Filed 7/19/12 In re Frank R. CA2/3

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

In re FRANK R. et al., Persons Coming Under the Juvenile Court Law.	B236461
LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. FRANK R., Defendant and Appellant.	(Los Angeles County Super. Ct. No. CK34622)

APPEAL from orders of the Superior Court of Los Angeles County, Timothy R. Saito, Judge. Affirmed.

Janette Freeman Cochran, under appointment by the Court of Appeal, for Defendant and Appellant.

John F. Krattli, Acting County Counsel, James M. Owens, Assistant County Counsel, and Sarah Vesecky, Deputy County Counsel, for Plaintiff and Respondent.

INTRODUCTION

Frank R. appeals from the orders of the juvenile court culminating in the termination of his parental rights to 11-year old twins Frank and T. (Welf. & Inst. Code, § 366.26.)[1] This is the second appeal father has brought from a termination order. We reversed the first order terminating father's parental rights because the court had failed to make a finding by clear and convincing evidence that father was unfit. (*In re Frank R.* (2011) 192 Cal.App.4th 532.) Returning to the juvenile court, it sustained a subsequent petition (§ 342), denied father's petition for modification (§ 388) and, finding by clear and convincing evidence that father was unfit, reinstated the order terminating father's parental rights. On appeal, father has not demonstrated error. Accordingly, we affirm the orders.

FACTUAL AND PROCEDURAL BACKGROUND

1. *Factual background based on father's previous appeal*

We derive the following facts from our earlier opinion: The children were residing with their mother in 2007 when she was arrested and charged with child cruelty for abusing T.[2] Father's whereabouts were unknown and so the juvenile court detained the children and placed them in foster care. (*In re Frank R., supra,* 192 Cal.App.4th at p. 534.)

The Department of Children and Family Services (the Department) located father living in a motel. He had no stable residence and was trying to obtain subsidized housing. Father was unemployed and received Supplemental Social Security Income (SSI) benefits because of a work-related injury, some of which income was sent directly to the twins. Father had an arrest history, including numerous convictions for being under the influence of a controlled substance. He still drinks alcohol, but claimed not to be an alcoholic. (*In re Frank R., supra,* 192 Cal.App.4th at p. 534.)

---

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

[2] Mother is not a party to this appeal.

The juvenile court declared father a presumed father and appointed counsel for him. Father stated that he wanted to reunify with the children and so the Department recommended that the court award him reunification services. (*In re Frank R., supra*, 192 Cal.App.4th at p. 535.)

The juvenile court sustained a section 300 petition as to mother and declared the children dependents, awarded her reunification services, and removed the twins from her custody. (*In re Frank R., supra*, 192 Cal.App.4th at p. 535.) However, the court found untrue and dismissed the allegations against father that he failed to provide for the children (§ 300, subds. (b) & (g)). Hence, father was nonoffending. Yet, father did not want custody of the twins, promising that when he obtained appropriate housing, he would file a section 388 petition to request custody. Father also requested through his attorney that the court not order a case plan for him. The court awarded father reasonable, unmonitored day visits so that he could obtain bus passes from the Department. The court stated, " 'I would like [father] to visit with the children on a regular basis and be a part of their lives.' " (*In re Frank R., supra*, at p. 535.)

Over the following two years, father's visits and telephone contact with the twins were irregular and infrequent. There were long periods of time without contact at all. His last visit with the children was three months before the first section 366.26 hearing. Nor did father contact the Department much to inquire about the twins' wellbeing or to request custody. (*In re Frank R., supra*, 192 Cal.App.4th at pp. 535-536.)

Father denied that visitation posed a problem for him. He also claimed that transportation was difficult and repeatedly asked the court to order the Department to provide him a bus pass. The court made that order numerous times. (*In re Frank R., supra*, 192 Cal.App.4th at p. 536.)

The Department obtained bus passes for father, but he never picked them up. Father only called the Department once about transportation funds. In addition to transportation aid, the Department arranged for the foster mother to meet father halfway or at the Department's offices. (*In re Frank R., supra*, 192 Cal.App.4th at p. 536.)

Father testified that the reason he did not visit the twins more was "financial," and this penury prevented him from traveling to visit the twins. He testified that the Department never provided him with bus passes and never called him despite his repeated messages to the social worker requesting funds for transportation. (*In re Frank R.*, *supra*, 192 Cal.App.4th at p. 536.)

