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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

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

ORANGE COUNTY SOCIAL SERVICES
AGENCY,

Plaintiff and Respondent,

v.

CYNTHIA M. et al.,

Defendants and Appellants.

G050047

(Super. Ct. Nos. DP023792 &
DP023793)

O P I N I O N

Appeals from an order of the Superior Court of Orange County, Deborah C. Servino, Judge. Affirmed.

Diana W. Prince, under appointment by the Court of Appeal, for Defendant and Appellant Cynthia M.

Pamela Rae Tripp, under appointment by the Court of Appral, for Defendant and Appellant Jesse B.

Nicholas S. Chrisos, County Counsel, Karen L. Christensen and Jeannie Su, Deputy County Counsel, for Plaintiff and Respondent.

* * *

Cynthia M. (mother) and Jesse B. (father) appeal from an order terminating their parental rights to their children, Sophia B. and Emma B. Neither parent attacks the termination order directly; instead, both argue that the juvenile court erred by summarily rejecting their petitions for a change in its prior order denying them reunification services, just before it ordered termination of their parental rights. Both parents contend they made a prima facie showing of changed circumstances and that a change in the prior order would be in the children's best interests. We find their arguments unpersuasive, and affirm the order.

FACTS

On May 14, 2013, mother and father brought four-week-old Emma to the emergency room at Children's Hospital of Orange County (CHOC), explaining that she was congested and vomiting. An examination revealed Emma had multiple injuries, including three or four broken ribs on each side of her chest and two skull fractures. There were indications that Emma had also suffered prior brain trauma. The parents attributed these injuries to Emma's sister, one-year-old Sophia, who had fallen on top of Emma on more than one occasion.

The doctor who examined Emma concluded her injuries were not consistent with the parents' explanation, and CHOC reported the case as potential child abuse. Both children were taken into protective custody. Emma was initially placed on a hospital hold, and Sophia was transported to Orangewood Children and Family Center, and then to a group home.

In its jurisdiction/disposition report, the Orange County Social Services Agency (SSA) noted that mother had a prior history as a dependent, and was adopted at age nine due to substance abuse and neglect involving her own birth parents. When

mother was 14 years old, she intentionally poisoned her adoptive family's dogs in retaliation for being placed on restriction. She admitted to the poisoning, but stated she had only intended to make the dogs sick, not kill them. SSA also noted father had a delinquency history spanning from 2005 to 2012.

SSA also reported that although mother stated that her own younger sister had visited with her on the weekends, the children had never been left alone with the sister. Mother denied that Emma had ever been left alone with anyone other than her and father. She also stated she did not believe father had inflicted the injuries on Emma because "[w]e both are always with them."

Father denied inflicting any injuries on Emma, either intentionally or accidentally. Father also denied that anyone else living in their residence might have injured Emma because he and mother were her only caretakers. When the social worker told him that Emma's severe injuries could not have been accidentally inflicted, he responded that he understood that, but maintained he was unsure what had happened to cause the injuries.

As of June 2013, when SSA filed its jurisdiction/disposition report, Emma was described as brain damaged and unlikely to ever walk or talk. She underwent surgery for insertion of a cerebral shunt to treat hydrocephalus. Sophia was described as healthy, with no known injuries, and developing at an appropriate rate. SSA deferred any disposition recommendation pending receipt of further medical reports. Pursuant to the parties' stipulation, the court continued the jurisdiction/disposition hearing to July.

On June 28, both Emma and Sophia were both placed in the home of a nonrelated extended family member. In July, the girls' caregiver reported she felt unable to continue caring for both of them. She explained that Sophia was exhibiting behavioral problems, including screaming, throwing herself on the floor, hitting herself and trying to head butt Emma, because she is jealous. She expressed suspicion that Sophia may have been abused in the past because Sophia has "night terrors often and physically harms

herself by pinching, biting, and hitting herself. She stated that [Sophia] is also exhibiting some signs of sexual abuse.”

SSA’s addendum report filed in conjunction with the continued jurisdiction/disposition hearing included a summary of the medical reports. SSA recommended that reunification services be denied to both parents based on Welfare and Institutions Code section 361.5, subdivision (b)(5) and (6) (all further statutory references are to this code), which allows a denial of services when a parent has inflicted severe physical harm on a child or the child’s sibling, and the court determines that reunification services would not benefit the child.

