

Filed 2/15/17 In re Hailey B. CA2/4

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

In re HAILEY B. et al., Persons
Coming Under the Juvenile Court
Law.

LOS ANGELES COUNTY
DEPARTMENT OF CHILDREN
AND FAMILY SERVICES,

Plaintiff and Respondent,

v.

V.R.,

Defendant and Appellant.

B271672 c/w B276728
(Los Angeles County
Super. Ct. No. DK06675)

APPEAL from orders of the Superior Court of Los
Angeles County, Michelle Blackwell, Commissioner.
Affirmed.

Robert McLaughlin, under appointment by the Court of Appeal, for Defendant and Appellant V.R.

Mary C. Wickham, County Counsel, R. Keith Davis, Assistant County Counsel and Jessica S. Mitchell, Deputy County Counsel, for Plaintiff and Respondent.

Appellant V.R. (Mother), mother of Hailey B. and D.B. (D.), appeals the juvenile court orders denying her petition for modification under Welfare and Institutions Code section 388 and its subsequent order terminating parental rights under section 366.26.¹ She contends the court abused its discretion by summarily denying the petition. She asserts no independent ground for reversing the order terminating parental rights, but contends it must be set aside in order to provide an opportunity for a hearing on her section 388 petition. We conclude the court did not abuse its discretion in denying the petition. Accordingly, we affirm both orders.

FACTUAL AND PROCEDURAL BACKGROUND

On July 21, 2014, the Department of Children and Family Services (DCFS) received a referral indicating that four days earlier, Mother had left the two girls, ages seven and three, with a relative without the documentation needed to properly care for them, and that Mother had not been

¹ Undesignated statutory references are to the Welfare and Institutions Code.

heard from since. The caller also reported that Mother had mental health issues and was not taking her medications. In addition, Mother was involved with a man, Jeremy P., who was threatening harm to her and her family.²

The caseworker found the children staying with Mother's cousin, Alison G., who said the family had been living with her since February 2014. She said Mother drank frequently, came home "plastered," could be found "over the toilet puking" in front of the children, and needed help. Alison also reported that she and other family members had been caring for the children since the family moved in with her.³ When Alison went to work, she took the children to the home of her mother (the children's great-aunt) Stella. Stella said Mother suffered from a major depressive disorder, and had been hospitalized for mental health problems from 2010 to 2012.

The caseworker interviewed the children. Hailey, then seven, reported being afraid Mother would hurt her. She said Mother had spanked and kicked her, and pulled her hair. She also said Mother "sleeps all day and always goes out," that Jeremy was "really mean," and that he had once threatened the family with a knife. She said Alison and

² Jeremy was not the father of either of the girls. Hailey's biological father lives in Idaho. He never became involved in the proceedings. The identity of D.'s father is unknown.

³ Alison later told the caseworker that maternal family members had been caring for the children off and on since their births.

other relatives took care of her and D. when Mother was gone. D., then three, said Mother spanked her with her hand or a belt, and sometimes hit her on the mouth, causing bleeding. She said Jeremy was “mean” and described hiding from him.

Mother was located and interviewed. She admitted drinking heavily, using marijuana and having a history of mental illness.⁴ At one point, she had been hospitalized on a 14-day hold. At various times, she had been prescribed Wellbutrin, Abilify, and Zoloft but was taking no medication at the time of the interview. Mother agreed she needed counseling and help with substance abuse and parenting skills. She gave DCFS consent to detain the children with Alison.

By the time of the September 2014 jurisdictional/dispositional hearing, Mother was no longer cooperating with DCFS, and her whereabouts were unknown. Alison reported Mother was not visiting or calling the children.⁵ The court found true that (1) Mother physically abused D. by striking her with belts and by hitting her on the mouth; (2) Mother physically abused Hailey by striking her with belts, pulling her hair, kicking her, and hitting her on the mouth;

⁴ An on-demand drug test was positive for cannabinoids.

⁵ The court’s detention order allowed Mother monitored visitation three times per week. The visitation could not be supervised by Alison until Mother submitted three consecutive clean drug tests. Mother had not submitted any drug tests since her initial contact with DCFS.

(3) Mother and Jeremy engaged in a violent altercation in the children's presence; (4) Mother failed to protect the children from Jeremy, who threatened the children with a knife; (5) Mother had a history of substance abuse and was a current abuser of marijuana and alcohol; (6) Mother was under the influence while the children were in her care and supervision; (7) Mother had mental and emotional problems which rendered her unable to provide regular care and supervision of the children; and (8) Mother placed the children in a detrimental and endangering situation by leaving them with Alison and Stella without making a plan for their ongoing care and supervision. The reunification plan required Mother to participate in a substance abuse program, a domestic violence program, drug/alcohol testing, a parenting class and individual counseling.

