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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

In re PRECIOUS F. et al., Persons  
Coming Under the Juvenile Court  
Law.

B290759  
(Los Angeles County  
Super. Ct. No. CK95854)

LOS ANGELES COUNTY  
DEPARTMENT OF CHILDREN  
AND FAMILY SERVICES,

Plaintiff and Respondent,

v.

STEPHANIE F.,

Defendant and Appellant.

APPEAL from order of the Superior Court of Los Angeles  
County, Marguerite D. Downing, Judge. Affirmed.

Suzanne M. Davidson, under appointment by the Court of  
Appeal, for Defendant and Appellant.

Mary C. Wickham, County Counsel, Kristine P. Miles,  
Assistant County Counsel, and Peter Ferrera, Principal Deputy  
County Counsel, for Plaintiff and Respondent.

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Stephanie F. (Mother) appeals from the denial of an evidentiary hearing on her petition under Welfare and Institutions Code<sup>1</sup> section 388. She contends the juvenile court abused its discretion by summarily denying her section 388 petition for custody of two of her children, 12-year-old Precious F. and 10-year-old Hazel F.,<sup>2</sup> or for reinstatement of her reunification services with unmonitored or overnight visits. We affirm the order.

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

<sup>2</sup> On February 4, 2019 we affirmed the juvenile court's termination of Mother's family reunification services and finding of detriment to her fourth child, J.D. (*In re J.D.* (Feb. 4, 2019, B288559) [nonpub. opn.].) On September 17, 2018 we reversed the juvenile court's jurisdictional findings as to Mother's fifth child, Evelyn F., but found Mother's appeal from the dispositional order removing Evelyn from her custody was moot. (*In re Evelyn F.* (Sept. 17, 2018, B287311) [nonpub. opn.].)

## FACTUAL AND PROCEDURAL HISTORY

### A. *The Jurisdiction and Disposition Hearing*

On October 5, 2012 the Los Angeles Department of Children and Family Services (the Department) filed a petition on behalf of Mother's three children—then six-year-old Precious F., four-year-old Hazel F., and 19-month-old Isaac D. On November 9, 2012 the juvenile court sustained the petition under section 300, subdivisions (a) and (b)(1). The juvenile court found true that Isaac's father, Humberto D., and Mother had a history of domestic violence, and he had struck Mother during her pregnancy with Isaac. In addition, the court sustained the allegations Mother had a history of illicit drug abuse and recent methamphetamine and marijuana abuse. On prior occasions, Mother was under the influence of illegal substances while caring for the children. The court also found Humberto had a history of illicit drug abuse and was a current abuser of methamphetamine, cocaine, and marijuana, which rendered him unable to care for Isaac.

At the November 9, 2012 disposition hearing, the juvenile court removed the children from Mother's custody. The court ordered Mother to participate in a minimum six-month drug and alcohol program with aftercare, weekly random drug and alcohol testing, a 12-step program, a support group for domestic violence victims, parenting classes, and individual counseling to address case issues. The court granted monitored visits for Mother for at least two times per week, with the Department having discretion to liberalize visitation. The court denied family reunification services to the fathers of Precious and Hazel pursuant to section 361.5.

B. *Termination of Mother's Family Reunification Services*

The May 10, 2013 six-month status review report stated Mother had evaded contact with social worker Sandra Paredes. Mother refused to provide Paredes with her current home address and telephone number and would not discuss her circumstances. In addition, Mother had not participated in any court-ordered services. Mother attended weekly monitored visits except for a few cancellations and a three-week period when she did not visit. However, during the visits, Mother was unable to set boundaries and structure for Precious, Hazel, and Isaac. On June 3, 2013 the juvenile court terminated Mother's family reunification services.

C. *Birth of J.D.: The Detention and Adjudication Hearings*

Shortly after J.D.'s birth in November 2013, the Department filed a petition alleging methamphetamine and alcohol use by Mother while pregnant with J.D. On December 23, 2013 the juvenile court detained then one-month-old J.D. The juvenile court released J.D. jointly to Mother and J.D.'s father, Juan D.

