

**NOT TO BE PUBLISHED IN OFFICIAL REPORTS**

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

In re Z.H., et al., Persons Coming Under  
the Juvenile Court Law.

SAN FRANCISCO HUMAN SERVICES  
AGENCY,

Plaintiff and Respondent,

v.

SHAWN H.,

Defendant and Appellant.

A135255

(San Francisco City & County  
Super. Ct. No. JD10-3371)

Shawn H., the presumed father of Z.H. and twins J.H. and M.H., appeals from an order denying his Welfare and Institutions Code<sup>1</sup> section 388 petition for reunification services. He claims his due process rights were violated because the juvenile court did not conduct a full evidentiary hearing on his petition, and further argues the court abused its discretion in denying the petition because he made a prima facie showing that granting the petition might be in the minors’ best interest. We affirm.

**I. FACTUAL BACKGROUND**

*A. Detention; Petition*

In 2008, T.T. and her three sons relocated to San Francisco from Ohio. On November 10, 2010, respondent San Francisco Human Services Agency (Agency)

<sup>1</sup> All statutory references are to the Welfare and Institutions Code.

removed Z.H. (born in Aug. 1998) and twin boys M.H. and J.H. (born in Nov. 2001) from their mother's home and placed them in emergency foster care, following a report from mother's girlfriend, Diana S. Diana S. reported that mother fed the children once a day and punished them by locking them in the bedroom for hours. The boys bathed once a month. The children reported that they lived with Diana S., her daughter and grandchild, and their mother. They shared a room and slept on the bars of a bunk bed because they had urinated on the mattress. When they were forced to stay in their room, they would urinate in the closet or on the floor. Often their mother would not feed them because she did not feel like cooking and ignored their requests for food. The minors also reported that their mother smoked "weed" in front of them sometimes, and when she got drunk, Diana S. would make them all leave for an hour or two, usually at night.

Protective Services Worker (PSW) Myeshia Grice interviewed Diana S. Diana S. said the family sometimes came to visit, but did not live with her; she claimed to not know where the family resided.

PSW Grice also spoke with the mother, who explained she had difficulty finding employment since moving to San Francisco. Mother said she and her children lived with Diana S.'s mother, but when the social worker visited the address, an elderly woman answered the door and stated she had no idea who T.T. was. Mother also said she had a few beers earlier that day, admitted smoking "weed" when she lived in Ohio, but denied any substance abuse problems. She denied locking the boys in their bedroom, and said they urinated on the floor once when they were mad. She claimed Z.H. lied a lot, would do anything to get attention, and once stabbed himself with a pencil when he got mad at school. Mother explained she moved the mattresses to air them out and thought the boys were sleeping on the floor.

The family had no prior child welfare history in California, although there was one unfounded report in Ohio. The minors and mother indicated that Shawn H. was the biological father of the three boys. PSW Grice was unable to locate the father to notify him of the children's removal from their mother's care.

The Agency filed a petition on November 15, 2010, alleging that the minors came within the provisions of section 300, subdivisions (b) (failure to protect) and (g) (alleged father's ability to care/whereabouts unknown).

*B. Jurisdiction/Disposition*

PSW Debra Culwell filed a disposition report on January 7, 2011, in advance of the settlement conference regarding jurisdiction and disposition,<sup>2</sup> reporting that mother stated she and Shawn H. were never married and the Agency had not received birth certificates. The family was homeless at the time. Mother's drug tests were clean, and she reported attending weekly therapy sessions but had not provided a signed release of information to confirm participation. Ohio records indicated mother had been receiving Supplemental Security Income, but the qualifying diagnosis was unclear because of mother's denial of mental health or other disability.

The children were placed together in a foster home outside of San Francisco. Their first placement had been changed due to Z.H.'s resistance to authority and rules, and his history of telling lies.

At the combined jurisdiction/disposition hearing on January 12, 2011, mother submitted to an amended petition on sustained allegations that she was unable to provide proper care, supervision and shelter for the minors, and father's whereabouts were unknown. The children were declared dependents and remained in foster care.

The juvenile court appointed counsel for father on April 25, 2011. Counsel objected to the jurisdiction and disposition findings and orders pertaining to father, due to lack of statutory notice. As well, counsel advised father of the legal issues, paying particular attention "to present lack of presumed father status and the limited rights of alleged fathers in California dependency matters." On June 23, 2011, appointed counsel asked to be relieved due to an "irrevocable breakdown in the attorney-client relationship." New counsel was appointed on June 29, 2011.

---

<sup>2</sup> No jurisdiction report has been located in the court files.

Based on the stipulation of all parties, the court ordered that Shawn H. was the legally presumed father of the three minor dependents.

