reported that [appellant] dismissed responsibility for the child." The social worker added, "However on 12/20/16 [appellant] reported he did not know of the child until mother sent a [F]acebook message stating that the child may be his after the children were detained on 12/16/16."

The court ordered a paternity test for appellant on April 24, 2017. It set the matter for a follow-up hearing on July 11, 2017.

In advance of that hearing, DCFS filed an interim review report on June 26, 2017. According to that report, appellant told a social worker on June 14, 2017 that mother had stayed with him for a week in January or February 2015. Approximately two days after she left his house, mother sent appellant a Facebook message stating, "I'm pregnant bitch." Appellant reported that mother and K.G. then threatened him; K.G. wanted to meet in person "to kick my ass." Approximately one month later, mother told appellant he was not the father. Appellant told the social

worker he wanted full custody of R.

After the July 11, 2017 hearing, the court began referring to appellant as R.'s biological father, though it does not appear to have made a finding to that effect at that time. It ordered monitored visitation for one hour per week and gave DCFS discretion to increase the duration of the visits if it would be in R.'s best interest.

In a status report filed August 16, 2017, DCFS reported that appellant had visited R. weekly and expressed an interest in obtaining less restrictive visitation and full custody. Both mother and K.G. told DCFS they did not want appellant involved in R.'s life. R., then approximately two-and-a-half, was "too young for a meaningful statement."

Appellant Moves for Presumed Father Status

On August 30, 2017, appellant filed a motion for presumed father status. The court set the motion for contest on November 7, 2017. On October 12, 2017, R. filed a response opposing the motion. R. argued that K.G., whom she "knows . . . to be her one and only father," should remain her sole presumed father. Mother also opposed the motion.

In a last-minute information filed October 23, 2017, DCFS reported that appellant had been consistent and appropriate during his visits with R. DCFS further reported that it erroneously had liberalized appellant's visitation to weekly three-hour unmonitored visits. When it realized that expanding the scope of the visits from monitored to unmonitored exceeded its discretion, DCFS retracted that portion of the liberalization and authorized appellant to have weekly three-hour monitored visits. Appellant told DCFS he wanted to have unmonitored and overnight visits with R.

At the November 7, 2017 hearing on appellant's motion for presumed father status, appellant's and mother's attorneys stated that they planned to submit on the papers. K.G.'s attorney called K.G. as a witness. K.G. testified that he and mother got back together shortly after she learned she was pregnant with R. He further testified that mother notified appellant he was R.'s biological father around that time. K.G. denied contacting appellant or threatening him. K.G. always knew he was not R.'s biological father but considered her his daughter and treated her like his other children. R. called him daddy and had a "loving reaction" when she saw him.

After K.G. testified, appellant's attorney called MGM as a rebuttal witness. She testified that R. said, "My daddy. My daddy," when she saw K.G. during monitored visitation. Appellant's attorney then called appellant as a further rebuttal witness. He testified that K.G. repeatedly telephoned him in April 2015 and stopped only when police intervened. Appellant blocked K.G.'s and mother's calls and changed his phone number.

Appellant's counsel argued that appellant acted as diligently as possible to obtain presumed father status. He argued that mother defrauded appellant by telling him that he was not R.'s father before telling him the truth in late 2016 after the DCFS case was well underway. As soon as appellant found out he could be R.'s father, he notified DCFS, became involved in the proceedings, and started visitation with R. Through appellant's visits, he developed a "worthwhile and fruitful" relationship with R., who "recognizes [appellant] as her father" and would be harmed if their relationship were terminated. He asked the court to use its "inherent equitable power to void the declaration of paternity" and declare appellant a presumed

father.

Mother's counsel, K.G.'s counsel, and R.'s counsel all urged the court to deny appellant's motion for presumed father status. Mother's counsel emphasized that appellant knew "from the onset" that mother was pregnant with his child, yet failed to "take prompt steps" to establish himself as a father. K.G.'s counsel echoed mother's comments. She also argued that K.G. had assumed the role of R.'s father from the moment he learned mother was pregnant, and that R. would not suffer detriment if K.G. and mother remained her only legal parents. R.'s counsel joined and reiterated both counsels' arguments. She also argued that there was no evidence, only comments from counsel, that R. had a relationship with appellant or viewed him as her father. DCFS did not take a position or make any argument.

