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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
FIRST APPELLATE DISTRICT  
DIVISION TWO

LE'ANNA P.,

Petitioner,

v.

THE SUPERIOR COURT OF THE CITY  
AND COUNTY OF SAN FRANCISCO,

Respondent;

SAN FRANCISCO COUNTY  
DEPARTMENT OF HUMAN SERVICES,

Real Party in Interest.

A134537

(City and County of San Francisco  
Super. Ct. No. JD05-3103)

**INTRODUCTION**

L.P. is an eight-year-old child who has been living in the home of her maternal grandfather and his wife in Alaska since she was placed there in January 2006, after removal from her mother. L.P.'s mother seeks writ review (Cal. Rules of Court, rule 8.452) of an order of the San Francisco Juvenile Court, granting the petition of the child's attorney, supported by the San Francisco County Department of Human Services (the department), to change the court's previous order from long term relative foster care by the grandparents to legal guardianship by the grandparents, based on changed circumstances (Welf. & Inst. Code, § 388)<sup>1</sup> and to set a selection and implementation hearing pursuant to section 366.26 for that purpose. The mother contends that the court

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<sup>1</sup> Unless otherwise indicated, all statutory references are to the Welfare and Institutions Code.

abused its discretion in granting the section 388 petition and referring the matter for a section 366.26 hearing, because the order is unsupported by evidence that circumstances have changed. We shall affirm.

### **BACKGROUND**

L.P. was removed from her mother in September 2005 and has lived in a long term placement with her maternal grandparents in Alaska since she was two and a half years old, after mother failed reunification. When the court sustained the petition in December 2005, it ordered that no further reunification services be provided mother, based on mother's failure to reunify with L.P.'s half-siblings. Reunification services were terminated and the matter was set for a selection and implementation hearing. In March 2006, the department filed a section 388 petition seeking long term placement with L.P.'s grandparents. Parental rights were not terminated. On April 27, 2006, the court identified a permanent plan as placement with the maternal grandfather in Alaska, with supervision pursuant to the Interstate Compact on Placement of Children (ICPC)<sup>2</sup> with a specific goal of legal guardianship. Mother was allowed supervised visitation, on condition that she was "clean and sober."

According to the status review report filed September 22, 2011, for a status review hearing held October 11, 2011, the child "is very bonded to her maternal grandfather and his family" and her grandparents "are the most significant parental figures in her young life." She has a strong bond with her older half-sibling, who has also resided with these grandparents since she was less than six month old. The status review related that the child was "developmentally on target in meeting physical milestones for her age."

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<sup>2</sup> Family Code section 7900 et seq., known as the Interstate Compact on Placement of Children, prescribes the procedures that must be followed before a dependent child is placed out of state. "The ICPC is an agreement among California and other states that governs 'sending, bringing or causing any child to be sent or brought into a receiving state for placement in foster care or as a preliminary to a possible adoption. . . .' (Fam. Code, § 7901, art. 3, subd. (b).) 'The purpose of the ICPC is to facilitate cooperation between participating states in the placement and monitoring of dependent children. [Citation.] . . .'" (*In re Emmanuel R.* (2001) 94 Cal.App.4th 452, 458.)

However, she had been diagnosed with ADHD. The doctor reported her challenging behaviors were indicative of prenatal drug exposure and in October 2010, he prescribed Concerta be taken on a daily basis. School staff at her previous school placement noted her behavior had shown some improvement in managing her ADHD symptoms following the Concerta prescription. Nevertheless, she “continues to have significant challenges in following directions, respecting the personal space of other children, and maintaining appropriate behavior in the classroom.”

The report related L.P. “continues to have a very low threshold for managing frustration when she does not receive immediate attention to her perceived needs. Her mental health supervisor reports that [L.P.] has limited understanding of personal boundaries and space for the other children in the home and also with her classmates. She is less aggressive towards her cousin . . . who is diagnosed with Fetal Alcohol Syndrome. . . . The maternal grandfather reports that [L.P.] continues to need an extraordinary level of supervision to keep her physically safe.”

