

**NOT TO BE PUBLISHED IN OFFICIAL REPORTS**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 This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.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 MARY B., a Person Coming Under  
the Juvenile Court Law.

SAN DIEGO COUNTY HEALTH AND  
HUMAN SERVICES AGENCY,

Plaintiff and Respondent,

v.

ROBERT W.,

Defendant and Appellant.

D062247

(Super. Ct. No. NJ13869)

APPEAL from an order of the Superior Court of San Diego County, Michael Imhoff,  
Commissioner. Affirmed in part, reversed in part and remanded with directions.

Robert W. appeals following the six-month review hearing in the juvenile dependency case of his daughter, Mary B. Robert contends the juvenile court abused its discretion by summarily denying his modification petition (Welf. & Inst. Code, § 388).<sup>1</sup> In his petition Robert asked the court to order Mary placed with him, or expand his visitation. We conclude

---

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

the court should have granted an evidentiary hearing on the petition's request for expanded visitation.

## BACKGROUND

When Mary was born in March 2008, she tested positive for amphetamine. Her mother, T.B., admitted using diet pills during pregnancy. Mary was detained. Mary remained in foster care until December, when she was placed with Robert. In July 2009, Robert obtained legal and physical custody of Mary. T.B. was allowed supervised visitation. On July 16, the juvenile court terminated dependency jurisdiction.

On November 19, 2011, Robert threatened to kill T.B. and assaulted her while she was holding three-and-one-half-year-old Mary. The incident took place in T.B.'s home, where Robert often resided. Robert was arrested and charged with domestic violence and child endangerment. He admitted there had been two earlier instances of domestic violence. He acknowledged he had been arrested in December 2010, for assaulting T.B. while she was holding Mary.

On December 2, 2011, the San Diego County Health and Human Services Agency (the Agency) filed a dependency petition. The petition alleged that on November 19, Robert physically assaulted T.B. in Mary's presence. Robert and T.B. (together, the parents) had a history of physical altercations in Mary's presence. The parents continued to live together. They refused to work with the Agency to alleviate the risk posed by their violence.

Mary was detained in a foster home. The court ordered the Agency to offer parenting classes and domestic violence treatment as soon as possible, and ordered supervised visitation.

Robert initially denied the domestic violence that gave rise to this case. He acknowledged "[getting] mad," but said he did not have "a violence problem." Robert said "he trie[d] really hard not to get angry around [Mary], but the times that it [had] happened she [did] not cry." Nevertheless, he believed his anger and yelling affected her, and "when this [had] happened he [would] sit down and tell [her] that it's okay." Robert vowed to "fix myself" and "learn to control whatever makes me mad." He did not want Mary ever to "have to worry about his anger." On January 11, 2012, Robert began domestic violence classes. By February 8, he had attended five sessions and was doing well.

Robert's visits with Mary were positive. By the time of the February 24, 2012, jurisdictional and dispositional hearing, he was having one weekly two-hour visit at a visitation center; one weekly one-hour visit supervised by the foster parents; and additional visitation if the maternal grandparents were available to supervise. Robert also telephoned Mary. She was happy to see him at visits, responded well to him, was physically affectionate and had difficulty separating from him at the close of visits. Robert fulfilled a parental role, showed empathy for Mary, responded appropriately to her verbal and nonverbal signals and put her needs ahead of his own. He was physically and verbally affectionate and praised and complimented her. Robert was patient with Mary and spoke softly to her. He focused on her and told her he loved her. Robert brought food to visits, washed Mary's hands and wiped her face. She responded when he corrected her behavior.

