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

In re R.T., a Person Coming Under the Juvenile
Court Law.

TULARE COUNTY HEALTH AND HUMAN
SERVICES AGENCY,

Plaintiff and Respondent,

v.

R.G.,

Defendant and Appellant.

F068835

(Super. Ct. No. JJV043171D-94)

OPINION

THE COURT*

APPEAL from a judgment of the Superior Court of Tulare County. Juliet L.
Boccone, Judge.

Jesse F. Rodriguez, under appointment by the Court of Appeal, for Defendant and
Appellant.

Kathleen Bales-Lange, County Counsel, John A. Rozum and Amy-Marie Costa,
Deputy County Counsel, for Plaintiff and Respondent.

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

R.G. (mother) appeals from the juvenile court's orders denying her petition filed under Welfare and Institutions Code section 388¹ as to her four-year-old son R.T.², and terminating her parental rights to R.T. under section 366.26. Mother contends that the juvenile court erred by denying her section 388 petition because she proved that circumstances had changed such that it would be in R.T.'s best interests to order reunification services. Mother asserts that the juvenile court's error in denying her section 388 petition requires reversal of its order terminating her parental rights to R.T. We disagree and affirm the judgment.

PROCEDURAL AND FACTUAL BACKGROUND

Mother's Previous Dependency Proceedings and Social History

In 1994, before she turned 17, mother gave birth to a child, D.G. A dependency case involving D.G. was filed in August of 1994 and terminated in October of 1994 when mother "reunified" with D.G.

The following year, when mother was 18, she gave birth to a second child, S.V. Mother began using methamphetamine and marijuana when she was 19 years old.

In March of 2000, D.G. was detained after mother was arrested for being under the influence of controlled substances. At the time of her arrest, mother and D.G. were homeless. A section 300 petition was found true that mother had failed to provide D.G. with adequate shelter due to her substance abuse and/or mental health problems. D.G. was placed with her noncustodial father; S.V. was living with his father. Jurisdiction was dismissed.

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

² Mother's brief refers to the minor as R.G., but the court documents refer to him as having the initials R.T., which we use here.

According to mother, she was raped in 2000 and afterwards began hearing voices. In 2006, she tried to “get clean.” That same year, mother was diagnosed with “Major Depression Psychosis” and was prescribed psychotropic medication. Mother had stopped taking the medication as she did not like the way it made her feel. By 2008, she again started hearing voices and resumed her methamphetamine use.

Mother’s criminal history dates back to 1998, when she was arrested for petty theft. She was arrested for being under the influence in 2000, 2001, and 2003. The 2003 drug arrest resulted in an order for 5 years of Drug Court. In 2004, mother was again arrested and ordered back into Drug Court. Mother was repeatedly arrested on drug related charges and served time from November 2003 to January 2004, from April to May of 2004, from June to August of 2004, and from September 2005 to May 2006, interspersed with shorter stays in June, September, October, and December of 2004, June of 2008, and August and November of 2009.

First Dependency Proceeding Involving R.T.

In June of 2010, mother, now 33 and pregnant with her third child, smoked a bowl of methamphetamine because she had not felt the baby move for a month. Mother claimed that when she smoked methamphetamine earlier in her pregnancy, she had felt the baby move.

Early the next morning, mother gave birth to R.T. in the bathroom of her home. R.T. was born with the umbilical cord wrapped around his neck and he was blue from his head to his chest. Mother tried to give R.T. CPR, but he did not begin breathing until after the ambulance arrived and emergency personnel revived him.

Mother and R.T. were transported to the hospital where both tested positive for amphetamine and methamphetamine. R.T. had tremors, some arm disturbance, and watery stools. He was described as a “poor feeder.”

R.T. was removed from mother and a section 300 petition was filed by the Tulare County Health and Human Services Agency (the agency) alleging mother failed to

protect R.T. due to mother's controlled substance abuse and exposure of R.T. to methamphetamine in utero (§ 300, subd. (b)), and that mother had neglected R.T.'s half siblings D.G. and S.V., placing R.T. at risk of similar abuse and neglect (§ 300, subd. (j)).

