Filed 8/25/17 In re L.L. 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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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

In re L.L. et al., Persons Coming Under the Juvenile Court Law.	B278322 (Los Angeles County Super. Ct. No. CK95233)
LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. R.J., Defendant and Appellant.	

APPEAL from orders of the Superior Court of Los Angeles County, Rudolph A. Diaz, Judge. Affirmed.

Lori N. Siegel, under appointment by the Court of Appeal, for Defendant and Appellant.

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

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R.J. (mother) appeals the juvenile court's orders denying her petition pursuant to Welfare and Institutions Code section 388[1] to modify the juvenile court's orders to allow unsupervised visitation with her two sons, who were under juvenile court jurisdiction, and placing them with a legal guardian. She argues the court abused its discretion and denied her due process by failing to hold a hearing on the section 388 petition. Because she failed to present a prima facie case entitling her to a hearing, the court did not abuse its discretion and we affirm.

BACKGROUND

Prior to the dependency petition at issue here, the family was already under a voluntary family reunification case plan as a result of mother leaving her older son in her vehicle unattended. In August 2012, the Los Angeles County Department of Children and Family Services (DCFS) filed the current petition alleging mother endangered her sons—then ages two and eight months—after she was arrested and incarcerated for assault with a deadly weapon and had inappropriately arranged for her terminally ill father to care for them. The assault occurred when mother threatened her cousin with a butcher knife, threw a shovel at her cousin's car, and threatened him with a power sander. She was

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1 All undesignated citations are to the Welfare and Institutions Code unless otherwise noted.

locked out of the home, and she damaged the door while demanding her children be given back to her. Family members also reported mother and father engaged in domestic violence, mother left the children unattended, she punched one of the boys in the chest to "toughen . . . him up," and she used cocaine. The children were detained from the parents' custody. Mother was allowed monitored visitation and DCFS was to provide family reunification services. At the time of the petition, father's whereabouts were unknown.

After uncovering an October 2011 police report of domestic violence between mother and father, DCFS filed an amended petition in October 2012, adding allegations mother and father engaged in domestic violence in the presence of the children and mother abused cocaine. Mother denied using drugs but agreed to submit to drug testing, which the court ordered.

Mother was released from jail in the last part of 2012 (the record is unclear when exactly), but she did not visit her children until March 2013 because she was uncomfortable visiting their caregiver's home. She continued to participate in anger management and parenting programs and claimed she attempted to drug test but there were paperwork problems. It was reported mother's attendance in her parenting class was "on and off," and she missed six drug tests.

The court sustained the domestic violence counts in the petition in March 2013 and removed the children from the parents' custody. It ordered mother to participate in anger management classes, a domestic violence support group, parenting classes, individual counseling, and 10 random and on-demand drug tests. It also ordered monitored visitation, but no joint visitation by the parents. The court issued similar orders

for father. The court also granted a restraining order for mother against father.

By September 2013, mother was visiting the children twice weekly for four hours, which went well. However, she also violated court orders by visiting the children without an approved monitor and with a male in the car, believed to be father. Neither mother nor father had fully complied with their court-ordered programs and drug testing.

In anticipation of an October 17, 2013 six-month review hearing, DCFS reported mother showed up to visits without a monitor and sometimes with father in violation of court orders, and she was driving the children without the social worker's knowledge. DCFS noted mother had been arrested four times since August 2012, which impacted her ability to reunify with her children. At the hearing, the court found mother was not in compliance with her case plan and continued family reunification services while maintaining the children in a suitable placement. Prior to the hearing, mother tested positive for marijuana.

In November 2013, DCFS reported mother refused visits with the children and told her social worker she did not want to visit them while they were in the care of the current caregiver, mother's cousin, and before mother had completed her court-ordered programs.

Mother quickly resolved her personal issues with the caregiver and resumed visits with her children. As of March 2014, she was stable in her home and reported that she was complying with her court-ordered programs. Father also reported he was complying with his programs. They both provided progress letters to DCFS, but DCFS determined the letters were forged. DCFS also learned mother had only sporadically

attended her programs. DCFS recommended the court terminate reunification services and set the matter for a section 366.26 hearing. At a March 17, 2014 hearing, the court ordered mother and father have one visit per week with the children at DCFS's offices.

