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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

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

SAN FRANCISCO HUMAN SERVICES
AGENCY,

Plaintiff and Respondent,

v.

JAMES H.,

Defendant and Appellant.

A148081

(San Francisco City & County
Super. Ct. Nos. JD043110A &
JD043110B)

I.

INTRODUCTION

Appellant James H. (Father) appeals the juvenile court's denial of his Welfare and Institutions Code section 388 petition¹ without an evidentiary hearing. Father alleged changes circumstances, namely his health problems, required increased visitation and telephone contact with two of his children, 17-year-old J.H. and 14-year-old E.H. Both children have been in the custody of their maternal great aunt, A.W., for 12 years, since 2004, and have lived with her out-of-state for the last 9 years. The existing order required two week-long periods of visitation per year and unlimited telephone contact between Father and the two children.

¹ All subsequent statutory references are to the Welfare and Institutions Code unless otherwise identified.

The juvenile court did not err or violate due process in summarily denying Father's section 388 petition. He failed to establish a prima facie case that his health problems created changed circumstances, or to demonstrate that any change in the current order was in the children's best interests. We affirm.

II.

FACTUAL AND PROCEDURAL BACKGROUND

We will only briefly summarize the lengthy background of this case, which began when the San Francisco Human Services Agency (the Agency) filed a juvenile dependency petition under section 300 in March 2004 for then five-year-old J.H. and two-year-old E.H., as well as their nine-year-old brother and newborn sister. Over a period of six months from March 2004 to August 2004, the Agency attempted reunification services and assistance to both Mother and Father, who struggled with use of amphetamines and methamphetamine, were homeless, failed to submit to regular drug testing, failed to take the infant to medical appointments, and failed to attend to the children's needs. In addition, J.H. and E.H. were found to have cigarette burns on their arms.

In August 2004, the children were placed with A.W., and the parents were provided continued reunification services. The parents had weekly visitation with the children. Both parents made minimal effort and progress with their respective reunification plans. They only submitted to a handful of drug tests, they failed to secure housing, and Father refused both a psychological evaluation and a substance abuse assessment. The parents were found to have failed in their reunification plan.

The Agency reported the children were "flourishing" and "thriving" in A.W.'s care. They all had medical, dental and vision examinations; they attended school and daycare regularly; and they participated in sports.

In April 2006, after two years, the court terminated reunification services because neither Mother nor Father had made any significant changes since the children were removed from their care. The court held a section 366.26 hearing in July 2006 and

ordered J.H. and E.H. to be placed with A.W. in long-term care without terminating parental rights because they were attached to their parents.²

In September 2007, A.W. moved with J.H., E.H., and their two siblings to Arizona. The court established a visitation schedule of twice per year and for the parents to be given funds to travel to Arizona. The parents failed to visit the children in Arizona, but A.W. brought the children to California to visit the parents.

Father filed a section 388 petition in January 2012 requesting the court change the visitation order. It stated that Father and Mother had successfully maintained their sobriety and reunified with two of the children's siblings. They requested the court reinstate reunification services, which had been terminated six years earlier, and allow "substantially increased visitation." The children's attorney filed a report stating that after interviewing both children, they expressed the desire to stay with A.W. in Arizona. The children both wanted to continue visits with their parents, but they wanted the visits to be no longer than a week, and E.H. stated a preference that the parents come to Arizona.

The court held a contested hearing on the petition and denied it. The court ordered two weeks of visitation per year, with one week during Thanksgiving and a second week to be determined.

On July 1, 2013, the court terminated dependency jurisdiction and appointed A.W. the legal guardian of J.H. and E.H. The court continued its order of two weeks of visitation per year. In July 2015, the court renewed dependency jurisdiction based on Mother's section 388 petition and her allegations that the children wanted to stay with the parents after a visit and were unwilling to return to Arizona. The court denied the petition and confirmed the prior order of placement with A.W.

² Their younger sister, who had lived with A.W. since she was an infant, was adopted by A.W. and parental rights were terminated.

Current Section 388 Petition

In February 2016, Father filed a section 388 petition requesting the court change the visitation schedule in its most recent order providing for two weeks of visitation per year. Father alleged that circumstances had changed because he suffered a heart attack in January 2016 and was in a rehabilitation facility. He asserted that he was unable to speak to his children by phone during his medical emergency. Father requested “[f]ace to face visits be expanded and open liberal telephone visits be ordered.” He argued it would benefit the children to spend more time with their father because of his life-threatening condition.

