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

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

KERN COUNTY DEPARTMENT OF HUMAN
SERVICES,

Plaintiff and Respondent,

v.

T.Q.,

Defendant and Appellant.

F065902

(Super. Ct. No. JD125331-01)

OPINION

THE COURT*

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

Robert McLaughlin, under appointment by the Court of Appeal, for Defendant and
Appellant.

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

Theresa A. Goldner, County Counsel, and Jennifer E. Feige, Deputy County Counsel, for Plaintiff and Respondent.

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T.Q. (mother) appeals from Welfare and Institutions Code section 366.26¹ orders terminating parental rights to her daughter, Cecilia M., and selecting adoption as Cecilia's permanent plan. In her opening brief on appeal, mother asserted these two orders must be reversed in part because the juvenile court erred when it rejected application of the section 366.26, subdivision (c)(1)(A) exception to termination of parental rights and adoption, which governs a child living with a relative who is "unable or unwilling to adopt the child because of circumstances that do not include an unwillingness to accept legal or financial responsibility for the child." Mother also asserted the juvenile court abused its discretion when it denied her section 388 petition, by which she sought either reunification services or Cecilia's return to her custody with family maintenance services.

Cecilia also appealed from the section 366.26 orders. On January 30, 2013, we filed our unpublished opinion in Cecilia's case, F065545, in which we reversed the orders terminating parental rights and selecting adoption as her permanent plan, and remanded the case to the juvenile court with directions to vacate the order as to Cecilia and conduct a new section 366.26 hearing to determine a permanent plan for her. We previously granted mother's request to take judicial notice of this opinion.

In her reply brief, mother recognizes that the disposition in Cecilia's case resolves her assertions of error with respect to the orders terminating parental rights and selecting adoption as the permanent plan. However, she continues to assert error with respect to the juvenile court's denial of her section 388 petition, which issue was not rendered moot

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

by the decision in Cecilia's case. We conclude the juvenile court did not abuse its discretion in denying the petition and therefore affirm the order.

FACTUAL AND PROCEDURAL BACKGROUND

Cecilia first came to the attention of the Kern County Department of Human Services (Department) in April 2010, when she and mother both tested positive for methamphetamine at her birth. While investigating the referral it received, the Department learned that both mother and father regularly used methamphetamine, and father had five other children by four other women. One of father's children was a dependent in foster care. Dependency proceedings were initiated over Cecilia but later dismissed when the Department released Cecilia to her maternal aunt, who agreed to seek legal guardianship.

The maternal aunt, however, did not apply for guardianship and instead returned Cecilia to mother. In October 2010, the Department again initiated dependency proceedings over Cecilia as mother and father continued to use drugs despite being offered voluntary family maintenance services, and the maternal grandparents' home where the family was living was unsafe, unclean, and an inappropriate place for a child to live. Cecilia was detained from her parents and placed in foster care.

The juvenile court found true allegations of a petition which alleged Cecilia came under section 300, subdivisions (b) and (j) due to her parents' continued drug use and the unsanitary condition of the home in which they were living, and because of the prior dependency case involving Cecilia's half-sibling. In November 2010, the juvenile court declared Cecilia a dependent of the court, removed her from her parents' custody, and offered mother and father reunification services.

Mother and father subsequently gave birth to a son, D.M., Jr. (the baby). In April 2011, after dependency jurisdiction was taken over the baby, both Cecilia and the baby were returned to their parents' custody with family maintenance services.

During the course of the dependency, father was diagnosed with depression, schizophrenia and bipolar disorder, and was prescribed psychotropic medications. After the children were returned to his custody, he stopped taking those medications, failed to drug test and admitted using methamphetamine and marijuana. In October 2011, the Department filed a section 342 subsequent petition alleging father's failure to take his psychotropic medications constituted an additional basis for jurisdiction over the children, and a section 387 supplemental petition to remove the children from father's custody. In November 2011, the juvenile court found the allegations of both petitions true, ordered the children removed from father's custody, and gave father reunification services. Mother and the children moved in with the maternal grandparents, while father lived elsewhere.

In February 2012, the Department filed a section 387 supplemental petition to remove the children from mother's custody because she allowed father to have unauthorized contact with the children. The children were detained and placed in a foster home. In March 2012, they were removed from that home due to allegations of physical abuse and placed in another foster home. After the children were detained, mother and father once again lived together. The Department determined Cecilia was appropriate for adoption planning. While her foster parents did not want to pursue a permanent plan, maternal relatives were interested and awaiting approval for placement.

