Filed 3/19/13 In re MacKenzie K. CA2/4

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

In re MACKENZIE K. et al., Persons Coming Under the Juvenile Court Law.	B242711 (Los Angeles County Super. Ct. No. CK80592)
ALEX K., Appellant, v. LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Respondent.	

APPEAL from an order of the Superior Court of Los Angeles County, Marilyn K. Martinez, Commissioner. Affirmed.

Lara Anderson for Appellant.

John F. Krattli, County Counsel, James M. Owens, Assistant County Counsel, and Jeanette Cauble, Senior Deputy County Counsel, for Respondent.

Alex K. (Father) appeals from the juvenile court's order granting in part and denying in part his petition under Welfare and Institutions Code section 388.[1] Father contends that the court's denial without a hearing of his request for visitation with his daughters violated his due process rights. We conclude that Father has not made the requisite showing of new or changed circumstances in order to trigger the right to a hearing. We therefore affirm.

FACTUAL AND PROCEDURAL BACKGROUND[2]

The family consists of Father, Tania K. (Mother),[3] and four children: Mackenzie (born in 1999), Frances (born in 2001), Sydney (born in 2003) and Charlie (born in 2006).[4] On January 6, 2010, the Los Angeles County Department of Children and Family Services (DCFS) filed a section 300 petition against Father and Mother. On June 10, 2010, the court sustained the allegations in the petition that Father abused Frances by striking her on the head, that Father and Mother had a 12-year history of domestic violence, and that Mother had a history of emotional problems.

On October 1, 2010, the court ordered family reunification services for Mother and Father and ordered Father to participate in counseling and domestic

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

2 This case has a long history, most of which we need not reiterate for purposes of this appeal. We set forth enough to explain that Father has not established changed circumstances but instead has continued to engage in the type of conduct that led to the suspension of visitation with his daughters.

3 Mother is not a party to this appeal.

4 MacKenzie, Frances, and Sydney are collectively referred to as "girls" or "daughters."

abuse services. Mother was ordered to participate in counseling and Alcoholics Anonymous (AA) or Narcotics Anonymous meetings. The court ordered monitored visits for Father.

In a December 21, 2010 interim review report, DCFS asked the court to issue a restraining order against Father prohibiting him from having any contact with Mother. According to the report, Mother was afraid of Father because he had been waiting for her outside her AA meetings, calling her, and following her. The court issued a temporary restraining order against Father prohibiting him from coming within 100 yards of Mother or the children unless he was exercising his permitted visitation rights.

On January 6, 2011, DCFS submitted last minute information for the court, stating that Father was harassing and intimidating numerous parties, including Mother, DCFS, the children's therapists, and the domestic violence shelter where Mother stayed. DCFS thus asked that Father's visits be limited to one hour per week at the DCFS office. The court issued a permanent restraining order and restricted his visits to one hour per week at the DCFS office.

On January 31, 2011, DCFS filed a section 388 petition, asserting that Father continued to harass and intimidate Mother, the children, and DCFS. DCFS stated that Father continually asked the children about Mother's whereabouts, causing them distress and fear. DCFS thus asked the court to terminate phone contact between Father and the children and to limit monitored visits to one hour per month.

On March 1, 2011, DCFS provided a report to the court, stating that the girls seemed happier since phone contact with Father had ceased, although they were sad about having no contact with him. The children requested one-hour visits with Father every other week. The court granted Father monitored one-hour visits every

other week but did not permit Father phone contact, explaining that Father had sabotaged prior foster placements, did not comply with court orders, and said inappropriate things to the children.

On April 21, 2011, DCFS reported that Father had videotaped the children thanking him for gifts and telling him that they loved him during a visit. DCFS further reported that, on April 8, 2011, Father had submitted a request for ABC News to be allowed to attend a hearing and videotape the proceedings, which the court denied. Nonetheless, ABC News accompanied Father to an April 12, 2011 hearing and tried to attend the hearing. The court thus ordered that no videos were to be taken of the children and that still pictures could be taken in the last five minutes of every visit, but not distributed to the media.

