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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT**

In re CHELSEY S. et al, Persons Coming Under
the Juvenile Court Law.

STANISLAUS COUNTY COMMUNITY
SERVICES AGENCY,

Plaintiff and Respondent,

v.

JACK S.,

Defendant and Appellant.

F063650

(Super. Ct. Nos. 509517, 509518)

OPINION

THE COURT*

APPEAL from an order of the Superior Court of Stanislaus County. Ann Q.
Ameral, Judge.

S. Konrad Lee, under appointment by the Court of Appeal, for Defendant and
Appellant.

John P. Doering, County Counsel, and Carrie M. Stephens, Deputy County
Counsel, for Plaintiff and Respondent.

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* Before Levy, Acting P.J., Cornell, J. and Kane, J.

Jack S. appeals from the juvenile court's summary denial of his petition brought under Welfare and Institutions Code, section 388¹ seeking reinstatement of reunification services with his 12- and 10-year-old daughters, Chelsey and Brianna. He contends the juvenile court abused its discretion. We affirm.

PROCEDURAL AND FACTUALSUMMARY

Jack and his wife (hereafter "the mother") are the parents of Chelsey and Brianna. The mother has a history of mental illness, violence and substance abuse. As a result, the Stanislaus County Community Services Agency (agency) responded to numerous reports of child neglect beginning in 2000 involving Chelsey and Brianna.

In 2000, the year of Chelsey's birth, the agency received a report that a five-month-old baby, presumably Chelsey, was not being fed. The mother said she stopped feeding the baby because the baby's food was poisoned. The mother was hospitalized. In December 2002, the mother was incoherent and trying to sell or give away her child outside a convenience store. The police arrested her on an outstanding warrant. The agency offered the family voluntary maintenance services. In October 2003, then three-year-old Chelsey and one-year-old Brianna were found wandering the streets unsupervised. When the police located the mother, she admitted she had been asleep on the couch. They arrested her for child endangerment. The agency provided the family voluntary maintenance services until December 2003. In November 2004, the mother was involuntarily hospitalized after she was found in bed with then four-year-old Chelsey and a large butcher knife. In June 2006, Jack and the mother were arrested after an altercation during which the mother stabbed Jack. In September 2006, the mother was trick-or-treating with one of the children at 11 p.m., while the other child was home alone and asleep.

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

In April 2005, four-year-old Chelsey and three-year-old Brianna were placed in guardianship with their paternal grandparents to limit their exposure to their mother. The guardians and Jack were ordered not to leave the children unsupervised in their mother's care.

In October 2006, after repeated violations of the visitation order, the agency filed a dependency petition. The juvenile court ordered the children detained and ordered services for Jack and the mother. The court also ordered supervised visits with Jack at the guardians' home twice a month and supervised visits with the mother at the agency once a month.

In December 2006, at a combined jurisdictional and dispositional hearing, the juvenile court declared Chelsey and Brianna dependents of the court and ordered reunification services for Jack and the mother. Chelsey and Brianna were released to their guardians' custody under family maintenance.

Over the next year, Jack and the mother unsuccessfully attempted reunification and in December 2007, the juvenile court terminated their services. The children remained in the guardianship of their paternal grandparents. The juvenile court ordered weekly four-hour visits for Jack and the mother to be supervised by the guardians.

In March 2008, the mother's probation officer informed the supervising social worker that the mother used methamphetamine and heroin and was not taking her psychotropic medication. The social workers also discovered that Chelsey and Brianna had spent the evening with Jack and the mother at the family home in violation of the court order. The guardians admitted that the visit was not permitted but felt that it was an exception and was justified because of the Easter holiday. The social workers suspected that the children resided primarily with Jack because their bedrooms were fully furnished and decorated and they had clothing and other personal items there, including recent school awards. They had also drawn chalk drawings throughout the sidewalk in front of

the home. The girls told the social worker that they spent the night at their parents' home but did not elaborate.

In March 2008, the agency filed a supplemental petition (§ 387) alleging that the children's placement with the guardians was ineffective because Jack and the guardians allowed unsupervised contact between the children and the mother. The agency also filed a section 728 petition to terminate the guardianship. The children were placed in foster care with Thomas M.

On April 17, 2008, at the jurisdictional hearing, the juvenile court sustained the supplemental petition and denied Jack's request for increased visitation. On May 8, 2008, at the dispositional hearing, the juvenile court ordered the children removed from Jack and the mother and found that returning them to the custody of Jack, the mother or the guardians would create a substantial risk of harm to them. The court set the guardianship aside, ordered a bonding study between the parents and the children and set the matter for a section 366.26 hearing.

Dr. Cheryl Carmichael conducted the bonding study in June and July 2008. She concluded that Chelsey and Brianna were attached to both parents and that their best interests would be served by continuing the parent/child relationships.

In November 2008, Jack filed a complaint against his attorney, claiming that his attorney failed to challenge the allegations in the petition and appeal the court's termination of guardianship. After reviewing Jack's complaint and his attorney's response, the juvenile court found that his attorney did not act incompetently.

On December 8, 2008, at the section 366.26 hearing, the juvenile court found that Chelsey and Brianna were not adoptable and ordered them placed with their foster father in a permanent plan living arrangement with a goal of legal guardianship. The court also ordered one visit a month for Jack and the children.

