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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

In re A.C., a Person Coming Under the Juvenile Court Law.	B261494 (Los Angeles County Super. Ct. No. CK89592)
LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. AR. C., Defendant and Appellant.	

APPEAL from orders of the Superior Court of Los Angeles County, Marguerite D. Downing, Judge. Affirmed.

Patti L. Dikes, under appointment by the Court of Appeal, for Defendant and Appellant.

Mark J. Saladino, County Counsel, Dawyn Harrison, Assistant County Counsel, and Navid Nakhjavani, Deputy County Counsel, for Plaintiff and Respondent Department of Children and Family Services.

Ar.C. (mother) appeals the dependency court's summary denial of her petition under Welfare and Institutions Code section 388.[1] We conclude the court did not abuse its discretion and affirm the order denying mother's petition.

FACTUAL AND PROCEDURAL BACKGROUND

Mother has three children: nine-year-old A.C., the child who is the subject of this appeal; four-year-old J.J., who now lives with his presumed father D.J.; and an infant born during these dependency proceedings. A.C.'s alleged father, A.M., died during these proceedings.[2]

On June 3, 2011, the Department of Children and Family Services (DCFS) received a referral alleging then seven-month-old J.J. was at risk of physical and emotional abuse. The referral indicated that a physical fight broke out between mother and D.J. in a car while D.J. was driving with J.J. in the backseat. Mother got out of the car when it stopped or slowed, and D.J. drove off.

When interviewed (separately) by Children's Social Worker (CSW) Regina Dupree, mother and D.J. each blamed the other for the incident. D.J. said mother had hit him first while mother said D.J. was the initial aggressor. Mother said D.J. had used marijuana earlier in the day, while D.J. said mother had consumed a lot of alcohol. D.J. said this was the first incident of domestic violence, while mother said that it was the worst but not the first incident of domestic violence by D.J.

Mother and D.J. agreed to take drug tests for DCFS but missed their scheduled tests on August 1. Mother told CSW Dupree that she planned to move out of their shared

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

[2] A.M. had a brief involvement in these proceedings. It appears that he was first contacted about this dependency proceeding on February 27, 2013, when he was advised of the February 28 detention hearing. A.M. told the social worker that he was disabled and needed a ride to court. An attorney was appointed for him at the February 28, 2013 hearing. A.M.'s health deteriorated over the summer. At one point, he was in a coma and on life support. A.M. apparently suffered a stroke in September 2013, and sustained brain damage. He died on November 18, 2014.

residence and obtain a restraining order against D.J., but by August 24, mother had not obtained a restraining order. Mother did not appear to have fully moved out of D.J.'s residence.

On September 6, 2011, DCFS filed a section 300 petition on behalf of then five-year-old A.C. and J.J., due to mother's and D.J.'s history of domestic violence and substance abuse. At the children's detention hearing, the juvenile court found a prima facie case for detaining A.C. and J.J. from D.J. The boys were released to mother's custody.[3]

Dependency Investigator Joseph Aparicio spoke with A.C. on September 29, 2011. A.C. said his mother got mad when she drank beer and would go to sleep without taking care of J.J. His maternal grandmother took care of A.C. and J.J. when mother drank.

The Dependency Investigator also spoke with mother. Mother said that it had been two years since she had used marijuana. She was not drunk at the time of the incident. Mother stated that she drank four or five beers when she went to parties. The maternal grandmother watched the children when mother drank. Mother did not believe she had a problem with alcohol.

On November 8, 2011, the court sustained the section 300 petition, which alleged the children were minors described by subdivision (b), and ordered family maintenance services. Mother was ordered to participate in a support group for victims of domestic violence, attend parenting classes and attend a drug and alcohol treatment program if she missed any random drug tests. D.J. was permitted to have monitored visits with the children.

On April 5, 2012, mother began attending parenting classes and receiving individual counseling on domestic violence issues. She missed her scheduled drug tests on January 25, February 1, February 13, March 12, and April 11, 2012. She did take two

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[3] The court found the Indian Child Welfare Act did not apply.

drug tests, on March 27 and April 23; both were negative. A DCFS report noted that mother was waiting to receive substance abuse treatment.

