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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

In re J.S. et.al., Persons Coming Under the  
Juvenile Court Law.

SAN FRANCISCO HUMAN SERVICES  
AGENCY,

Plaintiff and Respondent,

v.

E.L.,

Defendant and Appellant.

A140937

(San Francisco City & County  
Super. Ct. Nos. JD123217 &  
JD123217A)

E.L. (Father) appeals from a January 2014 order denying his petition under Welfare and Institutions Code section 388<sup>1</sup> seeking to change the prior placement order regarding his teenage children, J.S. and E.D.S., and to provide him with reunification services. Although the juvenile court found Father sufficiently proved changed circumstances, it denied his section 388 petition, finding it would not be in the minors' best interests to change their placement at that time. We conclude the court did not abuse its discretion, and affirm.

**BACKGROUND**

In June 2012, San Francisco's Child Abuse Hotline received a report of emotional abuse to J.S. and E.D.S., who at the time lived with their mother, her boyfriend, and their

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

three children. Two months later, J.S. and E.D.S. were detained and placed together in out-of-county foster care. A first amended section 300 petition, filed four days later, alleged the minors fell within subdivisions (b), (g),<sup>2</sup> and (j) based on allegations of domestic violence, inadequate food and shelter, physical abuse, and abuse of a sibling.

At the September jurisdictional/dispositional hearing, Father, who had not seen the minors in 15 years,<sup>3</sup> appeared and agreed to paternity testing and supervised visits. He thereafter filed a JV-505 statement regarding parentage and a motion for presumed parent status, which the court granted on January 9, 2013. Father initially waived reunification services, stating he was working full time, traveling two to three hours a day to job sites, and completing a probationary training period with his employer. The court ordered supportive services for Father.<sup>4</sup>

In mid-August 2013, the minors' social worker filed a status report in advance of the six-month review hearing. She reported both J.S. and E.D.S. had been diagnosed with PTSD and dysthymia. E.D.S. exhibited poor impulse control and attention seeking behaviors. And J.S. struggled academically and with her peers at school, although she was learning to maintain healthy friendships. The social worker reported the minors expressed a strong preference to remain with their foster parents. However, in an addendum filed in October, she reported that on August 30, 2013, the minors were placed in respite care and remained in two separate placements. Though only intended to be temporary, the minors were unable to return to their original foster care placement.

On November 4, Father filed a section 388 petition requesting the court order the minors placed with him through family maintenance services for no less than six months

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<sup>2</sup> The allegation under subdivision (g) that the whereabouts of Father was unknown was subsequently stricken.

<sup>3</sup> Father was incarcerated for violating terms of parole when J.S. was a year old and mother was pregnant with E.D.S. Mother claimed Father was abusive and while he was incarcerated, ended the relationship.

<sup>4</sup> Father claims that apart from his own logistical problems, the Agency experienced delays and problems in setting up the visitations. In the meantime, he sent the minors a letter to be reviewed during their therapy.

or, alternatively, order family reunification services with unsupervised visitation.<sup>5</sup> After a mediation concerning visitation, the court set Father's section 388 petition for an evidentiary hearing and in the interim expanded his visitation rights to include unlimited and unsupervised visits.

On December 30, the minors' counsel filed a section 317 report in advance of the hearing on the section 388 petition. According to counsel, J.S. and E.D.S. both expressed a strong desire to be "out of the system" and to have stability and permanency, but did not express a desire to live together or with Father. J.S. expressed a desire to go back to her former placement, but stated she was "open to exploring reunification with [Father]" and was also open to the "possibility of living with him if she could have more visits with him to get to know him better." E.D.S. placed his desire to be adopted as an eight out of 10, and ranked his desire to live with Father a five out of 10. Additionally, counsel expressed concern of a "dissonance between [Father's] position and his actions," noting he had only visited the children two or three times since he had been granted unlimited and unsupervised visitation rights. Father did not contact the minors on Christmas or New Year's Day.

At a hearing on January 21, 2014, the juvenile court denied Father's section 388 petition, stating although he had established changed circumstances, it would not be in the children's best interest to grant either the request for placement or family reunification services. The court focused on the minors' need for permanency and stability, their history of trauma, and their desire to remain in their foster care placements. Father continues to have unrestricted visitation and overnight stays.

### **DISCUSSION**

"Section 388 allows a parent or other person with an interest in a dependent child to petition the juvenile court to change, modify, or set aside any previous order. (§ 388,

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<sup>5</sup> Father lived in a two-bedroom apartment with his fiancée and their eight-year-old child, and believed he could accommodate the minors by sleeping in the living room. However, he had also taken steps for better accommodations and was on a waiting list for a three-bedroom apartment in a different location.

subd. (a).) ‘Section 388 provides the “escape mechanism” that . . . must be built into the process to allow the court to consider new information.’ [Citations.] The petitioner has the burden of showing by a preponderance of the evidence (1) that there is new evidence or a change of circumstances *and* (2) that the proposed modification would be in the best interests of the child. [Citations.] That is, ‘[i]t is not enough for [the petitioner] to show *just* a genuine change of circumstances under the statute. The [petitioner] must show that the undoing of the prior order would be in the best interests of the child. [Citation.]’ [Citation.] Furthermore, the petitioner must show *changed*, not *changing*, circumstances. [Citation.] The change of circumstances or new evidence ‘must be of such significant nature that it requires a setting aside or modification of the challenged prior order.’ [Citation.]” (*In re Mickel O.* (2011) 197 Cal.App.4th 586, 615.) Generally, when ruling on a 388 petition, the juvenile court considers: “(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.)

