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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

In re J.G., a Person Coming Under the  
Juvenile Court Law.

THE PEOPLE,

Plaintiff and Respondent,

v.

J.G.,

Defendant and Appellant.

A141014

(City & County of San Francisco  
Super. Ct. No. JW116377)

Appellant J.G., born in March 1996, appeals from a denial of a Welfare and Institutions Code<sup>1</sup> section 778 motion to modify a previous disposition order declaring him a ward of the court and placing him at the Log Cabin Ranch School. Finding no abuse of discretion, we affirm.

**I. FACTUAL AND PROCEDURAL BACKGROUND**

The San Francisco District Attorney’s Office filed a petition against J.G. on August 10, 2011, alleging violations of attempted robbery, conspiracy to commit robbery (Pen. Code §§ 664, 182, subd. (a)(1), 212.5, subd. (c)), assault (Pen. Code § 245, subds. (a)(1) & (4)), and participation in a criminal street gang (Pen. Code § 186.22, subd. (a)),

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

with deadly weapon and gang allegations (Pen. Code §§ 12022, subd. (b)(1), 186.22, subd. (b)). The petition arose from an incident occurring on July 11, 2011, when J.G. and another male approached two brothers and, after telling the brothers to give up their belongings, got into a fight with them. During the scuffle, J.G. struck one of the victims “at least twice in the rib area and . . . twice in the head with a padlock.” On August 11, 2011, J.G. was ordered detained, and was released on home detention on September 15, 2011. After being picked up on a bench warrant, J.G. returned to custody in San Francisco in June of 2012.

On August 1, 2012, the District Attorney’s Office filed another juvenile wardship petition, this time alleging assault by means of force likely to produce great bodily injury (Pen. Code § 245, subd. (a)(4)) with great bodily injury and gang allegations (Pen. Code §§ 12022.7, subd. (a), 186.22, subd. (b).) The petition arose from an “unprovoked and gang-related attack” by J.G. and several others on another minor at juvenile hall in July 2012. The attack caused “enough bodily injury to [the victim] to warrant a hospital trip.” On August 29, 2012, J.G. admitted to one count of violating Penal Code section 245, subdivision (a)(4) from each petition; all other counts and accompanying allegations were dismissed.

On August 2, 2013, after a contested dispositional hearing, Judge Albers declared J.G. a ward of the court and committed him to the Log Cabin Ranch School (LCRS) for a period not to exceed five years. On January 27, 2014, before J.G.’s 18th birthday, defense counsel filed a section 778 petition to modify the disposition. In his petition, J.G. requested a modification of his placement so he could qualify for extended foster care benefits under the California Fostering Connections to Success Act (Assem. Bill No. 12 (2009–2010 Reg. Sess.); Assem. Bill No. 212 (2011–2012 Reg. Sess.)) (“AB 12”).<sup>2</sup>

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<sup>2</sup> Financial support is available to foster care providers under the federal Aid to Families with Dependent Children-Foster Care (AFDC-FC). (See 42 U.S.C. §§ 622, subd. (a), 670; *In re A.F.* (2013) 219 Cal.App.4th 51, 54.) AB 12 amended section 11400 et seq. to allow qualified individuals in foster care to receive AFDC-FC payments after reaching the age of majority. (*In re A.F.*, *supra*, at pp. 55–57.) The goal of AB 12 is to

Because J.G.’s placement at the LCRS made him ineligible for benefits under AB 12, J.G. requested that the court modify his placement to an out-of-home placement for a few days surrounding his 18th birthday so he could qualify for the benefits.<sup>3</sup> The district attorney opposed the petition, arguing that it failed to present a change in circumstance or new evidence.

On February 3, 2014, the parties appeared for a hearing on the 778 petition before Judge Bolanos. At the hearing, J.G.’s counsel argued a change in circumstance because J.G.’s eligibility for AB 12 benefits had not been considered by Judge Albers at the disposition hearing when deciding J.G.’s placement. J.G.’s counsel argued, in substance, that he previously failed to appreciate that a LCRS placement would have the effect of rendering J.G. ineligible for AB 12 benefits ; that since the hearing before Judge Albers it had come to his attention that other juvenile court judges had made orders in other cases committing juveniles to out-of-home placement for the sole purpose of preserving eligibility for AB 12 benefits; and that he now wished to request such an order since it

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support youths who “age out” of foster care “before gaining the skills necessary to become productive members of society.” (*In re A.F.*, *supra*, at p. 55.; see Assem. Com. on Human Services, Analysis of Assem. Bill 12 (2009-2010 Reg. Sess.) May 27, 2010, pp. 6–7.)