At the detention hearing, R.T.'s removal from mother was upheld. A Court Appointed Special Advocate (CASA) was appointed for R.T.

At the July 2010 jurisdiction hearing, the trial court found the section 300 petition true. R.T.'s father was found to be "unknown" after mother's attempts to name him proved futile. Based on mother's substantial history of substance abuse and continued relapses, the juvenile court found it in R.T.'s best interests that he not be placed with mother in a perinatal drug treatment program. Instead, R.T. was ordered to remain out of mother's custody and mother was ordered to participate in a residential drug treatment program, including the aftercare program, random drug testing, and parenting classes. Mother was given supervised visits with R.T, but was ordered not to breastfeed him.

Mother began to engage in her services immediately after R.T.'s removal. In July 2010, she participated in an alcohol and drug assessment. Mother admitted a 14-year struggle with methamphetamine use and admitted using methamphetamine the day before R.T. was born. It was recommended that mother enter an intensive out-patient drug treatment program pending acceptance into a residential drug treatment program.

Mother began random drug testing in early July of 2010, testing negative, and continued to test negative on two subsequent tests that same months. She also completed training on drug exposed infants.

By the time of the January 2011 six-month review hearing, mother was in complete compliance with her case plan. She responded to all random drug tests and submitted a total of 23 negative and no positive tests between July and December 2010. Mother was appointed house manager at the residential treatment program, a position she maintained while participating in the program itself. She completed two of the five stages of parenting classes.

Mother participated in therapy to address her co-occurring mental health issues. She attended all of her weekly individual sessions and only had one excused absence at weekly group sessions. Mother's treatment was focused on assisting her with coping tools to manage her health symptoms and improve her social functioning.

Mother visited R.T. consistently and was appropriate during visits, engaging him with talking, singing, and working on some of his sensors. R.T. was receiving services to assist him with his moderate fine and gross motor delays. Mother was looking for employment and appropriate housing for herself and R.T.

The agency recommended mother be given an additional six months reunification services and the social worker requested an order allowing mother to transition to unsupervised and overnight visits. Mother submitted a January 2011 letter to the juvenile court from Central Valley Recovery Services stating mother was on her fifth step with her sponsor, was consistently compliant with all steps of her recovery program, saw her therapist weekly, continued to comply with her parenting classes, and had acquired a job through the Salvation Army.

The juvenile court ordered six additional months of reunification services. Worried that mother had not yet shown sobriety outside a residential treatment center, the juvenile court ordered visits with R.T. be supervised for at least an additional 30 days of clean drug testing before lifting supervision. The social worker was given discretion to allow mother overnight visits with R.T. after obtaining consent from R.T.'s counsel.

Mother continued to comply with her case plan services for the following six months. She consistently drug tested negative from July 2010 to May 2011. Mother, now in the aftercare segment of her substance abuse program, was on track to complete her certificate of completion in August of 2011. Mother was living with her parents. She successfully completed parenting classes in February of 2011.

Unsupervised visits between mother and R.T. began in May of 2011. R.T. continued to receive services for delays in gross motor and mobility skills, mildly

increased muscle tone, and overall muscle weakness. Mother attended all of his appointments.

At the 12-month review, the agency recommended R.T. be returned to mother with family maintenance. Mother was working, doing housecleaning, and she had the support of her parents.

A CASA report submitted for the 12-month review stated mother was consistent with her visits, but noted R.T.'s instructor's observations that mother did not appear to understand the seriousness of R.T.'s developmental issues.

At the June 2011 review hearing, the juvenile court ordered R.T. returned to mother with family maintenance services. The juvenile court reminded mother of the importance of following R.T.'s instructor's directives. A section 364 review hearing was set for November 2011.

Mother completed her substance abuse treatment program in August of 2011. By that time, mother was living with her parents, but was approved for Section 8 housing. The social worker was seeking financial assistance for mother's first month's rent.

At the section 364 review hearing in November of 2011, the juvenile court agreed with the agency and CASA recommendations and terminated juvenile court jurisdiction.

Subsequent Referrals on R.T.

Within four months of terminating juvenile court jurisdiction, the first of six referrals were received by the agency alleging mother's substance abuse.

