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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

In re M.A., a Person Coming Under the
Juvenile Court Law.

SAN BERNARDINO COUNTY
CHILDREN AND FAMILY SERVICES,

Plaintiff and Respondent,

v.

E.A.,

Defendant and Appellant.

E059684

(Super.Ct.No. J247205)

OPINION

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

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

Jean-Rene Basle, County Counsel, and Dawn M. Messer, Deputy County Counsel,
for Plaintiff and Respondent.

Defendant and Appellant E.A., father of M., appeals from the denial of his Welfare and Institutions Code section 388 petition¹ and asserts that he received ineffective assistance of counsel. His primary contention on appeal is the court erred in failing to properly assess the paternal grandmother for placement of the children. We find the trial court acted within its discretion and affirm.

I. FACTUAL AND PROCEDURAL BACKGROUND

Two-year-old M. and her half sibling, J., came to the attention of the San Bernardino County Department of Children and Family Services (CFS) on December 5, 2012, after M. was transported to the hospital suffering from loss of consciousness, abdominal pain, and vomiting. She had multiple bruising throughout her body in different healing stages, a radial fracture to her right arm, and there was evidence of a possible skull fracture. The children were removed from mother's custody. Mother later admitted shaking, grabbing and “yank[ing M.] up by her wrist out of frustration.” Father was serving 21 years in state prison for voluntary manslaughter. J.'s father's whereabouts were unknown. CFS filed a petition under section 300, subdivisions (a), (b), (e), and (g), alleging that M. suffered serious physical abuse by mother, and father had a violent criminal history and was incarcerated with an unknown release date.² A separate section 300 petition was also filed on behalf of J. with the same allegations and an

¹ All further statutory references will be to the Welfare and Institutions Code, unless otherwise indicated.

² On January 8, 2013, CFS filed an amended petition under section 300, subdivisions (a), (b), (e), and (g).

additional allegation under subdivision (j) (abuse of a sibling). On December 10, 2012, the court found a prima facie case for detaining the children.

In the jurisdiction/disposition report filed on January 4, 2013, CFS recommended no reunification services for either parent and a section 366.26 hearing with a permanent plan of adoption. CFS recommended that the children be placed in a concurrent planning home. At the hearing, father's counsel asked the court to evaluate the paternal grandmother and a paternal aunt for placement.³ CFS indicated it was having difficulty reaching the paternal grandmother. The court requested that CFS assess all relatives and have the assessments done by February 4, 2013.

The first addendum report filed on January 25, 2013, included assessments on all potential relatives. The social worker reported that in January 2013, she had received a call from a paternal aunt (E.) who impersonated the paternal grandmother and asked questions about the case. E. then called the social worker back and apologized for impersonating the grandmother, explaining that the grandmother did not speak English. Using an interpreter, the social worker spoke to the paternal grandmother, who said she was 69 years old, retired, and was raising her 17-year-old granddaughter. A second paternal aunt, Li., contacted CFS and asked to be assessed for placement, but she had a recent conviction for driving under the influence (DUI). E. also asked to be assessed, but she was reluctant to involve her tenant in the assessment process. The social worker reported that "the majority of the relatives have been ruled out . . . despite RAU [Relative

³ Although father is not the biological father of J., he never questioned or challenged placing both M. and J. with his relatives.

Assessment Unit] outcome.” She noted the viable options for relative placement included a maternal second cousin, a maternal aunt, and the paternal grandmother. However, the social worker opined that “[g]iven the serious nature of the abuse suffered, and both of the parents[’] current criminal charges, it is crucial that a careful assessment is completed on both maternal and paternal sides of the family”

On February 4, 2013, the court sustained the allegations in the petition and gave CFS permission to place the children with “any suitable relative.” CFS was focusing on placement with an aunt, not the paternal grandmother. Reunification services were denied. On March 8, 2013, the children were placed in the home of a maternal great-aunt.

On April 3, 2013, CFS filed a section 387 supplemental petition asking to have the children removed from the maternal great-aunt’s home. The maternal great-aunt had informed CFS that she was no longer able to care for the children because she had to care for her daughter’s medical needs due to a reoccurrence of her cancer. On March 22, the children were placed in foster care; however, CFS indicated that it would “continue to assess available relatives and seek the most appropriate concurrent planning home.” The social worker noted that the paternal grandmother and the paternal aunts were to begin supervised visitation with the children. On April 4, the paternal grandmother and paternal aunt, E., wrote to CFS reiterating their desire to have the children placed with the paternal grandmother instead of foster care. They noted the paternal grandmother’s home was approved by the RAU but CFS chose to place the children with their maternal great-aunt.

