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

In re ELIZABETH L., a Person Coming  
Under the Juvenile Court Law.

STANISLAUS COUNTY COMMUNITY  
SERVICES AGENCY,

Plaintiff and Respondent,

v.

LUIS L.,

Defendant and Appellant.

F069705

(Super. Ct. No. 516828)

**OPINION**

**THE COURT**\*

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

Mitchell Keiter, 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., Kane, J., and Peña, J.

Luis L. appeals from the juvenile court's order denying his request under Welfare and Institutions Code section 388<sup>1</sup> to modify its dispositional order removing his two-year-old daughter Elizabeth from his custody. He contends the juvenile court abused its discretion in refusing to consider new evidence. We affirm.

### **PROCEDURAL AND FACTUAL SUMMARY**

Dependency proceedings were initiated in September 2013 by the Stanislaus County Community Services Agency (agency). At that time, Luis and his wife, Stephanie, had temporary custody of Stephanie's then five-year-old niece, G.R., and 15-month-old nephew, Matthew. G.R. and Matthew are the children of Stephanie's sister A.

The agency received a report that G.R. went to school the day before with a bump on the left side of her forehead, scratches on her cheek and a swollen nose. G.R. told the school staff that she fell down the stairs prior to school and that her head and neck hurt. The week before, G.R. had a cut on her lower eyelid. She said she injured herself after slipping in a restaurant. G.R. denied falling down stairs while in Stephanie's presence.

Emergency Response Social Worker Michelle Silveira and Stanislaus County Sheriff's Detective Jesse Tovar responded immediately to Luis and Stephanie's home. Silveira noticed that Matthew was very thin for his age and appeared to have numerous bruises and scars in various stages of healing on his stomach and legs. G.R. stated that she did not like her real mom, A., and that one time A. hit her with a tablet and cut her eye. G.R. denied that Stephanie or anyone in the home hit her.

Stephanie and Luis said A. had been taking G.R. and Matthew in and out of their custody. When Silveira expressed concern about Matthew's weight and injuries, Luis

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

and Stephanie explained that they were trying to teach him to walk and he fell. They also said that A. returned him to their care the week before after having custody of him for several months. They agreed to meet Silveira at the emergency room with the children.

On her way to the emergency room, Silveira stopped at Elizabeth's daycare to check her for injuries or signs of abuse or neglect. Elizabeth appeared healthy, was well-groomed and well-dressed and did not have any visible marks or bruises.

At the emergency room, a nurse told Silveira that Matthew weighed 15 pounds which was very underweight for his age. Matthew had multiple bruises all over his body and burn marks in various stages of healing. G.R. was also examined and found to have a large bruise on her right hip and buttocks. G.R. stated that A. hit her with a belt and a hard toy on at least two different occasions.

Silveira told Luis and Stephanie they did not protect the children because they did not seek medical help for them or report that they had been abused. Luis said they did not want to get A. into trouble. After consulting with her supervisor, Silveira took G.R. and Matthew into protective custody.

The following day, Detective Joseph Delgado interviewed G.R. who initially stated that A. hit her with a belt, but then disclosed that Stephanie hit her multiple times, picked her up off the floor by her neck and dropped her, and hurt her by putting a hot towel on her. When Stephanie took G.R. to the doctor, she told G.R. to say that the marks, bruises and hot towel marks were made by A. When she had bruises or marks, Stephanie kept her home from school. Once G.R. told the teacher her neck hurt and Stephanie put hot sauce in her mouth. G.R. did not see Stephanie hit Matthew but heard the sound of her hitting him and saw the marks on him.

Tovar interviewed Stephanie and Luis at the sheriff's substation. He read Stephanie her rights and she agreed to speak to him. She said she had had G.R. since June 2013. She said Matthew was with A. from August 20 to approximately September

16, 2013. According to Stephanie, it was during that time that Matthew received his marks and bruises. Stephanie told Tovar that G.R. lied and she denied hitting G.R. and putting hot sauce in her mouth. She said she did not see G.R.'s bruises because she did not bathe her and did not report A. for abusing the children for fear A. would be deported. Luis denied that Stephanie hit the children.

Stephanie was arrested for physically abusing G.R. and Matthew. Elizabeth was allowed to stay in Luis's care provided he followed a safety plan which forbade Stephanie from being alone with Elizabeth. Luis agreed to abide by the plan. The day after Stephanie's arrest, Luis bailed her out of jail.