On November 28, 2012, CSW Lopez met with mother and the children. Mother disclosed that she had not drug tested because she had been drinking. She said, "I know I need help. I don't know why I waited so long, but I want to get help for my drinking. I want to stop drinking because I want to take care of my children." Mother explained that she had been under a lot of stress recently because she had been drugged and assaulted by two men. She filed a police report. As a result of the assault, mother suffered from depression and turned to alcohol. Mother agreed to submit to an on-demand drug test.

Mother successfully completed her parenting classes and domestic violence counseling sessions. Mother continued to drink, failed to submit to drug testing and did not begin family preservation services. DCFS recommended that the court maintain jurisdiction and order additional services for mother. On December 3, 2012, DCFS informed the court that mother had missed her intake appointment with Shields for Families which involved a substance abuse program. Mother stated that she was told in May 2012, that she did not need to attend a substance abuse program because her drinking was "not like an alcoholic."

At the December 3, 2012 section 364 hearing, the court ordered mother to enroll in a substance abuse program and to participate in random drug and alcohol testing. The court also ordered services for D.J.

Mother missed scheduled drug tests on December 4, 11 and 21, 2012 and January 7 and 17, 2013.

During a home visit on February 12, 2013, the maternal grandfather told the CSW that D.J. came to the house a lot and mother permitted D.J. to go out with J.J. The grandfather was worried because J.J. has asthma and D.J. smoked around him. He was not aware that a restraining order barred D.J. from the home.

On February 22, DCFS obtained a removal order for the children who were placed in a foster home.

On February 25, the CSW spoke with A.C. who said that he had seen his mother "drinking a lot but it was ok." The maternal grandmother told the social worker that mother continued to drink. She was concerned about mother's drinking and did not believe mother could stop drinking on her own.

On February 28, 2013, DCFS filed a section 387 petition on behalf of A.C. and J.J., based on mother's failure to enroll in a substance abuse treatment program and allowing D.J. to visit the home in violation of a restraining order. The court found a prima facie case to detain the boys. On April 18, 2013, the court sustained the petition and ordered family reunification services for mother and D.J.

In April and May 2013, mother visited the boys every Saturday morning. In June mother began cancelling visits. She saw the boys about twice a month. Several times mother called the foster home while intoxicated. Other times, mother left messages at the foster home in which she sounded intoxicated.

Mother told a CSW that she drank alcohol both alone and with others until she lost consciousness. She acknowledged she needs a residential treatment program. Mother also stated that she had been in the hospital for alcohol poisoning. DCFS referred mother to Shields for Families for treatment in August and September 2013, but mother cancelled her appointments. Mother missed all of her scheduled drug and alcohol tests between February and September 2013.

On January 8, 2014, mother told CSW Williams that she had began attending the substance abuse program at Shields for Families but "slipped and messed up with the drinking." She was hospitalized for intoxication. In a February 25, 2014, interview with mother, CSW Williams noticed that mother smelled of alcohol. Mother stated that she had not had a drink in two weeks. Mother's visits with her children were sporadic. She continued to miss her scheduled drug and alcohol tests.

D.J., meanwhile, completed a substance abuse treatment program and continued to participate in other court-ordered services. He tested negative in five consecutive drug tests in 2014. D.J. progressed to overnight weekend visits with J.J. At an April 17, 2014, hearing, the court ordered J.J. placed with D.J. with continuing family maintenance

services. The court set a section 366.21, subdivision (f), 12-month review hearing for A.C.

A.C. was moved from his original foster home to the home of his former respite caregivers because his original foster parent was no longer fostering children. The respite caregivers had expressed an interest in adopting A.C.

On May 6, 2014, CSW Williams was able to contact mother, who had been out of touch. CSW Williams told mother about A.C.'s move. Mother did not visit A.C. until three and a half months later. A.C. learned in one of his mother's sporadic telephone calls that she had a new baby.

At the June 4, 2014 contested review hearing, the court terminated mother's family reunification services and set a permanency planning hearing for A.C.