The report also observed that the grandparents “continue to provide a warm, loving and supportive environment for [L.P.] who experienced much emotional trauma and severe physical neglect before she was two years old. Upon placement in January 2006, [L.P.] appeared to be developmentally delayed in the areas of adaptive reasoning, fine motor, expressive language and self-help. Since that time, she has made substantial progress. Her strength continues to be in her cognitive abilities. Her vocabulary continues to grow and she is now speaking in sentences.” The permanent plan continued to be long-term foster care with her grandparents in Alaska. The report also stated that “KinGAP guardianship was considered for the relative caregiver, but is not recommended at this time because the child is placed in Alaska under ICPC supervision.<sup>[3]</sup> In addition,

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<sup>3</sup> Kin-GAP, the Kinship Guardianship Assistance Payment Program, provides aid to children who leave the juvenile court system to live with a relative legal guardian. To qualify, the child must have resided with the relative caregiver for at least twelve consecutive months in a court-ordered placement. Legal guardianship must be established with the relative caregiver and dependency must be dismissed at the same time or after establishment of the legal guardianship. (§§ 11360, 11363.) Until recently,

the child continues to need extensive services and case management support from the San Francisco Department of Human Services.”

The status review report also related that mother was continuing to work on her substance abuse and mental health issues, that from September 2010 to Spring 2011, the mother had bi-weekly, supervised telephone visitation with the child, that in September 2011, the department paid for mother to visit the child over the Labor Day weekend at the home of the grandparents.

The order emanating from October 11, 2011 hearing renewed the dependency status of the child, continued her in the relative placement with her grandparents, found the department has complied with the case plan, found by clear and convincing evidence that reasonable services were provided, and found long term foster care with the child’s relatives continued to be the appropriate plan. The court also found by clear and convincing evidence, “that there is a compelling reason that a 366.26 implementation hearing is not in the best interest of [the child] because: The child is not a proper subject for adoption, and no one is willing to accept legal guardianship.”

On November 2, 2011, mother filed a request to change court order pursuant to section 388. She claimed to have been clean and sober since 2006, to have completed a program and to be involved in an outpatient treatment for relapse prevention. She requested an order for six months of reunification services, and that the child be transitioned to return to her. Both the department and the child opposed the modification of the court’s order, arguing mother had failed to show a sufficient change of circumstances or that the change would be in L.P.’s best interest. On December 6, 2011, following a hearing, the court denied mother’s petition without prejudice.

On December 6, 2011, the child’s attorney filed on her behalf a request to change the existing court order to set a selection and implementation hearing pursuant to section 366.26, to determine that a permanent plan of legal guardianship was the best

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Kin-GAP did not allow for payments to children who leave the juvenile court system to live with a relative legal guardian outside California.

alternative for the child, and to determine that reunification with the mother was not the best alternative for this child.

At the January 24, 2012 contested hearing on the section 388 petition, department protective service worker Joan Kelly was the sole witness. She testified that she was assigned the case in 2006, shortly after the child had been placed. Her responsibilities included case management, such as maintaining contact with the family in Alaska, with the ICPC case worker, the school, and the therapist; verifying medical and dental services; addressing medication issues as needed; writing court reports; maintaining case notes; meeting with the mother; responding to mother's telephone calls; and arranging transportation. Her duties also included assessing L.P.'s case for permanency through on-going discussions with the ICPC worker in Alaska, the therapist, relative care providers, and with the mother; as well as assessment of service providers in Alaska. Kelly testified that she had conducted a permanency assessment for L.P. in early to mid-September and had more recently been able to update that assessment. The department's recommendation of legal guardianship was not made at the time of the September assessment. However, Kelly testified, "Had I had another couple of weeks, I would very likely have made a recommendation in that report for legal guardianship." She explained that she had conducted an administrative review, had spoken with the grandparents and with L.P.'s therapists, and also had found that "AB12 now allowed for a kinship guardianship out of state."

Kelly related that L.P.'s therapist spoke extensively about the issue of attachment and about how well the child was now doing. L.P. "was continuing to do group therapy, she was continuing to do individual therapy, but that it appears that [she] is turning the corner and having better control of her emotions and her impulsivity, her angry outbursts, et cetera."

