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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Shasta)

In re A.S. et al., Persons Coming Under
the Juvenile Court Law.

SHASTA COUNTY HEALTH AND HUMAN SERVICES
AGENCY,

Plaintiff and Respondent,

v.

W.S.,

Defendant and Appellant.

C069323

(Super. Ct. Nos.
09JVSQ2804501 &
09JVSQ2804601)

W.S., father of minors J.S. and A.S. (father), appeals from orders of the juvenile court denying his Welfare and Institutions Code,¹ section 388 petitions as to J.S. and A.S. and terminating his parental rights as to J.S. Father contends the court abused its discretion when it denied his request for

¹ Further undesignated statutory references are to the Welfare and Institutions Code.

hearing on his section 388 petitions, and therefore “prematurely” terminated his parental rights as to J.S., improperly denying him visitation as well as due process.

As we will explain, although we understand that this case has been an emotional and frustrating process for father, we find no error. Here, the juvenile court managed the very difficult visitation issues presented by this case to the best of its ability under these unique circumstances, and made every effort to permit father to be heard, at the same time appropriately considering the potential detriment to, and best interests of, both minors. Accordingly, we shall affirm.

FACTUAL AND PROCEDURAL BACKGROUND²

I

Removal Through Disposition

Minor J.S. (born January 1999) and her brother A.S. (born December 1994) were removed from parental custody in June 2009 due to father’s physical abuse of A.S., which J.S. had witnessed. At the time of the removal, J.S. disclosed to the social worker from the Department of Health and Human Services (Department) that father had touched her chest, buttocks, and

² The first portion of the factual and procedural background is taken from our prior opinion in this case, *In re A.S. et al.* (Oct. 26, 2011, C066035) [nonpub. opn.]. We discuss additional details from the record as we deem necessary in the Discussion portion of our opinion, *post*.

thighs "inappropriately."³ The court ordered family reunification services for the parents, including visitation with both children. The children were initially placed together and both refused to visit with either parent. The court ordered the children would not be physically forced to visit if they refused to attend visits.

As the proceedings progressed, J.S. continued to refuse visits with father, and her therapist recommended not forcing her to visit. Although due to the AWOL status of A.S., who had absconded from placement, the parties continued to come to court for regular hearings every 15 days, no progress was made in facilitating visitation between J.S. and father--J.S. simply refused to visit and her therapist continued to opine that she should not be forced to visit against her will. Accordingly, in February 2010, the court determined by a preponderance of the evidence that visitation between the parents and J.S. would be detrimental to J.S.'s well-being.

On April 8, 2010, the Department filed a section 342 petition alleging the parents had failed to protect the minor children. The petition specifically alleged that the prior section 300 petition had been sustained and that services provided pursuant to section 360, subdivision (b) had been ineffective in ameliorating the situation that led to the

³ These allegations of sexual abuse were investigated by the sheriff's department and determined to be unfounded. J.S. and A.S. had been through the dependency system before and had been subsequently adopted by father and his wife.

Department's involvement.⁴ On July 9, 2010, the court held the jurisdiction/disposition hearing on the section 342 petition. At that hearing, the juvenile court found true the allegations in the section 342 petition and adjudicated the minors to be dependents of the court. The court reaffirmed its prior finding that visits between the parents and J.S. would be detrimental to J.S., and granted the Department discretion to allow A.S. to have overnight visits with the parents, as A.S. was now visiting with both parents despite having initially refused visits.

Father appealed from this dispositional order, claiming error in the initial denial of visitation as well as the later finding of detriment and subsequent denial of visitation. On October 26, 2011, we affirmed the juvenile court's orders regarding visitation, including its detriment finding.⁵ (*In re A.S. et al.* (Oct. 26, 2011, C066035) [nonpub. opn.] .)

⁴ We explained in our prior opinion why informal supervision under section 360, subdivision (b), should not be ordered while the children remain detained, as they were in this case. We declined in our prior opinion to address the propriety of the specific orders in this case, and again decline to do so.

⁵ Although we found father had forfeited his claims by failing to timely appeal from the dispositional hearing, we proceeded to address his substantive claims in our opinion. (See *In re A.S. et al.* (Oct. 26, 2011, C066035) [nonpub. opn.] .)

