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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

In re SADE A., a Person Coming Under the
Juvenile Court Law.

B255992

(Los Angeles County
Super. Ct. No. CK36365)

LOS ANGELES COUNTY
DEPARTMENT OF CHILDREN AND
FAMILY SERVICES,

Plaintiff and Respondent,

v.

RICKY A.,

Defendant and Appellant.

APPEAL from an order of the Superior Court of Los Angeles County, Marguerite Downing, Judge. Affirmed.

Anne E. Fragasso, under appointment by the Court of Appeal, for Defendant and Appellant.

Mark J. Saladino, County Counsel, Dawyn R. Harrison, Assistant County Counsel, Kim Nemoy, Deputy County Counsel, for Plaintiff and Respondent.

This is the second appeal arising from dependency proceedings involving Sade A. In the first appeal, we affirmed the juvenile court's jurisdictional, disposition, and visitation orders. (*In re Sade A.* (July 20, 2012, B236030) [nonpub. opn.].) In this case, appellant Ricky A. (father) appeals from the order denying his Welfare and Institutions Code section 388¹ petition, which alleged changed circumstances and sought to modify the order terminating his reunification services for Sade. The juvenile court denied the petition without holding a hearing. Finding no abuse of discretion, we affirm the order.

FACTUAL AND PROCEDURAL SUMMARY

Sade is father's first child. The mother, A.A., has a long and troubled history with the Department of Children and Family Services (the Department) which resulted in the termination of her parental rights as to her six older children. Mother suffered a serious brain injury as a child and, as a result, continues to experience serious cognitive issues and seizures. She also has a lengthy substance abuse and criminal history. All of the older children were fathered by men other than Ricky A. Mother is not a party to this appeal.

Sade was born healthy with negative toxicology tests in May 2011. A mandated reporter at the hospital contacted the Department to report that mother was guarded and reluctant to answer questions regarding her older children. Mother's hostility toward hospital staff was causing problems. Two social workers made an unannounced visit to mother in the hospital the next day. Mother allowed them to enter her room, but refused to speak to the workers until father arrived in response to her phone call. Mother and father told the workers that they anticipated their visit, and produced a letter from a Salvation Army transitional housing program where they were receiving intensive services and classes.

Both parents reported a history of substance abuse, mainly cocaine. Mother admitted a five-year history of substance abuse and claimed to have been sober for two years. Father reported a 28-year history of substance abuse and stated he had been sober

¹ Subsequent section references are to the Welfare and Institutions Code.

for about a year; he stated that he was attending Narcotics Anonymous meetings “almost every day.” Father is legally blind and told the social worker he was unable to care for Sade by himself. He and mother were currently residing together and he expressed unwillingness to have mother move out of the home in order for the Department to consider returning Sade to him. The Department detained Sade based on the termination of mother’s rights as to her older children, her unresolved brain damage and seizure disorder, the parents’ history of substance abuse, and father’s inability to care for the child by himself. Sade was placed in a foster home.

In June 2011, the Department filed a petition alleging that Sade was a child within the meaning of section 300, subdivision (b). The amended allegations cited mother’s history of substance abuse, cognitive limitations, and seizures which rendered her unable to provide care and supervision for Sade. It also alleged that mother’s other children had received permanent placement services due to mother’s issues. The allegations against father cited his history of drug abuse, rendering him unable to provide regular care and supervision of the child.

Father’s extensive criminal history included convictions for transporting or selling controlled substances, possession of controlled substance devices, and being under the influence of controlled substances. Mother’s criminal history included convictions for prostitution, possession of controlled substances, and being under the influence of a controlled substance. When asked about mother’s older children, father argued that mother was not treated fairly in her prior dependency proceedings. When asked by the social worker what mother needed to safely parent, father responded that she needed assistance, and that he would provide it. Father acknowledged that mother was ““not normal”” and ““can’t think like us.”” A visit to the room in which father and mother lived at a Salvation Army program was clean, neat, and well-stocked for a baby. The Department noted that during a visit with Sade, father and mother engaged in an altercation with the foster mother, who was no longer willing to facilitate visits.

