Filed 11/7/17 In re Mia G. CA2/5

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

In re MIA G., a Person Coming Under the Juvenile Court Law.	B281898
LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. RICHARD G., Defendant and Appellant.	(Los Angeles County Super. Ct. No. CK 73593)

APPEAL from an order of the Superior Court of Los Angeles County, Debra L. Losnick, Juvenile Court Referee. Affirmed.

Daniel G. Rooney, under appointment by the Court of Appeal, for Defendant and Appellant.

Office of the County Counsel, Mary C. Wickham, County Counsel, R. Keith Davis, Assistant County Counsel, Aileen Wong, Deputy County Counsel, for Plaintiff and Respondent.

Richard G. (Father) appeals from juvenile court orders (1) denying his Welfare and Institutions Code section 388[1] petition seeking reinstatement of previously terminated reunification services and visitation with his daughter Mia G. (Mia), and (2) terminating his parental rights over Mia. Father asks us to consider reversing the order terminating parental rights because the juvenile court failed to enforce its earlier visitation orders in the case—even though Father concedes "the visitation issue was never questioned before the juvenile court." Father also asks us to decide whether the juvenile court abused its discretion in concluding he had not sufficiently demonstrated circumstances had changed and Mia's best interests would be served by reinstituting reunification services and visitation.

I. BACKGROUND

We affirmed the juvenile court's jurisdictional findings and disposition order regarding Mia in *In re Mia G.* (Mar. 3, 2016, B265784) [nonpub. opn.]. In doing so, we recounted the early factual and procedural history of this case, and we need not repeat that history here. We begin instead with the pertinent developments following the disposition hearing in April 2015.

The disposition order entered by the juvenile court at that hearing granted Father monitored visitation with Mia. It also required Father to participate in individual counseling, to submit to a psychiatric evaluation, and to participate in conjoint counseling with Mia at the discretion of her therapist.

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[1] Undesignated statutory references that follow are to the Welfare and Institutions Code.

Two months after the disposition hearing, Mia's attorney advised the juvenile court that visitation between her client and Father "continue[d] to be inappropriate" and "detrimental" and asked the court to "follow [the] request of Mia's therapist to have visitation between [F]ather and Mia in a therapeutic setting" and to discontinue phone contact between the two. Mia's attorney submitted correspondence from Mia's caregiver, Aunt Linda (Father's sister); Mia's therapist; and a mortician who observed Father's interaction with Mia at her paternal grandmother's funeral—all of which tended to show Father had a temper and Mia was afraid of him. The juvenile court ordered no phone contact and entered a new visitation order reducing visits from weekly to every other week, with visits to occur in a therapeutic setting.

At a progress hearing later in July 2015, the juvenile court ordered the Los Angeles County Department of Children and Family Services (DCFS) to arrange two visits between Father and Mia in the next three weeks. DCFS prepared a report in advance of the next court hearing that indicated one of the visits had taken place and generally gone well, and the other visit would be held by the court's deadline. DCFS also separately informed the court that Mia's therapist recommended delaying the start of conjoint counseling between Father and Mia so she would have more time to process her feelings and further develop tools to avoid her "negative responses to topics that include family, feelings and needs." The court, at the next hearing in August, ordered visits to take place between Father and Mia once a month, but with an "experienced" monitor, as it was too difficult to find a therapeutic monitor.

Roughly three months later, in mid-November 2015, Mia and Father participated in their first conjoint counseling session. Mia's therapist thereafter requested that conjoint counseling sessions be postponed because "Mia is neither ready nor comfortable continuing conjoint sessions with her [F]ather" and exhibited "difficulty processing all the case issues at this time." When the social worker asked Mia why she did not want to participate in conjoint therapy with Father, "Mia began to cry, remained quiet and refused to provide any more information." In mid-December, the court gave DCFS "discretion to liberalize parents' visits" subject to consultation with Mia's attorney.

On March 1, 2016, Father had what would become his last visit with Mia. Although DCFS reported the earlier visits between the two had gone well overall, DCFS reported Father "got out of control and was very aggressive towards Mia" during the March 1 visit. Father contradicted Mia on several topics and became particularly upset when Mia responded "no" to his question about whether she wanted to continue to have therapy with him. In an aggressive tone, Father asked, "'why not, why not, tell me. Don't you love your daddy anymore, tell me.'" Mia got upset and started to cry. The social worker took Mia out of the room. Mia told the social worker she did not want to continue with the visit and continued crying. At Mia's request, Aunt Linda arrived to take her home.

The social worker tried to explain to Father "that his communication was not appropriate and not acceptable." Father, however, was angry the social worker had terminated the visit and responded, "'This is a joke, this is ridiculous, you do not let me talk with my daughter.'" The social worker concluded "Father

does not acknowledge how his actions are perceived as aggressive to Mia and towards [the social worker] in front of Mia."