II

*Termination of Services Through
Termination of Parental Rights*

The six, 12 and 18-month review hearings were combined into a single hearing held on April 28, 2011. At the hearing, father was permitted to question the social worker (even though he was represented by counsel) and apparently did so.⁶ Father also testified. The Department recommended termination of reunification services and setting a section 366.26 hearing; after hearing testimony, the juvenile court adopted the recommendation, terminating both parents' services.

The assessment for the section 366.26 hearing concluded J.S. was adoptable. The prospective adoptive parent was identified as the single mother with whom J.S. had been placed in June 2009. The prospective adoptive mother reported that "she and her family fell in love with [J.S.]," and her relationship with J.S. is "that of 'mother and daughter.'" J.S. told the social worker she wanted to be adopted by her foster mother. The section 366.26 hearing was set for a contested hearing.

While the hearing was pending, father filed a section 388 petition seeking to reverse the court's order terminating reunification services and "continue with services that are comprehensive." In support of his petition, father attached

⁶ We were not provided with the transcript of the hearing.

seven pages⁷ of self-titled "remarks." Although he couched these remarks as "based on information NOT provided to the court," the remarks primarily *argued* what father apparently perceived to be points supporting his dispute with the manner in which the Department and juvenile court had handled the minors' detention and subsequent visitation issues. Father claimed particular facts related to the incident giving rise to the minors' removal and detention were excluded from the Department's reports, as well as the report of the original investigating officer. Father further alleged the interviews of the children at the time of their detention were "inappropriate."

Father also argued that he was denied due process because there were omissions in the Department's status review reports. In particular, father believed there was inconsistent information regarding whether J.S. wanted a "home visit," and conflicting information on whether J.S. actually needed counseling. Father also strongly believed A.S. was manipulating J.S., and the social worker was working against reunification.

On August 25, 2011, the juvenile court denied father's section 388 petitions by written order, finding no new evidence or change of circumstances. The court added in a written note on the order that the parties should be "prepared to discuss" father's claims (presumably the claims expressed in his written

⁷ Although the record contains seven pages of attachments, it appears that father's "remarks" were not provided to us in their entirety, as the seventh page ends midsentence.

"remarks") at the section 366.26 hearing, to be held the next day.

At the August 26 hearing, the lawyers objected to additional discussion of father's claims, and the court clarified: ". . . I mean, I've already indicated that I don't find that there is a change in circumstances. There is nothing warranting [] a [section] 388 hearing. But really, all I was trying to do was clear the air and make sure that something hasn't been missed or whatever." After an extensive on-record conversation with father and the various attorneys, the court decided to forgo any further discussion of father's claims with the exception of any evidence taken at the section 366.26 hearing, which was reset for September 23, 2011.

On September 23, both parents appeared for the section 366.26 hearing, along with all counsel. The court heard testimony from father and argument from counsel. Father argued that terminating his parental rights as to J.S. would be detrimental to her well-being, as termination would not help J.S. resolve whatever issues were underlying her refusal to visit with him during the reunification process. Moreover, he argued, J.S. needed more counseling to overcome her underlying issues, counseling that included father and his wife.

The court terminated parental rights as to J.S. This appeal followed.

DISCUSSION

I

Section 388 Petition

Father first claims the juvenile court erred in denying his section 388 petition without a hearing.

A. Petition Requirements and Standard of Review

A petition to modify a juvenile court order under section 388 must allege facts showing that new evidence or changed circumstances exist, and that changing the order will serve the minors' best interests. (*In re Daijah T.* (2000) 83 Cal.App.4th 666, 672.) A parent filing a section 388 petition must make only a prima facie showing in order to obtain an evidentiary hearing. (*In re Marilyn H.* (1993) 5 Cal.4th 295, 310.) A prima facie showing is one which alleges facts that, if supported by the evidence, would justify a favorable decision. (*In re Daijah T., supra*, 83 Cal.App.4th at p. 673.) The petition must be liberally construed in favor of its sufficiency. (*In re Daijah T., supra*, at p. 674, fn. 2.) However, if the juvenile court finds that the petition does not make a prima facie showing, the court may deny it summarily without an evidentiary hearing. (See *In re Zachary G.* (1999) 77 Cal.App.4th 799, 808; *In re Hashem H.* (1996) 45 Cal.App.4th 1791, 1799-1800; *In re Baby Boy L.* (1994) 24 Cal.App.4th 596, 610.)

We review a summary denial of a hearing on a section 388 petition for abuse of discretion. (*In re A.S.* (2009) 180 Cal.App.4th 351, 358.)

