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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

In re SYDNEY W., a Person Coming
Under the Juvenile Court Law.

CONTRA COSTA COUNTY CHILDREN
AND FAMILY SERVICES BUREAU,

Plaintiff and Respondent,

v.

BRITNEY G.,

Defendant and Appellant.

A147019

(Contra Costa County
Super. Ct. No. J14-00707)

Britney G. (mother) appeals from a juvenile court order terminating dependency jurisdiction over her daughter Sydney W., granting sole legal and physical custody to the child's father, and allowing mother one hour of monthly supervised visitation. (Welf. & Inst. Code, §§ 362.4, 364, subd. (c).)¹ Mother contends the trial court violated her right to present evidence concerning the propriety of the exit orders because the court denied without a hearing her oral motion for modification under section 388. She alternatively claims her trial attorney was ineffective in failing to file a procedurally appropriate motion under section 388 or request an evidentiary hearing on the issues of visitation and custody rights. We affirm.

¹ Further statutory references are to the Welfare and Institutions Code unless otherwise indicated.

I. BACKGROUND

Mother has been diagnosed with post traumatic stress disorder (PTSD) and has taken prescription opiates for a number of years. She gave birth to Sydney, her only child, in June 2014. During the pregnancy, mother tested positive for marijuana and refused to follow her doctor's orders to reduce her use of narcotics. She also made clear her intention to breastfeed while still taking those drugs.

In June 2014, respondent Contra Costa County Bureau of Children and Family Services (Bureau) filed a petition alleging Sydney was a person described by section 300, subdivision (b), due to mother's mental health problems and abuse of prescription opiates and marijuana. Mother pleaded no contest to an amended petition alleging (1) her post traumatic stress disorder was being treated by high doses of pain medication that impaired her ability to care for the minor, and (2) she had tested positive for marijuana while pregnant. At the dispositional hearing held in August 2014, the parties agreed Sydney would be removed from mother's custody and placed with her father, C.W., in the home of the paternal grandparents, subject to the provision of family maintenance services. (§ 364.) Mother would receive reunification services and would be permitted to reside with father in his parents' home. (§ 361.5, subd. (a)(1)(B).)

When the six-month review hearing commenced in February 2015 (§ 364, subd. (a); 366.21, subd. (e)(1)), Sydney was doing well in her father's care, but mother was still testing positive for various narcotics and had been homeless since she had been asked to leave the paternal grandparents' home. Mother had not complied with her case plan, and she was cancelling appointments and refusing to provide the names of her doctors to the Bureau. The review hearing was continued to March 2015, at which time mother appeared to be under the influence and tested positive for opiates. In June 2015, the court completed the review hearing and terminated reunification services for mother. (§ 361.5, subd. (a)(1)(B).) It continued father's family maintenance services. (§ 364, subd. (c).) Mother was not allowed to live in the same home as Sydney, and was permitted four one-hour visits each month.

The twelve-month family maintenance review hearing was held on November 12, 2015. In the report prepared in anticipation of that hearing, the Bureau advised the court that Sydney was doing very well in the home of her father, who had relocated to Reno, Nevada with his parents. Father had fulfilled the objectives of his case plan by completing a parenting class and demonstrating a willingness and ability to care for his daughter. Mother had not communicated with the social worker and had only attended two of eight scheduled visits, primarily because she did not confirm those visits by the expected deadline. Due to mother's lack of communication with the Bureau, it was unknown whether she was still abusing drugs or had found a stable living situation. The Bureau recommended terminating the dependency proceedings and awarding sole physical and legal custody to father, with an hour of visitation for mother each month.²