<sup>3</sup> J.G. sought to qualify for AB 12 benefits as a “nonminor dependent.” (§ 11400, subd. (v).) In order to be eligible as a nonminor dependent, an individual must be “a foster child . . . who is a current dependent child or ward of the juvenile court, or who is a nonminor under the transition jurisdiction of the juvenile court, as described in Section 450, who satisfies all of the following criteria: ¶ (1) He or she has attained 18 years of age while under an *order of foster care placement* by the juvenile court, and is not more than 19 years of age on or after January 1, 2012 . . . . ¶ (2) He or she is *in foster care* under the placement and care responsibility of the county welfare department [or] county probation department . . . . ¶ (3) He or she has a transitional independent living case plan . . . as described in Section 11403. ” (§ 11400, subd. (v), italics added.) A juvenile detention facility does not qualify as a “foster care placement” under the statutory scheme. (*In re Andrae A.* (2015) 241 Cal.App.4th 363, 372 [individual committed to a juvenile detention center “is not ‘in foster care’ [and] thus does not meet the statutory definition of a nonminor dependent”]; see § 11402.)

would be of assistance to J.G. as he made the transition to living independently as a young adult.

At the hearing before Judge Bolanos, J.G.'s counsel did not call J.G. or J.G.'s mother to testify as he had planned, because he believed he "refuted the district attorney's argument" without any testimony. The court denied the petition for lack of change in circumstance or new evidence. J.G. filed a timely notice of appeal.

## II. DISCUSSION

### A. Section 778 - Applicable Procedures and Standard of Review

Section 778, subdivision (a)(1) permits a ward of the juvenile court, "upon grounds of change of circumstance or new evidence, [to] petition the court in the same action in which the child was found to be a ward of 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." Under subdivision (a)(2) of section 778, "If it appears that the best interests of the child may be promoted by the proposed change of order or termination of jurisdiction, the court shall order that a hearing be held" and ensure proper notice be given to the appropriate parties.

Although a petition for modification must be liberally construed in favor of sufficiency (Cal. Rules of Court,<sup>4</sup> rule 5.570(a)), the court may deny the petition *ex parte* without a hearing if it "fails to state a change of circumstance or new evidence that may require a change of order . . . or fails to show that the requested modification would promote the best interest of the child, nonminor, or nonminor dependent." (Rule 5.570(d)(1).) This *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." (*In re Zachary G.* (1999) 77 Cal.App.4th 799, 806 [discussing *prima facie* requirement as it applies to parallel dependency statute, section 388].)

If, however, the court does grant a hearing, the court may grant the petition if it "states a change of circumstance or new evidence *and* it appears that the best interest of

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<sup>4</sup> All rule references are to the California Rules of Court.

the child, nonminor, or nonminor dependent may be promoted by the proposed change of order . . . .” (Rule 5.570(e)(1), italics added.) At the hearing, the petitioner requesting the modification has the burden of “proving by a preponderance of the evidence that the ward’s welfare requires the modification. Proof may be by declaration and other documentary evidence, or by testimony, or both, at the discretion of the court.” (Rule 5.570(i).)

In considering a petition to modify a previous court order under section 778, the reviewing court should consider “circumstances existing when the order sought to be modified or terminated was made . . . in order to determine whether there has been a substantial change in the circumstances warranting a modification or termination.” (*In re Corey* (1964) 230 Cal.App.2d 813, 831.) It is well established that “the modification . . . of an order previously made by a juvenile court rests within its discretion, and that its order granting or refusing an application for modification . . . may not be disturbed unless there has been an abuse of discretion.” (*Id.* at p. 832; see *In re Stephanie M.* (1994) 7 Cal.4th 295, 318–319.)

**B. The Court Did Not Abuse Its Discretion in Denying J.G.’s 778 Petition For Lack of Changed Circumstances or New Evidence.**

J.G. argues on appeal that the court abused its discretion because “[u]nquestionably, [he] presented new evidence” at the hearing in the form of “new information about a state program [(AB 12)] that the court had not considered.” He also argues that if the proposed modification might promote J.G.’s best interests, the court was required, pursuant to § 778, to hold a hearing on whether the disposition should be modified. In his reply brief, J.G. argues that “the juvenile court refused to hold a hearing at all.” He asks that we reverse and remand with instructions that the court hold a hearing to consider whether the modification requested is in his best interest. For the reasons stated below, we reject these arguments.

