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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
SIXTH APPELLATE DISTRICT

In re VINCENT B., a Person Coming  
Under the Juvenile Court Law.

H040808  
(Santa Clara County  
Super. Ct. No. 1-13-JD022077)

SANTA CLARA COUNTY  
DEPARTMENT OF FAMILY AND  
CHILDREN'S SERVICES,

Plaintiff and Respondent,

v.

ANGELINA G.,

Defendant and Appellant.

Appellant Angelina G. appeals from the juvenile court's order granting a Welfare and Institutions Code section 388<sup>1</sup> petition filed by respondent Santa Clara County Department of Family and Children's Services (the Department). The court's order required Angelina's visitation with her son Vincent B. to be supervised after Angelina tested positive for methamphetamine use. She claims that the court abused its discretion because the Department failed to show a change of circumstances and failed to

<sup>1</sup> Subsequent statutory references are to the Welfare and Institutions Code unless otherwise specified.

demonstrate that supervised visitation was in Vincent's best interest. We find no abuse of discretion and affirm the order.

## **I. Background**

Vincent was initially detained in Alameda County in 2004, when he was five years old, due to the parents' inability to care for him as a result of their substance abuse. Angelina had a long history of methamphetamine abuse, and she was "often delusional" when she was using methamphetamine. Vincent had been born with serious medical problems and had developmental disabilities that required ongoing care. Angelina had failed to ensure that he received such care. Angelina had previously lost custody of Vincent's four older siblings. Reunification services were bypassed, and Vincent was placed in a legal guardianship with his maternal grandmother. The juvenile court dismissed the dependency case in 2005 but retained jurisdiction over the guardianship.

The maternal grandmother was also the legal guardian of Vincent's older sister S. until February 2012, when S. was detained. Angelina was thereafter granted a year of reunification services for S., but services were terminated in June 2013. Angelina was ordered to submit to random drug testing as part of her reunification plan for S., but she failed to submit to even a single drug test.

In July 2013, Vincent was detained because the maternal grandmother had health problems and needed to move Oregon because she had lost her home. Vincent did not want to move to Oregon with her, and he expressed an interest in living with Angelina. He had been seeing Angelina and S. every few months and wanted "more frequent visits and calls" with them. If he could not reunify with Angelina, he would consider moving to Oregon.

Vincent had "anger issues." He "tries to hurt animals," and there had been several incidents in which he attempted to harm the maternal grandmother's dogs. Vincent also had hit the maternal grandmother several times. Vincent is "low functioning" and

receives services from the Regional Center. The maternal grandmother was concerned about whether Angelina could provide a safe environment for Vincent. The maternal grandmother had previously permitted Angelina to visit Vincent at the maternal grandmother's home. However, she stopped doing so because Angelina "would arrive . . . with . . . 'shady people.'" The maternal grandmother had asked Angelina not to bring these people to her home, but Angelina "relied on these friends for transportation." Instead, the maternal grandmother had taken Vincent to visit Angelina in San Jose. Angelina's last visit with Vincent prior to Vincent's July 2013 detention had been in January 2013.

Angelina was living in a friend's San Jose apartment and working as an in-home caregiver for an elderly woman. She lacked transportation. Although Angelina had not engaged in any substance abuse treatment or testing in the previous four years, she told the social worker that she was willing to drug test. However, she expressed doubt about her ability to comply with random testing due to her lack of transportation and varied work schedule.

In August 2013, the court resumed jurisdiction over Vincent, granted Angelina reunification services, and placed Vincent in a "Regional Center Group Home" in Gilroy. It ordered visitation twice a week for two hours, and it provided that the visits would be "unsupervised on condition that Mother does not have a positive or missed drug test. If there is a positive or missed drug test, Mother's visits shall be supervised." Angelina had three unsupervised visits of three to four hours with Vincent and wanted "longer visits" with him. Although these visits were "not supervised," "the group home staff that transports Vincent to the visits remains close by." Vincent appeared to enjoy these visits.

In September 2013, Angelina was ordered to participate in random drug testing once a week, and she agreed to do so.<sup>2</sup> On September 12, she submitted a sample that initially screened positive for methamphetamine. At a hearing that day, the court ordered: “If Mother’s drug test results are confirmed [as positive], the revised orders as attached shall remain in effect. However, if Mother’s drug tests [*sic*] results are unconfirmed, the Department’s original recommendations shall be effective.” The attached “revised orders” provided that Angelina was to have supervised visitation twice a week for two hours. Her test result was ultimately determined to be negative, and her visits were “moved back to unsupervised as soon as the test results showed that she was not positive.” She proceeded to have unsupervised visits once a week for three to four hours in Gilroy. Arrangements were also made for the group home to transport Vincent once a week to San Jose for a second weekly visit with Angelina.

