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

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

KERN COUNTY DEPARTMENT OF
HUMAN SERVICES,

Plaintiff and Respondent,

v.

MELISSA H.,

Defendant and Appellant.

F065595

(Super. Ct. Nos. JD125151-00,
JD125152-00)

OPINION

THE COURT*

APPEAL from orders of the Superior Court of Kern County. Jon E. Stuebbe,
Judge.

Hana B. Balfour, under appointment by the Court of Appeal, for Defendant and
Appellant.

Theresa A. Goldner, County Counsel, and Kelli R. Falk, Deputy County Counsel,
for Plaintiff and Respondent.

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* Before Cornell, Acting P.J., Detjen, J., and Franson, J.

INTRODUCTION

Melissa H. (mother) appeals from the juvenile court's order denying her petition pursuant to Welfare and Institutions Code section 388¹ that alleged sufficient changed circumstances to have her children returned to her. We reject mother's contention and affirm the juvenile court's order.

FACTS AND PROCEEDINGS

Initial Proceedings

On September 9, 2010, Sydney J., then 13 years old, and Cooper J., then 10 years old, were detained on allegations by the Kern County Department of Human Services (department) filed in a petition pursuant to section 300 that: mother suffered a mental illness, had suicidal and homicidal ideations toward herself and her children, suffered from anxiety and depression, had written letters stating she was going to kill herself and her children, and was arrested on felony charges that she made criminal threats (Pen. Code, § 422) and caused more than \$400 in damage by vandalism (Pen. Code, § 594, subd. (b)(1)).

Mother admitted to a social worker that she tried to get a weapon to kill herself. Mother also admitted that she felt it necessary to kill her children because it would be better for them to die than to live knowing their mother had committed suicide. Mother had suffered her suicidal and homicidal ideation since April 2010 and sought treatment through medication. Though mother had tried several different anti-depressants, none of them helped with her anxiety or depression. Mother had also made arrangements to meet with another child, E.F., that day and that she planned to kill all three children by suffocating them.

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

On November 30, 2010, mother submitted the matter on the social workers' reports and the court found the allegations in the petition true.² On January 5, 2011, the court ordered the children's removal from mother's custody. Mother was ordered to participate in counseling for parent training and mental illness, as deemed necessary by a therapist, and to follow through with all medication orders consistent with her counseling.

A review hearing was conducted on July 5, 2011, pursuant to section 366.21, subdivision (e). The department requested the appointment of a psychologist, Dr. Allison Little, to evaluate mother to determine which services to provide her in order to effectuate reunification with the children.

During her evaluation with Dr. Little, mother denied suicidal or homicidal thoughts. Inconsistently, mother admitted that she did think about killing herself and her children, but stated that things were now better and she was looking forward to being finished with her parole in May 2012. Mother claimed she had taken domestic violence and parenting courses in prison and had certificates indicating she had completed both classes. When the social worker contacted the prison, she learned that the prison did not offer these classes. A prison representative told the social worker that the certificates were invalid.

Dr. Little diagnosed mother with a Mood Disorder, Not Otherwise Specified. Mother showed a marked pattern of mood lability and volatility. Mother experienced episodes of severe depression with suicidal and homicidal ideation, generalized anxiety, and marked episodes of panic attacks. Mother's symptoms caused a marked impairment of her overall functioning from July 2007 through November 2010. Dr. Little also found

² Mother was incarcerated in state prison and not present at the hearing. Mother's counsel indicated mother waived her right to be present at the hearing and her counsel indicated mother acknowledged the allegations in the report.

a Personality Disorder, Not Otherwise Specified, presenting with Borderline, Histrionic, and Narcissistic personality traits.

Mother was released from prison on April 15, 2011. She had two visitations while incarcerated. Mother maintained regular visitations with the children after her release from prison. The social worker recommended continued reunification services for mother. At the section 366.21, subdivision (e) hearing on September 15, 2011, the court found mother had made only minimal progress in her case plan, but still ordered continued reunification services for mother. Mother was further ordered to participate in counseling for anger management, family counseling, and domestic violence as a perpetrator. The court further ordered mother to undergo counseling by a licensed psychotherapist and a psychiatric medical evaluation by a licensed psychiatrist.

