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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
SECOND APPELLATE DISTRICT  
DIVISION THREE

In re AIDEN M., a Person Coming  
Under the Juvenile Court Law.

B283900

LOS ANGELES COUNTY  
DEPARTMENT OF CHILDREN AND  
FAMILY SERVICES,

(Los Angeles County  
Super. Ct. No. DK00889)

Plaintiff and Respondent,

v.

ELISA M.,

Defendant and Appellant.

APPEAL from orders of the Superior Court of Los Angeles County, Debra Losnick, Commissioner. Affirmed.

Megan Turkat Schirn, under appointment by the Court of Appeal, for Defendant and Appellant.

Mary C. Wickham, County Counsel, Keith Davis, Assistant County Counsel and Julia Roberson, Deputy County Counsel for Plaintiff and Respondent.

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Elisa M. (mother) appeals orders of the juvenile court (1) denying her petition to reinstate her family reunification services, and (2) terminating parental rights to Aiden M. We find no abuse of discretion, and thus we affirm.

### **FACTUAL AND PROCEDURAL BACKGROUND**

#### *A. Initial Investigation and Detention from Mother (August 2013)*

Aiden (born in November 2011) is the oldest child of mother and Jose V. (father). The family came to the attention of the Los Angeles Department of Children and Family Services (DCFS) in August 2013, when mother was placed on an involuntary psychiatric hold pursuant to Welfare and Institutions Code<sup>1</sup> section 5150. Twenty-two month old Aiden was placed with his maternal grandmother, with whom Aiden, mother, and mother's adult siblings lived. In September 2013, while mother was still receiving inpatient psychiatric care, mother's 22-year-old brother stabbed to death her 19-year-old sister in Aiden's presence. Aiden was removed from the maternal grandmother and released to father.

On November 20, 2013, the juvenile court found that Aiden was a juvenile court dependent pursuant to section 300, subdivision (b). The court sustained allegations that mother had a history of mental and emotional problems that rendered her unable to care for Aiden; mother failed to protect Aiden from the maternal uncle, who had physically abused him; and mother allowed Aiden to reside with his maternal uncle, who had a history of mental and emotional problems and stabbed the

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<sup>1</sup> All subsequent statutory references are to the Welfare and Institutions Code.

maternal aunt to death in Aiden's presence. The court struck an allegation that father's marijuana use rendered him unable to care for Aiden, but ordered father to drug test.

*B. Detention from Father (March 2014)*

In March 2014, DCFS filed a supplemental petition alleging that father had failed to comply with the court's order to drug test. Aiden was detained from father and placed in foster care. Family reunification services were ordered for both parents.

*C. Six-Month Review (July 2014)*

After the supplemental petition was filed, DCFS reported that mother had completed a parenting class and undergone a psychiatric evaluation. Father refused to meet with DCFS or participate in any services. In May 2014, the juvenile court sustained an amended supplemental petition alleging that father failed to comply with a court order to drug test, endangering Aiden's safety. At the six-month review hearing in July 2014, the court continued mother's family reunification services, but terminated father's.

*D. First Termination of Mother's Reunification Services (March 2015)*

In July 2014, Aiden was moved to a new foster home at the foster mother's request; the foster mother reported that mother did not follow the visitation schedule or communicate with her.

By early 2015, DCFS reported that Aiden was receiving weekly trauma-focused therapy. He was exhibiting fewer negative behaviors associated with trauma, was having fewer nightmares, and had begun to toilet train and to speak in sentences. Mother regularly visited Aiden in an unmonitored setting, but had failed to enroll in mental health services and did

not have stable housing. DCFS recommended that mother's family reunification services be terminated.

On March 6, 2015, the juvenile court terminated mother's family reunification services and set a section 366.26 hearing.

*E. Mother's First Section 388 Petition (July 2015)*

Mother filed a section 388 petition on July 7, 2015. She asserted that she had obtained suitable housing and was enjoying unmonitored eight hour visits with Aiden every Saturday. Aiden's foster parents did not want to adopt him. Mother therefore asked either that Aiden be placed with her or that her reunification services be reinstated.

In September 2015, DCFS reported that Aiden had said father was present during his visits with mother. A children's social worker (CSW) visited mother's home and was greeted by a male; he refused to give his name and denied living with mother, but the CSW said the man resembled father. Accordingly, DCFS required that mother's visits with Aiden be monitored.

Following a hearing, the juvenile court granted mother's petition in part and reinstated her reunification services.

*F. Second Termination of Mother's Reunification Services (June 2016)*

In February 2016, DCFS reported that mother was participating in individual counseling but had not obtained a mental health evaluation. Mother continued to deny having a relationship with father.