The court denied appellant's motion for presumed father status but "elevated" him to "biological father status." It first concluded that appellant did not meet the criteria to be considered a *Kelsey S.* father,[2] because he did not expediently

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[2] *Adoption of Kelsey S.* (1992) 1 Cal.4th 816. A "*Kelsey S.* father" is a biological father who does not qualify for statutory presumed father status because he has been prevented from receiving the child into his home. If an unwed biological father "promptly comes forward and demonstrates a full commitment to his parental responsibilities—emotional, financial, and otherwise—his federal constitutional right to due process prohibits the termination of his parental relationship absent a showing of his unfitness as a parent. Absent such a showing, the child's well-being is presumptively best served by continuation of the father's parental relationship. Similarly, when the father has come forward to grasp his parental responsibilities, his parental rights are entitled to equal protection as those of the mother." (*Adoption of Kelsey S.*, *supra*, 1 Cal.4th at p. 849.)

attempt to become involved in R.'s life and had not been prevented from doing so. The court then concluded appellant did not qualify as a presumed father under Family Code section 7611. The court acknowledged appellant's recent visitation with R., but observed that appellant had no relationship with R. prior to that and had not provided for her. The court further found that this case was not one of the rare ones in which R. truly had more than two parents, and found that there was no detriment to R. in recognizing mother and K.G. as her only parents.

R. Moves to Reduce Visitation

After the court denied appellant's motion for presumed father status, R.'s counsel orally moved to reduce appellant's visits with R. to one time per month. Counsel represented that the visits confused R. and caused her anxiety. K.G.'s counsel agreed with the request, while mother's argued that appellant's visits should be eliminated altogether. Appellant's counsel re-called MGM, who testified that R. greeted appellant in a "friendly" manner during their visits, "[l]ike a play date." On cross-examination by R.'s counsel, MGM testified that R. was "confused" by visits monitored by the someone other than her, and "was screaming and crying" prior to the last visit. MGM added that R. had difficulty eating and sleeping and acted restless for "about a day or two" after visits.

The court denied R.'s counsel's motion. It found that the problem with R.'s visits was an unfamiliar monitor. It court ordered twice monthly visits of up to two hours each, monitored by MGM. The court also continued reunification services for mother and K.G.

Appellant Relocates to Florida

In a status review report filed January 31, 2018, DCFS reported that appellant "stopped his visits with R[.] because he moved permanently to Florida." The report continued: "[Appellant] has reported that he still wants to have full custody of R[.] and have her live with him in Florida. After the last Court hearing, [appellant] felt that he was being discriminated against because the Court was not 'giving him any rights' and he filed a complaint to DCFS Administration. The matter was handled . . . and [appellant] plans on hiring private counsel in order to appeal the Court's orders regarding R[.]."

Appellant's last visit with R. before the move was November 28, 2017. Appellant brought his son, R.'s older half-brother, to the visit, to which he arrived an hour late. The November 28 visit had been scheduled for November 21 but was postponed because R. was sick. After the cancellation, appellant "demanded to know whether R[.] was being properly seen by doctors" and further "demanded" that the social worker "text him regarding the cancelled visit."

Matter is set for a Section 366.26 Hearing

Meanwhile, mother and K.G. struggled to comply with their case plan. They were "very inconsistent" with their visitation and MGM reported that they had "issues" when they did attend. DCFS recommended that reunification services be terminated and the matter set for a section 366.26 hearing. Mother and K.G. requested a contested hearing, which the court held on March 27, 2018. After that hearing, the court terminated reunification services and set the matter for a section 366.26 permanency planning hearing on July 16, 2018.

R. Moves to Terminate Visitation

On June 14, 2018, R.'s counsel filed a section 388 petition seeking to terminate appellant's visitation with R. She asserted that "[t]he visits have been detrimental to R[.] given [appellant's] actions and sporadic visits." In the portion of the petition asking for a description of the changed circumstances supporting the requested order, R.'s counsel wrote: "After the court ordered that [appellant] was biological only (while [K.G.] remained R[.]'s presumed father) and was granted some visitation, [appellant] posted in appropriate [sic] materials on FaceBook [*sic*] including the names and address of the three children and their relative caregiver, the names of their parents, and confidential court documents. Additionally, [appellant] posted on FaceBook [*sic*] various rambling rants disparaging the foster court system, the judges and the family. While visiting with R[.] in 2017, caregiver noticed that R[.], age 2, appeared confused by the visits and had trouble eating and sleeping without having nightmares. Some 3 weeks after the paternity and visitation orders were made, [appellant] moved out of state to FL and all contact between [appellant] and R[.] ceased. After visits stopped, R[.]'s appetite and general happy demeanor returned and she stopped having nightmares. Then, in May 2018, [appellant] returned to CA for a funeral and asked for his visitation. He was in CA for a total of 3 weeks and received 6 hours of visits, covering 3 hours for May and 3 hours for June even though he was not in CA for a full month. During these 6 hours in 2018, he had a heated and loud verbal altercation with the caretaker in R[.]'s (and CSW's presence) while R[.] held on to caretaker's leg frightened and repeatedly asked to go home. Thereafter, R[.]'s nightmares and loss of appetite started again. Also in May 2018, CSW called the

