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

In re ADRIAN C., et al., Persons Coming Under
the Juvenile Court Law.

STANISLAUS COUNTY COMMUNITY
SERVICES AGENCY,

Plaintiff and Respondent,

v.

CHRISTOPHER C., et al.,

Defendants and Appellants.

F069995

(Super. Ct. No. 516653 & 516654)

OPINION

THE COURT*

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

Liana Serobian, under appointment by the Court of Appeal, for Defendant and
Appellant Christopher C.

Marsha F. Levine, under appointment by the Court of Appeal, for Defendant and
Appellant Daniella B.

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

* Before Cornell, Acting P.J., Gomes, J. and Peña, J.

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Christopher C. (father), the presumed father of Adrian C. and Izayah C. (collectively the boys), appeals the juvenile court's summary denial of his Welfare and Institutions Code section 388¹ petition without an evidentiary hearing and subsequent termination of parental rights. He contends the juvenile court abused its discretion in denying the petition, therefore both the denial of the petition and the order terminating parental rights must be reversed. The boys' mother, Danielle B. (mother) also appeals. Mother does not assert any independent issues; instead, she joins in father's opening brief insofar as it challenges the order terminating parental rights. Finding no abuse of discretion, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

The parents and Adrian came to the attention of the Stanislaus County Community Services Agency (Agency) in July 2012, when a referral was substantiated for general neglect with respect to then two-month-old Adrian due to substance abuse by both parents. Mother refused to work with a public health nurse or to participate in educational services through the Welfare to Work program, and had not taken Adrian to a doctor's appointment since his birth. The parents admitted to recent methamphetamine use and agreed to leave Adrian in the care of his paternal grandmother with a safety plan in place and to participate in voluntary family maintenance services.

Mother began attending interim groups at First Step, but believed her issues were related more to her mental health than to substance abuse. Mother had been on medication in the past for depression and bipolar disorder. After mother failed to attend her assessment appointment and missed several interim groups, she reported that she did not want family maintenance services and declined to submit to drug testing. Mother admitted there was a domestic violence incident in which she reported hitting father, but

¹ Undesignated statutory references are to the Welfare and Institutions Code.

later denied it became physical. Mother acknowledged she could not safely parent Adrian while using drugs, but she still requested case closure.

Father, who had a recent criminal history involving felony convictions of possession of controlled substances and a misdemeanor for obstruction of justice, was involved with Proposition 36 and attending classes at the Living Center three times per week. Father took hydrocodone to deal with pain caused from a shooting and Xanax for anxiety that resulted from his having Post Traumatic Stress Disorder (PTSD) as a result of the same shooting. He missed his scheduled subsequent substance abuse assessment due to a car accident, and tested positive for marijuana and opiates. Father admitted he was not in compliance with his Proposition 36 program, but he planned to stay clean and requested closure of the family maintenance case.

At Izayah's birth in April 2013, mother and Izayah tested positive for amphetamines. A Perinatal Substance Use Needs Assessment was performed, which found high risk factors due to mother not wishing to attend rehab, father being on probation, and mother's inadequate prenatal care. Mother admitted to both injecting and smoking methamphetamine intravenously, and lacked stable housing. Father failed to cooperate with his Proposition 36 program and had just been released from jail. Father had signed paternity declarations for the boys at the hospital and his name was on their birth certificates; he was determined to be the boys' presumed father.²

A dependency petition was filed on April 10, 2013, which alleged then 11-month-old Adrian and newborn Izayah came within the provision of section 300, subdivision (b) (failure to protect), based, in part, on (1) mother's Child Protective Services (CPS) history, which included seven CPS referrals in the past year of general neglect allegations involving prenatal substance abuse exposure, drug use in the home in Adrian's presence,

² Mother identified another man, Jacob S., as Adrian's biological father. Subsequent DNA testing, however, excluded Jacob from paternity and he was dismissed from the case.

lack of adequate care for Adrian due to continued substance abuse, physical violence between the parents, lack of medical care for Adrian, and mother's mental health issues; (2) the parents' refusal to participate in family maintenance services after the July 2012 referral; and (3) Izayah testing positive for amphetamines at birth. The boys were detained and placed in a licensed foster home. At the April 11, 2013 detention hearing, father was provided with referrals for services, including an AOD assessment, and a clinical assessment and parenting classes at Sierra Vista.

