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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

In re SKYLER M., a Person Coming Under the Juvenile Court Law.	2d Juv. No. B269847 (Super. Ct. No. J070567) (Ventura County)
VENTURA COUNTY HUMAN SERVICES AGENCY, Plaintiff and Respondent, v. BETH M., Defendant and Appellant.	

Beth M. appeals from the judgment entered after the juvenile court denied a Welfare and Institutions Code section 388 petition for reunification services and terminated parental rights with respect to her seven-month-old son, Skyler M.[1] (§ 366.26.) Appellant has a chronic drug problem and lost custody of three other children before Skyler was born. After Skyler was born, the trial court detained Skyler, bypassed services (§ 361.5, subd. (b)(13)), and summarily denied the section 388 petition for services because it failed to make a prima facie showing that the proposed order for

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

services would promote the best interest of Skyler. (§ 388, subd. (d); Cal. Rules of Ct., rule 5.570(d).) We affirm.

Facts and Procedural History

Appellant is a chronic methamphehetamine user and gave birth to Skyler in July 2015 while incarcerated on charges of identity theft, child endangerment, and shoplifting. Appellant is no stranger to the juvenile dependency system and has suffered devastating drug relapses, resulting in the placement of her three older children (Alexis B., Cooper E., and Hayden M.).

Three months before Skyler was born, the trial court bypassed services with respect to an older brother (Hayden M.) based on appellant's chronic substance abuse, drug relapses, and failure to comply with prior court-ordered treatment. (*In re Hayden M.*, Ventura County Sup. Ct., Case No. J070287.)[2] In that dependency proceeding, appellant admitted using methamphetamine during the first few months of her pregnancy with Skyler.

After Skyler was born, Ventura County Human Services Agency (HSA) filed a new dependency petition for failure to protect (§ 300, subd. (b)), no provision for support (§ 300, subd. (g)), and abuse of a sibling (§ 300, subd. (j)). The trial court sustained the petition at a combined jurisdiction/disposition hearing and bypassed services based on appellant's chronic drug abuse and failure to comply with prior court-ordered drug treatment (§ 361.5, subd. (b)(13)). The court set the matter for a contested permanent placement hearing which was held on February 25, 2016. (§ 366.26.)

Two weeks before the hearing, appellant filed a section 388 petition for reunification services. The petition alleged that appellant had completed a six-month drug treatment program at Prototypes, had received certificates of completion from various programs, and tested clean from July 2015 through November 2015. The petition

[2] The trial court terminated appellant's parental rights with respect to Hayden M. on September 30, 3015. We affirmed the judgment in an unpublished opinion. (B267350.)

alleged that appellant was regularly visiting Skyler and that Skyler "makes eye contact with his mother, engages with her and is able to recognize her."

The trial court denied the section 388 petition without an evidentiary hearing because no prima facie showing was made that the proposed order for services was in Skyler's best interest. At the section 366.26 hearing, the trial court found that appellant has "had a rough history. And I definitely looked at that before I decided to deny the 388 [petition]. . . . [Appellant] appears to have changed at least from the time this case began, but I just didn't think it would be in the best interest of Skyler to wait and see if [appellant] continues to commit to her sobriety especially given her history."

Standard of Review

To be entitled to an evidentiary hearing on a section 388 petition, the parent must make a prima facie showing of changed circumstances and that the proposed change would promote the best interest of the child. (*In re Zachary G.* (1999) 77 Cal.App.4th 799, 806.) A prima facie case is made where the allegations in the petition demonstrate that these two elements are supported by probable cause. (*In re G.B.* (2014) 227 Cal.App.4th 1147, 1157.) "It is not made, however, if the allegations would fail to sustain a favorable decision even if they were found to be true at a hearing. [Citations.] While the petition must be liberally construed in favor of its sufficiency [citation], the allegations must nonetheless describe specifically how the petition will advance the child's best interests. [Citations.]" (*Ibid.*) In determining whether the petition makes the necessary showing, the trial court may consider the entire factual and procedural history of the case. (*In re Jackson W.* (2010) 184 Cal.App.4th 247, 258.)