caretaker to inform her that [appellant] was stalking her house and that she should turn on the cameras inside and outside the house. (Apparently, [appellant] had called CSW telling her what he had seen while stalking the caregiver's home). In the cameras, [appellant]'s rental car was seen passing by the home on several occasions. He also spent a significant amount of time at a June visit insisting that R[.] call him 'daddy.' Once he had 6 hours of visits in less than one month's time, [appellant] started insisting on 'make up visits' which were not court ordered and which interfered with the children's schedules. After the last visit in June 2018, he posted another rambling live video on FaceBook [*sic*] comparing R[.]'s case to the case of young Gabriel who was killed in the Antelope Valley. Biological father has proven that he is an angry fellow who does not have R[.]'s best interest in mind. He remains a stranger to R[.], one that causes her fear and anxiety."

In the portion of the petition asking why the requested change would be better for the child, R.'s counsel wrote: "R[.] is two years old. She deserves to be free from violence, drama, and needless stress. Her biological father is basically a stranger to her. She calls someone else 'daddy'. She spends most of the visits in 2018 next to caregiver. She does not need to witness the biological father yelling at social workers or her caregiver. When she had no visits with [appellant], R[.] was happy, normal [*sic*] two year old but when she visited she was seen as confused, experienced loss of appetite and nightmares on a recurrent basis. Age-appropriate play therapy is being sought for R[.] as a result. R[.] will likely be adopted with her siblings by maternal grandmother at which time [appellant's] parental rights would be terminated. He has never occupied a parental role and is a

stranger to R[.]."

The court first addressed R.'s section 388 petition during a June 29, 2018 hearing. Mother and K.G. joined the petition at that time. The court set the petition for a contest on July 16, 2018, the date of the previously scheduled section 366.26 hearing. Over appellant's objection, the court ordered his visits with R. suspended until the contested hearing.

DCFS filed an interim review report also entitled "Response to 388 Petition" on July 13, 2018. In that report, DCFS advised the court that MGM called the social worker on May 21, 2018 to cancel appellant's scheduled visit because R. had a fever. MGM said she was willing to reschedule the visit. The following day, May 22, 2018, MGM texted the social worker to report that appellant was making "very disturbing" posts on social media. Appellant also called the child protection hotline to complain that his scheduled visit with R. had been cancelled. He blamed MGM for cancelling the visit and claimed that his Facebook account had been "attacked by fake profile accounts" that were "posting vile language" to his account. He told DCFS he suspected mother's family was behind the attack. Appellant also told DCFS that he moved to Florida "for his safety," because mother's family was harassing him. MGM told DCFS that appellant sent law enforcement to her home to perform a "wellness check" on R.

On May 23, 2018, a social worker made an unannounced visit to MGM's house. The house was in "appropriate" condition and R. was clean and happy, with no bruises or marks on her body.

Appellant had his rescheduled visit with R. on May 25, 2018. The visit was held at the DCFS office and was monitored

by a social worker and MGM. When the social worker left the room, appellant got out his cell phone. MGM told the social worker when she returned, and appellant "got up and started yelling loudly" about it. R. "started to 'freak out' and was holding onto [MGM's] leg in fear." Appellant "eventually calmed down and resumed his visit"; R. "warmed up" to him during the last thirty minutes of the two-hour visit. MGM told DCFS that R. "was up all night and was screaming and she wouldn't eat any food" after the visit.

Appellant had additional monitored visits with R. on June 1 and 4, 2018. MGM said the visits were "okay," though appellant tried to get R. to call him daddy even after MGM explained to him that R. called K.G. "daddy" and knew appellant by another name. The social worker observed that appellant "was more engaged with his cell phone" than with R. during the June 4 visit. MGM told DCFS she believed that appellant's "in-and-out behavior in R[.]'s life is disruptive to her and does not benefit her as she's too young to understand what is going on or who [appellant] is." She further reported that appellant had not contacted her to check on R. or to speak with R. on the telephone, but expected R.'s "life be disrupted so that he can see her" during his "sporadic[ ]" visits to California.

DCFS recommended that the court grant R.'s petition. It opined that R.'s' "maladaptive behavior" after visits "was concerning," and that the "sporadic visits" were "not healthy for her as she is young and deserves to have consistency and stability around her." DCFS also pointed to appellant's "disruptive" and "inappropriate" social media posts, "false allegations about R[.]'s well-being," and "screaming in her presence" as demonstrative of his failure to manifest "a closer relationship" with R. DCFS also

advised that that appellant had not communicated with R. on a regular basis or even contacted DCFS to check on her. "To the Department, this shows that [appellant] does not have an invested interest in R[.] and his inappropriate disclosures on social media are all to show that he has been a victim to 'the system.'"

