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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

In re B.P. et al, Persons Coming Under the
Juvenile Court Law.

RIVERSIDE COUNTY DEPARTMENT
OF PUBLIC SOCIAL SERVICES,

Plaintiff and Respondent,

v.

J.P. et al.,

Defendants and Appellants.

E064178

(Super.Ct.No. RIJ1300691)

OPINION

APPEAL from the Superior Court of Riverside County. Jacqueline C. Jackson,
Judge. Affirmed.

Jesse McGowan, under appointment by the Court of Appeal, for Defendant and
Appellant J.P.

Christy C. Peterson, under appointment by the Court of Appeal, for Defendant and
Appellant R.S.

Gregory P. Priamos, County Counsel, and Julie Koons Jarvi, Deputy County Counsel, for Plaintiff and Respondent.

R.S. (mother) and J.P (father) separately appeal from orders denying their petitions, pursuant to Welfare and Institutions Code section 388, for modification of the order terminating reunification services. (All statutory citations refer to the Welfare and Institutions Code.) Both parents assert that the juvenile court violated their due process right to a hearing on their petitions because, although the court ordered a hearing after having found that the petitions made the required prima facie showing of changed circumstances and that the modification might promote the children's best interest, the court did not permit the parents to argue, to cross-examine witnesses or to present evidence at that hearing. They contend that the matter must be remanded for a full hearing on their petitions for modification and that the order terminating their parental rights must be vacated.¹

We conclude that the parents have failed to demonstrate that the juvenile court found that their petitions made a prima facie showing as required by section 388. We further conclude that the petitions do not, in fact, make a sufficient showing to entitle the parents to a hearing. Finally, we conclude that the parents forfeited their contentions as to the sufficiency of the hearing the court did hold. Accordingly, we will affirm the order

¹ Both parents also filed notices of appeal from the order terminating their parental rights. However, the only issues either parent raises on appeal pertain to the section 388 petitions. They do not otherwise challenge the validity of the termination order.

denying their section 388 petitions, leaving the order terminating their parental rights intact.

FACTUAL AND PROCEDURAL HISTORY

In June 2013, the Riverside County Department of Public Social Services (DPSS) removed B., X. and D. from the parents' custody because mother and D. tested positive for methamphetamine at D.'s birth. D. was born five weeks premature and was "severely" underweight. There were also concerns about her eye health, in that her eyes would "cross, and . . . remain that way for a length of time." The parents admitted to smoking methamphetamine throughout mother's pregnancy with D. and immediately before her birth. They also had a history of domestic violence. Father was currently on probation for a domestic violence conviction.

On June 25, 2013, DPSS filed a petition pursuant to Welfare and Institutions Code section 300, alleging that the parents had failed to supervise or protect the children adequately based on the parents' drug use, D.'s positive test for methamphetamine, and the exposure of the children to domestic violence. B. was 20 months old and X. was 11 months old.

Because there were no family members suitable for placement of the children, the children were placed in foster homes. B. and X. were placed together, and D. was placed in a separate home.

At the detention hearing, the court found that a prima facie showing was made that the children came within section 300, subdivision (b), ordered the children detained in out of home placement, and ordered reunification services for the parents. At the

jurisdiction and disposition hearing, the court determined that the children came within section 300, subdivision (b), and found that the parents had made “adequate but incomplete” progress toward completion of their reunification case plans. The court found a substantial probability that the children might be returned to their parents within six months. It therefore ordered continued reunification services. The court found that the Indian Child Welfare Act of 1978 (25 U.S.C. § 1901 et seq.) does not apply.²

In its report for the 12-month review hearing, DPSS recommended terminating services because the mandated timeline for reunification services had been exceeded and the parents had not completed their reunification plan, although they had made some progress. In particular, both parents had participated in a substance abuse program (although neither had yet completed it), and both had consistently tested negative. However, they were living with father’s parents, and father’s mother suffered from mental health problems which caused her to have “angry outbursts.” There had been a violent incident between father and his mother in which one of them threatened the other with a knife. (Father was arrested for domestic violence as a result, but the charges were apparently dropped because his mother admitted that she had threatened him with the knife.) The grandmother’s condition placed the children at risk. Moreover, there were seven adults residing in the two bedroom apartment, and there were ongoing concerns with the parents’ ability to provide adequate and suitable food for the children, as well as