B. Analysis

We conclude that here the juvenile court did not abuse its discretion by summarily denying father's petition.

The court was well within its discretion to find that the petition did not make the required showing. Father failed to present new evidence or changed circumstances in support of his section 388 petition. Rather, father presented pages of argument on evidence already presented. His argument seemed to focus on the many problems he perceived with the juvenile court's assuming jurisdiction two years and many hearings before his section 388 motion was filed. Although he couched his "remarks" as "based on information NOT provided to the court," his rambling and accusatory notes are perhaps more accurately described as "venting." The remarks certainly did not set forth facts constituting a prima facie showing of a change in circumstances or new evidence, nor did the petition establish any facts that *suggested* that the best interests of the children might be promoted by the proposed change of order, as required for a hearing. Rather than facts, the remarks presented as accusations. Further, assuming for the sake of argument that the petition contained "new facts," these facts were not material. They did not even remotely relate to the propriety of *resuming services* for father as to both children, which was the changed order he requested by filing his petition.⁸

⁸ Father argues that the juvenile court necessarily found some merit to his petition due to its advisement to the parties to be

II

Premature Termination of Parental Rights:

Visitation and Due Process

Father next contends by its improper denial of his section 388 petition, the juvenile court "prematurely" terminated his parental rights as to J.S. As we have held *ante* that there was no error in the summary denial of father's section 388 petition, this related claim must also fail.

Father's final (and by far the most compelling) argument also alleges improper termination of his parental rights, but centers on the fact that he was effectively denied visits with J.S. throughout the duration of the dependency proceedings. Visitation was originally ordered by the court mere days after the minors' detention, on June 10, 2009, and again on July 22. The minimum visits were set, and the Department was given discretion only to increase visits, not decrease them. But J.S. indicated from the beginning of the case that she was fearful of visiting either parent, and did not intend to do so.⁹ The court

prepared to discuss his claims. As we have explained, it is evident from the record that the juvenile court did not believe father's petition made the required showing. It is clear to us that the court was aware of father's frustration, and was making *considerable* efforts to give father the opportunity to be heard. But because father's section 388 petition did not make the requisite showing, the juvenile court properly denied it without hearing.

⁹ Complicating the already difficult interrelationships was the fact that J.S. was still in contact with her biological family (as was A.S.), with whom the minors had a lengthy history of abuse and neglect before parental rights were terminated and they were adopted by father and his wife. J.S. made it clear

ruled, at the request of minors' counsel, that the children not be physically forced to visit.

In July and August 2009, visits were attempted but J.S. refused to leave with the social worker for transport to the visit. Even when a therapeutic visit was arranged, J.S. refused to attend and even refused to attend her own counseling session because she thought it was going to include a visit with her parents. The record shows that visitation was again addressed in court on October 5 and October 6, 2009.¹⁰ In October, J.S. told the social worker that she was afraid to return home as she was afraid she would be physically abused. At a hearing held on December 17, 2009, the court received information that J.S.'s therapist was not recommending therapeutic visitation unless the parents were ordered to undergo mental health evaluations. The therapist further opined that J.S.'s progress in therapy had been "slow," and that the parents should not yet be integrated into the therapy.

Visitation was addressed at additional hearings held on January 4, 2010, as well as January 19. On January 12, 2010, her therapist opined that it would be harmful for J.S. to visit her parents, and in February 2010 her attorney declared under penalty of perjury that visitation "would not be in her best

through her attorney that she did not consider her adoptive parents to be her "mother" and "father."

¹⁰ We were not provided with transcripts of the various hearings where visitation was addressed unless indicated otherwise.

interests" and would be "harmful" and detrimental" to her and "jeopardize her emotional safety."

The court entered its detriment finding on February 26, 2010. As noted *ante*, we previously upheld that finding. As the case progressed, A.S. began visiting with both parents despite his initial refusal and later progressed to unsupervised visits; J.S. eventually agreed to visit with her mother and did visit with her. But J.S. always refused to visit with father.¹¹

Father argues that this deprivation of the opportunity to visit rendered the process fundamentally unfair and denied him due process. We understand the argument, but are compelled to reject it. Although we agree that it is unfortunate that visits between father and J.S. did not occur during the attempt at reunification, we disagree that the lack of visitation constituted a violation of due process.

