Filed 3/2/17 In re A.O. CA2/2

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

In re A.O. et al., Persons Coming Under the Juvenile Court Law.	B271980 (Los Angeles County Super. Ct. No. CK86359)
LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. ANGELA H., Defendant and Appellant.	

APPEAL from a judgment of the Superior Court of Los Angeles County. Robert S. Draper, Judge. Affirmed.

Marissa Coffey, under appointment by the Court of Appeal, for Defendant and Appellant.

Mary C. Wickham, County Counsel, Keith Davis, Assistant County Counsel, Julia Roberson, Deputy County Counsel, for Plaintiff and Respondent.

Appellant Angela H. (Mother) appeals from the juvenile court's denial of her Welfare and Institutions Code[1] section 388 Petition (the Section 388 Petition) by which she sought to regain custody of her seven-year-old (A.O., born 2009,) and five-year-old (A'R.O., born 2011) children (the Children).[2] We conclude that the juvenile court did not abuse its discretion in rejecting Mother's Section 388 Petition.

STATEMENT OF THE CASE

In an earlier proceeding, the Los Angeles County Department of Children and Family Services (DCFS) filed a petition under section 300 petition (the Section 300 Petition) concerning Mother and the Children in July 2013, alleging Mother was unable to provide stable, safe housing for the Children. That petition was ultimately dismissed on March 26, 2014, and the Children were returned to Mother's care from foster care in which they had been placed by order of the juvenile court.

Four days following that dismissal, on March 30, 2014, DCFS received a referral in which it was alleged that Mother had entered a Los Angeles City Police Department station that day and stated that she could not care for the Children and wanted them returned to foster care. The next day, when interviewed by DCFS, Mother stated she had told the court at the March 26th hearing that she did not have a place to live and could not care for the Children as she had been kicked out of her residence and was unable to live in a shelter. She also stated she had called the prior foster mother for the

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

[2] Father was not a party to these proceedings; he was in custody throughout.

Children and had asked her to take the Children back. She then insisted that DCFS take custody of the Children. A police officer confirmed that Mother had asked at the station that the Children be taken from her.

On April 2, 2014, DCFS filed a Section 300 Petition (the Section 300 Petition) on behalf of the Children.[3] That petition alleged the Children had earlier been dependents of the juvenile court due to Mother's inability to provide them with ongoing care and supervision, Mother was again unable to ensure that the Children had the necessities of life (including food, clothing, shelter and medical care), and that on March 30, 2014, Mother had asked that the Children be removed from her care. Mother had a child welfare history which included a juvenile court case which was terminated in 2014. The DCFS social worker had assessed the Children's status as being at "a high risk for neglect" based on Mother's status as living in a tent on the streets, and Mother's initiating the request at the police station that the Children be returned to foster care due to her inability to provide housing and care for them. Mother also reported that the father of the Children was incarcerated and had no will to care for the Children. DCFS also reported that Mother's history of failing to care for the Children supported its view that Mother continued to be unable to meet the basic needs of the Children.

On the date the Section 300 Petition was filed, the juvenile court detained the Children from Mother's care, placed them with the foster family with whom they had been placed earlier, ordered that they resume counseling with their former therapists, allowed Mother unmonitored visits

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[3] Mother gave birth to a third child, by a different father, on August 31, 2015. There is no indication in the record that that DCFS sought to commence dependency court proceedings with respect to that child.

and continued the matter to April 29, 2014. Prior to the April 29th hearing, DCFS learned that Mother had multiple prior arrests and convictions for misdemeanor property and drug crimes. DCFS also began an investigation of reports that Mother had physically abused her five-year-old daughter.

At the April 29, 2014 hearing on the Section 300 Petition, Mother pled no contest to an amended petition. The court declared the Children dependents of the court and removed them from Mother's custody. Mother was given family reunification services and was allowed monitored visits pending the outcome of an investigation that the Children had been physically abused. She was ordered to participate in a parenting program and in individual counseling sessions. A subsequent hearing date of October 28, 2014, was established and Mother was ordered to return.

