

Filed 2/2/17 In re O.H. CA2/5

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

In re O.H. et al., Persons Coming  
Under the Juvenile Court Law.

B271559  
(Los Angeles County  
Super. Ct. No. CK89373)

LOS ANGELES COUNTY  
DEPARTMENT OF CHILDREN  
AND FAMILY SERVICES,

Plaintiff and Respondent,

v.

R.A.,

Defendant and Appellant.

APPEAL from an order of the Superior Court of Los  
Angeles County, Teresa Sullivan, Judge. Affirmed

Christopher R. Booth, under appointment by the Court of  
Appeal, for Objector and Appellant.

Mary C. Wickham, County Counsel, R. Keith Davis,  
Assistant County Counsel, Sarah Vesecky, Senior Deputy County  
Counsel, for Plaintiff and Respondent.

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R.A. (mother) appeals from an order denying her Welfare and Institutions Code section 388<sup>1</sup> petition seeking unmonitored visitation and reinstatement of reunification services. Mother contends the dependency court's decision to deny her request for a continuance violated her right to due process. Finding no due process violation, we affirm the order.

### **FACTUAL AND PROCEDURAL BACKGROUND**

This dependency case involves mother's three children: Oct. (born April 2007), Ome. (born December 2008), and Oma. (born August 2010). The children were detained from mother in December 2011 and placed with maternal cousin Michelle Jones. In May 2012, they were adjudicated dependents based on sexual abuse of Oct., medical neglect of Ome. (who has sickle cell anemia), and exposure to domestic violence.

The court ordered mother to attend parenting classes and sex abuse awareness counseling, as well as individual and conjoint counseling to address case issues. Mother's visits were to be monitored. The court terminated mother's reunification

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<sup>1</sup> All further statutory references are to the Welfare and Institutions Code, unless otherwise indicated.

services at the six-month review hearing under section 366.21, subdivision (e).

### *Permanency planning*

When the Los Angeles County Department of Children and Family Services (Department) initially tried to contact Jones in December 2012 to discuss permanency options for the children, it was unable to reach her. Maternal great-aunt (Jones's mother) stated the family was only willing to provide long-term foster care and was not interested in a more permanent option. At the six-month review hearing in December 2012, the court ordered the Department to begin permanency planning and to report on its progress by March 21, 2013.

In March 2013, Jones advised the Department that she could not provide permanency for all three minors. She stated she was willing to provide permanency for Oma. and Ome., but Oct.'s negative behaviors were too much to handle. Oct.'s behavior improved by June, after she began taking psychotropic medications.

The Department had not identified an adoptive home for the children as of the end of 2013, but was pursuing options like internet recruitment and adoption events. Unfortunately, no families expressed interest in adopting the three siblings.

Efforts to place the children for adoption continued in 2014. In October 2014, the Department reported that it had identified a possible match and would continue to work on placing all three children for adoption. By November 2014, the prospective adoptive family decided against pursuing adoption, based in part on Ome.'s medical needs and Oct.'s behavioral issues. Jones

again advised the Department that she was willing to continue to foster the three children until a permanent home was identified, but she was not interested in pursuing permanency.

By December 2014, the Department had determined that four-year-old Oma. met the criteria for a D-Rate, based on learning impairments, difficulties concentrating and interacting with others, impulsivity, temper tantrums, anger, and aggression. A Department report described Oct. as generally friendly and smart, but she could be unkind and disrespectful towards adults.

In April 2015, the Department reported it had not yet identified a prospective adoptive family. Jones informed the Department that the children's behaviors were digressing. The Department determined it was time to begin considering placing the children separately.

Jones gave the Department a seven-day notice in September 2015, asking the Department to find a new placement for Oct., whose negative behaviors had escalated dramatically. A Department social worker took Oct. to a mental health clinic after an incident at school where Oct. threatened to kill two classmates, herself, and her brothers. The clinic determined hospitalization was not necessary, but two subsequent foster home placements ended in less than a week when the foster parents requested Oct.'s removal. Oct. claimed her mother told her to act badly.

Oct. was in emergency placement at a girls' residential facility for 30 days, and then returned to Jones's home in October 2015. In November 2015, a social worker met with Jones to discuss the option of long-term foster care, but Jones declined the offer. Jones "was very clear that she was unwilling to provide

long term care for the children and urged [the Department] to continue looking for an adoptive home for the children.”

On December 10, 2015, the court declared the children a bonded sibling unit.

*Mother’s participation in services and visitation*

Mother had consistent monitored visits with the children after the children were detained, until she moved to Las Vegas in the summer of 2012. She then stopped visiting the children and only had telephone contact with them. She was not compliant with reunification services, including drug testing. The court terminated her reunification services at the six-month hearing. Mother resumed consistent visits in June 2013 after the Department set up a written visitation schedule as ordered at the six-month review hearing. Mother’s daily visits went well.