² The report prepared for the 12-month review hearing states that on June 26, 2013, the juvenile court found father to be the presumed father of all three children. We do not see that finding in the minute order from June 26, 2013. Father’s status is not in dispute, however.

with the “unkempt” condition of the home. The parents had not taken any action to find suitable housing for the children. For all of these reasons, DPSS concluded there was not a substantial probability that the children would be able to be returned home at the review hearing.³

By the final addendum report filed before the review hearing, both parents had completed their substance abuse program and had completed some, but still not all, of the other services that constituted their case plans. They had also not obtained suitable housing for the children. Moreover, the parents did not display good parenting skills during supervised visitation, and although the two older children appeared to have a bond with the parents, D., who had never lived with her parents, did not but instead had an emotional bond with her foster parents. At the hearing, the court found that the statutory time for reunification services had expired and that the children could not safely be returned home. The court terminated services and set a section 366.26 hearing.

The three children were moved together to a prospective adoptive home. Shortly before the section 366.26 hearing, each parent filed a petition for modification of existing orders, pursuant to section 388. The petitions were denied on June 11, 2015, and the section 366.26 hearing was continued.⁴ At the section 366.26 hearing, the court made all required findings, including that the children were adoptable and likely to be adopted. It

³ Because of several continuances, the 12-month review hearing became instead an 18-month review hearing.

⁴ We discuss the petitions in greater detail below.

terminated parental rights and ordered DPSS to proceed with adoption as the children's permanent plan.

The parents separately filed notices of appeal from the order denying their section 388 petitions. They also filed notices of appeal from the order terminating their parental rights.

LEGAL ANALYSIS

Introduction

Section 388 provides, in pertinent 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 in the same action in which the child was found to be a dependent child of the juvenile court or in which a guardianship was ordered pursuant to Section 360 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 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”

Although section 388 does not explicitly so provide, courts have long held that the right to a hearing is triggered only if the petition makes a prima facie showing, consisting of facts demonstrating a genuine change of circumstances or new evidence and facts showing that the requested modification will promote the child's best interests. (*In re C.J.W.* (2007) 157 Cal.App.4th 1075, 1079 [Fourth Dist., Div. Two].) To make a prima

facie showing, the petition must state facts which, if found to be true, would sustain a favorable decision. (*In re Anthony W.* (2001) 87 Cal.App.4th 246, 250.)

Here, each parent filed a section 388 petition. Mother asked for further reunification services for both parents and to transition the children back into the parents' care. Father asked for further family reunification. The petitions both alleged that the parents had made progress in their plans since termination of services and that mother had given birth to a fourth child, V., who was not detained at birth but left in the parents' physical custody, subject to a pending dependency petition. Both section 388 petitions referred to the desirability of having all four siblings raised together.

Before addressing the petitions, the court held a jurisdiction and disposition hearing as to V. The court declared V. a court dependent but awarded physical custody to the parents. The court ordered family maintenance services and found that the parents had made adequate progress. The court then proceeded to discuss the section 388 petitions filed by the parents as to their older children. Counsel for the various parties described the issue to be determined as whether the best interest of the three older siblings required resumed efforts to reunite them with the parents in light of the parents' progress and the birth of the new baby. The court stated that it was inclined to grant the requested hearings because V. was home with the parents. The court ordered a hearing on the petitions "because the best interest of the child may be promoted by the request." The hearing was set for June 11, 2015, the same date as the section 366.26 hearing.

On June 5, 2015, DPSS filed an addendum report which stated that the parents still lacked sufficient parenting skills to manage three children at a time and also allowed the

children to engage in risky behavior—running and jumping on furniture with toys in their mouths, allowing the one-year-old to play with a metal pen—without intervening. The report also stated that the parents favored B. and ignored D., and that mother slapped one child and grabbed another by the arm to drag him back to his seat.

On June 11, 2015, the date set for the hearing on the section 388 petitions, the court referred to the addendum report and said that despite the parents having the new baby at home, it “still seems like [the parents] are having issues” handling the three children, as well as playing favorites, “which does not sit well” with the court. The court noted that this was the case even after a year of services. The court then “summarily denied” the petitions without allowing the parents either to argue or present evidence. Neither parent objected or asked to argue his or her position or to make an offer of proof.