By the time of the jurisdictional and dispositional hearing, the parents were no longer living together, but were still in contact. The court entered a true finding on the petition, ordered Mary placed in foster care and ordered reunification services. Robert's services

included weekly domestic violence classes and individual therapy. The court deferred drug testing for Robert, and said it would consider testing if the issue arose in individual therapy.<sup>2</sup> The court ordered short-term, daytime, unsupervised visits, on the condition the parents visit separately.<sup>3</sup> The court gave the Agency discretion to expand visitation with the concurrence of Mary's counsel. The possible expansion included weekend and overnight visits, and a 60-day trial visit for either parent on condition the other parent was not in the home. The social worker was willing to consider unsupervised visits if she obtained "feedback from [Robert]'s treatment provider as to the progress he has made in treatment as well as he [has] drug tested negative so I can have proof that he is truly sober."

On April 18, 2012, and again on April 30, the social worker reminded the parents of the order that their unsupervised visits be separate. On May 10, Mary told the social worker the parents visited her together, unsupervised. On May 11 and 12, the foster mother told the social worker that Mary's "visits were with both parents." On May 21, the social worker again reminded the parents their unsupervised visits were to be separate. On May 30, Robert told the foster mother he planned to take Mary to see her grandmother. Mary later reported Robert had taken her to see T.B. On June 5, the foster mother reported that just before a visit, Mary said,

---

<sup>2</sup> In 1998, Robert was placed on probation for possessing a controlled substance. On December 8, 2011, he agreed to the Agency's request that he drug test. As of January 26, 2012, the Agency had asked Robert to test three times. He had failed to appear for all three tests.

<sup>3</sup> The court had previously ordered separate visits. On January 27, 2012, the foster parent informed the agency "that earlier that week the parents had attended [Mary]'s dental appointment together even though they were told specifically that they [were] not able to visit [Mary] together." On February 2, the court granted the Agency's request that the parents be allowed to attend Mary's February 6 dental appointment together.

"I hope my Daddy isn't at my Mommy's house. Sometimes he is there." The foster mother told Mary the visit was with T.B. only, and Robert's visit would take place a different day. Mary responded, "I know, but he is there anyway. They told me that they can see me together whenever they want to."

In May or June 2012, the foster parent announced she was unable to continue caring for Mary. The Agency planned to move Mary to a new foster home on July 2. A nonrelative extended family member (NREFM) expressed an interest in placement, but there were concerns about that placement. On July 2, Robert filed his section 388 petition.<sup>4</sup> At a hearing that day, the Agency's counsel said the Agency had "agreed to place with the NREFM today." The court gave the social worker discretion to place Mary with the NREFM and summarily denied Robert's petition.

## DISCUSSION

Section 388 allows the juvenile court to modify an order if a parent establishes, by a preponderance of the evidence, that changed circumstances exist and the proposed change would promote the child's best interests. (*In re Zachary G.* (1999) 77 Cal.App.4th 799, 806.) To obtain a hearing on a section 388 petition, the parent must make a prima facie showing as to both of these elements. (*Ibid.*; *In re Justice P.* (2004) 123 Cal.App.4th 181, 188.) The petition should be liberally construed in favor of granting a hearing, but "[t]he 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.*, at p. 806.) "[T]o be entitled to

---

<sup>4</sup> The Agency asserts Robert filed his petition one month before the scheduled six-month review hearing. Robert filed his petition seven and one-half weeks before the scheduled hearing.

a hearing . . . , [the parent is] not required to establish a probability of prevailing on [his or] her petition." (*In re Aljamie D.* (2000) 84 Cal.App.4th 424, 432.) "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.*, at p. 189.) We review the summary denial of a section 388 petition for abuse of discretion. (*In re Zachary G.*, at p. 808; *In re Jeremy W.* (1992) 3 Cal.App.4th 1407, 1413; *In re Aljamie D.*, at p. 433.)

Robert's section 388 petition asked the court to vacate the February 2012 finding it would be detrimental to Mary to be placed with Robert, and the order of that date removing custody from Robert and ordering Mary placed in foster care. In the petition Robert requested Mary be placed with him or the NREFM. Alternatively, the petition asked that visitation be expanded to include weekend or overnight visits.

