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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

In re ISAIAH R., a Person Coming Under
the Juvenile Court Law.

SAN DIEGO COUNTY HEALTH AND
HUMAN SERVICES AGENCY,

Plaintiff and Respondent,

v.

TAMIKA B.,

Defendant and Appellant.

D061335

(Super. Ct. No. SJ11689C)

APPEAL from an order of the Superior Court of San Diego County, Garry G.
Haehnle, Judge. Affirmed.

Tamika B., mother of dependent child Isaiah R., appeals a juvenile court order summarily denying her petition for modification under Welfare and Institutions Code section 388,¹ by which she sought reunification services and unsupervised visits with

¹ All further statutory references are to the Welfare and Institutions Code.

Isaiah. Tamika contends she was entitled to an evidentiary hearing on her section 388 petition because she presented prima facie evidence her circumstances had changed and it was in Isaiah's best interests to grant the requested modification for reunification services.² We affirm the order.

FACTUAL AND PROCEDURAL BACKGROUND

In January 2011, the San Diego County Health and Human Services Agency (Agency) filed a petition in the juvenile court alleging six-day-old Isaiah was at substantial risk of harm as a result of Tamika's substance abuse. Tamika tested positive for marijuana at the time of Isaiah's birth and admitted using marijuana daily throughout her pregnancy. Isaiah also tested positive for drugs. Two days after Isaiah was born, Tamika used methamphetamine. Tamika's two older children had been removed from her custody as a result of her substance abuse. Tamika did not reunify with these children after receiving reunification services, and they were adopted in 2009. Additionally, Tamika had been provided with voluntary services in 2004 to address her drug use and mental health concerns, but she failed to comply with these services.

According to the hospital social worker, Tamika did not seem capable of caring for Isaiah, and her behavior indicated she may have mental health problems. The Agency social worker noted Tamika lacked insight about how a parent using drugs might pose a risk in caring for an infant. The court detained Isaiah in out-of-home care and ordered liberal, supervised visits for Tamika.

² Tamika makes no argument as to unsupervised visits.

Tamika had 17 prior Agency referrals, dating from 2001, for drug abuse, mental health issues and neglect involving her other children. She had previously been arrested for drug-related activities and had been in a drug rehabilitation outpatient program. She had a diagnosis of bipolar disorder, and had been admitted to a psychiatric hospital on two occasions. Tamika did not take medication for her mental illness because she believed it was "the devil's drug."

Before the jurisdiction and disposition hearing, Tamika enrolled in KIVA, a residential drug treatment program. While there, she participated in parenting classes, Narcotics Anonymous (NA) meetings, life skills groups and anger management. She had three visits with Isaiah, and interacted appropriately with him. Tamika also completed a 16-session parenting course through adult education. Agency acknowledged Tamika's participation in KIVA, but recommended the court deny Tamika reunification services based on her lengthy history of substance abuse and mental health issues, and her failure to address or resolve them even after her parental rights to her other children were terminated.

At the contested jurisdiction and disposition hearing, the court sustained the allegations of the petition, declared Isaiah a dependent, removed his custody from Tamika and placed him in foster care. The court found Tamika had not made reasonable

efforts to treat the problems that led to the removal of Isaiah's siblings, and it would not be in Isaiah's best interests to offer her reunification services. (§ 361.5, subd. (b)(11).)³

According to the six-month review report, Tamika had completed the KIVA program and had maintained her sobriety for more than nine months. She was attending an outpatient drug treatment program and had obtained housing. Tamika had been attending parenting classes and therapy to resolve the protective issues. She was having one-hour supervised visits with Isaiah once a week. Isaiah's foster mother reported that Tamika would make inappropriate statements to Isaiah. Tamika became irate when a visit had to be canceled because Isaiah was ill and needed medical attention, demanding to receive a make-up visit and expressing no concern about Isaiah's well-being. She later apologized, but still did not ask about Isaiah.

