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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

In re JAKE M., a Person Coming Under the  
Juvenile Court Law.

B232958

LOS ANGELES COUNTY  
DEPARTMENT OF CHILDREN AND  
FAMILY SERVICES,

(Los Angeles County  
Super. Ct. No. CK78283)

Plaintiff and Respondent,

v.

RICKY M. et al.,

Defendants and Appellants.

APPEAL from an order of the Superior Court of Los Angeles County. Marilyn Mackel, Judge. Affirmed.

Donna Balderston Kaiser, under appointment by the Court of Appeal, for Appellant Judy C.

Andrea R. St. Julian, under appointment by the Court of Appeal, for Appellant Ricky M.

Andrea Sheridan Ordin, County Counsel, James M. Owens, Assistant County Counsel, Kim Nemoy, Deputy County Counsel, for Respondent.

M. Elizabeth Handy, under appointment by the Court of Appeal, for Minor.

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Ricky M. is the presumed father of Jake M. In a previous appeal, we affirmed the juvenile court's orders regarding paternity, jurisdiction and custody of Jake. In this appeal, Ricky contends the juvenile court erred when it declined to terminate its jurisdiction over Jake and denied Ricky's petition under Welfare and Institutions Code section 388<sup>1</sup> to modify its prior orders. We affirm the juvenile court's order denying Ricky's section 388 petition and declare moot his challenge to the court's continued jurisdiction because it terminated its jurisdiction during this appeal.

### **FACTUAL AND PROCEDURAL BACKGROUND**

Jake was born in 2001 to Judy C. (Mother) and Jaime C. Mother married Ricky shortly after Jake's birth and Ricky believed Jake was his son. In 2008, Ricky filed for divorce and learned that he was not Jake's biological father. A protracted custody battle ensued in which Mother, Jaime and Ricky all sought custody of Jake. Jake's custody battle spilled from the family court into the juvenile court when Jake was declared a dependent of the court as the result of substantiated allegations of physical and emotional abuse by Ricky. Specifically, the juvenile court found that "On or about 6/24/09, the child [Jake's] legal father Ricky [] physically abused the child in that the father inflicted a bruise to the child by grabbing the child's leg, while the father drove a vehicle, causing the child pain and significant bruises. The father has a history of inappropriately disciplining, and yelling at the child. Such physical abuse, inappropriately disciplining, and yelling at the child caused the child unreasonable pain and suffering, endangers the child's physical and emotional health and safety, and places the child at risk of physical and emotional harm and damage."

During the course of its investigation into the June 24, 2009 incident, the Los Angeles County Department of Children and Family Services (DCFS) documented the family's extensive prior child welfare history, which included: substantiated allegations of emotional abuse by Ricky against Erica P., Mother's daughter from a previous relationship, in 2008, and substantiated allegations of physical abuse after a witness

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

reported seeing Ricky grab Tamara, his daughter from another relationship, by the throat, punch her once, and throw her in a car in 1996. Mother's older children, Eric and Erica, revealed to DCFS that Ricky had a short temper and would hit the children when Mother was not at home. Ricky was also ordered to domestic violence classes after he beat Mother until she lost consciousness. As a result of the court's finding of jurisdiction, Jake was taken from Ricky's custody and moved into Jaime's home with visitation from Mother and Ricky.<sup>2</sup>

Ricky appealed the juvenile court's jurisdictional order as well as its orders regarding custody and paternity. By opinion dated October 26, 2011, we affirmed the challenged orders and found substantial evidence supported the court's finding of jurisdiction over Jake.

Meanwhile, Mother was given physical custody of Jake with monitored visits with Ricky and overnight visits with Jaime. Jake also participated in individual therapy and conjoint therapy with Mother and Ricky. Jake appeared to be thriving under the arrangement. In February 2011, DCFS recommended the juvenile court terminate jurisdiction. The juvenile court declined to do so and continued jurisdiction by order dated April 14, 2011. Ricky appealed from the April 14, 2011 order.

On June 1, 2011, Ricky filed a request under section 388 to terminate jurisdiction and change the juvenile court's order sustaining the allegations of physical abuse which removed Jake from his custody. To establish changed circumstances, Ricky relied on a letter by Ronald Banks, a therapist with the Children's Institute, Inc., which reported:

"Jake disclosed that he has not always been honest when testifying in court. When I attempted to probe further he denied making the statement. [¶] I told Jake that he spoke much differently than most of the nine year olds that I have met. He stated that he knew that because he was very intelligent. I acknowledged hi[s] intelligence but also told him that he sounds almost like an adult. He responded that his mother tells him

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<sup>2</sup> We set forth a detailed factual and procedural background of this matter in a prior appeal (*In re Jake M.* (Oct. 26, 2011, B227169) [nonpub. opn.]) and do not repeat it here except where necessary to provide facts to support the conclusions in this opinion.