The grandparents were now "ready, willing, and able to become L.P.'s legal guardian." The grandfather "has spoken extensively for the last six months or so of his desire to have legal guardianship of his granddaughter." Kelly had spoken with the maternal grandfather after the administrative review conducted on the case and on an

average of once per week, at least a dozen times in the previous three months. He and the grandmother “are very committed” to becoming L.P.’s legal guardians. Kelly testified that legal guardianship by her grandparents would be beneficial to the child as “[i]t provides stability, it provides permanency, it provides the best all things considered, a stable environment where she has lived 75 percent of her young life” and would give L.P. and “the family a permanency that they can move on with their life with creating a family, with supporting a family, et cetera.” Kelly could not definitively say that the State of Alaska would approve legal guardianship, as that state would have to conduct a legal guardianship home study. However, the grandfather was already the legal guardian of L.P.’s older half-sister, with whom L.P. had developed a “very strong emotional sibling bond.”

Another change was Kelly’s discovery that “AB12 has allowed the State of California to now authorize legal guardianship outside of the State of California, and to continue foster care financial support.” Kelly was referring to changes that were part of Assembly Bill No. 12, enacted in 2010, that became effective in 2011. (Stats. 2010, ch. 559 (Assem. Bill No. 12) § 34, operative Jan. 1, 2012.) Among other things, Assembly Bill No. 12 changed existing law so that the county having court-ordered jurisdiction of a child pursuant to section 300, would now be responsible for paying the child’s Kin-GAP benefits regardless of where the child resided. (§§ 11360, 11364, subd. (b)(4).)

Mother’s counsel cross-examined Kelly regarding previous status reports and the statement in those reports and particularly in the September 2011 report, that Kin-GAP guardianship had been considered but not recommended at that time, because L.P. was placed in Alaska under ICPC supervision and that she also needed extensive services and case management support from San Francisco Department of Human Services. Kelly responded that “[t]he biggest thing that’s changed is she has a new physician who has changed her medication, and everybody is commenting on the tremendous change in her behavior and in her emotional stability.” The new physician was a change from the physician identified in the September 2011 report. Kelly maintained that in addition to

the fact that Assembly Bill No. 12 was now in effect, “[w]hat has changed is a new physician, the medication, and her behavior.” Also, the most recent report from the ICPC worker in December spoke about the child’s improvement. Kelly did not believe the “serious behavioral difficulties” identified in the September 2011 report had suddenly disappeared, but stated they did seem to have lessened according to the most recent ICPC report.

Until January 2012, Kelly did not know whether Kin-GAP guardianship could apply to a child who was already placed outside of California. That information was confirmed to her in January. Kelly explained that services were provided to L.P. in Alaska. L.P. continued to need extensive services. However, after Assembly Bill No. 12, if a kinship guardianship is ordered, the child can receive case management—facilitation and arranging for those services—from Alaska, rather than from San Francisco. “AB12 allows a child who is placed out of state in a dependency matter to remain in that placement, for California to grant that relative Kin-GAP guardianship, to dismiss the legal action in California, and for foster care funding to continue for that child.” If L.P. were under a legal guardianship in Alaska, the care providers would have the legal authority to access those services on their own. As an illustration, Kelly testified she had recently received 12 pages of documents that must be signed by the San Francisco department representative for services for this child. However, since Assembly Bill No. 12, “[i]f the child was under a legal guardianship, the care provider in Alaska could sign those 12 pages.” Kelly testified she found the grandfather to be “fairly resourceful with getting services for [the child]” and Kelly believed that the grandfather, who had a background in working in social services in Alaska as a supervisor for a county teen shelter, would be able to access services L.P. needs without Kelly’s case management and facilitation.

The court stated it had considered the five-page declaration of the grandfather, discussing the family’s home life, the child, and the grandparents’ commitment to legal guardianship and the grandfather’s accompanying resume. Kelly stated that legal guardianship had been under discussion with the grandparents for about 18 months, that

the grandfather was always in favor of it, but that the department does not recommend going to legal guardianship until the case is “stable enough that there are—that the child has had enough time in the placement, that the child is showing a stability.”

At the conclusion of the hearing, the juvenile court granted the child’s section 388 petition and ordered a section 366.26 hearing to be held May 30, 2012. This timely appeal followed.

