

NOT TO BE PUBLISHED IN OFFICIAL REPORTS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 This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

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

SAN BERNARDINO COUNTY
CHILDREN AND FAMILY SERVICES,

Plaintiff and Respondent,

v.

T.T.,

Defendant and Appellant.

E056085

(Super.Ct.No. J240370-71)

O P I N I O N

APPEAL from the Superior Court of San Bernardino County. Christopher B. Marshall, Judge. Affirmed.

Diana W. Prince, under appointment by the Court of Appeal, for Defendant and Appellant.

Jean-Rene Basle, County Counsel, and Jeffrey L. Bryson, Deputy County Counsel, for Plaintiff and Respondent.

I. INTRODUCTION

Defendant and appellant, T.T. (Mother), is the mother of Y. and C., two children currently ages two and three. Mother appeals from the juvenile court's orders denying her Welfare and Institutions Code section 388¹ petition requesting either the return of the children to her care or reunification services and liberalized visitation, and its subsequent order terminating parental rights and placing the children for adoption. Mother's sole claim on appeal is that the court erroneously refused to allow her to testify at the hearing on her section 388 petition. We find no abuse of discretion or due process violation. Accordingly, we affirm the challenged orders.

II. BACKGROUND

A. *The Circumstance of the Children's Dependency*

On August 18, 2011, plaintiff and respondent, San Bernardino County Children and Family Services (the Department), detained Mother's four children, Y., C., S., and O., outside of Mother's care, after it became apparent that the father of Y. and C. (Father), had sexually molested S. Y. C., S., and O. were 14 months, two, three, and four years old, respectively. Mother and all four children were living with Father, Father's mother, and a paternal uncle. Dependency proceedings for S. and O. were dismissed after they were placed with their father, J.M.

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

Mother and Father were born in 1989 and attended high school together. According to J.M., Mother left S. and O. with J.M. shortly after S. was born, her whereabouts were unknown for about a month, and she was “partying” during this time. When she returned she was pregnant with C.

On the night of August 15, 2011, Mother bathed the younger children, then O., then S., and noticed while bathing S. that S. was bleeding from her vagina and had severe vaginal bruising. On August 16, Mother took S. to her pediatrician, who told Mother to immediately take S. to Loma Linda University Medical Center. Mother went to work instead, and took S. to Loma Linda University Medical Center on August 17.

A physical examination revealed that S. had been severely sexually abused. Her labia was swollen, bruised, and had abrasions, consistent with a penis having been rubbed against her. She also had bruises on her legs and wrists, which appeared to be “restraint injuries.”

S. told the social worker that Father “hurt her pee-pee,” and that Mother knew this. S. indicated that Father hurt her at night while Mother was “[a]sleep on the floor.” In 2002, when he was 13, Father admitted molesting (sodomizing) his two younger sisters when they were six years old, and spent four years in and out of home detention.

The social worker believed that Father sexually molested S. and Mother knew this but was attempting to cover for Father and “deflect[] suspicion” onto J.M. For example, Mother claimed that J.M. dressed S. in long sleeves and long pants on August 15 in an attempt to hide the bruises on her arms and legs, but a photograph of S. taken at school on

August 15 showed she was wearing a pink short-sleeved dress and had no injuries. Mother and Father gave inconsistent accounts to a police detective concerning what Father was doing on the night of August 15 when Mother was bathing the younger children and O., and Father had access to S. Mother claimed she never worked the night shift and never left S. and O. in Father's care at night, but her employment records showed she had worked the night shift. Mother had a history of using narcotics, and she and Father testified positive for marijuana on August 23.

J.M. showed the social worker a photograph of S., taken on May 28, 2011, with a bruise on her head and a black eye. O. told the social worker that Father struck S. in the face with his fist, causing the bruises.

The juvenile court sustained jurisdictional allegations for Y. and C.² At the subsequent dispositional hearing, the court bypassed family reunification services for both parents (§ 361.5, subd. (b)(6)), and scheduled a section 366.26 hearing.³ The court found there was clear and convincing evidence that Father severely sexually abused S., the children's sibling, and Mother failed to protect the child. (§ 361.5, subd. (b)(6).)

