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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

In re N.M., a Person Coming Under the  
Juvenile Court Law.

H040036  
(Santa Clara County  
Super. Ct. No. JD16117)

SANTA CLARA COUNTY  
DEPARTMENT OF FAMILY AND  
CHILDREN'S SERVICES,

Plaintiff and Respondent,

v.

D.M.,

Defendant and Appellant.

Appellant D.M. (father) submitted a petition pursuant to Welfare and Institutions Code section 388<sup>1</sup> seeking to modify the existing visitation order for N.M. (minor), who has been in a court-ordered guardianship since 2007. The juvenile court set an initial hearing on the petition to appoint counsel and granted the Department of Family and Children's Services (Department) additional time to prepare a report addressing the petition's allegations. After the parties' efforts to mediate the dispute were unsuccessful, the Department requested an opportunity to argue whether the petition made a prima facie showing of a change in circumstances justifying a modification, as required by

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<sup>1</sup> Further unspecified statutory references are to the Welfare and Institutions Code.

section 388. Following argument on that question, the juvenile court agreed with the Department's position and denied the petition.

On appeal, father argues the petition did make the requisite prima facie showing of changed circumstances and the juvenile court abused its discretion and violated his due process rights by failing to hold an evidentiary hearing.

We disagree and will affirm the order.

## **I. FACTUAL AND PROCEDURAL BACKGROUND**

### *A. Dependency proceedings up to and including guardianship*

In May 2005, a section 300 petition was filed alleging two-year-old minor (born July 2002) came within the jurisdiction of the juvenile court, under subdivisions (b) and (g), because of the parents' incarceration involving domestic violence and substance abuse issues. The mother told law enforcement that father had come to the motel room where she was staying, in violation of a restraining order, threatened her with a stun gun and inflicted other physical injuries on her. When officers went to father's home to follow up on this report, they found methamphetamine in his bedroom.

Father, who had custody of minor at the time, was receiving voluntary services from the Department relating to his problems with domestic violence and substance abuse. Over more than 20 years, father had been convicted multiple times for drug use, possession and possession for sale. On two occasions, he was sentenced to state prison on drug related charges. In 2003, he was convicted of felony domestic violence and sentenced to two years in prison.

Minor was declared a dependent in July 2005, and the court ordered reunification services for both parents. Minor was placed with a relative, and father was ordered to complete courses relating to domestic violence, as well as attend 12-step meetings and receive treatment for substance abuse.

At a six-month review hearing in March 2006, reunification services were terminated and a section 366.26 hearing was set. Father had remained incarcerated until

approximately one month before that review hearing. Prior to the section 366.26 hearing, father filed a section 388 petition seeking a return of minor to his custody or further reunification services. In that petition, father said he was having extensive visits with minor up to six times a week and he wanted to have overnights. Along with his petition, father submitted copies of his 12-step meeting sign-in sheets, a letter from his parenting without violence instructor, a treatment status report from his substance abuse treatment program, a positive letter from his parole agent as well as a supportive letter from his employer.

The court granted father's section 388 petition, ordered that he be provided an additional six months of services. The section 366.26 hearing was taken off calendar. Father was also ordered to continue substance abuse treatment, attend psychotherapy to address his history of domestic violence, attend 12-step meetings twice a week, and submit to random drug tests twice a week. In mid-November 2006, the social worker authorized unsupervised visits.

However, at the next statutory review hearing in January 2007, reunification services were again terminated and a new section 366.26 hearing was set. Father had been incarcerated following his arrest on charges of exhibiting a deadly weapon, disorderly conduct, loitering at private property, vandalism and trespassing. Prior to this incarceration, father had completed an outpatient drug program, and had regularly attended 12-step meetings for two months. He also had submitted regular drug tests for a while, but then missed multiple tests.

During the review period, minor was moved to the home of different relatives, a paternal aunt and uncle, who were willing to provide a permanent home for him. The Department's report indicated father had "shown a lot of enthusiasm and commitment to work on his case plan each time at the beginning but he has shown a pattern of failing at the end." The report also indicated that father did not appear to have integrated what he had learned in the services he attended, nor had he learned from his mistakes.