### 1. J.G.'s section 778 petition did not contain "new evidence."

Although section 778 does not define "new evidence," we are guided by the court's analysis in *In re H.S.* (2010) 188 Cal.App.4th 103 (*H.S.*), which considered identical language contained in section 388.<sup>5</sup> In *H.S.*, parents filed a section 388 petition in order to present a belated expert opinion and, in light of that opinion, to request reversal of previous court orders adjudicating the children to be dependents and removing them from parental custody. (*Id.* at p. 105.) The question in that case was "whether the belated submission of an expert's opinion, formed based on evidence that was available at the jurisdiction hearing, constitute[d] 'new evidence' " within the meaning of section 388, subdivision (a) and therefore warranted a modification of the previous orders. (*Ibid.*) The court in *H.S.*, holding that the expert's opinion did not constitute new evidence, defined "new evidence" as "material evidence that, with due diligence, the party could not have presented at the dependency proceeding at which the order, sought to be modified or set aside, was entered."<sup>6</sup> (*Ibid.*) Thus, when a 778 petition is based on new evidence, the evidence presented must be something that was unavailable to the petitioner at the time of the hearing where the order was made.

The trial court found that counsel's proffer of changed circumstances or new evidence was insufficient. We agree with that determination. Nothing about J.G.'s

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<sup>5</sup> Rule 5.570 applies to petitions for modification under both section 778 and section 388. Rule 5.570(d)(1), which permits an ex parte denial of a petition without a hearing where there is no change of circumstance or new evidence, applies to both statutes.

<sup>6</sup> The *H.S.* court looked to Code of Civil Procedure sections 1008, subdivision (a) and 657, subdivision (4) to define "new evidence," noting that although the wording of those sections differs in each provision, "both require the moving party to 'provide not only new evidence *but also a satisfactory explanation for the failure to produce that evidence at an earlier time. In short, the moving party's burden [in a section 1008 motion for reconsideration] is the same as that of a party seeking [a] new trial on the ground of 'newly discovered evidence, material for the party making the application, which he could not, with reasonable diligence, have discovered and produced at the trial.'* (Code Civ. Proc., § 657, subd. 4.)" ' ' ' ' (*H.S.*, *supra*, 188 Cal.App.4th at p. 108.)

factual circumstances had changed from the time of disposition to the time of the 778 petition. AB 12 went into effect on January 1, 2012 (see *In re A.F.*, *supra*, 219 Cal.App.4th 51, 55), and therefore it was already law when J.G.’s disposition hearing occurred in August of 2013. Because AB 12 was already in effect at the time of disposition, J.G. failed to carry his burden of showing that considerations pertinent to the statute could not have been presented to the judge at the disposition hearing. Clearly, they could have been, with the exercise of greater diligence. Regardless of whether AB 12 benefits were considered by Judge Albers, the failure of J.G.’s counsel to raise the AB 12 benefits issue at the disposition hearing does not constitute either changed circumstances or new evidence under section 778 and rule 5.570. Counsel’s after-the-fact realization that he might have made a different or better legal argument does not qualify under the standard we draw upon from *H.S.* and apply here.

**2. The hearing provided to J.G. was legally sufficient.**

Rule 5.570(e)(1) makes clear that the court considering the 778 petition “may” grant the modification if the petition “states a change of circumstance or new evidence *and* it appears that the best interest of the child” is promoted by the modification. (Italics added.) The use of the conjunctive “and” indicates that a court should grant a modification only if both elements—new evidence or change of circumstance, as well as best interest of the child—are present. If the petition does not present any new evidence or change of circumstance, then rule 5.570(d)(1) permits the court to deny the motion without a hearing. In this case, the court did not deny J.G.’s section 778 petition *ex parte*. The parties convened for a hearing at which the court made clear it would consider evidence and entertain argument. At the hearing, upon counsel’s proffer—presented in the form of argument, without evidence, which it was his burden to put forward—the court determined the threshold showing of either change of circumstance or new evidence was not met. Contrary to J.G.’s argument on appeal, the court was not required to do more than that. The hearing provided was sufficient.

### **III. DISPOSITION**

The denial of J.G.'s section 778 petition is affirmed.

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Streeter, J.

We concur:

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Ruvolo, P.J.

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Reardon, J.

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