

**NOT TO BE PUBLISHED IN OFFICIAL REPORTS**

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

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

In re Joshua P. et al., Persons Coming  
Under the Juvenile Court Law.

CONTRA COSTA CHILDREN AND  
FAMILY SERVICES BUREAU,

Plaintiff and Respondent,

v.

T.B. et al.,

Defendants and Appellants.

A137723

(Contra Costa County  
Super. Ct. Nos. J11-0195, J11-01094)

Mother appeals from an order denying her Welfare and Institutions Code<sup>1</sup> section 388 petition and terminating her parental rights as to two of her children, both of whom were under the age of three when removed from her custody. She contends the court abused its discretion by denying her petition for modification. The father of the younger of the two children appeals the same order insofar as it terminates his parental rights. He joins in mother’s arguments on appeal. We shall affirm the order.

**Factual and Procedural Background**

In December 2013, this court issued an order denying mother’s petition for an extraordinary writ (Cal. Rules of Court, rule 8.452) directed to the juvenile court’s order terminating her reunification services and setting a section 366.26 hearing. (*T.B. v. Superior Court* (Dec. 13, 2012, A136706) [nonpub. opn.].) Our decision sets forth the factual and procedural history of these proceedings: On August 4, 2011, the Contra Cost

<sup>1</sup> All statutory references are to the Welfare and Institutions Code unless otherwise noted.

County Children and Family Services Bureau (the Bureau) filed petitions alleging that the children came within the meaning of section 300, subdivisions (b), (g), and (j). The petitions alleged, among other things, that mother had a substance abuse problem that impairs her ability to care for the children, that she was in a domestic violence relationship that places the children at risk of harm, and that despite the provision of services she previously failed to reunify with the children's half-sibling due to her substance abuse. The petitions alleged that the children had been detained and placed in a foster home as of August 2, 2011. On September 16, the court sustained the allegations in the petition and continued the children in their foster care placement.

In advance of the disposition hearing, the Bureau recommended that no reunification services be provided to mother based on her reluctance to admit she had a substance abuse problem and her prior failure to reunify with the children's older half-sibling. The social worker explained that in the four years that the Bureau had been supervising mother, she had participated in four different treatment programs and that each time she completed the program but relapsed shortly thereafter. The older child was returned to mother's care three times during the prior dependency proceedings before parental rights were finally terminated. By the time the disposition hearing was held in this case in February 2012, mother had been participating in an outpatient treatment program for five months. Based on the positive reports from the program, the court ordered reunification services for mother.

In July 2012, in advance of the six-month review hearing, the Bureau submitted a report regarding mother's progress. The social worker reported that mother's father passed away in January 2012 and that, thereafter, mother became homeless. She moved around the Bay Area looking for housing but was unsuccessful and at the time of the report was homeless in Oakland. She had not participated in individual counseling, anger management, or domestic violence services as required by her case plan. She stopped participating in her drug treatment program in March 2012 and, although she had participated in some drug testing, she had missed eight tests. Mother rejected the social worker's recommendation that she enter a residential treatment program, opting instead

to make her own treatment plans. Her visits with the children were intermittent, but of good quality. The Bureau submitted an updated memo at the September 9, 2012 review hearing, reporting that at the end of July mother had moved into a shelter in Berkeley that provides substance abuse services for homeless individuals and that she had begun participating in an outpatient treatment program.

At the hearing, Mother acknowledged that she had used methamphetamine “randomly” in May and June because she was “having a moment” and “wasn’t quite finished grieving.” She testified she began the new out-patient program on August 8 and that since then had only one positive drug test for marijuana, which she uses to control pain from multiple sclerosis. She also reported that she missed two tests at the end of August because she was hospitalized briefly.

The court terminated reunification services and set a section 366.26 hearing. The court explained to mother, “[W]hen I look back . . . at your history, . . . what happens is you have ups and downs, but you kind of get it together right before these kind of big review dates, and then after the review date passes and then you get some more time given to you, then you fall into relapse. [¶] It seems to have happened in the case of your previous child[], and it seems to have happened even in the history of this case. Whereas, after disposition, I went and ordered . . . services and — in February, and in March you fail out of the Ujima program. Now you’re back in another residential program.”

In denying mother’s writ petition from the September 9 order, this court rejected mother’s argument that her circumstances, including her father’s death, lack of housing and multiple sclerosis, warranted extension of the statutory timelines for reunification. (*T.B. v. Superior Court, supra*, A136706 [nonpub. opn.].)

