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

In re N.R. et al., Persons Coming Under the  
Juvenile Court Law.

FRESNO COUNTY DEPARTMENT OF  
SOCIAL SERVICES,

Plaintiff and Respondent,

v.

SONIA C.,

Defendant and Appellant.

F073772

(Super. Ct. Nos. 11CEJ300064-1,  
11CEJ300064-2)

**OPINION**

**THE COURT\***

APPEAL from an order of the Superior Court of Fresno County. Brian M. Arax,  
Judge.

Roni Keller, under appointment by the Court of Appeal, for Defendant and  
Appellant.

Daniel C. Cederborg, County Counsel, and Brent C. Woodward, Deputy County  
Counsel, for Plaintiff and Respondent.

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\* Before Gomes, Acting P.J., Detjen, J. and Franson, J.

Sonia C. (mother) appeals from the juvenile court's summary denial of her Welfare and Institutions Code section 388<sup>1</sup> petition in which she requested that her daughter N.R. and son Damian R., now 16 and 10 years old respectively, be removed from their guardians and returned to her custody. The court denied mother's petition after finding she could not legally compel termination of a legal guardianship. Mother contends the court erred as a matter of law, citing *In re Priscilla D.* (2015) 234 Cal.App.4th 1207 (*Priscilla D.*). We reverse.

### **PROCEDURAL AND FACTUAL SUMMARY**

In March 2011, N.R., Damian, and their younger sister Isabella were removed from mother's custody because mother was mentally unstable, exposed the children to domestic violence, and failed to protect N.R. and Damian from Isabella's father. The juvenile court provided mother and the fathers of her children a year of reunification services but terminated them for noncompliance. During that time, mother gave birth to a daughter, Rebecca, who was removed and adjudged a dependent of the court. In April 2013, the court ordered N.R. and Damian into a permanent plan of legal guardianship with their paternal aunt and uncle.<sup>2</sup>

N.R. and Damian remained in the care of their guardians. In October 2013, the juvenile court established a kinship guardianship for Damien under the Kinship Guardianship Assistance Payment (Kin-GAP) program<sup>3</sup> and terminated its dependency

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<sup>1</sup> Statutory references are to the Welfare and Institutions Code.

<sup>2</sup> The juvenile court ordered Isabella into a legal guardianship with her maternal aunt and terminated dependency in February 2013.

<sup>3</sup> The Kin-GAP program is a state program that provides ongoing funding for children who exit the dependency system to live with relative legal guardians. In order to receive funding under the program the county welfare agency must enter into a written binding agreement with the relative guardian and dependency jurisdiction must be terminated. (§§ 11386, 11387.)

jurisdiction as to Damian. In September 2014, the court established a kinship guardianship for N.R. and terminated its dependency jurisdiction as to her.

Meanwhile, mother established a home and was granted sole legal and physical custody of Isabella and Rebecca. She was employed and attending college to study medical billing. In addition, she completed domestic violence counseling, parenting classes, mental health therapy, and substance abuse treatment, and consistently tested negative for drugs. In July 2015, she began overnight weekend visits with N.R. and Damian every other weekend from Friday to Sunday evening.

In May 2016, mother filed a section 388 petition asking the juvenile court to return N.R. and Damian to her custody with family maintenance services or return them to her and dismiss dependency jurisdiction. She alleged that N.R. and Damian wanted to reunite with her and their siblings. She said she had been sober since May 18, 2012, and had divorced Isabella's father. She believed she was financially, emotionally, and mentally ready to be a fulltime parent to all four of her children.

The juvenile court summarily denied mother's section 388 petition, stating: "The children are in a permanent plan, one of guardianship. This request seeks return of the children to mother. That is not legally possible unless the guardian seeks to terminate the guardianship. Mother has no standing, or right, to compel a termination of the guardianship."

## **DISCUSSION**

A parent may petition the juvenile court under section 388 to change, modify or set aside any prior order "upon grounds of change of circumstance or new evidence." (§ 388, subd. (a)(1).)<sup>4</sup> To prevail, the petitioner must demonstrate by a preponderance of

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<sup>4</sup> Section 388, subdivision (a)(1) provides in relevant part: "Any parent ... 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 ...."

the evidence that new or changed circumstances warrant a change in the prior order and that changing the order will promote the child's best interests. (*In re S.J.* (2008) 167 Cal.App.4th 953, 959.) If it appears that the child's best interests may be promoted by the proposed change of order, the juvenile court must conduct a hearing. (§ 388, subd. (d).) The juvenile court may, however, summarily deny a section 388 petition if the petitioner fails to make a prima facie showing that a change of circumstances or new evidence require a changed order and that the requested change would promote the child's best interests. (*In re Justice P.* (2004) 123 Cal.App.4th 181, 188-189.)

*Priscilla D.*, *supra*, 234 Cal.App.4th 1207 involved the denial of a mother's section 388 petition, asking the juvenile court to terminate a kinship guardianship and return the children to her custody. The juvenile court reinstated its dependency jurisdiction and conducted an evidentiary hearing. However, the court decided that a parent cannot petition under section 388 to terminate a kinship guardianship and denied the petition on legal grounds. We reversed and directed the court to conduct a hearing on the petition. We held that a parent can move to terminate a legal guardianship (including a kinship guardianship) by filing a section 388 petition. (*Id.* at pp. 1210-1218.) We stated:

“When the juvenile court establishes a kinship guardianship ... , it dismisses its jurisdiction under section 366.3 in recognition of the fact that the kinship guardianship is a permanent plan for the child and there is no need for ongoing scheduled court and social services supervision of the placement. (§§ 11361, 11386, subd. (e).) However, the juvenile court still maintains jurisdiction over the child as a ward of the legal guardianship and can vacate its order dismissing its dependency jurisdiction. (§§ 366.3, subds. (a) & (b), 366.4.) [¶] ... [¶]

“Further, ‘[a] parent has the continuing right to petition the [juvenile] court for a modification of any of its orders based upon changed circumstances or new evidence pursuant to section 388.’ [Citation.] This includes the right to petition the court to terminate guardianship.” (*Priscilla D.*, *supra*, 234 Cal.App.4th at p. 1216.)

Thus, the juvenile court's summary denial of mother's section 388 petition on the ground that she lacked the legal right to terminate the guardianship was error under *Priscilla D.* and requires reversal. However, rather than direct the juvenile court to conduct a hearing on remand as we did in *Priscilla D.*, we direct the juvenile court to first decide whether a hearing is required.

### **DISPOSITION**

The order denying mother's section 388 petition is reversed. The juvenile court is directed to determine whether mother's section 388 petition alleges sufficient facts to warrant an evidentiary hearing under section 388, subdivision (d). If the court determines that the section 388 petition warrants an evidentiary hearing, the court is directed to reinstate its dependency jurisdiction and conduct a hearing to consider the merits of mother's petition under section 388 and any evidence developed subsequent to the filing of her petition. If, however, the juvenile court determines that mother's section 388 petition does not warrant an evidentiary hearing, the court may summarily deny her petition on that basis.