On July 16, 2018, the court found that appellant had not received proper notice of R.'s section 388 petition. It continued the hearing on that petition and the section 366.26 hearing to November 13, 2018. Appellant's visits with R. remained suspended in the interim.

The court heard R[.]'s section 388 petition concerning appellant's visitation on November 28, 2018. The parties proceeded by argument only. R.'s counsel contended that appellant's irregular visits had scared and confused R., and that "circumstances have changed in that . . . [appellant] has not conducted himself in an appropriate fashion at the visits, not following the visitation protocol, is posting confidential information, is stalking the grandmother again," and "hasn't had a visit since June of this year," and since November 28, 2017 before that. R.'s counsel also pointed to appellant's abrupt move to Florida, and the shifting justifications he provided for it. She further argued that R. was bonded to K.G. and that it would not be in her best interest to have further visitation with appellant. Counsel for DCFS and K.G. joined the argument, and mother's counsel submitted without argument.

Appellant's counsel contended that it would not be in R.'s best interest to terminate visits and that "[t]erminating the visits would essentially prevent him any opportunity to have presumed father status." Appellant's counsel further argued that appellant

had made attempts to be involved in R.'s life, did not cut off communication with her, and "has made some provision for her." "He continued to attempt to reach out to the social worker, he never got a response," and "did try to reach out to maternal grandmother to find out about R[.]'s well-being."

The court granted R.'s petition and terminated visitation. It found "that it would not be in the minor's best interest to have continued visitation" with appellant. "In fact, it would be detrimental for the minor given [appellant]'s actions and impact on the minor. For that reason, the 388 is granted and the visits for [appellant] are terminated." Appellant timely appealed the order.

Appellant Moves For Presumed Father Status

On September 24, 2018, before R.'s motion was heard, appellant filed a section 388 petition requesting designation as R.'s presumed father. Appellant stated that circumstances had changed since the November 7, 2017 order designating him R.'s biological father because he "visited with R[.], provided for her and told everyone she is my child."

In an attached declaration, appellant stated that he "visited with her as much as I could, and was allowed to. I provided for her and also told everyone that she is my daughter. Several of our family members have also met with her." Appellant stated that he "believe[d] that awarding me presumed father status will be beneficial to R[.] because she would continue to benefit from a continued relationship with me, and with my two other children (her siblings). . . . They live with me in Kissimmee, Florida." Appellant stated that he brought "a diaper bag loaded with diapers, wipes as well as snacks, food, back-up clothing in case of an accident" to his visits with R., and "also had

sippy cups, toys, and purchased a car seat." He also "offered to buy anything she needs," and provided MGM with clothes, diapers, and wipes for R. Appellant recounted details of the two unmonitored visits he "managed to have" with R., in September 2017. He described those visits as "amazing" and said R. ate well, smiled, played, and spontaneously "planted a kiss on my face" during one of them. Appellant also stated that R. ran up to him and screamed "Daddy!" at all of his visits, and "would try to jump in the car with me as I left."

Appellant stated that he began to have "very serious problems" with MGM shortly after his visits reverted to monitored. He had only one visit in November 2017 after the court denied his motion for presumed father status, after which he "moved to Florida to better be able to provide for my family." Appellant "maintained contact with the social worker" and "regularly enquired, telephonically and via text, about R[.]'s wellbeing." Appellant visited with R. three times in May and June 2018. During the May visit, she "seemed a bit upset at me for the first 20-30 minutes, but then warmed up with me and couldn't stop laughing at me and playing with me." During the June visits, "she would panic when I would leave the room to use the restroom" and "ask me to pick her up and carry her." R. "kept asking me to call our family members whom she had already met by touching the pictures of them on my phone," talked to the family members when appellant called them, and "appeared to be very happy." Appellant concluded his declaration by stating, "My wish is to have R[.] live with me, her brother, and her sister. Absent safety concerns, it is always in a child's best interest to be placed with his/her parent. Her siblings and I all long to continue to have a relationship with her. . . . We live in a four-

bedroom home on a golf course in a family oriented neighborhood with lots of amenities. If I am awarded presumed father status, R[.], like her siblings, will have her college and medical insurance taken care of through my VA benefits."

The court denied appellant's section 388 petition without a hearing on September 25, 2018. In its form order, the court checked boxes indicating "the request does not state new evidence or a change of circumstances" and "the proposed change of order, recognition of sibling relationships, or termination of jurisdiction does not promote the best interest of the child." The court also wrote in, "Previously denied. No new evidence to warrant reconsideration." Appellant did not appeal this ruling.

