Filed 2/21/13 In re Destiny M. CA2/1

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

In re DESTINY M. et al., Persons Coming Under the Juvenile Court Law.	B242166 (Los Angeles County Super. Ct. No. CK10689)
LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. YVONNE G., Defendant and Appellant; DESTINY M. et al., Appellants.	

APPEAL from an order of the Superior Court of Los Angeles County, Phillip L. Soto, Judge. Affirmed.

Andrea R. St. Julian, under appointment by the Court of Appeal, for Defendant and Appellant.

Aida Aslanian, under appointment by the Court of Appeal, for Appellants Destiny M., St. M., Jeannie M., and S. M.

John F. Krattli, County Counsel, James M. Owens, Assistant County Counsel, and Tracey F. Dodds, Principal Deputy County Counsel, for Plaintiff and Respondent.

Yvonne G. (Mother), and her daughters Destiny M., St. M., Jeannie M., and S. M., appeal from the juvenile court's order denying Mother's petition under Welfare and Institutions Code[1] section 388. We affirm.

BACKGROUND

Mother's four oldest minor daughters are Destiny (now age 16), St. (now age 15), Jeannie (now age 14), and S. (now age 12). Miracle, Mother's fifth minor daughter (now age 10), was named in the dependency case, but is not a party to this appeal.

On June 14, 2011, when the five sisters were 14, 13, 11, 9, and 8 years old, the Department of Children and Family Services (DCFS) filed a petition under section 300, alleging under subdivision (b) that Mother had failed to provide for and protect the children.[2] After receiving a referral on June 8, 2011 alleging general neglect by Mother, DCFS conducted an investigation on June 9, and learned that Mother routinely left home before the children went to school and did not return home until after they were asleep. The children's maternal uncle, Angel, who worked from 8:00 a.m. to 1:00 p.m., lived in the home and would watch the girls and helped them cook and clean when Mother was gone at work cleaning houses. Miracle, who had spina bifida, needed a catheter, and

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[1] All further statutory references are to the Welfare and Institutions Code unless otherwise indicated.

[2] The petition also alleged under section 300 subdivisions (b) and (g) that the children's incarcerated father, Javier M., had failed to provide them with the necessities of life, placing them at risk of physical harm, damage, and danger. We denied the father's petition for extraordinary writ challenging an order setting a permanent plan hearing. (*Javier M. v. Superior Court* (Feb. 15, 2012, B237252) [nonpub. opn.].) The petition also included an allegation against Mother as to all the children under subdivision (j), which was later dismissed.

when Mother was not home the older children would change the catheter (although Angel would not, as he was of the opposite gender). The social worker received a phone call from "Velinda," who used to be Miracle's medical placement, and who was taking care of Miracle. Mother had called from a hospital asking Velinda to pick Miracle up. Miracle told Velinda that she and her sisters ran when the social workers came to the house, because they were scared because "the last judge warned their mother that the next time the children were detained, [Mother] would lose her parental rights."

The social worker contacted several hospitals, and learned that Mother had been in an emergency room on the night of June 8, and was currently on a 72-hour psychiatric hold at Pacifica Hospital for reported use of PCP and cocaine, depression, and an attempt to commit suicide by jumping off a parked car. Mother spoke to the social worker by telephone, and said she had been hospitalized on June 6 for a nervous breakdown and had been released, but because she still was depressed a friend took her to the emergency room on June 8. Mother stated she had not taken any drugs for over five years, and denied any attempt at suicide. She then admitted she "'could have been pissed off and taken a hit,'" and could have done something "'dumb'" like making an attempt at suicide. Asked when she was last home, Mother said, "I don't remember my days,'" denied having a job, and stated she was always home with the girls.

DCFS detained the five children, placing Destiny, St., Jeannie, and S. with the maternal grandmother, and Miracle with Velinda.

On June 14, 2011, the date of the detention hearing, DCFS filed a last minute information indicating that the maternal grandmother had a criminal record, and DCFS was seeking a waiver to approve her home as placement for the four older children.[3] The court ordered a mental health and developmental assessment of the children, and found a prima facie case that substantial danger existed to the children, reasonable efforts had been made to prevent removal, and continuance in the home was contrary to the

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[3] A later report stated that maternal uncle Angel was on active probation, and DCFS was attempting to get an exemption for him as well.

children's welfare. Custody of all five children was temporarily placed with DCFS pending further disposition, with sibling visits and monitored visitation for Mother.