In May 2011, DCFS filed a section 388 petition asking the court to order Father to have no contact with the children because of Father's "insulting and intimidating" behavior toward DCFS staff during two visits. DCFS explained that, during an April 26, 2011 visit, Father took pictures of the children and then took a picture of the social worker despite her request that he not do so. Frances became upset and told Father to stop. At a May 10, 2011 visit, the social worker told Father not to take so many pictures of the children. Father then tried to take the social worker's picture, but she turned her back to him. The social worker then told the children to start cleaning up because the visit was over. Father told the children not to clean up because the social worker would clean up. The social worker responded that she was not a maid, and Father said she looked like a maid. The children were crying and telling Father to stop. The children subsequently told a different social worker they did not want to have visits with Father because it was so embarrassing and they were afraid Father would force them to move to a different foster home.

On May 24, 2011, the court made an emergency order suspending Father's visits pending a June 17, 2011 hearing. At the June 17 hearing, Mackenzie testified that she missed and loved her father but that he usually would "do something wrong" and then the children would end up crying. She felt embarrassed by Father's behavior and worried that he would get in trouble.

Frances testified that Father's behavior was hurting the family. She also testified that Father asked her questions about Mother that made her nervous because it seemed that Father was trying to find out where Mother was. Frances did not want to have visits with Father at that time because his behavior hurt the family.

Sydney testified that she sometimes felt afraid with Father because he might do something bad such as take pictures of the social worker. She did not want to attend therapy with Father because he might lie to the therapist. The court found that the children were stressed by the visits and needed "a cooling-off period," and so continued the suspension of Father's visits.

On July 5, 2011, Father filed a section 388 petition asking the court to restore his visitation. He stated in his declaration that the DCFS service log was full of false and defamatory statements and detailed the statements he thought were false. The court denied the petition, stating that visitation had been suspended following a full hearing and that Father's petition was an attempt to relitigate the issues. The court thus found that Father had not established a change in circumstances or that the change would promote the best interests of the children.

In an interim review report for a July 12, 2011 contested section 366.21 12-month status review hearing, DCFS stated that Father had been participating in domestic violence classes and individual therapy. Father's psychiatrist, Dr. Vladimir Lipovetsky, submitted a letter indicating that Father's symptoms of anger

and frustration were due to the court proceedings and Father's perception that he was unable to please the court because he was "accused of having 'various disturbances' which [he] did not have." DCFS noted that Father had discontinued individual therapy due to cost constraints and Dr. Lipovetsky's opinion that the symptoms were caused by the external court proceedings. Because Father had not re-enrolled in therapy, DCFS found that Father had not complied with the court-ordered case plan. The report also relied on Father's behavior in the past two visits to recommend that the court terminate reunification services for him.

At a September 22, 2011 hearing, Father acknowledged that his visits had been terminated because of his altercations with social workers. The juvenile court denied Father's request to restore visitation and telephone contact with the children. The hearing was continued numerous times until November 28, 2011.

In an addendum report prepared for the November 28 hearing, DCFS reported that Father had sent a letter apologizing to a social worker for an inappropriate email and telling her that he had learned through a 52-week domestic violence program that his conduct constituted domestic violence. He expressed remorse and reassured her that the conduct would not continue. However, DCFS further reported that, on November 3, 2011, Father confronted Mother in the parking lot of the courthouse to ask if she was in a relationship with the man accompanying her. Father then kissed Mother and walked away. On November 8, 2011, Father forced his way into Mother's condo, tried to have sex with her, and held her there against her will. On December 8, 2011, the juvenile court issued a permanent restraining order against Father.

On February 14, 2012, the court found that return of the children to the parents would be detrimental, that reasonable reunification services had been provided, and that both parents had substantially complied with the court's orders

but had not made sufficient progress. The court terminated reunification services, maintained the order of no contact with Father, and set the matter for a section 366.26 hearing.

On April 11, 2012, Mother filed a section 388 petition asking that the court either place the children in her custody or grant her further reunification services. At an April 30, 2012 hearing, the court denied Mother's request for custody but granted her additional reunification services. The court granted Father a monitored visit with Charlie following the hearing but denied his request for a visit with the girls. Father asked the court to consider permitting monitored visitation with the girls if they wanted to see him, but the court stated that it could not delegate the decision to the children. However, the court stated that it would take the children's desires into consideration in making its decision.