On December 15, 2008, Jack filed a "Request to Change Court Order" (form JV-180) pursuant to section 388 (hereafter "section 388 petition") asking the juvenile court

to return Chelsey and Brianna to his care. He declared that his circumstances had changed in that he and the mother were divorced, no longer lived together, and only had contact at visits. He also declared that he was enrolled in parenting classes. He cited the girls' close relationship with him as the reason that their return would serve their best interests. The juvenile court denied the request without a hearing.

Over the ensuing years, Jack regularly visited the girls. In November 2009, at the girls' request, the department extended visits to a two-hour visit once a month. In May 2010, the girls' foster father was appointed their guardian.

In May 2011, the department reported that the girls loved Jack and their extended visits. The agency requested discretion to increase visits with an extended family member monitoring them. However, the agency also reported that the mother was not engaged with the social worker and had been in jail. The agency also reported the mother either lived with Jack or visited there frequently. The agency remained concerned about the children being exposed to the mother.

In September 2011, Jack filed a section 388 petition asking the juvenile court to reinstate reunification services so that Chelsey and Brianna could be returned to his custody. In response to question number 7 on the preprinted judicial council form JV-180, "What changed after the judge's order that would change the judge's mind?" Jack typed "Have evidence to support that [social workers] withheld or concealed exculpatory evidence from the father and the Juvenile Court in the Petition filed at the Detention and Jurisdiction Hearings, and filed false [allegations] against the father and the minors['] guardians. The [social worker] deprived the father his constitutional rights to have 'DUE PROCESS' in a court of law[.]"

In response to question number 9, "Why would the changes you are requesting be better for the child?" Jack typed, "[Father] was granted a divorce from [mother] on 2/25/2009, it was reported on 5/5/2010 that [mother] does not live at his residence anymore, on 8/21/2008 a Psychologist reported that [there] is a strong bond between

father and his children, on 11/18/2010 his daughter Chelsey requested to live [with father], [father] was granted a restraining order on 8/29/2011 against [mother] to protect himself and his children[.] PLEASE SEE COMPLAINT FILED ON 9-19-11[.]”

On October 4, 2011, the juvenile court denied Jack’s section 388 petition without a hearing. This appeal ensued.

DISCUSSION

Jack contends the juvenile court abused its discretion by summarily denying his section 388 petition. In his view, he made a prima facie showing that his circumstances had changed such that reinstating reunification services would serve Chelsey and Brianna’s best interests. We disagree.

A parent may petition the juvenile court to vacate or modify a previous order on grounds of change of circumstance or new evidence. (§ 388, subd. (a).) The parent, however, must also show that the proposed change would promote the best interests of the child. (§ 388, subd. (d); Cal. Rules of Court, rule 5.570; *In re Stephanie M.* (1994) 7 Cal.4th 295, 317.)

A court shall liberally construe such a petition in favor of its sufficiency. (*In re Marilyn H.* (1993) 5 Cal.4th 295, 309 (*Marilyn H.*.) Nonetheless, section 388 contemplates that a petitioner makes a prima facie showing of both elements to trigger an evidentiary hearing on the petition. (*In re Zachary G.* (1999) 77 Cal.App.4th 799, 806; see also *Marilyn H.*, *supra*, 5 Cal.4th at p. 310.) For instance, if a parent makes a prima facie showing of changed circumstances or new evidence sufficient to satisfy the first prong under section 388, a court may deny a section 388 petition without an evidentiary hearing if the parent does not make a prima facie showing that the relief sought would promote the child’s best interests. (*In re Justice P.* (2004) 123 Cal.App.4th 181, 189.)

A prima facie showing refers to those facts that will sustain a favorable decision if the evidence submitted in support of the petitioner’s allegations is credited. (*In re Edward H.* (1996) 43 Cal.App.4th 584, 593 (*Edward H.*.) Consequently, section 388

petitions with general, conclusory allegations do not suffice. Otherwise, the decision to grant a hearing on a section 388 petition would be nothing more than a pointless formality. (*Edward H.*, *supra*, at p. 593.) To obtain a hearing, successful petitions include declarations, certificates or other attachments, which demonstrate the showing the petitioner will make. (*In re Anthony W.* (2001) 87 Cal.App.4th 246, 250-251.)

The petition executed by Jack failed to make a prima facie showing of either changed circumstances or best interests. With respect to changed circumstances, Jack alleged that he had evidence that the social workers withheld or concealed evidence from him and the court in the “Petition” and that they filed false allegations against him and the guardians. He also asserted that his due process rights were violated. Jack failed, however, to explain how his due process rights were violated given that he was represented by counsel throughout the dependency proceedings and that the juvenile court found that his counsel acted competently. Even assuming such evidence existed, Jack had the burden of presenting the evidence to the juvenile court in his section 388 petition and he failed to do so.

Jack also failed to show that reinstating reunification services would serve Chelsey and Brianna’s best interests. Chelsey and Brianna were removed from Jack’s custody because they needed to be protected from their mother and Jack allowed the mother unsupervised contact with them in violation of the court’s orders. Though Jack took legal action to separate himself from the mother by filing for divorce and obtaining a restraining order, there was evidence that he, the mother and the girls had frequent contact in his home and that the mother was not mentally stabilized. Consequently, even if Jack had shown a change in circumstances existed, he failed to show on the face of the petition that Chelsey and Brianna’s best interests would be served by reunification when the girls were in a stable placement and there were still doubts about his ability to protect them from their mother’s erratic behavior.

In light of the foregoing, we find no abuse of discretion in the juvenile court's summary denial of Jack's section 388 petition.

DISPOSITION

The juvenile court's October 4, 2011 order denying Jack's section 388 petition is affirmed.