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COURT OF APPEAL - FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

HERBERT H., Petitioner, v. THE SUPERIOR COURT OF SAN DIEGO COUNTY, Respondent;	D048776 (Super. Ct. No. EJ2475A)
SAN DIEGO COUNTY HEALTH AND HUMAN SERVICES AGENCY, Real Party in Interest.	

PROCEEDINGS for extraordinary relief after reference to a Welfare and Institutions Code section 366.26 hearing. Gary M. Bubis, Referee. Petition denied; request for stay denied.

Herbert H. seeks writ review of juvenile court orders setting a Welfare and Institutions Code section 366.26[1] hearing regarding his son, Christopher W. He contends the court erred by granting a petition to remove Christopher from his care, arguing there was no showing of changed circumstances or that removal was in Christopher's best interests. He asserts the court therefore erred by setting a section 366.26 hearing. We deny the petition.

FACTUAL AND PROCEDURAL BACKGROUND

On August 20, 2004, when sheriff deputies were searching for Herbert to arrest him on a felony warrant, they found three-year-old Christopher sleeping alone in a home that smelled of feces and urine. The caretaker at the property where Herbert and Christopher lived said the property owner had asked him to watch Christopher, but he did not know Christopher or his parents. The deputies took Christopher into protective custody and the San Diego County Health and Human Services Agency (the Agency) petitioned on his behalf, alleging Herbert had left him alone and unsupervised in a recreational vehicle that reeked of urine and feces. Christopher was detained with his paternal grandmother (the grandmother). The court ordered supervised visitation to begin once the parents were located.

The social worker reported Herbert has a criminal history that includes domestic violence and drug trafficking. Herbert denied neglecting Christopher and said he had arranged for someone to watch him. He did not want to disclose his whereabouts at that

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

time because of the outstanding warrant. He described himself as "stuck," without a job, transportation or childcare, and said he could not pay for drug treatment.

On September 15, 2004, the court found Herbert to be Christopher's presumed father and appointed counsel. On October 14 it found the allegation of the petition true, declared Christopher to be a dependent child, removed custody, placed Christopher in relative care and ordered Herbert to comply with his case plan, which included a psychological evaluation and participation in the Substance Abuse Recovery Management System (SARMS).

For the six-month review hearing in April 2005, the social worker reported the Agency had provided Herbert with referrals for substance abuse treatment and testing, domestic violence treatment, counseling, and a psychological evaluation. Herbert entered a residential drug treatment facility. Christopher was doing well in the grandmother's care. The court found Herbert had made substantive progress and continued services.

In October 2005 the social worker reported Herbert had graduated from the residential program in July 2005 and was active in the SARMS program, where he was required to attend three 12-step meetings each week and maintain contact with SARMS. Herbert said he was drug testing and attending parenting classes and domestic violence treatment,[2] and his therapist reported he had begun counseling. The psychologist who performed a psychological evaluation reported Herbert had been addicted to drugs for 18

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[2] On the Agency's recommendation, in January 2006 the domestic violence component was removed from his service plan.

years. The psychologist agreed with the social worker's recommendation that Herbert be financially independent, have a stable home and demonstrate lasting sobriety and an understanding of the needs of a child before returning Christopher to his care.

On November 14, 2005, after a trial visit, the court placed Christopher with Herbert. Herbert and Christopher appeared to have a strong bond, but once Christopher was placed with him, Herbert stopped participating in his case plan, claiming he believed he did not have to comply anymore and his former social worker had not explained what he needed to do. He found employment and secured a home, but had two positive methamphetamine tests, one in February and one in March 2006. He ceased participation with SARMS and stopped attending parenting education classes and therapy. Because of a positive drug test, he was asked to leave his sober living program, but soon found another residence.

On May 11, 2006, Christopher's attorney petitioned in juvenile court, seeking Christopher's removal from Herbert's care. He alleged Herbert had to leave his sober living residence because he broke rules and tested positive for methamphetamine; he had not reported to SARMS since March and was not participating in other services. The Agency had earlier recommended Christopher remain in Herbert's care with family maintenance services, but in a report dated May 31, the social worker changed the recommendation to propose setting a section 366.26 hearing.

At a hearing on the petition on May 31, 2006, the current social worker testified he began working on the case on April 28. He said when he visited Christopher in Herbert's home, Christopher appeared well cared for and well bonded to Herbert. He said he had

changed the earlier recommendation that Christopher live with Herbert to a proposal that he be removed because of concern that Herbert was not complying with his case plan. He testified Herbert had two positive drug tests, was not drug testing, and the counselor at SARMS said Herbert was willing to drug test, but refused to attend 12-step meetings and other aspects of the SARMS program. He acknowledged there was no evidence of any positive drug tests since March. The social worker said he met with Herbert once, but Herbert was unable to make future appointments. His main concern was that Herbert remain clean and sober and opined Christopher should be placed with the grandmother.

One of the family's previous social workers testified she began working on the case in January 2006 and continued to do so along with the present social worker. She had visited Christopher four or five times and had earlier considered petitioning to remove him from Herbert's home, but determined he was safe there. She said she asked Herbert to return to SARMS numerous times, and, although he said he would return, he did not follow through.

The court found Herbert's drug relapse and unwillingness to address it constituted a changed circumstance and removal was in Christopher's best interests. It set a section 366.26 hearing, commenting the 18-month time period had passed and no mandated services were in place.

Herbert petitions for review of the court's orders. (§ 366.26, subd. (*l*); Cal. Rules of Court, rule 38.1.) This court issued an order to show cause, the Agency responded and the parties waived oral argument.

