Filed 11/30/12 In re A.K. CA2/1

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

In re A.K., a Person Coming Under the Juvenile Court Law.	B241650 (Los Angeles County Super. Ct. No. CK83847)
LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. CATHERINE C., Defendant and Appellant.	

APPEAL from a judgment of the Superior Court of Los Angeles County. Debra L. Losnick, Juvenile Court Referee. Reversed.

Catherine C. Czar, under appointment by the Court of Appeal, for Defendant and Appellant.

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

Catherine C. (Mother) appeals from orders of the juvenile court summarily denying her petition under Welfare and Institutions Code section 388 to modify the order ending her family reunification services and terminating her parental rights with respect to her children, six-year old A.K. and two-year old S.G. We agree with Mother that she was entitled to an evidentiary hearing on her petition prior to the court holding a permanent placement hearing and we therefore reverse both orders.

FACTS AND PROCEEDINGS BELOW

In October 2010, the Department of Children and Family Services (DCFS) filed a petition under Welfare & Institutions Code section 300, subdivision (a),[1] alleging that A.K. and S.G. (the children) were at substantial risk of serious physical harm due to domestic violence between Mother and S.G.'s father (Father) in the children's presence.[2] The juvenile court sustained the petition, removed the children from their home and ordered that they be suitably placed with monitored visitation for the parents. The parents were afforded family reunification services and ordered to attend parenting and domestic violence classes.

The evidence at the six-month review hearing in May 2011 included a police report stating that in March 2011 Father punched Mother on the side of her head, followed her from their residence, pulled her hair and threw her to the sidewalk. Mother told the police that she was four months pregnant with Father's baby and was trying to work things out with him.[3] Father told the DCFS worker that Mother was lying about the March altercation and that the baby was not his. He claimed that he and Mother were not living together and that he was not "romantically involved" with her. The DCFS reported that Mother enrolled in a parenting class and attended five out of nine sessions. Mother

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

[2] Father, F.G., is the biological father of S.G. and the presumed father of A.K. and S.G. He is not a party to this appeal.

[3] The court subsequently sustained a petition as to the baby under section 300, subdivisions (a) and (b) based on the pre-birth domestic violence described above. This order is not a subject of this appeal.

also attended four out of six domestic violence counseling sessions. She consistently visited the children once a week for three hours.

Following the hearing the court found that "neither parent is in substantial compliance" with its orders regarding counseling programs. The court terminated reunification services after seven months and set a date for a permanency planning hearing under section 366.26.

In May 2012, approximately a year after the court terminated reunification services and a few days before the permanency planning hearing, Mother petitioned the court under section 388 to have reunification services restored. In her petition Mother alleged that she had completed her parenting class, was enrolled in a domestic violence program, had participated in individual counseling sessions and consistently visited the children until they were moved to a new foster home in January 2012. The petition further alleged that reinstating family reunification services would benefit the children because they "know and love" Mother; Mother has "been working to provide a safe loving home for them;" and, Mother has "done the programs" the court asked her to do.

The court denied the section 388 petition without a hearing and terminated Mother's parental rights as to A.K. and S.G. Mother filed a timely appeal from both orders.

DISCUSSION

Section 388 provides for modification of prior juvenile court orders when the moving party can demonstrate new evidence or a change of circumstances and that modification of the previous order is in the child's best interest. (*In re Aaliyah R.* (2006) 136 Cal.App.4th 437, 446.) "The parent seeking modification must 'make a prima facie showing to trigger the right to proceed by way of a full hearing.'" (*In re Anthony W.* (2001) 87 Cal.App.4th 246, 250.) The Legislature did not intend to make this showing "unduly burdensome." (*In re Marilyn H.* (1993) 5 Cal.4th 295, 309.) It provided that a prima facie showing is made "[i]f it appears that the best interests of the child *may* be promoted by the proposed change of order[.]" (Italics added.) To be entitled to a

hearing, the petitioner "need[] only . . . show 'probable cause'; [the petitioner is] not required to establish a probability of prevailing on [the] petition." (*In re Aljamie D.* (2000) 84 Cal.App.4th 424, 432-433.) Finally, "[t]he petition [is] liberally construed in favor of its sufficiency." (*In re Daijah T.* (2000) 83 Cal.App.4th 666, 672.) "Thus, if the petition presents any evidence that a hearing would promote the best interests of the [children], the court must order the hearing." (*In re Angel B.* (2002) 97 Cal.App.4th 454, 461.)

