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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

In re TIMOTHY D., et al., Persons Coming
Under the Juvenile Court Law.

KERN COUNTY DEPARTMENT OF HUMAN
SERVICES,

Plaintiff and Respondent,

v.

C.D.,

Defendant and Appellant.

F063880

(Super. Ct. No. JD12068, JD126069)

OPINION

APPEAL from an order of the Superior Court of Kern County. Louie L. Vega,
Judge.

Seth F. Gorman, under appointment by the Court of Appeal, for Defendant and
Appellant.

Theresa A. Goldner, County Counsel, and Mark L. Nations, Deputy County
Counsel, for Plaintiff and Respondent.

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Christine D. (mother) appeals from an order terminating dependency jurisdiction.
She contends the juvenile court erred when it terminated jurisdiction before holding the

hearing it had set on her Welfare and Institutions Code section 388¹ petition to vacate the jurisdictional findings. We reverse.

FACTUAL AND PROCEDURAL BACKGROUND

The Kern County Department of Human Services (Department) placed mother's children, six-year-old Timothy and four-year-old Rebecca, into protective custody in February 2011,² after several medical professionals from Cedars Sinai Medical Center, Bakersfield Memorial Hospital, and Lucille Packard Children's Hospital at Stanford University Medical Center, who had treated Rebecca, expressed concern that she was at risk of harm while in mother's care. The Department claimed that mother, who is a medical doctor, told different medical professionals on various occasions that Rebecca had diagnoses of failure to thrive, lymphocytic colitis, celiac disease, constipation, encopresis and cystic fibrosis, but medical professionals ultimately determined Rebecca did not have any of these illnesses. The Department alleged that mother misrepresented Rebecca's condition and insisted she be treated for these illnesses and undergo unnecessary procedures, including multiple bronchoscopies, radiologic studies, laboratory tests, hospital admissions and pharmacological treatments. The Department further asserted mother compromised Rebecca's treatment by manipulating medical devices, providing unnecessary and potentially harmful medications, and subjecting Rebecca to wearing a compression vest to treat cystic fibrosis. The Department claimed that as a result of the extensive, invasive and unnecessary investigations and treatment, Rebecca had suffered medical trauma which led to a diagnosis of adjustment disorder with anxiety.

The Department filed a petition alleging that Rebecca came within the provisions of section 300, subdivisions (a) (serious physical harm), (b) (failure to protect),

¹ All undesignated statutory references are to the Welfare and Institutions Code.

² References to dates are to dates in 2011 unless otherwise noted.

(c) (serious emotional damage) and (i) (cruelty) based on these allegations. The Department also filed a petition alleging that Timothy came within the provisions of section 300, subdivisions (a) and (b), based on mother's treatment of Rebecca. The children were detained from mother and placed together in a foster home.

At the May jurisdictional hearing, the parties reached a settlement of the jurisdictional and dispositional issues. The Department dismissed all allegations with respect to both children except those under section 300, subdivision (b), which were amended. Mother plead no contest to the amended allegations, which stated that the children were at risk of suffering physical harm or illness due to mother's failure to provide Rebecca with appropriate medical treatment as a result of an anxiety disorder, and mother misrepresented Rebecca's symptoms and diagnoses which caused Rebecca to undergo unnecessary medical and pharmacological treatment. The court found the amended allegations true, that mother knowingly, intelligently and voluntarily waived her rights, and that she understood the nature of the allegations and the possible consequences of submitting the matter to the court.

As to disposition, Rebecca was removed from mother's custody and placed with Rebecca's aunt, with whom she had been residing, while Timothy was returned to mother's custody. Mother was given reunification services as to Rebecca and family maintenance as to Timothy. Following an August review hearing, Rebecca was returned to mother's custody on family maintenance. The court set a six month review hearing pursuant to section 364 for November 16.