At the time of the April 2015 six-month review hearing, Mother had made no progress in the reunification plan. Nor had she cooperated in arranging visitation. Alison had set up a schedule for telephone calls, but Mother did not call regularly. The children had been placed in therapy to alleviate the trauma they had experienced in the first years of their lives. They said they "love" living with Alison and felt "safe" with her. The caseworker observed that the girls appeared very bonded to Alison. The court continued reunification services and ordered DCFS to undertake additional efforts to set up a visitation schedule for Mother. The caseworker was unable to contact Mother to arrange visitation until September.

In May 2015, the caseworker learned that Mother had enrolled in an NCADD (National Council on Alcohol and Drug Dependence) program. In June, the caseworker received a call from an NCADD counselor expressing concerns about Mother's mental health. In July, the program discharged Mother, and gave her referrals to programs that incorporated mental health counseling.⁶ The caseworker agreed that Mother should be participating in a dual diagnosis program.

In August 2015, Mother began parenting classes. By December, she had completed 11 of the 16 sessions. The counselor believed she was becoming more engaged, and that her parenting skills and confidence were improving. In September 2015, Mother enrolled in individual counseling at California Mental Health Connection. The counseling included substance abuse, parenting issues, and domestic violence, and Mother attended counseling sessions regularly in September, October, November and December. The counselor reported Mother was responding positively and appeared to be learning to cope with life's stresses.

Prior to the December 10, 2015 twelve-month review hearing, the children reported that they felt safe in Alison's home and did not want to leave. Hailey was not interacting with Mother during the monitored visits, sometimes becoming anxious and sometimes becoming bored. Hailey

⁶ After two clean tests, Mother tested positive for marijuana in June 2015. She tested clean once in July, but then missed five tests in a row.

wanted to reduce visits to once per week. D. enjoyed the visits and was affectionate with Mother. Alison informed the caseworker that some of Mother's conversations with the girls were not age appropriate. The caseworker reported that a few days prior to the hearing, after moving her residence several times, Mother had enrolled in Patterns, a six-month inpatient substance abuse program. The court found Mother in minimal compliance with the reunification plan, and terminated reunification services.

Three months later, in March 2016, Mother filed a petition for modification under section 388. She asked the court to accord her additional reunification services. She presented a letter from counselors at Patterns stating she was attending parenting classes, domestic violence groups, individual counseling, and AA/NA meetings. The counselors stated she had shown great improvement and had "begun to evolve into a healthy member of society." While participating in the program, she had been regularly testing clean. Her estimated completion date was June 2016. The court denied the petition summarily, finding "circumstances are changing but have not fully changed" and that "[t]he best interest of the minor(s) would not be promoted by the proposed change of order." Mother filed a notice of appeal.

The status reports prepared in advance of the section 366.26 hearing stated that Hailey and D. continued to thrive in Alison's home, and that Alison wished to adopt them. Mother was visiting regularly, once a week. She also called the children occasionally. Hailey expressed the preference

that visits with Mother be discontinued. D. wanted to continue visiting, and enjoyed engaging with Mother during the visits. The girls' therapist reported their behavior had regressed since Mother had begun visiting regularly.

The section 366.26 hearing was held in August 2016, while the appeal from the denial of the section 388 petition was pending. Mother's counsel objected to termination of parental rights on the ground she was visiting the children and "work[ing] very hard" to maintain a bond. Minor's counsel and counsel for DCFS argued in favor of termination. The court found by clear and convincing evidence that the children were likely to be adopted, and that no exception to termination applied. Mother noticed an appeal of the termination order. The appeal was consolidated with the appeal of the petition denial order.

DISCUSSION

Mother contends the court abused its discretion in summarily denying her March 2016 petition for modification. She further contends the summary denial order and the subsequent order terminating parental rights under section 366.26 should be reversed, and the matter remanded for a hearing on her petition. We conclude the court did not abuse its discretion in summarily denying the petition. Accordingly, neither order is subject to reversal.

"Section 388 permits '[a]ny parent or other person having an interest in a child who is a dependent child of the juvenile court' to petition 'for a hearing to change, modify, or

set aside any order of court previously made or to terminate the jurisdiction of the court' on grounds of 'change of circumstance or new evidence.'" (*In re Lesly G.* (2008) 162 Cal.App.4th 904, 912, quoting § 388, subd. (a).) A section 388 petition may be filed and heard at any time, up to and including the time of the section 366.26 hearing. (*In re Marilyn H.* (1993) 5 Cal.4th 295, 308-309.) However, "[o]nce reunification services are terminated, the focus shifts to the needs of the child for permanency and stability," and a presumption arises that "continued care [under the dependency system] is in the best interest of the child." (*Id.* at pp. 309-310.)

