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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

In re MARIAH G., A Person Coming  
Under the Juvenile Court Law.

LOS ANGELES COUNTY  
DEPARTMENT OF CHILDREN AND  
FAMILY SERVICES,

Plaintiff and Respondent,

v.

T. J.,

Defendant and Appellant.

B258907

(Los Angeles County  
Super. Ct. No. CK89538)

APPEAL from orders of the Superior Court of Los Angeles County,  
Steven R. Klaif, Juvenile Court Referee. (Pursuant to Cal. Const., art. VI, § 21.)  
Affirmed.

Jesse McGowan, under appointment by the Court of Appeal, for Defendant and  
Appellant.

Office of the County Counsel, Mark J. Saladino, County Counsel,  
Dawyn R. Harrison, Assistant County Counsel, and Sarah Vesecky, Deputy County  
Counsel, for Plaintiff and Respondent.

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T. J. (mother) appeals from the juvenile court's denial of maternal grandmother's Welfare and Institutions Code<sup>1</sup> section 388 petition requesting placement of mother's three-year-old daughter, Mariah G., with her. Mother also challenges the subsequent termination of parental rights over Mariah. Mother argues that, had the juvenile court granted maternal grandmother's petition, mother "could have defended against the recommendation to terminate parental rights by raising the relative caregiver exception." We conclude the juvenile court properly denied the section 388 petition and affirm.

### ***FACTUAL AND PROCEDURAL BACKGROUND***

On July 15, 2011, the Department of Children and Family Services (Department) received a referral alleging that Mariah, then six months old, was the victim of emotional abuse and neglect by mother. The Department's social worker interviewed mother's landlord who said mother appeared to be under the influence of drugs at times and had admitted to leaving Mariah home by herself.

On August 31, 2011, the Department filed a petition alleging that Mariah was endangered by mother's substance abuse and leaving her unsupervised. Mariah was detained and placed with maternal grandmother. Mother's two older children also lived with maternal grandmother who was their legal guardian.

A few days later, the Department discovered that maternal grandfather had a criminal record. The Department informed maternal grandmother that, in order for Mariah to remain in the home, maternal grandfather would have to move out while the Department investigated him. He moved out and the Department submitted a criminal waiver request; however, the request was denied because of an outstanding warrant for his arrest. The Department had also previously substantiated an allegation of child abuse against him.

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

Maternal grandfather planned to moved back in with maternal grandmother, so on February 8, 2012 Mariah was placed with Mrs. E. On February 21, 2012, the court sustained the petition, removed Mariah, and ordered reunification services for mother.<sup>2</sup>

In August 2012, the Department reported that Mariah was happy in her new home and Mrs. E wanted to adopt her. Mariah and maternal grandmother initially had attended counseling together, but those services were terminated when maternal grandmother missed five consecutive sessions. Mother was incarcerated, had not complied with court-ordered services, and had visited Mariah only once in eight months.

Maternal grandmother told the Department she wanted Mariah to move back into her home, and the social worker again attempted to obtain a waiver to resolve concerns of “maternal grandparents['] ability to provide care due to their past criminal and child welfare history.”<sup>3</sup> At the six-month review hearing, the court ordered the Department to continue to evaluate maternal grandparents for placement.

In October 2012, mother gave birth to Destiny G. and the Department placed Destiny with Mrs. E.<sup>4</sup> In February 2013, the Department reported that Mariah continued to do well in Mrs. E’s home and Mrs. E was willing to adopt both children. Maternal grandparents wanted both children to be placed with them and the social worker helped them gather documentation for an evaluation under the Adoptions and Safe Families Act (ASFA).<sup>5</sup>

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<sup>2</sup> Mariah’s father was denied reunification services and his whereabouts were unknown throughout the rest of the proceedings.

<sup>3</sup> The record is silent as to the details of maternal grandmother’s criminal and child welfare history.

<sup>4</sup> We do not discuss Destiny’s dependency proceedings in detail as they are not relevant to the issues on appeal.

<sup>5</sup> The ASFA sets federal guidelines for foster care and relative care placements. (*In re Noe F.* (2013) 213 Cal.App.4th 358, 365, fn.2.)

The 12-month review hearing was held in August 2013. The Department reported that Mariah was bonded with Mrs. E and that maternal grandmother visited Mariah “when maternal grandmother [was] available . . . .” The court found that mother had not complied with the case plan and terminated her reunification services. A section 366.26 hearing on the termination of parental rights was set for December 2013.

In October 2013, the Department reported that maternal grandparents’ home had not been approved as a suitable placement because of the prior substantiated allegation of child abuse against maternal grandfather. The Department also concluded that maternal grandparents would not be eligible for approval for adoption or legal guardianship. On these grounds, the Department recommended that it was in Mariah’s best interests to remain with Mrs. E.