The first referral, March 9, 2012, alleged mother admitted to the reporting party that she was using methamphetamine, she appeared fidgety, had fallen asleep during a visit with the reporting party and could not be awakened, exhibited odd behavior, and had strange adults going in and out of her home.

The second referral, March 13, 2012, alleged mother was using methamphetamine in front of R.T., left R.T. when she crossed the street to obtain her drugs, kept drugs in a

kitchen cabinet, was high most of the time, and had known drug users going in and out of her home.

The third referral, April 16, 2012, alleged mother's apartment had a broken front window, mother allowed R.T. out in the cold at all hours of the day and night, and on one occasion R.T. was wearing only a diaper, and the reporting party suspected mother was using drugs.

Each of these three referrals was deemed "unfounded" because mother was participating in drug treatment service and appeared to be meeting R.T.'s needs.

The fourth referral, May 31, 2012, alleged R.T. had grabbed mother's meth pipe and was holding it and that mother threw R.T.'s bottle out the still unfixed broken window. Mother was thought to be hearing voices and not taking her prescribed mental health medications.

A fifth referral, July 24, 2012, alleged neglect as mother had no electricity in her home and that mother was a methamphetamine user.

With both the fourth and fifth referrals, mother drug tested negative for the agency and the referrals were closed as "unfounded."

Mother was arrested in January of 2013 for being under the influence of a controlled substance. She was released a month later. The agency did not receive a referral for this incident.

The sixth referral, May 15, 2013, alleged mother was prostituting herself at a local motel, that she was schizophrenic and hearing voices, that she used methamphetamine and crack, and that she spent her welfare money on drugs. It also alleged that R.T. had a burn mark on his leg from a crack pipe and that he had had the same burn mark the previous week.

That same day, the social worker located mother. According to mother, she and R.T. had moved from the motel to her parents' home the day before. Before living at the motel, mother and R.T. had been living with her sister. Mother denied allegations of

methamphetamine use, insisting she had not used methamphetamine since October 2012 and offered to take a drug test, which proved positive. R.T. had a burn on his upper right arm (not leg, as alleged). Mother stated that she noticed the burn the day before, but did not know how he received the injury.

The May 15, 2013, referral was substantiated, leading to the second juvenile court dependency case involving R.T.

R.T.'s Second Juvenile Court Dependency Case

A. Detention Report and Hearing

R.T. was detained on May 15, 2013. At the time, R.T. was two years old; mother was 36 years old.

The agency filed a section 300 petition May 17, 2013, alleging that mother's substance abuse rendered mother unable to provide R.T. with regular care and placed him at risk of suffering serious physical harm or illness, caused mother to neglect and inadequately supervise R.T., contributed to mother's transient lifestyle, and exacerbated mother's untreated mental health issues (§ 300, subd. (b)). The petition also alleged mother's substance abuse history and neglect of her other children (§ 300, subd. (j)).

In anticipation of the detention hearing, the agency questioned mother about her May 15, 2013, positive drug test. Mother admitted using methamphetamine in the motel bathroom four days earlier while R.T. was asleep. Mother insisted that she and R.T. were alone in the motel room and that R.T. was always with her. Mother also insisted that her recent methamphetamine use was the first time since October of 2012. Although mother admitted that she used a pipe to smoke methamphetamine, she denied R.T. could have been burned by her methamphetamine pipe. Instead, she thought R.T. burned himself when he picked up a cigarette from an ashtray.

R.T. was taken to a doctor by his foster mother. The doctor confirmed the injury was a burn, but that it was healing on its own and needed no further treatment.

At the May 20, 2013, detention hearing, the juvenile court ordered continued detention of R.T. Visits with mother were to be supervised.

B. Jurisdiction/Disposition Report and Hearing

In the report prepared in anticipation of jurisdiction/disposition, mother now said she had been living with two friends at the motel, and that, while R.T. was sleeping, she used methamphetamine in the motel bathroom. She then left R.T. with her two friends for a half hour while she went to the store to get diapers, but claimed that was the only time R.T. was not in her presence. Mother did not know how R.T. sustained his injury and she denied that she caused it.

