

I. THE TRIAL COURT ERRONEOUSLY DENIED APPELLANT'S PETITION FOR MODIFICATION WITHOUT A HEARING IN VIOLATION OF HER RIGHT TO DUE PROCESS.

A. Standard Of Review.

The juvenile court's denial of a petition for modification after hearing is ordinarily reviewed for abuse of discretion. (*In re Kimberly F.* (1997) 56 Cal.App.4th 519, 532, 534; *In re Stephanie M.* (1994) 7 Cal.4th 295, 318-319.) The standard of review for a summary denial of the petition without a hearing is de novo review. (*In re Angel B.* (2002) 97 Cal.App.4th 454, 460; *In re Jeremy W.* (1992) 3 Cal.App.4th 1407, 1416.)

Review for abuse of discretion is reserved for those decisions by the trial court that are discretionary. Section 388 does not give the juvenile court discretion to grant or deny a hearing. It requires the court to grant a hearing when a certain factual showing has been made. Further, principles of due process require the court to grant a party to an action a meaningful opportunity to be heard. Since the court has neither discretion to grant or deny a hearing on any basis other than the presence or absence of a specific factual showing nor discretion to withhold or provide due process, the abuse of discretion standard has no place here. (See, *Pack v. Kings County Human*

Services Agency (2001) 89 Cal.App.4th 821, 839-840 [court has no discretion to release juvenile court records if it finds detriment to child].)

There was no dispute about the facts alleged in appellant's petition for modification. The sole question for the juvenile court was whether they demonstrated changed circumstances such that her children may have benefitted from the requested modification. Thus, the issue here is either a pure question of law under section 388 and the Due Process Clause or a mixed question of law and fact. Either way, de novo review is appropriate. (See *People v. Cromer* (2001) 24 Cal.4th 889, 894 [purely legal and mixed factual/legal questions require de novo review], citing *Pullman-Standard v. Swint* (1982) 456 U.S. 273, 289 [72 L.Ed.2d 66, 102 S.Ct. 1781]. See also *United States v. McConney* (9th Cir. 1984) 728 F.2d 1195, 1203 [when the federal constitution is implicated, the "predominance of factors favoring de novo review is even more striking"].)

B. According To Statute And Principles Of Due Process, A Petition For Modification Must Be Liberally Construed In Favor Of The Grant Of A Hearing.

Any parent . . . 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 the court previously made[.] . . . 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[.]

(Welf. and Inst. Code § 388, subd. (a).)

“[A] petition must be liberally construed in favor of its sufficiency” (*In re Jeremy W.*, *supra*, 3 Cal.App.4th at pp. 1413-1414), and “[t]he parent need only make a prima facie showing to trigger the right to proceed by way of a full hearing.” (*In re Marilyn H.* (1993) 5 Cal.4th 295, 310.) Therefore “only if the application fails to reveal any change of circumstance or new evidence which might require a change of order” (*In re Jeremy W.*, *supra*, 3 Cal.App.4th at pp. 1413-1414, emphasis added), or if the parent has not alleged facts which would tend to show the change is in the best interest of the child, may the petition be denied without a hearing. (*Ibid.*; *In re Josiah S.* (2003) 102 Cal.App.4th 403, 419.)

The rule requiring liberal construction of a petition for modification comports with the constitutional entitlement to procedural and substantive due process in juvenile dependency proceedings. “[T]he central meaning of procedural due process [is] clear: ‘Parties whose rights are to be affected are entitled to be heard[.]’” (*Fuentes v. Shevin* (1972) 407 U.S. 67, 80 [32 L.Ed.2d 556, 92 S.Ct. 1983].)

We have emphasized time and again that “the touchstone of due process is protection of the individual against arbitrary action of government,” [citation], whether the fault lies in a denial of fundamental procedural fairness, [citation], or in the exercise of power without any reasonable justification in the service of a legitimate governmental objective, [citation].

(*County of Sacramento v. Lewis* (1998) 523 U.S. 833, 845-846 [140 L.Ed.2d 1043, 118 S.Ct. 1708].)

Due process in the context of juvenile dependency proceedings requires the opportunity to be heard generally. (*In re B. G.* (1974) 11 Cal.3d 679, 689.) “In juvenile dependency litigation, due process focuses on the right to notice and the right to be heard. ‘A meaningful hearing requires an opportunity to examine evidence and cross-examine witnesses.’” (*In re Matthew P.* (1999) 71 Cal.App.4th 841, 851.)

[The concept of procedural due process] “has traditionally involved the elaboration of procedural safeguards designed to accord to the individual ‘the right to be heard before being condemned to suffer grievous loss of any kind’ as a result of governmental choices[.]” . . . Procedural due process thus focuses upon the essential and fundamental elements of fairness of a procedure which would deprive the individual of important rights.

(*In re Crystal J.* (1993) 12 Cal.App.4th 407, 412, quoting Tribe, *American Constitutional Law* (2d ed. 1988) at page 664. Emphasis added.)

A petition for modification is a key “procedural safeguard” preserving the constitutionality of the dependency scheme. Although the focus shifts after the end of the reunification period to the child’s need for “permanency and stability”, the opportunity, even at that late stage, to prosecute a petition for modification pursuant to “[s]ection 388 provides the ‘escape mechanism’ that . . . must be built into the process to allow the court to consider new information.” (*In re Marilyn H.*, *supra*, 5 Cal.4th at pp. 309-311; *Sheila S. v. Superior Court* (2000) 84 Cal.App.4th 872, 879.) If this “safeguard” is to function, then the petitioning party must be granted a hearing unless she utterly fails to justify the need for one.

The right to an opportunity to be heard on a petition for modification filed after reunification services have been terminated is therefore likely the final barrier to an arbitrary deprivation of the fundamental right to parent one’s child. While it is true that the right to litigate a petition for modification is statutory, as are many of the rights and “procedural safeguards” vital to the constitutionality of the dependency scheme, this does not resolve the due process claim, because the Due Process Clause prohibits the arbitrary denial of a statutory right. (See *Hicks v. Oklahoma* (1980) 447 U.S. 343, 346 [65 L.Ed.2d 175, 100 S.Ct. 2227] [deprivation of the statutory right to

a jury instruction regarding punishment]; *In re Hashem H.* (1996) 45 Cal.App.4th 1791, 1800 [deprivation of statutory right to an evidentiary hearing]; *In re Laura H.* (1992) 8 Cal.App.4th 1689, 1695, fn.6 [deprivation of statutory right to effective assistance of counsel]; *Gray v. Klauser* (9th Cir. 2002) 282 F.3d 633, 645 [arbitrary evidentiary ruling].)

Therefore, principles of due process and section 388 itself, as construed by our courts, require a hearing where minimal pleading requirements are met. Here those requirements were met, because

C. The Error Requires Reversal.

An erroneous summary denial of a hearing on a petition for modification is presumptively prejudicial. (*In re Angel B., supra*, 97 Cal.App.4th at p. 461.) Further, any error that violates a party's right to due process requires reversal unless it is shown to be harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24 [17 L.Ed.2d 705, 87 S.Ct. 824]; *In re Stacy T.* (1997) 42 Cal.App.4th 1415, 1426; *In re Monique T.* (1992) 2 Cal.App.4th 1372, 1377.) The error here, as the similarly describe, "kafkaesque" and "palpabl[y] unfair" erroneous proceedings violated [parent's] right to due process. It deprived her of a "meaningful" hearing.

Therefore, the error was presumptively prejudicial. DHHS must show that the error, grounded in the deprivation of any tailored reunification services, was harmless beyond a reasonable doubt.