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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
FOURTH APPELLATE DISTRICT  
DIVISION TWO**

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

RIVERSIDE COUNTY DEPARTMENT  
OF PUBLIC SOCIAL SERVICES,

Plaintiff and Respondent,

v.

M.C.,

Defendant and Appellant.

E061006

(Super.Ct.No. SWJ010085)

OPINION

APPEAL from the Superior Court of Riverside County. John M. Monterosso,  
Judge. Reversed.

Matthew I. Thue, under appointment by the Court of Appeal, for Defendant and  
Appellant.

Gregory P. Priamos, County Counsel, and Julie Koons Jarvi, Deputy County  
Counsel, for Plaintiff and Respondent.

Defendant and appellant M.C., the prospective adoptive parent of A.M., appeals the denial of her Welfare and Institutions Code section 388<sup>1</sup> petition requesting that the May 23, 2013, order removing child from her home be changed. She contends the juvenile court abused its discretion in denying her petition without a hearing. We agree and reverse the court's order.<sup>2</sup>

## I. PROCEDURAL AND FACTUAL BACKGROUND

Al.M. (child's sister), who was almost six years old, and A.M. (child), who was just over one year old, were found to be dependent children of the court on July 27, 2010, on grounds of physical and sexual abuse, specifically of child's sister, who had been repeatedly sodomized before the age of five by an uncle. (§ 300, subs. (b), (d), (g) and (j); see *M.C. v. Superior Court* (Aug. 7, 2013, E058815) [nonpub.opn.] )

Reunification failed, and the parents'<sup>3</sup> parental rights were terminated in January 2013. As of June 2012, both siblings had been placed with M.C., as a foster/prospective adoptive parent, and things went well enough that by November 2012, the social worker was recommending that M.C. be given preference in adoption of the children. M.C. had been employed as a social worker since 2009. In February 2013, child's sister was

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

<sup>2</sup> We take judicial notice of our prior unpublished opinion, *M.C. v. Superior Court* (Aug. 7, 2013, E058815) [nonpub.opn.]. (Cal. Rules of Court, rule 81115(b)(1).) A portion of the factual background section is taken from our prior opinion.

<sup>3</sup> Child and Al.M. have the same mother, but different fathers.

diagnosed with posttraumatic stress disorder and depressive disorder arising from her molestation, and problems were escalating.

On April 30, 2013, at M.C.'s request, plaintiff and respondent Riverside County Department of Public Social Services (Department) removed child's sister from M.C.'s home. On May 1, 2013, the Department filed a "Notice of Intent to Remove Child" (Judicial Council form JV-323) requesting the court to remove child from M.C., because M.C. wished to adopt only child, and the siblings had never lived apart. The Department asserted that M.C. "lack[ed] the skills to parent a [special needs] child" like child's sister. M.C. opposed the removal, stating that child was thriving in her home and that the Department "never addressed any concerns or problems between myself and [child] until I put in a seven day notice on her sister." According to M.C., when the siblings came to live with her, they shared a room; however, M.C. had to separate them because of child's sister's "inappropriate and aggressive behaviors towards [child]." M.C. added that (1) child's sister was physically abusive to child when outside of the social worker's presence, (2) child's sister had "night rages" in which she would go into child's room, causing her to wake up crying, and (3) child's sister taunted and teased child when she (child's sister) became jealous. M.C. suggested that child's sister might never be able to form attachments and that it was unfair to child to have to "follow her sister from home to home until her sister is stable or worse[.] [H]er sister could go into one of her rages and try to hurt [child]." M.C. acknowledged that child and child's sister were bonded and loved each other.

On May 8, 2013, the Department filed an addendum report that abandoned the glowing view of M.C. which had been presented to the court at the time the children were

placed with her. In the addendum, the social worker found it “shocking” that there were no photographs of the children in M.C.’s residence and reported that M.C. had refused to cooperate with child’s sister’s “in-home” therapist. The social worker claimed that M.C. reportedly accused the Department of hiding child’s sister’s issues from her. The addendum stated that M.C. had asked for “a respite home,” because child’s sister was “out of control” and she herself was “losing it and at her wits end.” According to the social worker, after M.C. was unable to have child’s sister committed under section 5150, M.C. essentially gave her back to the Department. The social worker predicted that child might also be “strong-willed” and exhibit “behaviors” as a result of being separated from her sister, and would fear abandonment after seeing what happened to her sister. M.C. provided a supplemental response, countering the social worker’s observations and opinions.