In a report prepared for the jurisdiction/disposition hearing, the social worker stated that the parents were young and had a history of substance abuse dating back to their early teenage years. Mother, who was 19 years old, had a turbulent youth and was a ward of the court for most of her teenage years. She did rehab when she was 15 and was released from probation at 17. She and father became involved with each other when mother was three-months pregnant with Adrian. They lived together for several months; father held Adrian out as his own child and signed a declaration of paternity. Mother, however, claimed that father had not been in Adrian's life, as he had only seen Adrian about three times. After Adrian's birth, mother went to live with Adrian's maternal grandmother. There was not enough room to stay with father, as he slept in a laundry room, and he would be high on methamphetamine and Vicodin; the maternal grandmother did not want them living together. Mother said she only used methamphetamine twice prior to Adrian's conception and once per month after his birth, although she once used for three weeks straight and "shot it" twice. Prior to Izayah's birth, she was clean for two weeks and then used, which induced his birth.

Mother and father had a chaotic relationship that involved verbal fights, with numerous contacts with the police; mother also reported a domestic violence incident where father hit her once and she hit him back twice, which did not occur in Adrian's presence. Mother had a bruise the size of a quarter on her arm, which she said father had recently inflicted. She reported this to a women's shelter and the police responded.

Father's proclivity to violence was indicated in the numerous calls to the police, in addition to his having been placed on a psychiatric hold for being a danger to himself. Mother told the social worker she did not wish to be in a relationship with father; while she was not scared of him and she loved him "to death," she felt he loved drugs more, specifically "meth."

Father, who was 22 years old, told the social worker in an interview on April 25, 2013 that he had been an addict for eight years, but he was "winning this time." He had missed his AOD appointment and was going to "hand over my rights," but he changed his mind and wanted to get his kids. Father last used methamphetamine on April 24, 2013, when he smoked about \$10 worth. He was using "less and less . . . about \$10 every other day." Father said he met mother two years ago. They had lived together, but were not doing so currently and were "not going to be a couple." Father initially denied needing services, but later stated he could use some parenting classes and counseling services.

The boys remained placed together in the foster home they had been in since detention. Adrian was a "very happy little boy" who loved to chuckle and gain the attention of those around him. He cried infrequently and was verbal when necessary to get his needs met. He displayed appropriate bonding and attachment, and loved to interact with household members. Izayah was described as a joyous little boy who loved to be held and to observe his environment.

Despite multiple attempts by the Agency to schedule visitation for father, he failed to return calls and had not visited the boys since detention. In addition to missing his AOD appointment, father had not utilized his referral to Sierra Vista. The proposed service plan for father included a mental health evaluation to determine if psychotropic medication was appropriate; individual counseling at Sierra Vista to address his reported anxiety and PTSD; a 52-week domestic violence program; a parenting program at Sierra

Vista; and AOD assessment and subsequent treatment as recommended; and substance abuse testing. Two hour weekly supervised visits were also recommended.

A contested combined jurisdiction/disposition hearing was not held until July 23, 2013, due to two continuances. In addendum reports prepared for the continued hearing, the social worker reported that mother had been hospitalized in a psychiatric facility and, upon release, called the social worker for housing assistance. The social worker orchestrated her immediate admission to a clean and sober facility on May 14, 2013; mother tested positive for methamphetamine on admission and for the next two days, finally testing negative on May 16. She discharged herself from the program, however, on May 17. As of June 26, father had not visited the boys and had not attended an AOD appointment. The social worker had made another referral and father had an appointment for an assessment set for July 8.