Four days later, Silveira went to Luis and Stephanie's home. Stephanie was in the home and Elizabeth was in daycare. Stephanie said she had been spending the night because she did not have anywhere else to stay. She and Luis questioned why the safety plan was necessary. The agency decided Stephanie and Luis were unlikely to comply with the plan and took Elizabeth into protective custody.

The agency filed a dependency petition alleging Elizabeth was at risk of serious physical harm (§ 300, subd. (a)) and that Stephanie and Luis failed to protect her. (§ 300, subd. (b).) Elizabeth was initially placed in foster care and ultimately with a paternal uncle.

The juvenile court exercised its dependency jurisdiction over G.R. and Matthew and ordered the case transferred to Orange County, the county of A.'s residence. The court ordered Elizabeth detained and set a contested jurisdictional hearing.

In January 2014, the juvenile court convened a contested jurisdictional/dispositional hearing (combined hearing) as to Elizabeth. At county counsel's request, the DVD of G.R.'s interview was entered into evidence without objection and played for the court.

County counsel called Luis to testify and tried to establish when the children were in his and Stephanie's custody. Luis said G.R. had been in their care since June 2013 and had not returned to A. He also said G.R. was with them around the Fourth of July and was thin and bruised. County counsel asked Luis if the bruise on G.R.'s hip had been there since June of 2013. He said the bruise occurred when A. came to their home and hit her with a belt. Asked why he did not contact child protective services, he stated "I don't know." He also explained that the burn on G.R.'s leg occurred after she sat on the towel that he left on a wooden bench.

Luis testified that Matthew was also with them on the Fourth of July and was also thin and bruised. He returned to A. from August 20 to September 16, 2013. However, Luis also testified he first saw Matthew's bruises when A. returned Matthew to them in September. He knew they were in various stages of healing and he also recognized that Matthew was extremely malnourished. He agreed that "perhaps" Matthew needed immediate medical attention but he did not seek it for him. He never suspected that Stephanie was causing Matthew's bruises.

The juvenile court asked Luis how long he and Stephanie tried to get help for Matthew. Luis could not remember but after county counsel showed him Matthew's immunization records, he remembered taking him to the doctor on several dates including July 10, 2013. Luis said the doctor told them Matthew was malnourished and needed treatment. However, Luis said he and Stephanie did not take Matthew to the emergency room because they were feeding him and they did not want to get the family in trouble.

Luis further testified that he complied with the safety plan by not letting Stephanie stay in the home and that he never allowed Stephanie to be around Elizabeth. He said he wanted the family to be together.

Luis testified he never intentionally harmed G.R. or Matthew and never saw Stephanie hurt them. He said he had been going to parenting classes and anger

management counseling. He said he realized it was a mistake not to take Matthew to the doctor and he felt badly about it.

The juvenile court adjudged Elizabeth a dependent under section 300, subdivisions (a) and (b), ordered her removed from Luis and Stephanie's custody, ordered reunification services for them both and set a six-month review hearing for May 29, 2014.

In ruling, the juvenile court found that G.R. and Matthew suffered serious physical abuse in Luis and Stephanie's care and that Stephanie and Luis failed to protect them from the abuse. The court left open the possibility that A. inflicted some of the abuse but did not believe she was responsible for all of it. The court stated:

“I believe that both [Stephanie and Luis] seriously failed to be protective of either one of these children, and I believe that Stephanie was, indeed, the perpetrator of abuse. I don't know to the extent of [Luis] inflicting injuries, but to fail to do anything, to fail to protect these poor little children, to fail to ensure that their needs are being attended to is, in this [c]ourt's mind, physical abuse, and it is also serious abuse ....”

In February 2014, Stephanie filed a section 388 petition asking the juvenile court to vacate its dispositional order removing Elizabeth from her custody based on what she claimed was new evidence that A. abused G.R. and Matthew. Stephanie attached copies of posts on Facebook between her and A. and their sister Amanda made prior to and including October of 2013. In the only post between Stephanie and A., Stephanie told A. she needed her to bring Matthew to her. A. allegedly replied “Yes, mija, thank you, I will take him to you on September 15th.” In posts from Amanda to A., Amanda appears to be urging A. to admit that she abused the children. In one post, Amanda wrote, “they are accusing [Stephanie] of hitting [G.R.] and Matthew, you must respond for what you did, it was you, not her.” In posts to Amanda, A. wrote “I regret hitting them, [especially] ... Matthew” and “I can't they will send me to jail and have me deported” in response to Amanda's urging that she tell the truth and accept the consequences of her actions.