On May 22 and 23, 2013, the court conducted a hearing regarding removal of child from M.C.’s care and custody. Extensive testimony was presented. In summary, two social workers testified that child’s relationship with her sister was her primary attached relationship, and this relationship should be given precedence. There was testimony that child had stated she wanted to be with her sister. One of the social workers also testified as to her observations of the loving relationship between the two siblings, and characterized instances of rivalry, and even physical altercations, as normal. The plan was to seek a new adoptive home that would be appropriate for both children. M.C.’s sister testified that child’s behavior had begun mimicking that of her sibling, in a bad way, since the sibling had been removed. M.C. herself indicated she would be

willing to help preserve the sibling bond and would consider caring for child's sister in the future.

The juvenile court found that child's best interest required that she be removed from M.C. so that a joint placement with child's sister could be pursued. The court stressed it was not finding that M.C.'s care of child had been in any way lacking, but pointed out that child's sister had been the one stable factor in child's life after the siblings were removed from the home under what it described as "difficult" circumstances. It acknowledged that child was bonded to M.C. but found that child would be better able to recover from any detriment created by the removal than she would by separation from her sister. M.C. challenged the court's order via a petition for extraordinary writ pursuant to California Rules of Court, rule 8.452. We denied M.C.'s writ on August 7, 2013.

While M.C.'s writ was pending before this court, the Department filed its status review report on July 3, 2013. The Department continued its recommendation of a permanent goal of adoption for the siblings; however, child's sister's behaviors had worsened despite being prescribed Prozac. Child emulated her sister's behaviors. Child's sister had been in four different placements and child in three since they had been removed from their parents. The determined plan was that the Department "locate an adoptive family who will take both of the children for placement." The Department faulted M.C. for giving up so easily on child's sister and not trying Therapeutic Behavioral Services.

On January 3, 2014, the Department filed its postpermanency status review report, in which it recommended that the authorization for group home placement for child's

sister remain in place and that the permanent plan for both children remain adoption. Child's sister was described as "cognitively on track" and capable of having good hygiene, but that "she chooses to have poor hygiene and does not want to shower, wash her face, brush her teeth, and 'poops in her pants.'" When asked to attend to her hygiene, it "becomes a power struggle and will usually end up in a fully [*sic*] scale tantrum."

Child's sister's behaviors, as reported by past caregivers, consist of the following:

"[B]eing verbally and physically assaultive, threatens and postures, cannot focus, does not get along with other children in the home, argumentative, non-compliant, oppositional and destructive behavior, hard time sharing, lies, does not take responsibility, does not listen to directions, runs away, is rude, is mean, screams at the top of her lungs if she doesn't get her way and wants all the attention to herself. She has periods of rage and violence toward peers and adults." The social worker opined that because many adults have failed to keep their promise to provide child's sister with permanency and love, she "has a difficult time trusting adults and uses her 'anger issues' as an excuse to continue with the negative behaviors believing that her caregivers should just forgive her."

The Department reported that child was approved for counseling services to address aggression, anger, tantrums, and the several changes in her placement, along with the original reason for her detention. She was able to bond, she continued to want a permanent home, and she asked why the various potential homes would not keep her and her sister. As of January 2014, child's sister has been in nine different placements and child has been in seven different placements since removal from their parents. Since August 2013, the siblings have been in four different placements, two of which were

prospective adoptive homes. Because the Department was unable to locate a home willing to take both siblings due to child's sister's needs and behaviors, they have been living in separate homes since November 21, 2013. The Department acknowledged the possibility that the children may "not be able to be matched as a sibling set due to the negative behaviors." The Concurrent Planning Review Committee opined that child's sister "will not be able to succeed in a prospective adoptive home until behavioral and emotional/mental health needs are met and stabilized."

An addendum report was filed on February 14, 2014. The Department continued to recommend adoption of both children by the same family. As of the time of the report, the children had had three prospective adoptive homes and a few foster homes, but no family was able to commit and meet their needs for permanency.

On February 14, 2014, M.C. filed a section 388 petition asking the court to order child returned to the care of M.C. and her sister, and to allow them to proceed with adopting her. M.C. noted that the reason child was removed from M.C.'s home was that the Department wanted the siblings placed in the same home; however, the children have been unable to live in the same home due to child's sister's behavior. M.C. stated she was living with her sister, who has a foster care license, that both M.C. and her sister want to adopt child, and they are open to working with child's sister to maintain the sibling bond and "perhaps have [child's sister] return to ]M.C.'s] care as well." On February 19, 2014, the juvenile court indicated an intention of denying the petition; however, it allowed M.C. to withdraw her petition without prejudice.

On April 4, 2014, M.C. filed a new section 388 petition asking the court to order child to be placed in the care of M.C. and her sister, both of whom are licensed foster

care providers. Both M.C. and her sister wanted to adopt child, were willing to work with child's sister in therapy, were willing to maintain the sibling bond between child and her sister, and M.C. sought court authority to participate in conjoint therapy with child's sister, as well as family therapy. On April 7, 2014, the court denied M.C.'s request without a hearing, on the ground there was no new information or evidence since the court's last hearing on February 19, 2014.