On May 25, 2012, Father filed the section 388 petition at issue here, asking the court to change its May 24, 2011 order suspending his visits with the children. He asked the court to order weekly monitored visits with Charlie and to commence monitored visits and conjoint therapy with the girls.

In his declaration in support of his petition, Father stated that he had not been allowed to have visitation with the girls for a year. He detailed how well his April 30, 2012 visit with Charlie went and how sad he and Charlie were at the end of the visit. He stated that he did not want his children to think that he had abandoned them. He further stated that, although the girls said they did not want to see him, he thought that they were not old enough to make that decision and that they had been coached. He believed that Mother was telling the girls negative things about him and that, when the girls stated that they did not want to see him, they did not know it would lead to no contact for a year.

On June 5, 2012, the court summarily denied Father's request for monitored visits with his daughters in a therapeutic setting.

At a June 21, 2012 hearing, the juvenile court addressed the remaining issues on Father's section 388 petition and reviewed Mother's request in her section 388 petition for custody. The court granted Mother's petition, terminated suitable placement, and returned the children to her custody. The court granted Father's petition as to Charlie and ordered monthly monitored visits with him, finding that these would be in Charlie's best interest. Father timely appealed from the court's denial without a hearing of his section 388 petition requesting visitation with the girls in a therapeutic setting.

DISCUSSION

Father contends that the court's denial in part of his section 388 petition without affording him a meaningful opportunity to confront or present witnesses violated his due process rights.[5] We conclude that the juvenile court did not abuse its discretion in denying his petition regarding his daughters without a hearing.

"Section 388 permits '[a]ny parent or other person having an interest in a child who is a dependent child of the juvenile court' to petition 'for a hearing to change, modify, or set aside any order of court previously made or to terminate the jurisdiction of the court' on grounds of 'change of circumstance or new evidence.' (§ 388, subd. (a).)" (*In re Lesly G.* (2008) 162 Cal.App.4th 904, 912.) The petitioner must "establish[] by a preponderance of the evidence that (1) new or changed circumstances exist, and (2) the proposed change would promote the best interest of the child. [Citation.] The parent bears the burden to show both a

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[5] A second issue raised by Father on appeal regarding reasonable reunification services was dismissed by order of this court.

‘“legitimate change of circumstances”’ and that undoing the prior order would be in the best interest of the child. [Citation.]” (*In re S.J.* (2008) 167 Cal.App.4th 953, 959 (*S.J.*).)

“‘A parent need only make a prima facie showing of these elements to trigger the right to a hearing on a section 388 petition and the petition should be liberally construed in favor of granting a hearing to consider the parent’s request.’ [Citation.]” (*In re Mary G.* (2007) 151 Cal.App.4th 184, 205 (*Mary G.*).) “‘A “prima facie” showing refers to those facts which will sustain a favorable decision if the evidence submitted in support of the allegations by the petitioner is credited.’ [Citation.] ‘Whether [the petitioner] made a prima facie showing entitling [the petitioner] to a hearing depends on the facts alleged in [the] petition, as well as the facts established as without dispute by the [dependency] court’s own file . . . .’ [Citation.]” (*In re B.C.* (2011) 192 Cal.App.4th 129, 141.)

“‘[I]f the liberally construed allegations of the petition do not make a prima facie showing of changed circumstances and that the proposed change would promote the best interests of the child, the court need not order a hearing on the petition. [Citations.] . . . .’ [Citation.] [¶] The appellate court ‘“will not disturb [a] decision unless the trial court has exceeded the limits of legal discretion by making an arbitrary, capricious, or patently absurd determination [citations].”’ [Citation.]” (*Mary G.*, *supra*, 151 Cal.App.4th at p. 205.)

Father argues that at the hearing on his petition, DCFS made no reference to his positive visit with Charlie and instead focused on Father’s past mistakes. This argument, however, focuses on Charlie rather than on the girls. Father not only received a hearing on the issues in his section 388 regarding Charlie, but the court granted that part of his petition. It was only as to the girls that the juvenile court denied the petition without a hearing.

