Filed 1/11/13 In re Gabriel C. CA2/8

**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

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| In re GABRIEL C., a Person Coming Under the Juvenile Court Law. | B242721 |
| LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES,<br><br>Plaintiff and Respondent,<br><br>v.<br><br>F.C.,<br><br>Defendant and Appellant. | (Los Angeles County Super. Ct. No. CK79674) |

APPEAL from orders of the Superior Court of Los Angeles County. Margaret Henry, Judge. Affirmed.

Suzanne Davidson, under appointment by the Court of Appeal, for Defendant and Appellant.

John F. Krattli, County Counsel, James M. Owens, Assistant County Counsel and Jessica A. Mitchell, Deputy County Counsel, for Plaintiff and Respondent.

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Appellant F.C. (mother) appeals from the July 5, 2012 orders denying her Welfare and Institutions Code section 388 petition without a hearing and terminating her parental rights to her son, Gabriel C.[1] She contends: (1) the trial court improperly delegated to the Department of Children and Family Services (DCFS) and the caretakers the court's authority to order visits; and (2) denial of her section 388 petition was an abuse of discretion.[2] We affirm.

## FACTUAL AND PROCEDURAL BACKGROUND

Mother, born in 1983, was herself a child of the dependency system since the age of three. She was in 20 different placements between the ages of 15 and 18, including foster homes, group homes, juvenile hall and finally, MacLaren Children's Center. Mother was 22 years old when Gabriel was born in February 2005. She has identified three different men as Gabriel's father. Two cannot be found. The third, Earl M., denies that he is Gabriel's biological father but he was Gabriel's legal guardian when Gabriel was three months old and mother was incarcerated.[3]

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

[2] Respondent contends mother's appeal should be dismissed, arguing that because issues decided at a hearing setting a 366.26 permanent plan hearing (.26 hearing) are reviewable only by extraordinary writ, mother cannot appeal from the orders made on May 5, 2011, the date the court set the .26 hearing. We read mother's appeal as being from the orders made at the July 5, 2012 hearing at which mother's parental rights were terminated. Accordingly, we deny the motion to dismiss.

[3] In September 2010, mother identified Gabriel's father as Anthony B. In November 2010, mother said it was Terrance S., who lives in Texas. Despite due diligence, neither man was ever located.

According to the detention report, Gabriel lived with Earl for three months. But at the July 5, 2012 .26 hearing, mother testified that Gabriel lived with Earl for 18 months.

In October 2008, when Gabriel was three years old, mother agreed to a Voluntary Family Maintenance plan with DCFS. On November 2, 2009, mother was arrested for domestic violence after she stabbed her girlfriend, Tyesha G. Acting on a referral, a social worker went to mother's home the next day and found Gabriel with Tyesha. Then four-year-old Gabriel explained to the social worker that his mother was not home because she had stabbed Tyesha in the back because Tyesha was cheating on mother. Gabriel was detained that day and placed in shelter care. On December 11, 2009, Gabriel was released to Earl's parents, Gloria and Winston W., where he has remained throughout these proceedings.

Mother eventually submitted on an amended petition which alleged recurring domestic violence between mother and Tyesha, and the fact that mother left Gabriel in Tyesha's care despite her knowledge that Tyesha abused alcohol and engaged in domestic violence, endangered Gabriel's physical and emotional safety and placed him at substantial risk of harm within the meaning of section 300, subdivision (b).

After mother was released from jail on or about December 22, 2009, DCFS arranged a four-hour visit on Christmas Day followed by thrice weekly visits. Following a detention hearing on January 14, 2010, mother was ordered to participate in domestic violence counseling, parent education, individual counseling and drug and alcohol testing. DCFS was given discretion to liberalize mother's monitored visits.

According to the report for July 2010 the six-month status review hearing (§ 366.21, subd. (e)), mother was not in compliance with the case plan. Among other things, mother had missed a series of drug tests and had canceled or been a no-show for 16 of 26 monitored visits. Gabriel told the social worker that he loved mother but wanted to continue living with Gloria and Winston. The court ordered that visits occur at a location more convenient to mother.

For the January 2011 status review hearing, DCFS reported that Gloria and Winston were interested in adopting Gabriel. Mother was participating in the court-ordered programs but she was not taking her prescribed medications, and she refused to execute a release of medical information form. Gloria complained to DCFS that during

monitored phone calls with Gabriel, mother allowed other people to speak to Gabriel and that some of mother's comments to Gabriel were inappropriate. Mother, or someone using her cell phone, had sent a number of inappropriate text messages to Gloria. The court found mother in compliance with the case plan and that she had made significant progress in "alleviating or mitigating the causes necessitating placement in foster care . . . ." It ordered a supplemental report on the status of mother's psychiatric evaluation. The court subsequently ordered DCFS to report on the possibility of liberalizing mother's visits to unmonitored.