Father testified at the hearing. He admitted domestic violence, both verbal and physical, but claimed mother was the aggressor. He did not participate in any services during the voluntary family maintenance case and did not successfully complete the Proposition 36 program. He had been addicted to Vicodin daily for 10 years and methamphetamine for four years. He claimed he had not used the two drugs for “going on two and a half months,” but admitted he used “weed” to “get him through the withdrawals.” He got himself clean by being “locked down” in a trailer on his boss’ property in the country. He was not in any program to maintain his sobriety.

He did not remember getting referrals for services because he was “probably too high.” He did not go to the July 8 assessment appointment because he was not ready to come to Modesto, which he called “the meth capital.” He had not followed through on anything the social worker had asked him to do. He had not visited the boys, but did not know why, stating that when you come back to reality after being on drugs “it’s hard to face sometimes.” He did not know if he could “handle it” but he was just using that as an excuse; he said “I just got to man up and do it. It’s my kids.” It had been over three

months since he had seen the boys. He used to go long periods without seeing Adrian because mother did not want him around the house. He was working at a dairy, but that job was going to end in a week; after that, he was going to work with Tool Man Tow.

Father and mother stopped being a couple before Izayah was born. Father has PTSD from “the traumatic stuff I’ve been through. I’ve been shot with a shotgun. I’ve been stabbed 11 different times.” This was from “stupid mistakes” on the “streets.” He wanted the boys returned to him that day. He was back at work, which was his “new drug of choice.” When asked who would care for the boys while he was working, father responded that was “a good question[,]” and he guessed he would stop working for a while. He did not think he “needed” substance abuse treatment, but he would do it.

After hearing argument, the juvenile court found the petition’s allegations true, as both parents have mental health, domestic violence and substance abuse issues; adjudged the boys dependents; removed them from parental custody; and ordered reunification services for mother and father, adopting the proposed case plan.

Six-Month Review Hearing

In a January 2014 report prepared for the six-month review hearing, the Agency recommended termination of the parents’ reunification services and setting of a section 366.26 hearing to consider the permanent plan of adoption. The social worker had not had any contact with mother in over five months or with father over the reporting period, and their circumstances were unknown at that time. Neither parent had participated in court-ordered reunification services. Each month the social worker mailed letters to father scheduling monthly compliance appointments, but father had not kept one appointment. In the nearly six months since the July 24 jurisdiction/disposition hearing, mother and father each visited the boys three times. Father’s visits occurred on July 24, when he arrived 16 minutes late and left early; October 23, when he visited for 45 minutes and left early; and December 4, when he visited for one hour. On December 11, he was reported to be in jail.

The boys had been placed in the licensed foster home of S.D. on May 16, 2013. On January 3, 2014, the foster parents, S.D. and G.D., filed a request for de facto parent status.

At the January 15, 2014 review hearing, the juvenile court granted the D.s' request for de facto parent status. Father was "downstairs," but was not brought up for the hearing, but his attorney was present. Mother was not present, but her attorney asked for a continuance as mother had attempted or had gotten into the "COT program." The juvenile court continued the hearing to January 31.

In an addendum report, the social worker stated that mother was an inpatient at Doctor's Behavioral Health Center, where she had been since January 2, 2014. She had been diagnosed with chronic schizophrenia and she was not a good fit for substance abuse treatment.

The review hearing was continued several times due to mother's confinement in a locked facility, the parties' request for a contested hearing, and mother's consent to appointment of a guardian ad litem. The hearing was held on March 28, 2014, with both parents present. Father made an offer of proof that he had been at Nirvana Residential Treatment Facility for 11 days and was on a seven-day blackout. He had an appointment with Sierra Vista which ran concurrently with his AOD assessment, so he decided to attend the assessment and pursue drug and alcohol treatment before pursuing the counseling portion of his case plan. He had been visiting the boys regularly since February, when his visits were reinstated, and had been in custody from December 17, 2013 through January 27, 2014. Father understood the recommendations, but asked the court for six more months of reunification services. County counsel accepted the offer of proof, and reported that the public guardian had been appointed as mother's conservator. After hearing argument, the juvenile court explained that it did not see how the boys, who were under three years of age, could be returned to either parent within six months.