On September 17, 2014, DCFS filed a section 342 petition (the Section 342 Petition) alleging Mother had "exercised inappropriate physical discipline [to her Children]" using her hand, which it was alleged was excessive and which caused the children to sustain bruising and pain and suffering, and that the children were at risk of physical harm. In its detention report of the same date, DCFS wrote that the five-year-old child had reported that Mother hit her on legs, arms and buttocks during a visit. The seven-year-old child reported that Mother hit her and the younger child and that her younger sister was afraid of Mother even though she enjoyed Mother's visits. Both girls denied that the foster mother hit them. At this time, Mother was homeless and unemployed. Mother denied hitting the children; claiming Father and the foster mother hit them. The court continued the matter, ordering DCFS to submit a supplemental report.

In a jurisdiction/disposition report filed October 28, 2014, DCFS wrote that the five-year-old child had confirmed that it was Mother who hit her and

her sister. Mother continued to deny that she hit the Children, stating it was Father who did so. Mother also claimed the foster mother was manipulating the children. Although Mother was scheduled to visit the Children every Sunday, by the date of the October report, Mother had visited the children only four times in the six months since the Children had been placed in foster care. Mother also had not enrolled in any court-ordered services through the date of preparation of a September 12, 2014 report. The foster mother reported that the children experienced enuresis and encopresis after visits by their mother.[4] After Mother's visits, the foster mother occasionally noticed red marks on the children's arms. The children did look forward to visits by Mother and, when she did not come as scheduled, the children became upset. The therapist who had been treating the Children since 2013 reported that the older child had experienced a regression in symptomology; the younger child had made significant progress and no longer needed therapy. Although Mother claimed she was in a parenting program, she did not provide any document to support her claim.

In concluding a hearing on December 29, 2014, the juvenile court found true the allegation that Mother had used inappropriate physical discipline on the Children and that it caused them pain and suffering. The Children remained detained; Mother was not present for the hearing this date, but had signed waivers and entered a no contest plea and was represented by her counsel. The court also ordered additional reunification services for Mother.

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[4] "Encopresis is the soiling of underwear with stool by children who are past the age of toilet training." (http://www.webmd.com/digestive-disorders/encopresis#1 [as of Nov. 29, 2016].) Enuresis is most commonly known as bedwetting but also occurs in the daytime when a child urinates in his or her underwear. (http://www.webmd.com/mental-health/enuresis [as of Nov. 29, 2016].)

Because the older child had become increasingly aggressive, particularly when Mother missed the scheduled visits, she was placed on Prozac and then Zoloft in early 2015. As of February 2015, she was seeing a new therapist who wrote in a June 2015 report that this child had been hospitalized because of her increasing anger, aggression and unsafe behaviors; the therapist also reported that these behaviors worsened after visits with Mother. These behaviors also had an effect on her younger sister, who was again placed in therapy.

By June 2015, Mother was participating in a program at the Los Angeles Center for Alcohol and Drug Abuse. However, she was not complying with the drug testing protocol, although the two tests she did take were negative. DCFS also now learned that Mother was on probation for a drug-related conviction in connection with which she admitted to selling methamphetamine to an undercover police officer in September 2014. In April 2015, Mother was arrested for a probation violation.

When she did visit Mother was typically late for visits with the Children; usually by 40 minutes or more. Mother would tell the Children the foster mother was at fault for Mother being late. DCFS believed Mother was making up stories about the former foster mother, including alleging that the former foster mother had forged Mother's name on a psychotropic medication prescription for the seven-year-old child. Mother had still not enrolled in individual counseling. The current foster parents reported that Mother had shown little interest in the Children during visits with them. Although she told the Children that they would be going home with her at the end of one visit, that was not correct. After that visit, the Children experienced issues with enuresis and encomprisis. The Children also defecated on themselves during two of Mother's visits during this period. Mother did not clean her

children and blamed the Children for not wanting to be around her. The foster parents reported that the Children became upset with Mother when she missed visits and refused to speak with her on the phone, but when they did speak on the phone, they would say that they loved her. Mother obtained certificates of completion of her anger management and parenting classes in August 2015.

In an October 2, 2015 "Last Minute Information for the Court Report", DCFS wrote that Mother had now attended her first individual counseling session and was scheduled for weekly sessions. Mother's therapist wrote that Mother was motivated and engaged. At Mother's September 27th visit with the Children, Mother barely spoke to the Children and was often on the phone, the older child urinated on herself during the visit and wet herself a second time on the way home from that visit.