Father points to *In re Hunter S.* (2006) 142 Cal.App.4th 1497 (*Hunter S.*) in purported support of the due process portion of his argument. But the *Hunter S.* court specifically declined to reach mother's due process argument. (*Hunter S.*, *supra*, 142 Cal.App.4th at p. 1508 ("Our reversal of the order terminating parental rights based on the error in denying the section 388 petition renders it unnecessary to reach [mother's] due process arguments at this point".)) In *Hunter S.*, the juvenile court

¹¹ Although father suggests in his "remarks" that J.S. wanted to visit, the record contains only evidence of her consistent refusal to visit, a decision unwaveringly supported by her therapist.

ordered visitation only "as can be arranged" and then made no attempt to enforce the order when the child refused visits, but also made no finding of detriment. (*Hunter S.*, *supra*, 142 Cal.App.4th at p. 1505.) At issue was the juvenile court's failure to enforce its order, leaving the enforcement or lack of same to the child. Here, the juvenile court made a finding of detriment, which we already have held was not an abuse of its discretion. We also held in our prior opinion that any error in the delay of the detriment finding was harmless as clearly conditions justifying the finding were in place from the beginning of the dependency proceeding. (*In re A.S. et al.* (Oct. 26, 2011, C066035) [nonpub. opn.] .)

Although we understand and agree that the child alone may not dictate whether visitation occurs, nor may any third party make that decision for the court, as expressed by cases including *In re S.H.* (2003) 111 Cal.App.4th 310, 319 and *In re Donovan J.* (1997) 58 Cal.App.4th 1474, 1477-1478, cited by father, this particular case is unique on its facts.¹²

¹² *In re S.H.* holds that when the court orders visitation, it must also ensure that at least some visitation, at a minimum level determined by the court itself, will in fact occur. (*In re S.H.*, *supra*, 111 Cal.App.4th at p. 313.) Here, the juvenile court did initially order visitation, at a minimum level, and attempted to facilitate its occurrence, as did the Department. But when the potential for detriment to J.S. became glaringly apparent, the court found detriment. The court in *In re S.H.* made no finding of detriment. And it acknowledged that "Indeed, the Department and mental health professionals working with it and with the dependent child may determine when visitation should first occur." (*In re S.H.*, *supra*, at p. 319.)

J.S., who had already been through a lengthy dependency proceeding and had subsequently been adopted by father, accused father of what she perceived as inappropriate touching. Father had physically abused her brother in her presence. She was afraid to visit from the beginning of the case. Her therapist recommended against visits, even therapeutic, and opined being forced to visit with father would "be harmful" to J.S. J.S. told the social worker that she was afraid of father and that she feared she would be physically abused. Her attorney told the court he believed visitation would be harmful, detrimental, and jeopardize J.S.'s emotional safety.

As we explained in our opinion following the previous appeal and again in more detail *ante*, the juvenile court ordered minimum visits and scheduled frequent hearings in this case, at nearly *all* of which the parties discussed visitation between J.S. and father. The court, however, finally found visitation with father would be detrimental to J.S. and the court never had sufficient evidence to change that finding.

In *In re Donovan J.*, the juvenile court forbade father from visiting his children "without permission of minors' therapists." (*In re Donovan J.*, *supra*, 58 Cal.App.4th 1474, 1475.) This was error, as "[a]lthough a court may base its determination of the appropriateness of visitation on input from therapists, it is the court's duty to make the actual determination." (*In re Donovan J.*, *supra*, at p. 1478.) Here, the juvenile court clearly made its own decisions based on input from multiple appropriate sources, including the Department, the minors, the therapist, and the parents.

Father was permitted to cross-examine the social worker and testify himself at the April 2011 hearing; he testified, called witnesses, and argued at the contested section 366.26 hearing in September 2011. His visitation requests and all other orders were handled entirely by the court, not delegated to any third party. The commencing of visits between A.S. and both parents as well as J.S. and her mother shows that the juvenile court, assisted by input of the Department, therapists, and others, was continually reviewing and revisiting its visitation and detriment orders, giving father all the due process required by law. Unfortunately, this process did not generate the outcome for which most would hope; it did not repair the relationship between J.S. and her adopted father. Although father is understandably dissatisfied with the outcome of the process he now challenges, we find neither prejudicial error nor fundamental unfairness in that process.

DISPOSITION

The orders of the juvenile court are affirmed.

DUARTE, J.

We concur:

NICHOLSON, Acting P. J.

BUTZ, J.