As changed circumstances, the petition alleged that Robert enrolled in a domestic violence group on January 11, 2012, and attended 22 sessions without absences. He enrolled in individual therapy on April 12 and consistently attended weekly sessions. He had made progress addressing his boundary and anger issues and had met several of his treatment goals. He had not violated any orders requiring separate visits for the parents, and he did not believe Mary had said otherwise, as the foster parent claimed.

Concerning best interests, the petition alleged that Mary's imminent move from a familiar environment to a new and unfamiliar foster home was not in her emotional best interests. Since March 2012, Robert had unsupervised visits twice a week. The visits had been expanded from two hours to five hours. The visits were positive and appropriate. During the visits, Mary appeared happy and excited. She called Robert "Dad" and responded to him as a

parental figure. She was physically affectionate. She told Robert she looked forward to visits and said it was unfair she had to return to the foster parents at the close of visits.

The court concluded Robert had not met his burden of making a prima facie showing.<sup>5</sup> The court found Mary credible, and noted she was "making two types of statements. One is that she is seeing both of her parents at the same time, and second, both of her parents are telling her that's okay. [¶] If that proves to be correct, then that's a major setback in the case, because this is the same young lady whom the court found credible when she described hiding under her covers when her parents are fighting, even though neither of the parents took responsibility for that." The court said it needed an update or clarification regarding Mary's statements that the parents visited together, and an update from Robert's therapist. As explained below, the court abused its discretion in denying a hearing on Robert's request for expanded visitation.

Robert made the following prima facie showing of changed circumstances. First, he had attended 22 sessions of a domestic violence group, compared to the five sessions he had attended at the time of the dispositional order. Second, he had begun individual therapy, attended consistently, progressed and met several treatment goals. Third, he had not violated the order for separate visits, and he did "not believe that [Mary had] made any of the statements attributed to her by the foster mother."

Although the petition does not address Mary's statement to the social worker, without the foster parent as an intermediary, that Mary had unsupervised visits with the parents

---

<sup>5</sup> The court did not expressly say whether Robert had failed to meet his prima facie burden as to the changed circumstances element, the best interests element or both. In its formal order, the court checked a box indicating its ruling was based on the best interests element. The court did not check the box pertaining to the changed circumstances element.

together, the petition is to be liberally construed in favor of granting a hearing. An update or clarification regarding whether Mary made the statements the foster mother claimed, and ultimately whether Robert violated the order for separate visitation, were evidentiary questions for a hearing on the merits. The petition's third allegation, "if supported by evidence given credit at the hearing," would support a finding Robert had not violated the order. (*In re Zachary G., supra*, 77 Cal.App.4th at p. 806.) Similarly, whether a statement from Robert's therapist would support the second allegation was a matter for a hearing on the merits, not a reason for summary denial.

Robert also made of prima facie showing that expanded visits would be in Mary's best interests. According to the petition, there were lengthy, unsupervised visits after the dispositional hearing; the visits were just as positive and appropriate as the previous shorter, supervised visits; and Mary said it was unfair she had to return to the foster parents at the close of visits.

Robert did not, however, make a prima facie showing it would be in Mary's best interests to be placed with him. He lived with his mother in a retirement community where the residents were required to be at least 55 years old. Mary was not permitted to live there,<sup>6</sup> and the petition did not allege Robert had a home where she could live with him.<sup>7</sup>

---

<sup>6</sup> Robert was allowed to live in the retirement community for three weeks, then had to request an extension from the board of directors.

<sup>7</sup> Robert argues his petition "pleaded that he was able to provide a home for [Mary]." The petition contains no such allegation.

## DISPOSITION

The order summarily denying the section 388 petition is reversed as to Robert's request for expanded visitation, and the case is remanded to the juvenile court with directions to hold an evidentiary hearing on that request. In all other respects, the order is affirmed.

NARES, J.

WE CONCUR:

BENKE, Acting P. J.

HUFFMAN, J.