In June 2016, father was reported to have been in mother's home during a visit. Mother said she did not know how father got into her apartment, denied that he had a key, and denied having contact or a romantic relationship with father.

In June of 2016, mother gave birth to Aiden's sibling, Sebastian. A DNA test established that Sebastian was father's biological child. Mother admitted she had not taken her psychiatric medication during her pregnancy because she was afraid it would harm the baby. She also admitted that she and father were living together and that father had continued to use marijuana. Mother acknowledged a long history of depression, but believed she was managing it successfully.

On June 30, 2016, the juvenile court again terminated mother's reunification services and set a section 366.26 hearing. In September 2016, DCFS filed a juvenile dependency petition on behalf of baby Sebastian.

*G. Aiden's Placement with Prospective Adoptive Parents (October 2016)*

In October 2016, DCFS reported that Aiden had been placed with prospective adoptive parents, Mr. and Mrs. G. Father had not contacted DCFS about visits with Aiden. Mother continued having monitored visits with Aiden, and was reported to be appropriate and attentive. Mother's therapist reported that mother had attended 64 psychotherapy sessions to address her history of depression and family violence. According to the therapist, mother denied any domestic violence with father and denied ever physically abusing her children. Mother was seeing a psychiatrist and had begun taking prescribed medication to manage depression.

In December 2016, DCFS reported that father had one positive drug test for marijuana and had failed to show up for five scheduled tests. Mother had undergone a psychiatric evaluation and had been diagnosed with a mood disorder and posttraumatic stress disorder. Mother reported she and father were no longer

living together after he attempted to choke her during a fight in November, but he still had keys to her apartment. Mr. and Mrs. G. said they would like to adopt Aiden.

In February 2017, Aiden's court-appointed special advocate (CASA) reported that Aiden appeared to be very happy in his prospective adoptive home. Aiden said he liked living with his adoptive parents and wanted to stay there. He reportedly was doing well in school and was eating and sleeping well. DCFS reported that mother had been consistent with her monitored visits, but mother felt that Aiden was not attached to her. Mother was attending therapy inconsistently and, according to her therapist, was confused about how to set boundaries with father and why she should stay away from father. Mother was defensive of father, saying he was a good parent to her children. DCFS recommended adoption as a permanent plan for Aiden.

*H. Mother's Second Section 388 Petition; Termination of Parental Rights (February 2017)*

Mother filed a second section 388 petition on February 27, 2017. She asked the court to take the section 366.26 hearing off calendar and either order Aiden placed with her, or grant her an additional six months of reunification services. She urged that the proposed change of order would be better for Aiden because "throughout this case mother ha[d] maintained a consistent relationship with Aiden. Also, Aiden has had many placements and has not been at this placement for even 6 months. This change would place Aiden in a place he is familiar and comfortable with."

DCFS's report, dated April 10, 2017, stated that mother claimed she had been consistently taking her medication, seeing a psychiatrist, and attending individual counseling. Mother said

her visits with Aiden were positive. Mother admitted she had been unable in the past to end her relationship with father, but assured the CSW that she and father no longer had any contact. Mother's therapist spoke positively about mother's progress, and said she was optimistic about mother's ability to use the skills she had learned in therapy. However, the CSW reported that Aiden had grown attached to his potential adoptive family and lacked an attachment to mother.

DCFS initially recommended that mother's section 388 petition be granted and mother be provided with additional services. It changed its recommendation on April 19 after viewing mother's Facebook posts that suggested that mother had continued her relationship with father and might again be pregnant with his child. In light of this new information, DCFS recommended that mother's section 388 petition be denied and that her reunification services not be reinstated.

In a June 15, 2017 status report, DCFS reported that Aiden was thriving in the home of his prospective adoptive parents.

At the June 21, 2017 hearing, mother testified that she was no longer in a relationship with father. She said that a photograph of father hugging her, which she had posted on Facebook in April 2017 with the caption, "my love and I," had been taken a year earlier, when she was pregnant with Sebastian. She testified that a photograph of Valentine's Day gifts from father, which she had posted on Facebook in February 2017, had been taken the prior year. She said she posted the picture because father was "a good friend to me and also was a great father to my kids, a great partner. . . . [H]e was a very nice person to me." Mother said she last saw father in November 2016, when he moved out of the apartment they had been

sharing. Mother denied reports that a young man was living at her house or that father posed a risk to her children.