The court ordered a hearing pursuant to the pre-printed form, Form JV-183, which read: “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 court filled in a hearing date and time.

The Agency filed a response to Father’s petition and argued Father had failed to make a prima facie showing of changed circumstances or that it would benefit the children to change the visitation order. It asked the court to summarily deny the petition without a hearing. Father had failed to present any evidence that he remained hospitalized or that A.W. has ever been out of compliance with the visitation order. The children have always been able to speak to their parents at their leisure.

In conclusion, the Agency stated it had no information that would support changing the existing order and it found no evidence that any court order was being disobeyed by A.W. A change in the order would not be in the children’s best interests.

The children’s social worker, Jonathan Newsome, submitted a declaration after interviewing Father, Mother, A.W., J.H., and E.H. A.W. stated that the children may communicate with their parents whenever they wish, but they are sometimes not interested in contacting the parents because things have “turned ugly” in the past. J.H. stated she had no restrictions on calling or making contact with her parents. She stated “it is her decision to either call or not,” but she is often reluctant to call because things have been “messy” recently.

E.H. stated that A.W. and her parents did not get along, so she preferred to make contact with her parents at school to avoid “get[ting] anyone upset.” E.H. expressed a desire to visit her parents.

Father is illiterate and unable to communicate with the children by text or email. He stated he believed A.W. restricted the children from contacting him by phone.

A.W. agreed that whenever she travels to the Bay Area, she will allow the children to visit with their parents. The children had an extended summer visit in 2015.

The court held a hearing on March 17, 2016, but the parents were not present because their eldest daughter was in labor at the hospital. Father’s counsel requested a continuance so Father could appear and make a statement. The Agency objected to the continuance and argued the hearing was unnecessary given the record before the court. The children’s counsel also argued there was no reason to continue the hearing and the children were anxious to have the issue resolved.

The children’s counsel stated she had spoken to both of them. J.H. stated that if she wanted to talk to her parents, she would. She has access to a home phone and a cell phone. She regularly talked to her brother, who lives with the parents, but she was not interacting with her parents by choice. E.H. has her own cell phone and was in regular contact with her parents.

The court stated it would not grant a continuance, but the parents could appear by phone and it asked counsel to contact them. Both parents then appeared telephonically.

Father’s counsel advised the court that Father was out of the hospital, but father had a chronic and ongoing medical condition that affected his life span. Father requested liberal telephone contact and expanded face-to-face visits of more than two weeks per year.

The children’s counsel stated that both children have as much contact as they would like right now and they have the unlimited ability to talk to their parents. Neither child is requesting more visitation time. The children are both aware of Father’s medical issues.

The Agency argued that there has been no evidence presented to the court of changed circumstances or that it would be in the children's best interests to change the order.

Father requested to make a statement. The court stated it was "not going to take evidence from [Father] because I am making a finding that there is not a prima facie showing that there's a change of circumstances or new evidence requiring a changed order or that any change would promote the best interest of the child." The court denied the request "on its face."

III. DISCUSSION

Father argues that the court violated his procedural due process right by denying his section 388 petition without a full evidentiary hearing. Father contends that because the court checked a box on the JV-183 form ordering a hearing, it found there was a prima facie case and therefore, it must hold an evidentiary hearing.

Section 388 provides that a party may petition the court to change, modify, or set aside a previous court order. To prevail on a section 388 petition, the moving party must establish that new evidence or changed circumstances exist, *and* the proposed change would promote the best interests of the child. (*In re J.T.* (2014) 228 Cal.App.4th 953, 965.) The court shall order a hearing if it appears that the best interests of the child may be promoted. (§ 388, subd. (c); *In re C.J.W.* (2007) 157 Cal.App.4th 1075, 1079 (*C.J.W.*))

A party makes a prima facie case if the allegations demonstrate that these two elements are supported by probable cause. (*In re Aljamie D.* (2000) 84 Cal.App.4th 424, 432.) If the allegations would fail to sustain a favorable decision even if they were found to be true at a hearing, then a prima facie case is not established. (*In re Anthony W.* (2001) 87 Cal.App.4th 246, 250.) The allegation must specifically describe how the petition advances the children's best interests. (*Ibid.*)

We review a juvenile court's denial of a section 388 petition for abuse of discretion. (*In re Jasmon O.* (1994) 8 Cal.4th 398, 415.) We "may not disturb the

decision of the trial court unless that court has exceeded the limits of judicial discretion by making an arbitrary, capricious, or patently absurd determination. [Citation.]” (*In re E.S.* (2011) 196 Cal.App.4th 1329, 1335.)