At the six-month review hearing (§ 366.21, subd. (e)), the court reiterated that father was both nonoffending and not requesting custody of the children. At the 12-month review hearing (§ 366.21, subd. (f)), the court summarized that father was not offered reunification services and was not requesting placement. (*In re Frank R.*, *supra*, 192 Cal.App.4th at p. 536.)

Father informed the Department he did not want the children to be adopted. At the section 366.26 hearing on March 3, 2010, the juvenile court terminated father's and mother's parental rights. Father appealed. As noted, we reversed that order on the ground that, before the court could terminate father's parental rights, due process required the court to make a finding that father was unfit, or that it would be a detriment to the children to place them in father's custody. (*In re Frank R.*, *supra*, 192 Cal.App.4th at pp. 537-538.) Because the court dismissed the petition's allegations as to father, and deemed him a nonoffending parent, we held, the juvenile court never made the initial finding of unfitness. Then, as the court never removed the children from father's custody, it never made the detriment finding by clear and convincing evidence. (*Id*. at pp. 538-539.) Our opinion became final in April 2011.

2. *Factual background since the earlier appeal*

a. *The children are thriving in the care of the prospective adoptive parents.*

The children did not request any contact with their parents since being placed in early February 2010 with their prospective adoptive parents with whom they have bonded and thrived. Their therapist reported that both children "have made marked progress" and "continued improvements" in therapy and because of the "extremely stable and loving environment that [the caregivers] provide." The therapist reported that the children refer to their caregivers as "mom" and "dad," have expressed numerous times

their wish to remain with the caregivers " 'forever,' " and sign their names with the caregivers' last name. The therapist opined that the prospective adoptive parents are the only stability and "REAL unconditional love," the children have had. With them, the children have an opportunity to live a relatively normal life and it "might be detrimental to their wellbeing if [they are] removed." (Capitalization in original.)

The Department reported that the children were "highly adoptable" and the prospective adoptive parents were "very committed to" adopting them. The children were excited about being adopted and decided how they would change their names once adoption was finalized. When the adoption was cancelled as the result of our previous opinion, the children "were confused and frightened that they would be removed from the [prospective adoptive parents'] home" and became very apprehensive and depressed.

b. *Father does not maintain contact with the twins or the Department.*

After our reversal, the juvenile court asked the parties to brief "the issue of fitness." The record reveals the following:

Throughout this part of the dependency, father never contacted the Department to request visits with the twins, or inquire after their development and wellbeing. Between June 2009 and May 2011, father made *no* attempts to visit or contact the children. After our previous opinion issued, father did not notify the Department of his whereabouts. The Department opined in May 2011 that "It is apparent that father . . . had no interest in obtaining custody of his children . . . during the past 4 years this case has been under the supervision of [the Department]. Father has never made any attempts to seek custody and on several occasions in court father has stated that he does not want custody of his children. *Father has not remained in consistent contact or requested to be involved in any and all parts of rearing his children*." (Italics added.)

Father asked the juvenile court for a contested jurisdictional hearing. His attorney submitted a declaration stating that father wanted custody of the children as he claimed to be able to provide a stable and nurturing environment for the twins. Counsel declared that father was living with his brother in the same motel where he had been residing for the previous four years. Father also wanted to increase visitation and telephone contact

with the twins with an eventual transition to his home. Alternatively, the attorney stated father "would agree to Legal Guardianship with the foster parents with liberal visitation orders for Father."

Meanwhile, counsel for the children stated that the prospective adoptive parents "have not affirmatively forbidden or prevented father from visiting with the children. They've indicated that should father wish to visit the children, they would facilitate such visits." Father's attorney responded that father "very much wants visits." The court granted father unmonitored reasonable day visits with the children. Then, despite orders by the court that he arrange with the Department for his court-awarded unmonitored visits, and despite the fact the social worker specifically provided father with her telephone number, father did not contact the social worker or the Department. Moreover, the caregivers reported that while father had spoken with the children once, *he* "*did not make any arrangements for a visit*." (Italics added.)

c. *The Department files a subsequent petition under section 342.*

The Department's subsequent petition (§ 342) alleged father's failure to provide the children with the necessities of life including food, clothing, shelter, and medical care; and that he had not visited the twins since June 2009. (§ 300, subd. (g).)