Consequently, it terminated the parents' reunification services and set a section 366.26 hearing for July 17, 2014. Visits were reduced to one a month.

The Section 388 Petition and Termination Hearing

The "Section 366.26 WIC Report" was filed on June 27, 2014. The Agency recommended termination of parental rights and a permanent plan of adoption for the boys with their current caregivers. Mother, who was in a locked mental health facility, had not visited the boys since the last hearing. Father had once per month visits with the boys at the Agency and had maintained monthly contact. Father was a "no show" for his visit on April 2, 2014, but visited the boys at the Agency on April 16, May 7 and June 4, 2014.

The boys were reported to be in good health with no developmental or mental health issues. The D.s wanted to adopt the boys and were certain to do so if given the opportunity. The social worker reported that the boys had been with the D.s since May 2013, when they were placed in the D.s' home; the boys had lived with them most of their young lives and really had known no other caretakers; and the boys and the D.s were deeply and mutually bonded. The boys clearly were thriving in the D.s' home.

On July 15, 2014, father's trial counsel filed a section 388 petition requesting the juvenile court to vacate the section 366.26 hearing and reopen reunification services for him, giving him an additional six months to reunify. Father's counsel asserted that since the six-month review hearing, father had engaged in services on his own: he graduated from New Hope Recovery House; he was employed full-time; he enrolled in Positive Parenting at Sierra Vista; and he had consistently visited the boys. He further asserted the requested order would be better for the boys because father still had parental rights, it was always in a child's best interest to have a parent, and father was willing to step up and be that parent.

Attached to the petition were the following documents: (1) a June 19, 2014 certificate of graduation awarded to father for completing the requirements of treatment

presented by Recovery Systems Associates/New Hope Recovery House; (2) father's paystub from Six Thirty Six Company, Inc., for IHOP, that covers the pay period June 16-29, 2014; and (3) an April 24, 2014 letter to father from Sierra Vista providing information regarding the six-week parenting class, which was scheduled to start on July 1, 2014.

On July 16, 2014, the juvenile court denied the petition without a hearing, finding that the request did not state new evidence or a change of circumstances, and the proposed change of order did not promote the boys' best interest. The juvenile court explained: "Father failed to engage in any services for a period of at least 12 months since removal. Children were 11 mos. and 2 days old at removal. Children need permanency. Father barely shows changing circumstances, and enrollment in a parenting program is a far cry from completion of the same."

At the July 17, 2014 section 366.26 hearing, father made an offer of proof that mirrored the section 388 petition, adding that he had been sober 126 days and that visits were going well. In argument, father's attorney objected to the Agency's recommendation, as well as to the juvenile court's denial of the section 388 petition without a hearing. The juvenile court stated that it considered father's petition, but it was very concerned that father did absolutely nothing for at least 12 months after the boys were removed. Given the boys' ages at the time of removal, services normally would be limited to six months, but the children had been removed for 17 months. The juvenile court understood that sometimes it takes parents some time to start engaging in services, but noted that children should not have to wait forever for their parents to grow up. The boys had been living in the care of the de facto parents since May 2013; the juvenile court believed the boys were bonded and doing well in the home. At this point, the juvenile court had to consider the boys' best interests, so it had no option but to follow the Agency's findings and recommendations. The juvenile court terminated parental

rights after finding the boys adoptable and that termination would not be detrimental to them.