After reunification services have been terminated (here they were waived in February 2013), there is a rebuttable presumption “at that point, that continued care is in the best interest of the child. The parent, however, may rebut that presumption by showing that circumstances have changed that would warrant further consideration of reunification. [¶] It must be remembered that up until the time the section 366.26 hearing is set, the parent’s interest in reunification is given precedence over the child’s need for stability and permanency.” (*In re Marilyn H.* (1993) 5 Cal.4th 295, 310.) “After the termination of reunification services, the parents’ interest in the care, custody and companionship of the child are no longer paramount. Rather, at this point ‘the focus shifts to the needs of the child for permanency and stability.’ ” (*In re Stephanie M.* (1994) 7 Cal.4th 295, 317.)

“Whether the juvenile court should modify a previously made order rests within its discretion, and its determination may not be disturbed unless there has been a clear abuse of discretion.” (*In re J.C.* (2014) 226 Cal.App.4th 503, 525, citing *In re Stephanie M.*, *supra*, 7 Cal.4th at p. 318.) “The appropriate test for abuse of discretion is whether the trial court exceeded the bounds of reason.” (*In re J.C.*, at p. 525.) “ “ “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.*, at p. 318.)

Father maintains the court abused its discretion in denying his section 388 petition because it “relied exclusively upon the minors’ express wishes to remain at their current placements.” He asserts the minors are “entitled to have [their] wishes considered, [but the minors are] not entitled to decide where [they] would be placed,” relying on *In re John M.* (2006) 141 Cal.App.4th 1564, 1570 (*John M.*).

In *John M.*, the 13-year-old minor was removed from his mother after suffering physical abuse. (*John M.*, *supra*, 141 Cal.App.4th at p. 1567.) His 10-month-old half sister was also removed. (*Id.* at p. 1567, 1570.) His father lived in Tennessee, and “had been in contact with John for one year after a four-year hiatus.” (*Id.* at p. 1568.) The father indicated “the earlier lack of contact ‘was not on [his] part.’ ” (*Ibid.*) John, however, told a social worker he did not want to live with his father because he “lived in the country,” and wanted to live with his aunt. (*Ibid.*) The juvenile court found it would be detrimental to place John with his father “based on John’s wishes, his need for services, his relationship with [his infant half-sister] and members of his extended family in San Diego, his lack of relationship with [his father], the paucity of information about [the father], and [his mother’s] reunification plan.” (*Id.* at p. 1570.) The Court of Appeal reversed, noting John’s wishes about placement were “unclear.” The social worker did not ask John what he meant by his statement about his father living in the country, “could not see his facial expression during the conversation, and John’s aunt was in the room while they spoke.” (*Ibid.*) The social worker also testified John “had never told her that he did not want to live with [his father].” (*Ibid.*) Additionally, the social worker

“admitted she had no information [the father] was unable to meet John’s special needs,” and the trial court “found [the father] was not to blame” for the earlier four-year gap in contact. (*Id.* at p. 1571.) Accordingly, the court held the Agency had failed to prove detriment. (*Id.* at p. 1571.)

The circumstances in *John M.* are not present here. First, the procedural posture of that case was the initial dispositional hearing, not a section 388 petition seeking to change a prior order. Thus, in *John M.*, the juvenile court was required to “ ‘place the child with the parent unless it finds that placement with that parent would be detrimental . . . .’ ” (*John M.*, *supra*, 141 Cal.App.4th at p. 1569, quoting § 361.2, subd. (a).) In contrast, in ruling on a section 388 petition, the juvenile court must find modification of a prior order would be in the best interests of the minor. (*In re Mickel O.*, *supra*, 197 Cal.App.4th at p. 615.) And, because reunification services had been terminated, there was a presumption that continued care was in the best interests of the minors. (*In re Marilyn H.*, *supra*, 5 Cal.4th at p. 310.)

Second, John M. had expressed a wish to be placed with his aunt while she was in the room with him, been “unclear” about whether or not he wanted to live with his father, and gave as the only basis for his reluctance the fact that his father “lived in the country.” (*John M.*, *supra*, 141 Cal.App.4th at pp. 1568–1569.) Thus, there was no evidence that John’s reluctance to live with his father was due to a lack of a bond with him, or that it would be detrimental for him to be placed with his father. (*Id.* at pp. 1570–1571.)

In contrast, the juvenile court in this case correctly considered the bond, or lack thereof, between Father and the minors, as expressed by their placement wishes. (See *In re Kimberley F.*, *supra*, 56 Cal.App.4th at p. 532.) The court noted the minors’ wishes, but did not rely exclusively on them in denying the petition. Rather, the court based its ruling on “the comparative strength of bonds between the children and the parents and the current caregiver . . . , their history of trauma, their desires at this point.” The court considered the evidence the children had, until quite recently, no relationship with Father, and Father was initially offered, but waived, reunification services. Even when granted unlimited visitation and overnights in November 2013, Father only made the effort to see

the children two or three times in a two-month time period, and not on Christmas or New Year's Day. Indeed, the minors' wishes regarding their placement were based on the fact they had only recently met Father, and had a limited relationship with him.

In short, the court appropriately considered the very weak bond minors had with Father in assessing what was in the children's best interests, and the court's conclusion that stability and permanency should take precedence was within the realm of reason. Accordingly, the court did not abuse its discretion in finding it was not in the minors' best interest to change the prior orders.

**DISPOSITION**

The order denying Father's section 388 petition is affirmed.

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Banke, J.

We concur:

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Humes, P. J.

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Dondero, J.