On January 14, 2013, mother filed a petition for modification under section 388. The petition requests the court to set aside the permanency planning hearing set for January 18 and enter an order placing the children with her so long as she remains in her drug treatment program. In support of this request, the petition alleges, “Mother has made great strides in a recovery program and the program supports reunification. The program

has a room available for mother and her two children. Mother has been testing clean since July of 2012. She is living in Harrison House in Alameda County.”

On January 18, the court heard testimony in support of the modification petition before conducting the section 366.26 hearing. Contrary to what was alleged in the petition, mother testified that she was asked to leave her prior outpatient drug treatment program in November of 2012 and as a result was asked to leave Harrison House at the same time. She explained that the drug treatment program had a strict no drug policy which she was unable to comply with because of her multiple sclerosis. She testified that on two occasions between August and October she was given morphine while hospitalized for multiple sclerosis, which resulted in her removal from the program. Despite claiming to have been drug-free since July 2012, she acknowledged that she is still using marijuana, albeit “random[ly]” and “rarely.” She explained that although “you guys consider it a drug,” she has been using marijuana since she was 17 and understands it differently. She testified that at the time of the hearing, she was living at the Brookside Shelter and was not currently participating in a drug treatment program. When asked whether she had begun the therapy that had been arranged for her since the September review hearing she said that she had “yet to start because of the . . . relocation and exacerbation with [her] multiple sclerosis.” In explaining her failure to make progress on her case plan, mother claimed that the lack of funding for her housing and medical treatment was “the hiccup that kept [her] stagnated for the longest time” and that her “funding is now active and current so that [she] can move forward and be able to move out of the shelter . . . into [her] own place.” Mother was pregnant at the time of the hearing with a March 1, 2013 due date.

The court denied the section 388 petition. The court acknowledged that while mother “is clearly gaining further insight and going along the path of recovery,” she is not “anywhere near the kind of permanency [that is needed] for [the court] to consider her, because she still lacks fundamental insight. For example, she still hasn’t started the therapy that was suggested years ago. She still has not throughout this program checked herself into a full-time residential treatment program. . . . And most of concern to the

court was the almost casual, almost uncaring admission that she is smoking marijuana during her pregnancy. Regardless of what one's moral views are about the legality of marijuana, there is no dispute that smoking marijuana during pregnancy is extremely harmful . . . and I think that that lack of insight is something . . . to be considered.”

Turning to the permanency planning hearing, the court terminated parental rights and selected adoption as the permanent plan for the children. The parents filed timely notices of appeal.

### **Discussion**

Mother claims the juvenile court should have granted her petition under section 388 because she had been sober for seven months and was finally able to secure funding for the treatment of her multiple sclerosis, which “had been such a factor in impeding her access to, and completion of, reunification services.” Section 388 allows an interested person to petition the juvenile court for a hearing to change, modify or set aside a previous order if the petitioner can establish changed circumstances and that the proposed order would be in the best interests of the child. The burden of proof is on the petitioner. (*In re Clifton B.* (2000) 81 Cal.App.4th 415, 423.) The juvenile court here determined mother had not met that burden. We may not reverse the juvenile court's determination unless mother establishes that it was an abuse of discretion. (*Ibid.*) She has not done so.

While mother's illness undoubtedly complicated her recovery, it does not excuse her failure to make progress after so many years of being provided services. At the time of the hearing, mother had made almost no progress on her case plan. Her housing was still unstable, she was not participating in a drug treatment program and had not begun the therapy program to which she had been referred months before. While she claims to have been sober for seven months, she also acknowledges that she smoked marijuana during that time period, including while pregnant with her fourth child. As the trial court noted, her lack of insight into the seriousness of her addiction is cause for concern. In light of her 27-year history of drug addiction and regular relapses, her six months of “sobriety” does not establish that her addiction is under control sufficient to warrant

placing the children in her care. Under these circumstances, the court's denial of her petition was not an abuse of discretion.

Mother was not prejudiced by the change of judicial officer at the hearing on the section 388 petition. Mother argues that the section 388 petition was heard by a judge who was unfamiliar with her history, including her medical issues, and thus who could not properly assess her progress over time. It was, however, mother's burden to provide the court with evidence supporting her petition. Her failure to do so cannot be blamed on the bureau or the court. Moreover, the record establishes that the court did appreciate the efforts mother had made in recovery, but based on the evidence before it justifiably concluded that despite these efforts, mother was nowhere near where she needed to be in order for the court to grant her petition.

Mother does not separately challenge the merits of the order terminating parental rights. Accordingly, we shall affirm the order.

**Disposition**

The order denying mother's section 388 petition and terminating parental rights is affirmed.

---

Pollak, J.

We concur:

---

McGuinness, P. J.

---

Jenkins, J.