The jurisdiction and disposition hearing was held on August 31, 2011. The court considered a multidisciplinary assessment team (MAT) report. The primary concerns

were identified as the parents' history of substance abuse, mother's extensive and severe history with the Department, and her questionable ability to parent children due to her cognitive limitations. The report also lauded the parents' ongoing efforts to remain sober and participate in intensive programs in order to reunify with Sade. The juvenile court sustained the petition as amended as to mother and father and found Sade to be a person described by section 300, subdivision (b). The juvenile court also found by clear and convincing evidence there was a substantial risk of danger to Sade if she were to be returned home to her parents. Sade was ordered removed and placed in the Department's custody. Reunification services were ordered for the parents.

In September 2011, the Department requested a more restrictive visitation order based on father's and mother's conduct during visits. Mother had attempted to feed Sade four-month-old breast milk, which also included "a brown, lumpy substance" that mother described as cereal. She then attempted to feed Sade solid food, which the Department stated was not yet an appropriate diet for a child of Sade's age. The caregiver intervened, and mother was "resentful" of the intervention. On a separate visit, mother held Sade in such a way that her wooden necklace was digging into the side of the child's head. Sade began "crying excessively" and in a "well-intentioned attempt" to soothe her, mother "spoke loudly in the baby's ear" while kissing her ear and "making loud smacking noises." Father was also present during this visit. When the caregiver instructed mother not to make loud noises in Sade's ear, father and mother "became belligerent to the point where the guard at [the] DCFS office was called for back-up assistance." The Department noted that father "adamantly defend[ed] biological mother's parenting skills" and while observing these incidents, "fail[ed] to intervene" and instead, "defended" mother's actions.

In a last minute information to the court, the Department reported that mother and father had failed to show up for two scheduled visits in September 2011. Mother was involved in another incident in which, while holding Sade in her arms, she accidentally twisted the child's arm behind her back, "causing the infant to cry in pain" and prompting caregiver intervention. Mother stated she was "'just turning the baby.'" At the court

hearing on October 3, 2011, the juvenile court modified the visitation order to allow monitored visits for mother and father for one hour, three times a week, and unmonitored visits for mother at “Mommy and Me” classes.

In a report dated February 27, 2012, the Department informed the court that father had shown up for only one visit since the court hearing. He had not contacted the Department since October 28, 2011, when he left a voicemail explaining that his absence was due to an illness. The report indicated that father “sounded like he was under the influence of an amphetamine-like substance” because he was speaking “in a very agitated manner” and “repeat[ing] . . . information in a variety of ways in a rapid manner, at times becoming incoherent.” It was later discovered that, on October 12, father was arrested and detained for domestic violence for verbally threatening mother. On October 25, the parents were served with a notice to vacate their apartment provided by the Salvation Army Algeria program and father was officially terminated from the program. On November 1, 2011, father was arrested again, this time with mother, for drug possession. Mother’s visits continued following her release. She stated she was “aware her brain injury may be negatively impacting her behavior” and was “exploring psychiatric help.” Father was convicted of drug possession on February 21, 2012.

By December 2012, father and mother were homeless. Father and mother had completed a parenting program but failed to show up for drug testing on one occasion. Father tested positive for marijuana once, in June 2012, and mother tested positive for marijuana twice in June 2012 and once in August 2012. Father and mother visited Sade according to schedule, though they missed two visits without prior notice. Father underwent an eye consultation and was assured that, with correction, he would qualify for a driver’s license. He continued to exhibit anger management issues, as evidenced by an incident during which he broke mother’s phone out of anger. On February 21, 2013, the juvenile court terminated reunification efforts and scheduled a section 366.26 hearing.