Mother was arrested and incarcerated in May 2014 for burglary. She told DCFS father was physically abusing her again, and she changed her contact information as a result. The children's caregiver was also arrested and incarcerated for a short time in May 2014, but did not inform DCFS.

Following a contested hearing on May 8, 2014, the court terminated reunification services, finding the children were unable to return home to either parent. The court scheduled a section 366.26 hearing to address a permanent plan for the children.

Mother continued to visit the children regularly.

In light of the caregiver's arrest and suspicion she was allowing mother to have unmonitored visits and actually live with the children, DCFS removed the children from their current caregiver in January 2016 and placed them with maternal cousin Marlene W. The children thrived in Marlene W.'s home, closely bonding with her and referring to her as "grandma." She was willing to be appointed the children's legal guardian. At that time, mother continued to visit the children weekly. The children appeared happy to see her, and the visits went well.

On May 19, 2016, mother filed the section 388 petition at issue here. In explaining what circumstances changed, she wrote: "I have completed Parenting and Drug and alcohol class. With also 24 weeks completed of Domestic Violence classes. I have also been re-enrolled in Pactox and have provided 3 clean

drug test[s]. I have complied with the court. Willing to do whatever the court asks." She requested "unsupervised visits for the remainder of my Domestic Violence classes which end[] September 2016. In which I will still provide clean drug test." Finally, she believed the change was in her sons' best interests because they "mean the world to me. I am nothing without them. I love my boys unconditionally[;] nothing comes before them. I have my own apartment, Driver's License, and vehicle. They want to be returned home also. I am their mother."

She attached five documents to the petition: (1) a January 2016 certificate for completing a substance abuse/drug and alcohol education/relapse prevention program; (2) forms indicating she had taken two random drug tests in March and April 2016, although she did not provide the results; (3) a March 2016 progress report indicating she had attended 11 out of 13 sessions in a parenting program and had been "actively involved in all discussions and class activities"; (4) a March 2016 certificate of participation in the "Make Parenting a Pleasure" Program; and (5) a May 2016 progress letter indicating she had completed 34 of 52 weeks in an anger management/domestic violence with individual counseling program.

The court addressed the section 388 petition at a hearing on August 15, 2016. The court noted some of the items mother included were "old and have been considered previously so she's not completed the domestic violence class." The court also noted she did not submit actual drug test results. The court did not think the request was "complete" and "[t]he objective is legal guardianship here." The court indicated it could "still hear her 388 on the date of the [section 366].26" hearing, which was set for September 7, 2016, "if she completes it." The court concluded:

"So today I'll deny it as not demonstrating the change of circumstances as well as not showing that it's in the best interest. She's not asking for custody. I want to make that clear." The court issued a form JV-183 order denying the section 388 petition because it did not present new evidence or a change of circumstances and the proposed change was not in the best interests of the children.

DCFS reported in September 2016 that mother would have regular monitored visitation every first and third Saturday, and the one visit that had occurred went well; mother played with the children, watched a movie with them, and fixed them dinner.

The court held the section 366.26 hearing on October 3, 2016, with the goal to appoint a legal guardian. Mother objected to the legal guardianship. Mother's counsel provided documents to the court that were not included in the record on appeal, but mother's counsel told the juvenile court some of them were attached to the section 388 petition. Counsel indicated she told mother she had the option to file a section 388 petition, but the court would not likely set the matter to contest legal guardianship. Counsel informed the court mother would like unmonitored visits with the children. DCFS counsel argued mother provided nothing new and DCFS did not approve unmonitored visitation, so the court should proceed with guardianship. The children's counsel argued the section 388 petition was previously denied and she did not think mother's documentation was "very different" from what she submitted then. She also pointed out that the documents mother submitted showed mother missed half of her drug tests.

The court responded: "Again, these are circumstances that were looked at when mother submitted her 388 earlier this year

and after these documents. I don't see any basis to change the court's order regarding the appointment of a legal guardian so I'm going to deny mother's application at this time for [home of parent] and I'm going to go forward with guardianship."