In an October 1, 2014, report DCFS reported that A.C.'s current caregivers had an approved home study and wanted to adopt A.C. A.C. told Adoption CSW Garcia that he was happy living with his caregivers and wanted to be adopted by them because they were nice to him and cared about him. He liked his school, his friends and his teacher. DCFS recommended the court terminate mother's parental rights over A.C.

On October 24, 2014, mother filed a section 388 petition seeking A.C.'s return to her custody or in the alternative additional time to reunify with him. As a change of circumstance, mother pointed to her enrollment in a substance abuse program on September 9, 2014. Mother believed the modification of the court's order was in A.C.'s best interest because she shared a bond with A.C. and was now drug free.

On October 28, she withdrew her petition. The court continued the matter to December 3, 2014, due to issues related to alleged father A.M. In fact, A.M. died on November 18, 2014. On December 2, mother filed a section 388 petition which was identical to the one filed on October 24. The court continued the matter to December 4. On December 4, the court terminated jurisdiction over J.J.

On December 5, the court denied a hearing on the section 388 petition. The court summarily denied the petition, finding it did not state new evidence of a change of circumstances and the requested modification was not in A.C.'s best interest.

DISCUSSION

Mother contends the court erred in failing to conduct a full and fair evidentiary hearing on her section 388 petition seeking the return of custody of A.C. or in the alternative reinstatement of reunification services and unmonitored visitation. She contends the court's summary denial of the petition was an abuse of discretion.

a. *Applicable law*

"A juvenile court order may be changed, modified or set aside under section 388 if the petitioner establishes by a preponderance of the evidence that (1) new evidence or changed circumstances exist and (2) the proposed change would promote the best interests of the child. [Citation.] A parent need only make a prima facie showing of these elements to trigger the right to a hearing on a section 388 petition and the petition should be liberally construed in favor of granting a hearing to consider the parent's request. [Citation.] [¶] However, if the liberally construed allegations of the petition do not make a prima facie showing of changed circumstances and that the proposed change would promote the best interests of the child, the court need not order a hearing on the petition. [Citations.] The prima facie requirement is not met unless the facts alleged, if supported by evidence given credit at the hearing, would sustain a favorable decision on the petition. [Citation.]" (*In re Zachary G.* (1999) 77 Cal.App.4th 799, 806.)

The juvenile court may consider the entire factual and procedural history of the case in deciding whether to grant a hearing on a petition under section 388. (*In re Justice P.* (2004) 123 Cal.App.4th 181, 188–189.) The asserted change of circumstances "must be of such significant nature that it requires a setting aside or modification of the challenged prior order." (*Ansley v. Superior Court* (1986) 185 Cal.App.3d 477, 485.) In determining whether a change in placement is warranted, the court may consider factors such as the seriousness of the reason leading to the child's removal, the reason the problem was not resolved, the passage of time since the child's removal, the relative strength of the bonds with the child, the nature of the change of circumstance, and the

reason the change was not made sooner. (*In re Aaliyah R.* (2006) 136 Cal.App.4th 437, 446–447.) In assessing the best interests of the child, "a primary consideration . . . is the goal of assuring stability and continuity." (*In re Stephanie M.* (1994) 7 Cal.4th 295, 317.)

"We review the juvenile court's denial of a section 388 petition for an abuse of discretion. [Citation.] The court 'exceeds the limits of legal discretion by making an arbitrary, capricious or patently absurd determination.' [Citation.] The test for abuse of discretion is whether the court exceeded the bounds of reason. '"The appropriate test for abuse of discretion is whether the trial court exceeded the bounds of reason. When two or more inferences can reasonably be deduced from the facts, the reviewing court has no authority to substitute its decision for that of the trial court." [Citation.]' [Citation.]" (*In re Mickel O.* (2011) 197 Cal.App.4th 586, 616.)

b. *Analysis*

Mother contended that her circumstances had changed as follows: "Mother has enrolled in a full substance abuse program at American Recovery Center on September 9, 2014. She participates in individual sessions, group therapy, 12 [step] meetings, parenting class, and drug testing. Mother is engaging in all aspects of her treatment (See Attached Letter)[.]" The attached letter from American Recovery Services is dated October 22, 2014. The letter states that mother enrolled in their program on September 9, 2014, and had periodically drug tested and received negative results, attended individual and group therapy each week and had continued to go to parenting classes. It also states that mother, "has been able to demonstrate the ability to engage in her treatment. . . . "

