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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

In re K.P., a Person Coming Under the  
Juvenile Court Law.

ORANGE COUNTY SOCIAL SERVICES  
AGENCY,

Plaintiff and Respondent,

v.

K.K. et al.,

Defendants and Appellants.

G050419

(Super. Ct. No. DP024222)

O P I N I O N

Appeals from an order of the Superior Court of Orange County, Caryl Lee,  
Judge. Affirmed.

Jacob I. Olson, under appointment by the Court of Appeal, for Defendant  
and Appellant K.K.

Michelle L. Jarvis, under appointment by the Court of Appeal, for  
Defendant and Appellant A.P.

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

No appearance for Minor.

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## INTRODUCTION

K.K. (Mother) and A.P. (Father) appeal following an order terminating their parental rights to their daughter, now two-year-old K.P. Father contends the juvenile court abused its discretion by denying his Welfare and Institutions Code section 388 petition in which he sought an order providing him reunification services and vacating the scheduled permanency hearing. (All further statutory references are to the Welfare and Institutions Code.) Mother filed an opening brief which stated she “adopts by reference Father’s opening brief and requests reversal of the order terminating her parental rights on the grounds raised by Father” and further stated, “should the court find reversible error on a substantive basis with respect to Father, then the termination order as to Mother should also be reversed.” (Boldface & some capitalization omitted.) She did not raise any additional appellate issues or present any substantive legal argument in support of Father’s argument.

We affirm. As discussed in detail *post*, Father failed to make a prima facie showing that changed circumstances or new evidence supported an order providing him with reunification services and vacating the permanency hearing; he also failed to show that either request would be in K.P.’s best interests.

## BACKGROUND

### I.

#### THE JUVENILE DEPENDENCY PETITION

In September 2013, the Orange County Social Services Agency filed a juvenile dependency petition which, as amended in November 2013 (the amended

petition), alleged, inter alia, that then 16-month-old K.P. came within the jurisdiction of the juvenile court under section 300, subdivisions (b) (failure to protect) and (j) (abuse of sibling).<sup>1</sup>

The amended petition alleged that on September 13, 2013, Mother and Father were arrested. Mother was found in possession of a methamphetamine pipe in her vagina and methamphetamine in her anus. Father was charged with possession of a narcotic controlled substance, presenting false identification to a peace officer, receiving a stolen vehicle, and false impersonation. Mother was charged with grand theft, possession of a controlled substance, receipt of stolen property, and possession of unlawful paraphernalia. Both were released on bond. On September 17, Father was cited for petty theft and released from custody. On September 18, a methamphetamine pipe was found “in an area accessible to a child” inside the garage where Father, Mother, and K.P. resided.

The amended petition further alleged both Father and Mother had criminal histories involving drug- and property-related offenses. Mother had an unresolved substance abuse problem that included the use of marijuana and methamphetamine. She previously completed a drug treatment program and then resumed her drug use. Mother had also signed an “SSA [(Orange County Social Services Agency)] safety plan to attend weekly 12-step meetings to maintain her sobriety,” but she did not comply with the safety plan. Mother stated she had last used methamphetamine on September 13, 2013 and marijuana on September 18, 2013.

The amended petition alleged Father too had an unresolved substance abuse problem that included the use of marijuana and methamphetamine. He “self-report[ed]”

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<sup>1</sup> The juvenile dependency petition was also filed on behalf of two of K.P.’s maternal half siblings, Au.B. and Ar.B, who are not parties to these appeals. We therefore refer to K.P.’s half siblings only to the extent such references provide relevant background for our consideration of the issues on appeal.

that he had last used methamphetamine on September 17, 2013. He admitted he had been under the influence of drugs while the children were in his care.

The amended petition also contained allegations detailing the abuse K.P.'s maternal half siblings, Au.B, Ar.B., and Kr.K, had suffered at the hands of Mother. Those allegations included that Kr.K. (along with Mother) tested positive for the presence of methamphetamine at the time of his birth in 2008; Mother failed to reunify with Kr.K. and parental rights as to Kr.K. were terminated shortly thereafter. As Father's appeal is limited to the argument that the court should have granted a hearing on his section 388 petition, the details of the allegations pertaining to K.P.'s maternal half siblings are irrelevant.

