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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA**

**FOURTH APPELLATE DISTRICT**

**DIVISION TWO**

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

RIVERSIDE COUNTY DEPARTMENT  
OF PUBLIC SOCIAL SERVICES,

Plaintiff and Respondent,

v.

I.M.,

Defendant and Appellant.

E059584

(Super.Ct.No. INJ015934)

O P I N I O N

APPEAL from the Superior Court of Riverside County. Lawrence P. Best,  
Temporary Judge. (Pursuant to Cal. Const., art. VI, § 21.) Affirmed.

Donna P. Chirco, under appointment by the Court of Appeal, for Defendant and  
Appellant.

Pamela J. Walls, County Counsel, and Leslie E. Murad II, Deputy County  
Counsel, for Plaintiff and Respondent.

## I. INTRODUCTION

Defendant and appellant I.M. (Mother) is the mother of F.M. The juvenile court removed F.M. from Mother's custody and denied Mother reunification services. A hearing was scheduled pursuant to Welfare and Institutions Code section 366.26<sup>1</sup> with adoption as the proposed permanent plan. Mother filed a request to change court order pursuant to section 388 (section 388 petition). Specifically, Mother requested that the section 366.26 hearing be vacated and that she receive reunification or family maintenance services. The court denied that request, held the section 366.26 hearing, and terminated Mother's parental rights.

Mother appealed. She contends the court erred in denying her request to change court order. Because we find no abuse of the court's discretion, we will affirm the order denying her request.

## II. FACTUAL AND PROCEDURAL BACKGROUND

### A. *Detention, Jurisdiction, and Disposition*

Plaintiff and respondent Riverside County Department of Public Social Services (DPSS) filed a juvenile dependency petition when F.M. was five days old. Under section 300, subdivision (b) (failure to protect), DPSS alleged: (1) Mother has an open case concerning her three other children in which she failed to benefit from services;<sup>2</sup> (2)

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

<sup>2</sup> Mother's three other children had fathers different from F.M.'s father. At the time of F.M.'s detention, the other children were ages nine, seven, and five.

Mother has an extensive history of abusing controlled substances, including methamphetamine, and failed to benefit from substance abuse services; (3) Mother has an extensive criminal history, including child endangerment, armed robbery, and shoplifting; and (4) F.M.'s father is not a member of the household and has failed to provide for the child. Under subdivision (g) of section 300 (no provision for support), DPSS alleged that F.M.'s father's whereabouts are unknown and he has failed to provide F.M. with support. DPSS further alleged, under section 300, subdivision (j) (abuse of sibling), that Mother's three other children have been abused or neglected and that F.M. is at risk of the same.

At a detention hearing held in December 2012, the court found a prima facie case for juvenile court jurisdiction under section 300 and placed F.M. in the temporary custody of DPSS. Mother retained physical custody of F.M. She agreed to participate in random drug testing, counseling, and parenting classes.

Initially, DPSS recommended that family maintenance services be provided for Mother. However, this changed when issues arose regarding Mother's drug testing. In the six weeks since F.M.'s detention, Mother had a diluted drug test, failed to test as requested on two occasions, and eventually tested positive for marijuana, methamphetamine, and amphetamine. This led DPSS to take F.M. into protective custody and place her in foster care.

DPSS filed an amended petition under section 300 to include an allegation regarding the recent drug tests. It further alleged that Mother refused voluntary services and delayed enrolling in a substance abuse treatment program.

In a report prepared for the jurisdictional/dispositional hearing, DPSS recommended that the court deny reunification services for the parents. (The whereabouts of F.M.'s alleged father remained unknown throughout the case.) DPSS noted that Mother had not communicated with DPSS or tested for drugs as requested since F.M. was taken into protective custody. DPSS further stated that Mother failed to benefit from services for substance abuse provided to her in dependency proceedings regarding her other children.

At the jurisdictional/dispositional hearing, the court found the allegations in the amended petition true, declared F.M. to be a dependent of the court, denied reunification services to the parents, and set a hearing to be held pursuant to section 366.26.

In a report prepared for the section 366.26 hearing, DPSS recommended that the court terminate the parents' parental rights and select adoption as F.M.'s permanent plan. DPSS noted Mother's "extensive history" with the juvenile court "due to drug abuse." Although she had participated in drug treatment programs, Mother "failed to reunify" with her three other children. "It is evident," DPSS concluded, "that drug treatment has failed to be beneficial for [Mother]." DPSS further reported that the prospective adoptive parent "appear[s] to have a close bond" with F.M. and is providing her with "a safe, stable, and loving home."

