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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA**

**FOURTH APPELLATE DISTRICT**

**DIVISION TWO**

In re D.W., a Person Coming Under the  
Juvenile Court Law.

SAN BERNARDINO COUNTY  
CHILDREN AND FAMILY SERVICES,

Plaintiff and Respondent,

v.

D.W.,

Defendant and Appellant.

E058524

(Super.Ct.No. J-246177)

O P I N I O N

APPEAL from the Superior Court of San Bernardino County. Cheryl C. Kersey,  
Judge. Affirmed.

Megan Turkat Schirn, under appointment by the Court of Appeal, for Defendant  
and Appellant.

Jean-Rene Basle, County Counsel, and Jamila Bayati, Deputy County Counsel, for  
Plaintiff and Respondent.

## I. INTRODUCTION

Defendant and appellant, D.W. (Father), is the father of D., a boy born in September 2012. D was taken into protective custody as an infant after his mother admitted she physically abused him by yanking his arm, causing it to fracture. It was then discovered that D. had four more fractures—two in each leg. The court found D. was a child described in Welfare and Institutions Code section 300, subdivision (e)<sup>1</sup> (severe physical abuse) and refused to offer reunification or family maintenance services to either parent. (§ 361.5, subd. (b).) The court ultimately terminated parental rights and placed D. for adoption.

Father appeals, claiming the court erroneously refused to conduct a hearing on his section 388 petition seeking reunification or family maintenance services for D. (§ 388.) Father seeks reversal of the orders denying his petition and terminating parental rights. We conclude no evidentiary hearing was required on the section 388 petition because it did not state a prima facie case of changed circumstances or best interests. We therefore affirm the challenged orders.

## II. BACKGROUND

### A. *D.'s Multiple Bone Fractures*

Plaintiff and respondent, San Bernardino County Children and Family Services (CFS), took D. into protective custody in September 2012, when he was only 19 days old.

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

On September 27, Father and D.'s mother (Mother), took D. to Desert Valley Hospital after they awoke in the morning and noticed D.'s left arm was limp and swollen and he was crying. At the hospital it was discovered D. had a spiral fracture in his left arm which a doctor opined was "almost certainly" the result of nonaccidental abuse. D. is the parents' first and only child.

The parents initially denied knowing what had happened to D.'s arm. They claimed Mother may have rolled over on D.'s arm while she, Father, and D. were sleeping in the same bed the night before. They claimed that on the morning of September 26 they took D. to his pediatrician, who checked his bones and found no fractures. D. also showed no signs of injury or distress when the parents took him to visit friends during the afternoon of September 26.

Later on September 27, Mother admitted to a police detective that she grabbed D. by his wrist and jerked him across her body, possibly breaking his arm. She was tired and annoyed because D. woke her. She was arrested and charged with child abuse but later recanted, claiming her admission was coerced because the detective told her D. would be taken away if she did not confess.

D. was transported to Loma Linda University Medical Center, where Dr. Amy Young, a child abuse expert, conducted a forensic child abuse examination on September 28. Dr. Young discovered D. had four more fractures—two in each leg—which were between one and seven days old and which, like the arm fracture, were consistent with child abuse.

Dr. Young explained the left arm fracture was transverse, meaning the bone was “[s]napped in two pieces.” The leg fractures occurred as a result of pulling or yanking on the legs. Unlike the arm fracture, there was no swelling or pain associated with the leg fractures so the pediatrician could have missed them on September 26. The pediatrician would, however, have noticed the arm fracture had it been there on September 26.

In a written statement addressed “To whom this may concern” dated October 1, 2012, Father claimed the detective and interviewing social worker coerced Mother into admitting she abused D. under threat of having him taken away and never seeing him again. Father claimed D.’s arm was likely broken when Father put D. in a car seat during the evening of September 26. Father asserted Mother was “not guilty of anything that has been brought upon her.” Neither parent ever offered to explain how D.’s legs were fractured.

In Dr. Young’s opinion, D.’s left arm fracture could not have occurred by rolling over onto D. in bed, but could have occurred when Mother pulled on D.’s arm or when Father placed him in a car seat. Dr. Young believed it was unlikely the arm was broken and the “legs yanked at twice all in one episode.” The social worker believed Mother caused all of D.’s injuries and Father was either unaware of what Mother had done or was protecting her.

#### *B. Jurisdiction and Disposition*

At a November 2012 jurisdictional/dispositional hearing, the court determined D. was a child described in section 300, subdivisions (e), (g), and (i) based on findings

Mother intentionally inflicted severe physical harm to D.'s left arm; Father failed to protect D. from Mother's abuse when he knew or should have known of the abuse; and D. sustained four unexplained leg fractures while in the care and custody of *both* parents. Father testified, but refused to answer questions concerning how D. was injured, on self-incrimination grounds. (U.S. Const., 5th Amend.) The court refused to offer either parent reunification services (§ 361.5, subd. (b)(5) [court may refuse to offer services to parent when child is declared dependent pursuant to § 300, subd. (e), based on conduct of that parent]), placed D. with a maternal aunt and uncle, and set a section 366.26 hearing.

*C. The Section 388 Petition and Section 366.26 Hearing*

A contested section 366.26 hearing was scheduled for April 9, 2013, when D. was seven months old. CFS recommended terminating parental rights and adoption by the aunt and uncle who were continuing to care for him. Father had consistently visited D. once each month, supervised, as permitted by the court. Mother continued to be incarcerated.

