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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

In re A.T. et al., Persons Coming Under the  
Juvenile Court Law.

ORANGE COUNTY SOCIAL SERVICES  
AGENCY,

Plaintiff and Respondent,

v.

CORINA R.,

Defendant and Appellant.

G049827

(Super. Ct. Nos. DP022654,  
DP022655 & DP022656)

O P I N I O N

Appeal from an order of the Superior Court of Orange County, Kimberly Menninger, Judge. Affirmed.

Konrad S. Lee, under appointment by the Court of Appeal, for Defendant and Appellant.

Nicholas S. Chrisos, County Counsel, Karen L. Christensen and Jeannie Su, Deputy County Counsel, for Plaintiff and Respondent.

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Corina R. (mother) appeals from the order terminating her parental rights to her children A.T., D.T., and M.T. She does not attack the termination order directly, but instead argues the court erred when it summarily denied her petition under Welfare and Institutions Code section 388 (all further statutory references are to this code) seeking either reinstatement of her reunification services or a return of the children to her custody. Mother argues she demonstrated a significant change in circumstances, in that she was finally making serious efforts to address her drug problems and had obtained suitable housing for her children.

We conclude mother's appeal is untimely as a vehicle for challenging the separately appealable order denying her section 388 petition. While *In re Madison W.* (2006) 141 Cal.App.4th 1447 concludes the policy promoting liberal construction of notices of appeal does allow us to construe one challenging an order terminating parental rights as also encompassing an earlier order denying a section 300 petition, the case also makes clear that our power extends only to such orders issued within 60 days of the date appellant filed the notice of appeal. In this case, the order denying mother's section 388 petition was issued more than 60 days before she filed her notice of appeal. Consequently, as applied to that earlier order, the notice is untimely.

In any event, we would find mother's argument unpersuasive on the merits. As the trial court explained, mother's proffered evidence demonstrated, at most, that she had commenced an eleventh-hour effort to start changing her life; but it cannot be construed as demonstrating she had yet achieved any significant change. Consequently, we could not conclude the juvenile court erred by denying her section 388 petition.

Finally, because mother makes no arguments challenging the order terminating her parental rights, we affirm that order.

## FACTS

M. was born in June 2012, and tested positive for methamphetamine at his birth. As a result of that positive test, M. was placed under a hospital hold and his older sisters, A., age 2, and D., age 1, were taken into protective custody. All three children were placed in the care of their paternal grandmother.

On June 12, the Orange County Social Services Agency (SSA) filed a dependency petition pertaining to all three children, alleging a single count of failure to protect. (§ 300, subd. (b).) The petition alleged both M. and mother had tested positive for methamphetamine at the time of M.'s birth, that mother used methamphetamine during her pregnancy, and that she failed to obtain prenatal care. Moreover, mother had not successfully completed any substance abuse program, and thus her substance abuse problem was unresolved.

The petition also alleged that mother and the children's father, Charles T. (father), had a history of domestic violence. And on the day of M.'s birth, father was taken into custody on charges of robbery, inflicting injury on an elder, possession of a controlled substance and burglary, and thus the petition alleged he was unavailable to provide the children with care and support. The petition also alleged father's criminal history placed the children at risk of harm and neglect, and that he too had an unresolved history of substance abuse.

The jurisdiction and disposition hearing was held on July 18, 2012. Father submitted on SSA's report, and mother pleaded no contest to the petition. The court found the allegations of the petition to be true, vested custody of the children with SSA, and ordered reunification services. Mother's reunification plan included substance abuse treatment and testing, parenting classes, and participation in Narcotics Anonymous. The court allowed mother to have monitored visitation with the children, who remained placed with their parental grandparents.

Mother was provided with reunification services for a period of 12 months. However, during that time, she made little effort to comply with the requirements of her plan, or even visit with her children. Instead, by her own admission, mother focused on being with father and abusing drugs with him, between the time he was released from custody following his arrest in June 2012, and when he was ultimately incarcerated in May 2013.

During that 12-month reunification period, mother entered drug dependency court but was dismissed for lack of compliance. She had numerous positive drug tests, including for amphetamines, opiates and alcohol and she was discharged from multiple drug treatment programs.

By the time father was incarcerated, mother was seven months pregnant with her fourth child. She hid her pregnancy from other family members and had been using methamphetamine throughout the pregnancy. However, once father was incarcerated, mother entered an emergency shelter for pregnant women and began receiving prenatal care. She was able to remain drug-free for the remainder of that pregnancy, and gave birth to J. in July 2013. Both tested negative for methamphetamine at his birth. J. was the subject of a separate dependency petition and was placed in the care of his maternal grandparents.