## II.

### THE JURISDICTION AND DISPOSITION HEARINGS; THE JUVENILE COURT DOES NOT PROVIDE REUNIFICATION SERVICES AND SETS A PERMANENCY HEARING.

At the jurisdiction hearing, Mother pleaded no contest and Father submitted to the allegations of the amended petition. The juvenile court found the allegations of the amended petition true by a preponderance of the evidence.

At the disposition hearing in December 2013, the juvenile court ordered K.P. be declared a dependent child of the juvenile court. The court found that reunification services did not need to be provided to Father pursuant to section 361.5, subdivision (b)(13) (the parent's unresolved history of "extensive, abusive, and chronic use of drugs or alcohol"), and set the matter for a permanency hearing. (The court found reunification services did not need to be provided to Mother under section 361.5, subdivision (b)(10), (11), and (13).)

## III.

### THE PERMANENCY HEARING REPORT AND AN ADDENDUM REPORT

In the permanency hearing report dated April 9, 2014, the assigned social worker recommended that the juvenile court find K.P. adoptable and terminate Father's

and Mother's parental rights as to K.P. She had been placed with the paternal grandparents in September 2013, where she remained as of the date of the permanency hearing report.

As pertinent to the issues raised in these appeals, the permanency hearing report stated Father has a documented history of drug use and arrests. Father stated he had started using methamphetamine when he was 14 years old. In September 2013, he stated he had been clean for a three-year period once, but had relapsed a year and a half earlier. Although the juvenile court had ordered drug patch testing for Father, he had not submitted to testing due to his incarceration. After he was released, the social worker submitted a reauthorization referral for drug patch testing for Father.

Father was unable to participate in the six hours per week of monitored visitation because he was incarcerated at some point in the fall of 2013 and was not released until February 26, 2014.<sup>2</sup> The paternal grandmother took K.P. to visit Father, while he was in custody, for weekly 30-minute visits. After Father was released from custody, he visited K.P. and was observed to be very appropriate during the visits. He played with K.P. and fed her. The paternal grandmother reported that K.P. "loves her daddy' and looks forward to seeing him."

The paternal grandparents expressed the desire to provide K.P. a permanent home if parental rights were terminated. They love K.P. and want her to have a "stable and prosperous life." She looks to them for comfort and support. They are more than capable of meeting K.P.'s needs.

In an addendum report dated April 30, 2014, the assigned social worker reported that on April 3, 2014, Father submitted to a drug patch test that tested positive for the presence of methamphetamine. Father's previous four drug patch test results had been negative.

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<sup>2</sup> The record is inconsistent as to the date Father was released, citing different dates in February and March. We cite the earliest of these dates in favor of Father.

#### IV.

##### THE JUVENILE COURT SUMMARILY DENIES FATHER'S AND MOTHER'S SECTION 388 PETITIONS AND TERMINATES PARENTAL RIGHTS AS TO K.P.; MOTHER AND FATHER APPEAL.

On April 30, 2014, Father filed a petition under section 388, seeking an order providing Father reunification services and vacating the December 2013 order setting the permanency hearing for April 30, 2014. On the same date, Mother also filed a section 388 petition requesting an order providing her with reunification services.

Father's section 388 petition was supported by his declaration in which he stated he lived in a four-bedroom home where K.P. would have her own bedroom, and would be provided with clothing and food. He described his consulting business and full-time employment through which he earned a sufficient income to support K.P. He completed five parenting classes during his incarceration and received positive feedback from his instructor. He also completed a GED test preparation course. Certificates of completion of those courses as well as letters vouching for his character were attached to the declaration.

In his declaration, Father explained that upon his release from custody and the commencement of informal probation at the end of February 2014, he immediately attempted to enroll in an outpatient drug treatment program. After being initially placed on the waiting list, he began a six-month program. He also attended twice-monthly individual counseling sessions and twice-weekly group sessions. He participates in a 12-step program; he was working on step 4.

In his declaration, Father stated he had submitted to random drug tests. He submitted to one drug patch test in April 2014, which tested positive for the presence of methamphetamine; Father adamantly denied that he had used methamphetamine since his release from custody. He stated he had requested information about that test result and also requested more frequent testing to demonstrate that he was not abusing drugs.

