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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

In re TABITHA V., a Person Coming
Under the Juvenile Court Law.

B236097
(Los Angeles County
Super. Ct. No. CK47322)

LOS ANGELES COUNTY
DEPARTMENT OF CHILDREN AND
FAMILY SERVICES,

Plaintiff and Respondent,

v.

BEATRIZ S.,

Defendant and Appellant.

APPEAL from an order of the Superior Court of Los Angeles County,
Stephen Marpet and Terry Truong, Juvenile Court Referees. Affirmed.

Rich Pfeiffer, under appointment by the Court of Appeal, for Defendant
and Appellant.

John F. Krattli, Acting County Counsel, and Melinda S. White-Svec,
Deputy County Counsel, for Plaintiff and Respondent.

INTRODUCTION

A mother appeals from the dependency court's orders summarily denying her petitions for modification under Welfare and Institutions Code section 388. We affirm.

FACTUAL AND PROCEDURAL SUMMARY

In April 2003, the Department of Children and Family Services filed a petition alleging Tabitha S. (identified as Baby Girl S.) was born one week earlier, with a positive toxicology screen for amphetamines and methamphetamines, her mother Beatriz S. had a history of drug abuse, and her two-year-old sister Krystal V. was a dependent child due to domestic violence between her mother (Beatriz) and father (Manuel V.). (Welf. & Inst. Code, § 300, subs. (b) & (j) [All further statutory references are to the Welfare and Institutions Code].) Beatriz denied a drug addiction and said she had used methamphetamine before she knew she was pregnant.

At the time of the detention hearing, both parents were in custody and Tabitha was ordered detained.¹ Tabitha's counsel (joined by Beatriz and Manuel) later requested placement with Cesareo S., Beatriz's father.

As of the jurisdiction and disposition hearing in June, neither Beatriz nor Manuel could be located. The dependency court sustained the petition and ordered monitored visitation with no reunification services for either parent.

As of the permanent plan hearing in September, Tabitha was placed with Caesareo who said neither Beatriz nor Manuel had made any attempt to visit Tabitha. He provided the court with a current residence for them and said he had taken Tabitha to see them twice but they did not seem interested. He and his partner Petra wanted to adopt Tabitha

¹ Beatriz had a 2001 arrest for fraud to obtain aid; Manuel had a 2000 arrest for grand theft auto that had been dismissed, a 2001 arrest for burglary that had been dismissed and another arrest and conviction for making a fictitious check for which he received a 30-day jail sentence.

and were not opposed to visitation for Beatriz and Manuel as long as they were not under the influence of drugs or alcohol. He had provided Tabitha with excellent care. The hearing was continued to January 2004 to provide notice to Beatriz and Manuel.

As of the January hearing date, Beatriz and Manuel had moved to Las Vegas. Cesareo did not have an address for them, and they had not attempted to visit Tabitha. In May, Cesareo and Petra requested a continuance to give Beatriz and Manuel notice of the hearing; the court signed an order for notice by publication.

Krystal was emotionally attached to her foster mother and prospective adoptive parent who wanted her adoption completed. However, in June, Cesareo and Petra indicated they were no longer interested in adoption and believed legal guardianship would be better. Cesareo did not “want to remove his daughter’s parental rights because he believes that she may put herself together and be reunited with her children in the future.”

At the hearing in September, Cesareo and Petra as well as Krystal’s prospective adoptive parent indicated they intended to let the siblings continue to visit each other. Finding such visitation important, “particularly as the children get older,” the court ordered that sibling visitation continue. The dependency court found Tabitha was not adoptable and ordered a plan of legal guardianship for her; the court terminated parental rights to Krystal to free her for adoption.

Dependency jurisdiction was terminated on September 16, 2004, when Tabitha was placed in a legal guardianship with Beatriz’s father.

Nearly six years later, in May 2011, when Tabitha was eight years old, Beatriz filed a “Request to Change Court Order” pursuant to section 388. Beatriz stated that Tabitha was under legal guardianship and said she (Beatriz) wanted weekly (including weekend overnight) visitation and further requested the court to “re-open reunification services and/or clarification/order from the court regarding visitation with [Tabitha].” Referencing letters from herself and Manuel (who is not a party to this appeal), Beatriz said “parents have turned their lives around and have a twenty-two month old sibling in

their care.” They said they had “renewed” their relationship with Tabitha, but the “legal guardian is not allowing consistent contact which parents believe would be beneficial for Tabitha and her sibling and which parents believe Tabitha would enjoy.”

