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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

S.S.,

v.

THE SUPERIOR COURT OF ORANGE  
COUNTY,

Respondent;

ORANGE COUNTY SOCIAL SERVICES  
AGENCY et al.,

Real Parties in Interest.

G052432

(Super. Ct. No. DP024645)

O P I N I O N

Original proceedings; petition for a writ of mandate/prohibition to challenge an order of the Superior Court of Orange County, Dennis J. Keough, Judge. Petition denied.

David Christopher Bell for Petitioner.

Nicholas S. Chrisos, County Counsel, and Karen L. Christensen, Deputy County Counsel, for Real Party in Interest.

Law Offices of Harold LaFlamme and Jess Ann Hite for Minor.

S.S. (Father) challenges the order made at the 18-month review hearing setting a permanency planning hearing. (Welf. & Inst. Code, § 366.26, subd. (c), hereafter .26 hearing.)<sup>1</sup> He contends the juvenile court erred by denying his section 388 petition without a hearing. We find no error and deny his petition for an extraordinary writ.

## FACTS AND PROCEDURE

### *Detention, Jurisdiction & Disposition*

Then four-year-old Y.G. was taken into protective custody in February 2014, due to her mother's (Mother) mental health problems, substance abuse, and neglect. Mother suffered from panic attacks in which she would hit and cut herself. When she became angry and jealous of Y.G., she gave the child twice the recommended dosage of ibuprofen. She hit and neglected Y.G., and claimed she had once tried to give Y.G. bleach to drink. Mother suffered from depression, had multiple suicide attempts, and had a history of substance abuse, including alcohol, methamphetamine, and cocaine. Mother did not want to care for Y.G. and said she feared she would hurt the child. Y.G. was afraid of Mother.

Mother reported to the Orange County Social Services Agency (SSA) social worker that Father was Y.G.'s biological father, but they were never married. Mother reported that when she and Father were together, they had a history of domestic violence. She reported Father had a history of substance and alcohol abuse. Mother explained that when Y.G. was about one year old, Mother caught Father, who was "high and drunk," fondling Y.G. over her diaper. Mother left the residence with Y.G., but returned to Father about one month later. Father was later arrested by federal authorities and deported to Mexico. Father's whereabouts were unknown. Mother had no contact information for Father and she reported he had no contact with Y.G. for over three years.

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<sup>1</sup>

All further statutory references are to the Welfare and Institutions Code.

On February 8, 2014, Y.G. was placed in a foster home, where she has remained throughout these proceedings. A petition was filed alleging jurisdiction due to Mother's failure to protect. (§ 300, subd. (b).) As to Father, who was an alleged father, the petition alleged jurisdiction due to his failure to provide support, alleging he had no contact with Y.G. for approximately three years, had failed to provide for her safety, protection, and support, and was not available to provide appropriate care. (§ 300, subd. (g).)<sup>2</sup>

In its March 2014 reports for the jurisdiction and disposition hearing, SSA reported that when Y.G. was seen in late February in the foster home, she was adjusting to her placement but was very shy and would withdraw from anyone she did not know. She refused to communicate with the social worker, or even with the foster parents in the social worker's presence, and when she did communicate, it was only with "pure sounds" instead of verbal communication. The foster parents were concerned Y.G. would "'shut[] down' when redirected." They reported that once Y.G. took a plastic toy knife and simulated cutting herself. Another time, when another child was upset, Y.G. asked the child if he was going to kill himself. Y.G. was referred to counseling.

SSA had received a copy of Y.G.'s birth certificate listing Father as her father. The social worker filed a declaration of due diligence detailing her unsuccessful efforts at locating Father. Mother had detailed for the social worker Father's drug use when they were together, which included "'cocaine, [crystal] meth, and alcohol.'" Mother further explained about domestic violence—that both Father and Mother's estranged husband would yell at her, hit her, slap her, and force her to perform sex acts with them. Mother told the social worker that when Father was with them, he disciplined Y.G. "by screaming at her."

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<sup>2</sup>

Mother's estranged husband was also named as an alleged father but has never appeared in the proceedings.

