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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

In re A.D. et al., Persons Coming Under the
Juvenile Court Law.

A.D. et al.,

Plaintiff and Appellants,

v.

SAN FRANCISCO HUMAN SERVICES
AGENCY,

Defendant and Respondent.

A133223

(San Francisco City & County
Super. Ct. Nos. JD103106A,
JD103106B, JD103106C)

This juvenile dependency case involves four minor siblings, all of whom are under a probate guardianship designating their paternal grandmother (Guardian) as their legal guardian. One of the siblings alleged that Guardian was physically abusing the minors, and dependency proceedings were initiated. In the dependency proceedings, the juvenile court placed two of the siblings, as well as their half-sister, with Guardian. The other two siblings were placed with a paternal aunt and uncle (Aunt and Uncle).

In June 2011, three of the siblings filed petitions for modification of the juvenile court's orders, in which they sought to terminate Guardian's probate guardianship and to place all of the full siblings together in the home of Aunt and Uncle. The juvenile court denied the petitions, and the siblings appealed. We affirm.

FACTS AND PROCEDURAL BACKGROUND

The minors involved in this case are J.D. (Brother), a boy born in late 1995; A.D. (Sister 1), a girl born in late 1997; J.D. (Sister 2), a girl born in mid-2001; and A.I.D. (Sister 3), a girl born in mid-2002. We will refer to Sister 1, Sister 2, and Sister 3, who are the appellants in this court, collectively as Sisters.¹ All four minors have the same parents, M.M. and E.M.D., neither of whom was a party to the proceedings from which this appeal arose.² The minors also have an older half-sibling, Sister 4, born in late 1994, who shares the same mother.

In December 2004, the probate department of the San Mateo County Superior Court granted Guardian legal guardianship of Brother and Sisters. Guardian is also the legal guardian of the half-sibling, Sister 4, under a San Francisco County juvenile court foster care order. Sister 4 lives with Guardian, but was not a party to the proceedings below. Guardian's adult son (the minors' uncle) Joshua E. (Joshua), also lived with her at the time the dependency proceedings were initiated.

On March 21, 2010, Brother went to the San Francisco police and reported that Guardian and Joshua had physically abused him, and possibly broken his arm. The police called a social worker and told her they were taking Brother to the hospital. Shortly thereafter, the social worker received a report from a hotline stating that Guardian and Joshua were physically abusing Brother and Sisters. While at the hospital, Brother stated that he was afraid to return to Guardian's home, and asked the police to call Aunt and ask her to pick him up. They agreed, and Brother was released into the care of Aunt and Uncle. Later, a social worker interviewed Aunt, who expressed concern that

¹ The order from which this appeal was taken denied a petition filed by Brother, and a separate petition filed by Sister 2 and Sister 3 jointly. Sister 1 was not listed as a petitioner in either petition, although she was represented by the same counsel as Sister 2 and Sister 3 in the juvenile court. The notice of appeal was purportedly filed on behalf of Sister 1 as well as Sister 2 and Sister 3. (Brother, who had separate counsel, did not appeal.) As neither party has raised any issue as to Sister 1's status as an appellant in this court, and the issue does not affect our analysis, we treat the appeal as having been filed by all three Sisters.

² The siblings' father is in prison. Their mother's whereabouts are unknown.

Guardian's treatment of the minors was getting worse, and advised that the minors should be interviewed outside Guardian's presence because they would not talk freely otherwise. Aunt stated that she would like to have all of the minors placed with her.

On March 23, 2010, another social worker from respondent San Francisco Human Services Agency (the Agency) interviewed Sisters at their school, and then interviewed Sister 4 at her school. All of them denied that Guardian abused them, and none of them appeared to be afraid of her or reluctant to return to her home. The social worker visited Guardian's home and found it clean and well organized, and did not observe any interpersonal problems between the minors and Guardian or Joshua. Guardian told the social worker that there was a "family feud" between her and Aunt (who is Guardian's daughter), and that Aunt had previously threatened to take the minors from Guardian on numerous occasions.

On March 24, 2010, a team of social workers met with Brother, who reiterated his accusations that Guardian physically abused him and Sisters, and told the social workers that Guardian had told the minors not to tell anyone about the physical discipline she used. Brother refused to return to Guardian's home, and was temporarily placed with Aunt and Uncle. It was evident to the social workers that Aunt and Uncle had "a deep history of conflict" with Guardian. After the meeting, Aunt took Brother to his school, which was also the one attended by Sisters. While at the school, Brother was able to speak to Sister 1, and told her that "It is safe to talk."