Citing *In re Jeremy W.* (1992) 3 Cal.App.4th 1407, appellant argues that the summary denial of a 388 petition is subject to de novo review because it affects her procedural due process right to a full and fair hearing. The court in *In re Jeremy W.*, in dicta, suggested that a de novo standard of review applies but acknowledged that section 388 gives the trial "court discretion whether to provide a hearing on a petition alleging changed circumstances. [Citation.]" (*Id.*, at p. 1413.) Our courts have consistently

applied the abuse of discretion standard of review where there is a summary denial of section 388 petition. (See *In re Anthony W.* (2001) 87 Cal.App.4th 246, 250; *In re G.B.*, *supra*, 227 Cal.App.4th at p. 1160; *In re A.S.* (2009) 180 Cal.App.4th 351, 358.) "Under this standard of review, we will not disturb the decision of the trial court unless the trial court exceeded the limits of legal discretion by making an arbitrary, capricious or patently absurd determination. [Citation.]" (*Ibid.*)

Best Interest of Child

In determining whether the section 388 petition makes a threshold showing that the proposed order would promote the best interest of the child, the trial court considers the seriousness of the problem that led to the dependency, the strength of the relationship between Skyler and appellant and Skyler and his foster parents, and the degree to which the problem leading to the dependency has been removed or ameliorated. (*In re Kimberly F.* (1997) 56 Cal.App.4th 519, 532.) Skyler was declared a ward of the court because appellant was a chronic drug user for 15 years and chose drugs over her children. "She learned nothing from losing her [three] older children except that she was placed on notice that she could lose custody of newborn children if she continued to abuse drugs. This warning went unheeded." (*In re Ernesto R.* (2014) 230 Cal.App.4th 219, 225.)

The petition alleges that appellant has completed the drug treatment program at Prototypes, is testing clean for drugs, and regularly visits Skyler. Appellant, however, has never lived with Skyler and did not progress beyond weekly, one-hour supervised visits. Skyler was born while appellant was in jail and placed in a foster home, the only home he has known. The social worker reported that "[w]hile Skyler seems to have interest in contact with his birth mother, his level of attachment with her is uncertain [and] . . . he shows little reaction to seeing or leaving her care following visitation." It was a concern because Skyler was closely attached to his fost-adopt parents who were providing a secure and nurturing home. Appellant did enroll in Prototypes and complete the drug treatment program, but did so to avoid a five year four

month jail sentence. The social worker noted that appellant "self-reports current success regarding her sobriety, [but] it has been short term in nature. . . . [A]ppellant has not shown sobriety or stability outside the supervision of a treatment facility in the past and it is unclear that she will be able to develop this in the future."

The section 388 petition reflects that appellant is still addressing a long term substance abuse problem and is unable to care for Skyler. There is no allegation that appellant is able to provide Skyler a safe home or that Skyler would benefit from reunification services. More importantly, the petition fails to allege why a delay in permanency would benefit Skyler or impact his relationship with his siblings.

The trial court commended appellant for her progress but found that Skyler should not be required "to wait and see if [mother] continues to commit to her sobriety especially given her history." It did not abuse its discretion in ruling that appellant was not entitled to an evidentiary hearing on the section 388 petition. (*In re H.S.* (2010) 188 Cal.App.4th 103, 109.) Appellant "did not carry [her] burden of making a prima facie showing of 'new evidence' to support a finding that 'the best interests of the child may be promoted by the proposed change of order.' [Citations.]" (*Id.*, at pp. 109-110.)

Stated another way, the petition fails to make a prima facie showing that it was in Skyler's best interests to order reunification services and postpone the permanency of an adoptive home. (See, e.g., *In re C.J.W.* (2007) 157 Cal.App.4th 1075, 1081 [summary denial of § 388 petition affirmed].) Assuming, arguendo, that the trial court erred in not conducting an evidentiary hearing on the petition, the error was harmless beyond a reasonable doubt. (*In re Clifton V.* (2001) 93 Cal.App.4th 1400, 1404-1405.) The evidence is overwhelming that appellant is in the beginning stages of overcoming a chronic substance abuse problem and will not, in the foreseeable future, be able to provide Skyler a safe and secure home. (See, e.g., *In re Casey D.* (1999) 70 Cal.App.4th 38, 48-49 [nine months of sobriety insufficient to warrant section 388 modification]; *In re Cliffton B.* (2000) 81 Cal.App.4th 415, 423 [seven months of sobriety since relapse, "while commendable, was nothing new"]; *In re Angel B.* (2002) 97 Cal.App.4th 454, 463

[parent's sobriety very brief compared to many years of addiction].) "Childhood does not wait for the parent to become adequate. [Citation.]" (*In re Marilyn H.* (1993) 5 Cal.4th 295, 310.)

The judgment (order denying section 388 petition and order terminating parental rights) is affirmed.

NOT TO BE PUBLISHED.

YEGAN, J.

We concur:

GILBERT, P. J.

PERREN, J.

Tari L. Cody, Judge

Superior Court County of Ventura

Konrad S. Lee, under appointment by the Court of Appeal, for Appellant.

Leroy Smith, County Counsel, Joseph J. Randazzo, Assistant County Counsel, for Respondent.