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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

In re Y.R. et al., Persons
Coming Under the Juvenile
Court Law.

B295611
(Los Angeles County
Super. Ct. No. DK18204A-B)

LOS ANGELES COUNTY
DEPARTMENT OF
CHILDREN AND FAMILY
SERVICES,

Plaintiff and
Respondent,

v.

M.R.,

Defendant and
Appellant.

APPEAL from an order of the Superior Court of Los Angeles County, Robin R. Kesler, Referee. Affirmed.

Caitlin Christian, under appointment by the Court of Appeal, for Defendant and Appellant.

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

M.R. (mother) appeals from the dependency court's January 9, 2019 order summarily denying her petitions under Welfare and Institutions Code section 388.¹ Mother's petitions sought an order returning the minors, Y.R. and D.R., to her care or, alternatively, reinstating reunification services and allowing unmonitored visitation. She contends on appeal the dependency court abused its discretion when it denied the petitions without a hearing. We affirm.

FACTS AND PROCEDURAL HISTORY

Y.R. was born in November 2002, the daughter of mother and Rolando H. D.R. was born in August 2008, the son of mother and Frank R. Neither father is a party to this matter.

On July 7, 2016, the Los Angeles County Department of Children and Family Services (Department) filed a

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

petition under section 300, subdivision (b), alleging the minors were at substantial risk of suffering serious physical harm based upon mother's substance abuse and mother's failure to protect the children from physical abuse occurring in the home. Specifically, the petition alleged mother had a history of illicit drug use, including methamphetamine, and criminal convictions for possession of controlled substances, which endangered the children's physical health and safety and placed them at risk of serious harm. In addition, the petition alleged that the minors' adult sibling and their maternal grandparents physically abused D.R., and that mother knew or should have known of such abuse, but failed to protect him.

On July 7, 2016, the court ordered the children could remain with mother, and authorized the Department to conduct unannounced home visits.

On August 16, 2016, the Department filed an amended petition, which included an additional allegation that mother's mental and emotional problems placed the children at substantial risk of suffering serious physical harm. The petition provided that mother had mental and emotional problems including a diagnosis of Major Depressive Disorder, Severe, with Psychotic Features, which rendered her unable to provide regular care and supervision to her children.

The Department's August 23, 2016 jurisdiction and disposition report stated that "mother appears to have an unresolved history of substance abuse. Mother previously

had an open voluntary case in which mother missed more than half of the drug tests and failed to complete a substance abuse program. During the onset of this investigation, mother failed to drug test for the Department on two occasions.” The minors remained released to mother.

On August 25, 2016, the social worker went to mother’s house and observed a box full of “clear glass pipes that looked similar to drug paraphernalia used to smoke methamphetamine.” Mother claimed they were “art work pieces.” On September 19, 2016, after repeatedly failing to appear for drug testing, mother tested positive for amphetamines, methamphetamine, and alcohol. In early October 2016, mother was arrested for possession of a controlled substance and possession of unlawful drug paraphernalia. The minors were detained and removed from mother’s custody.

On October 13, 2016, the Department filed a second amended petition, adding allegations about mother’s failed drug test and the presence of drug paraphernalia and other safety hazards within and around the home. The court ordered that the children be placed with maternal relatives.

On January 18, 2017, the juvenile court sustained the amended petition allegations and removed the children from parental custody. The juvenile court also granted mother monitored visitation twice per week and ordered mother to participate in the following: a full drug/alcohol program with aftercare; weekly drug/alcohol testing; a 12-step program with court card and sponsor; a developmentally

appropriate parenting course; a psychiatric evaluation; prescribed psychotropic medication; individual counseling to address case issues; any follow-up with any recommended psychiatric appointments.

The Department's six-month status review report was filed on July 19, 2017. The report indicated that the children had been placed with maternal uncle. Mother was not complying with her case plan. She had failed to enroll in any of the court-ordered reunification services, despite being provided the necessary resources to do so. Despite being enrolled in weekly testing since March 2017, mother had failed to drug test. Throughout the Department's entire involvement, mother had been scheduled for 30 tests.

