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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

In re M.A., a Person Coming Under the
Juvenile Court Law.

RIVERSIDE COUNTY DEPARTMENT
OF PUBLIC SOCIAL SERVICES,

Plaintiff and Respondent,

v.

S.O. et al.,

Defendants and Appellants.

E059289

(Super.Ct.No. RIJ120241)

OPINION

APPEAL from the Superior Court of Riverside County. Jacqueline C. Jackson,
Judge. Affirmed.

Michele Anne Cella, under appointment by the Court of Appeal, for Defendant
and Appellant S.O.

Marissa Coffey, under appointment by the Court of Appeal, for Defendant and
Appellant W.A.

Pamela J. Walls, County Counsel, and Julie Koons Jarvi, Deputy County Counsel,
for Plaintiff and Respondent.

S.O. (Mother) and W.A. (Father) appeal after the termination of their parental
rights to M.A. at a Welfare and Institutions Code section 366.26¹ hearing.

Mother and Father essentially make the same claim on appeal that the juvenile
court erred and violated their due process rights by failing to conduct a hearing on their
section 388 petitions, and as a result, erred by summarily denying their petitions. Father
and Mother also join in each other's claims.

We will hold the juvenile court did not err in its 388 ruling and thus affirm the
subsequent termination of parental rights.

¹ All further statutory references are to the Welfare and Institutions Code
unless otherwise indicated.

PROCEDURAL AND FACTUAL BACKGROUND²A. *Detention*

M.A. was born in December 2012. M.A. was immediately detained by the Riverside County Department of Public Social Services (Department) because Mother tested positive for amphetamines upon giving birth. Mother also admitted to using methamphetamine four days prior to M.A.'s birth. Father, who admitted he was the biological father, also tested positive for amphetamine and methamphetamine at the hospital. M.A. was tested and she was found to have methamphetamine in her system.

M.A. had a half sibling, I.M., who was two years old. Mother's parental rights to I.M. had been severed on October 12, 2012. On October 27, 2010, during an unannounced home visit, Mother had two black eyes. I.M. was dirty and had not been bathed in several days. There was no food or supplies for I.M. Mother tested positive for marijuana when she gave birth. During the dependency proceeding for I.M., Mother tested positive for controlled substances. Mother claimed that she was waiting for another hearing in the case and that she was going to regain custody of I.M., even though parental rights had already been terminated. Mother had been 18 years old when she gave birth to I.M.

² A portion of the procedural and factual background is derived from the transcripts filed in case number E058108.

Mother wanted Father to take custody of M.A. She claimed he knew nothing about her drug use. They both claimed they were no longer together. Mother started smoking marijuana when she was 19 years old. Mother received consistent prenatal care.

A referral for Mother was received in May 2008. Mother's mother (maternal grandmother) had paid for Mother to stay in a motel because she did not want her in the house. Mother drank and used methamphetamine. In September 2008, Mother was found in a motel room (she was 16 years old at the time) and she was under the influence of methamphetamines. She was staying in the room with a 36-year-old man with whom she engaged in sexual acts.

Father claimed he had done nothing wrong and wanted custody of M.A. He acknowledged he had a prior criminal history but denied he had committed any violent crimes. Father lived with his mother and was unemployed. He admitted he had a long history of methamphetamine use. A search of Father's criminal history revealed that he had a prior conviction of robbery and several drug possession convictions.

Mother and Father were allowed to remain with M.A. However, Father immediately left the hospital and Mother left not long afterward. Mother had not contacted the Department since leaving the hospital.

On December 18, 2012, a section 300 petition was filed by the Department against Father and Mother for M.A. It alleged against Mother, under section 300, subdivision (b), that she abused controlled substances while pregnant and that she had an active dependency case involving I.M. As for Father, the petition alleged he abused controlled substances and had an extensive criminal history. It was also alleged against Mother

pursuant to section 300, subdivision (j), that M.A.'s sibling, I.M., had also been abused and/or neglected and M.A. was subject to a similar risk.