During a visit supervised by social worker Vincent Nguyen, Tamika held Isaiah on her lap or on the table in front of her. She kissed him and said, "I love you." Tamika spent much of the visit talking to the foster mother about the upcoming court hearing. Because Tamika did not engage Isaiah in play, Nguyen concluded she had limited knowledge of activities that were developmentally appropriate for him. Nguyen was concerned Isaiah would be at risk of physical harm and neglect if he were returned to Tamika's custody. He recommended the court set a hearing under section 366.26 to select and implement a permanent plan for Isaiah.

³ In an unpublished opinion, we affirmed the court's order denying Tamika reunification services. (*In re Isaiah R.* (Oct. 14, 2011, D059818).)

In November 2011, Tamika filed a section 388 petition for modification, asking the court for reunification services and unsupervised visits with Isaiah. The petition alleged Tamika had made significant changes in her life in order to provide a safe, loving home for Isaiah: she completed the KIVA residential drug treatment program and continued to have clean drug tests; she was currently in an outpatient program where she participated in group sessions; she completed several parenting education classes and regularly attended NA meetings; she was compliant with the medications prescribed by her psychiatrist; she continued to participate in individual therapy; she continued to attend a Co-Occurring Disorders (COD) program to further support her mental health; she was working on her goals of maintaining her sobriety and self-sufficiency; and she had successfully transitioned to a sober living home that was clean, spacious and equipped with supplies needed to care for Isaiah. The allegations of changed circumstances were supported by documents attached to the section 388 petition.

As to best interests, the petition alleged Tamika loves Isaiah, has devoted the past 10 months to working toward reunifying with him and has continued to take on a parental role in his life. During regular supervised visits, Tamika sings to Isaiah, feeds him, plays with him, changes his diaper when necessary and knows his feeding and sleeping schedule. The petition further alleged that providing Tamika with services would allow her to progress toward reunifying with Isaiah, thereby preserving the family. In support of these allegations, Tamika attached a letter she wrote describing the lessons she had learned about herself, child safety and parental responsibility.

In an addendum report, Nguyen stated Tamika recently denied having lost custody of her two older children as a result of her drug use. Tamika could not name one of her two prescription medications, but said she was taking them for depression and to help her sleep. She said the medications were not helping her, but she took them "because this is what I gotta take to get my baby back." Tamika told Nguyen that Isaiah preferred to be with her, stating, " 'If you ask him, he'll tell you that he wants to be with me.' " Tamika continued to have weekly supervised visits with Isaiah. Instead of engaging him in play, she held him and kept him close.

Nguyen believed Tamika continued to show she lacked insight into the protective issues that led to the removal of her two older children and Isaiah, she did not fully understand her mental health diagnoses and why she is taking prescribed medications and she showed little understanding of Isaiah's developmental level and needs. In Nguyen's opinion, Tamika had not changed enough to be an appropriate parent for Isaiah and, thus, it was not in Isaiah's best interests to delay selecting a permanent plan for him.

After reviewing the section 388 petition and its attachments, and hearing arguments of counsel, the court found there was no prima facie evidence of changed circumstances regarding Tamika's substance abuse and mental health. The court further found there was no prima facie showing Isaiah's best interests would be served by providing Tamika with reunification services. Accordingly, the court denied the petition without an evidentiary hearing.

DISCUSSION

A

A party may petition the court under section 388 to change, modify or set aside a previous court order. The petitioning party has the burden of showing, by a preponderance of the evidence, that (1) there is a change of circumstances or new evidence, and (2) the proposed change is in the child's best interests. (§ 388; *In re Jasmon O.* (1994) 8 Cal.4th 398, 415.) The petition must be liberally construed in favor of its sufficiency. (Cal. Rules of Court, rule 5.570(a); *In re Marilyn H.* (1993) 5 Cal.4th 295, 309.) The parent need not establish a probability of prevailing, but instead "need only make a prima facie showing to trigger the right to proceed by way of a full hearing." (*In re Marilyn H.*, at p. 310; *In re Aljamie D.* (2000) 84 Cal.App.4th 424, 432.) "A 'prima facie' showing refers to those facts which will sustain a favorable decision if the evidence submitted in support of the allegations by the petitioner is credited." (*In re Edward H.* (1996) 43 Cal.App.4th 584, 593.) In determining whether the petition makes the necessary showing, the court considers both the allegations in the petition as well as the entire factual and procedural history of the case. (*In re Justice P.* (2004) 123 Cal.App.4th 181, 188-189; *In re Angel B.* (2002) 97 Cal.App.4th 454, 461.) Successful petitions include declarations or other attachments in support of the showing the petitioner will make at an evidentiary hearing. (*In re Anthony W.* (2001) 87 Cal.App.4th 246, 250.)

