

**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

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

In re ARIANNA M. et al., Persons Coming  
Under the Juvenile Court Law.

KERN COUNTY DEPARTMENT OF HUMAN  
SERVICES,

Plaintiff and Respondent,

v.

JOHN M.,

Defendant and Appellant.

F065332

(Super. Ct. Nos. JD126573-00 &  
JD126574-00)

**OPINION**

APPEAL from a judgment of the Superior Court of Kern County. Louie L. Vega,  
Judge.

Linda K. Harvie, under appointment by the Court of Appeal, for Defendant and  
Appellant.

Theresa A. Goldner, County Counsel, and Elizabeth M. Giesick, Deputy County  
Counsel, for Plaintiff and Respondent.

Arianna M. and Aubrey M. were declared dependents of the juvenile court after (1) their mother physically attacked six-week-old Aubrey, cutting and stabbing the infant; (2) both parents admitted abusing illegal substances; and (3) a prior referral for general neglect had been substantiated. Reunification services were ordered for John M. (father). After father continued to test positive for illegal drugs and failed to make significant progress under his reunification plan, the juvenile court terminated reunification services and set a permanent plan hearing. At the combined hearing on a Welfare and Institutions Code section 388<sup>1</sup> petition filed by father and the section 366.26 permanent plan, the juvenile court denied the section 388 petition, terminated parental rights, and set adoption as the permanent plan.

Father appeals, contending the juvenile court abused its discretion in denying his section 388 petition and erred in terminating his parental rights. We reject father's contentions and affirm the order.

#### **FACTUAL AND PROCEDURAL SUMMARY**

A section 300 petition was filed on May 18, 2011, on behalf of then six-year-old Arianna and her sibling, then six-week-old Aubrey. John is the presumed father. The petition alleged that the children were at risk of suffering serious physical harm because their mother had stabbed Aubrey multiple times; Aubrey also had rib fractures. In addition, the petition alleged that the parents were unable to provide regular care due to their substance abuse as both parents used methamphetamine. The petition further alleged that in 2009 the mother delivered a stillborn child; the baby tested positive for methamphetamine and the cause of death was determined to be due to acute substance abuse by the mother while pregnant.

---

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

The social study noted that the mother had acknowledged stabbing Aubrey, and father was in the home at the time. Father told the social worker he was in the shower when Aubrey was stabbed; he was married to the children's mother; he used marijuana and methamphetamine; and he had a medical marijuana card, although he could not produce one. Except for the charges filed against the mother as a result of Aubrey's stabbing, neither parent had a criminal record.

At the detention hearing, the parents denied the allegations of the petition. The children were detained and father was provided supervised visitation with both children. Visitation with Aubrey occurred at Children's Hospital Central California where Aubrey was recovering from her injuries. No visitation was provided for the mother.

The social study for the jurisdictional hearing scheduled for August 4, 2011, reported that father had tested positive for drug use. He was enrolled in a substance abuse program. In a supplemental report, father admitted using illegal drugs but claimed he was not an addict. Family members stated both parents were frequent drug users and they were concerned that father may not be able to care for his children by himself.

At the jurisdictional hearing, the juvenile court found the section 300, subdivision (a) and (b) allegations true. The children were placed together with maternal relatives.

The social study prepared for the dispositional hearing scheduled for September 15, 2011, noted that father needed to improve his attendance at the substance abuse meetings and to participate in the meetings, as well as provide proof that his medical marijuana card was in compliance with the law. Father tested positive for illegal drugs four times. The social worker opined that father did not seem motivated to address the issues that led to the dependency and had made only minimal progress. The Kern County Department of Human Services (Department) recommended that reunification services be provided for father, but not the mother.

At the dispositional hearing, the juvenile court found that father had made minimal progress toward alleviating the conditions that had caused the children to be placed in

out-of-home care. Reunification services were ordered provided to father for a period not to exceed six months, with the reunification period expiring on March 15, 2012. Father was ordered to participate in parenting and substance abuse classes and to submit to random drug tests. Weekly supervised visitation was ordered. Father was notified that failure to make significant progress would result in termination of reunification services.

A section 366.21, subdivision (e) review hearing was held on March 15, 2012. Father requested continued reunification services; he claimed his attitude had changed and he would do whatever needed to be done to reunify. He had failed to drug test four times, tested positive twice, and tested negative twice. He was expelled from a sober living facility because he had tested positive for drugs and had failed to return when he left the facility on a pass. His visitation with the children was inconsistent. He missed scheduled visits in September, October, and November 2011 and February 2012. When he missed visits, Arianna became withdrawn or upset. During at least one visit, father engaged in an inappropriate discussion with Arianna, promising the child she would return home with her mother and father. The children were doing well in their out-of-home placement.