The jurisdiction/disposition hearing was continued several times while the parties waited to receive additional medical reports. On August 18, the girls’ caregiver reported the parents’ visits were inconsistent and they had not visited the girls since Emma had surgery on July 24. On August 21, SSA reported that the parents had completed parenting classes and were due to start “child batterer’s treatment classes” on August 27, but claimed they did not have the \$50 payment required for those classes. SSA also reported that as of that time, Emma’s neurologist had characterized her injuries as “very severe,” but explained that because of her young age, it was not certain how those injuries would affect her.

In October, the girls’ caregiver reported the parents were visiting them once a week, but do not really “parent” them during the visits. The parents had to be reminded to change the girls’ diapers and to feed them. Emma’s neurologist had described her brain injury as comparable to a massive stroke, and the caregiver stated she was exhibiting symptoms of moderate to severe cerebral palsy.

On October 23, the social worker spoke with mother’s sister. The sister reported that the parents’ account of how Emma had sustained her injuries had changed over time. While they initially claimed Sophia had injured Emma, they later claimed Emma was born with her injuries. The sister also reported that although she had never

seen either parent abuse Emma, she had witnessed domestic violence between them. She expressed the opinion that the parents' abusive relationship will harm the children, and claimed it had already affected Sophia, who has severe behavior issues.

The sister also claimed Emma had been left in father's sole care while she and mother had gone out together. According to the sister, when she and mother returned from their outing, father was asleep, and Emma was swaddled tightly in her crib, her hair was wet, and she looked "like death." Mother woke father and asked him "what did [you] do to her?" When the social worker asked the sister why she didn't report the incident to police, the sister explained she was a minor at the time and was "AWOL from SSA."

The sister also told the social worker that when mother is upset with father, she has told many other people that it was he who hurt Emma, and that if mother wanted to, she could "send him away for a long time."

The jurisdiction hearing was held on November 14, 2013. Both parents submitted on the reports, and the court found the allegations of the petition were true. The court set the dispositional hearing for December 2.

On November 20, SSA was contacted by the caregiver's husband. He reported that she had been hospitalized and they could not continue caring for Emma, whose needs were constant. He expressed concern that Sophia felt ignored due to Emma's needs and asked that Emma be removed from their custody immediately. They were interested in keeping Sophia in their care, and even adopting her if that option became available. SSA made the decision to place Emma with a new foster parent, while leaving Sophia's placement unchanged.

On November 26, SSA was informed that both parents were enrolled in a weekly child abuse treatment class. Mother had attended six classes, while father had attended five. Both were reported to be doing well.

At the disposition hearing, both parents submitted on SSA's recommendation, acknowledging they had no evidence to dispute the conclusion that offering them reunification services would not be in the girls' best interest. However, the parents also emphasized that although they had also submitted on the petition, there was no proof of how Emma's injuries were inflicted, and they continued to deny having injured her. They claimed that they loved their daughters very much, were visiting regularly, and were very motivated to take advantage of any opportunities to improve so that they might develop a basis for obtaining reunification services once the case proceeds to the section 366.26 hearing. They asked the court to order funding for them to participate in more significant programs prior to the section 366.26 hearing. That short-term funding request was denied, and the court also denied reunification services generally, pursuant to section 361.5, subdivision (b)(5) and (6). The case was set for a section 366.26 hearing for April 1, 2014.

On April 1, both parents filed section 388 petitions, seeking a change in the order denying them reunification services. Father offered evidence that he was employed, had housing and had participated in several programs, including a parent education program, an individual counseling program, conjoint counseling with mother, and 22 sessions of a child abuse intervention program. He was visiting with the children regularly, was aware of Emma's special needs and believed himself prepared to meet them.

Father explained he "continues to process what happened to Emma," but again denied he had caused her injuries. He also stated he did not believe mother had caused the injuries, and acknowledged it "pains [him] not [to] know exactly how those injuries occurred." He believed that through his participation in programs, he had learned to spot "red flags to be aware of in those people who are around [his] daughters."

Mother's petition was supported by evidence that she was enrolled in and participating regularly in a child abuse treatment program. She had completed a couples

counseling program with father and received a certificate of achievement. She believed the program had given them useful tools to use in working out their problems. She had also completed a parent education program. She had also maintained regular visitation with the children and believed she had acted in a parental role during those visits. Their relationship was warm and loving. Mother also pointed to the fact the parents' housing situation was safe and stable, and they had purchased a car that would be safe and appropriate for transporting the girls.

