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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

In re WALTER D., a Person Coming  
Under the Juvenile Court Law.

B238514

LOS ANGELES COUNTY  
DEPARTMENT OF CHILDREN AND  
FAMILY SERVICES,

(Los Angeles County  
Super. Ct. No. J972681)

Plaintiff and Respondent,

v.

ANGELA A.,

Defendant and Appellant.

APPEAL from an order of the Superior Court of Los Angeles County,  
Stanley Genser, Referee. Affirmed.

Cristina Gabrielidis Lechman, under appointment by the Court of Appeal, for  
Defendant and Appellant.

Office of the County Counsel, John F. Krattli, Acting County Counsel,  
James M.Owens, Assistant County Counsel, Jeanette Cauble, Deputy County Counsel for  
Plaintiff and Respondent.

Angela A. appeals from an order of the juvenile court terminating her parental rights to her son, Walter D., and finding him adoptable. She contends the court erred in finding Walter adoptable and in denying her motion under Welfare and Institutions Code section 388.<sup>1</sup> We find no basis for reversal and affirm.

### **FACTUAL AND PROCEDURAL SUMMARY**

Mother had a long history of substance abuse. She had lost custody of Walter's eight older siblings through dependency proceedings. Her parental rights had been terminated as to six of them, and two were in legal guardianships. Walter was born in July 2010, while his mother was in custody. He tested negative for drugs. Walter's alleged father was incarcerated and is not a party to this appeal. The Department of Children and Family Services (DCFS) filed a petition alleging that Walter is a child coming within the jurisdiction of the juvenile court under section 300, subdivisions (b) and (g). Walter was detained in foster care. Reunification services were not recommended for the parents pursuant to section 361.5, subdivision (b). A first amended petition was filed in September 2010, alleging jurisdiction under section 300, subdivision (b) because mother's 23-year history of substance abuse made her unable to provide care and supervision for the child.

The jurisdiction report outlined mother's criminal history. Initially, mother admitted her long history of substance abuse, but maintained that she did not need a treatment program to address the issue. At the adjudication hearing, mother submitted on the first amended petition. It was sustained as further amended, finding that Walter is a minor described by section 300, subdivisions (b) and (g). Walter was in respite care with an aunt. He screamed and cried whenever placed on his back and exhibited shakiness. After being hospitalized for a cold, he was at home with a nebulizer. The aunt was willing to adopt him.

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<sup>1</sup> Statutory references are to the Welfare and Institutions Code, unless otherwise indicated.

At the contested disposition, the court admitted DCFS reports. Mother did not submit any evidence, but her attorney asked the court to grant reunification services. Mother planned on entering a transitional house shortly. Walter was declared a dependent of the court and was removed from the custody of his parents. The court denied reunification services to mother. A permanency planning hearing was set pursuant to section 366.26.

The DCFS report for the section 366.26 hearing stated that Walter was receiving excellent care from his aunt, who had adopted one of his siblings. DCFS found the home to be a stable and nurturing environment. Walter was in good health, and his breathing condition was improving. Walter was meeting developmental milestones, and was rejected for early start services at a regional center because he did not have an established risk condition exhibiting significant developmental delays. At eight months, he was sitting with support, holding a bottle, and growing two front teeth. He enjoyed meals, naps, and slept well at night. Mother's monitored visits with Walter were going well. He also had frequent sibling visits. The aunt remained committed to adopting Walter, who had a strong bond with her. DCFS reported that mother had not taken steps toward sobriety and continued to struggle with her addiction. A continuance was requested by DCFS because the adoption home study for that aunt's home was incomplete due to the need to complete additional paperwork.

In a status review report prepared for June 3, 2011, the children's social worker reported that Walter was clean, well cared for, and well dressed. He was comfortable with his aunt, Brenda A., and her son, J. He was very alert, rolling over, eating well, cooing, and reaching out to people. Brenda A. was cooperative and in regular contact with the social worker. DCFS continued to recommend that Walter be adopted by Brenda A. Mother's whereabouts were unknown because she had left her treatment program and refused the entreaties of her family to return. The section 366.26 hearing was continued to October 11, 2011 because the adoptive home study was not yet complete.