By the fall of 2013, Mother told the Department she was attending parenting classes, individual counseling, and substance abuse counseling, and was planning to file a petition under section 388 asking the court to reinstate reunification services. A social worker observed the children with mother and noted that mother had difficulties controlling the children. Mother failed to appear for urine testing twice in October 2013, and had a positive urine test in December 2013.

In February 2014, the court gave the Department discretion to liberalize mother’s visitation if she continued to progress. A few days later, mother filed a petition under section 388, asking the court to grant unmonitored visitation and reinstate reunification services. The Department initially opposed the petition because of concerns that mother had not

attended programming for sexual abuse awareness and appeared to be losing motivation in the substance abuse program. A separate report recommended granting the petition after social workers met with mother and she agreed to additional counseling, but a few days later, the Department filed a last minute information that recommended denying the petition. Mother ultimately withdrew the petition.

Mother's regular visits went well for the first half of 2014, but in the second half of the year, Jones reported mother was not visiting the children in person, and was calling only sporadically. Mother's visits remained inconsistent through 2015.

On October 19, 2015, mother filed a second petition under section 388, asking the court to reinstate reunification services and grant unmonitored visits with her children. The court denied mother's petition without a hearing, finding no change in circumstances. A status review report for December 2015 stated that mother had monitored visits with the children twice a week, and that mother was visiting with the children sporadically. Mother told Oct. to misbehave in school, and made promises to Oct. that she could not keep.

#### *Mother's most recent section 388 petition*

On December 10, 2015, mother filed a third petition under section 388, again seeking reunification services and unmonitored visitation. Mother asserted she had completed all the programs ordered by the court, including a full sex abuse awareness program, a full parenting program, and a full domestic violence program. She had also tested clean for drugs and understood her children's needs and how to protect them. Mother

claimed the requested changes were in the children's best interests because they were bonded to her, she visited them consistently and regularly, and had done everything possible to have them returned to her. The court set the matter for a February 29, 2016 hearing.

On the February 29, 2016 hearing date, the Department filed two interim review reports (one for Ome. and another for Oct. and Oma.) reviewing mother's recent interactions with the children and other family members. The Department also filed a last minute information report. During an interview with the social worker assigned to Ome.'s case, mother claimed to have attended around five of Ome.'s medical appointments, but could not give the dates. She admitted she did not attend an annual appointment with the medical team at Children's Hospital Los Angeles in January 2016, but planned to call to schedule another appointment to get educated about Ome.'s current medical needs. Jones told the Department she informed mother about all of Ome.'s medical appointments by text message, but mother had only attended one appointment. Jones also expressed concern that mother did not ask about Ome.'s health and medication regimen during visits, and did not assume a parental role during visits. There were two incidents where Jones and the Department believed mother had instructed Oct. and Oma. to misbehave. Jones claimed that mother whispered to Oma. to misbehave and soil himself during visits with a prospective foster parent. Oma. confirmed the account to the social worker, and he did act out during the visit. The possible match was dissolved. In mid-February, Oct. left several voicemail messages for the social worker, who then met with Oct. at school. The social worker asked Oct. what she did over the weekend, and Oct.

looked down and said, “My mom told me to call you and tell you a lie.” She explained that her phone call on Saturday telling the social worker that “auntie Chelle was hitting [Oma.] and stuff . . . that was a lie.” In addition, a social worker interviewed mother, Jones, and Oct. about an incident in early February where it was alleged mother had stolen a cell phone and was refusing to leave maternal great-aunt’s home, and the police were called. Oct. said mother was cursing and yelling and would not leave until the police came. Oct. also told the social worker she did not want to have visits with mother, telling the social worker mother was “always saying stuff and telling me to do stuff. She be making things bad. I just don’t want too [sic].”

Mother sought a continuance at the scheduled section 388 hearing, so she could have the opportunity to collect evidence to counter the Department’s report. She also asked for the children to be present, since much of the Department’s report was based on statements by the children. The court denied mother’s request, noting that mother was present during the incidents described in the Department’s reports. Mother testified at the hearing, describing what she had learned in the various programs she had attended. She testified she attended three of Ome.’s doctor’s appointments, and denied telling Ome. to act out. She also claimed that her statements to Oct. had been blown out of proportion, and she was just encouraging Oct. to report what Oct. had told mother about Jones dragging Oma. down the sidewalk. Mother denied stealing her maternal grandmother’s cell phone, and claimed that the incident which led to the maternal great-aunt getting a restraining order against her took place after mother told Jones that she thought she might get her children back on the 29th. Mother claimed Jones and another



woman “had a few girls jump me outside” and mother refused to leave until the police were called to escort her to her car.