On March 26, 2014, Mother pleaded no contest to the petition.

The juvenile court sustained the allegations of the petition as to all counts, declared Y.G. a dependent child, removed her from parental custody, ordered reunification services for Mother, and set a six-month review hearing.

*Six-Month Review Period*

In its report for the September 2014 six-month review hearing, SSA recommended Mother receive further reunification services. Father's whereabouts were still unknown. Y.G.'s initial developmental screening showed her to be "close to the cut-off on gross motor, fine motor, and personal social areas." She was doing well in therapy and thriving under the foster parents' care. The foster parents were interested in adopting Y.G. Mother made moderate progress with her case plan. The parties stipulated to the juvenile court's order that services continue and a 12-month review hearing be set for March 2015.

*12-Month Review Period*

In its first report for the 12-month review hearing, SSA recommended terminating reunification services and setting a .26 hearing. Y.G. was thriving with her foster parents and she described her happiness on a scale of one to 10—with 10 being highest—as a 10. She referred to the foster parents as "Mommy and Daddy." Although she was still very shy, Y.G. was meeting all her goals in therapy, had greatly reduced her "shutdown" episodes, was doing very well in prekindergarten, and had made great improvements in her verbal skills. The foster parents were committed to caring for Y.G. and providing her a stable and loving home.

Father's whereabouts remained unknown. Mother's progress with her case plan was minimal. Mother was terminated from therapy with a guarded prognosis because of missed appointments. She missed several drug tests, or tested positive for opiates and amphetamines. She frequently missed, or arrived late, for visits with Y.G. Y.G. resisted going to visits with Mother, said she was "worried I have to live

with my mom[,]” and said she wanted to stay with the foster parents. The 12-month review hearing was continued to April 15, 2015.

In its report filed April 14, 2015, SSA continued to recommend terminating Mother’s services. Father’s whereabouts remained unknown. Mother continued to visit Y.G., but was almost always late. She missed more drug tests and more therapy appointments. The 12-month review hearing was continued to May 6, 2015.

In its report filed May 4, 2015, SSA’s recommendation remained the same. When the report was prepared, Father’s whereabouts still remained unknown. Mother’s compliance with her case plan remained the same. Y.G. was attached to the foster parents, expressed her desire to remain with them, and became upset after visits with Mother.

At the 12-month review hearing on May 6, 2015, Mother was able to provide the court with updated information on Father’s whereabouts. Mother’s counsel informed the juvenile court that Mother had a home telephone number for Father in Mexico. Mother also provided Facebook contact information. The parties stipulated to Mother receiving further services, and an 18-month review hearing was set for August 6, 2015. The juvenile court ordered SSA to use best efforts to contact Father.

#### *18-Month Review Period*

On June 16, 2015, SSA reported the social worker had spoken to Father in Mexico over the telephone. Father said he had “recently” heard about Y.G.’s situation from Mother via Facebook. Father said he had lived with Mother and Y.G. for the first year of Y.G.’s life, but he was deported in 2011. Father told the social worker that he had no contact with Y.G. after being deported because “[M]other would not let me talk to [Y.G.]” Father said he wanted to reunify with Y.G. and wanted counsel appointed. The juvenile court appointed counsel for Father.

In its report for the 18-month review hearing, SSA recommended terminating services and setting a .26 hearing. Mother’s participation in services was

only moderate. Y.G. remained firmly bonded with the foster parents, who she loved and called “mom and dad.” Y.G. was “happy and healthy” in her placement, continued to express that she wanted to remain with the foster parents and be adopted by them. Mother had little interaction with Y.G. during visits and Y.G. would remain in close proximity to the foster parents. Y.G. was doing well in school and in extracurricular activities. Y.G. had no recollection of Father. The social worker telephoned Father on July 15, 2015, but was told by Father’s sister he was away for two weeks working and there was no way to contact him. The 18-month review hearing was continued to August 10, 2015.