² The court sustained the allegations that S. sustained a black eye and bruising on her forehead due to injuries inflicted by Father, that Father sexually abused S., that Mother failed to protect S. from the injuries and abuse, that Father had a juvenile conviction for sexually abusing his sisters, and that Mother had a substance abuse history. (§ 300, subds. (b), (d).)

³ Mother petitioned for an extraordinary writ (E054897) following the setting of the permanency hearing, but this court dismissed the writ on December 8, 2011, based on a no issue letter from Mother's counsel.

The social worker recommended against providing Mother reunification services for Y. and C. The social worker cited the severity of the sexual abuse of S., Mother's conduct in failing to take immediate action when she discovered S.'s injuries, Mother's erratic parenting and emotional detachment from the sexual abuse, the young ages of Y. and C., and their ability to bond with new caretakers. The social worker did not believe Mother would benefit from reunification services in time to reunify with Y. and C. Counsel for Y. and C. agreed with the recommendation that Mother not receive reunification services, and argued, based on Mother's testimony at the disposition hearing, that Mother "seems to trivialize the situation" and did not understand the role she played in the abuse.

In February 2012, the Department filed a section 366.26 report recommending termination of parental rights to Y. and C. and placing them for adoption. Since October 2011, the children had been living with their paternal great-aunt and great-uncle, who were willing to adopt them. Mother and Father had been visiting the children weekly, supervised by the paternal great-aunt and great-uncle.

B. Mother's Section 388 Petition

The section 366.26 hearing was scheduled for April 11, 2012. On March 20, Mother filed a section 388 petition requesting that the court modify its prior order of no reunification services for Mother, and the setting of the section 366.26 hearing. She requested the return of the children to her care; alternatively, she requested reunification services and liberalized visitation, including unsupervised overnight and weekend visits.

The court set a hearing on the petition for April 11, 2012, just before the section 366.26 hearing, and ordered the “social worker to respond at the time of hearing.” In setting the hearing, the court circled paragraph 3 on mandatory Judicial Council form JV-183, next to the following statement: “The court orders a hearing on the form JV-180 request because the best interest of the child may be promoted by the request.” The phrase, “social worker to respond at time of hearing” was written on the order.

In her petition, Mother claims she was attending parenting classes, participating in counseling, had obtained suitable housing, and was continuing to work full time. She visited the children weekly and engaged in age-appropriate activities with them. She argued that returning the children to her care would be better for them because she and the children were very bonded. During visits, C. would ask when he and Y. were returning home and appeared to be stressed by being separated from Mother.

A letter attached to the petition confirmed that Mother had “attended an intake session” on February 21, 2012, for an outpatient mental health treatment program at Inland Behavioral and Health Services, and her next appointment was on March 16. Additional documents confirmed that Mother attended seven 1-hour therapy sessions at Catholic Charities Counseling Services between October 17 and December 5, 2011. A paystub and a rental deposit receipt were also attached to the petition.

On April 4, the Department filed an addendum report opposing the petition. In the report, the adoption social worker stated that the children were bonded to their current

caretakers and showed signs of separation anxiety when outside the current caretakers' immediate presence.

The addendum report also stated: “[T]here is no evidence . . . [that Mother] has benefited from the classes, or shows that she is capable of protecting her children into the future. . . . [T]he failure to protect issues that are key in this case, cannot easily be overcome, and there is no indication that [Mother] has adequately made a lifestyle change that would help the Court feel confident that the children would not be put in a harmful situation in the future if returned to her care full-time. Also, given that the children so quickly have bonded with the current caregivers, the attachment that had formed while in [parental] care was minimal; therefore the bond with the current caregivers is higher and should be considered with greater priority than with [Mother]. . . . What’s important is preserving and promoting the [current caretakers’] present stability with the children and this takes priority over waiting for any additional documentation that [Mother] provides.”