On October 11, 2011, mother filed a section 388 petition, alleging she was in an outpatient treatment program and was consistently visiting Walter. She sought to have Walter placed with her. She submitted a letter from a 9 to 12 month intensive drug abuse program which reported that she was consistently attending the program and actively participating. Her six drug tests had been negative. The court set a hearing on the section 388 petition and a contested section 366.26 hearing.

DCFS recommended against granting the section 388 petition because mother had left her treatment program for 13 days, during which she relapsed. In addition, concerns were raised about her visits with Walter and another son, because she continued to smoke despite requests by Brenda A. to stop due to the impact on Walter's breathing. Mother had been sober for only a short time. The social worker met with mother, and the executive director of the substance abuse program where mother resided in a sober living house. Mother was clean and sober and impressed the social worker with her progress in treatment.

A second meeting was held with mother, the treatment program director, the social worker, and members of mother's family. After mother expressed regret for her earlier choices, she said she remained committed to sobriety. Her family members supported her, but said that they did not believe she was ready to parent a child in light of her prior cycles of treatment, relapse, and failure to successfully parent her children. Three of mother's adult children told her they did not believe she was ready to parent Walter. Mother became upset and stormed out of the room, slamming the door so hard it shook the walls. Security was called as a precaution. Mother said that she was angry because her family was ganging up on her rather than supporting her sobriety. She was able to calm down and return to the meeting. Mother had tested clean for drugs continuously on nine occasions. DCFS recommended that the section 388 petition be denied because mother had not had sufficient time to demonstrate that she could remain sober and parent Walter.

In December 2011, DCFS notified the court that a co-adoption home study had approved the maternal aunt, Brenda A. and her son J. to adopt Walter. J. was employed

as Brenda's In-Home Support Services worker. Although Brenda had some health problems, her physician concluded that she could adopt Walter. Neither Brenda nor J. had a history of arrests or convictions, or DCFS referrals. They understood the responsibilities of adoption and were committed to adopting Walter and providing him a permanent home. Walter was found to be happy and thriving in their home.

At the section 388 hearing on December 2, 2011, mother requested family reunification services, based on her successful enrollment in a drug treatment program where she had tested negative for drug use. It was expected that she would complete the program in February. She had regular visits with Walter. The court expressed doubt about mother's completion of the program in two months, in light of her earlier relapse and absence from the program. Mother's counsel argued that sufficient changed circumstances had been demonstrated to establish that reunification services would be in Walter's best interests. Counsel for Walter asked the court to deny the petition. He acknowledged mother's recent progress, but emphasized that Walter was mother's ninth child in the dependency system and that she had lost custody of the other eight. He cited mother's history of treatment and relapse. He argued that mother had not demonstrated sufficient changed circumstances and that reunification services would not be in the child's best interests. Walter had been with his aunt Brenda since he was age four months and was doing well. Walter's counsel argued it was in his best interest to be with Brenda where he had a stable home and extended family support. DCFS argued that mother had not met the criteria for a section 388 petition.

The juvenile court ruled that mother had not met either prong of section 388. In light of mother's lengthy history of addiction and failed attempts at sobriety, and the fact that she had been in treatment for less than a year, the court found that she had not established a substantial change in circumstance. The court also found that there was "absolutely no evidence presented that it would be in the best interest of the child at this stage of [the] proceedings to provide mother further family reunification services that would deny the child permanency which is set by statute in terms of timetables." The court found that the likelihood of mother reunifying with Walter within six months was

very slim because of her history. It concluded that mother had not met her burden of proof and denied her section 388 petition with prejudice.

The court then held the section 366.26 hearing. Mother testified that Walter had been out of her care his entire life, and that she had visited him every Saturday for the preceding six months. She described spending time with Walter and three of her other children. Mother admitted smoking during her visits with Walter. Her attorney argued that parental rights should not be terminated because she has a bond with the child. He asked the court to consider a legal guardianship, which would give mother an opportunity to file another section 388 petition once she completed her treatment program.

Counsel for Walter asked the court to terminate parental rights because Walter was adoptable and the aunt had an approved home study. She argued that mother had not demonstrated that an exception to adoption applied under section 366.26. The court found that Walter is adoptable. It ruled that there was no evidence that severing mother's parental relationship would cause him any detriment. The court also found that mother had not acted in a parental role with Walter. Her parental rights were terminated. Adoption was identified as the permanent plan.

Mother filed a timely appeal from these orders.