A hearing on the section 387 petition was held on April 4, 2013. Father asked the court to reassess the paternal grandmother for placement. CFS acknowledged that the paternal grandmother was “cleared by RAU in the past”; however, CFS did not believe that long-term placement with her was appropriate because she relied on the paternal aunts for support. One of the aunts had two DUI’s, while the other had a substantiated history of child abuse. The paternal grandmother either did not drive, or did not drive very far. The court ordered CFS to assess “all available relatives.”

In the jurisdiction/disposition report filed on April 23, 2013, CFS identified I.G. as the biological father of J. based on DNA results; however, there was no parental relationship between J. and I.G. CFS noted that Li. withdrew her application for placement, and E. was not approved by RAU. Although the paternal grandmother was approved, the social worker opined that placement with her would not be in the children’s best interests. According to the social worker, the paternal grandmother lacked “insight into what [was] going on around her with her own adult children.” Specifically, the social worker noted that both aunts had aggressive and dominant demeanors, both talked for the grandmother, and neither was approved by RAU. She also noted the paternal grandmother “does not deal with things and lives in a state of denial.” When asked about father, the paternal grandmother said she did not know why her son was in prison and she did not want to know. She did not visit him and she would not allow him to “step a foot into her house” when he was released. She claimed that her support system was her daughter, Lo., who lived close by, not Li. or E. The paternal grandmother’s visits with

the children were appropriate; however, she was “observed to sit and watch the children play.”

On April 25, 2013, J.’s biological father, I.G., appeared at court, requested services, and indicated his willingness to have both children placed with him. On June 4, the court ordered reunification services for J.’s biological father, along with supervised visitation.

On August 15, 2013, father filed a section 388 petition asking the court to find him to be the presumed father of J. and to reconsider placement of both children with the paternal grandmother. He argued that it was in their best interests to be placed with family so they could be “raised by family and get to know the many extended family members who will be there for them.” Father wrote that the children would be raised with love, affection and discipline, and with benefits and privileges he was afforded but chose to squander. Mother also asked to have the children placed with the paternal grandmother, as she knew they would be well cared for and provided for. On August 21, 2013, the court denied father’s petition without a hearing on the grounds that the petition failed to state new evidence or a change in circumstances, and the proposed order was not in the best interests of the children. Father appeals.

II. DISCUSSION

A. Father’s Contentions

Father’s primary contention on appeal is the court erred in failing to properly assess the paternal grandmother for placement of the children. He complains this failure resulted because CFS provided no assessment report that considered the factors

delineated in section 361.3. Father asserts that his counsel's failure to timely object to the court's denial of placement with the paternal grandmother amounted to ineffective assistance, requiring him to later file a section 388 petition. In response, CFS argues father lacks standing (*Cesar V. v. Superior Court* (2001) 91 Cal.App.4th 1023, 1035 (*Cesar V.*)), and this court lacks jurisdiction because father failed to timely appeal the court's April 25, 2013, denial of placement of the children with the paternal grandmother.

As for father's standing, "a placement decision under section 387 has the potential to alter the court's determination of the child's best interests and the appropriate permanency plan for that child, and thus may affect a parent's interest in his or her legal status with respect to the child. . . . [Thus, father has] standing to challenge the trial court's findings and orders under section 387 on appeal." (*In re H.G.* (2006) 146 Cal.App.4th 1, 10.) As for our jurisdiction, father appeals from the August 21, 2013, denial of his section 388 petition, which raised the issue of relative placement, not the April 25, 2013, denial of placement. We have jurisdiction because the appeal is timely.

In any event, father asserts that if his section 388 petition was not the proper vehicle with which to bring the above issue before this court, then his counsel was ineffective for failing to object to the trial court's denial of placement of the children with the paternal grandmother at the section 387 hearing on April 25, 2013, and failing to point out that CFS did not produce an assessment report. We would therefore consider the claim to forestall a habeas petition based on ineffective assistance of counsel.

B. Ineffective Assistance of Counsel

Section 317.5, subdivision (a), provides: “All parties who are represented by counsel at dependency proceedings shall be entitled to competent counsel.” In order to establish that counsel in a dependency proceeding was ineffective, “a parent ‘MUST DEMONSTRATE BOTH THAT: (1) [her] appointed counsel failed to act in a manner expected of reasonably competent attorneys acting as diligent advocates; and that (2) this failure made a determinative difference in the outcome, rendering the proceedings fundamentally unfair in that it is reasonably probable that but for such failure, a determination more favorable for [the parent’s] interests would have resulted.’ [Citations.] In short, [the parent] has the burden of proving both that [her] attorney’s representation was deficient and that this deficiency resulted in prejudice. [Citation.]” (*In re Dennis H.* (2001) 88 Cal.App.4th 94, 98.)