In its reports for the petition dated July and September 2011, the Department indicated that the address father provided the court in his May 2011 section 388 petition was the same address he gave in 2007 when the children were first detained. However, in June 2011, the social worker called the motel and learned from the clerk that father had moved out over 20 days earlier. As father's whereabouts were again unknown, the Department was unable to interview him for the report. Father had not responded to the social worker's "several calls" to him. Father called the caregivers once in that time to discuss a social security issue, but did not ask to speak to the children, inquire about their wellbeing, or request a visit.

Since he was granted visitation, father called the children two or three times but "never to arrange a visit." In September 2011, the Department reported that the last

contact the children had with their father was in May 2011 when he called them for their birthday. He did not request to see them then, nor did he send a card or a gift.

Neither twin could remember father ever providing them with food, clothing, shelter, or medical care. Both children declared they wanted to continue to live with their prospective adoptive parents and did not want to " 'live with Frank.' " The social worker wrote that father made no effort to visit the children and provided no type of support since the case was brought to the Department's attention. The only thing father has been consistent about was appearing in court.

The juvenile court sustained the subsequent petition. (§ 300, subd. (g).)

d. *Father's attorney files a petition for modification (§ 388)*

Meanwhile, father's attorney filed a petition under section 388 requesting the court terminate the placement order and instead return the twins to father's custody. As changed circumstances, counsel wrote, "Father is non-offending [*sic*] and did not request placement of his children with him during mother's reunification period [and] *is now requesting custody of his children with a Home of Parent Father order*. Father has a stable residence and can take care of his children." (Italics added.) The requested change would be better for the children, counsel wrote, because "[h]aving a relationship and living with the children's biological father would benefit the children." The juvenile court granted a hearing on the petition.

Father testified at the hearing that he called "frequently," "every day," and left messages on "their" voicemail, but that "they" did not call him back. He also stated he had spoken with the children three or four times in the previous six months and talked about school and how they were behaving. Father explained he did not visit the children because they lived in Lancaster and the caregivers did not want father to know their address. He also testified he did not ask the social worker to arrange visits for him after 2009. Thus, father clarified that, he had not visited the twins in two years.

Asked what he wanted the court to do, father testified that he wanted the children to *remain in their placement* and that he be permitted contact. On cross-examination, father reiterated that he "just . . . want[ed] to be in their lives. I want to be able to visit

them and talk to them over the phone." Finding no change in circumstances, the juvenile court denied father's section 388 petition. The court also indicated that it did not believe father's claim that he had a relationship with the children.

e. *The juvenile court terminates parental rights (§ 366.26).*

Turning then to the section 366.26 issues, father's attorney argued that the court had not found by clear and convincing evidence that father was unfit, i.e., that it would be detrimental to the children for father to obtain custody. The court then made the finding that father showed little or no concern about actually reunifying with his children, and hardly made any visits. Father was absent from the twins' lives, had very little contact with the social workers, and made no effort to establish a relationship with his children. By contrast, the court found that the children were thriving in their placement, and the prospective adoptive parents were to be credited with the "dramatic" and "positive" changes in the twins' behavior since placement with their prospective adoptive parents. The court concluded, "So with that, the court finds, makes a *clear and convincing evidence finding with regards to unfitness as to the father in this case* and is going [to] reinstate the termination of parental rights" ruling it previous entered. (Italics added.)

CONTENTIONS

Father contends (1) insufficient evidence of unfitness to sustain the section 342 petition; (2) abuse of discretion in denying the section 388 petition; and (3) error in terminating parental rights.

DISCUSSION

1. *The record contained substantial evidence to support the order sustaining the subsequent petition.*

At a jurisdictional hearing, " 'proof by a preponderance of evidence, legally admissible in the trial of civil cases must be adduced to support a finding that the minor is a person described by Section 300.' (§ 355.)" (*In re Sheila B.* (1993) 19 Cal.App.4th 187, 198.)

The circumstances under which the juvenile court may take jurisdiction of a child are narrowly defined. Subdivision (g) of section 300 authorizes dependency jurisdiction

when "[t]he child has been left without any provision for support[.]" Subdivision (g) "does not require a specific finding of harm or risk of harm" to sustain a jurisdictional finding. (*In re J.O.* (2009) 178 Cal.App.4th 139, 153.) However, it appears that section 300, subdivision (g) applies only where the parent is unable to provide or arrange for the children *at the time of the jurisdictional hearing*. (*In re J.O.*, at pp. 153-154, italics added.)

