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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

In re ISABEL M. et al., Persons Coming
Under the Juvenile Court Law.

B244431
(Los Angeles County
Super. Ct. No. CK51337)

LOS ANGELES COUNTY
DEPARTMENT OF CHILDREN AND
FAMILY SERVICES,

Plaintiff and Respondent,

v.

ROBERT M.,

Defendant and Appellant.

APPEAL from an order of the Superior Court of Los Angeles County,
Jacqueline Lewis, Juvenile Court Referee. Affirmed.

Christopher Blake, under appointment by the Court of Appeal, for
Defendant and Appellant.

John F. Krattli, Office of the County Counsel, James M. Owens, Assistant
County Counsel and Navid Nakhjavani, Deputy County Counsel, for Plaintiff and
Respondent.

Appellant Robert M. (Father) appeals the juvenile court's summary denial of his petition for modification under Welfare and Institutions Code section 388.¹ We affirm. The expert testimony Father sought to present in his petition nine months after the jurisdictional/dispositional hearing was based on evidence available at the time of the hearing. Accordingly, the court was not compelled to grant a hearing. (*In re H.S.* (2010) 188 Cal.App.4th 103.)

FACTUAL AND PROCEDURAL BACKGROUND

A. Prior Proceeding

Father is the presumed father of Isabel M., now 11, and Moses M., now 10. In 2003 and 2004, Isabel and an older sibling, Sergio Y., were the subject of dependency proceedings based on their mother's substance abuse. Moses was born during the pendency of those proceedings. When the proceedings terminated in May 2004, the children were returned to their parents and eventually to Father's sole custody, after their mother resumed abusing drugs and was incarcerated.²

B. Adjudication

In 2005 or 2006, Father began living with Fatima D., who had three minor children, Amanda, Melissa and Jennifer C. Amanda died at home on November 27, 2010, when she was ten years old, apparently from heart failure. Amanda suffered from leukodystrophy, a progressive neurodegenerative disorder, and at the

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

² The eldest child, Sergio, had been living with his maternal grandmother for some time and was never made the subject of these proceedings. The children's mother, Delilah Y., remained imprisoned throughout the proceedings and is not a party to this appeal.

time of her death, was severely disabled and had a greatly enlarged heart.³ Father and Fatima called 911. The deputies observed “bruising, swelling, and redness” in the girl’s vaginal and rectal areas. Doctors who examined her in the emergency room and a coroner’s investigator concluded she had been sexually abused within hours of her death, and also appeared to have been the victim of continuous sexual abuse.⁴ The caseworker discovered there had been a prior referral when Amanda was 7 years old.⁵ The Department of Children and Family Services (DCFS) filed a petition alleging that Amanda had been seriously physically harmed and sexually abused, and that Father and Fatima “knew or reasonably should have known” of the physical and sexual abuse and failed to protect her.⁶

The four remaining children, Isabel, then 8, Moses, then 7, Melissa, then 14, and Jennifer, then 8, denied having been sexually abused.⁷ They also denied having observed Amanda being abused at any time. The family members reported that Amanda had shown signs of illness in the days before her death, including nausea, a stomach ache, vomiting, and general weakness. They further reported that on the night before her death, Fatima had slept with Amanda in one of their home’s bedrooms while Father slept on the couch. During the early morning hours, Fatima reported taking the girl to the bathroom and wiping her, as she

³ Fatima’s older daughter, Valerie C., had suffered from the same disease and died in 2007.

⁴ Preliminary medical reports indicated her anal and genital areas were blue and purple, and that there was a long red mark inside her vagina and a “notch” in her hymen.

⁵ Amanda had put a toy inside another object in front of a teacher and said “the pee-pee goes inside.” She had also said that Father lifted Fatima’s skirt and “‘hump[ed]” her, and that people did “‘nasty things’ at night in the bed.” The referral was closed as unfounded.

⁶ The petition further alleged that Fatima had physically abused Moses by striking him with a stick and covering his mouth with duct tape.

⁷ Moses reported that he had been hit and duct-taped by Fatima.

typically did, and returning to bed.⁸ When Fatima awoke, Amanda was not breathing and her body was cold.