#### *B. Mother's Section 388 Petition and the Section 366.26 Hearing*

In May 2013, Mother filed her section 388 petition. Specifically, she requested that the court (1) vacate its order denying services and setting a section 366.26 hearing,

and (2) make a new order to provide her with reunification or family maintenance services. In support of the request, Mother pointed to the following changed circumstances: She enrolled in (but had not yet completed) the MOMS substance abuse program and was attending 12-step meetings. According to her attorney, “Mother has finally gained insight into her relapse triggers and is committed to her sobriety and her children.”

Mother attached to her petition documents evidencing her participation and attendance in the MOMS program. A program supervisor stated that Mother had reported being sober since February 15, 2013, and her urine tests had been negative. The supervisor further stated: “[Mother] has demonstrated recovery growth by changing her people[,] place[,] and things. She has a positive attitude and is intentionally making behavior changes in her life to be able to give a better life to her kids. She is involved with [Narcotics Anonymous] meetings and has a sponsor.” Also attached to the request form was a certificate acknowledging her as a team leader in the MOMS program nursery.

In the petition, Mother’s attorney explained how the requested change would benefit F.M., stating: “Since [M]other now has the tools to remain drug free, she is hopeful to have all of her children returned to her custody. Granting [M]other services for this child will provide this child an opportunity to live and grow with her siblings and biological family.”

The court set a hearing on Mother’s request.

In its response to the section 388 petition, DPSS acknowledged the MOMS’s supervisor’s favorable comments and noted that Mother had graduated from the MOMS program on May 31, 2013. Nevertheless, DPSS opposed Mother’s petition. Mother’s completion of the MOMS program, DPSS stated, “does not negate the fact that [Mother] has an extensive history with Riverside County Juvenile Court due to controlled substance abuse and has previously participated in drug treatment programs to mitigate those circumstances. . . . [Mother] has not benefitted from the substance abuse treatment program services that [DPSS] has provided to her in [the] past and the present.”

In addition, DPSS noted that Mother “continues to have difficult[y] maintaining stable housing, as she has moved three times in approximately two months. While [Mother] is working to get her life back on track as she recently obtained employment, it does not appear that [Mother] can properly care for the child . . . and provide her with a stable home environment.” Finally, DPSS observed that F.M. has a “strong emotional bond” with her caregiver, who has provided F.M. “with a safe, stable, and loving home . . . .”

In addition to the section 388 petition filed in F.M.’s case, Mother filed a separate section 388 petition in the juvenile dependency case concerning her three other children.<sup>3</sup> With the stipulation of counsel for DPSS and Mother, the court held a joint hearing as to both petitions. Mother testified at that hearing. She testified, in essence, as follows:

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<sup>3</sup> Our record does not include the section 388 petition filed in the case concerning the older children.

Mother completed the MOMS program in May 2013; she has been attending 12-step meetings and working with her sponsor; in the sober-living facility where she lives she has been asked to “be in charge of the other women in the home”; she is working at Subway; her two-hour weekly visits with F.M. “are going good”; she soothes F.M. when she is fussy, plays with her, and feeds her; and she believes F.M. has bonded with her.

When Mother was asked why returning F.M. to her would be in F.M.’s best interest, Mother responded: “Because I really do love her. She is my daughter. I understand I was abusing alcohol, but that doesn’t mean I can’t love her.”

Following the hearing, the court denied the section 388 petition as to F.M. on the ground that it was not in F.M.’s best interest. As to the older children, the court granted the petition, stating that “there is a change of circumstances” and it “is in the best interests of the children to order family reunification services for [M]other and for those children.”

The court then held the section 366.26 hearing regarding F.M., terminated Mother’s parental rights with respect to F.M., and selected adoption as the permanent plan.

### III. DISCUSSION

Section 388 allows the parent of a dependent child to petition the juvenile court to change, modify, or set aside a previous order of the court. Under the statute, the parent has the burden of establishing by a preponderance of the evidence that (1) there is new evidence or changed circumstances justifying the proposed change of order, and (2) the

change would promote the best interest of the child. (*In re Stephanie M.* (1994) 7 Cal.4th 295, 317; § 388, subds. (a), (b).) The decision to grant or deny the petition is addressed to the sound discretion of the juvenile court, and its denial of the petition will not be overturned on appeal unless an abuse of discretion is shown. (*In re S.J.* (2008) 167 Cal.App.4th 953, 959-960 [Fourth Dist., Div. Two].)