Following J.'s birth, mother began to participate in more services at the emergency shelter. However, in August 2013, mother again tested positive for opiates.

On August 14, 2013, shortly after mother had her most recent positive drug test, the court terminated her reunification services and scheduled the case for a section 366.26 permanency planning hearing.

Mother again tested positive for opiates three times in September and was terminated from her perinatal drug program after testing positive for hydrocodone. She began a new outpatient drug program on October 14, 2013, but then tested positive for cocaine on October 23. Mother disputed that positive test result, however, explaining

that cocaine had never been her drug of choice. Mother failed to participate in her outpatient program from October 25 to November 7, but resumed thereafter.

During this period, following J.'s birth, mother continued regular visitation with A., D. and M., 10 hours per week. The paternal grandmother reported that the visits went well, and both A. and D. were very happy to see mother and were sad when she left. Mother was able to meet the children's routine needs during her visits.

SSA reported that the paternal grandparents had a warm and loving relationship with the children and were interested in adopting them. However, all three children were assessed as adoptable, even if the paternal grandparents did not choose to do so, given their young ages, pleasant dispositions, adorable features and good health.

The section 366.26 hearing was scheduled for December 19, 2013. On that date, mother filed a petition pursuant to section 388 seeking a change in the court's prior order terminating reunification services and a new order which either returned the children to her custody or reinstated the reunification services. Mother's petition argued that her enrollment in a substance abuse program and her ongoing participation in a personal empowerment program and counseling, combined with her stable living situation at the home of the children's great grandmother, qualified as material changed circumstances that justified giving her another opportunity to reunify with her children. SSA opposed mother's petition, as did the attorney representing the children.

The court denied mother's petition, concluding she had not shown any significant change in circumstances: "At the very best . . . you could say *she has for the very first time tried to change and might be trying*. I would leave it at that."

On January 31, 2014, the court terminated mother's parental rights. Mother filed her notice of appeal, referencing only the order terminating parental rights, on March 14, 2014. Father did not appeal.

## DISCUSSION

### *1. The Appeal From the Denial of the Section 388 Petition was Untimely.*

An order denying a petition filed pursuant to section 388 is a directly appealable order. (*In re K.C.* (2011) 52 Cal.4th 231, 235-236 [“[o]rders denying petitions under section 388 to modify prior orders of the juvenile court . . . are appealable under section 395”].) However, mother filed no direct appeal from the December 19, 2013, order denying her section 388 petition. Instead, she waited until after the court terminated her parental rights on January 31, 2014, and filed a notice of appeal on March 14, 2014, challenging that order.

Mother relies on *In re Madison W.*, *supra*, 141 Cal.App.4th 1447 (*Madison W.*) for the proposition that a notice of appeal from an order terminating parental rights may be liberally construed as also encompassing the court’s earlier order denying the parent’s petition for modification of a prior order, even if that order was not issued on the same date as the order terminating parental rights. Based on *Madison W.*, mother argues her notice of appeal in this case should also be construed as encompassing her challenge to the earlier order denying her section 388 petition.

But as SSA points out, even if mother’s notice of appeal can be construed as encompassing the earlier order denying her section 388 petition, it would nonetheless be *untimely*, because the notice was filed more than 60 days after the denial order was entered. (Cal. Rules of Court, rule 8.104 (a)(1).) Specifically, the court denied mother’s section 388 petition on December 19, 2013, but she did not file her notice of appeal until March 14, 2014 – nearly *90 days* later. That was too late to perfect an appeal from the order.

By contrast, in *Madison W.*, the order denying the section 388 petition had been issued only three days before the court ordered the termination of parental rights – and within 60 days of the date on which the mother in that case filed her notice of appeal.

Thus, when the court decided to construe her notice of appeal as encompassing the order denying her section 388 petition, it was also able to expressly determine the notice would qualify *as a timely appeal from that earlier order*. That timeliness determination was key to the court's ability to address the merits of the order denying the mother's section 388. As the court explained, "we will henceforth liberally construe a parent's notice of appeal from an order terminating parental rights to encompass the denial of the parent's section 388 petition, *provided the trial court issued its denial during the 60-day period prior to filing the parent's notice of appeal*. (*Madison W.*, *supra*, at p. 1451, italics added.)