At the hearing on the petition, the court said it had received the petition and the addendum report responding to it, and asked Mother’s counsel whether she wished to be heard. Mother’s counsel told the court she believed Mother had made a prima facie showing of changed circumstances and had completed a 15-session parenting program on March 28. Counsel said Mother was asking to be heard and made an offer of proof that, if called to testify, Mother would describe how she had benefited from her parenting class. Mother was also continuing to attend counseling sessions, continuing to work, and visiting the children.

County counsel pointed out that none of the documents attached to the petition indicated “what type of progress [Mother] has made addressing the issues” that led to the children’s dependency. On this basis, counsel argued that the petition failed to state a prima facie case for a hearing. The court agreed that the petition did not demonstrate changed circumstances or show that granting the petition would be in the best interests of the children. The court thus denied the petition “as not having made a prima facie case,” and proceeded to the section 366.26 hearing.

C. The Section 366.26 Hearing

At the section 366.26 hearing, Mother testified it would be detrimental to the children if parental rights were terminated, because she and the children shared a bond and her separation from them was “taking a toll on them.” She explained that the children cried when she left them following visits, and she believed they were “stressed out emotionally.” She visited them on Saturday or Sunday, usually from around 3:00 in the afternoon until 8:00 at night. She played and did “kid activities” with them, like taking them to the park or the discovery science center. They called her “mother,” or “mom,” and recognized her as their Mother. Y. gave her hugs and kisses when she arrived for visits, and followed her around during the entire time of the visits.

The adoption social worker was assigned to the case as the primary social worker in December 2011, and saw the children one time each month. She testified that there had been no reports of the children having separation anxiety following the visits with Mother or Father. To the contrary, the children were “able to handle the parents”^[1]

coming and going relatively easily,” and went back to their normal routine following the visits. They called their paternal great-aunt “mom” and their paternal great-uncle “poppa,” and shared a strong bond with them. The social worker admitted she had never observed Mother with the children. A secondary social worker was assigned.

The juvenile court found it was likely the children would be adopted and none of the statutory exceptions to adoption applied. The court terminated parental rights and selected adoption as the children’s permanent plan.

III. DISCUSSION

Mother claims the juvenile court deprived her of her right to “a full hearing” on her section 388 petition by refusing to allow her to testify at the hearing and explain how she had benefited from her parenting classes and other services. Mother argues that, in setting the hearing on the petition, the court necessarily found she made a prima facie showing in support of the petition, and given this finding the court had no choice but to conduct “a full hearing” and allow her to testify.

We conclude that the court neither abused its discretion nor violated Mother’s due process rights in refusing to allow her to testify at the hearing on her section 388 petition. First, in setting the hearing the court did not find that Mother made a prima facie showing in support of her petition. Further, at the hearing the court properly found that the petition did not make a prima facie showing and properly refused to allow Mother to testify concerning how she had benefited from her parenting class and counseling.

A. *The Right to a Section 388 Hearing*

Section 388 provides, in relevant part: “(a) Any parent or other person having an interest in a child who is a dependent child of the juvenile court . . . may, upon grounds of change of circumstance or new evidence, petition the court . . . 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 . . . 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. [¶] . . . [¶] (d) 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* and shall give prior notice” (Italics added.)

A section 388 petition must be liberally construed in favor of its sufficiency (see Cal. Rules of Court, rule 5.570(a);⁴ *In re Angel B.* (2002) 97 Cal.App.4th 454, 461), which is to say it must be “liberally construed in favor of granting a hearing to consider the parent’s request. [Citations.]” (*In re Marilyn H.* (1993) 5 Cal.4th 295, 309; *In re Jeremy W.* (1992) 3 Cal.App.4th 1407, 1413-1414.) “In fact, ‘. . . if the petition presents *any* evidence that a hearing would promote the best interests of the child, the court will order the hearing.’ [Citations.]” (*In re Hashem H.* (1996) 45 Cal.App.4th 1791, 1798-1799, quoting *In re Heather P.* (1989) 209 Cal.App.3d 886, 891; § 388, subd (d).)