On October 5, mother filed a section 388 petition (petition), in which she asked the court to vacate the jurisdictional findings based on new evidence and either (1) dismiss the petition as the allegations were not true or (2) set the matter for a new jurisdictional hearing. As new evidence, mother asserted that at the time of the jurisdictional hearing she had not received all of Rebecca's medical records despite diligently attempting to obtain them, and she since had received the complete record from Stanford which showed

information the Department relied on was inaccurate. The Department filed a written opposition, in which it asked the court to deny the petition without a hearing based on mother's no contest plea. The court ordered a hearing on the petition, which it set for October 19.

At an October 14 hearing, the court explained that it had set the petition for hearing to allow mother to respond to the Department's opposition and explain why the petition should go forward, not to address the petition's merits. The court permitted the Department to file a supplemental opposition and mother to file a response, which they subsequently did, and set a hearing for November 16 on the issue of whether the court should hear the petition. At the November 16 hearing, after oral argument, the court decided not to order a further hearing on the petition, thereby denying it. The section 364 review hearing was continued to December 6, as the Department did not have its report prepared.

On November 22, the Department submitted a report for the review hearing in which it recommended termination of dependency jurisdiction, as mother had been complying with her case plan, she was meeting the children's medical and dental needs, and she was providing them with a safe and stable living environment.

On December 1, mother filed a second section 388 petition (second petition) in which she again asked the court to vacate the jurisdictional findings based on new evidence and either (1) dismiss the petition as the allegations were not true or (2) set the matter for a new jurisdictional hearing. Mother alleged as new evidence that (1) she did not have all of Rebecca's medical records at the time of the jurisdictional hearing, despite having attempted to obtain them, and she since had received a complete record from Stanford which showed some of the information the Department relied upon was inaccurate, (2) Stanford and the American Academy of Pediatrics were investigating a doctor who had been involved in Rebecca's case, (3) she had obtained evidence that she had not written certain prescriptions for Rebecca and the pharmacy that filled the

prescriptions purportedly written by her was under investigation for sloppy and possibly fraudulent practices, (4) mother's counsel believed a public health nurse involved in Rebecca's case was under investigation by the state nursing board for misrepresenting medical evidence in the case, and (5) a Stanford doctor, who had since seen Rebecca for treatment of her pulmonary issues, acknowledged Rebecca had a significant and complicated history, and prescribed some of the treatments that had been considered unnecessary medical care. Some reports from Stanford were attached to the petition.

Mother stated the children's best interests would be served if jurisdiction were vacated because (1) the true finding had damaged her career, thereby affecting the children's well-being, (2) CPS involvement had made it difficult for her to find an acceptable pediatrician, (3) the children had suffered emotional damage by being removed from her care and placed in foster care, (4) if a judicial finding based on erroneous opinions and statements of fact were left to stand, the children's relationship with, and image of, her would be tainted forever, and (5) it is always in a minor's best interest to have the truth discovered in dependency proceedings.

In a declaration filed with the second petition, mother acknowledged entering a no contest plea to the amended allegations, but claimed she only agreed to the settlement because the Department was holding Rebecca "hostage" and she wanted to increase her visits with Rebecca. While mother believed she acted appropriately by continuing certain treatments after Rebecca's discharge from Stanford, she did not have anything in writing from Stanford to prove she acted appropriately, and she would not have entered into the settlement if she had the Stanford records, which show she followed instructions "to the letter." Mother explained the efforts made to obtain the Stanford records, which she picked up on July 6.

On December 2, the court signed and filed an order, in which it set a hearing on the second petition for December 28 "because the best interest of the child may be

promoted by the request.” The court clerk mailed notice of the hearing to the parties on December 2.

At the December 6 section 364 review hearing, mother’s attorney requested the review hearing be continued to December 28, the date set for the hearing on the second petition, so the court would have jurisdiction to hear the second petition. Mother’s attorney asserted it was in the children’s best interests that mother’s name be removed from “CACI” and she be cleared by a dismissal of the allegations based on the second petition. The court responded that if it heard the attorney correctly, the second petition would be a “moot point” if it terminated jurisdiction that day. Mother’s attorney responded that it left mother saddled with the listing on “CACI” and a true finding despite the new evidence mother presented showing the finding should not have been made, which should override any desire to dismiss jurisdiction that day.