Father filed a section 388 petition on the date of the section 366.26 hearing,<sup>2</sup> seeking family maintenance services or reunification services. Certificates attached to the petition showed Father had completed 12 anger management sessions and 12 parental education classes in February 2013. In the petition, Father stated he had "learned to be protective" of D. and could provide "a safe and loving home." The petition did not

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<sup>2</sup> In court on March 21, 2013, when the section 366.26 hearing was continued to April 9, Father's counsel announced that he would be filing a section 388 petition, but the petition was not filed until April 9.

indicate Father had attended general counseling though he had been referred to counseling earlier in the case.

Both county counsel and D.'s counsel opposed the petition on the ground it failed to show changed circumstances. D.'s counsel pointed out that Father was initially not protective of D. and there was no evidence that had changed. She argued: “[N]othing in the [section] 388 [petition] show[s] that his state of mind has changed. There is no therapy report showing that he would now be protective of [D.] . . . .” For her part, county counsel noted Father was denied services under section 361.5, subdivision (b)(5), and for that reason had the burden of showing by clear and convincing evidence there were changed circumstances and the best interests of D. would be served by granting the petition. (§ 388, subd. (a)(2).)

The court agreed the petition failed to show changed circumstances, denied the petition without hearing testimony or argument, and proceeded to the section 366.26 hearing. At the section 366.26 hearing, Father testified he had a close relationship with D. and his visits with D. had been positive. The court found none of the exceptions to the preference for adoption applied, terminated parental rights, and selected adoption as D.'s permanent plan.

### III. DISCUSSION

Father claims the court erroneously denied his section 388 petition without a “full hearing”—that is, without allowing him to present testimony concerning his changed circumstances. He argues his testimony concerning how he had benefited from the

domestic violence and parenting classes “was essential to show [his] state of mind as to how he would be able to protect [D.],” and the court’s denial of the petition without allowing him to present that testimony or allowing his counsel to present argument deprived him of due process. We reject this claim.

Section 388 provides, in relevant part: “(a)(1) 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 . . . . 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 . . . . [¶] . . . [¶] (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 . . . .*” (Italics added.)

The petition must state a prima facie case in order to trigger the right to proceed by way of a full hearing. (*In re Edward H.* (1996) 43 Cal.App.4th 584, 592.) That is, the petition must make a prima facie showing of facts which will sustain a favorable decision if the evidence submitted in support of the petition is credited. (*Id.* at p. 593; see *In re Marilyn H.* (1993) 5 Cal.4th 295, 310.) The petition must be liberally construed in favor of its sufficiency (see Cal. Rules of Court, rule 5.570(a); *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., supra*, at p. 309; *In re Jeremy W.* (1992) 3 Cal.App.4th 1407, 1413-1414.)

“There 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].) As Father concedes: “[I]f 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.” (*In re Zachary G.* (1999) 77 Cal.App.4th 799, 806; *In re C.J.W.*, *supra*, at p. 1079.)

We review the summary denial of a section 388 petition for an abuse of discretion. (*In re Marcos G.* (2010) 182 Cal.App.4th 369, 382.) If the liberally construed allegations of the petition do not make the required prima facie showings of both changed circumstances and best interests, the denial of the petition without a hearing does not violate the petitioner’s due process rights. (*In re Angel B.*, *supra*, 97 Cal.App.4th at pp. 460-461.)

Father’s petition did not make a sufficient prima facie showing to obtain a hearing on its merits. Liberally construed, the petition showed only that Father had completed 12 anger management classes and 12 parenting classes since D. was taken into protective custody as an infant seven months earlier. This was insufficient to show that the circumstances leading to D.’s dependency—including Father’s failure to protect D. from severe physical abuse (§ 300, subd. (e))—had changed or that D.’s best interests would be served by granting Father services.

Father's assertion in his petition that he had learned to protect D. and could provide him with a "safe and loving home" was conclusory and unsupported by any specific evidence or explanation. (*In re Anthony W.* (2001) 87 Cal.App.4th 246, 250-252 [prima facie showing of changed circumstances may not be conclusory and must be based on specific evidence].) Because he failed to offer any explanation in his petition concerning how he had benefited from his classes or had learned to protect D., Father was not entitled to testify at a hearing on these questions. (*Id.* at p. 251.)

Lastly, we observe that given the court's finding that D. suffered severe physical abuse in Father's custody (§ 300, subd. (e)) and its refusal to offer Father services on this ground (§ 361.5, subd. (b)), the court was *prohibited* from granting Father's petition for services unless it found, based on "competent testimony," that "those services were likely to prevent reabuse or continued neglect" of D., or that the failure to try reunification would have been detrimental to D. because he was "closely and positively attached" to Father. (§§ 361.5, subd. (c), 388, subd. (a)(2); *In re A.M.* (2013) 217 Cal.App.4th 1067, 1074-1076.) Father's petition made no showing in support of either of these findings.

IV. DISPOSITION

The orders denying Father's section 388 petition, terminating parental rights, and selecting adoption as D.'s permanent plan are affirmed.

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KING  
J.

We concur:

HOLLENHORST  
Acting P. J.

CODRINGTON  
J.