However, she only tested three times, one of which was the positive test for methamphetamine and alcohol on September 19, 2016. Mother's visitation with her children had been sporadic and inconsistent. Mother failed to comply with the agreed-upon visitation schedule; she would instead call the approved monitor (the minors' adult sibling Jimmy) on short notice "once every other week requesting a visit." Y.R. expressed fear that if mother were to comply with the reunification orders, "everything will go back to how it was before." Y.R. instead wanted to remain in the care of uncle. D.R. was also happy living with uncle, but did not appear aware of the circumstances surrounding his family.

At the six-month review hearing, the court continued mother's family reunification services. The court's minute order stated mother had made significant progress in

resolving the problems that led to the removal of her children and had demonstrated the capacity and ability to complete the objectives of the treatment plan. The record on appeal does not include a reporter's transcript from this hearing.

The Department's January 3, 2018, 12-month status review report indicated that the children were thriving with uncle, the children were receiving mental health services, and Y.R. did not want to reunify with mother. Mother's visitation remained inconsistent and she was only in partial compliance with the case plan. Mother began an in-patient drug treatment program but was discharged after a week due to non-compliance. Mother then enrolled in an out-patient drug treatment program, where she had been consistent in her attendance. Mother had also been attending weekly AA/NA meetings, as a requirement of the program. However, mother tested positive for methamphetamine three times between the months of October and December 2017. Mother also failed to address her mental health issues through psychiatric evaluations and individual counseling.

In a last minute information filed on March 9, 2018, the Department indicated that mother had surgery and was temporarily unable to attend her drug treatment program or to participate in her weekly drug testing from January 22, 2018 through February 2, 2018. She subsequently resumed her drug treatment program and consistently tested negative for all drugs for approximately a month, on four

occasions between February 9, 2018 and March 7, 2018. While mother did attend a mental health evaluation, she failed to attend any follow-up appointments. Further, mother had not participated in her court ordered therapy.

At the 12-month review hearing on March 19, 2018, the court found continued jurisdiction was necessary and that mother had only made minimal progress with her case plan. The court terminated mother's reunification services and set a permanency planning hearing for July 2018.

A Department report filed July 3, 2018, indicated that mother's visitation had remained inconsistent and that Y.R. refused to attend some visits. Y.R. described these visits, which occurred at a fast-food restaurant, as "boring" and that "[D.R.] and mother usually play on mother's phone." Mother had missed two visits, and was often 15 to 20 minutes late.

On July 13, 2018, mother filed a section 388 petition,² whereby she sought to change the March 19, 2018 order terminating her reunification services and ordering that the minors remain suitably placed. Mother requested that "the Court terminate the suitable placement order and order a home of parent-mother order. Alternatively, the mother respectfully requests the Court reinstate the mother's family reunification services for a period of six months and order unmonitored, weekend, and overnight visits with children." Mother alleged the following change of circumstances: "The

² The single petition listed both children.

mother completed outpatient services April 18, 2018 at Inter-Agency Drug Abuse Recovery Program and is enrolled in aftercare services. She is due to complete aftercare services in mid-July of 2018. She has a sponsor and is attending a 12-step program. Mother received a psychiatric evaluation and was determined to not need prescribed medication for any mental illness.” Mother argued that the requested order would be in the best interests of the minors because “[m]other regularly visits with children on a weekly basis and has a strong bond with the children. The children are older and are currently with a maternal relative and therefore have a strong tie to the mother and her family.”

Mother attached several exhibits to her section 388 petition, including a letter dated June 28, 2018, from a caseworker at the Inter-Agency Drug Abuse Recovery Program, which stated mother had been enrolled in their aftercare program since April 18, 2018, and that “[h]er UA tests since she began the Aftercare program have all been negative.” In addition, mother submitted a urinalysis log, evidencing 17 drug tests between October 2017 and February 2018, all of which are negative, except for one positive test for amphetamines on November 28, 2017. The court scheduled a hearing on mother’s section 388 petition for August 31, 2018. The court also continued the permanency planning hearing to August 31, 2018.

In an August 20, 2018 interim review report, the Department argued that mother had not presented sufficient evidence to grant the 388 petition. The Department

acknowledged that mother had made some progress, but had yet to complete the court-ordered programs. At the time, mother was reported to be transient, lacking stable housing. The Department was unable to reach mother to inquire about her progress. Further, the children stated that they did not wish to be returned to mother's care, as they were happy residing with their maternal uncle.