*C. Six-month Review*

PSW Gilbert Jue reported in the six-month status review report that the twins were happy, energetic and polite, appeared to be doing fairly well mentally and emotionally, but were behind academically. Z.H., while positive and friendly at school, had ongoing struggles while in placement. He was resistant, aggressive and threatening to his brothers and the caretaker's grandchildren. PSW Jue partially attributed Z.H.'s behavior to mother's destructive comments, and expressed concern that Z.H.'s behavior negatively impacted the twins, particularly when he threatened and hit them.

The social worker noted that father, who resided in Toledo, Ohio, had weekly telephone conversations with the children, as did the maternal grandmother. However, the boys seemed apprehensive and exhibited reservations when discussing possible placement with their father or grandmother.

The six-month review hearing took place on July 28, 2011. The juvenile court ordered that the minors remain in foster care, and that mother receive six additional months of reunification services; nothing was ordered as to father. Counsel for father was present, but the record does not reveal that he made any objections or requests.

*D. 12-month Review*

In the final status report, PSW Jue detailed mother's inconsistent efforts at reunification, with "little to no progress" made in the significant areas impacting the family. The Agency recommended termination of services.

PSW Jue reported that father occasionally left him voice mail messages stating he was interested in having the children placed in his care should mother not reunify with them, but called the boys only a few times and had very limited interaction with them. Jue stated father did not appear to have any meaningful relationship with the boys, nor did he have any contact with any service providers or school staff. Consequently, it was likely father had no knowledge of the issues they faced. He did not inquire how his children were doing; his commitment or ability to care for the children was unclear to

Jue. The boys were “adamant against being placed in his care, verbalizing a history of physical and emotional abuse, and poor treatment.” On the other hand they were “very clear” that they wanted to remain with the current caretaker, expressing this desire to the social worker, their attorney, service providers, the caretaker, and their mother and grandmother.

Most of Z.H.’s difficulties centered on cancelled visits by his mother. With the help of supportive services, he had begun to stabilize. The twins were now exhibiting struggles with anger due to frustration with cancelled visits and lack of following through. Z.H. qualified for special education services due to cognitive delays, and the twins were not functioning at grade level. School officials speculated they had little school exposure.

At the contested hearing conducted March 9, 2012, father appeared by telephone. Counsel related that father had been in favor of the children remaining in California, as long as mother complied with her plan, and submitted on the six-month review findings for that reason. However, father’s opinion about placement changed given mother’s lack of progress, and he now asserted his desire for custody. Counsel indicated that father intended to file “a JV180” to obtain reunification services. No such petition had been filed since counsel’s appointment. The court pointed out that the report with the current recommendation to terminate mother’s services and set a section 366.26 hearing was filed December 21, 2011. It terminated services as to mother and referred the matter for a selection and implementation hearing. Finally, providing father with a notice of intent to file a writ petition and request for records, the court admonished that “it’s important for you and for your children that these matters be resolved as soon as possible.”

Father filed the notice of intent to file a writ petition on March 20, 2012, attaching a letter outlining the prior activities he shared with his children and the care he provided, and describing the extended family in Ohio. However, he never submitted a writ petition. Instead, on April 11, 2012, father filed a section 388 petition requesting reunification services (Judicial Council form JV-180), along with a supporting declaration. Therein he stated that he had frequent and continuing contact with the boys until mother unilaterally

decided to take them to California. He again described the activities he enjoyed with his children and the parental role he played in their lives, as well as the interaction of other Ohio relatives with the minors. Based on his understanding that mother was making satisfactory progress toward reunification, he thought it was in their best interest to remain in California as long as mother complied with the reunification plan. With the termination of mother's reunification services, father asked for reunification services so his children would not face foster care or legal guardianship.

Judge Patrick J. Mahoney set the matter for a hearing on the petition, pursuant to item 3 on the mandatory Judicial Council form JV-183, which states: "The court orders a hearing on the form JV-180 request because the best interest of the child may be promoted by the request." The quoted language mirrors the language of section 388, subdivision (d), which requires the court to order a hearing "[i]f it appears that the best interests of the child *may be promoted* by the proposed change of order . . . ." (Italics added.)

Judge Linda Colfax presided at the subsequent hearing. At the outset, the Agency objected that the papers on their face did not demonstrate a prima facie case of changed circumstances, but rather simply showed what had happened, namely that mother failed reunification. The minors' counsel agreed, adding that the children did not know their father, and had not seen him in over five years. Counsel indicated that father had not called in over six months. The children's only memories included memories of abuse. Additionally, father's request was untimely because he had been represented since prior to the six-month review and never requested services at the review hearings. Counsel urged that the best interests of the children would not be served by reuniting them with their father. They wished to remain with their current caretaker, wholeheartedly objected to father receiving services, were set in school and receiving services.