At the March 2011 progress hearing, DCFS recommended against liberalizing mother's visits because mother had been a no-show for a scheduled mental health evaluation, had missed a drug test, was not forthcoming with information about her current boyfriend, and had not been consistent in her visits. Also, Gabriel had expressed fear of mother to both the social worker and Gloria. In a letter to the court, Gloria complained about mother's behavior. The court ordered mother to reschedule a mental health evaluation and ordered individual counseling for Gabriel.

For the May 2011 18-month permanency plan review hearing on May 5, 2011 (see § 366.22, subd. (a)), DCFS reported that mother had not consistently called or visited Gabriel. When she did visit, mother argued with Gloria in Gabriel's presence. Gabriel was not sad when visits ended. The social worker observed that Gabriel "interact[s] with the mother like he interacts with [the social worker] or any other adult." Gabriel said he liked visiting mother, but did not want to live with her. Mother had stopped attending all court-ordered programs but had completed only some of them. Notwithstanding one positive drug test (and four missed tests), mother denied using drugs; she attributed the positive test to sexual conduct with a man who had drug residue on his hands. Meanwhile, a few days before the hearing, mother told the social worker that she "no longer wants to reunify with Gabriel. The mother stated that Gabriel is 'happier' in the home of the current caregiver." Finding mother not in compliance with the case plan, the court terminated mother's reunification services, ordered an adoption home study of

Gloria and Winston and continued the matter for a .26 hearing. Pending that hearing, the court ordered permanent placement services.

In July 2011, after not visiting Gabriel for several months, mother asked to resume monitored visits and telephone calls, but no visits ever occurred. In August 2011, mother changed her mind again, telling the social worker that she did not intend to initiate any further contact with Gabriel. Mother apparently changed her mind a third time because there was one visit in November 2011, and in a letter to the court dated April 24, 2012, Gloria asked the court to admonish mother, who after a year of no contact had begun calling Gabriel and begging him to come home, as well as leaving disturbing voice mail messages for Gloria.

Meanwhile, the .26 hearing was continued several times in order to notify the alleged fathers. On June 27, 2012, mother filed a section 388 petition seeking a home of parent placement or renewed reunification services and unmonitored visits. At the .26 hearing on July 5, the court summarily denied mother's section 388 petition. Mother was the only witness at the .26 hearing that followed. She testified that Gabriel lived with her until June 2005 when he was about three months old. For the next 18 months, mother was incarcerated and Gabriel lived in a legal guardianship with Earl, son of Gloria. During that time, mother saw Gabriel every weekend. After mother was released, Gabriel lived with her until she was arrested in November 2009 and he was placed with Gloria. During mother's incarceration, Gloria would not allow any contact with Gabriel. After mother was released, she saw Gabriel about every other weekend. Gloria sometimes prevented visits. Mother last saw Gabriel on February 29, 2012. Since then, mother had tried to see him, but Gloria was unwilling to drive Gabriel or allow anyone to pick up Gabriel. The social worker told mother that Gloria had no duty to facilitate visits since mother's reunification services had been terminated. The court terminated all parental rights finding by clear and convincing evidence that Gabriel was adoptable, that adoption was in his best interests and that no exception to the preference for adoption exists. Mother timely appealed.

## DISCUSSION

*A. The Trial Court Did Not Delegate Its Authority to Order Visitation*

Mother contends the order terminating her parental rights should be reversed because the court improperly delegated its authority to order visits to DCFS and Gloria. She argues that after her reunification services were terminated and continued visitation was ordered on May 5, 2011, DCFS and Gloria prevented mother from visiting Gabriel in accordance with the court-ordered visitation schedule. We find no error.

Section 366.22, subdivision (a) directs that, at the 18-month permanency plan review hearing, the court must schedule a .26 hearing if it determines that return of the child to his or her parent would create a substantial risk of detriment to the child. "The court shall also order termination of reunification services to the parent or legal guardian. The court shall continue to permit the parent or legal guardian to visit the child unless it finds that visitation would be detrimental to the child." (*Ibid*.) In *Christopher D. v. Superior Court* (2012) 210 Cal.App.4th 60, 72-73 (*Christopher D.*), the court recently explained that it "is the juvenile court's responsibility to ensure regular parentchild visitation occurs while at the same time providing for flexibility in response to the changing needs of the child and to dynamic family circumstances. [Citations.] To sustain this balance 'the child's social worker may be given responsibility to manage the actual details of the visits, including the power to determine the time, place and manner in which visits should occur.' [Citation.] 'Only when the court delegates the discretion to determine whether any visitation will occur does the court improperly delegate its authority and violate the separation of powers doctrine.' [Citation.]"