The report detailed an August 14, 2018 visit from a social worker, who met with the children in their placement. The social worker reported that "[b]oth children appeared comfortable, happy, and well-adjusted in their placement home with maternal uncle and aunt." When asked about the possibility of returning to her mother's care, Y.R. stated, "I don't want to. She doesn't even have a house. I get worried that [D.R.] will far [*sic*] apart at school. Since being with [their uncle], he's doing a lot better now with reading, basically everything." According to Y.R., mother never helped them with school work while they were living with her. When asked about the possibility of returning to his mother's care, D.R. stated, "I wouldn't want to. I want to stay with them (referring to his aunt and uncle). Because it's just not the time to go. I don't really want to go because I'm doing fine with my Tio and Tia.³ I just don't feel like going with her [mother]. I want to stay with them. I still love her. I just don't want to live with her [mother]."

³ "Tio" and "Tia" means "uncle" and "aunt," respectively, in Spanish.

The Department reported that mother had not illustrated that she was capable of stability, either with housing, mental health, or sobriety. She had been homeless until two months earlier and had not yet demonstrated an ability to sustain her current housing. Mother was not consistent with her mental health services and had not had a consistent, appropriate therapist throughout her entire involvement with the Department. Although mother successfully completed the drug treatment program, she tested positive for methamphetamines on October 17, 2017, November 29, 2017, December 8, 2017, and March 28, 2018. The Department again recommended that the court deny mother's section 388 petition. Y.R. no longer attended the weekly monitored visits with mother, and mother had missed three of such visits with D.R. The Department recommended that the children remain permanently placed with their maternal uncle. The children were well cared for and their medical and educational needs were being met. D.R. was participating in therapy to address his feelings regarding adoption.

On August 31, 2018, the court continued the hearing on the section 388 petition to September 17, 2018. The court continued the permanency planning hearing to January 31, 2019.

In a last minute information, filed September 17, 2018, the Department indicated that when speaking to the social worker in September 2018, mother was surprised to learn of the failed drug test on March 28, 2018. She explained that

she had been temporarily living in an RV with her son, who is a methamphetamine user, and mother attributed her failed drug test to accidental inhalation. The Department noted that mother relapsed several times during her treatment.

At the scheduled September 17, 2018 hearing on the section 388 petition, mother withdrew the petition.

Mother filed a second 388 petition⁴ on December 21, 2018, again seeking to change the March 19, 2018 order terminating her reunification services. Mother requested that “the court terminate the suitable placement order and return the children to her care. If the court is not inclined to release the children back to the [mother]’s care, the mother would respectfully request that the court reinstate reunification services and order unmonitored, overnight, weekend visits with the mother and her children.” Mother alleged the following change of circumstances: “The mother completed an outpatient program on 04/18/2018 and has completed after care services. She has a sponsor and attends twelve step meetings almost daily. Mother also completed a mental health evaluation and the evaluator determined that she did not require psychotropic medication.” Mother argued that the requested order would be in the best interests of the minors because she “regularly visits the children on a weekly basis and has a strong bond with the

⁴ Mother filed two identical section 388 petitions, one for each child. For ease of reference, they will be referred to as a single petition.

children. Furthermore, the children have lived with their mother for most of their lives. Finally, the children are older and currently live with the maternal uncle, thereby continuing to foster the bond that the children share with their mother.”

In addition to the same evidence that mother submitted in support of her prior section 388 petition, mother also submitted the following evidence: eight clean drug tests spanning October to December 2018; a letter from mother’s NA sponsor, dated December 13, 2018, detailing mother’s success in the program; and a AA/NA meeting sign-in sheet, which indicated that mother had attended 27 meetings from October to December 2018.

On January 4, 2019, the court summarily denied the petition, stating the specific reason as “[n]o new info[rmation] since mother withdrew [her] previous 388 [petition on] 9-17-18.”

Mother filed a notice of appeal on February 8, 2019.

DISCUSSION

Mother contends the juvenile court abused its discretion by applying the wrong legal standard regarding a change in circumstances when it summarily denied her section 388 petition, after having previously granted a hearing on a nearly-identical section 388 petition, which she subsequently withdrew. We affirm because mother’s

petition failed to demonstrate a prima facie case that the requested order would be in the best interests of the minors.