In December 2013, the Department reported that it was likely Mariah would be adopted by Mrs. E once parental rights were terminated. The Department noted that maternal grandmother still visited Mariah “occasionally.” The section 366.26 hearing was continued to April 2014 at the Department’s and mother’s requests.

In February 2014, the Department reported that Mariah was happy and healthy and continued to reside with Mrs. E. Maternal grandmother had “sporadically” visited Mariah and talked with her on the phone. On the court’s motion, the section 366.26 hearing was continued to July 1, 2014.

In June 2014, maternal grandmother filed a section 388<sup>6</sup> petition requesting that she be appointed Mariah’s legal guardian. She said she and maternal grandfather had separated and attached documentary evidence of their separation and the well-being of the other two grandchildren who lived with her. On July 1, 2014, the court continued the section 366.26 hearing to July 10 and informed maternal grandmother that the court

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<sup>6</sup> Section 388 provides that “[a]ny parent or other person having an interest in a child who is a dependent child of the juvenile court . . . may, upon grounds of change of circumstance or new evidence, petition the court . . . for a hearing to change, modify, or set aside any order of court previously made . . . .”

would review her petition and determine whether to grant a hearing on it. “[I]f there’s going to be a hearing on the 388, it will be [on July 10] also, okay?” the court said, and maternal grandmother indicated she understood.

On July 10, 2014, the court began by stating that it was denying the section 388 petition as the requested change would not be in Mariah’s best interest. Maternal grandmother responded that her husband no longer lived in her home, and the court acknowledged that this constituted a change in circumstances but said it was still “not going to disrupt [Mariah’s] placement.”

The court then stated that “if any counsel wants to be heard based on what the court said, I am open.” Mariah’s counsel said she “agree[d] with the court’s statements” and noted that Mrs. E was “very open to [Mariah] having a relationship with [maternal] grandmother.” Mother’s counsel stated only that mother “would ask that the 388 be granted.”

The court denied the petition and proceeded to the termination of parental rights. Over mother’s objection, the court terminated parental rights and designated Mrs. E as Mariah’s prospective adoptive parent. Mother timely appealed from the orders at the hearing.

### ***CONTENTIONS***

Mother contends the court erred in summarily denying the section 388 petition without a proper hearing. The Department argues that mother lacks standing to challenge the denial of the petition, and that the court did hold a proper hearing on the petition.

### ***DISCUSSION***

#### ***1. Standing***

“A parent’s appeal from a judgment terminating parental rights confers standing to appeal an order concerning the dependent child’s placement only if the placement order’s reversal advances the parent’s argument against terminating parental rights.” (*In re K.C.* (2011) 52 Cal.4th 231, 238 [holding that father had no standing to appeal

paternal grandparents' request for placement of child with them because father had acquiesced in the termination of his rights].)

Mother contends the denial of maternal grandmother's section 388 petition advanced her argument against terminating parental rights because -- had the petition been granted -- mother could have argued against the termination of parental rights based on the "relative caregiver exception." This exception is codified in section 366.26, subdivision (c)(1)(A), which provides if "the child is *living* with a relative who is unable or unwilling to adopt the child . . . but who is willing and capable of providing the child with a stable and permanent environment through legal guardianship, and the removal of the child from the custody of [] her relative would be detrimental to the emotional well-being of the child," the court shall not terminate parental rights. (Emphasis added.)

Mother relies on *In re Esperanza C.* (2008) 165 Cal.App.4th 1042 where the juvenile court denied a relative's placement request under section 388 and, at a subsequent hearing, terminated parental rights. Mother appealed the order denying the relative's placement request and the appellate court concluded she had standing because "placement of a child with a relative has the potential to alter the juvenile court's determination of the child's best interests and the appropriate permanency plan for that child, and may affect a parent's interest in [] her legal status with respect to the child. [Citation.]" (*Id.* at p. 563-564.)

The Department notes that, unlike in *Esperanza C.*, the court here held the hearing on the section 388 petition and the termination of parental rights at the same time. Accordingly, even if the court had granted the petition, the relative caregiver exception would not have applied because Mariah would not yet have been living with maternal grandmother at the time of the section 366.26 hearing. In reply, mother argues that, had the court granted the petition, it also would have continued the section 366.26 hearing. Whether the court would have continued the section 366.26 hearing is uncertain. In any event, because "[w]e liberally construe the issue of standing and

resolve doubts in favor of the right to appeal,” we assume mother has standing here. (*In re Esperanza C.*, *supra*, 165 Cal.App.4th at p. 1053)

2. *The Court Did Not Summarily Deny the Section 388 Petition*

Section 388 provides that any person having an interest in a dependent child “may, upon grounds of change of circumstance or new evidence, petition the court . . . for a hearing to change, modify, or set aside any order of court previously made . . . .” “If it appears that the best interests of the child [] dependent may be promoted by the proposed change of order . . . the court shall order that a hearing be held [on the petition].” (§ 388, subd. (d).) “The parent need only make a prima facie showing to trigger the right to proceed by way of a full hearing.” (*In re Marilyn H.* (1993) 5 Cal.4th 295, 310.) The petition should be liberally construed. (*In re Jeremy W.* (1992) 3 Cal.App.4th 1407, 1414.)