At the March 27, 2014 jurisdiction and disposition hearing, the juvenile court sustained the petition under section 300, subdivisions (b) and (j). The court acknowledged Mother had completed her substance abuse program and was participating in aftercare. The court ordered Mother to participate in aftercare, weekly alcohol and drug testing, a 12-step program, parenting classes, alcohol and drug counseling, and individual counseling to address case issues.

D. *Mother's Prior Section 388 Petition (Precious, Hazel, and Isaac)*

On March 14, 2014 Mother filed a section 388 petition requesting custody of Precious, Hazel, and Isaac, or reinstatement of reunification services and unmonitored, overnight visitation with the children. Mother stated she had tested negative for drugs and completed a six-month drug program, a domestic violence program, parenting classes, individual counseling, and seven mental health classes. In addition, Mother contended she had consistently visited the children and would provide them with a stable and loving home.

On July 30, 2014 the juvenile court granted Mother's petition, ordering unmonitored visits and six months of family reunification services. The court ordered Mother to continue her counseling programs, including weekly random drug testing. On September 23, 2014 the court granted Mother overnight visits with Precious, Hazel, and Isaac.

E. *The Section 342 Petition and Adjudication Hearing (J.D.)*

On October 23, 2014 the Department received a referral, alleging domestic violence occurred while J.D. was present in the home. Mother stated Juan D. pushed her, causing her to fall, and pressed his hand over her mouth to prevent her from calling the social worker. Mother admitted Juan was using drugs, which she had previously denied. The Department filed a section 342 petition, and J.D. was detained from Mother and Juan on November 12, 2014. The court ordered monitored visits for Mother for all the children.

At the March 11, 2015 hearing, the juvenile court sustained the amended allegations in the section 342 petition. The court

granted Mother family reunification services with J.D., but terminated them as to Precious, Hazel, and Isaac because “her entitled reunification services has elapsed.” The court ordered Mother to participate in a domestic violence program, weekly random alcohol and drug testing, and individual counseling with a therapist “to address all case related issues including domestic violence, child protection, family history and dysfunction, and co-dependency.” The court granted Mother monitored visits for at least twice a week with all the children.

F. *Mother’s Visitation and Participation in Services from September 2015 to March 2018 (All Children)*

On September 9, 2015 the juvenile court acknowledged Mother had made progress with her case plan. The court granted Mother unmonitored visits with all the children contingent on her continuing to test negative for drugs. The court cautioned Mother if she tested positive or had an unexcused missed test, the visits would revert back to monitored visits.

On August 26 and September 15, 2015 Mother missed two drug tests. She re-enrolled in a six-month outpatient program. On October 12, 2015 Mother tested positive for alcohol. On February 10, 2016 she tested positive for cocaine while attending her outpatient program.

Mother completed an outpatient drug treatment program on June 30, 2016. The court ordered her to complete an aftercare program because of her positive drug test for cocaine. Mother consistently attended the visits with her children, which were now monitored because of her drug use, twice a week for two hours each visit. Mother improved her ability to set boundaries

during the visits, but Hazel and Isaac did not consistently follow Mother's directions.

On February 8, 2017 the maternal grandmother reported Mother's boyfriend had choked Mother and left a red mark on her neck in October or November 2016. On February 15, 2017 the juvenile court modified Mother's visitation with J.D. to monitored visits, and terminated her family reunification services as to J.D.

In June 2017 Mother gave birth to her fifth child, Evelyn. Subsequently, the Department filed a petition on behalf of Evelyn. On July 24, 2017, the juvenile court detained Evelyn from Mother, and released the child to her father, Manuel N.

The December 12, 2017 status report indicated Precious had been placed in the same foster home since October 2, 2012. She was polite, followed directions, and stayed on task. Precious started individual therapy in January 2013 and successfully completed therapy in November 2015. As for Hazel, she had four different placements since October 2, 2012. Hazel had difficulty staying on task and following instructions, needed redirection, was prone to tantrums, questioned authority, and could be oppositional at times. Hazel was diagnosed with ADHD, but her doctor discontinued her medication in October 2016. Hazel was adjusting to placement in a regular foster home after she graduated from a placement that had provided her with in-home intensive services.

The same status report stated Mother continued to have monitored visits with the children, mostly twice a week. The caregivers did not report any problems, but indicated Mother should be more proactive during her visits in setting limits and ensuring the children did their homework.