Standard of Review

We review the dependency court’s decision to summarily deny a section 388 petition without a hearing for abuse of discretion. (*In re G.B.* (2014) 227 Cal.App.4th 1147, 1158.) “To show abuse of discretion, the appellant must demonstrate the juvenile court exercised its discretion in an arbitrary, capricious or patently absurd manner that resulted in a miscarriage of justice.’ [Citation.]” *In re Elizabeth M.* (2018) 19 Cal.App.5th 768, 780.

“We uphold judgments if they are correct for any reason, “regardless of the correctness of the grounds upon which the court reached its conclusion.” [Citation.] “It is judicial action and not judicial reasoning which is the subject of review” [Citation.] We will not reverse for error unless it appears reasonably probable that, absent the error, the appellant would have obtained a more favorable result.” (*In re Jonathan B.* (1992) 5 Cal.App.4th 873, 876; see also *In re D.O.* (2016) 247 Cal.App.4th 166, 176–177.)

Standard for Setting a Hearing on a Section 388 Petition

“Any parent . . . 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” (§ 388, subd. (a)(1).) “Section 388 . . . gives the court two choices: (1) summarily deny the petition or (2) hold a hearing.” (*In re Lesly G.* (2008) 162 Cal.App.4th 904, 912). “The parent need only make a prima facie showing to trigger the right to proceed by way of a full hearing.” (*In re Marilyn H.* (1993) 5 Cal.4th 295, 310 (*Marilyn H.*)). Although a section 388 petition should be liberally construed in favor of granting a hearing to consider the request, a hearing is only required if the moving party makes a prima facie showing both of changed circumstances and that the proposed change would promote the best interests of the child. (See *In re Edward H.* (1996) 43 Cal.App.4th 584, 592–593.) “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.” (*In re Zachary G.* (1999) 77 Cal.App.4th 799, 806.) The juvenile court may consider the entire factual and procedural history of the case in deciding whether to grant a hearing on a petition under section 388. (*In re Justice P.* (2004) 123 Cal.App.4th 181, 189 (*Justice P.*)).

Mother has not shown an abuse of discretion

Mother contends that the juvenile court applied the wrong legal standard when it denied her request for a

hearing on her section 388 petition on the basis that there was “[n]o new information since mother withdrew [her] previous 388 [petition] on 9/17/2018.” Specifically, mother argues that the juvenile court failed to consider whether there had been a “change in circumstance or new evidence” since *the order* that she was seeking to change, and instead measured changed circumstances from the time of her *prior petition*, which was withdrawn. (§ 388, subd. (a)(1).) She reasons that “[s]ince [the December] petition contained even more allegations of changed circumstances, the court’s finding Mother’s [July] petition made a prima facie showing suggests that, had it applied the correct legal standard, it would have concluded that [the December] petition, too, pled facts sufficient to obtain a hearing.” However, even if we were to assume the juvenile court failed to properly measure a change in circumstances from the time of the last order (i.e., March 2018), we nevertheless would affirm the juvenile court’s summary denial of a hearing, because it was not an abuse of discretion to determine mother failed to make a prima facie showing that the order sought was in the children’s best interests.⁵

⁵ Mother mistakenly assumes the juvenile court’s denial of her second 388 petition was based solely on the change of circumstances prong, and not also on a failure to state a prima facie case that the proposed order would be in the minors’ best interests. The court’s order, which is written on Judicial Council form JV-183, leaves blank the sections that state “the request does not state new evidence or a change of circumstances,” and “the proposed change of

In assessing the best interests of the child, “a primary consideration . . . is the goal of assuring stability and continuity.” (*In re Stephanie M.* (1994) 7 Cal.4th 295, 317 (*Stephanie M.*)) “A petition which alleges merely changing circumstances and would mean delaying the selection of a permanent home for a child to see if a parent, who has repeatedly failed to reunify with the child, might be able to reunify at some future point, does not promote stability for the child or the child's best interests.” (*In re Casey D.* (1999) 70 Cal.App.4th 38, 47.) After reunification services have been terminated, the court’s focus in evaluating a child’s best interests shifts to the child’s need for permanency and stability. (*Stephanie M.*, *supra*, 7 Cal.4th at p. 309; *In re J.C.* (2014) 226 Cal.App.4th 503, 526–527.)