Mother continued to live with her boyfriend, the father of her new child. He had a lengthy drug-related criminal history. He was the person with whom Mother had sold drugs to the undercover police officer in 2014. The boyfriend had also been arrested for domestic violence against Mother in February 2015. Mother had told the police that she loved him and did not want him arrested.

On October 2, 2015, the court conducted the 18-month review hearing. (§ 366.21, subd. (f)(1).) Mother was present. After admitting evidence and hearing arguments the court determined that return of the Children to the physical custody of Mother "would create a substantial risk of detriment to the safety, protection, or physical or emotional well-being . . . ." The court also found that Mother had only partially complied with the orders previously made. The court ordered the Children to remain dependents of the court, continued the placement order, terminated reunification services for Mother,

and found that it was in the best interests of the Children to set a hearing on a permanency plan for adoption, guardianship or other permanent living arrangement. The court set the matter for a permanency planning hearing under section 366.26.

In a January 29, 2016 section 366.26 report DCFS wrote that the Children continued in therapy; that between October 2015 and the date of the report, Mother had attended eight visits with the Children and missed eight other visits. DCFS also reported that Mother was to attend a talent show in which the older child was participating, but did not show up. The older child became upset when Mother did not visit and defecated in her pants three times, and said that she was mad at her Mother. Mother showed no interest when the foster mother would tell her of the Children's events, whether dance recitals or holiday programs. The foster parents were willing to adopt the Children with whom it was assessed the Children had healthy bonds.

On March 9, 2016, Mother filed a "Request to Change Court Order" (the Section 388 Petition), by which she sought to reverse the court's October 2, 2015 order terminating reunification services for her, and to set a section 366.26 hearing. In support of her requests, she indicated she "has now participated in over 10 counseling sessions," and "has been a consistently regular group participant over the last four months." Mother wrote in the Section 388 Petition that she had learned proper discipline techniques and was maintaining a safe home environment for her youngest child. She included in the petition that the group therapist had noted that Mother "is a motivated, engaged, and forthcoming client." Finally, it was noted that Mother continues to test clean for DCFS and has "stable housing." Letters from her therapist attached to the petition indicated that Mother was

working on her various issues and "wants to continue working on her recovery process . . . ."

The juvenile court denied this petition on March 17, 2016. The minute order for that date shows that counsel for Mother was present and "walked" the matter on calendar. It also indicates that counsel waived a court reporter. For this reason, we have only the written presentation in the Section 388 Petition, summarized in the paragraph above, to review. That presentation was clearly insufficient. In making its ruling, the juvenile court found that the proposed change "does not promote the best interest of the child[ren]" and did not state new evidence or a change of circumstances.

In an April 1, 2016, status review report, DCFS indicated that the Children were doing well with the foster parents. The older child told DCFS that she felt safe and called her foster mother "Mom." The Children engaged in several extracurricular activities. The older child's encopresis continued, correlated to Mother's visits, and decreased when she did not see Mother. Her sister also referred to the foster mother as "Mom" and was doing well in school, but still had nightmares and anxiety. Between January 1, 2016, and the date of the April report, Mother had visited her daughters once, missing all of the other scheduled weekly visits. When Mother did visit, the Children would not interact with her, but play on her phone. The Children said they loved their Mother but wanted to live with the foster family.

At the April 1st section 366.26 hearing, the court began by noting that the January 29th section 366.26 report documented Mother's inconsistent visitation and "the toll that's had on the girls." Mother's counsel stated that Mother had made every effort to visit with her Children and at the same time care for her newborn. Counsel asked to set the section 366.26 hearing for contest. The court asked Mother's counsel for an offer of proof in response

to counsel's request for a contested hearing. Counsel responded by stating that Mother had been consistent in visiting and was bonded with her daughters. The court then denied the request for a contested hearing, stating "I don't believe at this point that is a sufficient offer of proof on the .26." Counsel for the Children stated that the older girl wanted to live with her Mother but was comfortable with her foster mother. Counsel also stated that the younger sister enjoyed visits with the Mother but was comfortable with her foster mother. Children's counsel joined the request by DCFS to terminate parental rights and proceed with the plan for adoption.

The court found "by clear and convincing evidence that the Children are adoptable, and that there are no legal impediments to adoption. The court finds it would be detrimental to the children to be returned home to Mother. [¶] The court finds that there is no exception to adoption in this case. And, therefore, the parental rights as to [the Children] . . . are hereby terminated." The court also designated the current foster parents as the Children's prospective adoptive parents.