County Counsel stated she was “somewhat confused” when the court set the second petition for a hearing, since it was substantially the same as the first petition, but agreed that, if the court dismissed jurisdiction that day, it did not have jurisdiction to consider any other matter on the case, except perhaps financial responsibility issues. County Counsel did not think the second petition should have been set for hearing, did not believe there was good cause to continue the review hearing, and asked the court to deny the second petition without a hearing. The court responded, “Well, I think it becomes moot if the court follows the recommendation.” County Counsel agreed. The children’s attorney stated that while he had not reviewed the second petition and did not know if it was materially different from the first one, he did not see any prejudice “either way” to continuing the section 364 hearing to December 28.

The court announced that it was going to go forward with the recommendation. The court found proper notice had been provided to mother, the children’s status was being reviewed pursuant to section 364, mother had been provided reasonable services, and the children’s needs had been identified and were being met. The court stated that

“[j]urisdiction is terminated.” The hearing then concluded. The minute order of the hearing states that the hearing on the second petition was vacated.

DISCUSSION

Mother contends that since the juvenile court ordered a hearing on the second petition after finding the children’s best interest might be promoted by her request to vacate the jurisdictional findings, it was required to hold the hearing before terminating dependency jurisdiction. The Department contends the court was obligated to terminate jurisdiction that day since grounds for jurisdiction no longer existed, and even if the court erred in failing to hold a hearing on the second petition, any such error was harmless.

Section 388 allows a parent with an interest in a dependent child to petition the juvenile court to change, modify, or set aside any previous order. (§ 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 and shall give proper notice” (§ 388, subd. (c).) A court presented with a section 388 petition has two choices: (1) summarily deny the petition or (2) hold a hearing. (*In re Lesly G.* (2008) 162 Cal.App.4th 904, 912 (*Lesly G.*)) “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 to the allegations by the petitioner is credited.’ [Citations.] ‘[I]f the petition fails to state a change of circumstances or new evidence that might require a change of order, the court may deny the application ex parte. [Citation.]’ [Citation.] On the other hand, ‘if the petition[s] present any evidence that a hearing would promote the best interests of the child, the court will order the hearing.’” (*Lesly G., supra*, 162 Cal.App.4th at p. 912.)³

³ Consistent with section 388, California Rule of Court, rule 5.570(f) provides, in pertinent part, that if the parties do not stipulate to the requested modification and “the petition has not been denied ex parte under section (d), the court *must* order that a hearing

Here, the court did not summarily deny mother's second petition. Instead, it ordered a hearing on it after finding the request may promote the children's best interests, thereby finding the petition stated a prima facie case. Once a court determines a section 388 petition states a prima facie case, it is required to hold an evidentiary hearing. (*In re Kenneth S.* (2008) 169 Cal.App.4th 1353, 1359-1360 (*Kenneth S.*)) To forego a hearing when a prima facie case has been established deprives the petitioner of his or her due process right to a full and fair hearing on the merits. (*In re Hunter W.* (2011) 200 Cal.App.4th 1454, 1463; *Lesly G., supra*, 162 Cal.App.4th at pp. 912-915; *In re Hashem H.* (1996) 45 Cal.App.4th 1791, 1800 (*Hashem H.*)) In such a situation, a court errs when it fails to hold a hearing on the petition. (See, e.g., *Kenneth S., supra*, 169 Cal.App.4th at pp. 1359-1360 [where court determined the section 388 petition stated a prima facie case, it erred when it failed to hold the required evidentiary hearing]; *Lesley G., supra*, 162 Cal.App.4th at pp. 914-915 [court's denial of section 388 petition without a hearing, after having found it stated a prima facie case, did not comport with due process or the statutory mandate of section 388]; *Hashem H., supra*, 45 Cal.App.4th at p. 1800 [court denied appellant's due process right to a full and fair hearing on the merits of section 388 petition, which made an adequate prima facie showing of changed circumstances, when it failed to hold a hearing on it.]