After hearing the arguments of counsel, the court ruled as follows: “While on the one hand, I do understand the mom still wanting to be in what she obviously considered to be a good and positive relationship for her. I think the mother still holds onto that belief, despite the fact that the father has been using drugs, has not complied with the case plan, has tried to choke her, and the fact that mother is still posting pictures of the father tells me that she’s not really quite over him yet. [¶] While the mother is in counseling, she has backed out of counseling and is not going consistently, in fact, going less consistently. I applaud the fact she was able to find not only one but two jobs because they are hard to find. But I do not feel that the mother’s evidence rises to a level of changed circumstances. [¶] We add into that that the court already has ordered further reunification services, and that did not result in the child being returned to the mother either.

“So at this time I am unable to make the finding that there is a change of circumstances, and there has been little or no testimony at all about how this would be in the child’s best interest. So the court is respectfully denying the [section] 388 petition.” The court then terminated parental rights and ordered Aiden placed for adoption.

Mother timely appealed from the orders denying the section 388 petition and terminating parental rights.

*I. Post-Termination, Mother Gives Birth to a Third Child with Father (July 2017)*

Less than a month after parental rights to Aiden were terminated, mother gave birth to her third child, Ezequiel.



Mother submitted a paternity questionnaire, on the basis of which the court found father to be Ezequiel's presumed father.

## **DISCUSSION**

Mother contends the juvenile court abused its discretion by denying her section 388 petition.<sup>2</sup> For the reasons that follow, we disagree and affirm.

### **I.**

#### **Standard of Review**

“Whether the juvenile court should modify a previously made order rests within its discretion, and its determination may not be disturbed unless there has been a clear abuse of discretion. (*In re Stephanie M.* (1994) 7 Cal.4th 295, 318 (*Stephanie M.*)) ‘. . . “[]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.)” (*In re J.C.* (2014) 226 Cal.App.4th 503, 525–526.)

### **II.**

#### **The Juvenile Court Did Not Abuse Its Discretion by Denying Mother's Section 388 Petition**

A party may petition the court under section 388 to change, modify or set aside a previous court order. The petitioning party has the burden of showing, by a preponderance of the evidence, that (1) there is a change of circumstances or new evidence, and

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<sup>2</sup> Although mother has also appealed from the order terminating her parental rights, her substantive contentions address only the order denying her section 388 petition.

(2) the proposed change is in the child's best interests. (§ 388; *In re Jackson W.* (2010) 184 Cal.App.4th 247, 257.)

We assume without deciding that mother demonstrated a change of circumstances. Mother must also show, however, that the evidence before the juvenile court compelled the conclusion that granting the petition was in Aiden's best interests. For the reasons that follow, she has failed to do so.

“‘[C]hildren have a fundamental independent interest in belonging to a family unit [citation], and they have compelling rights to be protected from abuse and neglect and to have a placement that is stable, permanent, and that allows the caretaker to make a full emotional commitment to the child.’” (*In re Marilyn H.* (1993) 5 Cal.4th 295, 306.) Consequently, “[a]fter the termination of reunification services . . . , the goal of family reunification is no longer paramount, and ‘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.’ [Citation.]” (*In re K.L.* (2016) 248 Cal.App.4th 52, 62.)

In the present case, substantial evidence supported the juvenile court's conclusion that granting mother's section 388 petition was not in Aiden's best interest. At the time of the section 388 hearing, Aiden was nearly six years old and had been out of mother's care for almost four years. During that time, Aiden had been in four different placements—briefly with father, and then in three foster homes. His current foster parents, with

whom Aiden had been living for approximately nine months, had an approved home study and wanted to adopt him.

In contrast, although mother had made significant progress in many areas of her case plan, she continued to be unable to reunify with Aiden because of her ongoing relationship with father. Father's reunification services had been terminated in July 2014 because father had failed to comply with the terms of the case plan; and in 2016 and 2017, there was evidence that father was still using drugs and had been physically violent with mother. Nonetheless, mother continued to have a relationship with father and gave birth to their second child in June 2016, even after assuring DCFS repeatedly that she and father were no longer together. At the June 2017 section 388 hearing, mother again insisted that she was not in a relationship with father and had not seen him since the previous November, but that testimony was belied by her Facebook posts and her subsequent delivery of their third child in July 2017. Mother's unwillingness to discontinue her relationship with father made it extremely unlikely that Aiden would be returned to her care, and thus that she could provide him the stability and permanency to which he was entitled.

Further, Aiden was reported to have a more secure attachment to his foster parents than to mother. The CSW reported Aiden was attached to his foster parents, and his CASA said the foster parents "are making him feel comfortable, secure and loved in his new home." Aiden was thriving in his foster parents' home: The foster parents reported that Aiden had no behavioral issues at home, Aiden's behavior at school was improving, and Aiden was making progress with toilet training, with which he had struggled throughout his time in foster care.