At the commencement of the review hearing, mother's counsel requested the opportunity to make "an oral 388 [m]otion." The court denied the request as untimely, but indicated it would allow counsel to make an argument to the court. Counsel stated: "Well, your honor, without being able to present evidence, mother appears before this court, I believe, a different person than the person that was here last time, both in appearance, in demeanor, in lack of anxiety, in ability to focus—in ability to focus, not inability. [¶] Mother is asking for an opportunity to prove herself to the Court. She is asking that the Court not follow the recommendation to dismiss and vacate today, but to give her the opportunity to prove the changes that she has made in her life. She is living in a clean and sober environment at this time, and she has a sponsor. She has addressed her medical issues with regard to the various medications, and she has reduced her medication significantly. [¶] If the Court is going to follow the recommendation and dismiss and vacate today, I do believe that it would be in Sydney's best interest that mother share joint legal custody, with physical custody and primary residence with the father. [¶] Submit."

² Joint legal custody gives both parents the right to make decisions relating to the health, education and welfare of the child, even if one parent is granted sole or primary physical custody. (Fam. Code, § 3003.)

County counsel asked the court to follow the Bureau's recommendation and award sole legal, as well as physical, custody to father. "[A]s to joint legal custody, with mother not showing up, not making visits, being difficult to find, it would be difficult for father to do some things regarding the child's medical care, school. It would be an unfair burden on father. [¶] If mother has turned her life around, she can go back to family court in the future and ask that [the] order be changed, if it is appropriate to be changed based on her behavior at the time." Minor's counsel concurred with the Bureau's recommendation.

The court terminated dependency jurisdiction, granted sole legal and physical custody to the father, and ordered supervised visitation one hour each month for mother. "I think the concern I have the most is that mother really hasn't done anything to make inquiries or visits with the child during the last reporting period. Maybe she got it together in the last two weeks or couple of days. I don't know. But it certainly would be in the best interest of the child to remain where the child is, and I agree that the sole legal and physical custody should be with the father. And I think [father's counsel's] argument that if the Department couldn't get a hold of mother, how on earth could he possibly get a hold of mother when she goes off and disappears."

II. DISCUSSION

Mother argues the juvenile court erred when it denied her oral motion under section 388 as untimely. Given the procedural and substantive defects in the motion, we disagree.

Section 388 is a general provision allowing the modification of a prior juvenile court order when the moving party can show new evidence or a change in circumstances and demonstrate the modification would be in the best interests of the child. (*In re Aaliyah R.* (2006) 136 Cal.App.4th 437, 446.) A party seeking modification must make a prima facie showing to trigger the right to proceed by way of a full hearing, and the decision to grant the petition rests in the sound discretion of the court. (*In re Anthony W.* (2001) 87 Cal.App.4th 246, 250.)

A petition under section 388 may be used by a parent to seek the reinstatement of reunification services before parental rights have been terminated. (*In re Marilyn H.* (1993) 5 Cal.4th 295, 309; *In re Baby Boy L.* (1994) 24 Cal.App.4th 596, 609.) This is the relief mother was seeking implicitly when she made her oral section 388 motion and asked the court to retain jurisdiction over the case to give her an opportunity to prove herself. But even if timely, her request was defective in several material respects. Section 388, subdivision (a)(1), requires the filing of a petition that is “verified;” i.e., made in writing. Section 386 precludes a court from modifying a previous order in a dependency case unless prior notice has been given to the social worker and the child’s counsel of record. Rule 5.570(a) of the California Rules of Court describes the necessary contents of a section 388 petition, and subdivision (b) of that same rule requires that it be filed on a JV-180 form.

Apart from the oral nature of the motion, mother did not make the prima facie case necessary to trigger the right to an evidentiary hearing. Given the longstanding nature of mother’s drug problem, counsel’s representation that she had recently begun living in a sober environment fell far short of establishing that a change of custody or additional reunification services would be in Sydney’s best interests. Evidence of a “changing” circumstance is insufficient to obtain relief under section 388. (*In re Casey D.* (1999) 70 Cal.App.4th 38, 47.)