As the Department points out, the phrase “prima facie showing” appears nowhere in section 388. Nor does it appear anywhere in rule 5.570(h), which governs hearings on

⁴ All further references to rules are to the California Rules of Court.

section 388 petitions. Nonetheless, the California Supreme Court has said that: “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.*, *supra*, 5 Cal.4th at p. 310; *In re Anthony W.* (2001) 87 Cal.App.4th 246, 250.) In addition, “[t]here are two parts to the prima facie showing: The parent must demonstrate (1) a genuine change of circumstances or new evidence, and that (2) revoking the previous order would be in the best interests of the children. [Citation.]” (*In re C.J.W.* (2007) 157 Cal.App.4th 1075, 1079 [Fourth Dist., Div. Two], quoting *In re Anthony W.*, *supra*, at p. 250; see also *In re Edward H.* (1996) 43 Cal.App.4th 584, 593 [“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.”].) Thus, a prima facie showing is made if the liberally construed allegations of the petition show both changed circumstances and that the best interests of the child *may* be promoted by petitioner’s proposed change of order. (*In re Aljamie D.* (2000) 84 Cal.App.4th 424, 431-432; § 388, subd. (d).)

B. *Analysis*

1. In Setting the Hearing, the Court Did Not Find That Mother’s Petition Made a Prima Facie Evidentiary Showing of Changed Circumstances and Best Interests

In support of the first part of her claim—that the court necessarily found she made a prima facie showing in support of her petition when it set the hearing on the petition—Mother points to the order setting the hearing, issued on mandatory Judicial Council of California form JV-183. In preprinted language, the order states: “The court orders a

hearing on the form JV-180 request *because the best interest of the child may be promoted by the request.*” (Italics added.) The order simply mirrors the language of section 388, which requires the court to conduct a hearing “[i]f it appears that the best interests of the child *may be* promoted by the proposed change of order” (§ 388, subd. (d), italics added.) Moreover, Mother reads too much into the court’s order.

To be sure, a parent has a right to a hearing on a section 388 petition if the petition makes a prima facie showing of changed circumstances and best interests. (*In re Lesly G.* (2008) 162 Cal.App.4th 904, 912; *In re Marilyn H.*, *supra*, 5 Cal.4th at p. 310.) But this does not mean that, in setting a section 388 hearing, the court necessarily determines that the petition makes the required prima facie showing. As the Department points out, the language of section 388, subdivision (d) is *permissive*. The statute requires the court to order a hearing “[i]f it appears” that the best interest of the child “*may*” be promoted by the proposed change, but it does not require the court to find, as a precondition to setting a hearing, that the petition makes a prima facie showing such that the parent is entitled to the hearing. (§ 388, subd. (d).) Indeed, the court is required to liberally construe the section 388 petition in favor of granting a hearing to consider the parent’s request. (*In re E.S.* (2011) 196 Cal.App.4th 1329, 1340 [Fourth Dist., Div. Two]; rule 5.570(a).) Thus here, in stating in its preprinted order that “the best interest of the child *may be* promoted by the request” (italics added), the court *did not find* that Mother’s petition made a prima facie showing or that she was entitled to a hearing on the petition.

Mother's reliance on *In re Lesly G.*, *supra*, 162 Cal.App.4th 904 is misplaced for at least two reasons. There, the court reversed the juvenile court's summary denial of a section 388 petition at a hearing on the petition. (*In re Lesly G.*, *supra*, at p. 915.) The order setting the hearing was made on former Judicial Council form JV-180, which the appellate court concluded was "not only internally inconsistent but legally infirm." (*Id.* at p. 914; accord, *In re C.J.W.*, *supra*, 157 Cal.App.4th at p. 1082 [recommending "reform" of former form JV-180].) Former form JV-180 was superseded effective January 1, 2009 by current form JV-183. On former form JV-180, the juvenile court in *In re Lesly G.* checked a box indicating that the petition "states a change of circumstances or new evidence." (*In re Lesly G.*, *supra*, at p. 909.) As discussed, the juvenile court here made no such finding.