In May 2007, the juvenile court conducted a section 366.26 hearing and appointed minor's paternal aunt and uncle as his legal guardians. The court ordered twice-monthly supervised visitation with father. The social worker had the discretion to increase the frequency and duration of visits and could also allow unsupervised visits with father. At that time, the guardians expressed their willingness to continue visits so long as they were appropriate. The guardians were supportive of father, but indicated they maintained clear boundaries and would not act against the best interests of minor.

In November 2007, the juvenile court conducted a postpermanency hearing to review what had occurred since the prior hearing. In the interim, Father was incarcerated until July 2007, after which he was released to an in-patient drug program. At the time of the hearing, he was residing in a sober-living environment and the guardians were allowing visits with minor. The dependency case was kept open.

In January 2008, the mother filed a section 388 petition seeking an order of visitation. Following a trial in March 2008, the court denied the mother's petition and, as requested by the Department, dismissed the dependency case.

*B. Proceedings related to father's 2013 section 388 petition*

On March 25, 2013, father filed a section 388 petition seeking an increase in visitation from that permitted in the juvenile court's 2007 order. The petition requested that visitation be increased from the current level of twice per month to once a week from Friday through Sunday. The petition asserted minor was being whipped with a stick by the guardians, and thus also requested an order directing that minor not be hit by the guardians or anyone else. The juvenile court set a hearing on the petition for April 19, 2013.

At the April 19 hearing, the juvenile court appointed counsel to represent father. The Department requested a continuance to complete its investigation of the allegations contained in father's petition. At the hearing, the court explained its practice of setting an initial hearing on a petition filed in propria persona, at which it finds out what social

worker is assigned to the case, appoints attorneys as necessary, and then gives the Department time to investigate. The court continued the hearing to May 9 and set a date for receipt of the Department's report.

At the May 9 hearing, the court appointed counsel for the legal guardians. The Department advised the court it opposed father's petition for modification of the visitation order. The court then said it was going to "have a setting," and father's counsel requested mediation to "discuss a more realistic visitation order." The guardians were initially reluctant to engage in mediation, but agreed after the court indicated the alternative would be a trial.

The Department's report for the May 9 hearing included an assessment of father's allegations of corporal punishment. The social worker had investigated and found that minor's behavior at school had been deteriorating. Minor was arguing with teachers, pulling his pants down in class and being disrespectful to the principal. When the paternal aunt attempted to discipline minor, he became cocky and told her his father would go to school and reprimand school staff for him. She admitted having spanked minor with a back scratcher over his jeans, but said it was very rare for them to spank him. She also said she would not hurt him.

The guardians said father was upset to learn that they physically disciplined minor and confronted them about it. Father was belligerent and challenged the paternal uncle to step outside to fight.

The guardians told the social worker they had tried to include father in what was going on with minor, and had invited him to attend a school conference concerning son's behavior problems. They believed father treated minor as a "home boy" and a "buddy" rather than as a son. Minor acted up every time he visited with father. Father also told minor he did not have to follow the guardians' rules, and directed him to tell the guardians' adult daughters to "shut up" when they tried to guide and correct him. According to the guardians, minor's relationship with their family was strong, and he

regards their daughters (his cousins) as his sisters. When he was in kindergarten, he asked his paternal aunt if he could call her “Mom.”

The guardians explained they had been allowing minor to have overnight visits at the paternal grandparents’ home where father was living. The grandparents supervised all of those visits and no unsupervised visits were allowed. They told the social worker they know minor loves father and would like the visits to continue, but they were uncomfortable with father at this point in time. They did not want to supervise minor’s visits with father, but offered to find someone to supervise the twice a month visits required by the 2007 order.

The guardians explained to the social worker that father disrespected their authority, creating issues of “trust, communication breakdown and animosity.” His behavior was erratic, extreme and unpredictable. Father got angry without provocation, and they were frightened by his behavior.