Father’s argument is premised upon *In re Lesly G.* (2008) 162 Cal.App.4th 904 (*Lesly G.*). In *Lesly G.*, the mother argued that the juvenile court violated procedural due process by failing to hold a hearing on her section 388 petition after notifying her a hearing would take place. (*Lesly G.*, at p. 912.) The court checked contradictory boxes on the JV-180 form indicating both that it would hold a hearing and that it would not hold a hearing. (*Id.* at p. 909.) The *Lesly G.* court concluded that because the court did not take testimony, receive documentary evidence, or allow counsel to argue the merits, it failed to provide a hearing. (*Id.* at p. 915.) Thus, the court’s procedure violated due process. (*Ibid.*)

The *Lesly G.* court specifically noted that the JV-180 form has been found by another court to be “internally inconsistent and ambiguous,” and it concluded the form was “legally infirm.” (162 Cal.App.4th at p. 914.) Since *Lesley G.* was decided, Form JV-180 form has been modified. The current form, JV-183, includes the option exercised by the court in this case: “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 hearing will take place on” As explained below, unlike the form used in *Lesly G.*, the current form does not imply that the juvenile court has found the parents made a prima facie showing of changed circumstances or modification would be in the child’s best interest.

This division considered and rejected the same argument raised by Father in this case in *In re G.B.* (2014) 227 Cal.App.4th 1147 (*G.B.*). In *G.B.*, the juvenile court denied the mother’s request to modify an ordering denying reunification services with her children without holding a hearing. (*Id.* at p. 1151.) Like Father here, the mother argued that the court initially ordered a hearing on the form order because she had presented a prima facie case to compel a hearing. (*Ibid.*) The mother filed a section 388 petition and the court filed the standard JV-183 order form, checking the box selecting an option stating that a hearing was ordered to consider the petition “ ‘because the best interest of

the child may be promoted by [it],’ ” and it set a hearing date. (*Id.* at p. 1154.) The agency argued that the mother had not met her burden of showing she was entitled to a hearing because she had failed sufficiently to demonstrate changed circumstances or that the petition was in the children’s best interests. (*Ibid.*) The mother argued that the court had already found a prima facie case by ordering a hearing via the form. (*Ibid.*) The juvenile court, however, stated that it had liberally construed the petition to give the parties the opportunity to argue whether there should be a hearing, “but that it had not necessarily concluded that mother had established a prima facie case entitling her to a full evidentiary hearing on the petition.” (*Ibid.*) The court denied the petition without an evidentiary hearing. (*Ibid.*)

Shortly thereafter, the mother filed a second section 388 petition. (*G.B., supra*, 227 Cal.App.4th at p. 1154.) The juvenile court again used the JV-183 standard form court order and selected the option indicating that the court was ordering a hearing “ ‘because the best interest of the child may be promoted by the request.’ ” (*Id.* at p. 1155.) This time, however, the court included a written note that the hearing was to determine if mother had made a sufficient prima facie showing warranting an evidentiary hearing. (*Ibid.*) At the hearing, the court heard argument about whether the mother had made a prima facie showing, and the court concluded she had not. (*Ibid.*)

On the first petition, this division held that in checking the box on the JV-183 form “the juvenile court was not deciding that a prima facie case had been made but was instead scheduling the matter for the parties to argue the issue—an option not included on the form.” (*G.B., supra*, 227 Cal.App.4th at p. 1158.) At oral argument, the court clarified that it had liberally construed the mother’s petition to have the opportunity for the parties to argue for a hearing. (*Ibid.*)

We distinguished *Lesly G.*, where the court used the ambiguous JV-180 form, which has since been updated. (*G.B., supra*, 227 Cal.App.4th at p. 1159.) “*Lesly G.* concluded that the juvenile court’s denial of the section 388 hearing violated the parent’s due process rights because the form order had already ruled that the section 388 petition stated changed circumstances and might promote the children’s best interests.” (*G.B., at*

p. 1159.) In *G.B.*, the court explained to the parties that the form order was not intended to be a ruling that the mother had established a prima case and was entitled to an evidentiary hearing. (*Ibid.*)