“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’ [citation], and in fact, there is a rebuttable presumption that continued foster care is in the best interests of the child. [Citation.]” (*In re Stephanie M.*, *supra*, 7 Cal.4th at p. 317, quoting *In re Marilyn H.* (1993) 5 Cal.4th 295, 309.) Still, it is at this very point that “[s]ection 388 plays a critical role in the dependency scheme. Even after family reunification services are terminated and the focus has shifted from returning the child to his parent’s custody, section 388 serves as an ‘escape mechanism’ to ensure that new evidence may be considered before the actual, final termination of parental rights.” (*In re Hunter S.* (2006) 142 Cal.App.4th 1497, 1506; *In re Kimberly F.* (1997) 56 Cal.App.4th 519, 528.)

Initially, we note that the court’s explanation regarding the section 388 petition in this case is not clear. Following the joint hearing on the two section 388 petitions, the court first addressed the petition concerning F.M. The court said nothing regarding the first element under section 388—a change of circumstances. In denying the petition the court stated only that it was not in F.M.’s best interest. However, in addressing the

section 388 petition concerning the older children, the court addressed both prongs of section 388. In addition to finding that the requested change was in the children's best interest, the court stated that "Mother has made some progress," and explicitly found that "there is a change of circumstances." It is not clear if the court's finding of Mother's changed circumstances applied only to the petition in the older children's case or to the petition in F.M.'s case as well.

Mother argues that "[i]f [M]other's circumstances have changed for three of the children then they necessarily have changed for all of the children including [F.M.]." Although we are not convinced that Mother's conclusion is "necessarily" so, we will assume for purposes of our analysis that the court impliedly found a change of circumstances for purposes of Mother's section 388 petition in F.M.'s case and that there is substantial evidence to support that finding. We will focus on the court's finding regarding the second section 388 prong—that the requested change would not be in F.M.'s best interest.

Here, there is only slight evidence of a parental bond between Mother and F.M. and comparatively strong evidence of a strong bond between the child and her prospective adoptive parent. F.M. was removed from Mother's custody when she was less than two months old. She was nine months old at the time of the hearing on the petition and had been cared for by her prospective adoptive parent for approximately seven months. Although Mother maintained weekly two-hour visits with F.M. and engaged in "age appropriate interaction with the child," there is no evidence that she

occupied a parental role in the child's life. By contrast, the social worker reported that the prospective adoptive parent has provided F.M. with a "safe, stable, and loving home," and that the two "appear to have a strong emotional bond."

Mother asserts that the primary problem that led to F.M.'s dependency case—Mother's drug use—has been ameliorated. She refers to evidence that she has completed a drug treatment program, is "substance abuse free," and committed to her sobriety. Although there is nothing in the record to contradict this, DPSS points out that Mother's sobriety is "very fresh" and she has relapsed before; her "addiction was on its way to being under control . . . , but was not established at the hearing." (See *In re Kimberly F.*, *supra*, 56 Cal.App.4th at p. 531, fn. 9 ["It is the nature of addiction that one must be 'clean' for a much longer period than 120 days to show real reform"].)

The juvenile court's rulings on the two different section 388 petitions may appear incongruous; why give Mother the opportunity to reunify with the three older children and not with F.M.? The reasons for the different treatment is not clear from our record because, with the exception of the joint hearing on the section 388 petitions, we have only the record of the proceedings regarding F.M.; we have no meaningful evidence regarding the situation facing the older children. However, in her argument to the court at the hearing on the section 388 petitions, Mother's counsel explained that the other children "have been in four or more placements at this point" and "have not had any permanency." She added that the other "three children are in limbo" and "[w]e don't have a permanent plan for them. The [section 366.26] hearing has been vacated. There

is a hope that they can place them together. . . . [T]he previous foster parent who was going to go guardianship and provide permanency for them, apparently she met someone and decided to move on with her life. And she wasn't able to give a commitment to these kids, and I can't imagine how difficult that must be for them that someone is just giving up on them so easily." Although counsel's statements are not evidence, they shed light on the apparent lack of stability and permanency for those children in foster care. F.M., by contrast, has a caregiver willing to adopt and provide her with a stable, permanent home. These different situations may explain the different rulings on the two petitions.

Although the record indicates that Mother has, as the court found, made progress, there is also substantial evidence to support the court's finding that Mother's requested change would not be in F.M.'s best interest. Accordingly, we conclude that the court did not err in denying Mother's section 388 petition.

#### IV. DISPOSITION

The orders appealed from are affirmed.

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KING  
J.

We concur:

HOLLENHORST  
Acting P. J.

McKINSTER  
J.