According to mother, she and R.T. lived at the motel because they had nowhere else to go and Section 8 housing did not provide enough rent or other necessities. While she tried to enter the Rescue Mission, she was prevented from doing so due to her substance abuse. Mother claimed she wasn't "doing anything wrong except doing drugs" and that she "only relapsed three (3) times in the last year, and that's pretty good." Mother attributed her drug usage to lack of family support, believing that R.T. would not have been removed from her care if family members contributed to her support.

The report recommended that no reunification services be offered to mother due to her extensive and chronic drug abuse and prior resistance to court ordered treatment (§ 361.5, subd. (b)(13)).³ The agency recommended a section 366.26 termination hearing be set within 120 days with the permanent plan of adoption for R.T.

Mother's parents wished to adopt R.T. They were seeking alternative housing because of an unfenced pool in their backyard. The adoption assessment, dated June 25,

³ Section 361.5, subdivision (b)(13) provides that no reunification services need be offered a parent who has a history of extensive substance abuse and has resisted prior court ordered treatment for the abuse during a three-year period immediately prior to the filing of the petition.

2013, determined that, given R.T.'s age and characteristics, he was adoptable by either mother's parents or by another adoptive family.

Mother, realizing that she would not be offered reunification services, enrolled in an outpatient substance abuse program. Although she was prescribed psychotropic medication, she stopped taking it because she did not like the way it made her feel.

At the July 8, 2013, contested jurisdiction hearing, the juvenile court found the section 300 petition subdivisions (b) and (j) true. Mother agreed to a disposition hearing on that same date, even though the recommendation was for no reunification services. The juvenile court adopted the findings and orders submitted by the agency, ordered no reunification services for mother pursuant to section 361.5, subdivision (b)(13) and set a section 366.26 permanency planning hearing for October 28, 2013. Mother received notice of the necessity to seek writ review, but no writ was filed.

C. Section 366.26 Report

The October 11, 2013, report prepared in anticipation of the October 28, 2013, section 366.26 hearing recommended termination of mother's parental rights and the permanent plan of adoption of R.T. by mother's parents. R.T. was to be placed with mother's parents on October 14, 2013.

Mother was consistent and appropriate at her twice weekly visits with R.T. R.T. was not affectionate with mother, but would tell her he loved her. R.T. was very happy to see mother's parents and responded positively to them.

D. Section 388 Petition and Hearing

On Friday, October 25, 2013, before the scheduled Monday, October 28, 2013, section 366.26 hearing, mother filed a section 388 petition seeking reunification services. In a declaration, mother claimed her circumstances had changed since the July 8, 2013, order denying her reunification services because she had completed the first phase of the outpatient treatment program, completed three of four parenting components, was drug testing clean, and was attending a rape support group to help with her depression.

Mother stated she was not taking her psychotropic medications for depression because doing so made her feel high and triggered her methamphetamine addiction. Mother attached certificates for the completion of three parenting components dated August 20, September 17, and October 15, 2013. Mother claimed that ordering her reunification services was in R.T.'s best interests because she and R.T. deserved "a chance to be together."

The contested hearing on the section 388 petition was held December 9, 2013. Since the petition was filed in October of 2013, mother, who was now eight months pregnant, had completed the fourth module of her parenting classes. Although mother felt the rape support group she attended had helped her with her depression, she stopped attending because one of the participants reminded her of someone involved in her rape. Mother stopped taking her psychotropic medications about a year earlier because, according to mother, they triggered her methamphetamine addiction. Other medications the doctor had prescribed did the same.

Mother claimed that the last time she used drugs was six months earlier on Sunday, May 12, 2013. Mother now had a job cleaning houses and assisting her mother-in-law with babysitting two children, ages two and five.

The agency opposed reunification services for mother due to her chronic substance abuse history and mental health issues. The agency opined that mother's claim of being through the first phase of outpatient treatment, compared to the many years of substance abuse, was not a sufficient change in circumstances. The agency noted that, at the time of the May 15, 2013, detention hearing, mother had already received 17 months of court-ordered services and yet mother was homeless, unemployed, and using drugs, and R.T. had an unexplained burn on his arm. The agency opined that R.T.'s life, while in mother's care, was unstable, whereas his care with mother's parents was in a stable, loving and drug free environment. The agency attached an adoption assessment again

finding R.T. adoptable and that mother's parents were willing to adopt R.T. and to raise him as their own child.