## **DISCUSSION**

### **I**

Mother argues the court erred in denying her section 388 petition because she had a record of demonstrated sobriety and because Walter likely would continue to have her in his life.

A parent may petition the juvenile court under section 388 to change any previous order. (§ 388, subd. (a).) “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.]” (*In re Mickel O.* (2011) 197 Cal.App.4th 586, 615.) “[T]he petitioner must show *changed*, not *changing*, circumstances. [Citations.] 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.]” (*Ibid.*) The denial of a section 388 petition is reviewed for abuse of discretion. (*Id.* at p. 616.)

We find no abuse of discretion on this record. While mother had some success in treatment, she had not yet completed the program and admittedly had left it once before during a relapse. She had been sober for only six months. In light of her lengthy history of substance abuse and failed treatment attempts, this progress does not constitute changed circumstances sufficient to meet the first requirement of section 388.

Mother argues that reunification services were in Walter’s best interests “because Walter was likely to continue to have Mother in his life.” She explains this is because Walter was placed with a maternal aunt who intended to allow mother future contact. She contends that reunification services should have been ordered to promote her continued sobriety. While mother may have shown that reunification services would have been in her best interest, she did not demonstrate how they would have been in Walter’s interest.

The juvenile court did not abuse its discretion in denying the section 388 petition.

## II

Mother challenges the sufficiency of the evidence to support the court’s finding that Walter was adoptable.

“At a section 366.26 hearing, the court may select one of three alternative permanency plans for the dependent child—adoption, guardianship or long-term foster care. [Citation.] If the child is adoptable, there is a strong preference for adoption over alternative permanency plans. [Citations.]” (*In re Michael G.* (2012) 203 Cal.App.4th 580, 588–589.) “A finding of adoptability requires ‘clear and convincing evidence of the likelihood that adoption will be realized within a reasonable time.’ [Citation.] The question of adoptability usually focuses on whether the child’s age, physical condition and emotional health make it difficult to find a person willing to adopt the child. [Citation.] If the child is considered generally adoptable, we do not examine the suitability of the prospective adoptive home. [Citation.] If the court finds the child is

likely to be adopted within a reasonable time, the juvenile court is required to terminate parental rights unless the parent shows that termination of parental rights would be detrimental to the child under one of the exceptions listed in section 366.26, subdivision (c)(1)(A) and (B). [Citation.]” (*Id.* at p. 589.) We review a determination that a child is generally adoptable for substantial evidence from which the court could find clear and convincing evidence that the child was likely to be adopted within a reasonable time. (*Ibid.*)

Mother claims Walter’s prognosis for future cognitive and emotional issues is an obstacle to his adoption. Despite the fact that he tested negative for drugs at birth, she contends it is likely that he was exposed to them in utero. She also cites his premature birth and subsequent breathing problems. Mother points to developmental disabilities and psychological issues experienced by several of her other children to assert that Walter is likely to suffer from the same issues. Without citation to the record, mother cites research from the National Institute of Health regarding the long-lasting negative effects of prenatal cocaine exposure.

Mother’s argument is speculative and contrary to the record regarding Walter’s development. The record establishes that he was meeting developmental goals, was eating and sleeping well, and interacting with others. He had been rejected for services through a regional center because he did not meet the criteria. Walter was healthy and his breathing problem was improving. This is substantial evidence that Walter was adoptable.

Mother also contends that adoption was an inappropriate plan because there was a likely legal impediment to a mother and son co-adopting. But since Walter was properly found to be generally adoptable, the suitability of prospective adoptive parents is not determinative on the issue whether parental rights should be terminated. The issue as to “whether a dependent child is likely to be adopted focuses on the child rather than on the prospective adoptive family.” (*In re Sarah M.* (1994) 22 Cal.App.4th 1642, 1650.) This is not the situation addressed in other cases where the social worker’s opinion that the child is adoptable was based solely on the existence of a particular adoptive parent.

(*Ibid.*) The record establishes that Walter is generally adoptable, not that he is adoptable only by Brenda and J. (*Id.* at p. 1651 [opinion that children were likely to be adopted was based on their young ages, good physical and emotional health, progress in several areas, and ability to develop relationships].)

### **DISPOSITION**

The orders of the juvenile court denying mother's section 388 petition and terminating her parental rights are affirmed.

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EPSTEIN, P. J.

We concur:

MANELLA, J.

SUZUKAWA, J.