At a detention hearing held on December 19, 2012, the juvenile court found a prima facie case and ordered M.A. detained.

B. *Jurisdictional/Dispositional Report and Hearing*

In a jurisdictional/dispositional report filed on January 16, 2013, the Department recommended that Mother be denied reunification services pursuant to section 361.5, subdivisions (b)(10) and (b)(11). It was also recommended that Father be denied reunification services pursuant to section 361.5, subdivisions (b)(12) and (b)(13).³

On January 8, 2013, a full criminal history check was run on Father. Father had consistent contact with law enforcement starting in 1994. In 1997, he had his first convictions involving possession of controlled substances. He had numerous other arrests between 1997 and 2004 for possession of controlled substances and robbery.

Mother was interviewed on January 8, 2013. Mother admitted relapsing and using methamphetamine after her services were terminated for I.M. She claimed to have stopped when she found out she was pregnant with M.A. and only "messed up" once. Mother complained that she had trouble with the social worker and foster family in the

³ Section 361.5, subdivision (b) provides that reunification services "need not" be provided under some circumstances. This includes if the parental rights of the parent over a sibling have been severed (*id.*, subs. (b)(10), (b)(11)); the parent has a prior violent felony conviction (*id.*, subd. (b)(12)); and if the parent has a long history of extensive, abusive and chronic use of drugs or alcohol (*id.*, subd. (b)(13)).

proceedings with I.M. Mother claimed she just gave up on trying to reunify with I.M. Mother insisted she did not know that Father was using drugs.

Mother had never been employed. Mother's prior boyfriend, the father of I.M., was abusive. He gave her two black eyes, broke her front tooth and she had numerous burn marks. Starting when she was 15 years old, she used marijuana daily and also drank several times a week. She consistently used methamphetamine beginning when she was 17 years old. She quit when she became pregnant with I.M. When she was unable to reunify with I.M., she began using methamphetamine again.

Father knew that Mother was abusing controlled substances prior to her pregnancy, but thought she had stopped. Father started using methamphetamine when he was 16 years old. By the time he was 18 years old, he was using two times a day. He had periods of sobriety when he was in prison. He was released from prison in 2011 and remained sober after his release. He tested positive at the hospital because he used once while with his friends. Father and Mother were back together.

M.A. had been evaluated and was not showing any adverse effects from being exposed to drugs in utero. Mother and Father had been consistent in their visitation with M.A. Both Mother and Father were attending Family Preservation Court. Father and Mother had two clean drug tests.

An addendum report was filed on February 15, 2013. M.A. was developing normally and had appropriate visits with Mother and Father. Both Mother and Father had negative drug tests on January 28, 2013, February 7, 2013, and February 11, 2013.

The jurisdictional/dispositional hearing was conducted on February 21, 2013. Father submitted on the Department's reports. Mother testified. Mother was enrolled in the Center for Change drug treatment program and was doing well in the program. It was a better program than the one she participated in during the dependency proceeding for I.M. She was moving forward in her life and requested reunification services. She wanted more time with M.A. in order to establish a bond.

The Department argued that no reunification services should be granted because Mother had them terminated in the prior proceeding as recently as October 11, 2012. Further, I.M. had also been exposed to drugs. Although Mother had completed 16 months of reunification services, she used drugs again. The juvenile court had to look at whether Mother resolved the issues that led to the removal of M.A.'s sibling. Mother had not resolved the issues. She also qualified under section 361.5, subdivision (b)(13) for passive drug resistance. Father's robbery conviction foreclosed services to him. Moreover, it was not in M.A.'s best interest to grant reunification services to Mother and Father.

Father argued his violent felony conviction was 16 years old. Father used drugs when he was young, but he was now participating in a drug program. This was the first time that he "really recognized" that he needed to stay sober. Section 361.5 did not require denial of services. Minor's counsel agreed with the Department's reports. Mother argued she was committed to changing her life. Mother had negative drug tests since December 28, 2012. The Department responded Mother had only been in the program for seven weeks.

