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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT**

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

FRESNO COUNTY DEPARTMENT OF
SOCIAL SERVICES,

Plaintiff and Respondent,

v.

M.J.,

Defendant and Appellant.

F063389

(Super. Ct. No. 08CEJ300152)

OPINION

THE COURT*

APPEAL from a judgment of the Superior Court of Fresno County. Jane Cardoza,
Judge.

Kristin Bryce Smith, under appointment by the Court of Appeal, for Defendant and
Appellant.

*Before Wiseman, Acting P.J., Levy, J. and Franson, J.

Kevin Briggs, County Counsel, William G. Smith, Deputy County Counsel for Plaintiff and Respondent.

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After defendant M.J.'s (mother) children were removed from her custody for the second time in about 30 months due to methamphetamine abuse and other factors, the juvenile court denied reunification services to her on the grounds that she had a history of extensive and chronic drug abuse and had resisted court-ordered drug treatment. (Welf. & Inst. Code, § 361.5, subd. (b)(13).)¹ This court upheld the denial of reunification services. (*Mary J. v. Superior Court* (May 10, 2011, F061947) [nonpub. opn.] (*Mary J.*.) Following a suggestion in our opinion (*id.* at p. 14), mother then filed a petition under section 388 asking the juvenile court to modify its order and provide reunification services on account of changed circumstances, namely her subsequent progress in curbing her drug habit. The court denied the petition and mother appeals. Finding no abuse of discretion, we affirm.

FACTUAL AND PROCEDURAL HISTORIES

Mother has four daughters, T.J., J.J., A.J. and B.J., who are presently eight, seven, five, and four years old. B.M. (father) is the father of A.J. and B.J. In June 2008, when mother was pregnant with B.J., police came to mother's home in response to a domestic violence call. They found trash everywhere inside the house, broken windows, and exposed wires. The electrical service to the house was turned off. The department of social services took T.J., J.J., and A.J. into custody. (*Mary J., supra*, F061947, at p. 2.) It took B.J. into custody after she was born in September 2008. The department's investigation showed that mother and father were substance abusers. Mother was ordered to undergo substance abuse treatment. She completed a six-month residential treatment program in April 2009 and an aftercare program in July 2009. The juvenile court

¹Subsequent statutory references are to the Welfare and Institutions Code.

returned custody of the children to mother in November 2009 and terminated its jurisdiction. (*Id.* at p. 3.)

In September 2010, the department received a report that mother had locked the children in the back yard, unsupervised, while she and a boyfriend used drugs in the house, and that the house was dirty and had no food or diapers. Two social workers and a police officer came to the house on September 30, 2010. (*Mary J., supra*, F061947, at p. 3.) We described in our prior opinion what they found:

“As they approached the home, they noticed that the front door knob was missing. They found the living room was messy with clothes strewn about the room and furniture tossed around. There were dirty diapers on the floor and mud in children’s toys that were in the middle of the living room. In the kitchen, there were open bags of cereal thrown on the furniture, piles of dishes in the sink, and frozen chicken pieces in a pan on the stove. It appeared to the police officer that the dishes had not been washed in weeks. There was food and clothing spread in the hallway. In the girls’ bedroom, the beds were upside down, the bedding was tossed around, and clothes were thrown everywhere. The house, including the girls’ bedroom, smelled like urine. The girls stated that they urinated on their beds. The bathroom also smelled like it had not been cleaned in a couple of weeks.” (*Mary J., supra*, F061947, at pp. 3-4.)

T.J., the oldest child, said she had seen father hit and kick mother, throw a drinking glass at her, and burn her by throwing a lit cigarette at her face. T.J. also said mother slept a lot during the day with her boyfriend, S.M. (*Mary J., supra*, F061947, at p. 4.) Mother told one of the social workers that the door knob was a casualty of a fight she and father had had a week before, during which father had hit her with a telephone. She said she did not use drugs in the house, but admitted she had smoked methamphetamine and marijuana the day before, and said a methamphetamine pipe and an empty bag that had contained methamphetamine were in the house. She claimed she had relapsed a week earlier. (*Ibid.*) The boyfriend, S.M., was present, and mother said he was there to help her with the children because “she was coming down from using drugs.” She had lost

contact with her sponsor from Alcoholics Anonymous/Narcotics Anonymous (AA/NA) six months earlier. (*Id.* at p. 5.)