Mother filed a timely notice of appeal from the juvenile court's April 1, 2016 termination of her parental rights, stating that she wanted to appeal "all orders and findings made on [April 1, 2016]."

CONTENTIONS

Mother contends that the court abused its discretion by summarily denying her Section 388 Petition and that the order terminating her parental rights must be reversed. DCFS contends this appeal should be dismissed because Mother did not file an appeal from the ruling denying her Section 388 Petition. If the matter is considered on its merits, DCFS contends that Mother's request should be denied.

DISCUSSION

I. The DCFS request to dismiss

Mother's notice of appeal, prepared by her counsel and timely filed, specifies the findings and orders which she is appealing as follows: "The court terminated my parental rights on 4/1/16. I would like to appeal all orders and findings made on that date." In her opening brief, Mother seeks a reversal based on the order made on March 17, 2016, rather than on April 1, 2016.

DCFS points out, initially, that, while Mother's opening brief addresses the juvenile court's March 17, 2016 summary denial of her Section 388 Petition, she "unambiguously stated she was appealing" the later, April 1st order and makes no mention in that notice of appeal of the earlier denial of the Section 388 Petition. In support of its argument that Mother has not appealed the March 17th order, DCFS cites *Nahid v. Superior Court* (1997) 53 Cal.App.4th 1051, 1068, which holds that the March 17th order is separately appealable. Based on this authority, DCFS asks us to dismiss Mother's appeal.

We find Mother's responsive argument and citation of *In re Madison W.* (2006) 141 Cal.App.4th 1447, to be persuasive on this initial procedural hurdle. As that court reasoned, a notice of appeal should be construed liberally and, in that case, and here, because denial of a Section 388 petition is an appealable order, (§ 395), if an appeal is filed within 60 days of the denial of such a petition, there is no prejudice to the respondent by construing the notice of appeal to include issues presented by the earlier denial of the Section 388 petition. (*In re Madison W.,* at pp. 1450-1451; see also *In re Josiah S.* (2002) 102 Cal.App.4th 403, 418-419.) Here, the notice of

appeal was filed 15 days after the ruling on her Section 388 Petition. Thus, based on these authorities, we find it timely.

II. There was no abuse of discretion in summarily denying the Section 388 Petition.

Section 388, subdivision (a)(1) allows a parent of a child who is a dependent of the juvenile court to petition the court, "upon grounds of change of circumstance or new evidence, . . . for a hearing to change, modify, or set aside any order of court previously made or to terminate the jurisdiction of the court." Subdivision (c) of section 388 states: "'If it appears that the best interests of the child may be promoted by the proposed change of order . . . or termination of jurisdiction, the court shall order that a hearing be held and shall give prior notice.'" (*In re Josiah S.* (2002) 102 Cal.App.4th 403, 418.)

"'The parent need only make a prima facie showing to trigger the right to proceed by way of a full hearing. [Citation.]' (*In re Marilyn H.* (1993) 5 Cal.4th 295, 310.) '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.]' (*In re Edward H.* (1996) 43 Cal.App.4th 584, 593.) '[A] petition must be liberally construed in favor of its sufficiency [citation] and a hearing may be denied only if the application fails to reveal any change of circumstance or new evidence which might require a change of order. Only in this limited context may the court deny the petition ex parte. [Citation.]' (*In re Jeremy W.* (1992) 3 Cal.App.4th 1407, 1413-1414.) Conversely, the hearing on the section 388 petition 'is only to be held if it appears that the best interests of the child may be promoted by the proposed change of order, which necessarily contemplates that a court need not order a hearing if this element is absent from the showing made by

the petition. [Citation.]' (*In re Zachary G.* (1999) 77 Cal.App.4th 799, 807, fn. omitted.)" (*In re Josiah S., supra*, 102 Cal.App.4th at pp. 418-419.)

On review, we do not disturb a juvenile court's denial of a section 388 petition absent abuse of discretion. "[W]hen two or more inferences can be reasonably deduced from the facts, we may not substitute our decision for the juvenile court's decision. (*In re Stephanie M.* (1994) 7 Cal.4th 295, 318-319.)" (*In re Josiah S., supra*, 102 Cal.App.4th at p. 419.) In conducting that review, we keep in mind "'that change of circumstances or new evidence must be of such significant nature that it requires a setting aside or modification of the challenged order.'" (*In re Jamika W.* (1997) 54 Cal.App.4th 1446, 1451 [denying hearing on section 388 petition for insufficient showing that a change would be in the best interests of the child].)