At the April 2012 hearing on the second section 387 supplemental petition, the juvenile court removed the children from mother's custody. As to Cecilia, the juvenile court terminated both parents' reunification services, set a section 366.26 hearing, and ordered an adoption assessment. As to the baby, the court ordered reunification services for mother, but terminated father's services. At the hearing, mother testified she and the children lived with her parents until January 2012, when the social worker told her to find somewhere else to stay because the home was not fit for the children. Mother and the children moved into a sober-living place. By the time of the hearing, the maternal

grandparents' home had been cleaned up and approved for placement. After the Department took the children, father came to live with her at the sober-living home. County counsel informed the court at the hearing that, at that time, the maternal grandparents indicated a desire to pursue legal guardianship for both children "and nothing beyond that."

In a social study prepared for the section 366.26 hearing, the Department recommended termination of parental rights and that two-year-old Cecilia be freed for adoption. An adoption assessment was completed in July 2012. The assessment reported that Cecilia had been placed with the maternal grandparents on April 16, 2012. Based on Cecilia's visits with mother and father, the assessor opined it would not be emotionally detrimental to her to terminate their parental rights. While Cecilia had a relationship with her parents, she did not depend on either of them for emotional, physical or financial support. The assessor recommended a plan of adoption based on Cecilia's age and lack of major medical problems. Cecilia had formed a relationship with her maternal grandparents who were providing for her daily needs. The social worker spoke with the maternal grandparents and they were committed to adopting Cecilia. The social worker also opined it would not be detrimental to Cecilia's emotional well-being if parental rights were terminated and recommended a plan of adoption.

The maternal grandparents were identified as prospective adoptive parents. They lived in a three bedroom, three bath home with no health or safety hazards, along with their adult daughter and her two children. The maternal grandmother was a stay at home mother, while the maternal grandfather worked as a janitor. Both were in good health. The assessor reported the grandparents were committed to a permanent plan of adoption and stated "they want to adopt Cecilia so that they can keep her in the family." Cecilia had come to look at the grandparents as her parents and depended on them for her daily needs. The assessor believed Cecilia and the grandparents had bonded together in a primary relationship that should continue. The grandparents had demonstrated they were

committed to and capable of taking care of Cecilia, and would continue to meet her needs into adulthood. On June 18, 2012, the grandparents were provided pamphlets on adoption and legal guardianship. They stated they understood the legal and financial rights and responsibilities of adoption, and were able and willing to assume full and permanent responsibility for Cecilia both now and in the future. They were committed to the permanent plan of adoption, expressed a desire to continue to provide the necessary care for Cecilia, and had the skills and resources necessary to provide a stable and loving home.

On August 7, 2012, mother filed a section 388 petition seeking to either have Cecilia returned to her with family maintenance services, to reinstate reunification services, or to order a bonding study. Mother alleged her circumstances had changed because she was admitted to a sober living home for women and children on June 29, 2012; she had been testing negative; she had less than seven sessions to complete her Family Matters program; she was attending NA/AA meetings; and visits were of good quality. She attached various documents attesting to her progress, including: (1) a letter from the owner of the sober living home, who verified mother's admission there and stated that mother had been "very positive thus far," had done two part time jobs that paid cash, and she was a role model in the community; (2) a Family Matters progress report, which verified her enrollment in the 26-week child protection group program, and stated she had attended 19 out of 26 sessions; and (3) an attendance sheet listing all of the NA/AA meetings she had attended. Mother asserted the modification she sought was in Cecilia's best interest because it "would allow the relationship that exists between the minor and the mother to grow and flourish." The juvenile court ordered a hearing to be held concurrently with the section 366.26 hearing.

In a social study prepared for the hearing on the section 388 petition, the Department asserted it was not in Cecilia's best interest to reinstate reunification services or provide family maintenance services and recommended the juvenile court deny the

petition. A social worker spoke with mother on August 10, 2012. Mother told the social worker she moved into the sober living home on June 29, 2012 with father's assistance. She was not referred to the home by an agency; father located the home for her. Father pays her rent and she receives food stamps. Mother was not employed, but she was actively seeking a job; she also did side jobs for the owner of the sober living home. The social worker asked mother what her plan was if father decided he no longer wanted to pay her rent. Mother said the owner told her she would work with her. If the children were returned to her care, mother would apply for aid and look for "Section 8" housing. Her parents' home was also an option. Mother had nearly completed Family Matters; she had two more classes. She was also drug testing for the Department and the sober living staff on a random basis.