Section 388 plays a critical role in the dependency scheme. (*In re Hunter S.* (2006) 142 Cal.App.4th 1497, 1506.) Even after reunification services are terminated, section 388 allows the court to address claims of changed circumstances or new evidence

"and affords a parent [the] final opportunity to reinstate reunification services before the issue of custody is finally resolved. [Citation.]" (*Ibid.*; *In re Kimberly F.* (1997) 56 Cal.App.4th 519, 528.) "A parent's ability to file a section 388 petition provides an 'escape mechanism' that lessens the risk of an erroneous deprivation of the parent-child relationship in the event of a legitimate change in circumstance." (*In re Dakota H.* (2005) 132 Cal.App.4th 212, 224, quoting *In re Marilyn H.*, *supra*, 5 Cal.4th at p. 310.) In this regard, section 388 is central to the dependency scheme's constitutionality. (*In re Hunter S.*, at p. 1506.)

B

Tamika's modification petition alleged her circumstances had changed because she had addressed her substance abuse problem by completing a residential drug treatment program, she remained clean and sober for nine months, continued to attend after-care programs and NA meetings to support her sobriety and had transitioned to a sober living home that was appropriate for Isaiah. These allegations were supported by detailed documentation, and were not contradicted by facts in the record. The petition also alleged Tamika was compliant with the medications prescribed by her psychiatrist, and she continued to participate in individual therapy and a COD program to further support her mental health. Documents attached to the petition contained admissible evidence to support these allegations.

The changes alleged in the petition must be viewed in the context of Tamika's history of substance abuse and mental health problems. Tamika was denied reunification services because she had previously failed to address her substance abuse and mental

health issues with respect to her two older children, resulting in termination of her parental rights to them. In contrast, Tamika put a great deal of effort into reunifying with Isaiah, even without the benefit of having court-ordered reunification services. Between the time she was denied services and the time she filed her section 388 petition, Tamika accessed services on her own. She achieved and maintained sobriety and mental health stability, which were concerns that led to Isaiah's dependency.⁴ Significantly, Tamika was not seeking immediate return of Isaiah to her custody, but only services that would enable her to reunify with him. To this end, the liberally construed allegations in the petition showed Tamika's circumstances had changed, and were not merely changing.⁵ (See *In re Hashem H.* (1996) 45 Cal.App.4th 1791, 1797-1801.)

Agency argues Tamika did not meet her prima facie burden of showing changed circumstances because: (1) her progress in outpatient drug treatment was reported as being "fair"; (2) she did not provide documentation of NA meetings for three weeks in October; (3) she attended only one of two group sessions each week for her COD program; and (4) the letters from her therapist and psychiatrist were "unclear" and not sufficiently detailed as to whether they supported her alleged mental stability. However,

⁴ Unlike many parents with extensive drug histories, Tamika has had no pattern of relapse. (See, e.g., *In re Casey D.* (1999) 70 Cal.App.4th 38, 43; *In re N.M.* (2003) 108 Cal.App.4th 845, 856; *In re Clifton B.* (2000) 81 Cal.App.4th 415, 423-424.)

⁵ We agree with Tamika's argument that the nature of recovery from drug addiction will often preclude a finding of "changed" circumstances because recovery is a life-long process that must be assessed one day at a time. Similarly, mental health issues cannot always be resolved, but often can be managed sufficiently to enable parents with these problems to successfully raise their children. This is what Tamika was attempting to do through ongoing medication and counseling.

