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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

In re Morgan A., a Person Coming Under the Juvenile Court Law.	B231326
LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. ANGELA L., Defendant and Appellant.	(Los Angeles County Super. Ct. No. CK82371)

APPEAL from orders of the Superior Court of Los Angeles County. David R. Fields, Judge. Dismissed in part and reversed in part.

Cristina G. Lechman, under appointment by the Court of Appeal, for Defendant and Appellant.

Andrea Sheridan Ordin, County Counsel, James Morgan A. Owens, Assistant County Counsel, Peter Ferrera, Deputy County Counsel, for Plaintiff and Respondent.

Maternal grandmother Angela L. appeals (1) from the dependency court's dispositional order placing minor Morgan A. with Morgan A.'s paternal uncle, and (2) from denial of appellant's petition under Welfare and Institutions Code section 388 (section 388 petition) alleging new evidence justified changing Morgan A.'s placement.[1] We dismiss the appeal from the dispositional order, reverse the order denying the section 388 petition, and remand for the trial court to conduct a full hearing on the petition.

FACTS AND PROCEEDINGS

Respondent Los Angeles County Department of Children and Family Services (the department) detained minor Morgan A. immediately after her birth in April 2010 and placed her with her maternal grandmother, appellant Angela L. The department filed a petition under section 300 alleging illegal drug use and domestic violence by Morgan A.'s parents put her at risk of harm. At the adjudication hearing in July 2010, the court sustained the petition's allegation that Morgan A.'s parents had failed to protect her from their behavior's harmful effects.

When appellant received Morgan A. into her care, appellant already had full legal and physical custody of Morgan A.'s older half sister, Hannah A., born in 2001. Hannah A. had a history of behavioral and psychiatric problems, including Bi-polar and Attention Deficit Hyperactivity Disorder, defiance, and physical aggression, resulting in her psychiatric hospitalization. In the weeks and months immediately after Morgan A.'s placement with appellant, the department opined that Hannah A.'s "defiant and aggressive behavior, which includes hitting and spitting at her grandmother [appellant] and running outdoors, presents a risk to the child Morgan." Based on the department's reports, the court ordered appellant not to leave Hannah A. and Morgan A. alone

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

together. Nevertheless, the department discovered at least one instance where appellant appeared to have violated that order.

On October 7, 2010, the court held the disposition hearing for Morgan A. The department opined that Hannah A.'s special needs overwhelmed appellant, rendering appellant unable to properly care for and protect Morgan A. The department told the court, "In view of minor Hannah's longstanding and ongoing defiant and hostile behavior, multiple and recent Psychiatric hospitalizations coupled with [appellant's] limited ability to effectively control or handle the child, the department continues to have serious concerns as to the safety of minor Morgan. [Appellant] has been observed as being clearly overwhelmed and ineffective with the child Hannah." Accordingly, the department recommended that the court place Morgan A. with her paternal uncle and order liberal visitation with Morgan A. for both appellant and Hannah A. At the end of the disposition hearing, the court's order adopted the department's recommendations.

A little less than six weeks later on November 16, 2010, appellant filed a section 388 petition alleging new evidence justified returning Morgan A.'s physical custody to appellant. In support of her petition, appellant submitted several letters from third parties challenging the department's assessment that Hannah A.'s behavior endangered Morgan A. The court granted a hearing for January 3, 2011, on appellant's section 388 petition and directed the department to prepare a report on the petition. However, when the section 388 petition was called on the court's calendar, the court refused to conduct a full hearing and denied the petition to change Morgan A.'s placement, finding: "The best interest of the child(ren) would not be promoted by [the] proposed change of order."

On February 28, 2011, appellant filed her notice of appeal from the "1/3/11 Denial of 388 petition to change court order dated 10/7/10 – Order to change placement of minor child Morgan [A.] from Maternal Grandmother and Sister's home to Paternal Uncle & imposing monitored visits."

DISCUSSION

A. *Placement With Paternal Uncle*

The court's October 7, 2010 dispositional order removed Morgan A. from appellant's physical custody. Morgan A. had lived with appellant most of the six months since birth. The court instead placed Morgan A. with her paternal uncle. Appellant contends the court erred in removing Morgan A. from her care. The department argues we must dismiss appellant's appeal from the dispositional order. We agree.

The dispositional order was an appealable order. (*In re Melvin A.* (2000) 82 Cal.App.4th 1243, 1250.) Because the order was appealable, court rules obligated appellant to file a notice of appeal no later than 60 days after October 7, 2010, the date the order was made. (Cal. Rules of Court, rule 8.406(a).) Appellant did not file a notice of appeal from the dispositional order; instead, she filed a notice of appeal more than four months later, on February 28, 2011, from the court's denial of her section 388 petition. A timely notice of appeal is a requirement for appellate court jurisdiction, and we do not have authority to extend the time to file a notice of appeal. (*Adoption of Alexander S.* (1988) 44 Cal.3d 857, 864; *In re Pedro N.* (1995) 35 Cal.App.4th 183, 189; Cal. Rules of Court, rule 8.406(c).) Thus, we must dismiss appellant's appeal from the dispositional order.

Appellant's opposition to dismissal focuses on the fact that the dispositional order is an appealable order, a point not in dispute. (*In re Melvin A., supra,* 82 Cal.App.4th at p. 1250.) The insurmountable obstacle appellant faces, however, is her appeal from that order was not timely. She also emphasizes the dispositional order's spillover effects in later proceedings that could prejudice her. (See, e.g., *In re T.G.* (2010) 188 Cal.App.4th 687, 694-695.) Those effects may very well arise, but they do not overcome the jurisdictional requirement of a timely notice of appeal.[2]

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[2] Because we dismiss the appeal from the dispositional order, we deny appellant's request to consider an exhibit not considered by the juvenile court at the dispositional hearing.