Substantial evidence supports the juvenile court's finding that father is unable to provide the children with support at the time of the hearing. The evidence shows that other than his social security checks, whose payments for the children are automatic and hence involuntary, father provided no financial support to the twins for at least five years. Neither child could remember father ever providing them with food, clothing, shelter, or medical care. Father's whereabouts are unknown. He has no stable housing. His listed residence is a motel, which he even indicated was inappropriate, and he moved out and had yet to inform the Department of his whereabouts at the time of the 366.26 hearing.

Nor did father have a relationship with the children. (*In re J.O.*, *supra*, 178 Cal.App.4th at p. 154.) Father had not lived with the twins in at least six years and did not want custody until his 2011 request for a contested hearing on the subsequent petition. Then, father testified at the hearing he *did not want custody*.

Father's "scant interest in the children" was further demonstrated by his failure even to inquire about their welfare in his rare attempts to contact them. Nor did he try to reach the Department to establish his interest in caring for the children. Father admitted at the hearing that what scarce visits he had with the twins ceased two years earlier. On appeal father justifies his lack of communication by asserting the adoptive parents' telephone number was confidential, but he also *testified* he called the children every day. The juvenile court was entitled to disbelieve father and instead believe the caregivers and social worker. (*In re Casey D.* (1999) 70 Cal.App.4th 38, 52.) And, in the rare contact father had with the children or their caretakers, he did not request visits. The record supports the juvenile court's conclusion father made nearly no affirmative attempt to communicate with the twins in the last two years. The history of father's neglect of these

children's needs spanned before and even after he appealed from the first order terminating his parental rights. As noted in *In re J.O.*, father's "failure to provide financial support for over a decade, combined with his demonstrated lack of interest in the children's welfare before and after DCFS intervention, supported the court's jurisdictional finding under subdivision (g)." (178 Cal.App.4th at p. 154.) Father's failure to attempt to affirmatively provide any support, be it emotional or financial, for at least five years, his chronic disinterest in the twins' welfare before and after the Department's intervention and the subsequent petition, amply support the juvenile court's jurisdiction finding under section 300, subdivision (g).

Father contends that subsequent petitions (§ 342)[3] are filed when children are already declared dependents and new facts or circumstances, other than those under which the original petition was sustained, have occurred (*ibid*.), and there is a substantial risk the children will be neglected in the future. (See *In re Carlos T.* (2009) 174 Cal.App.4th 795, 806 [where children are already dependents of the court, question under § 342 is whether children will suffer harm in future].) Here, however, father argues, the subsequent petition alleged no facts different from the ones in the original petition, which was dismissed, except for the allegation that father did not visit with the children since 2009.

Father's argument wrongly presumes he had no responsibility for his children once they were declared dependents of the court and placed in the care of the Department and foster parents. The subsequent petition alleges that father failed to provide the children with the necessities of life, including food, clothing, shelter, and medical care.

---

[3] Section 342 reads, "In any case in which a minor has been found to be a person described by Section 300 and the petitioner alleges new facts or circumstances, other than those under which the original petition was sustained, sufficient to state that the minor is a person described in Section 300, the petitioner shall file a subsequent petition. This section does not apply if the jurisdiction of the juvenile court has been terminated prior to the new allegations. [¶] All procedures and hearings required for an original petition are applicable to a subsequent petition filed under this section."

Although father's failure to support the children may not have been the initial reason for detaining the twins, the focus of the subsequent petition is obviously on the time period commencing *after* the allegations against father in the original petition were dismissed, and at the time of the hearing. (*In re J.O.*, *supra*, 178 Cal.App.4th at pp. 153-154.)