Appellant Again Moves for Presumed Father Status

On December 19, 2018, appellant filed another section 388 petition to change the November 7, 2017 order recognizing him as R.'s biological father but not her presumed one. The petition was identical to the one he filed in September 2018. Appellant attached to it the exact same declaration he provided in connection with his previous section 388 petition.

The court summarily denied appellant's section 388 petition the same day. It checked the same two boxes on the form—"the request does not state new evidence or a change of circumstances" and "the proposed change of order . . . does not promote the best interest of the child." It also wrote in: "Previously decided after full evidentiary hearing. No basis for reconsideration. See denial of 9/25/18." Appellant timely appealed.

Section 366.26 Hearing

The court held the section 366.26 hearing on February 21, 2019. R.'s counsel joined DCFS in recommending that mother's,

K.G.'s, and appellant's parental rights to R. be terminated. Mother's counsel, K.G.'s counsel, and appellant's counsel all opposed termination. Appellant's counsel contended that R. "would benefit from a continued relationship with him."

The court found by clear and convincing evidence that all three children, including R., were adoptable. It further found that "any benefit accruing to the children from their relationship with the parents is outweighed by the emotional and physical benefit they would receive through the stability and permanency of adoption and that adoption is in the best interest of the children," and that it would be detrimental to return the children to their parents. The court also found that no exception to adoption applied. Appellant timely appealed.

DISCUSSION

We have consolidated for all purposes appellant's three appeals—from the granting of R.'s section 388 petition terminating his visitation, the denial of his second section 388 petition seeking presumed father status, and the termination of his parental rights. We consider each appeal in turn.

I. Termination of Visitation

A. Legal Standards

Section 388 allows a parent or other interested person to petition the court to change, modify or set aside any previous order in the case. (§ 388, subd. (a).) "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." (*In re Mickel O.* (2011) 197 Cal.App.4th 586, 615.) In considering whether that showing has been made, the court may consider the entire factual and procedural history of the case.

(*Id.* at p. 616.)

We review the juvenile court's ruling on a section 388 petition for abuse of discretion. (*In re Stephanie M.* (1994) 7 Cal.4th 295, 318; *In re Mickel O.*, *supra*, 197 Cal.App.4th at p. 616.) The test for abuse of discretion is whether the juvenile court exceeded the bounds of reason. If two or more inferences reasonably can be deduced from the facts, we have no authority to substitute our decision for that of the juvenile court. (*In re Stephanie M.*, *supra*, 7 Cal.4th at pp. 318-319.)

B. Analysis

Appellant first argues the juvenile court abused its discretion because it "failed to make an express finding that circumstances had changed since the prior order and such changed circumstances required terminating visits." For this proposition he relies primarily on *In re A.M.* (2013) 217 Cal.App.4th 1067. We agree with DCFS that *In re A.M.* is inapposite.[3]

In *In re A.M.*, children A.M. and S.M. were declared dependents of the court after 11-week-old S.M. sustained multiple suspicious fractures while in his parents' care. (*In re A.M., supra*, 217 Cal.App.4th at p. 1070-1071.) The social services agency that brought the petition recommended the court deny reunification services to the parents, because their refusal to acknowledge any responsibility for the abuse indicated that no services would be likely to prevent re-abuse. (*Id.* at p. 1071.) The

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[3] DCFS also argues that appellant forfeited this argument by failing to "bring this alleged deficiency to the court's attention" below. Although the forfeiture rule applies in dependency proceedings, its application is "not automatic." (*In re S.B.* (2004) 32 Cal.4th 1287, 1293.) We decline to find forfeiture here.

juvenile court adopted the recommendation and denied reunification services to both parents under section 361.5, subdivisions (b)(5) and (b)(6).[4] (*Ibid.*; *id.* at pp. 1074-1075.) "On the eve of the section 366.26 hearing, less than three months after the jurisdictional ruling," the mother filed a section 388 petition seeking to modify the order denying her reunification services. (*Id.* at p. 1073.) The mother's accompanying declaration stated that, since the disposition hearing, she had separated from the father, obtained a domestic violence restraining order against him, and begun attending parenting classes and counseling. (*Ibid.*)

The court held a hearing on the petition, at which the mother "continued to profess ignorance about the source of S.M.'s injuries" and denied that the father would ever abuse him. (*In re A.M.*, *supra*, 217 Cal.App.4th at p. 1073.) She "further contended that, but for the Agency's intervention, Father would have presented no risk to the children." (*Ibid.*) Despite this testimony, the juvenile court granted the mother's section 388 petition and