Mother was arrested and the children were taken into custody and placed in foster care. The department filed a new dependency petition. The juvenile court ordered the children detained pursuant to the petition on October 5, 2010. The next day, mother enrolled in an outpatient drug treatment program. (*Mary J., supra*, F061947, at p. 5.) The court adjudged the children dependents in December 2010 and held a dispositional hearing in February 2011. (*Id.* at pp. 5-6.)

At the hearing, the department presented evidence that mother was visiting the children regularly, participating in a parenting program, complying with her drug treatment, and attending her AA/NA meetings. The department argued, however, that mother had a high propensity for continued drug use and was unlikely to be able to reunify with her children. Citing statements by the children about drug-related behavior and domestic violence occurring at various times, the department argued that mother had lied when she said she had only had a brief relapse the week before her arrest. (*Mary J., supra*, F061947, at p. 5.) The department also presented evidence that, although the children enjoyed mother's visits, they had no difficulty separating from her, expressed no desire to go home with her, and said they enjoyed their foster parents and liked living in the foster home because they were fed and felt safe there. (*Id.* at pp. 6, 8.) The department recommended applying section 361.5, subdivision (b)(13), to deny reunification services to mother. (*Mary J., supra*, at p. 6.)

Mother testified that she had had a brief relapse just before her arrest and had immediately sought treatment, calling to make her first appointment the day before she was arrested. (*Mary J., supra*, F061947, at pp. 6, 7.) She said she had stopped going to AA/NA meetings and stopped contacting her sponsor six months after the previous dependency case was closed because she thought she was better. She denied claims made

by the children that she and her boyfriend slept during the day, that her boyfriend hit them, and that she spanked them with a spatula. (*Id.* at p. 8.)

The court agreed with the department's recommendation. It found that mother's progress toward alleviating the causes necessitating the children's placement in foster care had been minimal. It found mother's testimony that she had only had a brief relapse was not credible. Under section 361.5, subdivision (b)(13), it denied her reunification services.

Mother filed a writ petition that led to our prior opinion. Among other things, she argued that section 361, subdivision (b)(13), did not apply. (*Mary J., supra*, F061947, at p. 11.) That subdivision allows the court to deny reunification services to a parent who "has a history of extensive, abusive, and chronic use of drugs or alcohol and has resisted prior court-ordered treatment for this problem during a three-year period immediately prior to the filing of the petition that brought [the parent's] child to the court's attention" (§ 361.5, subd. (b)(13).) Mother did not deny that her drug use was extensive, abusive and chronic, but instead argued that she never "resisted" treatment. (*Mary J., supra*, at p. 11.) Citing case law, we concluded that the evidence supported the juvenile court's implicit finding that mother's continued drug use amounted to resistance within the meaning of section 361.5, subdivision (b)(13), and was not a brief relapse. (*Mary J., supra*, at pp. 11-13.) We said, "A reasonable interpretation of this evidence is that petitioner was engaging in regular drug use given her prior history." (*Id.* at p. 12.)

We also noted that at oral argument in this court, mother had discussed progress she had made with drug treatment. We said, "To the extent that she can meet the requirements under section 388, she may want to file a petition asking the juvenile court to vacate its order denying her reunification services." (*Mary J., supra*, F061947, at p. 14, fn. omitted.)

On May 24, 2011, mother filed her petition under section 388. The petition stated that mother had completed her drug treatment program, was attending school and seeking

employment, and was maintaining a clean and appropriate home. It also asserted that the children wanted to return home and cried at the end of her visits. The petition asked the court to modify its previous order and either return the children to mother with family maintenance services or grant reunification services. It said that this modification would benefit the children because it would keep them together as a sibling group, support their emotional well-being by reuniting them with their mother, and lead to more consistent school attendance. The petition alleged that the children each missed 30 days of school since September 2010 while in foster care.

The juvenile court held a hearing on the petition on September 22 and 26, 2011. Mother testified that she began an outpatient drug treatment program on October 6, 2010, and completed the program on May 31, 2011. She attended individual and family substance abuse counseling through the same program. She had no positive drug tests. She also testified that she resumed attendance at AA/NA on September 29, 2010, and had attended three days a week or more since then. The attendance sheets she produced, however, showed less-frequent attendance and only covered about four months. Mother testified that she began a parenting class on October 19, 2010, and completed it on January 25, 2011. She began attending school in April 2011 to get a high school diploma, and needed only three credits to finish at the time of the hearing.

Mother testified that her visits with the children were going well. She disagreed with the department's view that the visits were chaotic. At the beginning of each visit, the children ran to her and gave her hugs and kisses, and at the end the children did not want to leave and asked when they could come home.