Later that day, the Agency received another hotline call reporting that Sister 3 had confirmed Brother's allegations of physical abuse against Guardian, and stated she was afraid of Guardian. As a result, the social worker interviewed Brother's siblings again. This time, Sisters confirmed Brother's allegations of physical abuse, stated that Guardian pinched, scratched, and hit them, and showed the social worker scabs and scars. They said that they had not disclosed the abuse during the prior interview because Guardian had told them if they did, they would be taken away from her and separated from one another, and they were afraid of Guardian. They were upset when they learned they would be detained, however, because they did not want to be removed from their current

school. Half-sister Sister 4, who was interviewed separately, continued to deny unequivocally that Guardian abused any of the minors, and expressed a strong desire to stay in the school she attended. Due to the visible marks and bruises exhibited by Sisters, the Agency decided to detain them, and placed them temporarily, on an emergency basis, with their paternal great-aunt and great-uncle (Mr. and Mrs. H.), which enabled them to continue attending their current schools.³

On March 26, 2010, the Agency filed the dependency petition from which this appeal arose. It alleged that Brother (then age 14) and Sisters (then ranging in age from 7 to 12) were at risk of harm from Guardian's physical abuse. The juvenile court held an initial detention hearing on March 29, 2010, and ordered Sisters, along with Sister 4, detained and temporarily placed with Mr. and Mrs. H. Brother was to remain with Aunt and Uncle.

On April 6, 2010, the Agency held a meeting to determine a longer term temporary placement for Sisters and Sister 4. At the meeting, the Agency decided that Sister 1 would join Brother in the care of Aunt and Uncle, and Sister 2 and Sister 3, together with Sister 4, would be moved to the home of Joshua's fiancée, Y.L. (Fiancée). On April 7, 2010, counsel for Sisters filed a request to change the order so as to place Sister 2 and Sister 3 with Aunt and Uncle, as the minors strongly desired to stay together. Counsel reported that Sister 1 was very upset when she was told, after the meeting, that her two younger sisters would be placed with Fiancée rather than with Aunt and Uncle. The juvenile court denied the request on the same day, on the ground that the placement with Fiancée was only a temporary detention placement, and the court had not yet entered an order regarding jurisdiction or disposition.

On May 4, 2010, the juvenile court ordered, as recommended by the Agency, that Sister 2 and Sister 3 remain with Fiancée until the end of the school year, and then move

³ Aunt and Uncle live far enough outside San Francisco that it was extremely difficult for the minors to attend San Francisco schools while residing with them. Mr. and Mrs. H. also live outside San Francisco, but close enough that a daily commute from their home to the minors' existing schools was less disruptive.

to Aunt and Uncle's home, while Brother and Sister 1 would remain with Aunt and Uncle. However, in a disposition report filed on May 25, 2010, the Agency reported that Sister 2 and Sister 3 appeared happy to see Guardian during a visit, and said in an interview outside Guardian's presence that they missed Guardian, were not afraid of her, and wanted to go back to live with her. They reported that Guardian did not hit them, although she did grab their upper arms and ears and spank them on their hands. The Agency reported that Sister 2, Sister 3, and Sister 4 were doing well in Fiancée's care, but nonetheless recommended that they be returned to Guardian, who wanted to reunify with all of the minors. The Agency also recommended services for Guardian, including therapy, visitation, and parenting education.

On May 26, 2010, the juvenile court ordered that Sister 4 return to Guardian's home; that Sister 2 and Sister 3 stay with Fiancée until the end of the school year, and then move to Aunt and Uncle's home; and that Brother and Sister 1 remain with Aunt and Uncle. The court further ordered that Guardian was to have three hours per week of therapeutic supervised visits; that the children have weekly visits with each other without Guardian or Joshua present; and that Guardian not visit the children in Fiancée's home or under her supervision.

After a contested combined jurisdiction and disposition hearing on August 11, 2010, the juvenile court filed two orders on August 25, 2010. As to all of the siblings, the court found jurisdiction under Welfare and Institutions Code section 300, subdivision (b).⁴ Brother and Sister 1 were placed with Aunt and Uncle, with visitation rights to Guardian as recommended by the Agency. Sister 2 and Sister 3 were returned to Guardian's home, with supervision and services to be provided by the Agency. Review hearings were set for February 9 and June 1, 2011.