In January 2012, the social worker prepared a report indicating that mother completed an anger management counseling course, but failed to visit the children during the majority of the review period. Mother began visiting the children again on November 18, 2011, but canceled a visit on December 21, 2011. The social worker noted that mother would contact Sydney and tell Sydney she was mad at her for talking to the caregiver. Mother would send inappropriate text messages telling Sydney that mother hoped Sydney would kill herself. Mother called Sydney “a disrespectful bitch” and told Sydney she did not want her or Cooper.

Mother contacted the social worker and asked if she could just get services for Cooper. Mother complained the caregivers got into Sydney’s head and that Sydney lied all of the time. Mother had not provided verification that she had undergone a psychiatric medication evaluation. The social worker noted that mother continued to display issues with controlling her anger as demonstrated by mother’s text messages to her daughter. Mother was not attending individual counseling from a licensed psychotherapist. Mother had not met most of the goals of her reunification plan. The social worker concluded

because mother had not attempted to address her mental health plan, had poor quality of visits, and failed to visit with her children during the majority of the review period, that reunification services be terminated.

At the section 366.21, subdivision (f) hearing on January 9, 2012, the court found mother had made minimal progress toward alleviating or mitigating the causes for the dependency or to avail herself of reunification services. The court found clear and convincing evidence that mother failed to participate regularly and make substantive progress in her court-ordered treatment plan. The court terminated mother's reunification services.

Section 388 Petition

The social worker reported in July 2012 that mother was keeping her weekly visitation schedule with the children. The caregiver reported, however, that Cooper's behavior always worsened after mother's visits. Mother claimed she had met the requirements of the mental health plan. Although the department tried to verify that mother was receiving mental health services, mother refused to sign consent forms to release her information. The social worker concluded mother had not made any progress on her case plan.

Mother filed a petition pursuant to section 388 on July 9, 2012, alleging that she completed her case plan, obtained a psychiatric medication evaluation, took required classes, and received individual psychological counseling. Mother attached certificates that she had completed courses in parenting, anger management, and domestic violence. Dr. Bangasan, a licensed psychiatrist, prepared a report indicating that he had evaluated mother and concluded mother did not require any psychiatric medications, was not currently depressed, and suffered only mild anxiety.

An evaluation by Dr. M. Dean Haddock concluded mother had no significant management problems, suffers from a panic disorder, her insight into her own

psychological functioning is good, and mother's prognosis with appropriate treatment was excellent. Dr. Haddock recommended mother obtain individual cognitive behavioral therapy, take an anti-anxiety medication, and receive counseling to address her anxiety and impulsive illegal acting out to avoid her panic attacks. Mother submitted an unsigned letter from the children dated June 28, 2012, indicating the children wanted to be returned to mother.

A social worker's report documented that although mother began to again regularly visit her children, she consistently spoke to them about returning home with her, which negatively impacted their behavior after visits. Mother was only minimally cooperative with the department. The social worker acknowledged that mother finally attended and completed components of her previously-ordered case plan, but continued to be emotionally unstable. Mother only attended four sessions of mental health counseling as of August 2012.

The social worker noted that although mother obtained a psychological examination, the examination did not address the issues that brought the children into a dependency action or mother's homicidal and suicidal ideation. The social worker stated that mother continues to exhibit impulsive behavior and cursed at social workers and a supervisor as recently as August 2, 2012, when she was confronted with information she did not wish to hear. Mother indicated she wanted the children placed back with her, but put a trip out of town as a higher priority over having a home evaluation. The social worker concluded that despite the fact that mother had begun counseling, she failed to make substantial progress on her case plan and continued to display aggressive and unstable behavior.

The juvenile court conducted a hearing on mother's section 388 petition on August 7, 2012. Mother's counsel asked the court to look past mother's animosity toward the department and to instead focus on mother's progress. Counsel requested that mother be

placed on family maintenance services. No testimony was given at the hearing. The court stated it was aware the children wanted to go home and given their ages (Sydney was 15 years old and Cooper was 12 years old at the time of the hearing), the court seriously considered the children's wishes. The court found, however, that mother's conduct "still evidences the kinds of problems" which led to the dependency action and denied mother's petition.

DENIAL OF SECTION 388 PETITION

Mother contends the court erred in denying her section 388 petition. Mother argues that her conflicts with social services were not evidence that she was depressed, suicidal, or homicidal. We disagree.

