

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

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

SAN DIEGO COUNTY HEALTH AND
HUMAN SERVICES AGENCY,

Plaintiff and Respondent,

v.

LINDA S.,

Defendant and Appellant.

D061949

(Super. Ct. No. NJ14109A & B)

APPEAL from an order of the Superior Court of San Diego County, Michael J.

Imhoff, Commissioner. Affirmed.

Linda S. appeals a juvenile court order denying her petition for modification under Welfare and Institutions Code¹ section 388, by which she sought to have her dependent

¹ Statutory references are to the Welfare and Institutions Code.

children M.S. and S.S. (together the minors), returned to her custody, or alternatively, to have unsupervised visits with them. Linda contends the court erred by summarily denying her petition as to S.S. because there was prima facie evidence that Linda's circumstances had changed and that it would be in S.S.'s best interests to have unsupervised visits with her.² We affirm the order.

FACTUAL AND PROCEDURAL BACKGROUND

In 2009, 12-year-old M.S. and 10-year-old S.S. became dependents of the juvenile court under section 300, subdivision (b) and were removed from Linda's custody based on findings that they were at substantial risk of serious physical harm because of Linda's mental illness.³ The minors, who both have special needs, were placed separately in out-of-home care. The court ordered no reunification services for Linda under section 361.5, subdivision (b).

At a section 366.26 selection and implementation hearing in March 2010, the court ordered another planned permanent living arrangement (APPLA) as the minors' permanent plans. Linda was having supervised visits with the minors. When Linda's aggressive behaviors and angry demeanor began to affect her interactions with the minors, the court ordered their supervised visits to occur in a therapeutic setting.

² Although the juvenile court made findings as to both M.S. and S.S., Linda does not raise any issues on appeal with respect to M.S.

³ A more detailed version of the facts leading to the minors' dependencies is recited in this court's prior unpublished opinions. (*In re M.S.* (Oct. 14, 2011, D059115) [nonpub. opn.]; *In re M.S.* (Jan. 13, 2012, D060044) [nonpub. opn.])

By November 2010, Linda's demeanor during visits had not improved. She was refusing to follow rules or respond to redirection. She often lost her composure, engaged in inappropriate conversations with the minors and failed to interact appropriately with them. Linda's aggressive and explosive behavior during visits caused the social worker to become concerned about S.S.'s safety. Consequently, the court granted Agency's request for no contact, other than supervised telephone calls, between Linda and S.S. The court gave the social worker discretion to resume visits in a therapeutic setting.

The court held a postpermanency planning review hearing in June 2011. At that hearing, the social worker testified that S.S. had suffered no detriment as a result of not seeing Linda for eight months. S.S.'s negative behaviors did not increase when contact with Linda was cut off. In fact, S.S. was much more compliant and willing to follow a routine when she had no contact with Linda. Once telephone calls between Linda and S.S. resumed, S.S. was reluctant to obey the foster mother or finish tasks. The social worker believed that Linda posed a risk of physical and emotional harm to S.S. Before the social worker could recommend face-to-face visits between Linda and S.S., he would want to see that Linda had made progress in therapy and had developed coping skills. The court found that the existing visitation order for no in-person contact between Linda and S.S. was appropriate and was in S.S.'s best interests, but gave the social worker discretion to expand visitation with the concurrence of minor's counsel.

By January 2012, Linda had been in individual therapy with Alan Lincoln, Ph.D., for a year. The court noted that there had been "a great deal of positive progress in the case" and authorized supervised visits between Linda and S.S. once a month. Linda

resumed in-person supervised visits with S.S., and although their interactions were generally positive, the visitation coordinator canceled visits at that site because Linda was volatile, unable to control her temper, and threatened to sue the visitation facility. Linda was also having supervised telephone contact with S.S. once a week.

In April 2012, Linda filed a section 388 petition for modification, seeking to have the court return the minors to her custody or allow her to have unsupervised visits with them. The court summarily denied the petition, finding that Linda had not made a prima facie showing of changed circumstances or that the modification that she was requesting would be in S.S.'s best interests.

DISCUSSION

Linda contends that the court erred by summarily denying her section 388 modification petition. She asserts that she made a prima facie showing that circumstances had changed and that the proposed modification — having unsupervised visits with S.S. — was in S.S.'s best interests.⁴

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

⁴ In its respondent's brief, Agency addresses several points that Linda did not raise in her brief, such as Linda's standing to request sibling visitation and the validity of prior psychological reports. We limit our discussion to the contentions set forth in Linda's opening and reply briefs. We also deny Agency's requests, filed August 27, 2012, for judicial notice, to augment the record on appeal, and to dismiss Linda's claims relating to sibling and grandparent visitation.