Here, at the January 14, 2010 detention hearing, the court ordered monitored visits with DCFS discretion to liberalize. By the time of the progress hearing on January 13, 2011, mother was regularly visiting Gabriel once week a week for three hours. In response to mother's request for unmonitored visits or, in the alternative, longer monitored visits, the court gave DCFS discretion to extend mother's visits. Over the next few months, mother missed several visits and at the progress hearing on March 10, 2011,

mother and Gloria blamed each other for the missed visits. The court ordered DCFS to set up a visitation schedule and mother to confirm that she would be attending on the morning of the visit. Mother did not appear at the .22 hearing on May 5, 2011, at which the court terminated reunification services, set the matter for a .26 hearing, and continued the monitored visit order. Nor did she appear at the continued .26 hearings on June 2 and November 3, 2011. Mother's counsel did not alert the court to any problems with visitation at any of those hearings. Mother appeared at the continued .26 hearing on March 1, 2012, but did not complain about visitation. Visitation was an issue at the continued .26 hearing on May 3, 2012, at which mother and Gloria once again blamed one another for missed visits. The court and mother's counsel had the following colloquy: "THE COURT: The social worker can set up visits. [¶] [MOTHER'S COUNSEL]: Just to be clear, mother is to contact the social worker to set up monitored visitation at this point. And the current caregiver is to allow mother those visits? [¶] THE COURT: If I order the visits, I don't think I have to go further and make it sound like the caretaker hasn't. There seems to be a difference of opinion on that. But the social worker to arrange for mother's monitored visits. Set up a schedule." From this colloquy, it seems clear that the court did not credit mother's claim that either DCFS or Gloria were preventing mother from visiting Gabriel.

Under *Christopher D., supra*, 210 Cal.App.4th at pages 72-73, the court properly exercised its duty to ensure visitation by ordering DCFS to make a visitation schedule for mother. By doing so, the court did not delegate to anyone the discretion to determine whether visits would occur.

*B. Summary Denial of Mother's Section 388 Petition Was Not an Abuse of Discretion*

Mother contends it was error for the court to deny a hearing on her section 388 petition to reinstate reunification services. She argues that it was "unfair for the court to focus on mother's lack of visitation when she was denied the chance to visit after her services were terminated." We disagree.

Section 388 permits a parent to petition for a change of a previous order when the change would be in the child's best interests.[4] The statute gives a parent one last chance to save a parent-child relationship following termination of reunification services but before termination of parental rights. (*In re Jackson W.* (2010) 184 Cal.App.4th 247, 258; *In re Hunter S.* (2006) 142 Cal.App.4th 1497, 1506-1508.)

To succeed on a section 388 petition, the parent must present new evidence or circumstances that justify modifying the prior order. (*In re B.D.* (2008) 159 Cal.App.4th 1218, 1228; *In re Zachary G.* (1999) 77 Cal.App.4th 799, 806-807.) The court may summarily deny the petition without a hearing if it finds 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." (Cal. Rules of Court, rule 5.570(d).) On the other hand, if the petition states a prima facie case for relief, the court shall conduct a hearing. (§ 388, subd. (d).) Courts must construe a section 388 petition liberally in favor of granting a hearing. (Cal. Rules of Court, rule 5.570.) "If the petition presents any evidence that a hearing would promote the best interests of the child, the court must order the hearing. [Citation.] The court may deny the application ex parte only if the petition fails to state a change of circumstance or new evidence that even might require a change of order or termination of jurisdiction. [Citation.]" (*In re Angel B.* (2002) 97 Cal.App.4th 454, 461.) We review a dependency court's ruling denying a section 388 petition under the deferential abuse of discretion standard. (*In re A.A.* (2012) 203 Cal.App.4th 597, 612; *In re Anthony W.* (2001) 87 Cal.App.4th 246, 250.)

Here, we find no abuse of discretion in the court's summary denial of mother's section 388 petition. Mother's petition, filed more than one year after her reunification services were terminated, alleged as changed circumstances that mother had completed

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[4] 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 . . . ."

"a domestic violence program, parenting program, individual counseling, 10 consecutive drug and alcohol tests and . . . submitted to psychiatric medication assessment." Mother alleged the change would be in Gabriel's best interest because, "I share a strong bond with Gabriel and he resided with me for most of his life. I have fully complied with my case plan and have learned how to be the best parent. I can be for Gabriel. It is in Gabriel's best interest to live with his mother and to continue our strong family bond." The record is to the contrary. First, contrary to mother's assertion, Gabriel had not lived with mother "for most of his life." At the time of the petition, Gabriel was seven years old and for more than four of those years he had not lived with mother.[5] Second, although mother alleged a strong bond with Gabriel, mother had not seen Gabriel since February 2012 and even before then had not maintained regular visitation. The court did not credit mother's claim that she was prevented from visiting by DCFS and Gloria. Moreover, Gabriel had consistently stated that he wanted to live with Gloria and not with mother. The court summarily denied the petition observing, "I'm not hearing that there's really anything to set the 388 on. I am glad that mother is working on employment in terms of the counseling service. But with what? Two visits? And the visits, I know you're saying not that you don't get visits, but the visits weren't regular before either. And we never moved past monitored." Under these circumstances, mother has not shown the court abused its discretion in finding that mother had not established a prima facie case that the modification would be in Gabriel's best interest.

[5] Mother testified that Gabriel lived with guardian Earl for 18 months while mother was incarcerated. From December 2009 until June 2012 (two years seven months), Gabriel had been living with Gloria.

## DISPOSITION

The judgment is affirmed.

RUBIN, ACTING P. J.

WE CONCUR:

FLIER, J.

GRIMES, J.