The social worker was unable to determine how these unsupervised visits were going. Vincent “hasn’t been really open all the time about what goes on during the visits.” Due to Vincent’s unwillingness to describe the visits, “[i]t would be hard to know if there were a problem during the visits.” The social worker also was not confident that Angelina would report a problem during the visits. On one occasion, Angelina, who lacked a driver’s license, had driven Vincent in a car during a visit. The social worker told her not to do this again, but Angelina continued to drive to and from visits.

On November 26, 2013, the Department filed a section 388 petition seeking a court order that visitation be supervised. Angelina had tested positive for methamphetamine on November 14. Five of her prior drug tests were either “inconsistent with normal urine and suggest substitution” or showed a low level of methamphetamine

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<sup>2</sup> The case was transferred to Santa Clara County in September 2013 because both Vincent and Angelina were residing in Santa Clara County.

use that was “too low for a positive.” The Department asserted that a change to supervised visits was necessary to “help ensure that Vincent will be safe around his mother.” The court immediately ordered that a hearing be held on the petition and that visits were to be supervised pending that hearing. On November 20, Angelina was required to drug test, but she failed to provide a sufficient sample. She was also required to drug test on November 26, and her sample again contained a low level of methamphetamine, which did not qualify as a “positive” test under federal guidelines but indicated use.

On December 9, 2013, Angelina requested a contested hearing on the Department’s petition. The court ordered that visitation be supervised at the same frequency and length pending that hearing, but it subsequently granted the Department discretion to increase the frequency and duration of visits. Angelina’s December 10 drug test was positive for methamphetamine. Her December 20 drug test showed a low level of use, though not enough for a positive. Her December 31 sample was dilute and showed a low level of methamphetamine use. Angelina’s January 7, 2014 drug test also showed a low level of methamphetamine use. Angelina’s January 21 sample also showed a level of methamphetamine use that was not enough for a positive result.

Angelina participated in parts of her case plan. She continued to have supervised visits with Vincent, and the supervision was provided by Angelina’s employer, with whom Angelina was now living. Although Angelina’s employer had agreed to “provide notes from the visits,” she provided no feedback of any kind to the social worker regarding these visits. Angelina reported that “the visits go very well.” Vincent did not report any problems with the visits. On January 7, 2014, Angelina told the social worker that her employer was no longer willing to supervise visits due to “a lot of difficulties” between Angelina and the employer. Angelina arrived at a January 12 visit by driving a car despite her lack of a driver’s license.

The social worker was concerned that Vincent would be “placed at risk” if he had unsupervised visits with Angelina while she was using or under the influence of methamphetamine. She felt that unsupervised visits would not be appropriate until Angelina had “a consistent and extended period of clean tests.” Staff at Vincent’s group home has raised concerns in mid-November 2013, around the time of Angelina’s first positive drug test, about Angelina’s “anxiety level and the way she presents.” Vincent told the social worker that he wanted to spend more time with Angelina, and reports from supervised visits indicated that the visits went well.

The contested hearing was held in February 2014. Angelina testified that she was currently having one supervised visit for two to three hours on Saturdays and one visit at the group home that was not supervised for four to five hours on Sundays. She was living in a home where she cared for an elderly woman at night. However, it was difficult to schedule supervised visits because Vincent was only free on weekends and supervisors were not readily available then. She was able to get to Gilroy by either taking the bus, having a friend drive her, or, once, driving herself. One time in September 2013, she had driven with Vincent in her car. After that, the social worker told her not to drive with Vincent in the car, and she had not done so. She denied both that she was using methamphetamine and that she had “a history” of using it. Yet she admitted that she had used methamphetamine “on-and-off” for 14 years. Angelina claimed that she had not used methamphetamine at all for the last five years since completing a residential treatment program. Angelina also denied substituting anything for the samples she submitted for drug testing. She had no explanation for her positive tests.

The Department argued that supervised visitation “is the only way to ensure Vincent’s safety while he’s with his mother,” particularly because Vincent is “emotionally . . . immature and vulnerable.” Vincent’s trial counsel argued that Angelina’s conduct showed “that she is unwilling to comply with basic rules” and

therefore could not be “trust[ed] . . . to follow through with making sure that Vincent is well taken care of when she’s on an unsupervised visit with him. He’s developmentally delayed, and he doesn’t have the ability to assess when he’s in danger.” Angelina’s trial counsel argued that the Department had not proved that she was using methamphetamine and had not shown that there was a “nexus established between use and risk to Vincent.” She also contended that the court should not require supervision as that would limit Angelina’s time with Vincent “because of the lack of supervisors available on weekends.”<sup>3</sup>

The court found that the Department had met its burden of showing a change in circumstances based on the drug test results. “I can’t come to any other conclusion except that [Angelina] is using.” On the best interest issue, the court noted that Vincent “has special needs and thus special needs for protection.” The court granted the petition and ordered that Angelina have supervised visitation a minimum of twice a week for two hours. However, the court’s order allowed visitation at the group home without a monitor, and it granted the social worker discretion to increase the frequency and duration of visits and to change them to unsupervised “if it looks like it’s appropriate.” Angelina timely filed a notice of appeal from this order.