At the section 366.26 hearing in June 2013, the Department reported that the parents’ visits with Sade proceeded largely without incident. However, during one of the visits, father and mother were observed “pushing and hitting one another” before Sade

arrived. A security guard reported that mother was pushing father and father was hitting mother in the face. Father explained they were ““playing”” and both parents agreed to keep their hands to themselves.

Sade’s foster mother, whom Sade had resided with since she was three months old, expressed interest in adopting her. The court granted several continuances so the Department could conduct a home study to investigate allegations of foster mother’s abuse and neglect toward her prior foster children.

Father and mother visited Sade weekly and she appeared comfortable with them. However, it was reported in a February 2014 report that father and mother continued to exhibit violent or belligerent behavior, such as making inappropriate comments, arguing outside the lobby, and being “confrontational” with other clients. After a meeting with social workers, father and mother agreed to behave appropriately.

On March 14, 2014, father filed a section 388 petition requesting custody over Sade or, in the alternative, overnight visits. He contended that he and mother had obtained “stable housing,” that they “participate in services at El Centro del Pueblo,” and that mother “consistently participates in Regional Center services.” He stated that Sade was “very bonded” to him. On March 21, 2014, the juvenile court denied father’s petition on the ground that it did not state new evidence or a change in circumstances. A notice to father regarding the petition denial stated that the request was also denied because the “best interest of the minor[] would not be promoted by the proposed change of order.”

This timely appeal followed.

DISCUSSION

I

“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.] A parent need only make a prima facie case showing of these elements to trigger the right to a hearing on a section 388 petition and the petition

should be liberally construed in favor of granting a hearing to consider the parent's request. [Citation.]" (*In re Zachary G.* (1999) 77 Cal.App.4th 799, 806.) However, a court need not hold a hearing on a section 388 petition if the liberally-construed allegations do not constitute a prima facie showing of changed circumstances promoting the best interests of the child. (*Ibid.*) A juvenile court's denial of a section 388 petition is reviewed on appeal for abuse of discretion. (*In re Mickel O.* (2011) 197 Cal.App.4th 586, 616.)

II

Father's petition stated that father had obtained "stable housing," the parents were participating in services at El Centro del Pueblo, and mother was participating in Regional Center services. Father argues that these events constituted prima facie evidence of changed circumstances and that the proposed change in order would promote the best interests of Sade. We are not persuaded.

A. *Changed Circumstances*

Father argues that his and mother's homelessness "was the remaining obstacle" to his ability to reunify with Sade. We disagree. When the Department first intervened in May 2011, father and mother were not homeless; in fact, they were living in a private one bedroom apartment which the Department described was well stocked with food and appropriate items for a baby. The parents became homeless only when father was arrested for domestic violence in October 2011. Nevertheless, the Department's and juvenile court's concerns went beyond the parents' homelessness. Throughout the dependency proceedings, the Department expressed continuing concern with the parents' inappropriate, sometimes violent, behavior toward one another, their ongoing substance abuse issues, their repeated arrests and drug-related criminal histories, mother's cognitive limitations affecting her parenting ability, and father's anger management problems.

Father presented evidence showing his and mother's participation in services at El Centro del Pueblo and mother's participation in Regional Center services. He also stated that Sade was "very bonded" to him. This does not show a change in circumstances or state new evidence. At best, it suggests "'changing,' not changed, circumstances," which

is an insufficient showing under section 388. (*In re Ernesto R.* (2014) 230 Cal.App.4th 219, 223.) Prior to and throughout the dependency proceedings, father and mother had been receiving services with no lasting results. Despite father's prior participation in Narcotics Anonymous programs, father was arrested for drug possession in October 2011 and tested positive for marijuana in June 2012. Father and mother were warned repeatedly to stop their violent and inappropriate behavior before their visits with Sade, to no avail. Moreover, we do not consider father's "epiphany" regarding mother's need for services as a change in circumstances; he admitted to the Department in the beginning of this case that mother needed assistance, and that he would provide it. Finally, the fact that father could obtain correction for his vision is not in itself a changed circumstance; nothing was presented to indicate that he actually obtained a license or even sought correction for his vision. Based on the foregoing, the juvenile court did not abuse its discretion in finding that father's petition did not state new evidence or a change in circumstances.