Both parents now assert that this was a violation of their right to due process and a reversible error, in that, having found that the petitions made a prima facie showing, the court was obligated to hold an evidentiary hearing. They also argue that they were entitled to a full hearing because their petitions did make the required prima facie showing.

The Record Does Not Show That the Juvenile Court Found That the Petitions Made the Required Prima Facie Showing.

The parents base their initial argument on the premise that the trial court found that the petitions made a prima facie showing on both prongs of section 388. The record does not bear this out.

The parents both rely on *In re Lesly G.* (2008) 162 Cal.App.4th 904 (*Lesly G.*). In that case, the court held that after ordering a hearing on a section 388 petition, the juvenile court's failure to afford the parent the opportunity to argue the merits of the petition was a denial of the parent's due process rights, requiring reversal of both the order denying the section 388 petition and the order terminating parental rights. (*Id.* at pp. 912-915.) *Lesly G.* is distinguishable from this case, however.

At the time of the proceedings in *Lesly G.*, *supra*, 162 Cal.App.4th 904, Judicial Council of California form JV-180, which is the form used to file a section 388 motion, included a page with three potential orders for the court to select, contained in paragraphs 12, 13 and 14. Paragraph 13, which the juvenile court in *Lesly G.* selected, states: "The best interest of the child may be promoted by the requested new order, and either (a) the request states a change of circumstances or new evidence, or (b) the request has been filed for the purpose of asserting a brother or a sister relationship with the child. A hearing shall be held on the request as follows" (*Lesly G.*, at p. 918 [Appendix A, former form JV-180].) By selecting that order, the juvenile court indicated that it had found that the parent had made a prima facie showing on both prongs, i.e., that a change of circumstances or new evidence existed and that the requested modification might promote the best interests of the child. That finding triggered the parent's right to a hearing on the merits of the petition. (*Id.* at pp. 912-913; see also *In re C.J.W.*, *supra*, 157 Cal.App.4th at p. 1079.)

Form JV-180 has been modified since *Lesly G.* was decided. In ruling on a section 388 petition, a juvenile court now uses form JV-183. That form still provides for

three potential orders, but they are not worded identically to the three options on former form JV-180. The option selected by the court in this case 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. The hearing will take place on” Unlike the order in *Lesly G.*, this order does not state or imply that the juvenile court has found that the parents made a prima facie showing of changed circumstances or new evidence, nor does it state or imply that the parents stated facts which, if found true, would support the conclusion that the modification is in the child’s best interest. At most, it reflects a finding that the parents have stated facts that *might* support such a conclusion. Nor did the court orally state that the petitions made a prima facie showing. Accordingly, in contrast to *Lesly G.*, the juvenile court’s written order for a hearing does not establish that the court found that the petitions made a prima facie showing, thus triggering the parents’ right to a hearing on the merits of their petitions.

The fact that the juvenile court did order a hearing is also not dispositive as to whether the court found that the petitions made a prima facie showing. Although we are not aware of this being a common practice, there is nothing in section 388 that precludes a court from setting a hearing for the purpose of gathering further facts or allowing argument as to whether a parent whose petition does not unequivocally make a prima facie showing actually can make such a showing. However, the record appears to show that the juvenile court in this case did intend to hold such a hearing rather than a hearing on the merits of the petitions. First, it appears that when the court ordered a hearing on the petitions, it had not yet read father’s petition, which had just been filed.

Consequently, it does not appear that the court could have determined at that point that father’s petition made a prima facie showing. Second, the fact that the court “summarily” denied the petitions supports the inference that the court did not find, prior to the hearing, that either petition had made the required prima facie showing. As father notes in his reply brief, “[W]hen a juvenile court summarily denies a section 388 petition, it is—by the nature of that order—rejecting an evidentiary hearing.” Third, as we discuss below, neither petition actually did make a prima facie showing. This lends further support to the inference that the juvenile court denied the petitions for that reason.