In her attached letter, Beatriz stated, “I have gotten my whole act together, starting with what is called addiction to methamphetamines, which in my eyes is a disease that only has a cure with will power, and I have accomplished to keep my will power in order to put things back in place in my life[.] I have been clean for more than 3 years.”² She said she had not only been clean and the mother of another child, but she said she had also “finished college with certification by state as a Business Office Administration graduate, I am currently employed at a Brokers Office, my position there is an Assistant/Transaction Coordinator, I am also in the process of getting my Real Estate license. I am a very independent person and a wonderful mother.” She said she had started parenting classes and would “complete any assigned tasks,” she understood and respected the decisions to date as well as her father’s feelings, but said it would be a “win, win situation” if her request were considered.

On June 10, the dependency court (Terry Truong) denied the petition without a hearing, noting the request “does not state new evidence or a change of circumstances.”³

On July 11, Beatriz filed another Request to Change Court Order under section 388, again asking to “reopen family reunification services and/or commence weekly visitation.” In response to the prompt asking “What changed after the judge’s order that would change the judge’s mind?” Beatriz stated: (1) she and Manuel had “turned lives around” and had a 22-month-old in the care who had bonded with Tabitha; (2) regular

² Manuel also said he had been clean for three years, was working and had started parenting classes.

³ Notice sent June 14, 2011, indicated the petition was denied; “[t]he best interest of the minor(s) would not be promoted by the proposed change of order.”

visitation had allowed Beatriz, Manuel and Tabitha to bond; and (3) she and Manuel were “in parent[i]ng and counseling to address their issues” and *Beatriz* (without mention of Manuel this time) had remained drug free for three years. Beatriz said the requested changes would be better because Tabitha had a strong bond with her parents, had bonded with her sibling and had indicated “she wants more time with [Beatriz, Manuel] and her sibling and the parents have addressed is[s]ues which have led to Tabitha’s dependency.”

In support of this petition, Beatriz submitted copies of “Enrollment Verification and/or Progress Report” forms from “Family Source,” stating that she and Manuel had enrolled in a parent education group on April 27, 2011, and had attended nine classes to date. In addition, there was a letter from Marcela C., stating that Beatriz and Manuel had visited Tabitha at her home (at the same address identified as Beatriz’s and Manuel’s address on the petition) “several times” and she had “noticed great and excellent bonding.” “[F]or the past two years,” she said, she had noticed a big difference in Beatriz and Manuel and “since early 2009,” they had “changed their li[v]es completely.” Manuel’s brother Rodolfo said on several occasions he had seen “good communication and bond” between Manuel and Beatriz and Tabitha and their other children when they had “their weekend visitations at our home w[h]ere we all live.” He said he was glad they both “got their acts together” and “could say this has been a long term change for them both.”

On July 15, 2011, the dependency court (T. Truong) denied the petition because “The request does not state new evidence or a change of circumstances. . . . Petitioner needs to provide proof of completion of drug rehabilitation program, testing, parenting and individual counseling.”⁴

⁴ Notice sent July 25, 2011, indicated the petition was denied; “[t]he best interest of the minor(s) would not be promoted by the proposed change of order.”

Beatriz appeals.⁵

DISCUSSION

According to Beatriz, the dependency court abused its discretion in finding her petition failed to state new evidence or a change of circumstances and denying her petitions without a hearing.⁶ (Welf. & Inst. Code, § 388, subd. (a).) We disagree.

“Under section 388, a parent may petition the court to change, modify, or set aside a previous court order on the grounds of changed circumstances or new evidence. (§ 388, subd. (a).) The petition must allege why the requested change is ‘in the best interest of the dependent child.’ (§ 388, subd. (b).) Section 388 goes on to state: ‘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.’ (§ 388, subd. (c).) However, the court may summarily deny the motion if the petition fails to make a prima facie showing (1) of a change of circumstances or new evidence requiring a changed order, and (2) the requested change would promote the best interests of the child. (*In re Anthony W.* (2001) 87 Cal.App.4th 246, 250 [104 Cal. Rptr. 2d 422].) In determining whether the petition makes the necessary showing, the court may consider the entire factual and procedural history of the case. (See *In re Jamika W.* (1997) 54 Cal.App.4th 1446, 1450–1451 [63 Cal. Rptr. 2d 513].)” (*In re Justice P.* (2004) 123 Cal.App.4th 181, 188-189.)

In *In re Jamika W.*, *supra*, 54 Cal.App.4th 1446, the dependency “court denied the appellant a hearing as to the guardianship order, noting that it did ‘not see where there

⁵ According to her September 2, 2011 notice of appeal, Beatriz appeals from the “[d]enial of my second 388 petition filed on July 11, 2011 and denied by the court on July 25, 2011.”