California Rule of Court rule 5.570 (rule 5.570) governs the conduct of hearings on section 388 petitions. (*In re Lesly G.* (2008) 162 Cal.App.4th 904, 913.) It provides that a hearing on a section 388 petition “must be conducted as a dispositional hearing” at which the “court must receive in evidence and consider . . . any relevant evidence offered by . . . the parent or guardian” when “(A) The request is for termination of court-ordered reunification services; or [¶] (B) There is a due process right to confront and cross-examine witnesses.” (C.R.C., rules 5.690(b) & 5.570(h)(2).) “Otherwise, proof may be by declaration and other documentary evidence, or by testimony, or both, at the discretion of the court.” (Rule 5.570(h)(2).)

Mother contends the court denied the section 388 petition without a hearing because the court “began the hearing by denying the section 388 petition” and did not “provid[e] the parties an opportunity to offer any evidence or argument.” In fact, the court did offer the parties an opportunity to present argument: once the court said it was denying the petition, it then proceeded to state that it was “open” and invited counsel “to be heard based on what the court said.” In response, mother’s counsel presented argument and did not object to this manner of proceeding.

In addition, under rule 5.570, it was within the court's discretion to consider additional evidence; the court was not required to do so. Rule 5.570 provides that the court must receive evidence at the section 388 hearing when (1) the petition requests termination of reunification services or (2) there is a due process right to confront and cross-examine witnesses. The first of these situations patently did not apply here, nor has mother asserted -- either below or on appeal -- that the second applied.

Accordingly, it was within the court's discretion to consider "documentary evidence, or [] testimony, or both" at the hearing. (Rule 5.570(h)(2).) The court did not preclude maternal grandmother or mother from presenting additional evidence, and neither of them asked to do so. Moreover, mother does not now identify any further evidence she wanted to present. Therefore, mother has not shown that the court either declined to consider any evidence or that it abused its discretion in doing so.

Mother's reliance on *In re Lesly G.* (2008) 162 Cal.App.4th 904 is also unavailing. The mother in *In re Lesly G.* appealed the denial of her section 388 petition and argued that the juvenile court violated due process when it failed to hold a hearing on the petition. (*In re Lesly G.*, *supra*, 162 Cal.App.4th at p. 912.) Although the juvenile court had sent the mother a notice stating that her petition was set for hearing, on the appointed day the court informed the mother at the beginning of the hearing that the petition "has been denied at this time." (*Id.* at p. 911.) The appellate court found that the juvenile court "provided no hearing whatsoever" as it "neither took testimony nor received documentary evidence, and it denied the petition without affording counsel an opportunity to argue the merits of the petition." (*Id.* at p. 915.)

Mother contends that, as in *In re Lesly G.*, the court here also announced it was denying the petition and did not give the parties an opportunity to submit evidence or argue the merits. However, as stated above, counsel was invited to argue the merits of the petition and did so, and the court did not refuse to hear additional evidence. The facts here are more analogous to *In re C.J.W.* where the juvenile court received written evidence at a section 388 hearing and allowed the parties to argue the merits of their petitions. (*In re C.J.W.* (2007) 157 Cal.App.4th 1075, 1080-1081.) The appellate court



held that the hearing comported with due process even though the juvenile court did not allow the parents to testify at the hearing. (*Id.* at p. 1081.) Similarly, here, counsel was permitted to argue the merits of the petition, and the court was “open” to receiving additional evidence. Accordingly, mother has not shown that the hearing failed to comply with section 388, rule 5.570, or some notion of due process.

Mother does not argue that, if the hearing was procedurally sufficient, then the court abused its discretion in denying the section 388 petition on the merits. Nor could she prevail on such an argument as the evidence did not show that it would be in Mariah’s best interests to be removed from Mrs. E’s care and placed with maternal grandmother. Mariah was three years old at the time of the hearing and had been living with Mrs. E for the previous two and a half years. By all reports, Mariah was happy and healthy in Mrs. E’s care and viewed Mrs. E as her mother. Mrs. E had wanted, for a long time, to provide Mariah with a permanent and stable home through adoption. Under these circumstances, it would not be in Mariah’s best interests to be removed from Mrs. E’s care and placed with maternal grandmother, who had only “occasionally” or “sporadically” visited Mariah and who was not willing to adopt her.

***DISPOSITION***

The orders are affirmed.

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EGERTON, J.\*

WE CONCUR:

EDMON, P. J.

KITCHING, 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.