The record in this case clearly establishes that there was no abuse of discretion in denying Mother's March 17th Section 388 Petition. First, Mother made an inadequate offer of proof. Rather than articulate facts that would indicate that she could establish that her circumstances and behaviors had actually changed, Mother only offered the briefest sketch that she was then engaged in the counseling process, viz., that she was now in the process of obtaining assistance. Thus, in her Request to Change Court Order (the Section 388 Petition), Mother indicated she "has now participated in over 10 counseling sessions," and "has been a consistently regular group participant over the last four months." In the letters attached to her petition, a therapist notes that Mother "is a motivated, engaged, and forthcoming client." It was also noted that Mother continues to test clean and has "stable housing." The attached letters also indicated that Mother was working on her various issues and "wants to continue working on her recovery process . . . . ." Mother also wrote in the Section 388 Petition that she had learned proper discipline

techniques and was maintaining a safe home environment for her newborn child.

These representations by themselves did not provide a sufficient offer of proof; assuming arguendo that the facts alleged in this petition could be established, they would only establish that Mother was in the process of developing the skills ultimately needed. The letter from the counselor did not contain any opinion that Mother was far along in her counseling, only that she was in the process. Another letter in the record, from Mother's substance abuse counselor, indicated Mother continued to struggle with daycare and transportation issues and contained the opinion that continued participation in services was necessary. Thus, this information was insufficient to warrant a change in the order challenged.

Second, the facts set out in the petition by themselves, and certainly when considered together with other facts in the record, did not warrant the conclusion that granting the request would be in the Children's best interests. The court was aware that Mother had been ordered to begin the counseling sessions almost two years earlier and had not begun those sessions until recently, over 17 months after they were ordered. The court was also aware that the services were originally ordered because Mother had herself told the authorities, just four days after the Children had been reunited with her on termination of an earlier juvenile court proceeding, that she was unable to care for the Children. It had also been determined that she was inappropriately physically punishing the Children; most often did not attend the scheduled weekly visits with them and when she did attend, she was habitually late and did not engage with the Children; and she had failed to attend the Children's recitals and other program activities. Moreover, the Children were being treated, inter alia, for their traumatic

reactions to the visits Mother did make, viz., for their encopresis and enuresis when Mother was or recently had visited them. The court was also aware that Mother was living with a man who had a lengthy criminal record and that she had recently violated her own probation for a drug offense.

DCFS's reliance on *In re Anthony W.* (2001) 87 Cal.App.4th 246 is well-taken. There, Division Three of this court found insufficient a much more extensive offer of proof. In that case, the mother had indicated she had completed a family reunification program which included drug counseling and testing as well as parenting classes, and that she visited her children regularly. While in the present case, Mother submitted evidence that she was enrolled in appropriate classes, the letters she attached to her petition indicate she was in the process and had not completed any of the classes which had been ordered two years earlier, but which she had only recently begun to attend. And like the circumstances in *In re Anthony W, supra,* Mother's petition does not demonstrate how a change in the subject order would be in the best interests of the Children. (*Id.* at pp. 251-252.)

Instead, in the present case, there is compelling evidence that even infrequent visits by Mother produce severe adverse physical reactions in the Children. And, as in *In re Anthony W.*, at this late stage in the proceedings, just a few weeks prior to adoption proceedings, and after two years of Mother's failures to comply with court orders, there was no abuse of discretion in denying Mother's petition. (See *In re Anthony W., supra,* 87 Cal.App.4th at pp. 251-252.)

The court did not have to overlook the record and rely only on Mother's offer of proof, which even by itself, was insufficient to warrant the new hearing Mother was requesting. When viewed together with the facts known to the court at the time the offer of proof was made, the court could and did

reasonably make the inference that there was no basis to grant Mother's Section 388 Petition.

DISPOSITION

The March 17, 2016 order is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.*
GOODMAN

We concur:

_____, Acting P.J.
ASHMANN-GERST

_____, J.
HOFFSTADT

* Retired Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.