Father's counsel contended that since there was an objection to the petition, the matter should be set for an evidentiary hearing. The trial court denied father's request to present further evidence, ruling that he had not demonstrated the threshold issue of a change of circumstance, and therefore the court need not address the second issue of

whether the proposed change was in the best interest of the children. The court observed that father did not supply any authority for the proposition that termination of mother's reunification services qualified as a change of circumstances, when father has been in the picture and "has known everything about this case for quite some time." In short, father was never precluded from seeking reunification services throughout the case.

## II. DISCUSSION

Father maintains that the failure of the juvenile court to conduct an evidentiary hearing on his section 388 petition violated his due process rights and amounted to structural error warranting reversal. Alternatively, he contends the court abused its discretion in denying the petition.

### A. *Legal Framework*

Section 388 provides in part: "(a) Any parent . . . 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 . . . . [¶] . . . [¶] (d) If it appears that the best interests of the child may be promoted by the proposed change of order, . . . the court shall order that a hearing be held . . . ." To trigger the right to a full hearing on a section 388 petition, the petitioner must make a prima showing that (1) changed circumstances or new evidence exist, and (2) the proposed change would advance the best interests of the child. (*In re Zachary G.* (1999) 77 Cal.App.4th 799, 806.) We liberally construe the petition in favor of granting a hearing. (*Ibid.*)

Nonetheless, if the allegations in the petition do not demonstrate a prima facie case of changed circumstances or new evidence and that the proposed change would advance the best interests of the child, the court need not order a hearing on the petition and can deny the petition ex parte. (*In re Zachary G.*, *supra*, 77 Cal.App.4th at p. 806; Cal. Rules of Court, rule 5.570(d) (rule 5.570).) The prima facie requirement is not satisfied "unless the facts alleged, if supported by evidence given credit at the hearing, would sustain a favorable decision on the petition." (*In re Zachary G.*, *supra*, at p. 806.) In deciding whether a section 388 petition makes the required showing, the court may consider the

entire procedural and factual history of the case. (*In re Justice P.* (2004) 123 Cal.App.4th 181, 189.) Furthermore, the petition may not be conclusory. It must bring forth specific allegations describing the evidence that constitutes the proffered new evidence or changed circumstances. (*In re Anthony W.* (2001) 87 Cal.App.4th 246, 250.)

We review the juvenile court's denial of a section 388 petition under the abuse of discretion standard. (*In re Anthony W.*, *supra*, 87 Cal.App.4th at p. 250.) Due process violations in dependency proceedings are subject to the harmless beyond a reasonable doubt standard of prejudice. (*In re Justice P.*, *supra*, 123 Cal.App.4th at p. 193.)

#### B. Analysis

At the outset of the hearing, Judge Colfax asked if there were objections to father's papers, and thereafter the Agency and counsel for the minors objected. The court had before it the moving papers. After hearing argument from all sides, the court stated that although generally when someone files a section 388 petition "the court invites further information," in the circumstances before it if the petition did not cover the threshold change of circumstance. Thus, the court did not need to advance to the second prong as to whether a change would be in the minors' best interest. The court indicated it was not going to change its mind, but allowed father's counsel to make the record for a change of circumstance. Counsel merely repeated what the moving papers stated.

Father objects that Judge Colfax did not have authority to "essentially change" Judge Mahoney's ruling, and complains that his due process rights were violated because the court failed to conduct an evidentiary hearing on his section 388 petition. In this regard he asserts that by not initially summarily denying the request, Judge Mahoney impliedly found that a prima facie showing of changed circumstances and best interest had been made. We disagree on all points.

It is true that a parent has a right to proceed by way of a full hearing on a section 388 petition *if* the petition establishes the threshold prima facie showing of changed circumstances and best interests. (*In re Marilyn H.* (1993) 5 Cal.4th 295, 310.) However, this does not mean that by setting a hearing, the juvenile court also necessarily decides that the petition fulfills this requirement. Section 388 does not require the court

to find, as a prerequisite to setting a hearing, that the petition, in fact, sets out a prima facie case such that the parent is entitled to a full evidentiary hearing as a matter of right. Rather, the statute is framed in permissive language, requiring the court to set a hearing “[i]f it appears that the best interests of the child *may be promoted* by the proposed change of order . . . .” (§ 388, subd. (d), italics added.) Indeed, we are mindful that the court is to liberally construe section 388 petitions in favor of granting a hearing to consider the parent’s request. (*In re E.S.* (2011) 196 Cal.App.4th 1329, 1340.) Thus, by checking paragraph three on the preprinted order, Judge Mahoney did not impliedly find that father’s petition satisfied the prima facie test or that he was entitled to a full evidentiary hearing as a matter of right.