As the court in *In re Carrie M.* (2001) 90 Cal.App.4th 530 noted, “A claim of ineffective assistance of counsel in a dependency matter is generally cognizable in the Court of Appeal on a petition for writ of habeas corpus. [Citation.]” (*Id.* at p. 533.) In the instant case, father did not file a petition for writ of habeas corpus. We recognize the rule requiring such a writ petition is not absolute. There is “an exception in cases where ‘there simply could be no satisfactory explanation’ for trial counsel’s action or inaction [citations]” (*In re Eileen A.* (2000) 84 Cal.App.4th 1248, 1254, overruled on other grounds as stated in *In re Zeth S.* (2003) 31 Cal.4th 396, 413-414.) Given the nature of the issue, we will assume there could be no satisfactory explanation for trial counsel’s

inaction and address the merits of father's primary claim within the confines of his section 388 petition.

C. Summary Denial of Section 388 Petition

“Section 388 permits ‘[a]ny parent or other person having an interest in a child who is a dependent child of the juvenile court’ to petition ‘for a hearing to change, modify, or set aside any order of court previously made or to terminate the jurisdiction of the court’ on grounds of ‘change of circumstance or new evidence.’ (§ 388, subd. (a).) ‘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 . . .’ [Citation.] Section 388 thus gives the court two choices: (1) summarily deny the petition or (2) hold a hearing. [Citations.] In order to avoid summary denial, the petitioner must make a ‘prima facie’ showing of ‘facts which will sustain a favorable decision if the evidence submitted in support of the allegations by the petitioner is credited.’ [Citations.]” (*In re Lesly G.* (2008) 162 Cal.App.4th 904, 912.)

“We review a summary denial of a hearing on a modification petition for abuse of discretion. [Citation.] Under this standard of review, we will not disturb the decision of the trial court unless the trial court exceeded the limits of legal discretion by making an arbitrary, capricious or patently absurd determination. [Citation.]” (*In re A.S.* (2009) 180 Cal.App.4th 351, 358.)

Here, in support of his petition, father claimed that the new evidence or changed circumstances included (1) his belief that no appropriate evaluation of the paternal grandmother for placement had been made, and (2) his seeking designation as the

presumed father of J. in order that both children could be placed with the paternal grandmother. The juvenile court summarily denied father's petition without an evidentiary hearing. In doing so, the court concluded there was no new evidence or change of circumstances. Father was not offering any new evidence regarding the paternal grandmother's qualifications for placement and the biological father of J. had been located and was being offered services. As such, summary denial of the section 388 petition was proper.

D. Evaluating the Paternal Grandmother for Placement of the Children

Notwithstanding the above, we consider father's primary claim that the court erred in failing to properly evaluate the paternal grandmother for placement of the children at the time of the section 387 hearing. According to father, the failure of CFS to provide the court with an assessment report, coupled with the court's failure to consider each of the factors listed in section 361.3, subdivision (a) in evaluating the paternal grandmother for placement, support a modification of the prior order denying placement of the children with the paternal grandmother. We disagree.

Section 361.3 provides that "[i]n any case where a child is removed from the physical custody of his or her parents . . . preferential consideration shall be given to a request by a relative of the child for placement of the child with the relative" (§ 361.3, subd. (a).) "Preferential consideration' means that the relative seeking placement shall be the first placement to be considered and investigated." (§ 361.3, subd. (c)(1).) The statute lists a number of factors to be used by the county social worker (i.e., the Department) in determining whether a placement is appropriate, although

consideration is not limited to the specified factors. (§ 361.3, subs. (a)(1)-(a)(8).) Among these are the following: “The best interest of the child, including special physical, psychological, educational, medical, or emotional needs” (§ 361.3, subd. (a)(1)); the wishes of the parents and the relatives (§ 361.3, subd. (a)(2)); the placement of siblings together (§ 361.3, subd. (a)(4)); the character of adults in the relative’s home (§ 361.3, subd. (a)(5)); the nature and duration of the relationship between the relative and the child (§ 361.3, subd. (a)(6)); the ability of the relative to provide a safe, secure, and stable environment for the child (§ 361.3, subd. (a)(7)(A)); and the safety of the relative’s home (§ 361.3, subd. (a)(8)).

Cases interpreting section 361.3 have stressed that it does not create an evidentiary presumption. Instead, “‘relatives [are to] be assessed and *considered* favorably, subject to the juvenile court’s consideration of the suitability of the relative’s home and the best interests of the child.’ [Citations.]” (*In re Antonio G.* (2007) 159 Cal.App.4th 369, 377.) The preference applies “when a new placement becomes necessary after reunification services are terminated but before parental rights are terminated and adoptive placement becomes an issue.” (*Cesar V.*, *supra*, 91 Cal.App.4th at p. 1032.)