to be entitled to a hearing, Tamika was not required to prove changed circumstances or even show the probability of prevailing on her petition, but only to present prima facie evidence—"that which suffices for the proof of a particular fact, until contradicted and overcome by other evidence." (*In re Raymond G.* (1991) 230 Cal.App.3d 964, 972.) Agency's reports did not contradict Tamika's allegations and supporting documents, but instead contained the social worker's opinion that Tamika still lacked parenting skills, an understanding of child development and "insight" about her substance abuse and mental health issues. But any question or uncertainty about the genuineness of Tamika's changed circumstances would be more appropriately addressed at a full evidentiary hearing at which Tamika could present witnesses and additional evidence, subject to the scrutiny of cross-examination and counter-evidence, before the court decided whether she was entitled to the requested modification.⁶

C

But the inquiry does not end here. After making a prima facie showing of changed circumstances, Tamika was still required to show the requested modification would promote Isaiah's best interests. (*In re Jasmon O.*, *supra*, 8 Cal.4th at p. 415.) Tamika

⁶ In cases like this one, the better practice is to hold an evidentiary hearing. The unintended result of summarily denying a section 388 petition is to further delay the proceedings, and ultimately stability for the minor, should reversal be required. (See, e.g., *In re Daijah T.* (2000) 83 Cal.App.4th 666, 675-676.)

asserts she met this burden because the case was still in the reunification phase;⁷ she consistently and regularly visited Isaiah and loves him; she has devoted the past 10 months to reunifying with him; and she has continued to take on a parental role in his life. Providing her with services, she claims, would allow her to progress toward reunifying with Isaiah, thereby preserving the family.

Tamika did not plead facts (i.e., evidence) showing the proposed modification may be in Isaiah's best interests. (Cf. *In re Daijah T.*, *supra*, 83 Cal.App.4th at p. 672 [if petitioner does not plead sufficient facts, juvenile court has no way to evaluate petitioner's evidence as to whether requested modification may promote best interests of child].) Instead, she described what she has personally learned about herself, child safety and parental responsibility. Although it may benefit Tamika to receive services in an effort to reunify with Isaiah, the focus of the inquiry under section 388 is on the *child's* best interests, not those of the parent. (*In re Angel B.*, *supra*, 97 Cal.App.4th at p. 465 [hearing on section 388 petition properly denied where evidence did not show any parent-child bond from child's perspective, but only from mother's].) Isaiah has never lived with Tamika and consequently, never developed a bond with her. Tamika's affection and love for Isaiah, which she displayed at weekly supervised visits, is not enough to show how his best interests would be promoted by the requested modification. Moreover, Tamika's statement in her section 388 petition that she "has continued to take on a parental role in

⁷ The court had not yet ordered a hearing under section 366.26 to select and implement a permanent plan for Isaiah because his father was receiving reunification services.

her son's life" is conclusory and unsupported by facts in the record. (See *In re Anthony W.*, *supra*, 87 Cal.App.4th at p. 250.)

Tamika argues that offering her reunification services would ultimately preserve the family. However, "[t]he presumption favoring natural parents by itself does not satisfy the best interests prong of section 388." (*In re Justice P.*, *supra*, 123 Cal.App.4th at p. 192.) There is no evidentiary basis for the argument that postponing permanency for Isaiah would be in his best interests. (See *In re Marilyn H.*, *supra*, 5 Cal.4th at p. 310 [it is not in a child's best interests to wait indefinitely to find out whether a parent will become adequate].) Although the case was technically still in the reunification stage at the time the court considered Tamika's section 388 petition, termination of reunification services for Isaiah's father was likely to occur in the next month. At this point, Isaiah's interest in stability and permanence, in exchange for an uncertain future, was paramount. (*In re Stephanie M.* (1994) 7 Cal.4th 295, 317; *In re C.J.W.* (2007) 157 Cal.App.4th 1075, 1081.)

The liberally construed allegations of the petition did not show Isaiah's best interests would be served by offering Tamika reunification services. (See *In re Stephanie M.*, *supra*, 7 Cal.4th at p. 317.) Tamika was not entitled to an evidentiary hearing because the facts alleged, even if supported by evidence given credit at that hearing, would not sustain a favorable decision on the petition. (*In re Zachary G.* (1999) 77 Cal.App.4th 799, 806.)

DISPOSITION

The order is affirmed.

HALLER, J.

WE CONCUR:

HUFFMAN, Acting P. J.

O'ROURKE, J.