The juvenile court found that Arianna was a member of a sibling group where at least one sibling was under the age of three at the time the children were removed from parental custody. The juvenile court found that father had failed to participate regularly or make substantial progress in his reunification plan. Finding there was not a substantial probability the children would be able to be returned within six months, reunification services were ordered terminated. A section 366.26 hearing was scheduled for July 13, 2012.

On July 10, 2012, father filed a section 388 petition requesting the juvenile court reinstate reunification services or, alternatively, provide family maintenance services and place the children with him. He also requested a bonding study. Attached to the section

388 petition was a certificate indicating father had completed a substance abuse treatment program.

The social study prepared for the section 366.26 hearing reported the following information. Father had completed 29 out of 38 possible visits with the children. Although most visits generally were positive, father made inappropriate comments and false promises to Arianna, stating she would be returning home to live with her mother and father and discussing the dependency case with the child. Father also stated his dislike of the social workers to Arianna and allowed phone calls between Arianna and her mother, despite a no-contact order. During some of the visits, father spent time talking on his cell phone.

During the six years Arianna lived with her father, she had bonded with him. The dependency and removal from the home interrupted that bond. The social worker opined that Arianna had a strong bond with her father, but that her bond with her younger sister was greater and Arianna expressed a desire to remain in a placement with her sister. At the time of her placement, Arianna was struggling in school and in danger of being retained. Arianna's attendance at school had improved markedly after the dependency, her academic achievement had increased, and she "flourished" and was happy in her placement.

When Arianna initially was placed, she was diagnosed as suffering from anxiety and depression. She had nightmares, cried constantly, had difficulty making friends, and was unable to focus. Arianna's negative behaviors resurfaced after visits with her father. Father blamed the caretakers for keeping Arianna away from her family and falsely promised Arianna she would return home soon. Father's statements also created confusion for Arianna.

Aubrey had no real bond with her father since she was removed from parental custody at six weeks of age.

Arianna and Aubrey had a strong bond. When initially separated at placement, Arianna constantly asked for her sister. When placed together, Arianna was very attentive to Aubrey, was able to soothe Aubrey during visits with their father, and was concerned about Aubrey's well-being. The social worker opined that the children would benefit from placement in the same home because of their strong bond, which also would allow for a sense of familial identity.

Father had continued to maintain a romantic relationship with the mother and had expressed his intent to reunite the children with their mother if he were given custody. The social worker opined that father failed to comprehend the safety risks involved in such an action or the severity of the mother's actions.

Adoption by the caregivers was the recommended permanent plan. The caregivers were receptive to allowing father contact with the children after an adoption and to entering into a postadoption agreement with father regarding visitation with Arianna.

On July 13, 2012, the juvenile court conducted a section 366.26 hearing, as well as a hearing on the section 388 petition. The Department and counsel for the minors objected to the section 388 petition. The Department pointed out that the circumstances had not changed in that father had tested positive for drugs in March 2012; visitation with the children had been inconsistent; father was intending to reunite the children with their mother, despite her criminal conviction and the inherent risks to the children; the children had a family waiting to adopt them; and father had failed to demonstrate that granting the section 388 was in the best interests of the children.

The juvenile court denied the section 388 petition, stating that no benefit to the children had been demonstrated and father had shown he was "perhaps changing his habits and lifestyle, but has not stabilized in that regard."

On the section 366.26 hearing, the juvenile court made findings and orders in accordance with the social study and found that the mother had been convicted of a felony indicating unfitness; father had failed to comprehend the severity of the mother's

actions and the effect on the children's safety; Aubrey had no bond with her father; Aubrey and Arianna had a strong bond; the children would benefit from remaining together in a stable home; and the children were likely to be adopted. Parental rights were terminated.

After the juvenile court announced its decisions and terminated parental rights, father's counsel raised the issue of a postadoption contract to allow visitation between father and the children. The juvenile court declined to make any order in this regard.

On July 19, 2012, father filed a notice of intent to file a writ petition challenging the juvenile court's orders. On July 26, 2012, this court deemed the notice of intent to be a notice of appeal. On October 1, 2012, father filed a request for judicial notice, asking that this court take judicial notice of the disposition of the criminal actions that had been filed against him and the mother. By order dated October 3, 2012, we deferred ruling on the request.

## **DISCUSSION**

Father raises two main issues in this appeal: (1) the juvenile court abused its discretion in denying his section 388 petition, and (2) the trial court erred in terminating parental rights.