The juvenile court acknowledged mother's recent efforts at drug treatment, finding that her latest six-month period of sobriety was "a long time in some respects and a very short time in other respects." The juvenile court also considered mother's history of relapsing, finding that R.T. had suffered in the process. The juvenile court found that R.T.'s best interests were served by being in a safe and stable home, which he was receiving with mother's parents. The juvenile court then denied mother's petition, finding no change of circumstances.

E. Section 366.26 Hearing

Following the denial of mother's section 388 petition, the juvenile court terminated mother's parental rights, finding the parent/child relationship exception to adoption did not apply, and a section 366.3 review hearing was set for May 19, 2014.

DISCUSSION

Mother contends that the juvenile court abused its discretion when it denied her section 388 request for reunification services. In her view, the evidence established she made significant changes in her sobriety and that it was in the child's best interests to grant reunification services to allow her a further opportunity to develop and maintain a relationship with R.T. as his biological mother.

Section 388, subdivision (a)(1) provides that "[a]ny parent or other person" may petition the juvenile court to "change, modify, or set aside" any previously made order on grounds of "change of circumstance or new evidence" The parent, however, must also show that the proposed change would promote the best interests of the child. (§ 388, subd. (d); *In re Stephanie M.* (1994) 7 Cal.4th 295, 317 (*Stephanie M.*)) In considering a section 388 petition, the juvenile court may consider the entire factual and procedural history. (*In re Jamika W.* (1997) 54 Cal.App.4th 1446, 1450-1451.)

We review a juvenile court's decision on whether to grant a section 388 petition for abuse of discretion. The judgment below will not be disturbed except on a showing that the court made the determination in an arbitrary, capricious, or patently absurd manner. ““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.”” (*Stephanie M., supra*, 7 Cal.4th at p. 319; see *In re Jasmon O.* (1994) 8 Cal.4th 398, 415-416.) Having reviewed the record as summarized above, we conclude the juvenile court properly exercised its discretion by denying mother's section 388 request.

No Changed Circumstances to Justify Modifying the Prior Order

The procedure under section 388 accommodates the possibility that circumstances may change so as to justify a change in a prior order. (*In re Marilyn H.* (1993) 5 Cal.4th 295, 309 (*Marilyn H.*)) As discussed above, mother sought to set aside the juvenile court's order denying her reunification services. Thus, as a matter of logic, a change of circumstance or new evidence which would justify setting aside the denial of services would have to address the basis for the court's original order. In denying those services, the juvenile court found, pursuant to section 361.5, subdivision (b)(13), that mother had a history of extensive abuse of drugs and resistance to prior court-ordered treatment in the three years immediately prior to the filing of the petition.

By the time of the hearing on her section 388 request, mother claimed she had completed the first phase of an outpatient treatment program, was drug testing clean, and was participating in parenting classes and showing signs of progress. But the evidence before the juvenile court did not compel a finding of either significant progress or a substantial probability that R.T. might be returned to her custody with additional reunification services. Indeed, there was evidence from which the juvenile court could conclude the opposite.

Mother had a 17-year history of substance abuse, almost half her life. She had a pattern of becoming clean, and being capable of maintaining sobriety for a period of time,

then returning to her methamphetamine use. She had been arrested multiple times for substance offenses, repeatedly incarcerated, had three children removed from her care, was involved in four separate juvenile court dependency matters as a parent, and had been involved in numerous drug treatment programs by either court order or self-referral, dating back to 2005. More recently, in 2011, she completed a residential drug treatment program with aftercare. But in 2012, within four months of the juvenile court terminating jurisdiction of R.T., numerous referrals were received alleging mother's substance abuse. Several of those referrals were closed as unsubstantiated because mother was again involved in substance abuse treatment. Mother was arrested in January of 2013 for being under the influence and incarcerated for over a month. In December of 2013, at the time of the section 388 hearing, mother had completed phase one of an outpatient program, and had been, according to her, sober for slightly over six months.