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[4] Section 361.5, subdivision (b) authorizes the trial court to deny reunification services when it finds by clear and convincing evidence that one of 17 enumerated conditions has been met. The condition listed in subdivision (b)(5) is "[t]hat the child was brought within the jurisdiction of the court under subdivision (e) of Section 300 because of the conduct of that parent or guardian." The condition listed in subdivision (b)(6)(A) is "[t]hat the child has been adjudicated a dependent pursuant to any subdivision of section 300 as a result of severe sexual abuse or the infliction of severe physical harm to the child, a sibling, or a half sibling by a parent or guardian, as defined in this subdivision, and the court makes a factual finding that it would not benefit the child to pursue reunification services with the offending parent or guardian."

awarded her reunification services. (*Ibid.*) It explained, "'The change in circumstances that I see is that the mother obtained the restraining order. She appears to me to be making good progress in taking classes to better herself and become a responsible parent. And I think that at this stage of the proceedings reunification services for the mother are something that would very likely result in reunification.'" (*Id.* at pp. 1073-1074.)

The social services agency and the children both appealed, arguing that the finding of changed circumstances was not supported by substantial evidence and the grant of services was based on an incorrect legal standard. (*Id.* at p. 1074.) The appellate court reversed, concluding that the juvenile court "applied the wrong legal standard and failed to make necessary findings in granting reunification services to Mother." (*Id.* at p. 1069.) The appellate court held that when reunification services are denied under section 361.5, subdivision (b)(6), the juvenile court lacks the authority to subsequently order those services unless it expressly finds that clear and convincing evidence establishes that doing so would be in the best interest of the child. (See *id.* at pp. 1075-1076.) Such an express finding is mandated by section 361.5, subdivision (c), which the court held that the mother (and the juvenile court) could not avoid by proceeding under section 388. (*Id.* at p. 1076.) Thus, reversal was required due to the juvenile court's failure to make findings under section 361.5, *not* section 388. *In re A.M.* does not support appellant's argument that section 388 requires explicit findings.

Appellant next acknowledges that "[a] required finding need not be made if the substance of the finding appears in the record," and contends the substance of the finding does not

appear in the record here. He argues the "only comment the juvenile court made was that [appellant's] actions made visitation detrimental. There was no comment about circumstances being different from those that existed when the visitation order was made." Moreover, he contends, "[s]ubstantial evidence would not support a finding of changed circumstances had an express finding been made."

Appellant has not pointed to any authority supporting his contention that a finding may not be implied absent an express comment on that topic by the court. He cites *In re John S.*, (1978) 83 Cal.App.3d 285, 292 in his opening brief, but that case does not support his position. In *In re John S.*, a delinquency case, the court failed to check a box on a form minute order indicating that it made a finding that it was necessary to remove the minor from his parents' custody. (*In re John S.*, *supra,* 83 Cal.App.3d at p. 289.) The minor argued this omission meant that no such finding was made. (*Id.* at p. 290.) The appellate court disagreed. It held that "the absence of a formal minute order entry in the language of section 726 is not determinative. If the transcript of the proceedings shows 'the substance of a finding' [citation] within that section, it is sufficient." (*Id.* at p. 292.) The court went on to conclude that "[t]he transcript of the judge's comments announcing the ruling shows clearly that he found in substance that the welfare of the minor required that his custody be taken from his parent . . . ." (*Ibid.*) Not only does *In re John S.* concern a different statute, it has been interpreted to mean that a finding may be implied where it is apparent from the *record*, not merely the court's comments. (See *In re Kenneth H.* (1983) 33 Cal.3d 616, 621; *In re Michael W.* (1980) 102 Cal.App.3d 946, 953, fn. 2.)

Appellant also cites *In re Israel T.* (2018) 30 Cal.App.5th 47 in his reply brief, but that inapposite case concerned a jurisdictional finding in which the court struck words necessary to support jurisdiction and remarked, "'I am amending [the petition] so it will invite reversal at the Court of Appeal.'" (*In re Israel T.*, *supra*, 30 Cal.App.5th at p. 50.) We are not persuaded that the court had to make an express finding or comment here, where the record contains substantial evidence of changed circumstances: appellant moved to Florida, failed to contact R. for months at a time, and his sporadic visits caused her to suffer nightmares and appetite disruption..