A January 5, 2018 last minute information for the court stated Mother continued to test negative for drugs. Mother cancelled visits with all the children on three occasions in November and December 2017, and failed to attend the second weekly visits with J.D. in November and December.<sup>3</sup>

The April 4, 2018 addendum report discussed the permanency plan for Precious and Hazel. The report stated 12-year-old Precious did not want to be adopted, but instead, wanted to remain in the foster home where she had been for nearly six years; she did not object to her foster mother being her legal guardian. Precious's foster mother had cared for Hazel in the past, but admitted she was unable to care for Hazel because of her behavioral issues. Ten-year-old Hazel said she was agreeable to adoption and was willing to participate in adoption recruitment events. The Department requested a 60-day continuance of the section 366.26 hearing in order to identify an appropriate permanent plan for Precious and Hazel.

G. *Mother's Section 388 Petition (Precious and Hazel)*

On April 4, 2018 Mother filed a section 388 petition, seeking return of Precious and Hazel to her custody, or reinstatement of her family reunification services with unmonitored or overnight visits. Mother contended she had

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<sup>3</sup> On January 9, 2018 the juvenile court released Isaac to the custody of his father, Humberto, and ordered family maintenance services. On February 29, 2018 the court granted legal guardianship to J.D.'s paternal aunt, and terminated jurisdiction over J.D. On March 28, 2018 the court terminated jurisdiction over Evelyn with a juvenile custody order granting sole physical custody to Evelyn's father, joint legal custody for Mother and the father, and unmonitored visits for Mother.



completed her services, including a substance abuse program and anger management and domestic violence counseling. In addition, she had complied with her case plan for Evelyn by participating in drug testing and individual counseling to address domestic violence and anger management issues. Mother argued she had alleviated the case issues that led to removal of Precious and Hazel, and now could provide a safe environment for them. Mother added, “The children are not in permanent plans hence it is in their best interest to be returned to their birth mother who is now safe to care for them.”

In support of her petition, Mother attached a September 4, 2013 certificate of completion for individual counseling through Jade Family Services; a December 13, 2013 certificate of completion for seven mental health classes with the Los Angeles County Department of Mental Health; a January 14, 2014 certificate of completion and letter showing Mother had completed a six month outpatient substance abuse program; a January 30, 2014 letter from the South Gate Police Department stating Mother had attended 12 one-hour weekly individual counseling sessions on domestic violence; a March 14, 2018 letter from her therapist confirming Mother had been attending weekly individual therapy sessions to address domestic violence and anger management since October 18, 2017; and a March 15, 2018 status review report from Evelyn’s case indicating Mother had tested negative for drugs and alcohol from September 29, 2017 to February 8, 2018, except for six occasions when she tested positive because she took prescribed medication.

The Department’s report for Mother’s section 388 petition recommended denial of the petition. On March 6, 2018 social worker Rocio Aguayo created a visitation agreement for Mother

with Precious and Hazel, as well as with Isaac and J.D. The foster mothers for Precious and Hazel and Isaac's father Humberto all reported Mother was often on her cell phone and did not pay attention to the children during visits. Hazel's foster mother stated Mother did not interact with Hazel during visits and did not call her at home between visits. Hazel spent visitation time running around or hugging her foster mother. When Mother interacted with the children, it was mostly with Precious. Precious's foster mother and Humberto reported Mother had cancelled Monday visits and failed to confirm her visits as required by the visitation agreement. Mother acknowledged she sometimes forgot to confirm visits. In addition, Mother reported she had moved out of her relative's home because of the drug use there. As a result, Mother did not have stable housing and was living with her brother, sleeping in the living room. Social worker Aguayo concluded, "Mother continues to show a lack in commitment with visiting the minors weekly and has demonstrated that she is not interested to take the time to engage and bond with the minors during visits. Mother does not have stable housing and has not secured a safe and stable home for the minors. It is in the best interest of the minors to remain in the current placement. . . ."

On May 18, 2018 the juvenile court denied Mother's section 388 petition without a hearing based on the Department's response in the section 388 report. Mother timely appealed the order.