The caseworker interviewed a number of additional witnesses, including Fatima's adult sons, Steven and Jonathan, who had previously lived with her and Father. Steven reported that he had seen Father masturbating while spying on Steven's sister Valerie in the shower. When Steven reported the incident to Fatima, she slapped him and told him it was none of his business. He confronted Father as well, and received a beating from Father and Fatima. On several occasions, Steven observed Father coming out of the girls' bedroom in the morning. When he reported this to Fatima, she again slapped him and told him it was none of his business.⁹ Jonathan reported that Father had touched his sisters on their buttocks underneath their clothes.

In August 2011, Father was arrested after the autopsy report and DNA testing were completed. The jurisdictional hearing took place over several days in December 2011.¹⁰

At the hearing, Dr. Ruey-Kang Chang, a pediatric cardiologist, testified that Amanda's symptoms on the day before her death -- tiredness, nausea, vomiting, etc. -- indicated impending heart failure. If Amanda had been receiving regular

⁸ Fatima said she might have been responsible for any genital and rectal bruising because she regularly cleaned and wiped Amanda after the girl used the toilet.

⁹ Steven also reported that Amanda was scared of men and never wanted to stay at home by herself with Father and Fatima. Amanda's teacher had reported that Amanda was "absolutely terrified" by the appearance of a male teacher or staff member at school. "She would throw up, crying, terrified. If Amanda could have climbed onto me, she would have."

¹⁰ At the time of the hearing Isabel and Moses were living with their maternal grandmother, who had custody of their brother Sergio. Moses exhibited rage, aggression, cruelty to animals, and recklessness. At one point, Isabel was said to be suicidal and at another, to have engaged in "sexualized behavior."

medical treatment, such as diuretics and blood pressure medication to relieve the strain on her heart, she would likely have responded and might still be alive.

Asked if being taken to an emergency room three hours before her death would have prevented her death, he responded: “I would say it’s possible,” and that there would have been a “better chance” if she had received medical treatment 12 or 24 hours earlier.

Dr. James Ribe, the coroner who examined Amanda’s body, was qualified as an expert in child fatalities.¹¹ He testified that he found fresh-appearing traumatic injuries on the genitalia, including a long abrasion apparently caused by a fingernail, 14 bright red punctuate or point-like abrasions, and “a complete transection of the hymen at the [top] and other complete transections at the sides of the hymen.”¹² Dr. Ribe concluded that these physical findings were indicative of sexual trauma. He further opined that the injuries he observed had occurred within minutes or hours of Amanda’s death, noting that the injuries were bright red and showed “vital reaction,” or bleeding into skin tissue. He further stated that the rough and ragged nature of the tears in the hymen was indicative of recent injury. He concluded: “[I]t was clear to me that [Amanda] had suffered blunt force injury to her genital organs close to the time of death, or possibly at the time of death.”

Dr. Ribe was unable to identify the cause of death with medical certainty, but proposed three potential causes: (1) Amanda might have died from sudden cardiac arrest due to her greatly enlarged heart; (2) she might have suffered physiological stress, such as pain or fear resulting from blunt force sexual trauma,

¹¹ Dr. Ribe had also conducted the autopsy on Valerie. He testified that he had diagnosed her cause of death as “undetermined.”

¹² The autopsy report itself stated that there were “multiple transections of the hymen,” a “5 mm nail mark of the medial right labium majus,” and “multiple red punctuate abrasions of the vaginal introitus,” or outside the hymen.

which caused her to suffer a fatal cardiac arrhythmia; or (3) she might have been suffocated with a pillow. He was unable to say which of these causes was most likely.

Dr. Astrid Heger was a professor of clinical pediatrics at the University of Southern California and a qualified expert in child sexual abuse.¹³ She examined Amanda's body and records of the case. She testified "to a reasonable degree of medical certainty" that Amanda was the victim of sexual abuse. Dr. Heger observed that Amanda had "a number of recent acute injuries to the genital area, including to the hymen, that are diagnostic of blunt force penetrating trauma." She observed "a through-and-through tear to the base of the hymen" which she described as "an acute, freshly bleeding tear," indicative of recent penetrating injury. She opined that Amanda had been sexually abused six to 12 hours prior to her death. When asked whether it was possible that the trauma might have been caused by cleaning the child, she answered "[n]o."

The criminalist testified that DNA tests indicated Amanda's DNA appeared on a sample taken from Father's penile shaft.¹⁴ She explained that DNA is usually passed through bodily fluids. Father presented no evidence.