Mother was not taking additional classes at that time, but she felt she needed an anger management class. Mother did not think she needed to complete the class before having the children returned to her care, as she felt she could manage the children. The social worker mentioned to mother that it had been noted during several visits with the children that mother yelled at Cecilia and did not interact with the children very much. Mother acknowledged that both things were true, but claimed she was making an active effort to change and she had been different during the past few visits. Mother recognized she had a "stronger bond" with the baby than Cecilia, but she was "trying to build that" with Cecilia. Mother said she had learned skills from the two parenting classes she had completed and realized she could not be angry toward the kids because of her situation. Mother often would give herself a time out and had done that during visits.

The social worker asked mother what she had learned that would assist her in having Cecilia returned to her care. Mother responded that she was focused on being a better parent and paying attention to the children's needs. When the social worker asked mother if she understood that father could not be around the children at this time, mother acknowledged he needed to work on his mental health and there is a danger to the

children; mother said she would not allow him access to the children until the court indicated he could have contact with them. The social worker asked mother if she and father planned on continuing their relationship; mother reported they had been married for two years and she wanted to continue the relationship if he is mentally stable. She also stated, however, that she would choose the children over him and she wanted them back with her. Mother added that she would only allow father access to the children if he completed his counseling. Mother claimed she did not have much contact with father; she saw him when he transported her to counseling and visits.

The owner of the sober living home told the social worker mother was doing very well there; she had been testing negative, had a positive attitude and was a model resident. The owner also stated that mother had made progress. Mother attended NA/AA meetings and church. The owner knew father was not allowed around the children and she would abide by that order. The owner said mother could stay in the home as long as she needed to.

According to case records, mother had completed parenting and child neglect in February 2011, and substance abuse in February 2012. Mother had 15 negative drug tests since February 2012, and one presumptive positive for failure to test. The social worker spoke with the facilitator of the Family Matters program, who stated that mother would complete the class in September 2012, she was doing really well there, and had made an effort this time around. Mother had started the class before, but failed to complete it. The facilitator thought mother was learning from the classes.

The social study reported on father's progress. He completed outpatient substance abuse counseling in May 2012, and had been discharged successfully from treatment. He was not complying with his mental health counseling or taking his prescribed psychotropic medication. Mother had acknowledged to the social worker that father's treating doctors had told her father posed a danger to himself or others when he did not take his medication. Father had appointments for mental health services in August 2012.

A July 23, 2012, random drug test of father was negative. Since father's reunification services were terminated in April 2012, the social worker did not know whether father was living a drug free lifestyle and the Department was not monitoring him.

In recommending denial of the petition, the Department stated it was concerned about mother's continued reliance on father as a "major support system" and believed mother would likely allow father access to the children after she left the sober living home. The Department also argued reinstating reunification services would not be in Cecilia's best interest because she was in a stable placement with the baby in the home of her maternal grandparents.

At the August 14, 2012, hearing, the juvenile court considered and denied the section 388 petition. The court explained it did not find that the circumstances had changed to the extent that they would permit reinstatement of reunification services or the provision of family maintenance services, or that it would be Cecilia's best interest to grant the petition. With respect to the permanent plan, the attorneys for mother and Cecilia asserted that the maternal grandparents were interested in guardianship, not adoption. The maternal grandfather testified he and his wife always intended to care for the children until mother could get them back, but if she could not, then they would adopt. The maternal grandfather knew mother was in a sober-living home and getting better; he wanted mother to have a chance to get the children back in the future and thought it was in Cecilia's best interest to have him be her guardian rather than her legal parent, and confirmed his wife wanted the same thing. Despite the maternal grandfather's testimony, the juvenile court found by clear and convincing evidence that Cecilia was likely to be adopted, terminated mother's and father's parental rights, and referred Cecilia to the county adoption agency for adoptive placement.

DISCUSSION

Any party may petition the juvenile court to modify or set aside a prior dependency order pursuant to section 388 on grounds of changed circumstance or new

evidence. (§ 388, subd. (a).) The party bringing the section 388 petition must also show the proposed change is in the best interests of the child. (*In re Stephanie M.* (1994) 7 Cal.4th 295, 317 (*Stephanie M.*)) Section 388 provides a means for the court to address a legitimate change of circumstances even at the permanency planning stage while protecting a child's need for prompt resolution of his or her custody status. (*In re Marilyn H.* (1993) 5 Cal.4th 295, 309 (*Marilyn H.*)) Whether the juvenile court should modify a previously made order rests within its discretion and its determination will not be disturbed absent a clear abuse of discretion. (*Stephanie M., supra*, at p. 318.)

Mother contends the juvenile court abused its discretion in denying her section 388 petition requesting reunification services and placement of Cecilia with her. Mother argues she established a change of circumstances by her successful participation in services, through which she developed the skills she needed to protect the children from father, and her commitment to prevent father from having unauthorized contact with the children. Relying on the factors set forth in *In re Kimberly F.* (1997) 56 Cal.App.4th 519 (*Kimberly F.*), mother asserts the evidence shows it was in Cecilia's best interest to modify the prior order denying reunification services in light of the bond she shared with Cecilia.