They added that it was their job to protect minor and do what was best for him, and that it would be irresponsible to let him go with his father every weekend, because they did not know when father might start using drugs again. The guardians noted this has been father’s pattern for 20 years. They reported that father had active substance abuse issues, and described an incident on Christmas Eve 2012, when father beat up the paternal grandfather and “knocked out his teeth.” The grandfather had to be taken to the hospital. At the time of this event, father had been hallucinating. When they asked father whether he was using drugs, he admitted he had used “sometime this week.” The guardians also indicated that father had psychotropic drugs he was supposed to be taking for mental health problems.

In his interview with the social worker, father confirmed he had hit his father on Christmas Eve, explaining he was “having a bad day.” He also admitted to relapsing. Father said he had not seen his psychiatrist for a long time and had not refilled his psychotropic medication prescription since the incident. However, he claimed he did not

need the medication, since he was only paranoid and delusional when he was under the influence of drugs.

Father claimed to have been sober since the December 2012 incident, and that he completed a substance abuse treatment program. He also reported attending 12-step meetings approximately once every two weeks, and said he had been employed for three months.

When the social worker interviewed minor, he told her that he had been hit with the back scratcher one time and had also been hit with a belt. He said the guardians hit him “because [they] want[] me to grow into a nice gentleman . . . so I’ll learn next time.” He said he was happy in his home most of the time, but not always. He said he loved father and “he’s the best dad I’ve ever had.”

Father’s parole agent told the social worker that father had been released from prison on a vandalism conviction in November 2011. His parole conditions included chemical testing, search and seizure, employment, victim restitution and attending a substance abuse program. Father was presently in compliance with parole, and had graduated from a substance abuse program in November 2012. Father had last tested positive in February 2012.

The Department’s report acknowledged that minor loved father and that it was important that he continue with visitation. The social worker stressed that the visitation should be reasonable, sustainable and support minor’s sense of belonging in his home.

On June 27, 2013, the parties unsuccessfully participated in mediation. The court indicated it would “set another hearing for what’s called a trial setting.” The court asked father’s attorney to submit a new section 388 petition by a specified date “because the one submitted by the father when he was representing himself doesn’t really encompass everything [father’s attorney] needs it to encompass.” The court also asked that parties be ready with witness lists on the next court date.

Guardians' counsel advised that they wanted to argue at the next hearing whether father's section 388 petition presented a prima facie showing such that an evidentiary hearing would be required. The court agreed, and said the matter would be set for a trial setting and for argument on whether the petition made a prima facie showing.

Father's attorney filed an amended section 388 petition<sup>2</sup> on July 5, 2013. In the amended petition, father alleged the "changed circumstances" are, as follows: (1) Since 2007, the guardians permitted father and minor to have "frequent, lengthy and liberal visits, including unsupervised and overnight visits, at a frequency exceeding 2x/month order"; (2) father is "in active recovery, holds a steady job, has custody of [minor's] older brother, and participates in the child's school and extracurricular activities"; (3) "[s]ince March 2013, the [guardians] have deprived the child and father of visits at the frequency to which they had become accustomed, after father confronted [guardians] about their use of inappropriate physical discipline on the child"; and (4) "[t]ension between the [guardians] and father has intensified, resulting in an unnecessary disruption in the child's life and relationship with his father." The petition also indicated the tension between father and guardians was "caus[ing] undue confusion and stress" for minor. According to the petition, increased visitation with father is in the minor's best interest.

At the July 9, 2013 hearing, the court allowed the paternal aunt to speak on the issue of whether the petition presented a prima facie showing of changed circumstances. She said father has had the same pattern since before she and her husband became minor's guardians. When they assumed guardianship of minor, their intent was that father would, at some point, become clean and sober and regain custody. As the years

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<sup>2</sup> At the subsequent hearing, the juvenile court expressed some concern about the failure to include the word "amended" on the July 5, 2013 petition, as it may cause confusion in later proceedings regarding which petition the court was acting upon. The parties stipulated that the July 5, 2013 petition was intended to supersede father's March 25, 2013 in propria persona petition.

passed, father has followed the same pattern: he would do well for a period of time, but then he would use for no apparent reason. He would end up back in jail or prison and be gone for extended periods. The paternal aunt told the court over the last two years, when he used, father had become violent and the violence had escalated.