Finding clear and convincing evidence the children were not adoptable, the court granted legal guardianship to Marlene W. As part of the guardianship issue, the court allowed mother to argue for approximately four pages in the reporter's transcript that her circumstances had changed. She basically argued she had "grown up," was being "railroaded" by the court, and had remained sober. She ended by asking, "[W]hat more do I need to do? I can't just let it—no, I don't want to have fun and let somebody else raise my kids. That's my job. That's why I brought them here."

When she finished, the court responded, "I'm finding that you've already had a chance to apply for a change of circumstances. You did it again today. I let you argue to the court for a long time and I didn't hear anything that convinces the court of anything that's been done [in] the past should be reversed." Mother responded, "And how is that? Can you explain to me what haven't been done so that I can do it and I can get my kids back because I'm willing to do whatever." The court terminated the case.

In the order terminating jurisdiction, the court granted mother monitored visitation with the children for five hours on the first and third Saturdays of each month and father monitored visitation for two to three hours on the second Saturday of every month.

Mother appealed.

DISCUSSION[2]

As relevant here, section 388 allows a parent to file a verified petition with the juvenile court "for a hearing to change, modify, or set aside any order of court previously made or to terminate the jurisdiction of the court." The petition must present "in concise language any change of circumstances or new evidence that is alleged to require the change of order or termination of jurisdiction." (§ 388, subd. (a)(1); see Cal. Rules of Court, rule 5.560(d).) The court may grant the petition "only if the court finds by clear and convincing evidence that the proposed change is in the best interests of the child." (§ 388, subd. (a)(2).) "If it appears that the best interests of the child or the nonminor dependent may be promoted by the proposed change of order, . . . the court shall order that a hearing be held . . . ." (*Id.* § 388, subd. (d).)

The juvenile court may summarily deny the petition without an evidentiary hearing if it "fails to state a change of circumstance or new evidence that may require a change of

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[2] Mother's notice of appeal identified both the court's October 3, 2016 order granting legal guardianship at the section 366.26 hearing and "Denial of previous 388 petitions." In her briefs on appeal, she explains she is challenging the denial of her May 19, 2016 section 388 petition, and she argues the trial court could not grant legal guardianship at the section 366.26 hearing until it held a full hearing on the claimed change in circumstances. (See *In re Hashem H.* (1996) 45 Cal.App.4th 1791, 1801 (*Hashem H.*) ["The court must first afford appellant a fair hearing on her alleged change of circumstances before proceeding to the section 366.26 hearing and disposition."].) She does not attack the order granting legal guardianship on any other ground, so we limit our discussion accordingly.

order" or "fails to show that the requested modification would promote the best interest of the child." (Cal. Rules of Court, rule 5.570(d)(1); see *In re Jeremy W.* (1992) 3 Cal.App.4th 1407, 1414.) The petition must be construed liberally in favor of its sufficiency. (Cal. Rules of Court, rule 5.570(a); *Hashem H., supra,* 45 Cal.App.4th at p. 1798; *Jeremy W.*, *supra*, at p. 1414.) " '[I]f the petition presents *any* evidence that a hearing would promote the best interests of the child, the court will order the hearing.' [Citations.] 'The parent need only make a prima facie showing to trigger the right to proceed by way of a full hearing.' " (*Hashem, supra,* at pp. 1798-1799; see *In re Angel B.* (2002) 97 Cal.App.4th 454, 461 (*Angel B.*) ["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."].)

As an initial matter, we reject respondent's argument that the juvenile court actually held the evidentiary hearing required by section 388 when it addressed the petition at the August 15, 2016 hearing and later at the October 3, 2016 section 366.26 hearing. If the juvenile court does not summarily grant or deny a section 388 petition, it must select one of two options: (1) "order that a hearing on the petition be held within 30 calendar days after the petition is filed"; or (2) "order a hearing for the parties to argue whether an evidentiary hearing on the petition should be granted or denied." (Cal. Rules of Court, rule 5.570(f); see *In re Alayah J.* (2017) 9 Cal.App.5th 469, 479-480.) The record makes clear the court chose the latter course. In the August 15, 2016 form JV-183 order, the court noted the August 13, 2016 hearing addressed "whether the court should grant or deny an evidentiary hearing." The court did *not* complete the section that

would have ordered an evidentiary hearing on the petition "because the best interest of the child may be promoted by the request." Nothing the court said or did at either the August 13, 2016 hearing or the October 3, 2016 section 366.26 hearing suggested otherwise.