⁶ The Department did not file a respondent’s brief but filed a letter advising that it takes “no position on this appeal.” The Department says it was not served with copies of either of Beatriz’s section 388 petitions, never prepared a response to either one and has not evaluated the matter since 2004. Citing *Brown v. Boren* (1999) 74 Cal.App.4th 1303, 1316 (“a litigant may not change his or her position on appeal and assert a new theory”), because it took no position on the matters in the dependency court, the Department says it cannot do so now on appeal.

[was] any showing that it would be in the best interest of [Jamika].[]’ The court was thoroughly familiar with the facts in the case, having presided at each of the hearings. The court was aware that from August 1994, when appellant abandoned Jamika to the care of a relative, to March 20, 1996, the day appellant came to court late, she had very little contact with Jamika. It was also aware that for a year and one-half, appellant did not attend any of the court proceedings, and had failed to follow the court-ordered plan for reunification services (visitation with the minor, participating in and completing a drug counseling program, as well as a parent education program). The court also was advised that Jimmy W. was capable of caring for Jamika’s needs, that she was very bonded to him and that she was doing quite well. Contrasting this history with the weak and inadequate changes of circumstances alleged in the section 388 petition, the trial court was well within its discretion in denying without hearing the guardianship order. . . . The trial court concluded the best interests of Jamika would not be promoted by modifying the guardianship order. We find no abuse of discretion.” (*Id.* at pp. 1450-1451, citation and footnote omitted.)

Section 388 provides: “Any parent or other person having an interest in a child who is a dependent child of the juvenile court or the child himself or herself through a properly appointed guardian 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 or in which a guardianship was ordered pursuant to Section 360 for a hearing to change, modify, or set aside any order of court previously made or to terminate the jurisdiction of the court. The petition shall be verified and, if made by a person other than the child, shall state the petitioner’s relationship to or interest in the child and shall set forth in concise language any change of circumstance or new evidence that is alleged to require the change of order or termination of jurisdiction.”

As Beatriz concedes, modification of the previous order must be in the child’s best interest. (*In re Stephanie M.* (1994) 7 Cal.4th 295, 317; *In re Jasmon O.* (1994) 8 Cal.4th 398, 415.) Contrary to Beatriz’s assertion, the record in this case is nothing like the record in *In re Hashem H.* (1996) 45 Cal.App.4th 1791, which Beatriz claims is “almost

identical.” As she acknowledges, she and Manuel were active drug addicts who made no efforts to even visit their daughter, and as she further admits, Tabitha’s bond with Cesareo with whom she has lived “for a long time” is “greater” than her bond with Beatriz. The “biggest factor,” Beatriz says, is the degree to which they have addressed the problem that led to dependency as demonstrated by three years of sobriety, holding a job successfully parenting a two-year-old.⁷ Just as in *Jamika W.*, *supra*, 54 Cal.App.4th 1451, “Contrasting this history with the weak and inadequate changes of circumstances alleged in the section 388 petition, the trial court was well within its discretion in denying without hearing the guardianship order.” (*Id.* at p. 1451; and *In re Hashem H.*, *supra*, 45 Cal.App.4th at p. 1800, citing *In re Baby Boy L.* (1994) 24 Cal.App.4th 596, 610 [“But [c]hildhood does not wait for the parent to become adequate.” [Citation.] A mere prima facie showing of changing--we hesitate to say, ‘changed’--circumstances was not enough to require or justify a hearing on return of the child to her after two years.”].) In addition to the required showing of a change of circumstances, Beatriz also bore the burden to show that the requested change would promote Tabitha’s best interest. As submitted to the dependency court in 2011, given the considerable passage of time and the fact Beatriz is apparently in the midst of a drug program, we find no abuse of discretion in the dependency court’s denial of her request without a hearing. (*In re Stephanie M.*, *supra*, 7 Cal.4th at p. 317.)

⁷ According to a subsequent minute order dated November 23, 2011, another section 388 petition filed on November 4, 2011, was “walked on calendar.” According to the order, the dependency court denied the petition and jurisdiction remains terminated. In a footnote at the end of her opening brief (filed in December 2011), Beatriz says, “*While not in this record*, the parents are also *enrolled* in a drug program and are drug testing but the drug program *won’t end for another five months*. Mother’s trial counsel requested this appeal go forward without that evidence because it is counsel’s opinion the trial court will not grant these parents a hearing on any [section] 388 petition, and visitation with Tab[i]tha should be increased at this time.” (Italics added.)

DISPOSITION

The order is affirmed.

WOODS, J.

We concur:

PERLUSS, P. J.

ZELON, J.