The juvenile court considered all of the reports filed by the Department. It also considered all of the documents submitted by Mother and Father, Mother's testimony and argument by counsel. The juvenile court found the allegations in the section 300 petition true. As for reunification services, the juvenile court noted, "although the Court is pleased to see both parents making a great effort, the Court does feel it's a bit early in the process to determine it's sufficient enough to overcome the statutory presumption." Father and Mother were denied reunification services based on section 361.5, subdivisions (b)(10), (b)(11), (b)(12) and (b)(13). It was not in M.A.'s best interest to grant reunification services. A section 366.26 hearing was set. Visitation was continued bimonthly.

C. *Section 366.26 Report*

On June 11, 2013, the Department filed a report for the section 366.26 hearing. It was recommended that Father's and Mother's parental rights be terminated. The permanent plan for M.A. was adoption.

M.A. was developing normally but it was not clear if she would have long-lasting effects from the drug exposure. M.A. was very bonded to her caregiver who was anxious to adopt her. The prospective adoptive mother was willing to facilitate visitation between M.A. and I.M.

Father and Mother had attended all of their visits with M.A. M.A. was very happy during the visits and they acted appropriately with her. The Department noted that M.A. had loving and nurturing connections with the parents and the prospective adoptive

parent. Mother and Father continued to be participating in Center of Change drug rehabilitation.

D. *Section 388 Petition*

On July 25, 2013, Father filed his section 388 petition. He claimed he had been enrolled in Family Preservation Court since January 2, 2013, and had completed Phase One, which included parenting and anger management courses. He continued to have negative drug tests. Father was requesting that the section 366.26 hearing be vacated and that he receive six months of reunification services. Further, he submitted documentation to support his participation in the Family Preservation Court program.

Mother also filed a section 388 petition. Mother had been fully participating in Family Preservation Court and had consistently tested negative for drugs. She had received her GED. She was also asking that the juvenile court vacate the section 366.26 hearing and grant her six months reunification services.⁴

The Department filed an addendum report that addressed the section 388 motions. It was unclear where Mother and Father were residing, and if they were living together. Both were unemployed. The Department continued to report that Mother was a danger to M.A. because of her extensive and unresolved history of drug abuse. Father had a substantial history of drug abuse and he had a significant criminal history. The

⁴ Mother filed an addendum to the section 388 petition that she was participating in a group that visited convalescent homes and helped at-risk youth, and other documentation from the Family Preservation Court.

Department supported that Mother was fully participating in Family Preservation Court and was doing well. She continued to have negative drug tests. Father also was regularly participating in Family Preservation Court and testing negative for drugs. All visitation was appropriate.

The Department did not believe it was in the best interest of M.A. to be returned to Mother's care because of her extensive history of drug use and due to her losing her parental rights to I.M. There was concern that there was inability of Father to care for M.A. long term because of his substance abuse and criminal history.

E. *Section 366.26 and 388 Hearings*

The juvenile court summarily denied the section 388 petitions on July 23, 2013, as will be discussed in more detail, *post*. The juvenile court then conducted the section 366.26 hearing. Mother testified that she had been consistent with all visitation and she and M.A. were as bonded as they could be based on the limited visitation. The parental rights of Mother and Father were terminated and M.A. was freed for adoption.

II

SUMMARY DENIAL OF SECTION 388 PETITIONS

Father and Mother both contend that the juvenile court erred and violated their due process rights by summarily denying their section 388 petitions without a hearing.

A. *Additional Factual Background*

At the outset of the section 388 proceeding, the juvenile court allowed the parties to make "threshold arguments" about the petitions. The juvenile court had reviewed the petitions and accompanying documentation.

Mother requested a full hearing on her section 388 petition. Mother had been in the Family Preservation Program since December 28, 2012. Mother was moving on to the Third Phase of the treatment. Mother was continuing treatment despite having no assistance from the Department. Mother and Father were only friends and not in a dating relationship. Mother had shown a change in circumstances. Mother had also shown it was in M.A.'s best interest to grant six-months reunification services as Mother had shown consistent visitation. Mother should be allowed to testify to provide further information about her changed circumstances.