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 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.) " '[I]f the petition presents any evidence that a hearing would promote the best interests of the child, the court will order the hearing.' [Citation.]" (*In re Jasmon O.*, at p. 415.) "However, if the liberally construed allegations of the petition do not make a prima facie showing of changed circumstances and that the proposed change would promote the best interests of the child, the court need not order a hearing on the petition. [Citations.] The prima facie requirement is not met unless the facts alleged, if supported by evidence given credit at the hearing, would sustain a favorable decision on the petition." (*In re Zachary G.* (1999) 77 Cal.App.4th 799, 806.) In determining whether the petition makes the necessary showing, the court may consider the entire factual and procedural history of the case. (*In re Justice P.* (2004) 123 Cal.App.4th 181, 188-189.)

B

Linda's petition alleged that her circumstances had changed because she had made progress in therapy with Dr. Lincoln for the past year and a half, she no longer suffered from depression, and she was now capable of caring for the minors, or at least having unsupervised visits with them. Specifically, Linda requested that the visitation restriction be lifted so that S.S. could travel with her to visit the maternal grandfather, who was terminally ill.

In support of her request, Linda attached a letter from Dr. Lincoln, which outlined Linda's specific therapy goals, and noted that Linda had been consistently participating in treatment with him for 15 months. Dr. Lincoln reported that Linda had recently shown that she was better able to understand her role in the issues that led to the minors' removal from her custody and the restrictions that were placed on her visitation, but "she tends to either minimize or externalize responsibility relative to the information provided [to Dr. Lincoln] as required by the court." Dr. Lincoln wrote that Linda has difficulty understanding the perspectives of her children, and that she is consistently unable to regulate her behaviors and emotions, which was a concern when considering the possibility of unsupervised visits with the minors. Further, "[h]er progress in achieving better behavior and affective regulation has been limited, partly because she frequently attempts to use her therapeutic sessions to relitigate her case or complain that [Dr. Lincoln] should take an active investigatory role to obtain facts to show the court that the decision was wrong."

Dr. Lincoln states in the letter that Linda was not currently under the care of a psychiatrist or taking her prescription medication for depression, and that taking the medication was necessary to "further support her progress in maintaining more consistent self-control and judgment." Dr. Lincoln hoped that Linda "will continue in her therapy and develop better skills involving behavior and affective regulation." Linda had reported to Dr. Lincoln that she had made some steady progress with telephone and in-person contacts with S.S. With regard to visitation, Dr. Lincoln stated: "I feel the court could give more specific and clear direction to social services to create a more stable

schedule of visits with [S.S.] and potentially move to unsupervised visits in the near future if all continues to go well."

Linda's petition and supporting documentation show, at most, that her circumstances were "changing," but had not changed. (*In re Casey D.* (1999) 70 Cal.App.4th 38, 47.) Although Dr. Lincoln acknowledged that Linda is making a great effort to regulate her behavior and affect, he also stated that she is in the early stages of the therapeutic process, and needs considerably more work. Nothing in Dr. Lincoln's letter indicates that Linda's progress in therapy has been sufficient to warrant unsupervised visits with S.S. Indeed, Dr. Lincoln's statement about the potential for "unsupervised visits in the near future" was expressly conditional — "if all continues to go well." Linda did not make a prima facie showing that she had eliminated the concerns that led to the court's order for supervised visits with S.S. Thus, any changes in Linda's circumstances were "not legally sufficient to require a hearing on her section 388 petition." (*In re Angel B.* (2002) 97 Cal.App.4th 454, 465.)

C

Even if Linda's petition had made a prima facie showing of changed circumstances, there was no showing that the proposed modification was in S.S.'s best interests. Linda's mental health issues, and in particular, her inability to consistently regulate her behaviors and emotions, remained an impediment to having unsupervised visits with S.S. Linda continued to display aggressive and explosive behavior, even when visits were supervised, which caused the social worker to be concerned about S.S.'s physical and emotional safety. More recently, Linda had been able to positively

communicate with S.S. under supervised conditions, but Linda still had difficulty managing her anger toward others during visits, which is another indication that it would not be beneficial to S.S. to have unsupervised visits.⁵ Because the liberally construed allegations of the petition would not have sustained a favorable decision on the section 388 petition, Linda was not entitled to an evidentiary hearing. (*In re Zachary G.*, *supra*, 77 Cal.App.4th at p. 808; *In re Mary G.* (2007) 151 Cal.App.4th 184, 205-206.)

DISPOSITION

The order is affirmed.

AARON, J.

WE CONCUR:

BENKE, Acting P. J.

McINTYRE, J.

⁵ To the extent Linda was requesting that S.S. be allowed to visit her grandfather, there were existing court orders permitting such visits.