After hearing the evidence, the court sustained the following allegation: "[Father] caused [Amanda's] death by repeated sexual abuse. At the time of death [Amanda] was suffering from an untreated heart condition which may have contributed to her death. Further[,] the coroner concluded that the child suffered a

¹³ Dr. Heger had written and lectured worldwide on child sexual abuse, been qualified as an expert in child sexual abuse hundreds of times, and was a member of the Royal Society of Medicine. The parties stipulated to her expertise in the field of child sexual abuse.

¹⁴ The DNA analysis report prepared by the criminalist stated that Amanda was a "possible contributor" to DNA collected from Father's penile shaft. None of Father's DNA (or any male DNA) was detected on samples taken from Amanda.

fatal cardiac arrhythmia while being sexually abused. Physical findings on autopsy are also consistent with the child being suffocated during the sexual assault.

[Father] caused or contributed to the death of the child Amanda through abuse or neglect by sexually assaulting Amanda . . . on the date of her death.”¹⁵ Due to the gravity of the sustained allegations, Father was not provided reunification services per section 361.5, subdivision (b)(4) and (b)(6), and the court scheduled a section 366.26 hearing.¹⁶

On April 17, 2012, the court continued the section 366.26 hearing for an assessment of the proposed guardianship. In June 2012, six months after the adjudication, counsel for Father moved to continue the section 366.26 hearing, informing the court that the criminal case against Father had been dismissed and that she anticipated filing a section 388 motion. The court granted a 90-day continuance.

C. Father’s Section 388 Petition

On September 19, 2012, Father filed a section 388 petition. The petition stated that the district attorney’s office had dismissed the criminal case in May 2012. The petition further indicated that in February 2012, the Sheriff’s Department had sent the DNA evidence provided by Father on the day of

¹⁵ The court sustained other allegations that Father “failed to take action to protect” Amanda from sexual abuse. It struck allegations that Amanda had been sodomized and the allegations pertaining to the physical abuse of Moses by Fatima.

¹⁶ Section 361.5, subdivision (b)(4) permits the court to deny reunification services to a parent who “caused the death of another child through abuse or neglect.”

Subdivision (b)(6) permits denial of reunification services where the child, a sibling or a half-sibling “has been adjudicated a dependent . . . as a result of severe sexual abuse or the infliction of severe physical harm” by the parent. The proposed permanent plan was long-term guardianship rather than termination of paternal rights, as the maternal grandmother did not wish to pursue adoption.

Amanda's death to the Serological Research Institute (the Institute) for additional testing at the request of the Alternate Public Defender's Office. In April, the Institute prepared its report stating that Amanda could not have been the source of any of the DNA found on Father's penis.

In addition, the petition stated that the Alternate Public Defender's Office hired a pediatric forensic pathologist, Dr. Janice Ophoven, to review the medical records and autopsy report. Dr. Ophoven prepared two reports, one dated February 22, 2012 and one dated April 13, 2012.¹⁷ In them, she expressed her conclusion that the bruising and trauma to the genital and rectal area reportedly observed by first responders and emergency personnel was likely normal postmortem phenomena.

With respect to the other reported injuries, Dr. Ophoven stated that these types of injuries "do not fulfill any known diagnostic criteria for sexual injury." She further stated that in her opinion, neither the photographs nor the tissue indicated the presence of acute or chronic trauma. With respect to the presence of recent injuries, Dr. Ophoven stated: "My review of the photos indicates venous engorgement of the tissues in this area consistent with the typical settling of blood into the dependent tissues after death. . . . There is no tissue confirmation of a recent laceration." Dr. Ophoven found "no scientific basis for the conclusion that [Amanda's] death was in any way associated with sexual assault" as there was "no confirmatory evidence this child was the victim of a recent sexual assault."

Father also submitted a lengthy report by a clinical psychologist, Martha L. Rogers, Ph.D., dated September 18, 2012. Dr. Rogers reported that she had

¹⁷ The first report was prepared prior to her review of the slides and tissue saved from the autopsy. Dr. Ophoven did not purport to review any evidence not available at the time of the jurisdictional hearing and, unlike Dr. Ribe and Dr. Heger, she did not examine the body.

interviewed Father and submitted him to psychological testing and concluded that nothing in his profile suggested sexual interest in children.

The court summarily denied the section 388 petition, stating in the order that the request did not “state new evidence or a change of circumstances.” At the September 19, 2012 continued section 366.26 hearing, the court further explained that the evidence submitted represented “new opinions based on the evidence available at the time of the adjudication.” Father appealed.