some things but that he often listens to her phone conversations with his biological father. Sometimes she is not aware that he is listening to her conversations. At other times she is very aware of his presence while on the phone as she walks around the house talking about Ricky and the court case.” Based solely on Jake’s disclosures to Banks, Ricky requested the juvenile court: (1) vacate the jurisdictional findings and dismiss the petition; (2) order a new trial; or (3) terminate jurisdiction and grant Mother and Ricky joint legal and physical custody. The court denied the petition on June 13, 2011, without a hearing, because it failed to state new evidence or a change of circumstances. The court also ordered additional conjoint therapy for Ricky and Jake. Ricky appealed from the order denying his section 388 petition on June 30, 2011. The juvenile court terminated its jurisdiction on November 3, 2011, after Ricky filed his opening brief in this matter.

### **DISCUSSION**

Ricky first challenges the juvenile court’s decision to continue jurisdiction in the case under its April 14, 2011 order. We find this issue to be moot because the juvenile court terminated jurisdiction on November 3, 2011. Ricky contends the issue is not moot because the purported error could infect the outcome of subsequent proceedings. (*In re J.K.* (2009) 174 Cal.App.4th 1426, 1431-1432 [court could exercise dependency jurisdiction based on findings of prior instances of serious harm or abuse].) If Jake were to become a dependent of the court again, “a review of the maintenance review judgment will be misconstrued as a finding that Ricky had continued in his inability to appropriately parent Jake.” We disagree the purported error is of such magnitude as to affect the outcome of a subsequent proceeding, if any. The allegation that Ricky physically and mentally abused Jake was substantiated and formed the basis for the juvenile court’s initial jurisdiction over Jake. We affirmed that jurisdictional order in our previous opinion. Given that allegations of physical and emotional abuse were already substantiated and dependency jurisdiction established, we do not believe it to be material that, one year and nine months after the filing of the original petition, the juvenile court decided to maintain jurisdiction for an additional few months (from April to November 2011).

Ricky next contends the juvenile court erred when it denied his section 388 petition to request modification of the prior orders. Section 388 permits any child who is a dependent of the juvenile court or person having an interest in such child to, “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 or to terminate the jurisdiction of the court.” To trigger the right to proceed to a full hearing, the petitioner seeking modification must make a prima facie showing of a genuine change of circumstances or new evidence, and that revoking the previous order would be in the best interests of the children. (*In re Marilyn H.* (1993) 5 Cal.4th 295, 310; *In re Kimberly F.* (1997) 56 Cal.App.4th 519, 529.) “[S]pecific allegations describing the evidence constituting the proffered changed circumstances or new evidence” is required. (*In re Edward H.* (1996) 43 Cal.App.4th 584, 593.) “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.]” (*In re Anthony W.* (2001) 87 Cal.App.4th 246, 250.) We find the juvenile court did not abuse its discretion in denying Ricky’s section 388 petition.<sup>3</sup>

Dr. Banks’s letter states that Jake admitted that “he has not always been honest when testifying in court.” According to Dr. Banks, Jake then recants and denies making the statement at all. Ricky contends, “Jake had recanted the allegations against Ricky which were the basis for the taking of jurisdiction and disposition. In so recanting, Jake essentially expressed that he made the allegations as a result of his mother’s negative

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<sup>3</sup> Ricky contends the proper standard of review is de novo, citing to *In re Jeremy W.* (1992) 3 Cal.App.4th 1407, 1413 and *Aquino v. Superior Court* (1993) 21 Cal.App.4th 847. Neither case stands for that proposition. *In re Jeremy W.* holds that the proper standard of review in this situation is abuse of discretion. *Aquino* is not a juvenile dependency case and does not address section 388 issues at all. Even if we were to review this issue de novo, Ricky failed to make a prima facie showing necessary to obtain a hearing.

statements about Ricky.” This is insufficient to show as a matter of law a change in circumstances or new evidence to warrant a hearing.

This is because the jurisdictional finding was not based solely on Jake’s testimony, truthful or not. Instead, a teacher at Jake’s school and a DCFS case worker observed the bruising on Jake’s legs and Ricky admitted that he grabbed Jake’s leg. Additionally, Ricky has a documented history of violence and anger management issues: he was ordered to complete 52-weeks of domestic violence classes as a result of beating Mother until she was unconscious in 2002; his daughter Tamara was declared a dependent of the court in 1996 after a witness reported that Ricky grabbed Tamara by the throat, hit her in the face and threw her in a car; and Mother’s other children, Eric and Erica, reported to DCFS that Ricky hit them when Mother was not home. Against this backdrop, Jake’s dubious admission to Dr. Banks does not constitute a prima facie showing sufficient to warrant a full hearing under section 388. There was no abuse of discretion.

**DISPOSITION**

The order denying the section 388 petition is affirmed.

BIGELOW, P. J.

We concur:

RUBIN, J.

FLIER, J.