The paternal aunt also explained that father made promises to minor about returning to his care. She told the court father had done nothing to change the pattern of making progress then relapsing, and she felt that father “needed some longevity” before she would entertain the idea of overnight visits. Since the Christmas 2012 incident, when she asked father what he was going to do about “this problem,” he would get angry with her. He refused to talk about programs<sup>3</sup> which he had already done. She said that father had completed the Salvation Army program and done well, but ultimately only remained sober for 10 months afterwards.

When the paternal aunt finished her remarks, father’s counsel asked if the court was taking testimony. The court responded it was giving the paternal aunt leeway just as it had done for father with his section 388 petition, and that it “heard what [it] need[ed] to hear.”

The Department argued the petition failed to show a change in circumstances. The attack on the paternal grandfather in December 2012 occurred just one month after father completed a drug program ordered by the criminal court. Father had also admitted a relapse in January 2013. The Department maintained that within the last six months, father’s substance abuse and domestic violence problems had resurfaced, which demonstrated nothing had changed since minor had come into the dependency system.

In support of the petition, father’s counsel argued that the change of circumstances on which he was relying was the recent reduction in visits permitted by the guardians, not whether he had resolved the issues that had brought minor into the system in the first

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<sup>3</sup> Presumably, drug abuse and anger management programs.

place. Father was not asking to dissolve the guardianship, but merely wanted the court to consider whether it was in minor's best interest to increase visits beyond that permitted by the 2007 order.

The minor's attorney informed the court that minor was in favor of increasing visitation, but had an unrealistic, idealized view of father. Although there was a good relationship between the two, what was in the minor's best interest was for father to respect the boundaries imposed by the guardians. The court "made them the legal guardians for a reason, part of which is to protect [minor] and follow through on what they think to be in his best interests. That's what they were doing when they restricted the visitation."

The court explained that the relevant change in circumstances is a change in the factors that were the underlying reasons for the dependency, or the guardianship, in the first place. The court indicated it had not heard much from father's counsel about that issue. The court questioned father's attorney about the claim he was in active recovery, because nothing was attached to the report to support that claim. The court asked several specific questions about father's alleged recovery: "Is he going to 12-step meetings? Does he have a sponsor? Is he working the steps?" In response, father's counsel acknowledged there was no dispute about father's "history of doing remarkably well, being in recovery, and, unfortunately, succumbing to his addiction and relapsing." However, "[a]t this present time, he's doing well." Father's counsel again argued the relevant issue was not whether father had permanently addressed the issues that brought minor into dependency, but was instead the reduced visitation.

The court took the matter under submission and rendered its decision at a subsequent hearing. Before stating its decision, the trial court summarized the proceedings to date, beginning with the establishment of a guardianship for minor in 2007. When father filed an in propria persona section 388 petition in March 2013, the juvenile court, per its usual practice, brought the parties into court to appoint counsel as

well as order the Department to investigate and make recommendations on the petition. The court did not believe it was required to, at that stage of the proceedings, either summarily deny the in propria persona section 388 petition or grant an evidentiary hearing outright. The court explained, “[I]t makes sense for there to be some middle ground also, which is, I think, what was done here. Treat the [section] 388 [petition] from a self-represented litigant pretty liberally to get it into court and give the parties a chance to informally resolve things, try to resolve it with the Court’s assistance so the Court can determine what the next step is.”

The court found the guardians’ actions of increasing--then decreasing--visitation did not support modifying the visitation order. The court stated: “In fact, the guardians did what the Court wants guardians to do in closed guardianships, and that is assess the circumstances of the child and the parent, determine if it’s appropriate to increase visitation above the court-ordered visitation (the minimum order), and then, when necessary, decrease that visitation.”