II. Denial of Section 388 Petition for Presumed Father Status

Appellant contends the court abused its discretion by summarily denying his second section 388 petition for presumed father status without a hearing. He also asserts, somewhat circularly, that "[d]enying him presumed father status also deprived him of presumed father status." He contends the court's invocation of the November 7, 2017 hearing at which it denied his initial motion for presumed father status was an inadequate basis to deny a hearing because that hearing concerned different issues and did not include evidence "concerning the substantial visitation that took place between August 30 and November 7, 2017." Appellant also argues a hearing was required because his petition made prima facie showings of R.'s best interest and changed circumstances. We disagree.

A. Legal Standards

The court is required to hold a hearing on a section 388 petition only "[i]f it appears that the best interests of the child . . . may be promoted by the proposed change of order. . . ." (§ 388,

subd. (d).) To clear this threshold, the petition "must make a prima facie showing that circumstances have changed since the prior court order, and that the proposed change will be in the best interests of the child." (*In re Alayah J.* (2017) 9 Cal.App.5th 469, 478.) "To make a prima facie showing under section 388, the allegations of the petition must be specific regarding the evidence to be presented and must not be conclusory." (*Ibid.*) The standard is one of probable cause; if the petition demonstrates probable cause of changed circumstances and best interest when liberally construed in light of the entire factual and procedural history of the case, the trial court should grant the petitioner a hearing. (*In re G.B.* (2014) 227 Cal.App.4th 1147, 1157; *In re Jackson W.* (2010) 184 Cal.App.4th 247, 258.) We review the decision to deny a section 388 petition without a hearing for abuse of discretion. (*In re G.B.*, *supra*, 227 Cal.App.4th at p. 1158.)

B. Analysis

In its order summarily denying appellant's section 388 petition, the court noted that the petition was "[p]reviously decided after full evidentiary hearing," and that appellant had provided "[n]o basis for reconsideration." Appellant first contends denying a hearing on this basis was an abuse of discretion, because the November 7, 2017 hearing concerned "a motion to 'set aside [K.G.'s] Voluntary Declaration of Paternity'" and addressed whether appellant was a *Kelsey S.* father. He argues that "[n]either of these matters were raised in [his] December 19, 2018 section 388 petition." He also asserts the court only considered visitation predating August 30, 2017 at the November 17, 2017 hearing, because the court "did not allow" appellant to testify about his more recent visitation.

We are not persuaded the court abused its discretion by referring to the November 7, 2017 hearing. The November 7, 2017 hearing addressed a motion that appellant captioned "Motion for Presumed Father Status." The opening paragraph of the motion indicated that appellant "shall seek to be declared a presumed father of the minor child." Appellant's desire to be declared a presumed father was the crux of the motion, just as it was the basis for the section 388 petition, in which he requested, "I would like the court to recognize me as R[.]'s presumed father." Whether appellant was a *Kelsey S.* father or whether he should supplant or join K.G. as a presumed father were ancillary issues related to the primary request for presumed father status. Also, appellant, not the court, was responsible for the limited nature of his evidentiary presentation. His counsel informed the court at the outset of the hearing that he wanted to proceed on the papers and only chose to call MGM and appellant as rebuttal witnesses to respond to testimony presented by K.G.

Appellant next contends he made a prima facie showing that circumstances had changed since November 7, 2017, because his declaration described visits he had with R. in September through November 2017 and in May and June 2018. He argues that the allegations established that R. "had more and longer visits and R[.] had come to know her paternal family. The allegations showed that the additional visits maintained and deepened R[.]'s bond with [appellant] and his family

Appellant is correct that he visited with R. for several hours during the year that passed between the court's November 7, 2017 ruling denying him presumed father status and the section 388 petition at issue. Yet no prima facie case is made "if the allegations would fail to sustain a favorable decision even if

they were found to be true at a hearing." (*In re G.B.*, *supra*, 227 Cal.App.4th at p. 1157; see also Cal. Rules of Court, rule 5.570(d)(1).) The court did not abuse its discretion by finding that to be the case here.

The parties agree that Family Code section 7611, subdivision (d) is the relevant provision regarding presumed father status. It provides that a person may be a presumed parent if he or she "receives the child into his or her home and openly holds out the child as his or her natural child." "A person requesting presumed parent status under section 7611, subdivision (d) must have a 'fully developed parental relationship' with the child." (*In re M.Z.* (2016) 5 Cal.App.5th 53, 63.) "A presumed parent must demonstrate "'a full commitment to [parental] responsibilities—emotional, financial, and otherwise.'" [Citation.]" (*Ibid.*) As a general rule, a child may have only one presumed father. (*Id.* at p. 64) A court may recognize more than two parents only if it finds that recognizing only two parents would cause detriment to the child. (*Ibid.*) Appellant's declaration regarding his visitation did not establish that he had a fully developed parental relationship with R., particularly in light of evidence before the court that he never contacted R. or MGM from Florida to speak to R. or inquire about her well-being and that he posted adverse information about the case on his social media pages. (See *In re Donovan L.* (2016) 244 Cal.App.4th 1075, 1091 ["courts seek to protect *existing* relationships rather than foster *potential* relationships"].) Moreover, appellant's petition and declaration did not show that failing to recognize him as R.'s presumed parent in addition to mother and K.G. would cause R. detriment. R. knew K.G. as "daddy" and suffered nightmares and other disruptions after

visits with appellant.