The record here shows that father has not arranged for the care of the children for at least four years, which gives rise to the reasonable inference he was presently incapable of doing so, despite his claimed "interest" in obtaining custody. (See *In re J.O.*, *supra*, 178 Cal.App.4th at p. 154 [the father's failure to arrange care for children for eight years supports reasonable inference of present inability].) The children languished in foster care because father failed to take responsibility for them, despite his repeated promises to do so. Father failed to provide any emotional or financial support for the children (other than social security funds which were involuntarily funneled to the children). Father did not visit the twins, reach out to them, attempt to parent them or make any effort to communicate with the Department to establish his current ability to care for the children. (See *ibid*. [father's lack of relationship with the children, failure to live with them for more than a decade, and rare telephonic contacts ceased all supported § 300, subd. (g) jurisdiction].) Other than to appear in court and object to the termination of his parental rights, father's failure to provide for the children's care combined with his utter lack of interest in the twins' welfare, supports the juvenile court's finding true the section 300, subdivision (g) allegations. (*In re J.O.*, at p. 154.) Added to this evidence is the children's therapist's opinion and so there is ample evidence in this record to support the juvenile court's finding by clear and convincing evidence that father is unfit. (See *Sheila S. v. Superior Court* (2000) 84 Cal.App.4th 872, 880-881 [we review juvenile court's clear and convincing finding for sufficiency of the evidence]; *In re Frank R.*, *supra*, 192 Cal.App.4th at pp. 537-539, citing *In re P.A.* (2007) 155 Cal.App.4th 1197, 1212 [finding of unfitness made by clear and convincing evidence where father relentlessly avoided responsibility for child and failed to maintain any involvement in child's life for years].)

2. *The juvenile court did not abuse its discretion in denying the section 388 petition for modification.*

A section 388 petition seeks to *modify the status quo* in a dependency case. "Under section 388, a parent may petition the court to change, modify, or set aside a previous court order. The petitioning party has the burden of showing, by a preponderance of the evidence, that [(1)] there is a change of circumstances or new evidence, and [(2)] the proposed modification is in the minor's best interests. [Citations.]" (*In re S.M.* (2004) 118 Cal.App.4th 1108, 1119.) "It is not enough for a parent to show *just* a genuine change of circumstances under the statute. The parent must show that the undoing of the prior order would be in the best interests of the child. [Citation.]" (*In re Kimberly F.* (1997) 56 Cal.App.4th 519, 529.)

A petition under section 388 is addressed to the juvenile court's sound discretion and on appeal, we will disturb the decision only on a clear abuse of that discretion. (*In re Jasmon O.* (1994) 8 Cal.4th 398, 415.)

Here, under "What order or orders do you want the judge to make now?" the section 388 petition stated "Home of Parent Father." The petition also stated father "is now requesting custody of his children with a Home of Parent Father order." Father did not sign the petition; his counsel did. In contrast to the 388 petition, at the hearing on that petition, *father testified twice that he did not want custody* of the twins. Father cannot be heard now to complain that the trial court did not grant the section 388 petition, which contains no evidence father consented to it (see *Suzanne J. v. Superior Court* (1996) 46 Cal.App.4th 785, 788 [dismissal of section 388 petition where no evidence parent authorized it]) seeking return of the children to his custody when he repeatedly told the court in person that *he did not want custody*.

Moreover, father demonstrated neither a change in circumstances nor that the modification requested in the section 388 petition, a change he later retracted, would be in the children's best interest. (§ 388.) Although the petition alleged he had stable housing, in fact he had moved out of his hotel and his whereabouts were unknown. Also, the petition claimed that "[h]aving a relationship and living with the children's'

biological father would benefit the children." Yet, father made no effort whatsoever to demonstrate he had made any effort to establish a relationship with his children who are thriving in the prospective adoptive parents' custody. There was manifestly no abuse of discretion in denying father's 388 petition.

3. *The juvenile court did not rely on the promise of future contact between children and father when it reinstated the order terminating father's parental rights (§ 366.26).*

Father's sole contention with respect to the termination of his parental rights (§ 366.26) is that "[t]o the extent the court relied on the promise of the adoptive parents to permit continued contact between the children and their father, it abused its discretion when it terminated father's parental rights." Yet, the record indicates that continued contact was not a factor in the juvenile court's decision. The possibility of future visitation was not raised until *after* the court summarized the evidence and stated, "the court finds, makes a clear and convincing evidence finding with regards to unfitness as to the father in this case and is going [to] reinstate the termination of parental rights." Only then did the children's attorney ask the court to instruct father that the adoptive parents indicated they wished to maintain visitation and contact with father. The court did not rely on any promise of future contact when it terminated parental rights.

DISPOSITION

The orders are affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

ALDRICH, J.

We concur:

CROSKEY, Acting P. J.

KITCHING, J.