In his declaration, Father stated he enjoyed his monitored visits with K.P. who, he said, calls him “Daddy.” She often asks to sit on his lap; she sometimes falls asleep while he is holding her. He stated that she runs to him for comfort when she hurts herself while playing. She hugs and kisses him at the start and the end of visits. She often spontaneously tells him she loves him.

In his declaration, Father acknowledged that his parents were willing to provide a stable and permanent home for K.P., but he also stated that they believe he has made changes in his life and is capable of caring for K.P. if given the chance to participate in reunification services. He stated that his parents believe he deserves to raise K.P., but they are willing to adopt her if that is not possible.

In his declaration, Father stated that “[i]t is in K[P.]’s best interest for the Court to Order reunification services for a myriad of reasons. I have composed a letter to the Court to best express why I believe it is in her best interest. (Exhibit K) I have been present in her life since her birth. She knows me as her father and I have consistently been there for her longer than anyone. We have a loving parent-child relationship and I believe I have proved to the court that I have changed my lifestyle in order to be given the chance to regain custody of her. My daughter loves me and deserves to have a father who will care for her every need. I would provide her with the security she needs. I would never jeopardize losing her in the future if the Court were to give me a chance to raise her. I love her forever unconditionally and I believe it is in her best interest to experience that love and commitment I can offer by returning her to my care. I have worked very hard to ameliorate the conditions that brought my child[] before this Court. I believe I have a lot to offer my child and that I can help her heal the emotional wounds she surely has from my actions which led her to foster care. I will do anything to have her returned to my care and show her how very much I love her.” Exhibit K to Father’s declaration is a four-page, undated, handwritten letter by Father, which reiterates his love for K.P., commitment to sobriety, and caring for K.P.

The juvenile court found neither Father's nor Mother's section 388 petition made a prima facie showing. The court denied both section 388 petitions without a hearing.

Following the permanency hearing, the juvenile court found it likely K.P. would be adopted and selected adoption as the permanent plan for her. The court terminated Father's and Mother's parental rights as to K.P.

Father and Mother each appealed.

## DISCUSSION

Father contends the juvenile court abused its discretion by summarily denying his section 388 petition.

We review the juvenile court's decision to deny Father's section 388 petition without a hearing for abuse of discretion. (*In re Brittany K.* (2005) 127 Cal.App.4th 1497, 1505.) We may not reweigh the evidence or substitute our judgment for that of the juvenile court. (*In re Stephanie M.* (1994) 7 Cal.4th 295, 319.) We affirm the order unless it ““exceeded the bounds of reason. 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.”” (*In re Brittany K., supra*, at p. 1505.) The juvenile court's decision will not be disturbed unless the court ““has exceeded the limits of legal discretion by making an arbitrary, capricious, or patently absurd determination [citations].” [Citations.]” (*In re Stephanie M., supra*, at p. 318.)

To succeed on a section 388 petition, a parent must show changed circumstances establishing that the proposed modification would be in the best interests of the child. (*In re Kimberly F.* (1997) 56 Cal.App.4th 519, 526.) “The parent seeking modification [through a section 388 petition] must ‘make a prima facie showing to trigger the right to proceed by way of a full hearing. [Citation.]’ [Citations.] There are two parts to the prima facie showing: The parent must demonstrate (1) a genuine change of

circumstances or new evidence, and that (2) revoking the previous order would be in the best interests of the children. [Citation.] If the liberally construed allegations of the petition do not show changed circumstances such that the child's best interests will be promoted by the proposed change of order, the dependency court need not order a hearing." (*In re Anthony W.* (2001) 87 Cal.App.4th 246, 250.)

Father's section 388 petition, including his declaration and its attachments, reflected, at most, changing but not changed circumstances. Within months of the permanency hearing, Father had taken significant steps toward addressing his serious and long-term substance abuse problems. We commend his efforts, including at the time of the permanency hearing, working on step 4 of the 12-step program, and hope he continues to work on his goal of achieving lasting sobriety. Father had not, however, completed any substance abuse program at the time he filed his section 388 petition. The same month he filed his section 388 petition, Father's drug patch test showed a positive result for the presence of methamphetamine. Consequently, Father failed to make a prima facie showing of changed circumstances or new evidence within the meaning of section 388.