## DISCUSSION

Under section 388, subdivision (a)(1), a parent may petition for a hearing to change, modify, or set aside any previously made order based on a change of circumstance or new evidence. A petitioner requesting modification under section 388 has the burden of proving by a preponderance of the evidence that the child's welfare requires the change. (Cal. Rules of Court, rule 5.570(h)(1)(D) ["All other requests require a preponderance of the evidence to show that the child's welfare requires such a modification."]; *In re Stephanie M.* (1994) 7 Cal.4th 295, 317; *In re J.T.* (2014) 228 Cal.App.4th 953, 965.) "[T]he petitioner must show *changed*, not *changing*, circumstances." (*In re Mickel O.* (2011) 197 Cal.App.4th 586, 615; accord, *In re Casey D.* (1999) 70 Cal.App.4th 38, 47.) In addition, new evidence or a change in circumstance must be of such a significant nature that it requires modification of the challenged order. (*In re A.A.* (2012) 203 Cal.App.4th 597, 612; *In re Mickel O.*, at p. 615.)

A moving party is only entitled to an evidentiary hearing on a section 388 petition if he or she makes a prima facie showing of both a change in circumstance or new evidence and that the proposed change is in the child's best interests. (Cal. Rules of Court, rule 5.570(d)(1) [§ 388, subd. (a) petition may be denied without a hearing if it "fails to state a change of circumstance or new evidence . . . or fails to show that the requested modification would promote the best interest of the child"]; *In re Alayah J.* (2017) 9 Cal.App.5th 469, 478 ["To obtain an evidentiary hearing on a section 388 petition, a parent must make a prima facie showing that circumstances have changed since the prior court order, and that the proposed change will be in the best interests

of the child.”].) “A prima facie case is made if the allegations demonstrate that these two elements are supported by probable cause.” (*In re G.B.* (2014) 227 Cal.App.4th 1147, 1157; accord, *In re J.P.* (2014) 229 Cal.App.4th 108, 127 [“The prima facie showing is not met unless the facts alleged, if supported by evidence given credit at the hearing, would sustain a favorable decision on the petition.”].) We review an order denying a section 388 petition for an abuse of discretion. (*In re Stephanie M.*, *supra*, 7 Cal.4th at p. 318 [“the trial court’s ruling [on a section 388 petition] should not be disturbed on appeal unless an abuse of discretion is clearly established”]; *In re G.B.*, at p. 1158 [denial of section 388 petition without hearing reviewed for abuse of discretion].)

Mother contends it was an abuse of discretion to deny her section 388 petition without an evidentiary hearing. She argues she made a prima facie showing to trigger her right to a full hearing based on the evidence she submitted showing she completed two outpatient substance abuse programs, consistently tested negative for drugs, and consistently attended individual therapy since termination of her reunification services for Precious and Hazel.

Although Mother participated in services to address her case issues, she failed to show it was in the best interests of Precious and Hazel for her to have custody or reinstatement of reunification services with unmonitored visits. Precious and Hazel had not lived with Mother for over five and a half years, since October 2, 2012. Further, Mother had a visitation agreement that provided for weekly monitored visits with Precious, Hazel, Isaac, and J.D., but she cancelled frequently and failed to confirm visits in advance. During visits, Mother was

often on her cell phone and did not interact with the children. When she did engage with the children, it was mostly with Precious. Mother ignored Hazel during visits and did not call her between visits. She did not demonstrate through her visitation that she was engaged with Precious and Hazel and strengthening her bond with them, and that she could care for them if they were returned to her custody. Moreover, Mother did not make a showing she would have suitable housing for Precious and Hazel if they were returned to her in that she was sleeping on the living room floor of her brother's home and did not have plans for alternative housing. (See *In re Angel B.* (2002) 97 Cal.App.4th 454, 462-463 [denial of the mother's § 388 petition without hearing was not abuse of discretion where there was no evidence mother could provide suitable care, housing, and childcare for her son].) Given Mother's failure to engage with Precious and Hazel during visits and the lack of suitable housing for the children, it was not an abuse of discretion to deny Mother's section 388 petition without a hearing. We note, as acknowledged by the Department, that if the quality and consistency of Mother's visits with Precious and Hazel improves, and she maintains sobriety, Mother could file another section 388 petition.

## **DISPOSITION**

We affirm the order.

FEUER, J.

WE CONCUR:

ZELON, Acting P. J.

SEGAL, J.