Mia refused to participate in the next two monthly visits with Father. In a March 16, 2016, handwritten letter to the assigned social worker, Mia wrote: "I would prefer not to have visits with mother or father. With my father and mother I feel uncomfortable and as if they don't understand me. I also feel scared with my dad." Then, in another handwritten letter to her attorney and the social worker three weeks later, Mia wrote: "With my father I do not want visits. He makes me feel [scar]ed and uncomfortable. Also I am nervious [sic] [wha]t happened at our last visit will happen [aga]in." Mia's therapist heard similar sentiments from Mia and reported that "[s]ince the most recent visitation session with Mia's father, [Mia] has expressed not wanting to participate in sessions with [Father] due to feeling fearful when she is with him."

The social worker reported that Father, on the other hand, thought "Mia has a wonderful relationship with him and he does not believe that [Mia] is scared of him or not willing to have conjoint sessions with him." Father expressed frustration with and anger toward Aunt Linda because he believed she was coaching Mia and DCFS was oblivious to the coaching.[2] The social worker observed that "[w]hen [F]ather gets upset or angry talking about [Aunt Linda] or about the case, he becomes aggressive, hostile, demanding, and threatening towards staff and child. It appears [F]ather is more focus[ed] on provi[ng] to

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[2] The social worker asked Mia about this and she denied she had been coached by Aunt Linda or any other family members. Mia instead told the social worker that Aunt Linda would always tell her how important it is to be honest.

the Department that his child is being coached by [Aunt Linda] instead of addressing the issues that brought him to DCFS attention or how to build his relationship with his child."

During May through July of 2016, the juvenile court held several hearings to address issues that had arisen in the case, including consideration of Aunt Linda's request for a restraining order against Father (which was denied), a de facto parent request from Aunt Linda (which was granted), a *Marsden*[3] hearing for Father (which resulted in the appointment of new counsel), and the setting of a contested 12-month permanency hearing. Counsel for Father appeared on his behalf at each of these hearings, and so far as the record reveals, no issue was raised with respect to his visits (or the lack thereof) with Mia.

At the permanency hearing held in September 2016, the juvenile court found Father was not in compliance with his case plan and ordered his family reunification services terminated. The court also set a date for a section 366.26 hearing to consider terminating Father's parental rights over Mia. So far as the record reveals, Father raised no issue concerning visitation with Mia at this hearing either.

Father filed a notice of intent to seek writ relief from the order terminating his reunification services. No writ petition was ever filed, however, as counsel for Father notified this court she believed there were no grounds for filing a petition after consulting with trial counsel and researching potential issues.

DCFS prepared a report in advance of the section 366.26 hearing. Among other things, the report revealed Mia (then age 10) "would just shut down" when discussing the prospect of visits

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[3] *People v. Marsden* (1970) 2 Cal.3d 118.

with her parents and "would only state she wanted no type of contact with [her] parents or [her] sibling." The report also summarized the various orders regarding visitation the juvenile court had made throughout the history of the case, as well as the history of contacts between Mia and her parents. A dependency investigator also asked Mia about visiting with Father and recounted the conversation as follows: "Mia stated, 'No. I don't want to have visits with my dad because when we have visits he is trying to show off to whoever is monitoring the visit or like he just acts for the visits. He tries to act like a different person.' ([The investigator] asked Mia what she meant about [F]ather being different[.]) She stated, 'like better. He is normally loud and he behaves different.' When asked about [the] last visit Mia began to shut down and began to cry, 'I don't remember. I remember that he made me cry and I had to text my aunt to come.'"

DCFS's section 366.26 report also included information about Aunt Linda, the prospective adoptive parent, and Mia's relationship with her. DCFS indicated Aunt Linda had known Mia since she was born and had cared for her for over two years during the course of the dependency proceedings. DCFS opined Aunt Linda had "developed a close bond and relationship with Mia where Mia can be herself and feel safe," had provided Mia with proper care and supervision, and wanted to adopt Mia knowing all that adoption would entail. Mia similarly told DCFS that she liked living with Aunt Linda and wanted Aunt Linda to adopt her.

With the section 366.26 hearing on the horizon, Father filed a section 388 petition on January 31, 2017. It asked the juvenile court to change its prior order terminating family

reunification services. Father's petition argued Father "ha[d] been denied visitation with [Mia], who refuses to visit," and Father asked the court to reinstate services and have "[Mia] visit to give her a chance to determine whether the relationship [with Father] is salvageable." The court ordered a hearing on the petition solely as to the visitation issue raised (not the request to reinstate services).