## II. DISCUSSION

M.C. contends the juvenile court abused its discretion in denying her an evidentiary hearing on her section 388 petition without a hearing. We agree.

### A. Applicable Law.

“Section 388 permits ‘[a]ny parent or other person having an interest in a child who is a dependent child of the juvenile court’ to petition ‘for a hearing to change, modify, or set aside any order of court previously made or to terminate the jurisdiction of the court’ on grounds of ‘change of circumstance or new evidence.’ (§ 388, subd. (a).) ‘If it appears that the best interests of the child may be promoted by the proposed change of order, . . . the court shall order that a hearing be held . . .’ [Citation.] Section 388 thus gives the court two choices: (1) summarily deny the petition or (2) hold a hearing. [Citations.] In order to avoid summary denial, the petitioner must make a ‘prima facie’ showing of ‘facts which will sustain a favorable decision if the evidence submitted in support of the allegations by the petitioner is credited.’ [Citations.]” (*In re Lesly G.* (2008) 162 Cal.App.4th 904, 912.)

There are two requirements for a prima facie showing: The petitioner must show, by preponderance of the evidence, that (1) there is a genuine change of circumstances or

new evidence, and (2) a modification of a previous order would be in the best interests of the child. (*In re Anthony W.* (2001) 87 Cal.App.4th 246, 250; *In re D.B.* (2013) 217 Cal.App.4th 1080, 1089; Cal. Rules of Court, rule 5.570(h)(1)(C).) In considering whether such a showing has been made, the petition should be liberally construed in favor of granting a hearing to consider the request. (*In re Zachary G.* (1999) 77 Cal.App.4th 799, 806.) “In determining whether the petition makes the necessary showing, the court may consider the entire factual and procedural history of the case. [Citation.]” (*In re Justice P.* (2004) 123 Cal.App.4th 181, 189.)

“We review a summary denial of a hearing on a modification petition for abuse of discretion. [Citation.] Under this standard of review, we will not disturb the decision of the trial court unless the trial court exceeded the limits of legal discretion by making an arbitrary, capricious or patently absurd determination. [Citation.]” (*In re A.S.* (2009) 180 Cal.App.4th 351, 358.)

## **B. Analysis.**

In summarily denying M.C.’s section 388 petition, the juvenile court found that the request did not state new evidence or a change of circumstances. More specifically, the court stated there was “No new information or evidence since last Court hearing on 2/19/14.” M.C. correctly notes that the juvenile court improperly limited the time period to be considered in determining whether to summarily deny a section 388 petition. “[T]he term ‘new evidence’ in section 388 means material evidence that, with due diligence, the party could not have presented at the dependency proceeding at which the order, sought to be modified or set aside, was entered.” (*In re H.S.* (2010) 188 Cal.App.4th 103, 105.) M.C. sought to modify the court’s May 23, 2013, order removing

child from M.C.'s custody. Thus, the relevant time period of new evidence or change of circumstances for the court's consideration was from May 23, 2013, through April 4, 2014, the date that the section 388 petition was filed.

Considering the period from May 23, 2013, through April 4, 2014, the question is: Did M.C. make a prima facie showing of a genuine change of circumstances or new evidence, and that modification of the previous order would be in the best interests of the child? We conclude she made the requisite showing. The change of circumstance or new evidence was the fact that since November 21, 2013, the siblings were no longer able to live in the same home. The reason for child's removal from M.C. was the Department's desire to keep the sibling set together in the same home. From May 23, 2013, through November 21, 2013, both siblings moved several times between foster homes and prospective adoptive homes. However, on November 21, 2013, they were placed in separate homes because the Department was unable to locate a home (adoptive or foster) willing to take both siblings due to child's sister's needs and behaviors. Thus, M.C. made a prima facie showing of change of circumstances or new evidence.

Regarding the second prong, best interests of the child, the record shows that when child was removed from M.C.'s custody, the reason for the removal was to keep child with her sibling, not because M.C.'s care of child had been lacking or that there was no bond between M.C. and child. Assuming the siblings could not be kept in the same home, and the fact that child had been moved several times since May 2013 (including both foster and prospective adoptive homes), M.C. made a prima facie showing that returning child to her custody was in the child's best interest.

We conclude that the trial court abused its discretion in denying M.C.'s section 388 petition without a hearing on the merits.<sup>4</sup>

### III. DISPOSITION

The April 7, 2014, order summarily denying M.C.'s section 388 petition is reversed, and the cause is remanded to the juvenile court with instructions to hold a hearing on M.C.'s section 388 petition and to decide the matter on the merits.

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HOLLENHORST

J.

We concur:

RAMIREZ

P.J.

MCKINSTER

J.

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<sup>4</sup> Nothing in this opinion mandates a specific outcome of the hearing.