Even a showing of great effort to make improvements will not necessarily be persuasive when a parent has an extensive history of drug use. (*In re C.J.W.* (2007) 157 Cal.App.4th 1075, 1081 [affirming the denial of a section 388 petition when the parents' efforts at drug rehabilitation were only three months old at the time of the section 366.26 hearing]; *In re Mary G.* (2007) 151 Cal.App.4th 184, 205-206 [mother's very recent treatment for drug abuse and bipolar disorder was not even a prima facie case of changing circumstances]; *In re Casey D.* (1999) 70 Cal.App.4th 38, 47-48 [affirming denial of a section 388 petition when mother with an extensive history of drug use had been drug free for only a few months and had not completed her treatment program].)

We note that mother also had a history of not properly treating her mental health issues. Although mother received mental health treatment and psychotropic medications in 2006, she stopped taking the medications because she did not like the way it made her feel. At the December 2013 section 388 hearing, mother stated she quit taking her psychotropic medications for depression a year earlier because she did not think it was helping with her addiction. And while she admitted that attending a rape support group

helped her with her depression, she stopped attending because one of the participants reminded her of someone involved in her rape.⁴

Thus, mother's circumstances were not changed, but, at best, merely changing, as the juvenile court found, and did not justify a change in its prior order. (*Marilyn H., supra*, 5 Cal.4th at p. 309; *In re Casey D., supra*, 70 Cal.App.4th at p. 49.)

No Best Interests Showing

Mother has also failed to establish that granting reunification services would be in R.T.'s best interests. To understand the element of best interests in the context of a section 388 motion brought, as in this case, on the eve of a section 366.26 hearing, we consider the Supreme Court's language in *Stephanie M., supra*, 7 Cal.4th 295.

“[A]t this point ‘the focus shifts to the needs of the child for permanency and stability’ [citation] [Citation.] A court hearing a motion for change of placement at this stage of the proceedings must recognize this shift of focus in determining the ultimate question before it, that is, the best interests of the child.” (*Stephanie M., supra*, 7 Cal.4th at p. 317.)

Mother's petition argued that giving her reunification services was in R.T.'s best interests because she and R.T. deserved “a chance to be together.” On appeal, mother ignores the Supreme Court's language in *Stephanie M.* and instead urges this court to apply factors legislated by the appellate court in *In re Kimberly F.* (1997) 56 Cal.App.4th 519, 530-532 (*Kimberly F.*), to evaluate the children's best interest. Those factors the appellate court identified were: the seriousness of the problem leading to dependency and the reason that problem was not overcome; the strength of relative bonds between the dependent children to both parents and caretakers; and the degree to which the problem

⁴ Mother claims on appeal that the reunification services she received in 2010-2011 did not include mental health services. To the extent mother is claiming those services were not reasonable, she has waived the issue by not objecting to adequacy of services before the juvenile court at the appropriate time. (*In re Christina L.* (1992) 3 Cal.App.4th 404, 416.)

may be easily removed or ameliorated, and the degree to which it actually has been.

(Ibid.)

We decline to apply the *Kimberly F.* factors if for no other reason than they do not take into account the Supreme Court's analysis in *Stephanie M.* of best interests, especially after reunification efforts have been terminated or, as in this case, denied outright. From that point forward, the focus shifts from family reunification to the child's needs for permanency and stability and a court must recognize this shift of focus in determining the best interests of the child. (*Stephanie M., supra*, 7 Cal.4th at p. 317.) At most, the *Kimberly F.* court reviewed the facts in *Stephanie M.* and compared them with the underlying facts in their case. (*Kimberly F., supra*, 56 Cal.App.4th at pp. 533-534.) We choose instead to follow the direction of our state's Supreme Court. Consequently, when a parent petitions for reunification services after denial of reunification services, the parent must show how such a change will advance the child's need for permanency and stability in order for a court to find modification would be in the child's best interests.

Simply put, mother's evidence did not establish that R.T.'s need for permanency and stability would be advanced by an order for services. Under *Stephanie M., supra*, 7 Cal.4th at page 317, we conclude the juvenile court did not err.

DISPOSITION

The juvenile court's orders denying mother's section 388 petition and terminating her parental rights as to R.T. are affirmed.