On October 1, 2010, Sisters' counsel filed a section 388 petition seeking to ensure that the siblings could have ample visitation, because they missed seeing one another. The petition also sought an order protecting Sisters from Joshua, who was described as

⁴ All further undesignated statutory references are to the Welfare and Institutions Code.

inflicting harsh discipline on Sister 2 and Sister 3. On October 20, 2010, the juvenile court ordered that all the siblings have weekly visitation with each other at Aunt and Uncle's home, plus unlimited telephone contact and additional visits as agreed by the caretakers, and that Joshua not be present at any visit.

The Agency's status report for the scheduled February 9, 2011 review hearing recommended that the status quo be maintained until the 12-month review hearing set for June 1, 2011, with another six months of services to be provided to Guardian. Guardian had been participating in the services she had been receiving, and was attempting to reach out to Brother and Sister 1 during their weekly therapeutic visits, which were taking place at a social services agency. Sister 2 and Sister 3 were adjusting well to living in Guardian's home with Sister 4. When the status review hearing was finally held, on April 11, 2011, the court issued orders maintaining the status quo as to placement, and continuing services.

Meanwhile, Guardian's aunt and mother both passed away during February and March 2011. As a result, Guardian had to move out of the home she had been living in, and Sister 2 and Sister 3 reported that her new temporary residence had cockroaches. In addition, the Agency reported that Guardian had "de-stabilized [*sic*] considerably" due to the deaths in her family; had cancelled the therapeutic visits she had been receiving for almost three months; and "appear[ed] . . . to be so overwhelmed with her grief and the stress of her living situation, that she [was] not able to devote the energy required to successfully engage in her therapeutic reunification services and improve the way she parents/interacts with the children." The Agency recommended that reunification services be terminated; that Sister 2 and Sister 3's dependency be dismissed, with full legal and physical custody returned to Guardian; and that Brother and Sister 1 remain in Aunt and Uncle's home, and that a section 366.26 hearing be set, with a recommended permanent plan of guardianship by Aunt and Uncle.

On June 1, 2011, the 12-month review hearing was continued to June 29, 2011. On June 27, 2011, counsel for Brother filed a petition under section 388 (section 388 petition), seeking to have Brother's two youngest sisters, Sister 2 and Sister 3, visit him

for two weeks over the summer, and to be placed with him and Sister 1 in the home of Aunt and Uncle for the ensuing school year. On June 28, 2011, counsel for Sisters filed a section 388 petition joining in Brother's petition for a change of Sister 2 and Sister 3's placement, and also seeking termination of Guardian's probate guardianship. The Agency opposed the petitions. The siblings' father joined in the petitions, and Guardian joined in the Agency's opposition.

In an addendum report filed on August 11, 2011, the Agency reported that in two interviews with Sister 2 and Sister 3 outside Guardian's presence, first at their therapist's office on July 26, 2011, and then at Guardian's home on August 3, 2011, the girls denied that Guardian had hit or hurt them in any way, although they did complain that their older half-sister Sister 4 had recently hurt them in the course of an incident during which Sister 2 and Sister 3 locked Sister 4 in the bathroom briefly. The social worker acknowledged that Sister 2 and Sister 3 clearly would prefer to live with Aunt and Uncle, but reported that she "cannot find sufficient cause to support their wish to be removed." She opined that the girls' relationship with Guardian and Sister 4 was "perhaps grounds for ongoing family therapy," but that those conflicts were "not evidence of abuse or neglect that would warrant removal."

Both section 388 petitions were heard and denied by a commissioner on August 22, and reheard by a juvenile court judge on September 14, 2011. The judge denied the petitions, and Sisters timely appealed.

DISCUSSION

A. Standard of Review

The standard of review on appeal from an order denying a section 388 petition is abuse of discretion, and "[t]he denial of a section 388 [petition] rarely merits reversal as an abuse of discretion. [Citation.]" (*In re Amber M.* (2002) 103 Cal.App.4th 681, 685-686.) "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.]" (*In re Stephanie M.* (1994) 7 Cal.4th 295, 318-319 (*Stephanie M.*))

Thus, we will not reverse a juvenile court’s denial of a section 388 petition “ “ “unless the trial court has exceeded the limits of legal discretion by making an arbitrary, capricious, or patently absurd determination [citations].” ’ [Citations.]” (*Stephanie M.*, at p. 318.)