Further, the juvenile court in *In re Lesly G.* summarily denied the petition without admitting any evidence or allowing argument, even though the court previously indicated that a prima facie showing had been made. (*In re Lesly, G.*, *supra*, 162 Cal.App.4th at p. 914.) Here, the juvenile court admitted the petition and the social worker's addendum report into evidence, and allowed argument on the petition, before the court found that the petition failed to make the necessary prima facie showing.

2. The Court Properly Refused to Allow Mother to Testify at the Hearing

The second part of Mother's claim, that the court had no choice but to conduct "a full hearing" on Mother's petition by allowing her to testify, is also unavailing. Mother

essentially argues that whenever a court sets a hearing on a section 388 petition, it has no choice but to admit all evidence proffered at the hearing. This is not the law.

Rule 5.570(h) governs the conduct of hearings on section 388 petitions. (*In re E.S.*, *supra*, 196 Cal.App.4th at p. 1339.) The petitioner has the burden of proof. (Rule 5.570(h)(1).) When there is a due process right to confront and cross-examine witnesses, the hearing must be conducted as a disposition hearing under rules 5.690 and 5.695. (Rule 5.570(h)(2)(C).) Otherwise, and except in circumstances not present here, “proof may be by declaration and other documentary evidence, or by testimony, or both, at the discretion of the court.” (Rule 5.570(h)(2).)

Mother did not seek to cross-examine the social worker at the hearing, and does not claim on appeal she had a due process right to cross-examine the social worker. The question she effectively raises on appeal is whether the court violated her due process rights or abused its discretion in refusing to allow her to testify. Mother’s counsel made an offer of proof that, if called to testify, Mother would explain how she had benefited from the parenting class she had recently completed, and from her counseling sessions. The testimony was offered to refute the social worker’s claim, set forth in her addendum report and argued by county counsel at the hearing, that Mother’s petition did not make a sufficient evidentiary showing of either changed circumstances or best interests because it did not show how Mother had benefited from services.

The court’s discretion to limit the evidence at a section 388 hearing “is not absolute and does not override due process considerations.” (*In re Matthew P.* (1999) 71

Cal.App.4th 841, 850-851 [court erroneously refused to conduct “full hearing” by refusing to allow de facto parents to testify and refute contents of reports filed in response to their section 388 petition].) But “[e]ven where due process rights are triggered, it must be determined ‘what process is due.’ [Citations.]” (*In re E.S.*, *supra*, 196 Cal.App.4th at p. 1340.) “It is well recognized that due process is a flexible concept which depends upon the circumstances and a balancing of various facts.” (*Ibid.*; *In re Jeanette V.* (1998) 68 Cal.App.4th 811, 817.)

Given the contents of Mother’s petition, the social worker’s written response, and Mother’s offer of proof at the hearing, the court did not abuse its discretion or violate Mother’s due process rights in refusing to allow Mother to testify at the hearing. As county counsel argued and as the court found at the hearing, Mother’s petition did not make a prima facie showing of changed circumstances or that the best interests of Y. and C. would be promoted by the proposed change of order. (*In re Marilyn H.*, *supra*, 5 Cal.4th at p. 310; § 388, subd. (a).) Against this background, Mother’s proffered testimony, if credited, would have shown only that her circumstances were changing. Her testimony, together with the evidence submitted in support of her petition, would not have been sufficient to meet her evidentiary burden of showing both that her circumstances had changed and that the children’s best interests would be served by returning them to her care or granting her services and liberalized visitation. We therefore find no error in the court’s refusal to allow Mother to testify at the hearing.

IV. DISPOSITION

The orders denying Mother's section 388 petition, terminating parental rights to Y. and C., and placing the children for adoption are affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

KING
J.

We concur:

RAMIREZ
P. J.

HOLLENHORST
J.