Father argues that *In re Lesly G.* (2008) 162 Cal.App.4th 904 (*Lesly G.*) supports his position that reversal is warranted for lack of a full evidentiary hearing. There, the juvenile court made an ex parte finding of a prima facie showing of changed circumstances but thereafter, at a contested section 366.26 hearing, denied the section 388 petition without taking testimony, receiving documentary evidence or affording counsel an opportunity to argue the merits of the petition. “In short, it provided no hearing whatsoever.” (*Lesly G., supra.*, at pp. 909, 911, 915.) The failure to hold any hearing under these circumstances amounted to a procedural due process violation mandating reversal. (*Id.* at pp. 912, 917.)

*Lesly G.* is inapposite for several reasons.

First, unlike *Lesly G.*, as we indicated above, Judge Mahoney never overtly or impliedly determined that changed circumstances had been shown.

Second, father demonstrably failed to articulate any changed circumstances or new evidence in the petition and supporting declaration. He merely recited the status of the proceedings. Father’s inability or reluctance to come to terms with the consequences of the dependency, and the reality that mother might not reunify until reunification was terminated, does not represent a change of circumstances. Father was aware of the dependency as early as April 2011 when the court appointed counsel to represent him. By December 2011 he was notified of the Agency’s intent to terminate mother’s

reunification services, and to set a section 366.26 hearing. As of the March 9, 2012, 12-month review hearing, father still had not filed any request or petition for reunification services. And finally, even after the court terminated mother's services and set the section 366.26 hearing, father could have pursued a writ petition challenging the setting of that hearing so he could assert his own entitlement to services before the permanency plan hearing, but he did not.

Without question, having waited more than a year after being apprised of his boys' dependency, an assertion of the right to reunification services based on mother's failure to reunify fails the prima facie test of changed circumstances. For this reason as well, we reject father's contention that the juvenile court abused its discretion in denying the hearing. The court was well within its discretion to determine, on the papers and evidence before it, that father did not make any showing of changed circumstances that would merit taking further evidence or granting the petition.

Third, in contrast to *Lesly G.*, *supra*, 162 Cal.App.4th 904, father received a hearing, but not a full evidentiary hearing. Father's claim to a full evidentiary hearing hinges on his incorrect belief that Judge Mahoney impliedly found that a prima facie showing of changed circumstances had been made.

Moreover, to the extent father believes that whenever a court sets a section 388 hearing, it has no option but to conduct a full evidentiary hearing, he is mistaken. Rule 5.570(h) governs the conduct of hearings on section 388 petitions. (*In re E.S.*, *supra*, 196 Cal.App.4th at p. 1339.) The petitioner bears the burden of proof. (Rule 5.570(h)(1).) If there is a due process right to confront and cross-examine witnesses, the hearing must be conducted as a disposition hearing; otherwise, and subject to exceptions not present here, "proof may be by declaration and other documentary evidence, or by testimony, or both, at the discretion of the court." (Rule 5.570(h)(2).)

*In re C.J.W.* (2007) 157 Cal.App.4th 1075 is instructive. There, the juvenile court handed down an ambiguous order that was "hopelessly inconsistent regarding whether and how" a hearing would be conducted on the parent's section 388 petitions. (*In re C.J.W.*, *supra*, at p. 1080.) Rejecting the parents' argument that their due process rights

were violated because they were not allowed to cross-examine the social workers and present evidence, the reviewing court noted that parents did not identify what further evidence they wished to produce. Further, the court found the petitions deficient because they did not make a sufficient showing of changed circumstances or best interest. The court did not base its ruling on information presented by the social workers, but rather on the paucity of evidence submitted by parents. This hearing, in which the court received written evidence and heard substantial argument from counsel, comported with due process. (*Id.* at pp. 1080-1081.)

So, too, in the case at hand, father submitted a declaration with his section 388 petition and was permitted to argue the merits of the request. Father asked for a full evidentiary hearing, but never identified what further evidence he wished to adduce. The juvenile court did not summarily deny the petition; instead, it made its decision upon reviewing the written evidence submitted and considering the arguments of counsel. The petition was rejected because it did not establish changed circumstances—a paucity of evidence on father’s part, as in *In re C.J.W.*, *supra*, 157 Cal.App.4th 1075. That is enough given that the petition failed to make out a prima facie case for relief. The court did not violate father’s due process rights in restricting the hearing to the written evidence and argument of counsel rather than holding a full evidentiary hearing.

### III. DISPOSITION

We affirm the order denying father’s section 388 petition.

---

Reardon, J.

We concur:

---

Ruvolo, P.J.

---

Rivera, J.