On receipt of a section 388 petition, the court may either summarily deny the petition or hold a hearing. (*In re Lesly G., supra*, 162 Cal.App.4th at p. 912.) The petition will be summarily denied unless the petitioner makes a prima facie showing in its favor. (*Ibid.*) "There are two parts to the prima facie showing: The parent must demonstrate (1) [either] a genuine change of circumstances or new evidence, and . . . (2) [that] revoking the previous order would be in the best interests of the [child]. [Citation.]" (*In re C.J.W.* (2007) 157 Cal.App.4th 1075, 1079; accord, *In re G.B.* (2014) 227 Cal.App.4th 1147, 1157.) The prima facie requirement is not met unless the facts alleged "will sustain a favorable decision if the evidence submitted in support of the allegations by the petitioner is credited." (*In re Lesly G., supra*, at p. 912; accord, *In re G.B., supra*, at p. 1157 ["A prima facie case is made if the allegations demonstrate that

[the] two [required] elements are supported by probable cause”].)

“In considering whether the petitioner has made the requisite showing, the juvenile court may consider the entire factual and procedural history of the case.” (*In re Mickel O.* (2011) 197 Cal.App.4th 586, 616.) “To support a section 388 petition, the change in circumstances must be substantial.” (*In re Ernesto R.* (2014) 230 Cal.App.4th 219, 223.) We review the juvenile court’s summary denial of a section 388 petition for abuse of discretion. (*In re C.J.W.*, *supra*, 157 Cal.App.4th at p. 1079.)

Our review of the factual and procedural history of the case reveals that Mother made no progress at all for the first ten months of the proceeding, from July 2014 to May 2015, when she finally enrolled in a substance abuse program that was unable to address her mental health issues. During that period she continued to abuse the substances that had contributed to serious deficiencies in her parenting abilities, as demonstrated by her positive and missed tests. She made no progress on improving her mental health. She failed to visit the children at all, and rarely contacted them. She filed the section 388 petition a few months prior to the section 366.26 hearing. The evidence indicated that she was doing well in the Patterns residential treatment program. However, she was months away from completing the program, and had demonstrated no consistent ability to avoid drugs and alcohol and no commitment to maintaining and improving her mental health. Thus, as the court found,

she demonstrated “changing” not “changed” circumstances. (See, e.g., *In re Ernesto R.*, *supra*, 230 Cal.App.4th at p. 223 [mother’s recent sobriety represented “changing’ not changed, circumstances”]; *In re Kimberly F.* (1997) 56 Cal.App.4th 519, 531, fn. 9 [“It is the nature of addiction that one must be “clean” for a much longer period than 120 days to show real reform”].)

Moreover, even had the evidence she submitted fulfilled the first requirement of a section 388 petition -- a *prima facie* showing of changed circumstances -- the evidence did not support that restarting reunification services to allow Mother a chance to obtain custody would be in the children’s best interest. The evidence demonstrated the girls were traumatized by Mother’s years of neglect and abuse and by her failure to protect them from her male companion. Mother asserts that she “raised Hailey and [D.] from the time they [were] born until July 2014.” The record reflects that Alison had taken over the primary parental role in February 2014, months before DCFS became involved. The evidence further indicated that relatives had been stepping in to protect and care for the children since their births. By the time of the section 388 petition, the children were firmly bonded to their caregiver Alison, and repeatedly reported feeling safe in her care. Neither expressed any desire to return to Mother’s custody. Hailey did not even enjoy visiting Mother and wished the visits to discontinue. Their therapist expressed the belief that both girls were

regressing as a result of their more frequent contact with Mother.

“[I]n order to prevent children from spending their lives in the uncertainty of foster care, there must be a limitation on the length of time a child has to wait for a parent to become adequate.” (*In re Marilyn H.*, *supra*, 5 Cal.4th. at p. 308; see § 352, subd. (a) [juvenile court required to “give substantial weight to a minor’s need for prompt resolution of her or her custody status, the need to provide children with stable environments, and the damage to a minor of prolonged temporary placements”].) Even when viewed most favorably to Mother, the evidence in support of the petition provided no basis for the court to find it would have been in the best interests of the children to delay their opportunity to achieve permanence and stability with the relative who had appropriately and lovingly cared for them a substantial portion of their lives and wished to adopt them. Accordingly, the court did not abuse its discretion in summarily denying the petition.

DISPOSITION

The order denying the petition for modification and the order terminating parental rights are affirmed.

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MANELLA, J.

We concur:

WILLHITE, Acting P. J.

COLLINS, J.