In response to his CSW's inquiry, Aiden said he wanted to live with his foster parents forever.

In contrast, although mother visited Aiden consistently through the dependency proceedings, the quality of the visits was reported to be poor as “mother is not emotionally/mentally present during the visit[s] as mother seems preoccupied with other thoughts.” Further, Aiden reportedly “does not show any emotion when mother leaves” and “does not ask for mother” between visits. Mother herself acknowledged that she did not believe Aiden was attached to her, although she felt very attached to him. And, as noted above, Aiden told the CSW he wanted to live “forever” with his foster parents, not with mother.

In short, mother's petition “made no showing of how the [Aiden's] best interests would be served by depriving [him] of a permanent, stable home in exchange for an uncertain future. (*In re C.J.W.* (2007) 157 Cal.App.4th 1075, 1081; *In re J.H.* (2007) 158 Cal.App.4th 174, 182–183 [children need stability and permanency, not protracted legal proceedings that prolong uncertainty for them].)” (*In re Jackson W.* (2010) 184 Cal.App.4th 247, 260.) Accordingly, the juvenile court did not abuse its discretion by concluding that granting mother additional reunification services was not in Aiden's best interest.

Mother appears to contend on appeal that she was not required to proffer evidence that granting her petition was in Aiden's best interest because DCFS “had already conceded” the point. In fact, although DCFS initially recommended that the court grant the petition, it changed its recommendation nearly two months before the section 388 hearing, after learning that mother was still romantically involved with father. In any event, the court is not bound by an agency's recommendation, but must

independently assess the evidence and best interests of the child when making placement and other orders. (§ 388 [court shall modify prior order “only if *the court* finds by clear and convincing evidence that the proposed change is in the best interests of the child”], italics added.) And, as DCFS notes, mother at all times carried the burden to prove that granting her section 388 petition was in Aiden’s best interests. (E.g., *In re Michael B.* (1992) 8 Cal.App.4th 1698, 1703 [“The parent requesting the change of order has the burden of establishing that the change is justified.”].)

Mother also contends that the juvenile court abused its discretion by “summarily” denying her section 388 petition “without an analysis showing consideration of” the factors identified in *In re Kimberly F.* (1997) 56 Cal.App.4th 519—i.e., the seriousness of the problem that led to the dependency, the degree to which the problem has been resolved, and the relative strength of the bonds between the child and the parents and caregivers. Our Supreme Court has never adopted the *Kimberly F.* factors, however, and at least one Court of Appeal has rejected them as failing to take into account the shift in focus toward promoting the child’s needs for permanency and stability that is appropriate after reunification services have been terminated. (*In re J.C.*, *supra*, 226 Cal.App.4th at p. 527.) Accordingly, the juvenile court was not required to make findings on these factors.

Finally, mother contends that the juvenile court was “erroneously dismissive of the presumption favoring natural parents,” and failed to take into account the importance of Aiden’s sibling ties. Not so. There was no evidence at the section 388 hearing that Aiden had formed bonds with either of his siblings, both of whom were born after he was removed from

mother's care. With regard to the asserted presumption, "[t]he presumption favoring natural parents by itself does not satisfy the best interests prong of section 388. The cases that state a child may be better off with his or her biological parent rather than with strangers do so when the biological parent has shown a sustained commitment to the child and parenting responsibilities." (*In re Justice P.* (2004) 123 Cal.App.4th 181, 192; see also *In re J.C.*, *supra*, 226 Cal.App.4th at p. 527 ["It is true a parent and a child share a fundamental interest in reuniting up to the point at which reunification efforts cease. [Citation.] However, the interests of the parent and the child have diverged by the point of a [§ 366].26 hearing to select and implement a child's permanent plan."].)

We note in conclusion that nothing we have said should be understood to denigrate mother's substantial accomplishments, including holding down two jobs, maintaining stable housing, and addressing her mental health challenges. However, " "[t]he reality is that childhood is brief; it does not wait while a parent rehabilitates himself or herself." ' ' " (*Adoption of A.B.* (2016) 2 Cal.App.5th 912, 924.) After nearly four years in the foster care system, Aiden is entitled to a permanent home, which mother cannot currently provide. The trial court did not err in so concluding.

**DISPOSITION**

The June 21, 2017 orders are affirmed.

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EDMON, P. J.

We concur:

LAVIN, J.

DHANIDINA, J.\*

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\* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.