Mother also stated that she accepted "complete and total responsibility for Emma's injuries because I am her mother and I am supposed to protect her and make sure she is well-cared for and safe from harm at all times." However, she too denied any role in actually inflicting those injuries, claiming she "wish[ed] that I know exactly how her injuries occurred, but I do not. I will forever regret and be saddened by my failing her"

The court denied both petitions, concluding that neither parent had made a prima facie showing of changed circumstances, and continued the section 366.26 hearing.

The contested section 366.26 hearing took place on April 29, 2014. Both parents testified. The court found that both girls were adoptable and terminated parental rights.

DISCUSSION

Section 388 provides that any party can petition the juvenile court to modify or revoke a prior order in a dependency case based on a showing of a material change in circumstances or new evidence, and if the court determines the party has made a prima facie showing of the changed circumstance or new evidence, and the proposed modification or revocation appears to be in the child's best interests, it shall order a hearing on the petition. (§ 388, subds. (a), (d); *In re Mickel O.* (2011) 197 Cal.App.4th

586, 615 [“[I]t is not enough for [the petitioner] to show *just* a genuine change of circumstances under the statute. The [petitioner] must show that the undoing of the prior order would be in the best interests of the child”].) “A ‘prima facie’ showing refers to those facts which will sustain a favorable decision if the evidence submitted in support of the allegations by the petitioner is credited.” (*In re Edward H.* (1996) 43 Cal.App.4th 584, 593.)

Here, both mother and father claim they made such a prima facie showing, and thus the court erred by refusing to schedule a hearing on their respective section 388 petitions. We disagree. As the court concluded, the evidence offered by both parents fell short of demonstrating any significant change in circumstance. Initially, we note that both parents were already participating in some counseling and classes at the time the court ordered that reunification services be denied. Thus, their continued involvement in such programs, while commendable, was not really a significant *change* in the circumstances which existed at the time the court issued the order denying them reunification services.

But more significantly, neither parent offered any evidence suggesting they had made any meaningful progress in addressing the core issue underlying the court’s denial of services – i.e., the determination that one or both of them had inflicted severe physical abuse on Emma. As long as these parents continue to deny that abuse occurred, they cannot convincingly claim they are addressing that problem.

In fact, the stance taken by both parents is unchanged from what it was when their children were first detained: They initially denied having done anything to cause Emma’s severe injuries, and other than positing the notion that their older daughter might have inflicted the injuries by falling on Emma, they claimed bafflement as to how those injuries might have been sustained; that is still their position. And at no point did they ever previously claim it was permissible for a parent, or anyone else, to inflict the

sort of severe injuries on a child that Emma sustained. Thus, their current insistence that they would never permit such a thing to occur is not a change.

While mother does take “complete responsibility” for Emma’s injury, she means that only in the most generic sense – i.e., that as Emma’s mother, she is generally responsible for keeping her safe, and thus she is *automatically* responsible for Emma’s prior injury. But what she does not do is admit to any specific past failings that contributed to – let alone actually *caused* – the catastrophic injuries Emma suffered. And because Mother offers no insight into what actually happened to Emma, she cannot explain what she would do differently in the future to ensure that Emma – and Sophia – would remain safe.

Father’s evidentiary showing is similar. He denies having inflicted Emma’s injuries and denies any knowledge of what might have caused them. He does not believe mother was responsible either. And although he claims to have learned how to spot “red flags” in how people might treat his daughters, that alleged insight has not enabled him to recognize, even in hindsight, what has *already happened* to Emma.

While continued attendance in child abuse treatment classes and couples counseling might be a positive step for both parents, a necessary change in circumstance means something more than that a parent has finally decided to *begin* tackling the problems underlying the dependency. As explained in *In re Casey D.* (1999) 70 Cal.App.4th 38, 47, “[a] petition which alleges merely changing circumstances and would mean delaying the selection of a permanent home for a child to see if a parent . . . might be able to reunify at some future point, does not promote stability for the child or the child’s best interests.” (See *In re Mickel O.*, *supra*, 197 Cal.App.4th at p. 615 [“the petitioner must show *changed*, not changing, circumstances”].)

In this case, in the absence of some recognition that Emma actually suffered severe physical abuse while in the care of one or both of these parents – which is what the court found to have occurred in this case – neither of them can demonstrate they have

achieved a material *change* in the circumstances that caused the court to deny them services. Consequently, we cannot conclude the juvenile court erred by summarily denying their section 388 petitions.

DISPOSITION

The order is affirmed.

RYLAARSDAM, ACTING P. J.

WE CONCUR:

ARONSON, J.

IKOLA, J.