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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

In re ISAAC K. et al., Persons Coming Under the Juvenile Court Law.

MENDOCINO COUNTY DEPARTMENT OF SOCIAL SERVICES,	**A129659**
Plaintiff and Respondent,	**(Mendocino County Super. Ct. Nos. SCUKJVSQ0915591, SCUKJVSQ0915594)**
v.	
A.K.,	
Defendant and Appellant.	

_____/

A.K. (father) is the presumed father of Isaac K. and K.H. (collectively, children). In April 2010, the trial court terminated father's reunification services and set a Welfare and Institutions Code section 366.26 hearing (.26 hearing) for late July.[1] In early July, father moved the court to appoint an expert witness to conduct a bonding study. The

[1] Unless otherwise noted, all further statutory references are to the Welfare and Institutions Code. We refer to K.H. by her initials because her name is "unusual" within the meaning of California Rules of Court, rule 8.401. (See *In re Edward S.* (2009) 173 Cal.App.4th 387, 392, fn. 1.) Tabatha H. (mother) is not a party to this appeal and is mentioned only where relevant to the issues raised in father's appeal. (*In re V.F.* (2007) 157 Cal.App.4th 962, 966, fn. 2, superseded on other grounds as stated in *In re Adrianna P.* (2008) 166 Cal.App.4th 44, 57-58.)

court denied the motion and, following the .26 hearing, terminated father's parental rights.

Father appeals. He contends the court abused its discretion by denying his motion for a bonding study. He also claims the court's denial of his motion violated his due process rights because it deprived his counsel of the ability to prepare a defense to the termination of parental rights. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

This case has an extensive history. We provide a brief procedural history and recite only those facts relevant to father's appeal of the court's denial of his motion for a bonding study.

Isaac was born in September 2005. K.H. was born in November 2007. In February 2009, the Mendocino County Health & Human Services Agency (the Agency) filed a section 300 petition alleging: (1) mother failed to provide K.H. with adequate food and medical treatment; (2) mother had a substance abuse problem; (3) father knew about K.H.'s medical condition and failed to protect her; and (4) Isaac was at risk of harm and neglect due to mother's failure to address K.H.'s needs. According to the petition, father stated, "he could not provide care" for K.H. and had last seen her in February 2008. The court detained the children and, following a contested jurisdiction hearing, determined they came within section 300, subdivision (b). (§ 300, subd. (b).)

In its disposition report, the Agency noted that father: (1) had been arrested in April 2009 for battery on a person with whom he had a dating relationship (Pen. Code, § 243, subd. (e)(1)) and for dissuading a victim (Pen. Code, § 136.2, subd. (b)(1)) & (2)) had been involved in various incidents of domestic violence. Following a disposition hearing, the court ordered reunification services for father. Among other things, the court ordered him to participate in Family Empowerment Group and to take various parenting and anger management classes.

In a report prepared for the six-month review hearing, the Agency noted that father had "actively engaged in every service required in his case plan," including participating in Men's Alternatives to Violence and Family Empowerment Group. He had "diligently

visited" the children and had taken them to their medical and dental appointments. The Agency reported that the children were forming a bond with father, that they enjoyed the visits, and that they "look[ed] forward to spending time with [him]." The Agency also noted, however, that father had: (1) tested positive for marijuana; (2) lost his housing; and (3) not made sufficient progress in therapy. Following the six-month review hearing, the court ordered additional reunification services for father.

In its 12-month status review report filed in late March 2010, the Agency noted that father had completed various parenting classes as required by his case plan, but had two "anger outburst[s]" toward a Family Empowerment Group therapist in December 2009. On one occasion, father and his therapist had a misunderstanding about an appointment time. When the therapist suggested it may have been a scheduling error, father "became quite upset" and said, "'No. This is not an *error*. This is . . . right and wrong. I am right and she is a liar.'" (Original italics.) In a subsequent therapy session, father stated his "therapist should be 'publicly whipped' for her lies." When discussing his domestic violence charges, he claimed he was innocent and likened the criminal court system to the "Mafia." On another occasion, father "had an episode of explosive rage that was directed at [a] facilitator." The "display of anger . . . was extreme enough that [the] facilitator . . . believed that he would have physically assaulted her had others not been present." Father had another "outburst" at a doctor at the Mendocino County Health Clinic in February 2010. During an appointment at the clinic, a doctor told father he was not handling Isaac appropriately and that calling Isaac a "'crybaby'" was "adding to Isaac's anxiety." Upset that the doctor "reprimanded him in front of his children," father left the appointment with Isaac. He later returned to the Health Clinic and apologized.

The Agency also reported that father's visits with the children were "problematic." Father "act[ed] rough towards the children" if they did not cooperate with him and was "short tempered towards the children when they [did] not obey him. He has yelled at the children and exhibited a lack of patien[ce]." Isaac reported being spanked and kicked by father during an outing at the park, but stated that he "likes visits with his dad." The Agency reduced the length and frequency of father's visits and began to supervise them

"due to [father']s negative behavior towards his children." The Agency opined that the probability of returning the children to father's care was "low" because of various factors, including father's angry outbursts, the reduction in his visiting hours, and his lack of housing and employment.