We concluded: “[E]ven if we were to construe the form as a ruling that mother had stated a prima facie case, we would reject mother’s argument that it barred the juvenile court from changing its mind after considering the parties’ oral argument. *Lesly G., supra*, 162 Cal.App.4th 904 does not stand for the blanket proposition advanced by mother that a juvenile court is forever bound by a box it checks on a form order suggesting a certain finding. A juvenile court has the authority to change, modify, or set aside a previous order sua sponte if it decides that a previous order was ‘erroneously, inadvertently or improvidently granted.’ (*Nickolas F. v. Superior Court* (2006) 144 Cal.App.4th 92, 116. . . .) Thus, even if the juvenile court here had determined when it checked the box that mother’s section 388 petition established a prima facie case, it retained the discretion to change that determination upon further consideration, and it did so. (§ 385.)” (*G.B., supra*, 227 Cal.App.4th at p. 1160.)

Similarly in *C.J.W., supra*, 157 Cal.App.4th 1075, the court used the same ambiguous JV-180 form to indicate it would hold a hearing on the parents’ section 388 petition in conjunction with the section 326.66 hearing. The court did not allow testimony from the parents on their section 388 petition, and they argued that their due process rights had been violated. (*C.J.W.*, at p. 1079.) The court did conduct a hearing where it evaluated the written evidence and heard argument from counsel, but it did not allow testimony from the parents. (*Id.* at p. 1080.) The parents argued they should have been allowed to cross-examine the social workers and present evidence. (*Id.* at p. 1081.) The appellate court concluded that the parents did not identify what further evidence they wanted to present, and “a fair reading of the record is the court found the section 388 petitions to be deficient because they did not support granting reunification services to the parents based on sufficient changed circumstances or the best interests of the children.” (*C.J.W.*, at p. 1081.) Thus, the hearing comported with due process. (*Ibid.*)

Like the juvenile courts in *G.B.*, and *C.J.W.*, the court here checked the box on the JV-183 form ordering a hearing, not because the court had determined that a prima facie case of changed circumstances had been shown, but simply to hold a limited hearing to determine if such a prima facie showing had been made. Thus, there was no need to hold a full blown evidentiary hearing which included allowing Father to testify in order to comport with due process.

Additionally, even if scheduling a hearing indicated the court believed Father had presented a prima facie case, the court retained the discretion to change its mind after reviewing the Agency's briefing and the report from the social worker as well as hearing argument from counsel. (*G.B.*, *supra*, 227 Cal.App.4th at p. 1160.)

Here, unlike *Lesly G.*, the court received documentary evidence consisting of the social worker's interviews with both parents, both children, and A.W. The court also heard argument from counsel. The only information the court refused to hear was a statement by Father. Under both *C.J.W.* and *G.B.*, this comports with due process. (*G.B.*, *supra*, 227 Cal.App.4th at pp. 1163-1165; *C.J.W.*, *supra*, 157 Cal.App.4th at p. 1081.) Father has failed to identify what additional evidence he could have presented at an evidentiary hearing that would have necessitated a change in the visitation order. Father's request for the children to be able to communicate with him anytime they desired was already in place. Also, Father offered no evidence that it would be in the children's best interests to have increased visitation with him. Father had suffered a heart attack and had ongoing health issues, and it may have been in his best interest to see his children more often, but this does not demonstrate it was in their best interests. They had lived with A.W. for 12 years and only saw Father when A.W. would bring them to California for visits. Father never traveled to Arizona to visit them. Neither child requested increased visitation with Father.

The juvenile court did not abuse its discretion in summarily denying the section 388 petition based on the absence of changed circumstances, and the fact Father could not demonstrate a change was in the children's best interests. “ ‘If the liberally construed allegations of the petition do not show changed circumstances such that the child's best

interests will be promoted by the proposed change of order, the dependency court need not order a hearing. [Citation.]’ ” (*C.J.W., supra*, 157 Cal.App.4th at p. 1079, quoting *In re Anthony W., supra*, 87 Cal.App.4th at p. 250.) The children had unlimited communication with their parents and did not express a desire for increased visitation. They had been “thriving” in A.W.’s custody for 12 years, and Father could not demonstrate expanded face-to-face visitation was in the children’s best interests.

IV.

DISPOSITION

The court’s order denying appellant’s section 388 petition is affirmed.

RUVOLO, P. J.

We concur:

REARDON, J.

STREETER, J.