The court concluded father had not made a prima facie showing on his section 388 petition. Father presented no evidence to support his claim he was in active recovery and offered no showing he had addressed the issues, i.e., substance abuse and anger management, which underlay the initial dependency proceedings. The court admitted into evidence the Department’s response to the petition, which the court considered in making its ruling.

The court left the original visitation order unchanged, but specifically noted the guardians retained discretion to increase or liberalize visitation as appropriate, as well as decrease it to no less than the court-ordered minimum.

## **II. DISCUSSION**

### *A. Standard of review*

Section 388 permits any person having an interest in the child to petition for a hearing to change, modify, or set aside any court order previously made on grounds of

change of circumstance or new evidence. (*In re Lesly G.* (2008) 162 Cal.App.4th 904, 912.) To prevail, the petitioner must demonstrate by a preponderance of the evidence that new or changed circumstances warrant a change in the prior order to promote the best interest of the child. (*In re S.J.* (2008) 167 Cal.App.4th 953, 959.) “We review the grant or denial of a petition for modification under section 388 for an abuse of discretion.” (*In re B.D.* (2008) 159 Cal.App.4th 1218, 1228.) “ “The appropriate test for abuse of discretion is whether the trial court 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.” ’ ’ (*In re Stephanie M.* (1994) 7 Cal.4th 295, 318-319.)

*B. Statutory framework*

Section 388 provides, in pertinent part, as follows: “(a)(1) Any parent or other person having an interest in a child who is a dependent child of the juvenile court . . . may, upon grounds of change of circumstance or new evidence, petition the court . . . for a hearing to change, modify, or set aside any order of court previously made . . . . [¶] . . . [¶] (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 . . . .”

The procedural requirements for section 388 petitions are set forth in California Rules of Court,<sup>4</sup> former rule 5.570.<sup>5</sup> Per rule 5.570(a), “[a] petition for modification must be liberally construed in favor of its sufficiency.” However, if the petition fails to state a change of circumstance or new evidence, the court may summarily deny it. (Rule 5.570(d).) Rule 5.570(f), provides: “If all parties stipulate to the requested modification, the court may order modification without a hearing. If there is no such stipulation and

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<sup>4</sup> Subsequent unspecified rule references are to the California Rules of Court.

<sup>5</sup> Rule 5.570 has been subsequently amended, effective January 1, 2014. We cite the version in effect at the time of the proceedings below.

the petition has not been denied ex parte under section (d), the court must order that a hearing on the petition for modification be held within 30 calendar days after the petition is filed.”

Rule 5.570(h), which governs the conduct of hearings on section 388 petitions, provides that the hearing is conducted in the same manner as a dispositional hearing if, among other things, “[t]here is a due process right to confront and cross-examine witnesses.” (Rule 5.570(h)(2)(C).) Otherwise, “proof may be by declaration and other documentary evidence, or by testimony, or both, at the discretion of the court.” (Rule 5.570(h).)

The petition to modify a prior order must include: (1) a showing of changed circumstances; and (2) the requested modification must be in the child’s best interests. The burden is on the petitioning party to show both of these elements. (*In re Casey D.* (1999) 70 Cal.App.4th 38, 47.) However, the petitioner need not prove he or she will be likely to prevail on the petition before a contested hearing may be set. (*In re Aljamie D.* (2000) 84 Cal.App.4th 424, 431-432.) Rather, a party is entitled to such a hearing so long as the petition makes a prima facie showing of a change of circumstance such that the proposed modification “*might* be in the child’s best interest.” (*In re Angel B.* (2002) 97 Cal.App.4th 454, 461.)

Conversely, the court need not order a hearing on the section 388 petition where the allegations, even when liberally construed, do not make a prima facie showing of changed circumstances and that the proposed change would promote the best interests of the child. (*In re Zachary G.* (1999) 77 Cal.App.4th 799, 806.) A prima facie showing is made where the facts alleged, if supported by evidence given credit at the hearing, would sustain a favorable decision on the petition. (*In re Edward H.* (1996) 43 Cal.App.4th 584, 594.) In determining whether the section 388 petition makes the necessary showing, the court may consider the entire factual and procedural history of the case. (*In re Justice P.* (2004) 123 Cal.App.4th 181, 188-189.)