The trial court did not err in denying mother’s section 388 motion and terminating the dependency. When, as here, a child has been placed with a parent under a plan of family maintenance, a review hearing must be held at least every six months. (§ 364, subd. (a).) At such hearings, “[t]he court shall terminate its jurisdiction unless the social worker or his or her department establishes by a preponderance of the evidence that the conditions still exist which would justify the initial assumption of jurisdiction under Section 300, or that those conditions are likely to exist if supervision is withdrawn.” (§ 364, subd. (c).) This provision establishes a statutory presumption in favor of terminating jurisdiction and returning the child to the parent’s care without further court supervision. (*In re Aurora P.* (2015) 241 Cal.App.4th 1142, 1155 (*Aurora P.*)). The

evidence before the court showed that Sydney was being appropriately cared for by her father, and mother has articulated no reason why continuing dependency jurisdiction was required to protect Sydney now that she is in her father's exclusive care. (See *Aurora P.*, *supra*, 214 Cal.App.4th at p. 1163 [reversal not required unless evidence compels a finding in favor of party opposing termination of dependency jurisdiction].)

Mother argues that even if it was too late to request additional reunification services, she was entitled to present evidence relating to the custody and visitation orders issued under section 362.4. Reversal is not required on this basis.

A juvenile court has the power to make "exit orders" regarding custody and visitation when it terminates dependency jurisdiction, which will remain in effect unless terminated or modified by a family law court. (*In re T.H.* (2010) 190 Cal.App.4th 1119, 1122–1123.) The court should consider evidence offered by a parent that is relevant to those orders, even when not framed as a motion for modification under section 388. (*In re Armando L.* (2016) 1 Cal.App.5th 606, 615–620; *In re Michael W.* (1997) 54 Cal.App.4th 190, 194–195; *In re Roger S.* (1992) 4 Cal.App.4th 25, 30–31; but see *In re Elaine E.* (1990) 221 Cal.App.3d 809, 814 [only issue at review hearing under § 364 was whether the conditions for continued supervision exist; noncustodial parent was required to file § 388 petition to raise issues relating to existing visitation order].)

Here, mother's counsel did not object to or present an argument regarding the proposed visitation order, forfeiting any appellate claim that mother was precluded from offering evidence on that issue. (See *In re Anthony P.* (1995) 39 Cal.App.4th 635, 641.) Counsel did request that mother be granted joint legal custody (with physical custody to father), having advised the court that mother had recently entered a sober living environment and had cut back on her medications. But this proffered evidence did not address the court's primary reason for giving father sole legal custody, namely, the Bureau's difficulties in communicating with mother and the problems this would create if father needed to make educational and medical decisions on behalf of Sydney. Viewing counsel's argument as an offer of proof of the evidence relevant to the exit orders (see *In re Tamika T.* (2002) 97 Cal.App.4th 1114, 1120–1123), we conclude the trial court did

not err in declining to take additional evidence. We also conclude that any error was harmless, because it is not reasonably probable that evidence of mother's recent efforts would have changed the outcome of the review hearing. (See *In re Celine R.* (2003) 31 Cal.4th 45, 59–60 [standard of prejudice found in *People v. Watson* (1956) 46 Cal.2d 818, 836, generally applicable to dependency cases].)

Mother finally argues her counsel was ineffective in failing to present a proper motion under section 388 or request an evidentiary hearing on custody and visitation issues. The record on appeal does not support her claim, because we cannot ascertain what such a motion would have contained, or whether the evidence to be presented would have been likely to change the outcome in mother's favor. (See *In re Arturo A.* (1992) 8 Cal.App.4th 229, 243; *In re Eileen A.* (2000) 84 Cal.App.4th 1248, 1253, overruled on another ground in *In re Zeth S.* (2003) 31 Cal.4th 396, 413–414.)

III. DISPOSITION

The judgment is affirmed.

NEEDHAM, J.

We concur.

SIMONS, ACTING P.J.

BRUNIERS, J.