### **I. Section 388 Petition**

#### ***Standard of Review***

We review the juvenile court's denial of a section 388 petition for an abuse of discretion. (*In re Shirley K.* (2006) 140 Cal.App.4th 65, 71 (*Shirley K.*)) The juvenile court "exceeds the limits of legal discretion by making an arbitrary, capricious or patently absurd determination. [Citation.]" (*Ibid.*) "'The appropriate test for abuse of discretion is whether the trial court exceeded the bounds of reason. When two or more inferences can reasonably be deduced from the facts, the reviewing court has no authority to substitute its decision for that of the trial court.' [Citations.]" (*In re Stephanie M.* (1994) 7 Cal.4th 295, 318-319 (*Stephanie M.*))

### ***Analysis***

Section 388 provides that “Any parent or other person having an interest in a child who is a dependent child of the juvenile court ... may, upon grounds of change of circumstance or new evidence, petition the court in the same action in which the child was found to be a dependent child of the juvenile court ... for a hearing to change, modify, or set aside any order of court previously made ....” (*Id.*, subd. (a)(1).)

“Section 388 provides the ‘escape mechanism’ that ... must be built into the process to allow the court to consider new information.” (*In re Marilyn H.* (1993) 5 Cal.4th 295, 309; *In re Zacharia D.* (1993) 6 Cal.4th 435, 447; see also *Stephanie M.*, *supra*, 7 Cal.4th at p. 317.)

The petitioner has the burden of showing by a preponderance of the evidence that (1) there is new evidence or a change of circumstances, and (2) the proposed modification would be in the best interests of the child. (§ 388; *Nahid H. v. Superior Court* (1997) 53 Cal.App.4th 1051, 1068; *In re Casey D.* (1999) 70 Cal.App.4th 38, 47.) That is, “It is not enough for [the petitioner] to show *just* a genuine change of circumstances under the statute. The [petitioner] must show that the undoing of the prior order would be in the best interests of the child. [Citation.]” (*In re Kimberly F.* (1997) 56 Cal.App.4th 519, 529.) Furthermore, the petitioner must show changed, not changing, circumstances. (*Casey D.*, at p. 47.) 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.” (*Ansley v. Superior Court* (1986) 185 Cal.App.3d 477, 485 (*Ansley*).)

In determining whether the petitioner has made the requisite showing, the juvenile court may consider the entire factual and procedural history of the case. (*In re Justice P.* (2004) 123 Cal.App.4th 181, 189.) The juvenile court may consider factors such as the seriousness of the reason leading to the child’s removal, the reason the problem was not resolved, the passage of time since the child’s removal, the relative strength of the bonds

with the child, the nature of the change of circumstance, and the reason the change was not made sooner. (*In re Aaliyah R.* (2006) 136 Cal.App.4th 437, 446-447 (*Aaliyah R.*)) In assessing the best interests of the child, “a primary consideration ... is the goal of assuring stability and continuity. [Citation.]” (*Stephanie M., supra*, 7 Cal.4th at p. 317.)

Here, father failed to meet his burden of proof. There were no changed circumstances. Reunification services were terminated in March 2012 when father again tested positive for illegal drugs. There were no recent drug tests establishing sobriety. As the juvenile court stated in denying the petition, at best, there were changing, but not changed, circumstances. There was no indication father had changed his approach and attitude to parenting. He did not realize the seriousness of the mother’s actions and that she could not be part of the children’s lives. He did not appreciate the problems he created when he falsely informed Arianna she would live with her parents again and he allowed contact with the mother. His argument that granting the section 388 would be in the best interests of the children consisted of his desire that the family live together again as a family.

Father failed to prove changed, not changing, circumstances. (*Casey D., supra*, 70 Cal.App.4th at p. 47.) He also failed to demonstrate that any change of circumstances was “of such significant nature that it requires a setting aside or modification of the challenged prior order.” (*Ansley, supra*, 185 Cal.App.3d at p. 485.) Father did not seriously begin to address the issues that led to the dependency petition until after reunification services had been terminated and had no excuse for not addressing the issues sooner. (*Aaliyah R., supra*, 136 Cal.App.4th at pp. 446-447.)

The juvenile court did not exceed the bounds of reason in denying the section 388 petition; consequently, there was no abuse of discretion. (*Stephanie M., supra*, 7 Cal.4th at pp. 318-319; *Shirley K., supra*, 140 Cal.App.4th at p. 71.)

## **II. Termination of Parental Rights**

Father raises three contentions regarding termination of his parental rights. He contends he met his burden of demonstrating the section 366.26, subdivision (c)(1)(B)(i) exception; the juvenile court improperly relied upon a postadoption contract; and, the juvenile court improperly balanced the sibling bond against a parental relationship.

### ***Parental Benefit Exception***

Father argues the juvenile court erred because of his close bond with Arianna. He contends the parental benefit exception to termination of parental rights should have been applied in this case because continuing the parental relationship would have been beneficial to Arianna.