It is mother's burden of proof to show there was new evidence or there were changed circumstances that made a change of the children's placement in their best interests. (§ 388; *In re Stephanie M.* (1994) 7 Cal.4th 295, 317 (*Stephanie M.*.) The parent need only make a prima facie showing to trigger the right to proceed by way of a full hearing. (*In re Marilyn H.* (1993) 5 Cal.4th 295, 310.) If the petition presents any evidence that a hearing would promote the best interests of the child, the court will order the hearing. (*In re Jasmon O.* (1994) 8 Cal.4th 398, 415 (*Jasmon O.*.) The petition must be liberally construed in favor of its sufficiency. (*Ibid.*)

The mandate for liberal construction of a section 388 petition, however, does not entitle a petitioner to avoid describing the changed circumstances or new evidence. Section 388 and the pertinent rule of court (Cal. Rules of Court, rule 5.570) require the petition to allege changed circumstances or new evidence that requires changing a prior order. (*Jasmon O.*, *supra*, 8 Cal.4th at p. 415.) As the moving party, it was mother's burden of proof, by a preponderance of the evidence, to show there was new evidence or there were changed circumstances that called for a change of the previous order denying reunification and that reunification services would be in the children's best interests.

(§ 388; *Stephanie M.*, *supra*, 7 Cal.4th at p. 317.) Mother's petition was very weak, but the juvenile court nevertheless gave mother a hearing based on the petition.

The parent bears the burden of showing, in a section 388 petition, that both a change of circumstance exists *and* that the proposed change is in the best interests of the child. A petition only alleging changed circumstances, which would lead to a delay in the selection of a permanent home, to see if a parent could eventually reunify with a child at some future point, does not promote stability for the child or the child's best interests. (*In re Casey D.* (1999) 70 Cal.App.4th 38, 47.)

Mother argues there was new evidence that she fulfilled the requirements of her case plan by finishing her course requirements and by obtaining psychological services and a psychiatric evaluation. Mother did not even attempt to comply with her case plan until nearly two years after the dependency proceeding began. Mother was in prison at the beginning of the dependency, but was released in April 2011 and still waited another year to begin compliance with her court-ordered case plan in earnest. Mother had a long history of mental illness and told social workers at the beginning of the dependency that she had tried different anti-depressant medications and they did not work.

Mother obtained a psychiatric diagnosis from Dr. Bangasan that she only suffered from mild anxiety and required no medications. Mother received an arguably inconsistent diagnosis from her psychologist, Dr. Haddock, that she suffered from a panic disorder, necessitating anti-anxiety medication and cognitive behavioral therapy. There is no indication in mother's section 388 petition or elsewhere in the record that mother followed through with Dr. Haddock's recommendations. Mother's failure to do so is troubling because she had a well-documented violent past, a criminal record, and had expressed a well-planned homicide directed toward her children, followed by her own suicide. Given mother's long history of mental health issues, the juvenile court was entitled to give less weight to the opinions of Drs. Bangasan and Haddock than to Dr.

Little. On appeal, we do not reweigh the credibility of the medical opinions before the juvenile court.

We also reject mother's argument on appeal that the juvenile court's judgment was improperly focused on mother's hostility toward the department. Mother's behavior remained angry and irrational. The department noted that mother had only attended four individual therapy sessions as of early August 2012. In December 2011, mother sent Sydney text messages suggesting that Sydney should kill herself. A few weeks before the hearing on her petition, mother went on a trip out of town rather than making herself available for a scheduled in-home evaluation. The juvenile court could reasonably conclude from the record in this case that mother still failed to adequately address the mental health issues that were a primary reason for the dependency. Mother appeared to be in denial about her suicidal and homicidal ideation.

To understand the element of best interests in the context of a section 388 petition, we look to the Supreme Court's decision in *Stephanie M.* After the termination of reunification services, a parent's interest in the care, custody, and companionship of his or her child is no longer paramount. (*Stephanie M., supra*, 7 Cal.4th at p. 317.) Rather, the focus shifts, once reunification efforts end, to the child's needs for permanency and stability; there is in fact a rebuttable presumption that continued out-of-home care is in the best interest of the child. (*Ibid.*) A court conducting a modification hearing at this stage of the proceedings must recognize this shift of focus in determining the ultimate question before it, that is, the best interest of the child. (*Ibid.*)

Notably, both here and in the juvenile court, mother ignores her children's need for permanence and stability in advocating her position. Neither the juvenile court nor this court, however, may do so.

DISPOSITION

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