At the conclusion of the 12-month review hearing in April 2010, the court terminated reunification services and decreased father's visitation to supervised visits twice a month. The court expressed concern about father's "angry outbursts" and his tendency of "blaming others" as well as concern about his tendency to be impatient with the children. The court noted, "I just don't see that it's possible that within the 18 months the children could be . . . safely returned to his custody. . . . He's made some progress, but the issue of anger management especially, which is really the most concerning issue here, I don't find that he's made significant progress toward alleviating or mitigating the causes necessitating the placement of the children in foster care. . . ." The court set a .26 hearing for July 29, 2010.

In July 2010 — three months after the court terminated reunification services — father moved the court to appoint an expert witness to perform an evaluation on the bond between he and the children. In the points and authorities in support of the motion, counsel for father stated that father believed "there [was] a bond between him and his children" and noted that in the six-month status review report, the Agency opined "'[t]he children are forming a bond towards . . . father'" and that they looked forward to spending time with him. In a declaration, counsel for father stated she had spoken to Dr. Kevin Kelly, Ph.D., who would be able to conduct a bonding assessment and prepare a report a week before the .26 hearing.

At the hearing on the motion, counsel for father stated she had "heard" from father and from staff at the family center where father visited the children "that he believes the children are still very closely bonded to him [and] that they do cry at the end of his visits[.]" Counsel noted that two psychologists would be able to complete a bonding study before the .26 hearing. Counsel for mother supported father's request, noting that "I think the parents have the right to make this request and I think the only issue could be

potential delay to the [.26] hearing." Children's counsel opposed the motion on the grounds that it was untimely and that father had not made a "prima facie case for [a] bonding assessment" given that he was only visiting the children twice a month. The Agency agreed with children's counsel.

The court denied the motion. It explained that the "relevance of the bonding study becomes less likely as the case approaches the determination of permanency because 'the kind of parent-child bond the court may rely on to avoid termination of parental rights . . . does not arise in the short period between the termination of services and the section . . . .26 hearing.' [Citation.]" The court noted that "bonding motions made after the termination of reunification services" are disfavored and that there were no "compelling circumstances" to support a bonding study. Finally, the court concluded that the motion for a bonding study "comes too late, may lead to delay, and is not likely to provide the Court with material evidence at the hearing regarding permanency."

In the report prepared for the .26 hearing, the Agency noted that father had missed several visits and at a recent visit, K.H. "did not want to go to . . . father. She tried to wiggle out of his arms to get down." According to the Agency, both children refer to their prospective adoptive parents as "Mom" or "Mommy" and "Dad" or "Daddy" and do not ask to see father between visits. The Agency noted that the children regard their potential adoptive siblings as true siblings and look to them for support and comfort. At the .26 hearing in August 2010, the social worker testified the children were doing well in their foster home. Although father initially testified that the children cried when his unsupervised visits ended, he conceded that the children had not cried since visits were reduced and became supervised in February.

Following the .26 hearing, the court terminated parental rights and freed the children for adoption.[2] The court determined there was "proof beyond any doubt . . .

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[2] The court also denied father's section 388 motion to, among other things, reinstate reunification services and increase visitation. The court determined father's "housing circumstance[s]" were "still up in the air" and that his history of domestic violence and anger presented a risk to the children. The court also noted there had "been missed visits,

[that] the children are adoptable" and concluded there was not sufficient evidence to overcome the presumption in favor of adoption.

DISCUSSION

Father claims the court abused its discretion by denying his motion for a bonding study pursuant to Evidence Code section 730, which authorizes the juvenile court to appoint an expert witness to examine the bond between a parent and child.[3] (See *In re Jennifer J.* (1992) 8 Cal.App.4th 1080, 1084.) We review the court's decision for abuse of discretion, reversing only if the court's decision is arbitrary, capricious, or exceeds the bounds of reason. (*In re Lorenzo C.* (1997) 54 Cal.App.4th 1330, 1339 (*Lorenzo C.*); *In re Jasmine D.* (2000) 78 Cal.App.4th 1339, 1351.)

"There is no requirement in statutory or case law that a court must secure a bonding study as a condition precedent to a termination order. In addition, although the preservation of a minor's family ties is one of the goals of the dependency laws, it is of critical importance only at the point in the proceeding when the court removes a dependent child from parental custody. [Citation.] Family preservation ceases to be of overriding concern if a dependent child cannot be safely returned to parental custody and the juvenile court terminates reunification services. Then, the focus shifts from the parent's interest in reunification to the child's interest in permanency and stability. [Citation.] This appeal involves issues which arose well after the juvenile court removed [the children] from [parental] custody and terminated [father's] reunification services." (*Lorenzo C., supra,* 54 Cal.App.4th at pp. 1339-1340, fn. omitted.) By the time of the permanency planning hearing, a parent's "right to develop further evidence regarding [his or] her bond with the child [ ][is] approaching the vanishing point." (*In re Richard C.*

. . . marijuana use and . . . concerns regarding parenting . . . [and] continuing anger concerns." The court concluded father had not established changed circumstances.