The Department called maternal great-aunt as a witness. She testified that she had sought a restraining order against mother after mother was disrespectful to her, and her foul language got worse after maternal great-aunt asked her to be quiet. She testified the children were sitting on the sofa and observed mother’s behavior.

Finding no changed circumstances and that the requested change would not be in the children’s best interests, the court denied mother’s section 388 petition.

## DISCUSSION

### *Standard of Review*

“The juvenile court has the power to ‘control all proceedings during the hearings with a view to the expeditious and effective ascertainment of the jurisdictional facts and the ascertainment of all information relative to the present condition and future welfare of the person upon whose behalf the petition is brought.’ [Citations.] Although continuances are discouraged in dependency cases [citation], the juvenile court may continue a dependency hearing upon a showing of good cause, provided the continuance is not contrary to the interest of the child. [Citations.] . . . ‘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 Emily D.* (2015) 234 Cal.App.4th 438, 447–448.)

A court's decision to deny a section 388 petition is also reviewed for abuse of discretion. (*In re Stephanie M.* (1994) 7 Cal.4th 295, 318 (*Stephanie M.*) [the lower court's decision on a section 388 petition is "committed to the sound discretion of the juvenile court, and [its] ruling should not be disturbed on appeal unless an abuse of discretion is clearly established"].) We do not inquire whether substantial evidence would have supported a different order, nor do we reweigh the evidence and substitute our judgment for that of the lower court. (*Ibid.*) We ask only whether the court abused its discretion with respect to the order it actually made. (*In re Jasmine D.* (2000) 78 Cal.App.4th 1339, 1351.)

*The dependency court did not abuse its discretion in denying mother a continuance to obtain additional evidence on her own petition for a change of court order*

Mother contends that the court's decision to deny her a continuance violated her right to due process because it deprived her of the right to present evidence to dispute the Department's reports. We disagree, and find no abuse of discretion in the court's action.

Upon a showing of good cause, the dependency court may continue a hearing, provided that no continuance shall be granted that is contrary to the interest of the minor. (§ 352, subd. (a).) A petitioner under section 388 seeking modification of an earlier court order must present new evidence or a change of circumstances and demonstrate modification of the previous order is in the child's best interest. (*Stephanie M., supra*, 7 Cal.4th at p. 317.) After a parent's reunification services have been terminated, the court's focus is on the needs of the child for

permanency and stability, and to revive the question of reunification, the parent bears the burden of proof. (*In re Vincent M.* (2008) 161 Cal.App.4th 943, 955.) “A juvenile court order may be changed, modified or set aside under section 388 if the petitioner establishes by a preponderance of the evidence that (1) new evidence or changed circumstances exist and (2) the proposed change would promote the best interests of the child. [Citation.] 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 Zachary G.* (1999) 77 Cal.App.4th 799, 806.)

Mother argues the court should have granted a continuance to give her the opportunity to present evidence to refute the information in the Department’s reports, because she only received the reports the morning of the hearing. She claims the rationale behind requiring the Department to give parents advance copies of its reports in the context of other dependency hearings should apply equally to hearings under section 388, but there is no legal authority to support her argument. The authorities she cites all involve situations where the Department bears the burden of proof, such as jurisdictional or dispositional hearings. (See, e.g., § 355, subd. (b)(3); § 366.05; Cal. Rules of Court, rule 5.690(a)(2); *In re C. P.* (1985) 165 Cal.App.3d 270, 273–274 [continuance to give father opportunity to prepare for jurisdictional hearing].)

Mother filed her third section 388 petition seeking reinstatement of reunification services on December 10, 2015, and on December 22, 2015, the court granted a hearing on the petition and ordered the Department to submit a report. Neither

the court nor mother requested an advance copy of the Department's report. The Department filed two separate reports on February 29, 2016, detailing interviews the social workers conducted with mother, Jones, Oct., and Oma. in January and February. A third report attached a criminal history report for mother's boyfriend, that was later determined to be inaccurate. As the court pointed out when it denied mother's request for a continuance, the information included in the Department's reports was known to mother in advance of the hearing. Mother had the opportunity to testify at the hearing, and she testified about what she learned in her classes. She also denied coaching the children to misbehave.

Given that mother had the burden of showing both changed circumstances and that the requested change in court orders would be in the children's best interests, we find no abuse of discretion in the court's determination that good cause did not exist to grant mother's requested continuance of the section 388 hearing. Mother had sufficient time to prepare evidence in support of her request for a change in court orders, and the fact that the Department's reports documented some recent events did not warrant giving mother additional time. Even if the Department had submitted no new information in its report, mother failed to demonstrate that she had the skills needed to care for her three children, particularly considering Oct.'s behavioral and mental health needs, and Ome.'s medical needs.

## **DISPOSITION**

The court's order denying mother's section 388 petition is affirmed.

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KRIEGLER, J.

We concur:

TURNER, P.J.

BAKER, J.