On August 10, 2015, Father filed a section 388 petition asking the court to return Y.G. to his care in Mexico, or to grant him reunification services, and asked for presumed father status. In his declaration, Father explained he lived with Y.G. until she was one year old. After being deported he had contact with Y.G. via Skype. But “[w]hen [M]other entered into a new relationship, the contact began to decrease gradually from once a week to once every [two] weeks, and so on until contact ceased in 2013 or 2014.” Father declared he lived in a two-bedroom house with his girlfriend and new daughter, and extended family was nearby. He denied there was domestic violence or drug use when he lived with Mother. He denied Mother’s claim he sexually abused Y.G., believing Mother made the allegation to keep him away from Y.G.

At the August 10, 2015, hearing, the juvenile court first considered whether a prima facie showing under section 388 had been made. Although Father had been notified of the hearing and invited to appear telephonically, he was not home when his counsel telephoned. Father’s counsel argued that when Father’s contact with Y.G. began to diminish, he did not know how to go about getting contact, “because Mother cut him off.” Father then learned from Mother’s Facebook page that “something was amiss” with Y.G. but did not know who to contact. Counsel argued Father was a non-offending parent.

The juvenile court granted Father's request for presumed father status but denied the section 388 petition without a hearing, finding he had not established a prima facie case. The court observed Father had not demonstrated a change of circumstances or that changing the prior orders was in Y.G.'s best interests. The court proceeded to the 18-month review hearing, terminated reunification services, and scheduled a .26 hearing.

#### DISCUSSION

Father contends the juvenile court erred by denying his section 388 petition without a hearing. We find no error.

“Any parent . . . may, upon grounds of change of circumstance or new evidence, petition 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..” (§ 388, subd. (a).) “If the petition . . . states a change of circumstance or new evidence and it appears that the best interest of the child may be promoted by the . . . termination of jurisdiction, the court may grant the petition” after conducting a noticed hearing within 30 days after the petition is filed. (Cal. Rules of Court, rule 5.570(e)(1); § 388, subd. (d) [“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”]; see generally Cal. Rules of Court, rule 5.570(e)-(g).)

“Section 388 provides the ‘escape mechanism’ . . . built into the [dependency] process to allow the court to consider new information.” (*In re Marilyn H.* (1993) 5 Cal.4th 295, 309 (*Marilyn H.*)). “A petition for modification must be liberally construed in favor of its sufficiency.” (Cal. Rules of Court, rule 5.570(a); see *Marilyn H.*, *supra*, 5 Cal.4th at pp. 309-310.) But “if the liberally construed allegations of the petition do not make a prima facie showing of changed circumstances and that the proposed change would promote the best interests of the child, the court need not order a hearing on the petition. [Citations.] The prima facie requirement is not met unless the facts alleged, if supported by evidence given credit at the hearing, would sustain a favorable

decision on the petition. [Citation.]” (*In re Zachary G.* (1999) 77 Cal.App.4th 799, 806; see Cal. Rules of Court, rule 5.570(d) [court may deny section 388 petition “ex parte” if petition fails to state change of circumstance or new evidence, or requested modification would promote best interest of the child].)

The juvenile court’s denial of the “section 388 petition without a hearing is reviewed for abuse of discretion. [Citations.] We must uphold the juvenile court’s denial of appellant’s section 388 petition unless we can determine from the record that its decisions “exceeded the bounds of reason. When two or more inferences can reasonably be deduced from the facts, the reviewing court has no authority to substitute its decision for that of the trial court.” [Citations.] [Citations.]” (*In re Brittany K.* (2005) 127 Cal.App.4th 1497, 1505.) The record supports the court’s denial of the section 388 petition.

#### *1. Change of Circumstances/New Evidence*

Father contends he made a prima facie showing of changed circumstances and/or new evidence justifying a change in the juvenile court’s orders. He contends the changed circumstances were that because of his deportation in 2011, he was unable to keep track of Mother’s whereabouts in relation to Y.G. When he finally learned Y.G. had been taken into protective custody, he told the social worker he was willing to do whatever was necessary to reunify with her. Father contends the new evidence is that he denied Mother’s allegations he engaged in substance, domestic violence, or sexual misconduct with Y.G.