Even if Father had made a prima facie showing of changed circumstances, he failed to make a prima facie showing that the relief he requested in his section 388 petition would be in K.P.'s best interests. The following factors are considered in determining whether a section 388 petition addresses the best interests of the child: "(1) the seriousness of the problem which led to the dependency, and the reason for any continuation of that problem; (2) the strength of relative bonds between the dependent children to *both* parent and caretakers; and (3) the degree to which the problem may be easily removed or ameliorated, and the degree to which it actually has been." (*In re Kimberly F.*, *supra*, 56 Cal.App.4th at p. 532.)

In *In re Stephanie M.*, *supra*, 7 Cal.4th at page 317, the California Supreme Court stated, "[a]fter the termination of reunification services, the parents' interest in the

care, custody and companionship of the child are no longer paramount. Rather, at this point ‘the focus shifts to the needs of the child for permanency and stability’ [citation], and in fact, there is a rebuttable presumption that continued foster care is in the best interests of the child. [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.” (See *In re J.C.* (2014) 226 Cal.App.4th 503, 527 [child’s “best interests are not to further delay permanency and stability in favor of rewarding Mother for her hard work and efforts to reunify. Mother’s best interests are simply no longer the focus.”].)

In *In re J.C.*, *supra*, 226 Cal.App.4th at page 527, the court stated, “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.*, applicable after reunification efforts have been terminated. As stated by one treatise, ‘In such circumstances, the approach of the court in the case of . . . Kimberly F. . . . may not be appropriate since it fails to give full consideration to this shift in focus.’ [Citation.] We instead follow the direction of our Supreme Court, holding that after reunification services have terminated, a parent’s petition for either an order returning custody or reopening reunification efforts must establish how such a change will advance the child’s need for permanency and stability.”

Father’s section 388 petition was filed after the juvenile court had determined that no reunification services would be provided to him due to his chronic drug abuse history, pursuant to section 361.5, subdivision (b)(13). At this stage of the proceedings, we review the petition to see how the relief Father sought would advance K.P.’s need for permanency and stability. As discussed *ante*, Father had only begun to address his serious long-term unresolved substance abuse problem. Although Father expressed his love for K.P. and his desire to reunify with her, and had positive monitored visits with her, K.P. has lived in the home of the paternal grandparents, since September

2013, where she is well cared for. The paternal grandparents have “tak[en] excellent care of her and are willing to provide her a permanent home if parental rights are terminated.”

“At this point in the proceedings, on the eve of the selection and implementation hearing, the children’s interest in stability was the court’s foremost concern, outweighing any interest [Father] may have in reunification.” (*In re Anthony W.*, *supra*, 87 Cal.App.4th at pp. 251-252.)

Father argues *In re Hashem H.* (1996) 45 Cal.App.4th 1791 supports reversal of the juvenile court’s summary denial of his section 388 petition. *In re Hashem H.* is factually distinguishable and lends no support to Father’s contention. In that case, the appellate court held “[a] fair reading of the petition indicates that appellant’s mental and emotional problems which led to the removal of [the child] from her home had been successfully resolved through therapy.” (*Id.* at p. 1799.) The mother’s “continuous participation in individual therapy for more than 18 months which was so successful that her therapist recommended [the child] be returned to her custody.” (*Ibid.*) The court held the juvenile court erred by refusing to grant a hearing on the mother’s section 388 petition because she made “an adequate prima facie showing of changed circumstances under section 388.” (*Id.* at p. 1800.) Here, Father failed to make a showing that he had resolved his serious long-term substance abuse issue in the section 388 petition; as discussed *ante*, he had only begun to address it.

We acknowledge that at the time Father’s section 388 petition was summarily denied, K.P.’s counsel had stated that he believed Father had met his burden of making a prima facie case in support of his section 388 petition. K.P.’s counsel, however, gave no reason for his belief. Counsel did not express any opinion on the ultimate merit of the section 388 petition.

For the reasons discussed *ante*, the juvenile court did not abuse its discretion by summarily denying Father’s section 388 petition.

DISPOSITION

The order is affirmed.

FYBEL, J.

WE CONCUR:

ARONSON, ACTING P. J.

IKOLA, J.