Father argued that this was his first child; he did not have the history like Mother with the Department. Father had excelled in Family Preservation Court. Father had been clean and sober since M.A. was detained. Father had changed his circumstances. Father had never missed a visit.

M.A.'s counsel argued that the section 388 petitions should be denied because Mother and Father were only in the preliminary stages of changing their circumstances. M.A. should not have to wait for Mother and Father to establish that they could remain sober. Father, based on his history of drug convictions, had a difficult time maintaining his sobriety.

The Department noted that Mother had previously completed 16 months of reunification services and then relapsed. M.A. deserved a safe and stable home. Father had a history of drug abuse from the time he was 16 years old. Further, he had a prior violent felony conviction and there was exemption as defined in section 361.5,

subdivision (b)(12). Father argued that the child's best interest could override the section 361.5, subdivision (b)(12) exception.

The juvenile court recognized that Father and Mother had been working hard. It also recognized that Family Preservation was not an easy program. The juvenile court found that the circumstances were still changing for Mother and Father. "And the Court does not believe it's in [M.A.]'s best interest at this time to grant the petition."

B. *Analysis*

"Section 388 allows a person having an interest in a dependent child of the court to petition the court for a hearing to change, modify, or set aside any previous order on the grounds of change of circumstance or new evidence." (*In re Anthony W.* (2001) 87 Cal.App.4th 246, 250). "[S]pecific allegations describing the evidence constituting the proffered changed circumstances or new evidence' is required. [Citation.]" (*Ibid.*) It "shall set forth in concise language any change of circumstance or new evidence which are alleged to require the change of order or termination of jurisdiction." (§ 388, subd. (a).)

A section 388 petition must state a prima facie case in order to trigger the right to proceed by way of a full evidentiary hearing. (*In re Edward H.* (1996) 43 Cal.App.4th 584, 592.) "There are two parts to the prima facie showing: The parent must demonstrate (1) a genuine change of circumstances or new evidence, and that (2) revoking the previous order would be in the best interests of the children. [Citation.]" (*In re C.J.W.* (2007) 157 Cal.App.4th 1075, 1079, 1081 [Fourth Dist., Div. Two] (*C.J.W.*) [summary denial of § 388 petition was proper where there was no showing of how the

children's best interests would be served by depriving them of a permanent stable home in exchange for an uncertain future].)

“We review the juvenile court's summary denial of a section 388 petition for abuse of discretion.” (*In re Anthony W.*, *supra*, 87 Cal.App.4th at p. 250; see also *In re Marcos G.* (2010) 182 Cal.App.4th 369, 382.) A section 388 petition is addressed to the sound discretion of the juvenile court, and its decision will not be disturbed on appeal in the absence of a clear abuse of discretion. (*In re Stephanie M.* (1994) 7 Cal.4th 295, 318-319.)

Father was denied reunification services due to his extensive criminal history and drug use. Father insisted that due to his participation in Family Preservation Court, and the fact that his violent felony conviction was 16 years old, he had changed his circumstances and was entitled to reunification services. While Father was commended by the juvenile court for completing the program, it was only a step in a long process of recovery. Even a showing of great effort to make improvements will not necessarily be persuasive when a parent has an extensive history of drug use. (*C.J.W.*, *supra*, 157 Cal.App.4th at p.1081 [affirming the denial of a section 388 petition when the parents' efforts at drug rehabilitation were only three months old at the time of the section 366.26 hearing]; *In re Casey D.* (1999) 70 Cal.App.4th 38, 47-48 [affirming the denial of a section 388 petition when the mother with an extensive history of drug use had been drug free for only a few months and had not completed her treatment program]; *In re Mary G.* (2007) 151 Cal.App.4th 184, 205-206 [mother's very recent treatment for drug abuse and bipolar disorder was not even a prima facie case of changing circumstances].)