## **II. Discussion**

“At a hearing on a [Welfare and Institutions Code section 388 petition], the burden of proof is on the moving party to show by a preponderance of the evidence that there is

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<sup>3</sup> Angelina told the social worker on February 21, 2014 (the same day that the court granted the petition) that “it had been working very well for her to go to the group home and be able to spend more time with Vincent than she would if the visit were supervised by a social worker in another setting.” But just two days later, on February 23, she complained to the social worker that it took her “more than three hours to get to and from the group home on the bus,” and “it is not reasonable for her to visit at the group home.”

new evidence or that there are changed circumstances that make a change . . . in the best interest of the child.” (*In re Stephanie M.* (1994) 7 Cal.4th 295, 317 (*Stephanie M.*)) A juvenile court’s ruling on a section 388 petition is reversible for abuse of discretion only if the court’s ruling is ““an arbitrary, capricious, or patently absurd determination.”” (*Stephanie M.*, at p. 318.) ““The appropriate test for abuse of discretion is whether the trial court 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.’” (*Id.* at pp. 318-319.)

Angelina’s contention is that the Department failed to “show a nexus between the test results and a change in the quality of visitation, nor did the Department establish that a change to supervised visitation was in the child’s best interest.” She claims that drug use alone is not enough to show a change of circumstances because drug use alone is not enough to support jurisdictional findings. She cites no authority for the proposition that a change of circumstances sufficient to support an alteration to a visitation order must be supported by the same type of evidence that is required to assert dependency jurisdiction in the first place. We are aware of no authority for this proposition. Dependency jurisdiction is usually based on proof of a substantial risk of serious physical harm. (§ 300, subd. (b).) A section 388 petition, which can only be brought after jurisdiction has already been obtained, may be granted if the change of order is in the child’s best interest. It is not necessary for the party filing a section 388 petition to prove that there is some new basis for dependency jurisdiction. The juvenile court was empowered to grant the Department’s section 388 petition if the court concluded that the Department had shown a change of circumstances or new evidence and that the change of order was in Vincent’s best interest.

The Department provided ample proof of a change of circumstances or new evidence. At the time of the September 2013 visitation order, Angelina had no confirmed drug test results. By November 2013, her drug test results demonstrated that she was

using methamphetamine. By the time of the hearing on the section 388 petition, Angelina had had two positive results for methamphetamine, numerous results that reflected use but were too low to qualify as a positive result under federal guidelines, and multiple results that suggested that she was attempting to evade discovery of her methamphetamine use by providing a diluted or substituted sample. The juvenile court reasonably concluded that there was no credible alternative explanation for these test results. Evidence that Angelina was using methamphetamine was new evidence, and Angelina's methamphetamine use was a change of circumstances.

Angelina claims that the Department failed to establish a "nexus" between her methamphetamine use and the need for supervision of visitation. Not so. The record contains ample evidence that Angelina's methamphetamine use places any child in her care at risk. Angelina's past methamphetamine use rendered her "often delusional." Vincent became a dependent in the first place due to Angelina's substance abuse interfering with her ability to care for him, and she had lost custody of her other children for similar reasons. Angelina's judgment was obviously affected by her drug use. The maternal grandmother was unwilling to let Angelina visit Vincent at the maternal grandmother's home because Angelina brought "shady people" to the maternal grandmother's home. Despite her lack of a driver's license, Angelina drove and even drove with Vincent in her car. This evidence established that there was a substantial risk that Angelina's drug use might lead her to place Vincent at risk. Angelina points out that the social worker did not see any signs that Angelina's drug use was impacting her interactions with Vincent. But of course the social worker had no opportunity to see how Angelina behaved during *unsupervised* visits. In any event, the Department was not required to wait for Vincent to be actually exposed to harm before seeking a measure of protection for him.

Angelina asserts that the record does not establish that supervised visitation was in Vincent's best interest because Vincent wanted more visitation. We disagree. The

court's order that visitation be supervised outside of the group home was designed to allow for as much visitation as was feasible under the circumstances. Vincent was developmentally delayed and could not be expected to report any difficulties during unsupervised visits. Angelina's conduct with respect to the drug tests demonstrated that she was not trustworthy, and she could not be relied upon to report anything negative that occurred during unsupervised visits. By permitting unmonitored visits at the group home, but requiring supervision outside of that protected setting, the court limited the risks to Vincent but allowed Angelina to continue to have lengthy visits with Vincent. The court's order did not preclude Angelina from visiting Vincent more at the group home without the need to arrange for a supervisor. This served Vincent's best interest by protecting him from the risks that Angelina posed to him in an unsupervised setting while encouraging more visitation in a safe setting.

In sum, the record supports the juvenile court's findings that Angelina was using methamphetamine, that her drug use posed a risk to Vincent, and that supervised visitation outside of the group home was necessary to minimize that risk. The court did not abuse its discretion.

### **III. Disposition**

The order is affirmed.

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Mihara, J.

WE CONCUR:

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Elia, Acting P. J.

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Bamattre-Manoukian, J.