In any event, the fact that we must resort to inferences as to what the court intended by setting the hearing in itself defeats the parents’ argument on this point. To meet his or her burden on appeal, the appellant must provide a record which demonstrates error. (*Aguilar v. Avis Rent A Car System, Inc.* (1999) 21 Cal.4th 121, 132.) Ambiguities in the record are resolved in favor of affirmance. (*Winograd v. American Broadcasting Co.* (1998) 68 Cal.App.4th 624, 631.) Even viewing the record most favorably to the parents’ position, the record is at best ambiguous as to whether the juvenile court found that the petitions made an adequate prima facie showing. Consequently, the parents have not met their burden on appeal.⁵

Moreover, we agree with DPSS that the parents’ contentions on appeal as to the sufficiency of the hearing are forfeited. A reviewing court ordinarily will not consider a

⁵ DPSS contends that the juvenile court merely reconsidered its prior order finding that the petitions made a prima facie showing. We need not address that contention because the record contains no basis for concluding that this is what the court did.

challenge to a ruling if an objection could have been made in the trial court but was not. (*In re S.B.* (2004) 32 Cal.4th 1287, 1293, superseded by statute on another point as stated in *In re S.J.* (2008) 167 Cal.App.4th 953, 962.) The purpose of this rule is to encourage parties to bring errors to the attention of the trial court, so that they may be corrected. (*Ibid.*) This rule applies in dependency proceedings. (*Ibid.*) And, although a reviewing court may choose to address an issue that could have been raised below but was not, that authority should be exercised rarely and only in cases presenting an important legal issue. (*Ibid.*) Here, we see no reason to deviate from the normal rule. After the court stated that it was summarily denying the petitions, mother's counsel said, "Okay. Thank you." Father's counsel said, "Thank you, Your Honor. [¶] And just for the record, Your Honor, I did file some supplemental documents, just ask those be lodged with the Court." The court replied, "I read those too." Counsel responded, "Submit it." The parents clearly had the opportunity to object or to ask to be heard on the merits of the petitions, but they chose not to do so.

The Petitions Did Not Make a Prima Facie Showing on the Best Interest Prong of Section 388.

We also reject the parents' arguments that they were entitled to a full evidentiary hearing because they made a prima facie showing that the requested modification would promote the children's best interests.

Although a section 388 petition must be construed liberally in favor of its sufficiency, to make a prima facie showing, the petition must state facts which, if found to be true, would sustain a favorable decision. (*In re Anthony W, supra*, 87 Cal.App.4th

at p. 250.) Mere conclusory assertions do not satisfy the parent's burden. (*Ibid.*) Here, neither petition states any facts pertaining to the best interest prong. Rather, both petitions merely assert, in effect, that it is necessarily in the best interest of a child to be raised with his or her siblings. But this is simply not true in all cases, nor is it inevitably true that if reunification is in the best interest of one sibling, it must be in the best interest of all siblings. Determining the best interest of a child involves multiple complex factors, and depends upon the particular circumstances that apply to each child. (*In re Kimberly F.* (1997) 56 Cal.App.4th 519, 529; *In re Jasmon O.* (1994) 8 Cal.4th 398, 418.) Accordingly, in order to make the required prima facie showing, it was necessary to state facts which would demonstrate that it is in the best interest of *each* of the three older siblings, based on the circumstances unique to each child, to be reunified with their parents because of the birth of V. The petitions do not do so.

Moreover, when a section 388 petition is filed “on the eve of the selection and implementation hearing, the children’s interest in stability [is] the court’s foremost concern, outweighing any interest [the parents] may have in reunification.” (*In re Anthony W.*, *supra*, 87 Cal.App.4th at pp. 251-252; see also *In re Marilyn H.* (1993) 5 Cal.4th 295, 309.) In order to make the required prima facie showing, a section 388 petition filed after services have been terminated must state facts that “establish how such a change will advance the child’s need for permanency and stability.” (*In re J.C.* (2014) 226 Cal.App.4th 503, 527.) A petition that fails to address that question necessarily fails to make a prima facie showing. (*Ibid.*; *In re Anthony W.*, at pp. 251-252.) In the absence of such a showing, the right to a hearing does not arise and the petition may be summarily

denied. (*In re Anthony W.*, at pp. 250-252.) No such facts were asserted in either petition in this case. Accordingly, the juvenile court did not abuse its discretion in denying the petitions without a hearing on the merits.⁶

DISPOSITION

The judgment is affirmed.

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McKINSTER
J.

We concur:

RAMIREZ
P. J.

MILLER
J.

⁶ We review a summary denial of a section 388 petition for abuse of discretion. (*In re Anthony W.*, *supra*, 87 Cal.App.4th at p. 250.)