Here, the record demonstrates that the paternal grandmother’s home had been repeatedly assessed and carefully considered by CFS and the juvenile court as required by section 361.3. On January 9, 2013, the trial court asked that “the relatives be assessed and we have those assessments done by February the 4th.” In response, CFS filed its addendum report containing those assessments on January 25, 2013. On mother’s side, there were six potential relatives for placement, and on father’s side, there were three. Of

father's three relatives, the only viable candidate was the paternal grandmother.

According to the social worker, the paternal grandmother was awaiting RAU approval and the social worker, with a Spanish interpreter, would be completing an in-depth psychosocial assessment of her. The social worker opined that “[g]iven the serious nature of the abuse suffered, and both parents['] current criminal charges, it is crucial that a careful assessment is completed on both maternal and paternal sides of the family, as the children deserve to have a safe, nurturing and protective family to grow up in.”

At the February 4, 2013, hearing, the trial court acknowledged that “there’s a whole bunch here about relative assessment,” and questioned about the paternal grandmother. CFS informed the court that instead of the paternal grandmother, a paternal aunt, E., was being considered for placement. The court authorized placement of the children with “any suitable relative.”

On April 4, 2013, at the section 387 petition hearing, father’s counsel informed the court that father and his family were requesting that the paternal grandmother be “re-assessed or continued to be assessed for placement” In response, counsel for the children stated: “[T]here were two paternal aunts who were also evaluated and found not to be able to clear RAU. And the paternal relatives are adamant about seeking the placement, but with the information that the aunt gave me, I told her I had a chance to talk to her about how the process works and the likelihood of them getting what they are looking for. It seems pretty slim, given their background and the circumstances of the case, and the Department looking for concurrent home for these children. So she says that they did have a TDM[(team decision meeting)], waiting to get a date for a TDM. I

told her that they were going through the appropriate steps and if it's found to be appropriate, then the Department would place with. It did not sound like it was going to be an appropriate setting."

CFS noted that the paternal grandmother was assessed, approved through RAU, "but the other step was whether or not it was a good home, long-term home for a two-year-old -- I'm sorry, a one-year-old and three-year-old and CFS's assessment was that she is not. Her support system [is] her two daughters and one daughter has two DUI's on her record and one has a substantiated child abuse record of physical abuse. She apparently doesn't drive or if she does, she doesn't drive very far and she uses these daughters to help, so it's not appropriate for a long-term placement. There is a TDM that's being held with family members to see if there is anyone else that can be assessed and I believe that's being held on April 17th." The court ordered that "all available relatives are to be assessed."

In the report prepared for the April 25, 2013, hearing, the social worker indicated why CFS was not recommending the paternal grandmother. Specifically, the paternal grandmother stated that she would handle the stresses of the adolescent years with the help from her family and one of her adult sons. When asked about father, the paternal grandmother reported that she did not know why he was in prison, nor did she want to know. She did not visit father because it was "too hard on her emotionally." She stated that when he gets out of jail, she would not let him "step a foot into her house." The social worker expressed concern that the paternal grandmother's support system, Li. and E., were not approved by RAU; however, the paternal grandmother said that Lo. is her

support system if she needed any help or had an emergency. When the social worker spoke with Lo., she voiced her objection to being assessed for placement; however, she indicated a willingness to act as a support system and move in with the paternal grandmother if necessary. Lo. had never met the children and there was no relationship between her and the children. Her criminal history included a DUI, assault on a police officer, and forgery.

The social worker did not recommend the paternal grandmother for placement because she would not be able to meet the needs of the children; she did not have insight into what is going on around her with her own adult children; two of her daughters (Li. and E.) were unable to be approved by RAU; Li. and E. both had aggressive and dominant demeanors and talked for the paternal grandmother; she had not dealt with the reality of her son being in prison for murder; she failed to deal with the reality of things she did not like, choosing to live in a state of denial; and she was not “healthy” and would not be effective in raising the children. The social worker included a letter from the paternal grandmother and one of her daughters contesting the recommendation of CFS. On April 25, 2013, the court concluded there were “no relatives available for concurrent planning home placement.”

According to the record before this court, the paternal grandmother’s home had been repeatedly assessed and carefully considered by CFS and the juvenile court as required by section 361.3. In fact, CFS’s initial plan had been to place the children with the paternal grandmother pending the results of its assessment. Unfortunately, she lived in a state of denial regarding the aggressive criminal histories of her children, who were

her support system. Mother admitted that she would rely on her adult children as needed when raising the M. and J. Thus, CFS did not find placement of the children with paternal grandmother to be in their best interests, given the circumstances that brought them to the attention of CFS. The juvenile court agreed, and so do we.

For the above reasons, we reject father’s challenge to the court’s refusal to place the children with the paternal grandmother.

III. DISPOSITION

The order denying father’s section 388 petition is affirmed.

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HOLLENHORST

Acting P. J.

We concur:

RICHLI

J.

CODRINGTON

J.