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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION TWO

In re BASTIAN D., a Person Coming
Under the Juvenile Court Law.

LOS ANGELES COUNTY
DEPARTMENT OF CHILDREN
AND FAMILY SERVICES,

Plaintiff and Respondent.

v.

JACQUELINE M.,

Defendant and Appellant.

B289751

(Los Angeles County
Super. Ct. No. DK19767A)

APPEAL from an order of the Superior Court of
Los Angeles County. Kim Nguyen, Judge. Affirmed.

Christopher R. Booth, under appointment by the Court of
Appeal, for Defendant and Appellant Arturo V.

Mary C. Wickham, County Counsel, Kristine P. Miles,
Acting Assistant County Counsel, and Brian Mahler, Deputy
County Counsel for Plaintiff and Respondent.

Appellant Jacqueline M. (mother), the mother of Bastian D. (born Apr. 2009), appeals the denial of her petition, under Welfare and Institutions Code section 388,¹ seeking return of Bastian to her custody, or in the alternative, family reunification services. Mother contends the juvenile court erred by denying her section 388 petition and by denying her an evidentiary hearing on the petition.

The juvenile court did not abuse its discretion by summarily denying mother's section 388 petition without an evidentiary hearing. We therefore affirm the juvenile court's order.

BACKGROUND

Section 300 petition and detention

On October 5, 2016, the Los Angeles County Department of Children and Family Services (the Department) filed a petition on behalf of then seven-year-old Bastian, under section 300, subdivisions (a) and (b), alleging that Bastian was at substantial risk of serious physical harm as the result of father Eduardo's (father's) abuse and neglect.² The petition alleged that father struck Bastian with a belt, engaged in physical violence toward a female companion in the child's presence, failed to protect the child from the maternal grandmother's physical abuse, and that father had a history of substance abuse and drove with the child while intoxicated.

In its detention report, the Department stated that paternal family members had informed the social worker that mother was undocumented and had left the United States for Chile in March 2013. According to the paternal relatives, mother

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

² Father is not a party to this appeal.

had asked father to bring Bastian to Mexico in August 2016 so she could see the child, but father did not do so because he was afraid that mother would kidnap Bastian. Mother then informed the paternal relatives that she would be hiring an attorney to obtain custody of Bastian.

Bastian told the social worker that mother had left for Chile when he was three years old. He said he was asleep when mother left and that he had not seen mother or spoken with her by telephone since then.

At the October 5, 2016 detention hearing, the juvenile court asked father about mother's whereabouts and contact information. Father responded that mother had moved to Chile three years ago. He said he did not know mother's date of birth and had no address or telephone number for her, but stated that his girlfriend could communicate with mother via Facebook. The juvenile court directed father to provide the Department with information regarding mother's Facebook page so that the Department could attempt to locate her. The court then ordered Bastian detained from both parents.

Jurisdiction and disposition

In its November 2016 jurisdiction/disposition report, the Department informed the juvenile court that family members said that mother had been absent from Bastian's life for many years. Mother resided either in Chile or Mexico and was unable to return to the United States because she was undocumented. On November 22, 2016, the Department filed a declaration of due diligence stating that its efforts to locate mother had been unsuccessful.

At a November 22, 2016 adjudication hearing, the juvenile court sustained the allegations of an amended petition, and found, under section 300, subdivision (b), that father had inappropriately disciplined Bastian by striking him with a belt,

had engaged in physical altercations with a female companion in the child's presence, and had a history of substance abuse, placing Bastian at risk of harm. The court assumed jurisdiction over Bastian as a dependent of the juvenile court, removed him from father's custody, and ordered him placed with a paternal uncle. The court continued the disposition hearing as to mother to allow the Department to complete its search for her.

On December 16, 2016, a Multidisciplinary Assessment Team (MAT) issued a report stating that Bastian had endured multiple traumas including witnessing domestic violence between father and his female companion, being struck by a belt while disciplined, being exposed to father's substance abuse, and having mother leave the country while he was asleep. As a result, Bastian was exhibiting various anxious, inattentive, hyperactive, and defiant behaviors, and the team recommended mental health services for him. Despite these issues, Bastian appeared to be "an optimistic and caring boy" who was doing well in school. He had transitioned smoothly into the paternal uncle's home and said that he felt safe and cared for by his uncle.