DISCUSSION

“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.’ (§ 388, subd. (a).)” (*In re Lesly G.* (2008) 162 Cal.App.4th 904, 912.) On receipt of a section 388 petition, the court has two choices: “(1) summarily deny the petition or (2) hold a hearing.” (*In re Lesly G., supra*, at p. 912.) “In order to avoid summary denial, the petitioner must make a ‘prima facie’ showing of ‘facts which will sustain a favorable decision if the evidence submitted in support of the allegations by the petitioner is credited.’” (*Ibid.*, quoting *In re Edward H.* (1996) 43 Cal.App.4th 584, 593.) The petition must be liberally construed in favor of its sufficiency. (*In re Marilyn H.* (1993) 5 Cal.4th 295, 309; California Rules of Court, rule 5.570(a).) Generally speaking, “[i]f the petition presents ‘any evidence’ that a hearing would promote the best interests of the child, the court must order a hearing.” (*In re Hiren C.* (1993) 18 Cal.App.4th 504, 516.)

As the primary requirement of section 388 is proof of a “change of circumstance[s]” or “new evidence,” the court does not abuse its discretion when it denies a section 388 petition supported solely by the opinion of an expert who

had reexamined evidence previously submitted. (*In re H.S., supra*, 188 Cal.App.4th at pp. 107-109.) In *H.S.*, the minor had suffered injuries which a medical assessment concluded had been deliberately inflicted. Three months after the jurisdictional hearing, the parents submitted an opinion by an expert who had reviewed the medical records and concluded there were other explanations for the injuries. Discussing authorities interpreting Code of Civil Procedure sections 657 and 1008, the appellate court stated that parties seeking reconsideration are generally required to ““provide not only new evidence but also a satisfactory explanation for the failure to produce that evidence at an earlier time,”” and to state why they could not ““with reasonable diligence, have discovered and produced [the evidence] at the trial.”” (188 Cal.App.4th at p. 108, quoting *Baldwin v. Home Savings of America* (1997) 59 Cal.App.4th 1192, 1198, italics omitted.) Accordingly, “the term ‘new evidence’ in section 388 must be construed to include the three requirements of new evidence, reasonable diligence, and materiality found in sections 675 and 1008 of the Code of Civil Procedure.” (188 Cal.App.4th at pp. 108-109.) Because the expert “reached his opinion based on the same evidence available to the experts who testified at trial and simply came to a different conclusion than theirs,” the parents did not act with the requisite “due diligence.” (*Id.* at p. 109, italics omitted.)

The bulk of the evidence submitted by Father was precisely the type the court found to be insufficient to trigger the right to a hearing in *H.S.* Dr. Rogers could have examined Father and expressed her opinion concerning his psychological state at any time. Dr. Ophoven’s report was based on the interpretation of pre-existing evidence available at the time of the jurisdictional hearing. Moreover, she did not irrefutably establish that sexual abuse had not occurred, but simply disagreed with Dr. Ribe and Dr. Heger that the physical phenomena they observed when they examined Amanda’s body indicated recent

sexual abuse. As the *H.S.* court observed, “[t]he fact that the new expert interprets the evidence differently than did the medical doctors who testified at the jurisdiction hearing . . . does not make [such] expert opinion ‘new evidence’ within the meaning of section 388.” (*In re H.S.*, *supra*, 188 Cal.App.4th at p. 109.)

Neither with respect to the medical experts’ opinions nor the DNA evidence did Father seek additional testing or the appointment of other experts. Nor do we view the DNA evidence as unduly significant. The original report stated only that Amanda was a “possible contributor” to the DNA collected from Father. The juvenile court did not mention the DNA evidence when making its findings, and there was other evidence of Father’s sexual misbehavior, including masturbating while spying on Amanda’s older sister in the shower, engaging in sex with Fatima in front of Amanda, and touching the girls on their buttocks. As the testimony Father sought to present was based on evidence available at the time of the jurisdictional hearing nine months earlier, the juvenile court did not err in determining that he had failed to make a *prima facie* case of “‘new evidence’” showing that “‘the best interests of the child[ren] may be promoted by the proposed change of order.’” (*In re H.S.*, *supra*, 188 Cal.App.4th at p. 110, quoting *In re Daijah T.* (2000) 83 Cal.App.4th 666, 672.)

DISPOSITION

The order summarily denying the section 388 petition is affirmed.

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MANELLA, J.

We concur:

WILLHITE, Acting P. J.

SUZUKAWA, J.