DISCUSSION

Father challenges the summary denial of his section 388 petition without a full evidentiary hearing. In his view, he made a prima facie showing of changed circumstances, as he made significant changes in the months before the section 366.26 hearing on his own volition, which entitled him to a hearing to show that extending his reunification services another six months was in the boys' best interests. He asserts that at such a hearing, he could have established that the boys maintained visitation with father's relatives and himself such that the boys could transition easily back into that the familial environment upon his completion of the case plan. As discussed below, we disagree with father and conclude the juvenile court did not abuse its discretion when it denied his petition.

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;³ *In re Stephanie M.* (1994) 7 Cal.4th 295, 317 (*Stephanie M.*).

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.*, at p. 310.) For instance, if a parent makes a prima facie showing of

³ California Rules of Court, rule 5.570(d) provides: "The court may deny the petition ex parte if ... the petition [under section 388] fails to state a change of circumstance or new evidence that may require a change of order or termination of jurisdiction, or fails to show that the requested modification would promote the best interest of the child"

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 father's counsel failed to make a prima facie showing of either changed circumstances or the boys' best interests. With respect to changed circumstances, father failed to show anything more than that his circumstances were changing, not that they had changed. Father had a lengthy history of drug abuse and had been sober for only four months. Father had tried to stop using on his own early in the case, but apparently relapsed. His sobriety at the time of the petition was untested, as it had been only one month since he completed drug treatment. While father also points to his participation in parenting education as evidence that he was working on his case plan components, he had not completed the program. Moreover, he had not begun to engage in the other components of his plan, such as individual counseling and the year-long domestic violence program.

Although father's developments were positive, they did not constitute changed circumstances within the meaning of section 388. At most, they showed "changing circumstances" regarding father's ability to parent. (*In re Casey D.* (1999) 70 Cal.App.4th 38, 48-49 (*Casey D.*) [court did not abuse its discretion in denying § 388

petition given mother's short drug recovery period and failure to complete prior treatment programs, which showed only changing circumstances]; *In re Clifton B.* (2000) 81 Cal.App.4th 415, 423-424 [200 days of substance abuse treatment not enough to reassure juvenile court that parent's most recent relapse was his last].)

Even assuming father showed changed circumstances, he did not establish that reopening reunification services would be in the boys' best interests. The parent bears the burden of showing in a section 388 petition both a change of circumstance and that the proposed change is in the child's best interests. A petition only alleging changing circumstances, which would lead to a delay in the selection of a permanent home, to see if a parent could eventually reunify with a child at some future point, does not promote stability for the child or the child's best interests. (*Casey D.*, *supra*, 70 Cal.App.4th at p. 47.)

To understand the element of best interests in the context of a section 388 petition brought, as in this case, shortly before the section 366.26 hearing, we look to our Supreme Court's decision in *Stephanie M.* At this point in the proceedings, a parent's interest in the care, custody, and companionship of his or her children is no longer paramount. Rather, once reunification efforts end, the focus shifts to the children's needs for permanency and stability; there is in fact a rebuttable presumption that continued out-of-home care is in the best interests of the child. (*Stephanie M.*, *supra*, 7 Cal.4th at p. 317.) A court conducting a modification hearing at this stage of the proceedings must recognize this shift of focus in determining the ultimate question before it, that is, the best interests of the child. (*Ibid.*)

Father did not show it would be in the boys' best interests for the juvenile court to order continued services for him. That option would have delayed permanency and stability for the boys. Izayah had never been in father's care, as he was removed at birth, and father apparently had not been involved in Adrian's life for any significant period of time prior to Adrian's detention at 11 months of age. Father paid little attention to the

boys during most of the reunification period; he only began visiting consistently 10 months after removal. Notably, in advocating his position, father ignores the boys' need for permanence and stability. Neither the juvenile court nor this court, however, may do so.

In sum, father failed to make a prima facie showing in his petition of changed rather than changing circumstances, and that continuing services would be in the boys' best interests.

DISPOSITION

The juvenile court's July 16, 2014 order denying the Welfare and Institutions Code section 388 petition and its July 17, 2014 order terminating parental rights are affirmed.