On December 21, 2016, the juvenile court made dispositional orders as to mother, finding she was a noncustodial parent and that it would be detrimental for Bastian to be placed in her custody. The court denied mother reunification services pursuant to section 361.5, subdivision (b)(1),³ and ordered Bastian to remain placed with the paternal uncle.

³ Section 361.5, subdivision (b)(1) authorizes the denial of reunification services to a parent whose whereabouts are unknown. It states, in relevant part: "Reunification services need not be provided to a parent or guardian described in this subdivision when the court finds, by clear and convincing evidence, . . . [¶] [t]hat the whereabouts of the parent or guardian are unknown. A finding pursuant to this paragraph shall be supported by an affidavit or by proof that a reasonably diligent

Six-month review

In May 2017, the Department reported that mother's whereabouts remained unknown. Bastian "continue[d] to thrive in the home of paternal uncle," who was willing to adopt Bastian if necessary.

In a last minute information for the court, the Department reported that mother had telephoned from Santiago, Chile on July 10, 2017. Mother told the social worker that she left the United States for Chile in 2013 for her father's funeral and to take care of other personal matters. According to mother, she and father went to a notary before she left the United States, and they both signed an agreement granting them joint custody over Bastian. The agreement further stated that father would take Bastian to mother in Chile after the funeral; however, father never did so. Mother stated that she had filed for custody of Bastian in the Chilean court system. She said the last time she saw Bastian was in 2013 and that she last spoke with him two years ago. Mother said that she wanted to see Bastian and to speak with him. She provided the social worker with her telephone number and address.

At the July 11, 2017 contested six-month review hearing, the juvenile court ordered Bastian to remain suitably placed, continued father's reunification services, and scheduled a 12-month review hearing for January 2018.

Twelve-month review

In a January 2018 status review report the Department stated that it would continue to make efforts to contact mother to assess her situation. On January 9, 2018, Amy McAllister, an attorney for the Los Angeles Dependency Lawyers, informed the

search has failed to locate the parent or guardian. The posting or publication of notices is not required in that search." (§ 316.5, subd. (b)(1).)

juvenile court that she had contacted mother in Chile and that mother had declined legal representation in the dependency proceedings.

In two last minute information reports, the Department informed the juvenile court that it had contacted mother by telephone on January 29, 2018 and again on February 7, 2018. Mother was happy to hear about Bastian and said she missed him but that she was unable to return to the United States because her Visa had expired. Mother said she was still married to father and that she did not intend to divorce him. She said that she loves Bastian and that she wants to speak to him by telephone. The social worker advised mother that because there had been no contact between mother and Bastian for a number of years, the Department would recommend that mother's telephonic contact with Bastian be monitored and take place in a therapeutic setting. Mother agreed to these conditions.

At the 12-month review hearing on February 8, 2012, attorneys Amy McAllister and Peggy Dayton made special appearances on mother's behalf. The juvenile court found that continued jurisdiction was necessary, continued father's reunification services, and ordered Bastian to remain placed with the paternal uncle. The juvenile court further ordered the Department to determine whether telephonic contact could be established between mother and Bastian that would include the child's therapist. The court set a progress hearing for March 15, 2018.

Mother's section 388 petition

On March 14, 2018, mother filed a section 388 petition seeking custody of Bastian, or in the alternative, reunification services. In her petition, mother alleged that since the December 21, 2016 hearing at which the juvenile court ordered Bastian to remain suitably placed, "mother has come forward and want[s]

her child returned to her. She has been working with attorneys since 2014 to regain custody of her son. Unfortunately, she is unable to come to the [United States], which has hindered her ability to regain custody. Furthermore, she has attempted to maintain a relationship with her son, but her efforts have been thwarted by her child's father." Mother further stated that she was ready and willing to provide Bastian with a safe home.