Appellant also contends he made a prima facie showing that awarding him presumed father status would promote R.'s best interests, because his petition alleged she enjoyed spending time with him and he would be able to provide her with a stable home "on a golf course in a family-oriented neighborhood, and he would provide medical insurance and college tuition." It was not an abuse of discretion for the court to conclude otherwise. The court had determined only a month earlier that appellant's visits with R. should be terminated because they were detrimental to her; appellant's declaration concerning events that pre-dated that determination did nothing to challenge that finding. Appellant's willingness and ability to provide for R. over the long term are commendable, but they do not establish a prima facie case that granting him presumed father status would be in R.'s current best interests. (See *In re Donovan L.*, *supra*, 244 Cal.App.4th at pp. 1092-1093.)

III. Termination of Parental Rights

Appellant contends the juvenile court abused its discretion in terminating his parental rights because DCFS provided the court with an inadequate assessment report. Appellant acknowledges that he failed to object on this basis below, and that an appellate challenge to the adequacy of an assessment report is forfeited if not raised in the juvenile court. (*In re Crystal J.* (1993) 12 Cal.App.4th 407, 411.) However, he contends he should be permitted to pursue the argument here because "the deficiency is so significant it undermines the basis of the juvenile court's decision to terminate parental rights." He relies on *In re Valerie W.* (2008) 162 Cal.App.4th 1, 14 to support this proposition. We agree with DCFS that appellant's reliance on *In*

re Valerie W. is misplaced and the argument is forfeited. Even if the argument were preserved, we would not be persuaded that the court abused its discretion by terminating parental rights here.

Section 366.21, subdivision (i) requires DCFS to prepare an assessment when it recommends adoption as a child's permanent plan. That assessment "shall include" "[a] preliminary assessment of the eligibility and commitment of any identified prospective adoptive parent or legal guardian. . . particularly the caretaker, to include a social history including screening for criminal records and prior referrals for child abuse or neglect, the capability to meet the child's needs, and the understanding of the legal and financial rights and responsibilities of adoption and guardianship." (§ 366.21, subd. (i)(1)(D).) Appellant contends the assessment did not comply with those requirements because it did not indicate that DCFS had obtained a criminal waiver for MGM or thoroughly investigated a 2003 inconclusive referral alleging neglect of mother; previous reports mentioned both issues but left them unresolved.

In *In re Valerie W.*, *supra*, 162 Cal.App.4th at p. 13, the assessment report "failed in most respects" to comply with section 366.21. It did not identify or include a social history for one of the prospective adoptive parents, did not address the prospective adoptive parents' ability to meet one of the children's special needs (which it did not fully investigate or describe), and did not address the agency's efforts to identify other prospective adoptive parents. (*Id.* at p. 14.) The appellate court concluded that these deficiencies "were significant" and "sufficiently egregious to undermine the basis of the court's decision to select adoption as the children's preferred permanent plan and to terminate

parental rights." (*Ibid.*)

In re Valerie W. did not consider forfeiture or delineate the circumstances under which assessment deficiencies may be so significant as to preclude it. It therefore does not support appellant's contention that his forfeiture should be excused; cases are not authority for propositions not considered or decided. (*Loeffler v. Target Corp.* (2014) 58 Cal.4th 1081, 1134.) We conclude that appellant's argument is forfeited.

Even if it were not, we would not be persuaded that the court erred by finding R. adoptable and terminating appellant's parental rights. The assessment report substantially complied with section 366.21. (See *In re Valerie W.*, *supra*, 162 Cal.App.4th at p. 13.) The record shows that DCFS was aware of MGM's criminal record and had initiated the process of obtaining a waiver; R. and her siblings had been placed safely with MGM for more than a year. DCFS also previously noted for the court MGM's prior, inconclusive child welfare history. We disagree with appellant that the court was required to "go behind the label inconclusive, learn the nature, circumstances, and evidence concerning maternal grandmother's child abuse history" to protect R.'s best interests. The court's finding that R. was adoptable, which appellant challenges only to the extent it rested on the assessment report, was supported by substantial evidence.

DISPOSITION

The orders of the trial court are affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

COLLINS, J.

We concur:

MANELLA, P. J.

CURREY, J.