The juvenile court denied Stephanie's section 388 petition without an evidentiary hearing, finding she failed to state new evidence or a change of circumstances. The court explained that the "new evidence" Stephanie alleged was all dated prior to the contested jurisdictional hearing held in January 2014. Stephanie appealed from the juvenile court's dispositional order removing Elizabeth from her custody and from its denial of her section 388 petition. We affirmed (*In re Elizabeth L.* (Aug. 15, 2014, F068743 [nonpub. opn.]).

In March 2014, during the pendency of Stephanie's appeal, Luis filed a section 388 petition asking the juvenile court to vacate its order removing Elizabeth from his custody and order her returned based on the postings between Stephanie and her sisters. The court set an evidentiary hearing on the petition to determine whether Luis knew about the postings and their content.

In mid-May 2014, the agency filed its report for the six-month review hearing and recommended the juvenile court terminate Luis and Stephanie's reunification services because they refused to take responsibility for any of the abuse G.R. and Matthew suffered while in their custody.

On May 20, 2014, the juvenile court conducted a contested hearing on Luis' section 388 petition. Stephanie's attorney informed the court that a social worker had discussed the Facebook postings with A. and asked the court for a continuance to determine what A. said. The court did not find good cause to continue the hearing because it was Luis's section 388 petition not Stephanie's. The court also questioned the reliability of the Facebook postings, stating they lacked proper foundation. The court denied Luis's section 388 petition because the alleged new evidence was not material given its jurisdictional findings that Luis and Stephanie failed to protect G.R. and Matthew.

This appeal ensued.

## DISCUSSION

Luis contends the juvenile court erred in denying his section 388 petition because the Facebook postings had not been authenticated. He further contends the postings were material to the reasonableness of his reunification services. To that end, he argues his case plan required him to admit to seeing Stephanie abuse the children. If the postings showed that A. abused the children then there would be grounds to alter his services plan. We find his contentions meritless.

Section 388, subdivision (a) states in pertinent part: “[A parent] ... 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 ... for a hearing to change, modify, or set aside any order of court previously made or to terminate the jurisdiction of the court.”

“To prevail on a section 388 petition, the moving party must establish that new evidence or changed circumstances exist so that the proposed change in the court’s order would promote the best interests of the child.” (*In re Marcelo B.* (2012) 209 Cal.App.4th 635, 641-642.) Further, “the change of circumstances or new evidence must be of such significant nature that it requires a setting aside or modification of the challenged prior order.” (*Ansley v. Superior Court* (1986) 185 Cal.App.3d 477, 485.) One court has further defined “new evidence” to denote “material evidence that, with due diligence, the party could not have presented at the dependency proceeding at which the order, sought to be modified or set aside, was entered.” (*In re H.S.* (2010) 188 Cal.App.4th 103, 105.) “The determination of whether to change an existing order is ‘committed to the sound discretion of the juvenile court, and [its] ruling should not be disturbed on appeal unless an abuse of discretion is clearly established.’ [Citation.] An abuse of discretion occurs when the juvenile court has exceeded the bounds of reason by making an arbitrary,

capricious or patently absurd determination. [Citation.]” (*Marcelo B.*, *supra*, 209 Cal.App.4th at p. 642.)

As a preliminary matter, we note that the juvenile court did not deny Luis’s section 388 petition because the postings were not authenticated. The court doubted their authenticity but denied the petition because it found the evidence was not material. Consequently, we need not address authentication as a basis for denying Luis’s petition.

Further, we concur A.’s Facebook postings were not material to Luis’s court-ordered services. The juvenile court found that G.R. and Matthew were seriously physically abused while in Luis and Stephanie’s care. The court did not rule out the possibility that A. inflicted some of the abuse, but believed that Stephanie physically abused the children and that Luis at a minimum failed to protect them. As a result, the juvenile court adjudged Elizabeth its dependent, ordered her removed from Luis and Stephanie’s custody, and adopted a services plan that required Luis to address the physical abuse G.R. and Matthew suffered while in his care. Contrary to Luis’s assertion, the case plan did not require him to admit seeing Stephanie abusing the children. Rather, it required him to take responsibility for his part in the abuse. Thus, even if A.’s postings were fully credited, it would not change the juvenile court’s jurisdictional findings and its dispositional orders, including the reunification plan components. If anything it would merely result in spreading the blame to A.

We find no error on this record and affirm.

#### **DISPOSITION**

The judgment is affirmed.