## **DISCUSSION**

### ***A. Legal Framework***

Section 388 allows any person having an interest in a dependent child to petition the juvenile court to change, modify or set aside a previous order, based on changed circumstances or new evidence. (§ 388, subd. (a).) Thus, counsel for the child and/or the department “may, upon grounds of change of circumstance or new evidence, petition the court in the same action in which the child was found to be a dependent child of 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).) The moving party has the burden of establishing by a preponderance of the evidence that changed circumstances existed and the proposed change was in the best interests of the child. (*In re S.R.* (2009) 173 Cal.App.4th 864, 870; *In re M.V.* (2006) 146 Cal.App.4th 1048, 1057, 1059.) The change in circumstance must be of such significant nature that it requires setting aside or modifying the challenged order. (*Ansley v. Superior Court* (1986) 185 Cal.App.3d 477, 485.) It must relate to the purpose of the order, “and be such that the modification of the prior order is appropriate.” (*In re S.R.*, at p. 870.)

“Determination of a petition to modify is committed to the sound discretion of the juvenile court and, absent a showing of a clear abuse of discretion, the decision of the juvenile court must be upheld. (*In re Stephanie M.* (1994) 7 Cal.4th 295, 318–319; *In re Robert L.* (1993) 21 Cal.App.4th 1057, 1067.)” (*In re S.R.*, *supra*, 173 Cal.App.4th at p. 870.) We accept the lower court’s factual findings and the reasonable inferences that support them. (*In re M.V.*, *supra*, 146 Cal.App.4th at pp. 1059-1060.)

## **B. Application**

The child and the department met their section 388 burden of demonstrating, by a preponderance of the evidence, that circumstances had changed such that the previous order should be changed from long term foster care to setting of a 366.26 selection and implementation hearing to consider legal guardianship by the grandparents. Mother focuses on the closeness in time of the September 2011 status review report that continued to recommend long term foster care with the grandparents and refused to recommend Kin-GAP legal guardianship. She contends that nothing significant has changed about L.P.'s needs. However, the evidence before the court here provided ample support for the court's determination that things had changed with respect both to L.P.'s behaviors and circumstances surrounding the availability and desirability of a legal guardianship by her grandparents.

First, substantial evidence was presented that in connection with a very recent administrative review, L.P.'s therapist and the Alaskan ICPC worker had observed that L.P. was doing well on her new medication and that it appeared she "is turning the corner and having better control of her emotions and her impulsivity, her angry outbursts, et cetera." The therapist also spoke to Kelly at length about the issue of attachment and Kelly opined that the change to legal guardianship would benefit L.P. by giving her "permanency" and "stability" with the only family she had ever really known. Within the last 18 months, L.P.'s grandparents had expressed their commitment to becoming her legal guardians and changes in the law allowed them to receive Kin-GAP funds to help support L.P.'s needs, where such assistance had previously been either unavailable or uncertain.

*In re Heraclio A.* (1996) 42 Cal.App.4th 569, held that a legal guardians' decision to provide more stability for the dependent child by moving from legal guardianship to adoption was a significant change in circumstance supporting the granting of a section 388 petition, where the child was bonded to the legal guardians. (*Id.* at pp. 577-578.) According to the court, "the fact that the current caretakers desired to provide more stability for [the child] constituted a substantial change in circumstances. The juvenile

court did not abuse its discretion in granting the petition.” (*Id.* at p. 578.) Similarly, in this case, the willingness and ability of the grandparents to provide more stability for L.P. by moving from long-term foster care to legal guardianship is a substantial change of circumstance supporting granting the petition.

In addition, it had become clear that because of the change in the law relating to Kin-GAP funding for children in out-of-state legal guardianships, the grandfather could access services directly for L.P., rather than having the provision of services managed and facilitated through the department in San Francisco.

It may be that the confluence of all of the various circumstances—the new availability of Kin-GAP funds to assist children already in out-of-state foster care, the change in L.P.’s medication and significant improvement in her behavior, and the concerns triggered by mother’s recent attempt to change the order to reestablish services and move toward reunification—combined to focus the grandparents, the department and the child’s counsel on the issues of attachment and stability and to reinforce the grandparents’ commitment to legal guardianship of this child. Taken together, the record contains substantial evidence of changed circumstances and further shows that modification of the existing order would be in the child’s best interest. The court acted well within its discretion in granting the section 388 motion and in setting a selection and implementation hearing pursuant to section 366.26.

**DISPOSITION**

The order granting the section 388 motion is affirmed. The petition is denied on the merits, as is the petition to stay the section 366.26 hearing. (*Kowis v. Howard* (1992) 3 Cal.4th 888, 894 [barring later challenge by appeal].) Our decision is immediately final as to this court.

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Kline, P.J.

We concur:

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Lambden, J.

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Richman, J.