Appellate courts have interpreted the phrase “benefit from continuing the relationship” to refer to a parent-child relationship that promotes the well-being of the child to such an extent as to outweigh the benefits the child would gain in a permanent home with adoptive parents. Courts balance the strength and quality of the natural parent-child relationship against the security and sense of belonging the new family would provide. If severing the natural parent-child relationship would deprive the child of a substantial, positive emotional attachment so that the child would be greatly harmed, only then is the preference for adoption overcome and the parents’ rights are not terminated. (*In re L.Y.L.* (2002) 101 Cal.App.4th 942, 953 (*L.Y.L.*); *In re Autumn H.* (1994) 27 Cal.App.4th 567, 575 (*Autumn H.*))

To meet the burden of proof for this exception, the parent must show more than frequent and loving contact or pleasant visits. (*L.Y.L., supra*, 101 Cal.App.4th at pp. 953-954.) The relationship arises from day-to-day interaction, companionship, and shared experiences. The parent must show he or she occupies a parental role in the child’s life that results in a significant, positive emotional attachment from child to parent. (*Id.* at p. 954.)

Here, there is no dispute that father occupied a parental role in Arianna's life for a period of six years and formed a close bond with her. That relationship, however, was not entirely positive. At the time the dependency was filed, father had an admitted history of frequently using illegal drugs, including methamphetamine and marijuana. Arianna was struggling in school and in danger of being held back a year. Arianna also was suffering from nightmares, anxiety, and depression. After placement with the caregivers, Arianna's attendance in school and academic achievement increased markedly and her anxiety, depression, and nightmares dissipated. After visits with her father, the problems would reoccur briefly.

Father's visitations with Arianna were not always positive. Although he generally acted appropriately and lovingly with the child, he did inappropriately criticize the social workers and blame them for the breakup of the family; he told Arianna she soon would be living with her mother and father; and he allowed contact between Arianna and the mother, even though there was a no-contact order.

While father, the mother, and Arianna were living together as a family unit, the abuse of illegal drugs led to the stillbirth of one child and clearly was a factor in the stabbing of Aubrey. Despite the horrible attack on Aubrey, father continued a romantic relationship with the mother and told Arianna his plan was for the family, including the mother, to live together.

Aubrey had no real bond with father whatsoever, and father does not argue on appeal that she did.

Thus, it was shown that the children flourished while placed with the caregivers, had formed a loving attachment with them, and the caregivers were prepared to adopt both girls. The evidence also showed that while in father's custody prior to the filing of the petition, Arianna and Aubrey did not thrive and were at substantial risk of physical injury.

Lastly, father notes that the social study acknowledged that Arianna suffered from being removed from the care and custody of her parents. A finding of no detriment to the child is not a prerequisite to the termination of parental rights. (*In re Jasmine D.* (2000) 78 Cal.App.4th 1339, 1348 (*Jasmine D.*.) Rather, it is the burden of a party opposed to termination to show that termination would be detrimental under one of the exceptions. (*In re Zachary G.* (1999) 77 Cal.App.4th 799, 809.)

Father failed to meet his burden of proof that maintaining a parental relationship with him would promote the well-being of the children to such an extent that it would outweigh the benefits the children would gain in a stable, permanent home with adoptive parents. (*In re Jamie R.* (2001) 90 Cal.App.4th 766, 773.)

Moreover, when a juvenile court rejects a detriment claim and terminates parental rights, the appellate issue is not one of substantial evidence. Instead, it is whether the juvenile court abused its discretion. (*Jasmine D.*, *supra*, 78 Cal.App.4th at p. 1351.) On review of the record, we find no abuse of discretion.

#### ***Postadoption Contract***

Father also is incorrect when he asserts the juvenile court inappropriately relied upon a postadoption contract in making its decision. The record reflects that while the social study filed with the juvenile court for the section 366.26 hearing mentions that the caregivers were open to discussing such a contract, the juvenile court never mentioned it in making a ruling and it was not raised by either party until *after* the juvenile court had rendered its decision. When it was raised by father's counsel, the juvenile court declined to take any action on such a contract and deferred any further consideration until there was a determination of whether it was in the best interests of the children.

#### ***Sibling Bond***

Father asserts that the juvenile court inappropriately balanced the sibling bond against a parental relationship. There is nothing in the record that expressly suggests the juvenile court did anything of the kind.

It is appropriate for the juvenile court to consider the sibling bond when reaching a decision. (*Autumn H., supra*, 27 Cal.App.4th at pp. 576-577.) That is what occurred here. There is no evidence of an “inappropriate balancing” of such a consideration with anything else. Any such conclusion is mere speculation. This argument fails.

**DISPOSITION**

The request for judicial notice filed October 1, 2012, is granted pursuant to Evidence Code section 459, subdivision (a). The July 13, 2012, order denying father’s section 388 petition and terminating parental rights and setting adoption as the permanent plan pursuant to section 366.26 is affirmed.

---

Cornell, Acting P.J.

WE CONCUR:

---

KANE, J.

---

POOCHIGIAN, J.