We agree with respondent, however, that the juvenile court acted within its discretion when it denied mother an evidentiary hearing. To trigger the hearing requirement under section 388, the parent must present a prima facie case of "(1) a genuine change of circumstances or new evidence, and that (2) revoking the previous order would be in the best interests of the children." (*In re Anthony W.* (2001) 87 Cal.App.4th 246, 250.) The prima facie case "refers to those facts which will sustain a favorable decision if the evidence submitted in support of the allegations by the petitioner is credited." (*In re Edward H.* (1996) 43 Cal.App.4th 584, 593 (*Edward H.*).) This standard is not met by "general averments rather than specific allegations describing the evidence constituting the proffered changed circumstances or new evidence." (*Ibid.*) The juvenile court may look at the facts alleged in the petition, as well as the undisputed facts in the court file. (*Angel B., supra,* 97 Cal.App.4th at p. 461.) We review the court's summary denial of a section 388 petition for abuse of discretion. (*Anthony W., supra,* at p. 250.)

When mother filed the section 388 petition, her children had been under juvenile court supervision for more than three years based on sustained allegations that mother and father's domestic violence posed a danger to them. During that period, mother repeatedly demonstrated she was unable to fully comply with court orders designed to eliminate that risk and reunify the family. For example, by September 2013, her monitored

visitation had been going well, but she also visited the children without an approved monitor and visited them with father, even though joint visits were prohibited. She had been arrested four times between August 2012 and October 2013, and she tested positive once for marijuana. She then refused to visit the children at all in November 2013 due to issues with their caregiver and because she wanted to complete her court-ordered programs.

While she quickly resumed her visits, in March 2014, she and father forged letters indicating they were in compliance with their court-ordered programs. In reality, mother had only been sporadically attending her classes. Mother was arrested and incarcerated for burglary two months later, and she claimed father was physically abusing her again. By May 2014, the juvenile court determined the circumstances required terminating reunification services and setting a hearing for a permanent plan. The children were eventually placed with Marlene W., and while mother continued to visit the children regularly, they thrived in Marlene W.'s care.

Against this backdrop, mother presented only recent documentation that she drug tested twice but did not submit results; she completed a substance abuse program and a "Make Parenting a Pleasure" program; she attended 11 out of 13 sessions in a parenting program; and most importantly, she completed only 34 of 54 weeks in an anger management and domestic violence program—the very reason the children came within juvenile court jurisdiction in the first place. True, she assured the court she had her own apartment, driver's license, and vehicle, and she claimed she would do whatever the court ordered to reunite with her children. While her progress and her

desire to reunite with her children were commendable, we cannot say the juvenile court abused its discretion in finding it fell short of a prima facie case of changed circumstances warranting a hearing to explore unmonitored visitation. (See *Angel B., supra,* 97 Cal.App.4th at p. 463 [completion of classes "does not, in and of itself, show prima facie that either the requested modification or a hearing would be in the minor's best interests"].)

Further, even if mother's evidence showed changed circumstances, mother failed to present a prima facie case that unmonitored visitation was in the children's best interest. Because reunification services were terminated and the court set a section 366.26 hearing for permanent placement, "the children's interest in stability was the court's foremost concern and outweighed any interest in reunification." (*Edward H., supra,* 43 Cal.App.4th at p. 594.) The children had been removed from their parents for four years by the time of the section 366.26 hearing, which was nearly their entire lives. They were thriving in their placement with Marlene W., and the court was holding proceedings to declare her their legal guardian. While mother continued her monitored visits with them, she offered no evidence to address the risk to the children from domestic violence between her and father during *unmonitored* visitation. The record showed she had been prone to allowing father to participate in visitation and she had not yet finished her domestic violence classes, so the juvenile court had no assurance the children would be safe in mother's unmonitored care. Thus, the juvenile court did not abuse its discretion in finding the children's best interests were not served by granting mother unmonitored visitation.

DISPOSITION

The section 388 and section 326.66 orders are affirmed.

FLIER, Acting P. J.

WE CONCUR:

GRIMES, J.

SORTINO, J.*

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* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.