B. Denial of Request to Set Aside Probate Guardianship

We turn first to Sisters’ contention that the juvenile court erred in denying their request to terminate Guardian’s probate guardianship, or, alternatively, in declining to order their counsel to file a motion to do so under section 728. At the outset, we note that there are significant legal differences between a guardianship established in the course of dependency proceedings and a guardianship established in another forum, such as probate or family court. As one court has described it, there are “two types of guardians”: “the guardian appointed in dependency cases as part of a long-term plan,” on the one hand, and on the other hand, the type of guardian who is “the legal caretaker of the child at the time dependency is initiated.” (*In re Carrie W.* (2003) 110 Cal.App.4th 746, 758 (*Carrie W.*)).⁵

The phrase “parents or legal guardians” is used repeatedly in the relevant portions of the Welfare and Institutions Code. This language reflects a determination on the part of the Legislature that for the purpose of dependency proceedings, predependency guardians are generally treated as equivalent to the dependent child’s parents, and thus have more rights than dependency guardians. (*Carrie W.*, *supra*, 110 Cal.App.4th at pp. 758-759; *In re Heraclio A.* (1996) 42 Cal.App.4th 569, 575-576; see also *In re Catherine H.* (2002) 102 Cal.App.4th 1284, 1292-1293 [distinguishing between family court guardianship and juvenile court guardianship].)

Even when a predependency guardianship is in place, however, “[o]nce a petition has been filed in juvenile court alleging that a child is described by a subsection of

⁵ For convenience, we will refer to legal guardians who were designated as such independently of the dependency proceedings, such as those appointed by a probate or family court, as predependency guardians (of which probate guardians are one variety). We will use the term dependency guardians to refer to guardians appointed by the juvenile court as part of a child’s permanent plan in a dependency proceeding.

section 300, and until the petition is dismissed or dependency is terminated, the juvenile court has sole and exclusive jurisdiction over matters relating to the custody of the child and visitation with the child.” (Cal. Rules of Court, rule 5.620(a).) Thus, when a child who has a predependency guardian becomes a dependent of the juvenile court, as occurred in the present case, exclusive jurisdiction over custody of the child is transferred to the juvenile court. However, when the predependency guardianship order originated in a probate court, the process specified in section 728 must be followed in order to modify or terminate the probate guardianship. (See *In re Angel S.* (2007) 156 Cal.App.4th 1202, 1207 (*Angel S.*)) Thus, as Sisters concede, a petition for modification of a juvenile court order under section 388 is not the proper procedural vehicle for terminating a predependency probate guardianship.

Sisters maintain, however, that the juvenile court here erred in not ordering their counsel to file a petition under section 728, subdivision (a). That statute provides that if a minor is being supervised by a probation officer, the probation officer may request the juvenile court to order the appropriate county official to file a motion to terminate or modify a probate guardianship. In the present case, however, it was not a probation officer, but Sisters’ counsel, who sought an order requiring him to file such a motion. No such order was necessary. Section 728 expressly permits a child’s attorney to initiate proceedings to terminate or modify a probate guardianship, *without* requiring an order from the juvenile court as a prerequisite. (§ 728, subd. (a) [“The motion [to terminate or modify the probate guardianship] may also be made by the guardian or the minor’s attorney”].)

As the Agency points out, it appears that Sisters’ counsel have misread section 728, subdivision (a). The juvenile court was correct in informing Sisters’ counsel that attorneys serving as counsel for minors in a dependency proceeding have independent statutory authority to file a section 728 motion to terminate the minors’ predependency probate guardianship, and do not need an order from the juvenile court granting permission to do so. Because no such order was necessary, the juvenile court did not abuse its discretion in declining to issue one.

C. Denial of Request to Change Placement

Any party to a dependency proceeding may file a section 388 petition seeking to modify a prior juvenile court order. If the children involved have already been removed from the custody of their parent(s) or predependency guardian(s), and the section 388 petition merely seeks to change their placement, “the burden of proof is on the moving party to show by a preponderance of the evidence that there is new evidence or that there are changed circumstances that make a change of placement in the best interests of the child[ren]. [Citations.]” (*Stephanie M.*, *supra*, 7 Cal.4th at p. 317.) This is the standard that Sisters argue was applicable here.