Even liberally construing mother's petition, when the court considered mother's statements in the context of the court file, the court properly concluded mother had not made a prima facie case that warranted a hearing. Mother's enrollment in a substance abuse program, although commendable, reflects "changing," not changed circumstances. On at least one previous occasion, mother began a substance abuse program, but "slipped up" and ended up in the hospital with alcohol poisoning. (See *In re Ernesto R.* (2014) 230 Cal.App.4th 219, 223 [appellant's recent sobriety was a "changing" circumstance

where he had a history of relapses, was in the early stages of recovery and was still addressing a chronic substance abuse problem].) Even "*completion* of drug treatment program, at this late a date, though commendable, is a not a substantial change of circumstances." (*Ibid*. [emphasis added]; *In re Cliffton B.* (2000) 81 Cal.App.4th 415, 423 [full compliance with treatment plan plus seven months of negative drug tests not sufficient to show change of circumstances for parent who has had relapses from sobriety in the past]; see *In re Kimberly F.* (1997) 56 Cal.App.4th 519, 531 and fn. 9 [it is doubtful that a "parent who loses custody of a child because of the consumption of illegal drugs and whose compliance with a reunification plan is incomplete during the reunification period" could ever show a sufficient change of circumstances to warrant granting a section 388 motion].) When mother filed her section 388 petition, she had not even completed her treatment program, let alone established a period of sobriety.

Even if mother had shown a change of circumstances, she did not show that modification of the order would be in A.C.'s best interest. There are four factors to consider in determining whether a modification would be in the child's best interest, and three of those factors concern the problem which led to the dependency. (*In re Kimberly F., supra*, 56 Cal.App.4th at p. 532.) Those three factors are: (1) the seriousness of the problem and the reason for any continuance of the problem; (2) the degree to which the problem may be easily removed or ameliorated; and (3) the degree to which the problem actually has been ameliorated. (*Ibid*.) Alcohol abuse is a very serious problem which is not easily overcome. Mother's problem was particularly acute, resulting in at least two alcohol-related hospitalizations. Her alcohol abuse continued during the three years of the dependency because she was initially in denial about her problem, then after acknowledging her problem did not seek treatment for a significant period of time and then after finally starting treatment had a serious relapse resulting in hospitalization. Although mother had begun the process of ameliorating her problem by the time she filed her petition, she still had a long and uncertain way to go.

The fourth factor to be considered is the strength of the relative bonds between the child and the parent and caregivers. (*In re Kimberly F., supra*, 56 Cal.App.4th at p. 532.)

As mother pointed out in her petition, A.C. had lived with her for the first six or seven years of his life. Although there was a bond between mother and A.C., it had attenuated during the course of the dependency. A.C. was removed from his mother's custody in February, 2013. By June 2013, mother was visiting A.C. only twice a month. She visited A.C. three times in the period from November 2013 through January 2014, and three times in the March through April 2014, time period. Beginning in June, 2014, her phone calls to the children began to drop off as well. She did not visit the children at all in June or July 2014. By October 2014, A.C. told the adoption CSW that he was happy living with his caregivers and wanted to be adopted by them because they were nice to him and cared about him. He liked his school, his friends and his teacher.

Thus, the nature of mother's problem and the relationships between A.C. and mother and A.C. and his caregivers do not support mother's claim that granting the section 388 petition would be in A.C.'s best interest.

DISPOSITION

The juvenile court's order is affirmed.

KIRSCHNER, J. [*]

I concur:

KRIEGLER, acting P.J.

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

MOSK, J., Concurring

I concur.

Most courts have said the abuse of discretion standard applies to an appeal from a refusal to hold a hearing under Welfare and Institutions Code section 388. I have doubts that the standard of review for a determination that a parent has not stated a prima facie case for such a hearing should not be de novo. I would affirm in this case under either standard of review.

MOSK, J.