C. *Analysis*

1. *No prima facie showing of change of circumstances*

As he argued below, father asserts that his amended section 388 petition seeks to change the 2007 visitation order primarily because minor's situation is different than it was at the time of that prior order. According to father, his own personal situation, i.e., whether he is remaining sober, etc., is relevant, but it is not the primary consideration for determining whether the visitation order should be modified. Father persists in asserting that the most important change in circumstances is this: the guardians' decision to decrease visitation to the court-ordered minimum after previously allowing increased visitation. We disagree.

“Not every change in circumstance can justify modification of a prior order. [Citation.] The change in circumstances must relate to the purpose of the order and be such that the modification of the prior order is appropriate. [Citations.] In other words, the problem that initially brought the child within the dependency system must be removed or ameliorated.” (*In re A.A.* (2012) 203 Cal.App.4th 597, 612.) In evaluating the question whether there have been changed circumstances promoting the child's best interests, the court should examine the following factors: “(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.” (*In re Kimberly F.* (1997) 56 Cal.App.4th 519, 532.)

Applying those standards to this case, the purpose of the original visitation order providing supervised twice-a-month visits was to protect minor from father's substance abuse and anger management problems. Father failed to adequately address those issues during the dependency case and it was that failure which led to the guardianship in the first instance.

There is no dispute father has a longstanding drug problem as well as a history of anger management issues which sometimes results in violence against others. The original petition sustained by the juvenile court was based in large part on father's issues with substance abuse and domestic violence. At the time minor was made a dependent in 2005, father had a 20 year history of criminal convictions related to drugs (both using and selling) as well as a history of domestic violence. He had been in state prison at least twice since the guardianship was established in 2007, demonstrating ongoing instability and a failure to rehabilitate.

While minor's attorney acknowledged the strong bond between the two and minor's desire for increased visits with father, counsel added that minor had an "unrealistic" view of father. Minor did not believe that father had any relapses and "doesn't quite understand the safety concerns."

The Department's report indicated that the contentious relationship which had recently developed between the guardians and father was negatively affecting minor's integration with the guardians' family, which the guardian had indicated was otherwise very strong. However, father was actively undermining their relationship with minor, telling minor he did not have to follow the guardians' rules of the house and instructing him to tell the guardians' adult daughters to "shut up" if they tried to correct him. The guardians also reported that minor's behavior deteriorated every time father visited with him. When the guardians tried to work with minor to improve his behavior at school, he told the guardians his father would go to the school and reprimand the school staff on his behalf. Father had also been telling minor that he was going to get a place of his own and take custody of him.

At the time the court ruled on father's petition, there was ample evidence that father's longstanding problems with violence and substance abuse had not been resolved. He acknowledged beating his own father on Christmas Eve in 2012, explaining he had been having a "bad day." He also admitted using drugs within a week of that event. The

assault itself occurred just a month after father had successfully completed a substance abuse treatment program as a condition of probation.

Father had previously been ordered to undertake psychotherapy when the juvenile court offered him reunification services during the dependency case, but at the time of the instant proceedings below, he acknowledged that he had neither seen a psychiatrist nor taken his prescribed medication “for a long time.” His explanation for this was that he did not need the medication because he was only paranoid or delusional while under the influence of drugs.

Father failed to make any showing, even when expressly queried by the court to do so, about how his substance abuse and anger management issues had been ameliorated or resolved. Father submitted no evidence of recent participation in or completion of any substance abuse treatment, no proof of attendance at any 12-step meetings, no proof he had a sponsor to assist with his substance abuse issues, and admitted he had not sought mental health treatment or taken prescribed medication in “a long time.” Father’s counsel further admitted “[he] has a history of doing remarkably well, being in recovery, and, unfortunately, succumbing to his addiction and relapsing.”