B. *Denial of the Section 388 Petition*

Appellant filed her section 388 petition less than six weeks after the court's October 7 dispositional order. Section 388 permits an interested party to petition the dependency court to change a previous order when a change would be in the dependent minor's best interests.[3] For the petition to succeed, appellant must also present new evidence or a change in circumstances that justify changing the order. (*In re B.D.* (2008) 159 Cal.App.4th 1218, 1228; *In re Zachary G.* (1999) 77 Cal.App.4th 799, 806-807 [must show change or new evidence *and* in best interests].) The court may summarily deny a hearing on a section 388 petition if it finds the petition fails to disclose a change in circumstances that would make modification of a prior order in the child's best interests. (Cal. Rules of Court, rule 5.570(d).)

In support of her section 388 petition, appellant submitted several letters praising her parenting skills and opining that Hannah A. did not pose a risk to Morgan A. One letter dated October 12, 2010, was from Hannah A.'s psychiatrist. Written five days after the court's dispositional order, the letter noted Hannah A. was responding well to medication after 13 days of psychiatric hospitalization the previous month. According to the psychiatrist, Hannah A. did not create a risk to Morgan A. Another letter was from the principal of Hannah A.'s elementary school, explaining Hannah A. had transferred to a nonpublic school not because she had been expelled but because the nonpublic school was better suited to her needs. Two more letters came from the licensed clinical social worker who facilitated appellant's weekly therapy support group for grandparent caregivers. Both letters stated that Hannah A. did not endanger Morgan A. And a final

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[3] Section 388, subdivision (a) provides: "Any . . . person having an interest in a child who is a dependent child of the juvenile court . . . 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 . . . ."

letter was submitted from a licensed marriage and family therapist written in July 2010, two and a half months before the October hearing. The therapist reported Hannah A. was improving with medication and therapy.[4]

When the case was called on the court's calendar for January 3, 2011, and before any factual presentation or argument was made, the court announced: "I have your 388 petition and I also have received a response from the department. And I will deny the 388 petition today." Later, the court discussed with counsel and appellant each party's respective views about visitation which to some extent overlapped with the section 388 petition: Morgan A.'s mother asked that the court return Morgan A. to appellant; Morgan A.'s father opposed removing Morgan A. from her paternal uncle, as did the minor's counsel, and, at least for the time being, the department. No formal argument and no evidence was presented on the section 388 petition.

In deciding whether or not to grant a hearing on the section 388 petition, where the juvenile court concludes that the "petition . . . fails to state a change of circumstances or new evidence that may require a change of order or termination of jurisdiction or, that the requested modification would promote the best interest of the child," the court may deny the application ex parte. (Cal. Rules of Court, rule 5.570(d).) On the other hand, if a prima facie case for granting the petition is made, the court shall conduct a hearing. (§ 388, subd. (d).) We review a ruling to grant or deny a hearing on a section 388 petition under the deferential abuse of discretion standard. (*In re A.A.* (2012) 203 Cal.App.4th 597, 612.) We are mindful that it is the rare case indeed that we reverse the denial of a section 388 petition. (*In re Kimberly* (1997) 56 Cal.App.4th 519, 522.)

The issue presented to us, however, is not whether the section 388 petition should be granted on its merits but only whether the court was obligated to conduct a hearing on the petition. A parent "need only make a prima facie showing of the [changed circumstances/best interests of the child] elements to trigger the right to a hearing on a

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[4] Appellant does not discuss whether a letter written before the October 7 dispositional hearing is truly new evidence.

section 388 petition and the petition should be liberally construed in favor of granting a hearing to consider the parent's request." (*In re Zachary G.*, *supra*, 77 Cal.App.4th at p. 806.)

We conclude the section 388 petition adequately demonstrated a prima facie case for relief and the juvenile court should have conducted a full hearing. The court's explanation for removing Morgan A. from appellant and placing her with her paternal uncle was that Hannah A.'s behavioral issues created a risk to Morgan A.'s safety if the two half-sisters were allowed to reside in the same house, a point the department acknowledges on appeal. Although the time between the dispositional order and the date of the letters appellant submitted with her section 388 petition was short, we are dealing with a minor under the age of one year and the short time frame cannot be dismissed out of hand. If the court were to find credible the letters and any evidence offered in support of them, the court reasonably could have concluded that Hannah A. no longer posed a threat to Morgan A.'s safety (i.e, changed circumstances) and that returning Morgan A. to the home of appellant and her half-sister with whom she had lived most of her life was in Morgan A.'s best interests. We do not suggest that the trial court must credit this new evidence when it holds a hearing, only that it must hold the hearing.

Appellant suggests the court denied her section 388 petition because it held a "grudge" against her for having audio-recorded on her iPhone 22 minutes of testimony during the October 2010 dispositional hearing, despite the court having ordered appellant to turn off the iPhone. Appellant claimed the recording was inadvertent. Appellant's characterization of the court as holding a grudge is unwarranted and we reject that assertion. The court was justifiably concerned that appellant had intentionally recorded some of the proceedings and doubted her protestations to the contrary. The juvenile court was in the best position to judge the significance of those events and we do not disturb that judgment.

DISPOSITION

The appeal from the court's October 7, 2010 dispositional order is dismissed, and the order denying appellant a hearing on her section 388 petition is reversed. On remand, the juvenile court shall conduct a hearing on the section 388 petition.

RUBIN, J.

WE CONCUR:

BIGELOW, P. J.

GRIMES, J.