Mother's counsel asked her what her "safety plan" would be should she relapse again. Mother said, "I don't have a safety plan should I relapse. My plan is, I'm not going to relapse."

Mother testified that she did not have a home of her own. She was living with her brother and his family in Tollhouse and planned to move in with a family friend in Clovis if she regained custody of the children.

Mother also testified that she believed it would be in the children's best interest to give her another chance at reunification because, among other reasons, it was likely that the children would be split up if they were not returned to her. The father of the two younger children was receiving reunification services and would probably get custody of them if mother did not.

On cross-examination, the department's counsel challenged mother's testimony that her first relapse after reunification was during the week before her arrest in September 2010. The department's counsel pointed out that a drug counselor's notes for an addiction severity index (A.S.I.) report said she relapsed about three months after the November 2009 reunification. Mother testified that this was not correct and that the only relapse was in September 2010.

In its closing argument, the department conceded that the children would probably be split up if they did not return to mother, since father was on a path to gain custody of the two younger children. Further, the current foster care provider was not willing to make a long-term plan with the children. The department maintained, however, that even though it was admirable that mother obtained services on her own, she had "not come far enough" to warrant another chance. The department believed mother lacked insight into her addiction because she had failed to give a clear explanation of what caused her to relapse in September 2010. It concluded that there was no significant change of circumstances, and modifying the order to provide reunification services would not be in the best interests of the children. Counsel for the children agreed with the department.

The court also agreed with the department. It stated that it still did not believe mother's claim that she never relapsed until September 2010 and instead accepted the statement in the A.S.I. report that she relapsed three months after the November 2009

reunification. The court also found that mother lacked insight into her problems. It concluded that there was no change in circumstances and that granting mother's petition would not be in the children's best interest.

DISCUSSION

Mother argues that the court's order denying her section 388 petition should be reversed. We review the ruling on a section 388 petition for abuse of discretion. (*In re Stephanie M.* (1994) 7 Cal.4th 295, 316, 318.) The juvenile court has not abused its discretion unless its ruling exceeded the bounds of reason and was arbitrary, capricious, or patently absurd. (*Id.* at p. 318.) When the facts reasonably support two or more inferences, we have no authority to substitute one reasonable inference for another. (*Id.* at p. 319.)

To obtain a modification of a juvenile court's order, a section 388 petitioner must present new evidence or demonstrate that there has been a change of circumstances and must show that the new evidence or changed circumstances mean that it would be in the child's best interest to modify the prior order. The petitioner must make this showing by a preponderance of the evidence.² (*In re Stephanie M., supra*, 7 Cal.4th at p. 317.)

In this case, the court's prior order denied reunification services to mother because the court found that she had "a history of extensive, abusive, and chronic use of drugs or alcohol and [had] resisted prior court-ordered treatment for this problem during a three-year period immediately prior to the filing of the" dependency petition. (§ 361.5, subd. (b)(13).) We upheld this finding and it is not challenged in the present appeal. To

²The department argues that mother should instead have been required to make her showing by clear and convincing evidence, because reunification services cannot be provided to a parent described in section 361.5, subdivision (b)(13), unless the juvenile court finds by clear and convincing evidence that reunification is in the child's best interest. (§ 361.5, subd. (c).) We need not address this contention because, as will be seen, we hold that the juvenile court had discretion to find that mother failed to carry her burden even under the lower standard of proof.

prevail on the section 388 petition, mother had to show that her circumstances had changed in such a way that providing reunification services to her would be in the children's best interest after all, as her drug abuse and any other relevant problems would no longer stand in the way of reunification.

The court could, within the bounds of reason, find that mother did not make the necessary showing by a preponderance of the evidence. Mother admitted that she relapsed less than a year after getting the children back and admitted that she had stopped attending AA/NA meetings six months after getting the children back. The juvenile court found that mother had relapsed even earlier, and mother does not argue that this finding was not supported by substantial evidence. There was evidence that, by the time of the children's second removal, they were again exposed to domestic violence and were again living in conditions of neglect. The progress mother made after the second removal is commendable, but the risk of relapse and the associated dangers for the children had been demonstrated vividly, and that risk remained. Mother admitted she had no plan to provide for the children's safety if she should relapse again. Under these circumstances, there was a sufficient basis for the court's finding that mother's circumstances did not change enough to establish that reunification would be in the children's best interest.

DISPOSITION

The juvenile court's order denying mother's section 388 petition is affirmed.