On this record, the juvenile court did not abuse its discretion in finding father had failed to make a prima facie showing of changed circumstances to support his section 388 petition.

## 2. *No due process violation*

Father also raises a due process argument in which he challenges the procedure below in which the juvenile court set and held several hearings, and even allowed the paternal aunt to address the court, before eventually concluding that no evidentiary hearing on the petition was necessary. We think the procedure followed by the juvenile court in this case, while not expressly countenanced under section 388 or rule 5.570, is not prohibited, nor does it violate due process.

The court's improper denial of a full and fair hearing on the merits of a section 388 petition violates the petitioner's constitutional right to procedural due process. (*In re Jeremy W.* (1992) 3 Cal.App.4th 1407, 1416.) The right to such a hearing, however, is not triggered unless the petitioner has made the necessary prima facie showing. (*In re Zachary G., supra*, 77 Cal.App.4th at p. 806.) As demonstrated above, father did not make that showing.

According to the juvenile court, when a self-represented party files a section 388 petition, its practice is to set a hearing for the appointment of counsel, find out which social worker is assigned to the case and give the Department time to investigate. Once the Department's report is prepared, the court gives the parties an opportunity to resolve the issue through mediation before proceeding further. In this case, after mediation was unsuccessful, the juvenile court indicated that the next hearing would be for trial setting and for argument on whether the petition made the necessary prima facie showing. At each stage of the proceedings, the juvenile court explained what it was doing and described what the next step in the process would be.

We agree with the juvenile court that, when presented with a section 388 petition, particularly one filed in propria persona, it is not restricted to either denying the petition summarily or granting a contested hearing at the outset. There is a "middle ground" such as the one navigated by the juvenile court.

*In re C.J.W.* (2007) 157 Cal.App.4th 1075 is instructive in this regard. In that case, the court considered the parents' section 388 petitions and conducted a hearing at which it did not take testimony. (*In re C.J.W., supra*, at p. 1080.) Instead, the hearing was limited to the court receiving written evidence and hearing argument, after which it denied the petitions for failing to show changed circumstances or benefit to the children. (*Id.* at pp. 1080-1081.) On appeal, the petitioners complained this procedure violated their due process rights because they were not allowed to cross-examine the social workers and present (unspecified) evidence. The Court of Appeal affirmed the juvenile

court's denial of the petition, indicating that the juvenile "court did not base its ruling on information presented by the social workers [citation] but on the paucity of evidence submitted by parents in their petitions." (*Id.* at p. 1081.)

Here too, father appears to complain that the juvenile court violated his due process rights by not allowing him an opportunity to present testimony or cross-examine witnesses. He also seems to suggest that the juvenile court improperly relied on the paternal aunt's (unsworn) remarks in reaching its decision, without giving him an opportunity to rebut those statements or cross-examine her. These contentions are without merit.

First, there is no indication the court considered the paternal aunt's statements as evidence or relied on them in deciding the petition failed to make a prima facie showing of changed circumstances. In any event, the statements she made at the hearing were essentially identical to those she made when interviewed by the social worker as set forth in the Department's report, which was itself admitted into evidence without objection.

Second, father did have the opportunity to rebut the claims raised by the guardian and the Department, but chose not to. When asked by the juvenile court to address their contentions and support his claim to be in "active recovery," father's counsel instead admitted he had a pattern of progressing and relapsing. Rather than addressing the court's concerns directly, father persisted in his efforts to redirect the focus of the inquiry onto what he deemed were the relevant changed circumstances, i.e., the guardians' reduction in visitation back to the court-ordered minimum, rather than his poor record in addressing his substance abuse and anger management problems.

The juvenile court finally concluded, after considering the documentary evidence submitted by all parties, and the arguments made, that father had failed to make a prima facie showing of changed circumstances. As discussed above, the juvenile court did not abuse its discretion in making this finding, and consequently, father was never entitled to an evidentiary hearing.

**III. DISPOSITION**

The order denying the petition to modify the 2007 visitation order is affirmed.

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Premo, J.

WE CONCUR:

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Rushing, P.J.

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Elia, J.