Father also contends that DCFS' report that he had made no progress was unsubstantiated because DCFS had not seen him or spoken with him in nearly two years. The burden, however, is on Father to show both a change of circumstances and that the proposed change would be in the children's best interest. (*S.J.*, *supra*, 167 Cal.App.4th at p. 959.) The burden is not on DCFS to show that there has been no change in circumstances.

Father has not established a prima facie case that the circumstances have changed. His declaration in support of his petition does not set forth any facts that show changed circumstances. He only describes how well his visit with Charlie went, asserts that Mother is telling the girls negative things about him, and argues that the girls need two parents. He does not set forth any facts to show that his circumstances have changed or that the change would be in the girls' best interests.

Father argues that DCFS expected him to show changed circumstances in terms of his relationship with the girls, but deprived him of the opportunity by obtaining an order that he have no contact with them. However, Father misconstrues his burden. He needs to show that there has been some change in his own circumstances such that the requested change in the juvenile court's order would promote the girls' best interests. He makes no such showing in his declaration, and the record indicates that his circumstances have not changed. DCFS reported two incidents of aggressive behavior by Father against Mother in November 2011. Thus, despite Father's email to the social worker assuring her that he had learned that his conduct constituted domestic violence and would refrain from such conduct, the record indicates otherwise.

Father contends that his case presents facts very similar to those found in *In re Hunter S.* (2006) 142 Cal.App.4th 1497 (*Hunter S.*), in which the juvenile court ordered visitation between the mother and son, but the son refused any contact

with the mother for over two years. During that time, the mother completed a number of programs while in prison and, after her release, "made every effort to remain sober and productive." (*Id.* at p. 1502.) Despite her showing of changed circumstances, the juvenile court found that she had failed to show it was in her son's best interest to be returned to her custody. The juvenile court thus denied her section 388 petition and found the son adoptable under section 366.26.

On appeal, the appellate court stated that "[m]eaningful visitation is pivotal to the parent-child relationship, even after reunification services are terminated. [Citation.]" (*Hunter S.*, *supra*, 142 Cal.App.4th at p. 1504.) The only reason the visitation order was not enforced was the son's refusal to see his mother, which was erroneous because it delegated the visitation decision to the child. (*Id.* at p. 1505.) "By not enforcing its visitation order and delegating the discretion as to whether any visits occurred to others, the [juvenile] court effectively denied [the mother] any postreunification opportunity to repair her relationship with her son." (*Id.* at p. 1507.) Yet the juvenile court had focused on the absence of contact or current bond between the mother and son to find that it was not in the child's best interest to grant the petition. The appellate court concluded that "it was unfair to apply this standard when [the mother] had been denied any chance to satisfy the contact requirement." (*Ibid*.) The court thus concluded the denial of the section 388 petition was an abuse of discretion. (*Ibid.*)

Father contends that, as in *Hunter S.*, he has been denied any opportunity for visitation with his daughters during the reunification period and yet is expected to show changed circumstances in order to have visitation restored. *Hunter S.* is distinguishable.

First, the procedural posture here is different. In *Hunter S.*, the juvenile court held a hearing and found that the mother had shown a substantial change of

circumstances. Here, the question is whether Father has shown a change in circumstances in order to determine whether he merits a hearing, a question we have already answered in the negative.

Moreover, in *Hunter S.*, the mother was denied meaningful visitation "through no fault of her own." (*Hunter S.*, *supra*, 142 Cal.App.4th at p. 1504.) By contrast, here, Father's behavior toward Mother, following her and continuing to engage in aggressive conduct toward her, and his behavior toward the social workers were the factors that led the juvenile court to suspend visitation. Thus, unlike *Hunter S.*, visitation was not "dictated solely by the child[ren] involved." (*In re Nicholas B.* (2001) 88 Cal.App.4th 1126, 1138.)

Father has not made a prima facie showing that the proposed change would promote his daughters' best interests. The court did not abuse its discretion in denying his petition without a hearing.

DISPOSITION

The order appealed from is affirmed.

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WILLHITE, J.

We concur:

EPSTEIN, P. J. SUZUKAWA, J.