At a March 15, 2018 progress hearing, the juvenile court ordered the Department to arrange for Skype visits between mother and Bastian in a therapeutic setting.

In a status review report, the Department informed the juvenile court that mother was in weekly telephone contact with the social worker to obtain information on Bastian's well being. The Department was in the process of arranging telephone contact between Bastian and mother in a therapeutic setting.

On March 27, 2018, the juvenile court denied mother's section 388 petition without a hearing, finding insufficient evidence to demonstrate a prima facie case of changed circumstances or that the requested relief was in Bastian's best interests. This appeal followed.

DISCUSSION

I. Applicable law and standard of review

Section 388 provides in relevant part: "Any parent . . . [of] a child who is a dependent child of the juvenile court . . . may, upon grounds of change of circumstance or new evidence, petition the court . . . to change, modify, or set aside any order of court previously made." To obtain the requested modification, the parent must demonstrate both a change of circumstances or new evidence, and that the proposed change is in the best interests of the child. (§ 388, subd. (a)(1); Cal. Rules of Court, rule 5.570(a) & (e); *In re Casey D.* (1999) 70 Cal.App.4th 38, 47.) "[T]he change of circumstances or new evidence must be of such significant nature

that it requires a setting aside or modification of the challenged prior order.” (*Ansley v. Superior Court* (1986) 185 Cal.App.3d 477, 485.)

The parent bears the burden of proving the requested modification should be granted. (Cal. Rules of Court, rule 5.570(i); *In re Stephanie M.* (1994) 7 Cal.4th 295, 317.) A juvenile court’s determination on a petition brought under section 388 is reviewed under the abuse of discretion standard. (*Stephanie M.*, at p. 318.)

To obtain an evidentiary hearing on a section 388 petition, the petitioner must plead facts sufficient for a prima facie showing that (1) the circumstances have changed since the prior juvenile court order, and (2) the proposed modification will be in the best interests of the child. (*In re Marilyn H.* (1993) 5 Cal.4th 295, 310; *In re Daijah T.* (2000) 83 Cal.App.4th 666, 672.) “The prima facie requirement is not met unless the facts alleged, if supported by evidence given credit at the hearing, would sustain a favorable decision on the petition. [Citation.]” (*In re Zachary G.* (1999) 77 Cal.App.4th 799, 806.) An appellate court cannot reverse a summary denial of an evidentiary hearing on a section 388 petition unless the ruling constituted an abuse of discretion, i.e., it was arbitrary, capricious, or beyond the bounds of reason. (*In re Anthony W.* (2001) 87 Cal.App.4th 246, 250.)

II. No abuse of discretion

Mother contends she made a prima facie showing of changed circumstances or new evidence justifying a change in the juvenile court’s orders. She asserts that because she was denied custody and reunification services on the ground that her whereabouts at the time were unknown, her request for custody and services should have been granted once she was located.

Mother’s telephonic contact with the Department and subsequent appearance in the case, more than six months after

the juvenile court denied her custody and reunification services, did not compel the juvenile court to grant her subsequent request for reunification services. Had mother's whereabouts become known within six months of Bastian's out-of-home placement, mother would have been entitled to reunification services under section 361.5, subdivision (d). That statute provides: "If reunification services are not ordered pursuant to paragraph (1) of subdivision (b) [providing that reunification services need not be provided to a parent whose whereabouts are unknown] and the whereabouts of a parent become known within six months of the out-of-home placement of the child, the court shall order the social worker to provide family reunification services in accordance with this subdivision." (§ 361.5, subd. (d).) Mother's whereabouts did not become known until July 2017, more than six months after Bastian was removed from father's custody in November 2016 and from mother's custody in December 2016. Because section 361.5, subdivision (d) did not apply, mother was not entitled to reunification services. (*In re Korbin Z.* (2016) 3 Cal.App.5th 511, 518.)