DISCUSSION

Herbert contends the court erroneously granted Christopher's section 388 petition for modification of the previous order placing Christopher in his care. He argues the evidence did not show Christopher was at a substantial risk of detriment in his home.

Section 388 provides in part:

> "(a) Any parent or other person having an interest in a child who is a dependent child of the juvenile court . . . may, upon grounds of change of circumstance or new evidence, petition the court in the same action in which the child was found to be a dependent child of the juvenile court . . . for a hearing to change, modify, or set aside any order of court previously made or to terminate the jurisdiction of the court. . . . [¶] . . . [¶]
>
> "(c) If it appears that the best interests of the child may be promoted by the proposed change of order . . . the court shall order that a hearing be held . . . ."

In order to gain the relief sought in a section 388 petition, the petitioner must show both a change of circumstances or new evidence and that the change sought is in the child's best interests. (§ 388; Cal. Rules of Court, rule 1432(c); *In re Michael B.* (1992) 8 Cal.App.4th 1698, 1703.) A petition is liberally construed in favor of its sufficiency. (*In re Angel B.* (2002) 97 Cal.App.4th 454, 461.) The petitioner bears the burden of proof, however, to make both showings. (*In re Stephanie M.* (1994) 7 Cal.4th 295, 317.) A reviewing court will not disturb a court's ruling in a dependency proceeding "'"unless the trial court has exceeded the limits of legal discretion by making an arbitrary, capricious, or patently absurd determination [citations]."'" (*Id.* at p. 318, quoting *In re Geoffrey G.* (1979) 98 Cal.App.3d 412, 421.)

The court's finding of a change of circumstances is well supported. Christopher petitioned to change his placement on the basis that Herbert had been ordered to leave his sober living residence because he broke rules and had a positive drug test, and he tested positive for methamphetamine use in February and March 2006. Also, Herbert had not reported to SARMS since March 16, 2006, and was not participating in other components of his case plan. These developments necessitated a change to the court's order placing Christopher with Herbert.

The problems that led to Christopher's dependency resulted from Herbert's long-term drug addiction. Herbert, in order to evade sheriff's deputies, left then three-year-old Christopher, alone and unattended, in a recreational vehicle that reeked of urine and feces. Herbert completed residential drug treatment and secured employment and a stable home, but once Christopher was placed with him, he had two positive methamphetamine tests and stopped drug testing and participation in other SARMS requirements. The psychologist who evaluated Herbert agreed with the Agency's assessment that Herbert needed to show not only financial independence and residential stability, but also lasting sobriety. However, Herbert did not remain sober and was unwilling to address his relapses. His failure to continue to test at SARMS made it impossible for the Agency to assess whether he was maintaining lasting sobriety. This was a critical change of circumstances.

Herbert relies on *David B. v. Superior Court* (2004) 123 Cal.App.4th 768. There, the court reversed an order terminating services because the father had done everything the social services agency had asked of him and had even requested anger management

services on his own. (*Id*. at p. 772.) The court determined a risk to the child was not shown simply by the father living with a brother-in-law with a troubled history, and the agency had not warned him of its concern. (*Id*. at pp. 772-774, 793.) Here, the situation is completely different. After Christopher's return, Herbert relapsed and stopped participating in the SARMS services that were designed to help him overcome his severe addiction so that he could provide a safe home for his child. *David B. v. Superior Court* does not support his position.

Herbert contends, even assuming a change of circumstances, there was no showing removal was in Christopher's best interests. He relies on *In re Kimberly F.* (1997) 56 Cal.App.4th 519 (*In re Kimberly F.*) for his argument that the court must not simply define a child's best interests by comparing the home of the natural parent with that of other caretakers. *In re Kimberly F.*, is not helpful to his arguments. The court here did not remove Christopher because of a simple comparison between homes. In *In re Kimberly F.*, the appellate court listed three factors for court consideration when determining if a child's best interests would be served by granting a section 388 petition: (1) the seriousness of the problem that led to the dependency and the reason for any continuation of the problem; (2) the strength of the bond between both the child and the caretaker; and (3) the degree to which the problem may be removed and the degree to which it has been removed. (*In re Kimberly F., supra,* 56 Cal.App.4th at p. 532.) Applying the first and third factors listed in *In re Kimberly F.*, we note the problems that led to Christopher's removal stemmed from Herbert's severe drug addiction, and services designed to treat the addiction were put into place. But Herbert relapsed and stopped

trying to address his addiction, showing the problem had not been resolved. The second factor also does not support Herbert's arguments. While it is true that Herbert and Christopher have a strong bond, Christopher also appears to have a good, secure relationship with the grandmother. The evidence supports the court's finding that Christopher's best interests were well served by removal from Herbert's care. Herbert has not shown the court abused its discretion in granting Christopher's request to modify the previous order.

Herbert also argues the court erred in setting a section 366.26 hearing. He has not shown error. Section 366.22, subdivision (a) provides that at an 18-month hearing, the court shall order return of the child unless it finds, by a preponderance of the evidence, that return would create "a substantial risk of detriment to the safety, protection, or physical or emotional well-being of the child." (*Ibid.*) The statute additionally states: "The failure of the parent . . . to participate regularly and make substantive progress in court-ordered treatment programs shall be prima facie evidence that return would be detrimental." (*Ibid.*) After completing residential treatment, Herbert did not comply with the services designed to help him parent Christopher safely. His failure to address his drug relapse placed Christopher in a situation of substantial risk of detriment to his safety, protection and well-being. The court did not err in setting a section 366.26 hearing.

DISPOSITION

The petition is denied. The request for stay is denied.

McCONNELL, P. J.

WE CONCUR:

NARES, J.

McDONALD, J.