We disagree. Because Guardian was a predependency guardian rather than a dependency guardian, Sisters are in error when they argue that Guardian is not entitled to the same level of legal protection as a parent. Indeed, the case on which Sisters rely for that proposition, *In re Merrick V.* (2004) 122 Cal.App.4th 235 (*Merrick V.*), expressly acknowledged the distinction between predependency guardians and dependency guardians. (*Id.* at pp. 249-250.) In *Merrick V.*, however, the juvenile court had already *terminated* the predependency guardianship *before* the disposition hearing as to the guardian, and the Court of Appeal held the juvenile court proceeded properly in that regard. (See *id.* at pp. 245, 249-250, 253-254.)⁶ Then, because the predependency guardianship had been terminated, the court held that the guardian was no longer entitled to the rights extended to a parent in a dependency proceeding.

That is not the case here. Guardian’s probate guardianship was still in place when the section 388 petition was filed, and Sister 2 and Sister 3 were residing in her home. In effect, therefore, the section 388 petition was one seeking to remove children from the home of their parent or predependency guardian. In those circumstances, as Sisters

⁶ The issue in *Merrick V.*, *supra*, 122 Cal.App.4th 235, was whether the probate guardian had a right to reunification services before the probate guardianship could be terminated. The court held that the guardian had no such right, because by the time the issue of reunification arose, the probate guardianship had already been terminated. (See *id.* at pp. 250-254.) That holding has no bearing on the showing required to remove a child from the home of a predependency guardian whose guardianship is still in effect.

acknowledge, the party filing the section 388 petition must prove by clear and convincing evidence the applicability of one of the grounds for removal specified in section 361, subdivision (c).⁷ (Cal. Rules of Court, rule 5.570(h)(1)(A); *In re Victoria C.* (2002) 100 Cal.App.4th 536, 543; *In re Michael D.* (1996) 51 Cal.App.4th 1074, 1084-1085.)

The only ground for removal arguably applicable in the present case was that specified in section 361, subdivision (c)(1).⁸ Under that subdivision, before ordering a child removed from the home of his or her parent or predependency guardian, the juvenile court “must find the child’s welfare requires removal because of a substantial danger, or risk of danger, to the child’s physical health if he or she is returned home, and there are no reasonable alternatives to protect the child. [Citations.] There must be clear and convincing evidence that removal is the only way to protect the child. [Citation.]” (*In re N.M.* (2011) 197 Cal.App.4th 159, 170.) Thus, in the present case, Sisters had the burden to prove by clear and convincing evidence that removing Sister 2 and Sister 3 from Guardian’s home was necessary to protect them from harm.

Sisters argue that the section 388 petition should have been granted because they presented substantial evidence showing that circumstances had changed, and that moving Sister 2 and Sister 3 to Aunt and Uncle’s home would be in their best interests. This argument misses the point. Even assuming Sisters established a change of circumstances, the issue was not whether moving Sister 2 and Sister 3 would be in their best interests, but whether it was *necessary to protect them from harm*. The juvenile court, which was

⁷ Section 361, subdivision (c), provides that “A dependent child may not be taken from the physical custody of his or her parents *or guardian or guardians* with whom the child resides at the time the petition was initiated, unless the juvenile court finds clear and convincing evidence” of at least one of the circumstances enumerated in the statute. (Italics added.)

⁸ As relevant here, section 361, subdivision (c)(1) provides that removal may be ordered when “[t]here is or would be a substantial danger to the physical health, safety, protection, or physical or emotional well-being of the minor if the minor were returned home, and there are no reasonable means by which the minor’s physical health can be protected without removing the minor from the minor’s parent’s or guardian’s physical custody.”

familiar with the case, determined that it was not. We have reviewed the record, and agree with the Agency that Sisters did not show by clear and convincing evidence that Guardian was still subjecting Sister 2 and Sister 3 to physical abuse at the time the section 388 petition was filed. Accordingly, we are not persuaded that the juvenile court abused its discretion in denying the petition.

DISPOSITION

The order from which this appeal was taken is affirmed.

RUVOLO, P. J.

We concur:

RIVERA, J.

SEPULVEDA, J.*

* Retired Associate Justice of the Court of Appeal, First Appellate District, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.