Mother’s December 2018 petition alleged that the requested order would be in the best interests of the children because she regularly visited them, they lived with her for most of their lives, and they were currently residing with a maternal relative. Even giving full credit to mother’s allegations that she had maintained a strong bond with her children, mother has not made a *prima facie* showing that reinstating her reunification services or placing the children

order . . . does not promote the best interest of the child.” Rather, the court’s reasoning is written within the section labelled “Other,” and we read the juvenile court’s reference to a lack of new information to reflect a determination that mother offered no recent or current information with regard to both prongs of the section 388 analysis.

in her custody would serve their best interests in terms of permanency and stability. (See *Justice P.*, *supra*, 123 Cal.App.4th at pp. 189–190 [court may deny a section 388 petition without an evidentiary hearing “if the parent does not make a prima facie showing that the relief sought would promote a child's best interests”].) By December 2018, the children had already been out of mother’s custody and living with maternal uncle for close to two years, and he was committed to providing them permanency through adoption. A permanency hearing under section 366.26 was scheduled for January 31, 2019, and there was ample evidence not only that the minors were thriving in their uncle’s home, but also that Y.R. had been refusing to attend visits with mother and both minors had indicated that they would prefer to remain in the care of their uncle.

Although the juvenile court had granted a hearing on mother’s first section 388 petition, filed in July 2018, it was not an abuse of discretion to summarily deny the nearly-identical section 388 petition that mother filed in December 2018. When mother filed the subject section 388 petition, an additional five months had passed since the prior petition was filed. During these five months, the minors remained under the care of their uncle, where they were thriving. Further, the minors themselves informed a social worker that they did not want to return to mother’s care. Mother wholly failed to address how the additional passage of time would impact the minors’ interest in permanency and stability; indeed, as to this point, the court concluded that

mother provided no new information from the prior five-month period. Moreover, by the time of the court's ruling on mother's second petition, the permanency planning hearing pursuant to section 366.26 had already been delayed an additional approximately six months. Despite this, mother failed to address the minors' interests in permanency and stability at this late stage in the proceedings.

Given "the entire factual and procedural history of the case," we cannot find that the juvenile court abused its discretion in denying a hearing, as mother's petition did not make a prima facie case that the requested relief was in the children's best interests. (*Justice P.*, *supra*, 123 Cal.App.4th at p. 189.)

DISPOSITION

The order denying mother M.R.'s petitions under section 388 without a hearing is affirmed.

MOOR, J.

I concur:

KIM, J.

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BAKER, Acting P. J., Concurring

I concur in the result. The record does not establish the juvenile court applied the wrong legal standard. At worst, the juvenile court can be accused of stating its reasons for denying M.R.'s (Mother's) Welfare and Institutions Code section 388 (Section 388) petition in too shorthand a fashion. But that shorthand is sufficiently clear to permit me to conclude there was no abuse of discretion.

Mother first filed a Section 388 petition in July 2018. It alleged she completed an outpatient drug program and enrolled in aftercare services, was attending 12-step program meetings, underwent a psychiatric evaluation, and was regularly visiting her dependent children. The Los Angeles County Department of Children and Family Services (Department) opposed the request for Section 388 relief and made a compelling presentation regarding the deficiencies in Mother's petition and evidence she had not discussed that undermined her request for a change in the court's prior order. On the date of the scheduled hearing on the Section 388 petition in September 2018, Mother opted to

withdraw it.¹ Three months later, however, Mother refiled nearly the exact same petition, the only difference being some additional drug testing and 12-step program evidence. The juvenile court denied the refiled petition without holding a hearing, stating in a minute order that there was “no new info since [M]other withdrew previous 388 9-17-18.”

Under the circumstances, the juvenile court’s reference to the absence of no new information since Mother’s prior withdrawal of her petition is naturally read as a finding that the petition did not present a *prima facie* case for relief. A party’s decision to withdraw a motion or a petition is often understood as a concession that the filing has no chance of succeeding, and the trial court’s reference to the withdrawal of the petition seems to me to have been made with just that understanding in mind. Coupled with the trial court’s comment that there was no meaningful additional evidence that Mother had produced in the short intervening time since the earlier withdrawal, that is effectively a finding that the refiled petition was so lacking in merit as to permit denial of the petition without a hearing. For the reasons the majority gives, that determination was not an abuse of discretion.

BAKER, Acting P. J.

¹ Our appellate record includes only a minute order for the hearing at which the petition was withdrawn. There is no reporter’s transcript or settled or agreed statement.