Father had been using methamphetamine since he was 16 years old. By the time he was 18 years old, he was using twice a day. He continued to use drugs as evidenced by his numerous arrests for possession of controlled substances. Father was able to show only that his circumstances were changing, not that they had changed within the meaning of section 388. Further, section 361.5, subdivision (b)(12) does not specify any time limit for a violent felony conviction. His prior conviction foreclosed him from receiving reunification services and he provided no valid exemption from this section. Thus, the juvenile court did not abuse its discretion in determining he had failed to establish that his circumstances had changed for purposes of section 388 and refusing to grant six months reunification services.

As for Mother, she also was only in the beginning process of her recovery. Mother admitted that she started using marijuana daily when she was 15 years old. By the time she was 17 years old, she was consistently using methamphetamine. When she gave birth to I.M., she tested positive for marijuana. She then was found to have been beat up by I.M.'s father. She tested positive for controlled substances during the dependency proceeding. She ultimately could not reunify with I.M., and when her parental rights were terminated, she relapsed and began using methamphetamine again.

Mother had shown with I.M. that she could have moderate success but was subject to relapses. Mother had only been sober for seven months during the proceeding with M.A. and reasonably could be considered by the juvenile court to only be changing her circumstances.

Moreover, it was not in M.A.'s best interest to grant the section 388 petitions. M.A. had been with her prospective adoptive mother since her birth and had a strong bond with her. Father had not shown any type of parental bond with M.A. despite several visitations with her. Mother admitted that there was not a strong bond. The juvenile court did not abuse its vast discretion in determining that M.A.'s best interest was to be freed for adoption.

Father and Mother both contend that they were entitled to full hearings on their petitions. However, a "full hearing" on a section 388 petition is not synonymous with allowing the petitioner to present unnecessary or irrelevant evidence. (See *In re Jeanette V.* (1998) 68 Cal.App.4th 811, 817.) A section 388 petitioner has a due process right to be heard in a meaningful manner. (*In re Lesly G.* (2008) 162 Cal.App.4th 904, 915.)

Here, both Mother and Father filed written section 388 petitions and attached written documentation. They were permitted to present extensive argument on the petitions and the juvenile court assumed the written evidence was true.

This case is similar to *C.J.W.*, *supra*, 157 Cal.App.4th 1075. In *C.J.W.*, it was found that the juvenile court did not violate the parents' procedural due process rights in refusing to allow them to cross-examine the social workers and present unspecified evidence in addition to the documentary evidence they presented in support of their petition. In *C.J.W.*, the juvenile court received written evidence and heard argument from counsel for the parties. (*Id.*, at pp. 1080–1081.) Thus, the hearing in *C.J.W.* comported with due process. (*Id.* at p. 1081.)

Here, nothing in the record suggests that the court in this case violated the procedural due process rights of Mother and Father in failing to conduct a “full hearing” or hear the testimony of Mother and the social worker. Moreover, like *C.J.W.*, we conclude that “[i]t is not reasonably likely additional testimony would have persuaded the court to grant the section 388 petition[] and offer reunification services to [Mother and Father]. [Citation.]” (*C.J.W.*, *supra*, 157 Cal.App.4th at p. 1081.)

Mother claims that this case is “clearly analogous” to *In re Lesly G.*, *supra*, 162 Cal.App.4th 904. In that case, the parents claimed the juvenile court violated their procedural due process rights in failing to hold any hearing on their section 388 petition after the court apparently ruled the parents made the required prima facie showing. (*Id.* at p. 912.) *Lesly G.* is distinguishable because there the court failed to hold any hearing on the petition. It did not receive documentary evidence and denied the petition without allowing the parents’ counsel an opportunity to argue its merits. “In short, [the court] provided no hearing whatsoever.” (*Id.* at p. 915.)

Here, the juvenile court considered the documentary evidence filed in support of the petitions, and allowed Mother’s and Father’s counsel to argue the merits of their petitions. Mother and Father cannot show a due process violation.

Accordingly, we reject Father’s and Mother’s arguments that the juvenile court erred in denying their section 388 petitions.

III

DISPOSITION

The juvenile court's judgment is affirmed.

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RICHLI
J.

We concur:

RAMIREZ
P. J.

KING
J.