We review the juvenile court's summary denial of a section 388 petition for abuse of discretion. (*In re Angel B., supra,* 97 Cal.App.4th at p. 460.)

Here the court did not deny Mother's petition because she failed to show a change of circumstances. Rather, the court denied the petition on the grounds that the proposed reinstatement of reunification services "does not promote the best interest of the child" and the petition was "not timely." The court erred on both grounds.

A. The Petition Was Timely.

The court denied Mother's section 388 petition in part because it was "not timely." Respondent concedes that this was error. Section 388 does not limit the time within which an interested party may petition for a modification of a juvenile court order. On the contrary, as we discuss below, a section 388 petition is intended to serve as an "escape mechanism" to allow consideration of relevant new information any time up to the termination of parental rights. (*In re Marilyn H., supra,* 5 Cal.4th at p. 309.)

B. Mother's Petition Made A Prima Facie Showing That Reinstating Family Reunification Services Would Be In The Children's Best Interests.

Mother stated three reasons why she believed reviving unification services for her and her children would be in the children's best interests. She pointed out that as a result of her consistent visits with the children, they "know and love" Mother. She also stated that she had been working on her own, without support from the DCFS, "to provide a safe loving home" for the children. Lastly, Mother stated that she had "done the programs" the court ordered her to do. At the time the court ruled on Mother's petition,

its file contained evidence supporting Mother's claims. A DCFS report found that Mother consistently visited the children and that A.K. "enjoys having visits" with Mother. (The report stated that S.G. was too young to make a statement.) The file contained Mother's certificate of completion of her parenting class. And, finally, the file held a letter from the Director of Mother's domestic violence support group. The Director stated that Mother "has been an active member of [the] group," has demonstrated that she understands the topics discussed in class and "is learning the tools to keep herself and her children safe." Mother enrolled in the group in November 2011 and as of the date of the letter, March 2012, had attended 11 of 14 sessions.

Given the showing required to obtain a hearing on a section 388 petition (see Discussion, *ante,* at pp. 3-4), we cannot see how Mother's petition, considered in light of the entire record (*In re Angel B., supra,* 97 Cal.App.4th at p. 461), failed to make a prima facie case for giving Mother and the children further reunification services.

Based on the court's statements that the section 388 petition was "not timely" and that "[t]he court does not normally address those [petitions] on the record at a .26 hearing," it appears the court erroneously believed that the immanency of the permanent planning hearing precluded an evidentiary hearing on the petition to modify the order terminating reunification services. Our Supreme Court rejected that view in *In re Marilyn H., supra*. The issue in *Marilyn H.* was whether the juvenile court law or the parent's right to due process required the court at a permanency planning hearing to consider returning the child to the parent. The Supreme Court held that the statutory law does not authorize the juvenile court to consider reunification as an option at the permanency planning hearing but that due process is satisfied nevertheless because the issue of reunification "may be raised by filing a petition pursuant to section 388 for modification or termination of jurisdiction based on changed circumstances." (*In re Marilyn H., supra*, 5 Cal.4th at p. 298.) The court concluded that the ability to petition for modification even as late as the permanency planning hearing is one of the "[s]ignificant safeguards" built into the dependency scheme. (*Id*. at p. 307.) Thus, the

court explained, sections 366.26 and 388, construed together, balance the interests of the parent in reunification and the interest of the child in permanency and stability. Under that balancing, "[t]he parent is given a reasonable period of time to reunify and, if unsuccessful, the child's interest in permanency and stability takes priority." But, even after the focus has shifted away from reunification, "the scheme provides a means [through section 388] for the court to address a legitimate change of circumstances while protecting the child's need for prompt resolution of his custody status." (*Id*. at p. 309.) The parents' petitions under section 388 "are to be liberally construed in favor of granting a hearing to consider the parent's request." (*Ibid*.)

For the reasons stated, we conclude that the court abused its discretion in summarily denying Mother's petition for a restoration of family reunification services.

DISPOSITION

The orders denying the section 388 petition and terminating parental rights are reversed and the cause is remanded for a hearing on the modification petition.

NOT TO BE PUBLISHED.

ROTHSCHILD, Acting P. J.

We concur:

CHANEY, J.

JOHNSON, J.