The juvenile court heard the section 388 petition in conjunction with the scheduled section 366.26 hearing. Taking up the section 388 petition first, the court admitted in evidence the pertinent DCFS reports, which included a one-page letter Mia wrote during therapy. The letter was addressed "[t]o whom needs to hear this (and will listen)" and it stated in relevant part: "Below I will list the reasons I would not at all like to go back to live with my dad. I have already said this proba[b]ly a million times but, he scares me. HOW?, you may ask. He yells and uses his hands. I know what you are thinking, 'Oh but Mia you have fun during visits[ ] Oh but he is so behaved in visits.' Well guess what he's acting. If you met the guy and lived with him you would see him WAY and I mean WAY different. Also this guy cannot listen. Also I don't care what he says. For heaven[']s sake I was proba[b]ly 5? Well guess what buddy I have changed, now I know who you really are. We DO NOT, I repeat DO NOT HAVE A BOND![ ] Oh and I don't want to live with you forever either."

After also hearing testimony from Aunt Linda and argument by the parties, the juvenile court denied Father's 388 petition. The court addressed on the record Father's argument that the court had erred because "it was as if the visitation was delegated to [Mia]": "Despite overwhelming evidence that [Mia] did not wish to visit with her father, despite overwhelming

evidence from numerous therapists that it was not in her best interest to force her to do so, I continued to do so because it is this court's belief that with time 99 percent of our cases the time heals, and the relationships get repaired. So I do believe that I bent over backwards to continue to almost force the visitation with this child, knowing that she did not wish to visit. It didn't seem to have worked. [¶] I don't see any change of circumstances whatsoever by [Father] . . . and I don't see how what is being asked of the court to do, in other words, to change the visitation any further or more liberal[ly] would be in [Mia's] best interest. [¶] This child has made it very clear more than most children in her age what her wishes are."

Proceeding to the section 366.26 determination, the juvenile court found that Mia was adoptable, likely to be adopted, and that there were no applicable exceptions or legal impediments to terminating parental rights. The court accordingly ordered parental rights terminated, albeit over Father's objection.

II. DISCUSSION

Father has no proper basis to now argue the juvenile court "sanctioned the denial of Father's visits with Mia" and thereby deprived him of a basis for contesting the termination of his parental rights under the parent-child relationship exception.[4]

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[4] The parent-child relationship exception to termination of parental rights is found at section 366.26, subdivision (c)(1)(B)(i). In relevant part, the statute provides: "[T]he court shall terminate parental rights unless . . . [¶] . . . [¶] (B) The court finds a compelling reason for determining that termination would be detrimental to the child due to one or more of the following

The record reveals no instance in which Father raised with the court the asserted lack of compliance with the visitation orders the court had concededly made during the ten months between his last visit with Mia (the March 2016 visit that went poorly) and the filing of his section 388 petition.

In addition, the juvenile court did not abuse its discretion in denying Father's section 388 petition. Even assuming for argument's sake there had been changed circumstances, the focus of the dependency proceedings had shifted from reunification to Mia's need for permanency and stability. The juvenile court properly concluded Mia's best interests were not served by an order that would disrupt Mia's thriving relationship with Aunt Linda to reinstitute reunification services and visitation for Father.

A. Father Forfeited the Visitation Challenge He Raises on Appeal, and No Valid Ground Exists to Excuse the Forfeiture

The record before us demonstrates, as the juvenile court stated during the section 366.26 hearing, that the court did not delegate the question of visitation to Mia but rather maintained visitation orders in force. The actual visits ordered, however, did not resume following the March 2016 visit that DCFS ended when Father became aggressive and Mia started crying.

In his opening brief, Father initially asserted the absence of visits during this period occurred with the juvenile court's "tacit

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circumstances: [¶] (i) The parents have maintained regular visitation and contact with the child and the child would benefit from continuing the relationship."

approval," and Father sought reversal on the basis of authority holding a court can only terminate visitation if a finding of detriment is made. (See, e.g., *In re Manolito L.* (2001) 90 Cal.App.4th 753.) That authority, however, is factually inapposite because, as Father appropriately concedes in his reply brief, "the visitation issue was never questioned before the juvenile court." DCFS argues the failure to contemporaneously raise the issue—i.e., to alert the juvenile court visits were not occurring during the relevant ten-month period and to pursue available remedies in light of the absence of visits—operates as a forfeiture of the issue for purposes of appeal now. We concur the issue is forfeited. (See, e.g., *In re S.B.* (2004) 32 Cal.4th 1287, 1293 (*S.B.*); *In re Dakota H.* (2005) 132 Cal.App.4th 212, 222 ["[The mother] failed to bring to the court's attention her assertion that principles of due process required the court to make a new finding of parental unfitness before proceeding to a permanency hearing. Had she done so, the court could have considered her claim and, if it found her due process argument meritorious, determined and applied the appropriate legal standard. A party may not assert theories on appeal which were not raised in the trial court. [Citation.] [The mother] forfeited the right to assign error on appeal"] (*Dakota H.*); see also *In re Liliana S.* (2004) 115 Cal.App.4th 585, 589 [""An appeal from the most recent order entered in a dependency matter may not challenge prior orders, for which the statutory time for filing an appeal has passed""]; *In re Meranda P.* (1997) 56 Cal.App.4th 1143, 1151 ["The principle—which for convenience we will identify as the 'waiver rule'—that an appellate court in a dependency proceeding may not inquire into the merits of a prior