Father relies on *In re Jonathan P.* (2014) 226 Cal.App.4th 1240 (*Jonathan P.*), to support his contention that as a deported “non-offending” parent for whom information and contact with his child was cut-off by Mother, he was entitled to have the child placed in his custody, or at the very least entitled to reunification services. *Jonathan P.* does not aid Father.

The 15-year-old minor in *Jonathan P.*, had lived with his father for 11 years pursuant to a family law custody order. While the minor was on a summer visit with his mother, the father was deported, so the minor remained with the mother. The father remained in regular contact with the mother and the minor, and both told him everything was fine in the mother's home. The mother and her partner, however, were engaging in domestic violence in the home that led to the 15-year-old being taken into protective custody and declared a dependent child due to his mother's abuse and failure to protect. (*Jonathan P.*, *supra*, 226 Cal.App.4th at pp. 1245-1246.)

Significantly, there were no allegations in the *Jonathan P.* petition as to the father, and it was undisputed he was a non-offending parent. (*Jonathan P.*, *supra*, 226 Cal.App.4th at p. 1244, fn. 3.) However, because the father's whereabouts were unknown at the dispositional phase, the minor could not be placed with him when removed from the mother's home. (See § 361.2 [court's options for placing child with non-offending parent].) The father reentered the United States illegally and appeared at the six-month review hearing requesting the child be placed with him based on the prior custody arrangement. (*Jonathan P.*, *supra*, 226 Cal.App.4th at p. 1247.) But at that point the minor had run away from his placement and his whereabouts were unknown. The juvenile court told the father it could not restore custody to him because the minor's whereabouts were unknown and directed him to file a section 388 petition if he wished reunification services. (*Jonathan P.*, *supra*, 226 Cal.App.4th at pp. 1247-1248.) The father filed a section 388 petition, which the court denied concluding it could not make a finding it was in the minor's best interest to be placed with the non-offending parent, or to give the non-offending parent reunification services, when the minor's whereabouts remained unknown.

The Court of Appeal reversed. It first concluded that as a noncustodial and non-offending parent, the father's custody request should have been analyzed under the detriment standard of section 361.2, subdivision (a), not the best interests standard of

section 388. (*Jonathan P.*, *supra*, 226 Cal.App.4th at p. 1256.) But the court concluded that the error was harmless because the minor's whereabouts were unknown, so "[i]t was not possible to conduct an evaluation of whether it would be detrimental to [the minor] to place him with [the] [f]ather." (*Id.* at p. 1257.) The court found the father was nonetheless entitled to reunification services because although services were properly denied at the dispositional phase when his whereabouts were unknown (§ 361.5, subd. (b)(1) [reunification services need not be provided if parent's whereabouts are unknown]), the social services agency became aware of the father's whereabouts *before* the six-month review hearing triggering the father's right to reunification services (see § 361.5, subd. (d) [court shall order services if parent's whereabouts become known within six months]; Cal. Rules of Court, rule 5.695(h)(9) ["If the parent or guardian is located prior to the six-month review and requests reunification services, the welfare department must seek a modification of the disposition orders"].) (*Jonathan P.*, *supra*, 226 Cal.App.4th at pp. 1257-1258.)

In contrast to *Jonathan P.*, Father was not a non-offending parent and placement under section 361.2 is not at issue. The petition as sustained included a section 300, subdivision (b), count [failure to protect], that included Mother's allegations of Father's domestic violence, substance abuse, and sexual misconduct with Y.G. More importantly, the petition was sustained as to the section 300, subdivision (g) count [no provision for support] alleged as to Father based on allegations his whereabouts were unknown, he had no contact with Y.G. for almost three years, and he had failed to provide for her safety, protection, and support. Additionally, unlike *Jonathan P.*, where the father's whereabouts became known within six months of the dispositional hearing, before the six-month review hearing, triggering a right to services under section 361.5, subdivision (d), here Father's whereabouts remained unknown until almost 14 months after disposition. Thus, no right to reunification services was triggered under

section 361.5, subdivision (d). Accordingly, the court correctly analyzed Father's request for custody, or in the alternative services, under section 388.