B. *Child's Best Interests*

In considering whether a proposed change in a juvenile court's order serves a child's best interests, father urges us to consider the three factors outlined in *In re Kimberly F.* (1997) 56 Cal.App.4th 519, 532 (*Kimberly F.*): 1) the seriousness of the problem leading to dependency, 2) strength of the existing bond between the parent and child, as well as the child and her caretaker, and 3) the degree to which the problem may be easily removed or ameliorated, and the degree to which it actually has been. Father's reliance upon *Kimberly F.*, however, is misplaced. The factors set forth in that case have been criticized as being in conflict with the Supreme Court's holding in *In re Stephanie M.* (1994) 7 Cal.4th 295, 317 (*Stephanie M.*). (See *In re J.C.* (2014) 226 Cal.App.4th 503, 527 [declining to apply the *Kimberly F.* factors because they "do not take into account the Supreme Court's analysis in *Stephanie M.*, applicable after reunification efforts have been terminated"].) In *Stephanie M.*, the Supreme Court held that once reunification services have been terminated, "the parents' interest in the care, custody and companionship of the child are no longer paramount" and that "at this point 'the focus

shifts to the needs of the child for permanency and stability.’” (*Stephanie M.*, *supra*, at p. 317.) Because the juvenile court had terminated reunification services for father, the analysis of *Stephanie M.*, rather than *Kimberly F.*, controls this case.²

“Family preservation, which necessarily includes family reunification services, is the primary focus during the first 12 to 18 months of dependency proceedings. [Citations.]” (*David B. v. Superior Court* (2006) 140 Cal.App.4th 772, 778.) Once reunification services are terminated, however, the focus shifts to the child’s needs for permanency and stability. (*Ibid.*) In assessing these considerations, we give weight to the fact that Sade had been living with her foster mother since she was three months old. In addition, the foster mother was in the process of adopting Sade, which would ensure a stable, permanent home environment for her. In contrast, father presented no evidence to suggest that granting weekend and overnight visits would benefit Sade’s need for permanency and stability. Father argues that Sade was “bonded” to father, but this alone does not advance Sade’s needs for stability and permanency. Since her detention, Sade’s interactions with her father and mother had been extremely limited, raising concerns as to whether father would be able to provide a permanent, suitable, and stable environment for Sade. Although DCFS reported Sade was comfortable in their presence, she saw her parents only during their visits in the Department’s office and had never been left in

² Even under the three *Kimberly F.* factors, father did not present prima facie evidence showing the proposed changes serve the best interests of Sade. As to the first and third factors, father’s and mother’s history of substance abuse and extensive criminal histories continued to present serious problems during the dependency proceedings. They were arrested for drug possession and tested positive at least once for marijuana. Father presented unresolved anger management issues, and the parents had been observed being violent toward one another and aggressive toward others despite repeated warnings. Although father recognized from the beginning that mother needed assistance in providing for Sade, he consistently defended her parenting ability and insisted mother was being targeted by the Department. The second factor, fully addressed below, also weighs in favor of denying father’s request. Sade had been residing with her foster mother since she was three months old and the foster mother was in the process of adopting Sade. Sade’s interactions with father had been very limited in time and scope. Based on these considerations, father did not present prima facie evidence that overnight and weekend visits would serve Sade’s best interests.

father's care overnight or during the weekends. Therefore, at the time of the section 388 petition, it would not have been in Sade's best interests to grant custody to father or allow overnight or weekend visits. The juvenile court did not abuse its discretion in so finding.

DISPOSITION

We affirm the order of the juvenile court.

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EPSTEIN, P. J.

We concur:

WILLHITE, J.

MANELLA, J.