That did not occur here. In this case, the trial court's denial of mother's section 388 petition was outside the 60-day appeal period. Consequently, our ability to construe mother's notice of appeal as *encompassing* the earlier order denying her section 388 petition is not sufficient to preserve her right to challenge that order on appeal.

## 2. *Mother's Appeal Lacks Merit.*

But even if we could entertain mother's challenge to the denial of her section 388 petition on the merits, we would affirm the court's order. Section 388 provides that any party can petition the court to modify or revoke a prior order in a dependency case based on a showing of a material change in circumstances or new evidence, and if the court determines the party has made a prima facie showing of the changed circumstance or new evidence, and the proposed modification or revocation appears to be in the child's best interests, it shall order a hearing on the petition. (§ 388, subs. (a)(1), (d); *In re Mickel O.* (2011) 197 Cal.App.4th 586, 615 ["[I]t 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"].) "A 'prima facie' showing refers to those facts which will sustain a favorable decision if the evidence submitted in support of the allegations by the petitioner is credited." (*In re Edward H.* (1996) 43 Cal.App.4th 584, 593.)

Mother's contention is that she made such a prima facie showing here, and thus the court erred by refusing to schedule a hearing on her section 388 petition. We disagree. As the trial court concluded, the evidence offered by mother fell short of demonstrating that her chronic drug dependency – the primary problem underlying this dependency – had been resolved. A necessary change in circumstance means something more than that a parent has finally decided to *begin* tackling the problems underlying the dependency. (See *In re Baby Boy L.* (1994) 24 Cal.App.4th 596, 610 [noting that “at the eleventh hour and the fifty-ninth minute, [mother] offered a bare scintilla of proof that she was *beginning* to rehabilitate”].) As explained in *In re Casey D.* (1999) 70 Cal.App.4th 38, 47, “[a] petition which alleges merely changing circumstances and would mean delaying the selection of a permanent home for a child to see if a parent, who has repeatedly failed to reunify with the child, might be able to reunify at some future point, does not promote stability for the child or the child’s best interests.” (See *In re Mickel O., supra*, 197 Cal.App.4th at p. 615 [“the petitioner must show *changed*, not changing, circumstances”].)

Here, when mother presented her section 388 petition, she had yet to even complete a single drug program. And while she was then enrolled in such a program, she had previously dropped out of several others. It would be difficult, to say the least, to conclude that mother’s drug problem was convincingly resolved even before she had successfully completed a drug treatment program. Under these circumstances we could not conclude the trial court erred in finding mother’s petition failed to demonstrate she had yet achieved a material change in circumstances.

Moreover, even if we assumed that mother’s progress in addressing her drug problem would qualify as a sufficient change in circumstance, we would still conclude the section 388 petition was deficient for failing to demonstrate how it would be in the children’s best interests to re-commence a reunification process with her. In considering the children’s interests in this context, we would be required to give

substantial weight to their need for a prompt resolution of their custody status and a stable environment. “When custody continues over a significant period, the child’s need for continuity and stability assumes an increasingly important role. That need will often dictate the conclusion that maintenance of the current arrangement would be in the best interests of that child.” (*In re Stephanie M.* (1994) 7 Cal.4th 295, 317.)

In her written section 388 petition, mother simply claimed it would be best for her children to see that “through hard work and dedication a family can heal and be whole again.” But that conclusory assertion was insufficient to demonstrate how these children would actually be better off if they were kept in limbo for some significant additional time while mother finally chose to get serious about resolving the drug problem she had ignored for so long, or were even removed from the loving and stable home they had found with their paternal grandparents. Because this case had proceeded to the point of a section 366.26 hearing, the court certainly did not err by concluding the children’s need for permanency and stability was the paramount concern. (*In re Marilyn H.* (1993) 5 Cal.4th 295, 309.)

### *3. The Order Terminating Parental Rights is Affirmed.*

In her brief, mother makes no argument directly challenging the order terminating her parental rights. In fact, as SSA points out, mother dropped her objection to the termination of her parental rights during the course of the section 366.26 hearing. Mother’s attorney explained that “after speaking with the current caretaker,” mother realized “it would be in her children’s best interest to . . . be in support of [SSA’s] recommendation.”

We consequently affirm that order.

DISPOSITION

The order is affirmed.

RYLAARSDAM, ACTING P. J.

WE CONCUR:

BEDSWORTH, J.

MOORE, J.