The juvenile court did not abuse its discretion in finding that mother had not presented evidence of changed circumstances sufficient to warrant a modification of its order terminating reunification services. At best, mother showed her circumstances were changing. (See *Marilyn H., supra*, 5 Cal.4th at p. 309 [burden on parent to show changed circumstances]; *In re Casey D.* (1999) 70 Cal.App.4th 38, 49 [merely changing circumstances].) Mother's sobriety was untested by the stresses of ordinary life outside the sober living home. More importantly, while mother told the social worker she would not allow father to have unauthorized contact with Cecilia, the evidence showed that mother previously had allowed father to have contact with the children despite knowing that he presented a risk to them when he was not taking his psychotropic medications,

that she continued to rely on father for financial support and transportation, and she intended to continue a relationship with him. While mother was participating in a class addressing the failure to protect children and reportedly was making progress in it, she had not yet completed the class and it was uncertain whether mother would, in fact, protect the children from father given her reliance on him for support. On this record, the juvenile court reasonably could reject mother's argument that circumstances had changed following its termination of reunification services.

Moreover, mother failed to show that providing her reunification services, or returning Cecilia to her with family maintenance services, would be in Cecilia's best interest. In *Kimberly F.*, the appellate court identified three principal factors relevant to the juvenile court's evaluation of best interests in the context of a section 388 petition: (1) the seriousness of the problem that necessitated dependency and the reason the problem continued; (2) the strength of relative bonds between the dependent child and the parent and caretakers; and (3) the degree to which the problem may be easily removed and the degree to which it actually has been. (*Kimberly F.*, *supra*, 56 Cal.App.4th at p. 532.)

Applying the *Kimberly F.* factors, mother contends that providing her reunification services would serve Cecilia's best interests. Specifically, mother contends that she resolved the problem that led to dependency, namely her problematic relationship with father, through her participation in services. She also asserts Cecilia shared a significant bond with both her and the maternal grandparents. Mother contends she formed a parent-child relationship with Cecilia, who had lived with her for the majority of Cecilia's life, and notes that Cecilia's continued placement in the maternal grandparents' home was uncertain in light of mother's ongoing reunification efforts with the baby.

We concur with the juvenile court's finding that mother failed to show it would be in Cecilia's best interest to continue reunification efforts. As the Department points out, there was more than mother's failure to protect the children from father that led to

dependency jurisdiction; there was also mother and father's substance abuse and the unsanitary condition of the home in which they were living. The seriousness of these problems is not in dispute.

Although mother was making commendable efforts to address the problems, the record does not support her suggestion that she had all but conquered them at the time of the section 366.26 hearing, or that she had ameliorated the problems to such a degree that ordering reunification services would be in Cecilia's best interest. As discussed above, mother's sobriety was untested outside the confines of the sober living home and she was still addressing the issues relating to her failure to protect the children from father. She had not yet completed her class, and while she stated she would not allow the children to have contact with father until it was court-ordered, she continued to rely on father to help her find the sober living home, to provide financial support, and to transport her to appointments. Despite acknowledging father needed to work on his mental health and was a danger to the children, she planned to continue her relationship with him, although she claimed she would do so only if he was mentally stable. Yet she continued to have contact with him despite knowing he was not receiving mental health treatment or taking his medication. It was uncertain how mother had resolved the issues related to her codependency with father in light of the fact she continued to rely on him for support.

As to the strength of the bonds Cecilia had with mother and the maternal grandparents, the record shows that Cecilia was in a stable placement with her maternal grandparents, who were committed to caring for her. Cecilia's bond with mother, however, was not strong. According to the adoption assessment, while Cecilia had a relationship with mother, she did not depend on her for emotional, physical or financial support, and termination of parental rights would not be emotionally detrimental to her. Even mother admitted that she was not as bonded with Cecilia as she was with the baby.

We conclude on this record that the juvenile court did not abuse its discretion in denying mother's section 388 petition. Mother asserts that in light of our opinion in

Cecilia's case, the permanent plan of adoption effectively has been negated and reunification with her may provide Cecilia with the best chance for long-term stability and permanency. Our opinion, however, was not before the juvenile court when it denied the section 388 petition. Mother's arguments are better addressed to the juvenile court, which we have already directed to vacate the orders terminating parental rights and conduct a new section 366.26 hearing to determine a permanent plan for Cecilia.

DISPOSITION

The juvenile court's order denying mother's petition pursuant to Welfare and Institutions Code section 388 is affirmed.