final appealable order on an appeal from a later appealable order is sound"].)

Father, however, asks us to "exercise [our] discretion in this case to 'review an error despite a party's failure to raise it below [because] due process rights are involved.' (*In re P.A.* (2007) 155 Cal.App.4th 1197, 1210; *In re Gladys L.*[ ] (2006) 141 Cal.App.4th 845, 849.)" We respectfully decline. Constitutional due process rights may be forfeited like other rights (*Dakota H.*, *supra*, 132 Cal.App.4th at pp. 221-222), and our discretion "to excuse forfeiture should be exercised rarely and only in cases presenting an important legal issue" (*S.B.*, *supra*, 32 Cal.4th at p. 1293)—which this case does not. Further, the circumstances here present a particularly unattractive case for the exercise of discretion to vindicate the asserted due process right of parents generally over their children when Father has been the subject of a sustained jurisdictional finding of dependency (which we upheld on appeal) and a decision to terminate his reunification services for failure to comply with his case plan (which Father did not challenge by way of a writ petition).

B. The Juvenile Court Did Not Abuse Its Discretion in Denying Father's Section 388 Petition

"Section 388 accords a parent the right to petition the juvenile court for modification of any of its orders based upon changed circumstances or new evidence." (*In re Alayah J.* (2017) 9 Cal.App.5th 469, 478, fn. omitted.) "To prevail on a section 388 petition, the moving party must establish that (1) new evidence or changed circumstances exist, and (2) the proposed change would promote the best interests of the child. [Citation.] 'The petition is addressed to the sound discretion of the juvenile court,

and its decision will not be overturned on appeal in the absence of a clear abuse of discretion.' [Citation.]" (*In re J.T.* (2014) 228 Cal.App.4th 953, 965.)

We need not analyze the question of changed circumstances at the time Father's section 388 petition was heard because the outcome of a best interests analysis is both clear and dispositive: the juvenile court was well within its discretion to conclude Mia's best interests supported terminating Father's parental rights so she could be adopted by Aunt Linda. By the time of Father's section 388 petition, the juvenile court had shifted its focus from reunification with Father to Mia's need for the permanency and stability that would come from adoption. (*In re Stephanie M.* (1994) 7 Cal.4th 295, 317 [after reunification services terminated, a parent's interest in the care, custody and companionship of the child is no longer paramount; focus shifts to needs of child for permanency and stability]; accord, *In re Angel B.* (2002) 97 Cal.App.4th 454, 464.) Aunt Linda, who had known Mia since birth and had been caring for Mia for roughly the past two years, had a strong bond with Mia and wanted to adopt her. Mia likewise wanted to be adopted by Aunt Linda, and the record persuasively demonstrates that Mia was thriving in her care. As DCFS reported, Mia could be herself living with Aunt Linda and Aunt Linda was the person Mia would turn to for comfort and support in times of stress and angst—not infrequently, stress and angst caused by Father.

Thus, even assuming Father could show changed circumstances, the juvenile court did not abuse its discretion when it denied his section 388 petition. (*In re Aaron R.* (2005) 130 Cal.App.4th 697, 706 [no error in denying section 388 petition where nothing rebutted "the mass of evidence in the

record" indicating the minor was thriving under the prospective adoptive parent's care]; *In re Kimberly F.* (1997) 56 Cal.App.4th 519, 531 [although not dispositive, "the disruption of an existing psychological bond between dependent children and their *caretakers* is an extremely important factor bearing on any section 388 motion"]; *In re Michael D.* (1996) 51 Cal.App.4th 1074, 1087 [a child's wishes are not determinative of his or her best interests, but the minor's testimony and repeated spontaneous statements that he wanted to live with his mother "constituted powerful demonstrative evidence it would be in his best interest to allow him to do so"].)

DISPOSITION

The orders denying Father's section 388 petition and terminating his parental rights are affirmed.

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BAKER, J.

We concur:

KRIEGLER, Acting P.J.

DUNNING, J.*

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