[3] Evidence Code section 730 provides in relevant part, "When it appears to the court, at any time before or during the trial of an action, that expert evidence is or may be required by the court or by any party to the action, the court on its own motion or on motion of any party may appoint one or more experts to investigate, to render a report as may be ordered by the court. . . ."

(1998) 68 Cal.App.4th 1191, 1195 (*Richard C.*); *Lorenzo C., supra,* 54 Cal.App.4th at p. 1340.)

The court did not abuse its discretion by denying father's motion for a bonding study. As an initial matter, it was "unlikely that a bonding study would have been useful to the juvenile court" because there was sufficient evidence upon which to evaluate the bond between father and the children. (*Lorenzo C., supra,* 54 Cal.App.4th at p. 1341.) The purpose of ordering a bonding study is to have an expert determine and then testify to the attachment, if any, between the parent and child. Here, there was ample evidence before the court regarding the bond, if any, between father and the children. Father admitted that he never lived with K.H. and that "he did not have an opportunity to parent his children" before the Agency detained them in February 2009 because "mother's whereabouts were unknown to him." At the time of the .26 hearing, father had supervised visitation with the children twice a month. During these visits, his behavior was "problematic" — he was rough and impatient with the children. On other occasions, he called Isaac names and exhibited behavior that made Isaac anxious. The court was well aware of father's relationship with the children because it had presided over the dependency proceedings. The court was aware that nine months earlier, the Agency reported that "[t]he children are forming a bond towards . . . father" and looked forward to spending time with him. In addition, the court was aware that father had, at one point, visited the children in an unsupervised setting.

The denial of father's motion for a bonding study was proper for an additional reason: the motion came late in the proceedings, several months after the court terminated reunification services. "Bonding studies after the termination of reunification services would frequently require delays in permanency planning. Similar requests to acquire additional evidence in support of a parent's claim [that termination of parental rights would be detrimental to the child] could be asserted in nearly every dependency proceeding where the parent has maintained some contact with the child. The Legislature did not contemplate such last-minute efforts to put off permanent placement. . . . While it is not beyond the juvenile court's discretion to order a bonding study late in the process

under compelling circumstances, the denial of a belated request for such a study is fully consistent with the scheme of the dependency statutes, and with due process." (*Richard C.*, *supra*, 68 Cal.App.4th at p. 1197, fn. omitted.)

Counsel for father offered no explanation for waiting three months *after* the termination of reunification services to seek a bonding study, particularly when counsel had been contemplating bringing the motion for several months before doing so. Counsel's failure to explain the delay in seeking a bonding study creates an inference that father's motion was intended to delay the proceedings. (See, e.g, *Stafford v. Mack* (1998) 64 Cal.App.4th 1174, 1185.) Additionally, granting father's motion would likely delay the .26 hearing because the Agency would need time to evaluate the study and prepare a response to it before the .26 hearing.

Because it did not appear that the study would have been useful to the court and because father's request for a bonding study came several months after the court terminated reunification services, the court did not abuse its discretion by denying father's motion. We reject father's contention that the court "employed the wrong legal standard" — and therefore abused its discretion — when it denied his motion for a bonding assessment. None of the cases upon which father relies, including *In re S.B.* (2008) 164 Cal.App.4th 289, 299, are factually similar or support his argument. For example, father relies on *In re S.R.* (2009) 173 Cal.App.4th 864, but that case does not assist him because it dealt with the burden of proof required to change a court order authorizing a bonding study. (*Id.* at p. 871.)

Finally, we reject father's claim that the denial of his motion for a bonding study prevented him from preparing "a potential defense to the termination of parental rights." Even if we assume for the sake of argument that the court had granted father's motion and ordered the preparation of a bonding study, it is highly unlikely father would have been able to establish the applicability of the beneficial relationship exception at the .26 hearing. The beneficial relationship exception requires a parent to demonstrate he or she has "maintained regular visitation and contact with the child and the child would benefit from continuing the relationship" with the parent. (§ 366.26, subd. (c)(1)(B)(i).) The

beneficial relationship exception is "difficult to make in the situation, . . . where the parents have [not] . . . advanced beyond supervised visitation." (*In re Casey D.* (1999) 70 Cal.App.4th 38, 51.) At least one court has commented that the beneficial relationship exception "may be the most unsuccessfully litigated issue in the history of law. . . . [I]t is almost always a loser." (*In re Eileen A.* (2000) 84 Cal.App.4th 1248, 1255, fn. 5, disapproved on other grounds in *In re Zeth S.* (2003) 31 Cal.4th 396, 413-414.) Given the "problematic" behavior father exhibited at visits, the children's apparent lack of desire to see him, and the fact that father had not progressed beyond supervised visitation, we fail to see how father would have established the beneficial relationship exception even with the assistance of a bonding study.

DISPOSITION

The orders denying father's request for a bonding study and terminating his parental rights are affirmed.

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Jones, P.J.

We concur:

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Needham, J.

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Bruiniers, J.