We cannot say the juvenile court erred by concluding Father did not make a prima facie showing of changed circumstances or new evidence that would justify changing its orders at the 18-month review hearing. Assuming for argument's sake Father's denials of Mother's allegations he engaged in substance abuse, domestic violence, or sexual misconduct with Y.G., was "new evidence," it was not evidence that would have made him a non-offending parent. As already noted, the petition was sustained as to the section 300, subdivision (g), count [no provision for support] alleged as to Father based on allegations his whereabouts were unknown, he had no contact with Y.G. for almost three years, and he had failed to provide for her safety, protection, and support. The juvenile court could reasonably conclude Father failed to justify his lack of contact with his young daughter. Father initially told the social worker he had no contact with Y.G. after he was deported in 2011 because "[M]other would not let me talk to [Y.G.]" But in his motion and declaration he explained he maintained contact via Skype after his deportation, but after Mother got into a new relationship, Father's contact "began to decrease" until it ceased all together in 2013 or 2014. There was no indication in Father's declaration that Mother refused to allow Father to communicate with or support his daughter, or that Father made any attempts to further communicate with his child or inquire into her well-being. Father was apparently following Mother on Facebook, as he told the social worker that was how he learned Y.G. had been taken into protective custody. The juvenile court could reasonably conclude Father's vague claims that Mother "cut him off" were not sufficient to demonstrate changed circumstances.

## *2. Best Interests*

Even were we to agree with Father that he made a prima facie showing of changed circumstances or new evidence, he did not meet his burden of demonstrating Y.G.'s best interests would be served by the requested relief.

Y.G. was four years old when she was removed from Mother's custody, and it is undisputed she has not lived with Father since she was one year old. When she first went into foster care in February 2014, there were many concerns. Y.G. would not speak to strangers in the home even if the foster parents were present, communicating only through noises, she mimicked cutting herself with a plastic knife, made comments to other children about killing themselves, would "shut down" if the foster parents tried to redirect her, and was placed in therapy. By the time of the 18-month review hearing, Y.G., now almost six years old, had blossomed. She was doing well in school and meeting all her goals in therapy. She loved her foster parents, referred to them as her mom and dad, described her happiness in her placement as a "10," and said she wanted to remain with the foster parents.

Father argues that in determining whether the juvenile court erred in denying his section 388 petition, we should apply the factors set forth in *In re Kimberly F.* (1997) 56 Cal.App.4th 519, 531-532 (*Kimberly F.*), which include: "(1) the seriousness of the problem which led to the dependency, and the reason for any continuation of that problem; (2) the strength of relative bonds between the dependent children to *both* parent and caretakers; and (3) the degree to which the problem may be easily removed or ameliorated, and the degree to which it actually has been."

*Kimberly F.* dealt with the more common situation in which a parent who has failed in successfully completing reunification services files a section 388 petition to delay permanency and obtain additional reunification services. (*Kimberly F.*, *supra*, 56 Cal.App.4th at p. 525.) Here, because Father did not have Y.G. removed from his care, two of the three *Kimberly F.* factors are not pertinent: the seriousness of the parent's problems that led to the dependency and whether they can be or have been ameliorated. However, the remaining *Kimberly F.* factor, namely, the nature of the bond that Y.G. has with Father is directly on point and strongly supports the juvenile court's decision. Y.G. has no bond with Father. She has not seen him since she was one year

old and has no memory of him. She was fully bonded with her foster parents who she called her mom and dad, and wanted to remain with them. Father did not demonstrate that at this late stage in the dependency proceeding, 18 months after Y.G. was placed in the foster parents' care, it was in her best interest to derail her hard won stability by either placing her in the care of a parent she did not remember or prolong achieving her permanency by allowing reunification services.

DISPOSITION

The writ petition is denied.

O'LEARY, P. J.

WE CONCUR:

MOORE, J.

THOMPSON, J.