In re A.G. (2017) 12 Cal.App.5th 994 (A.G.), on which mother relies as support for her position, is inapposite. The issue presented in *A.G.* was whether reasonable court-ordered reunification services had been provided to a non-custodial father who was arrested and deported to Mexico six years before the filing of a section 300 petition on his children's behalf. (*Id.* at pp. 998, 1002.) Although the father could not be located at the time the children were removed from their mother's custody, he contacted the agency five months later and asked for reunification services that would enable him to obtain custody of the children in the event they were unable to reunify with their mother. (*Ibid.*) The juvenile court granted the father's request and ordered the social services agency to provide the father with

reunification services and supervised visits with the children at the international border. (*Id.* at p. 999.) The agency subsequently claimed it was unable to provide the father with services because he lived in Mexico. The juvenile court agreed, finding that reasonable services had been provided. (*Id.* at p. 1000.)

The appellate court in *A.G.* reversed, finding that the father's arrest and deportation to Mexico did not make the agency's failure to provide court-ordered services reasonable under the circumstances. The court stated: "Just as there is no "Go to jail, lose your child" rule in California [citation], there is no 'Go to Mexico, lose your child' rule in California [citation]. The Legislature recognizes there may be barriers to providing services to a person who has been arrested and deported to his or her country of origin. [Citation.] However, under the California dependency scheme, this circumstance may constitute reason to provide an *extended period of reunification services* to the parent. [Citation.] It does not relieve the Agency from its obligation to provide reunification services to a deported parent." (*A.G.*, *supra*, 12 Cal.App.5th at pp. 1002-1003.)

Here, unlike *A.G.*, mother's whereabouts did not become known until more than six months after Bastian's out-of-home placement, mother had no statutory right to reunification services, and there is no issue as to whether the Department provided mother with reasonable court-ordered services. *A.G.* is therefore inapposite.

Mother's conclusory allegations that "[i]t is in the best interest of the minor to reunify with his mother" and that "[s]he is ready and willing to provide [Bastian] with a safe and stable home" are insufficient to make a *prima facie* showing that granting her reunification services or custody of Bastian would be in the child's best interests. "If a petitioner could get by with

general, conclusory allegations, there would be no need for an initial determination by the juvenile court about whether an evidentiary hearing was warranted. In such circumstances, the decision to grant a hearing on a section 388 petition would be nothing more than a pointless formality.” (*In re Edward H.* (1996) 43 Cal.App.4th 584, 593.)

Mother fails to establish that the summary denial of her section 388 petition was arbitrary, capricious, or beyond the bounds of reason. The juvenile court did not abuse its discretion by denying mother a hearing on her section 388 petition.

III. Substantial evidence supports the denial of mother’s petition

There is substantial evidence in the record to support a determination that granting mother’s section 388 petition was not in Bastian’s best interests. Bastian reported that mother had gone to Chile when he was three years old, that he was sleeping at the time and did not see her when she left, and that he had not seen her or spoken to her since. The MAT determined that Bastian was exhibiting anxious, hyperactive, and defiant behaviors as the result of multiple traumas, including mother’s departure when he was three years old and his inability to say goodbye to her when she left. Despite these traumas, Bastian was thriving under the care of his paternal uncle, with whom he had been placed since November 2016. The paternal uncle was meeting Bastian’s emotional, educational, and mental health needs while providing a safe and stable home environment, and Bastian reported feeling safe, cared for, and happy in his uncle’s home.

Mother’s unsupported assertion that “it was presumptively in Bastian’s best interests that services be granted” once she had been located is legally incorrect. Such a presumption applies only when the whereabouts of a parent become known within six

months of the out-of-home placement of the child. (§ 361.5, subd. (d).) Here, mother's whereabouts remained unknown for more than six months after the juvenile court denied her custody and reunification services under section 361.5, subdivision (b)(1).

Mother failed to meet her burden of proving that the requested modification of the juvenile court's order was in Bastian's best interests. The juvenile court accordingly did not err by denying mother's section 388 petition.

DISPOSITION

The order denying the petition under section 388 is affirmed.

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_____, J.
CHAVEZ

We concur:

_____, P. J.
LUI

_____, J.
HOFFSTADT