Although the court in this case ordered a hearing on the second petition, the court did not hold the hearing but instead terminated dependency jurisdiction. This was error, as mother had a due process right to a hearing on the second petition, which right the court deprived her of when it terminated jurisdiction.

The Department asserts the court was required to terminate jurisdiction on December 6 by section 364, subdivision (c), which provides that at a section 364 review

on the petition for modification be held within 30 calendar days after the petition is filed.'" (Italics added.)

hearing the court shall determine whether continued supervision is necessary “[a]fter hearing any evidence presented” and “shall terminate [dependency] jurisdiction unless the social worker or his or her department establishes by a preponderance of the evidence that the conditions still exist which would justify initial assumption of jurisdiction under Section 300, or that those conditions are likely to exist if supervision is withdrawn. . . .” The Department reasons that because the court had before it uncontested evidence that jurisdiction no longer existed, the court had no discretion to continue its jurisdiction.

We disagree. While section 364, subdivision (c) does state that the court “shall” terminate jurisdiction if the conditions for jurisdiction no longer exist, the statute does not state that the court is without authority to continue the review hearing before ordering termination of jurisdiction. Neither of the cases the Department cites, *In re N.S.* (2002) 97 Cal.App.4th 167, 173 and *Bridget A. v. Superior Court* (2007) 148 Cal.App.4th 285, 304, supports the proposition that the court does not have discretion to continue a section 364 review hearing, particularly in a circumstance such as here, where the court had set a hearing on a section 388 petition that sought to vacate jurisdictional findings.

The court’s failure to hold a hearing on the second petition necessitates reversal of the order terminating jurisdiction. By her second petition, mother sought to vacate the jurisdictional findings on the ground that there was no basis for them. Instead of holding a hearing on the petition, the court terminated jurisdiction. While the ultimate result of the court’s action is the same as if the court had granted the second petition, i.e. mother’s children are no longer under dependency jurisdiction, the termination of jurisdiction leaves mother in a different position than she would have been in had the second petition been granted, as the jurisdictional findings remain in place. For this reason, the second petition was not moot merely because the conditions for jurisdiction no longer existed, and the court erred in concluding otherwise.

The Department asserts any error in failing to hold a hearing on the second petition was harmless. It argues that since the second petition was based on an erroneous

assertion there was new evidence from Stanford, as well as unsubstantiated allegations that certain witnesses were being investigated, and other evidence existed which supported jurisdiction, it was not reasonably probable the end result of the second petition would have been more favorable than the end result of the section 364 review hearing. (Cal. Const., art. VI, § 13; *In re Celine R.* (2003) 31 Cal.4th 45, 60; *People v. Watson* (1956) 46 Cal.2d 818, 836.)

The Department, however, disregards the court's initial determination that the petition stated a prima facie case sufficient to require a hearing on the merits. The court never held that hearing; instead it dismissed dependency jurisdiction and vacated the hearing date. We conclude the error merits reversal, as "we cannot presume that a hearing would have been fruitless." (*Lesly G.*, *supra*, 162 Cal.App.4th 904, 916; see also *Kenneth S.*, *supra*, 169 Cal.App.4th at pp. 1359-1360 [failure to provide parent an evidentiary hearing on his modification petition not harmless error]; *In re Aljamie D.* (2000) 84 Cal.App.4th 424, 433.) In so concluding, we express no opinion on the merits of the second petition. We hold only that in this case, once the juvenile court set the hearing on the second petition, it was obligated to hold the hearing before terminating dependency jurisdiction. Since we conclude a hearing should have been held on the second petition, we do not address mother's contention that the court erred in summarily denying the first section 388 petition, as the two petitions seek the same relief.

DISPOSITION

The order dismissing dependency jurisdiction is reversed. The matter is remanded to the juvenile court with directions to hold a hearing on mother's request to vacate the jurisdictional findings.

Gomes, J.

WE CONCUR:

Wiseman, Acting P.J.

Cornell, J.