The jurisdiction/disposition report dated July 14, 2011 indicated that Destiny, St., Jeannie and S. were placed with a licensed foster mother, and Miracle was with Velinda, also a licensed foster mother. The report detailed Mother's prior history with DCFS; all the prior petitions had been sustained. A 1994 petition alleged as to Mother's older child by a different father, Francine (now an adult) that Mother, a PCP user, was incapable of providing regular care and had been under the influence of drugs on a number of occasions, making her unable to protect or supervise the child. Mother received family reunification services from April 1994 to November 1995, and family maintenance services followed until January 1997.

A second petition filed in 1999 alleged that Mother tested positive for cocaine when Jeannie was born, Jeannie had a positive toxicology screen for cocaine, and Mother's substance abuse placed Jeannie, Destiny, and St. at physical and emotional risk. The children were placed with Father until December 2000, the court terminated jurisdiction and Mother reunified with the children.

A third petition in 2003 alleged that Mother had a positive toxicology screen at the time of Miracle's birth. The court did not order reunification services. In May 2004, however, Mother filed a section 388 petition requesting the return of the children to her care, and in July 2004, the children were ordered home to Mother with family maintenance services.

A fourth petition in 2007 alleged abuse of Francine by Mother and Father. Mother was on probation following a September 2006 arrest for possession of controlled substance and driving with a suspended license, and had failed to complete a drug program ordered by the criminal court. Mother subsequently completed the program, and was dismissed from criminal court supervision in October 2008.

DCFS recommended that Mother not receive reunification services.

Mother enrolled in a six-month outpatient drug treatment program at Bienvenidos' Institute for Women's Health on June 28, 2011. Mother did not start the program until

July 25, 2011, after which she attended regularly with four weekly negative drug tests in August 2011. She also started group therapy and was on the wait list for individual counseling.

On September 14, 2011, Mother appeared at a hearing and pleaded no contest to an amended petition, including the subdivision (b) allegations. She indicated that she understood that it was possible that she would not receive family reunification services, and the court could put into place a permanent plan which might include termination of her parental rights.

In a supplemental report dated October 19, 2011, DCFS reported that Mother was initially inconsistent with her attendance in the drug treatment program, and on September 8, 2011, she had attended nine out of 20 sessions. On September 8, however, Mother tested positive for methamphetamines. She told an investigator on October 5 that she did not use on purpose, and unknowingly consumed the methamphetamine orally when she was given a Starbucks coffee. She denied otherwise using drugs, and at the time of the supplemental report continued to comply with her programs.

At a hearing on October 19, 2011, with Mother present, counsel for Destiny, St., Jeannie, and S. each represented that his or her client wished to reunify with Mother. Counsel for DCFS argued that no reunification services should be provided to Mother, who had not made reasonable efforts to treat her ongoing drug abuse. The September 8 positive test for methamphetamines was in addition to Mother's use of PCP and cocaine, as reflected in the allegations sustained by the court. Mother had multiple relapses in the past, had been slow to begin the counseling, and "she's quite frankly telling falsehoods about the meth use." Counsel for the four children argued that unlike Miracle, they had no medical issues, and as older children they were bonded to Mother and would very much like to reunify. Mother's counsel also requested reunification; she had previously reunified with the children "multiple times. It's not a lost-cause." She had tested positive for methamphetamine, which meant "she either knowingly took the methamphetamine and she's hanging out with people she shouldn't be hanging out with.

Either way she's dealing with the situation by re-enrolling in the program and separating herself from these people."

The court declared the children dependents of the court under subdivision (b) as to Mother, and declined to offer reunification services. The court outlined Mother's involvement with DCFS, with petitions in 1994, 1999, 2003, and 2007 (following an arrest for possession of a controlled substance) showing that her history was "just replete with her drug use." In the current 2011 petition, Mother was a current user of "serious hard drugs," PCP and cocaine, and "just recently a month-and-a-half ago on September 8, she tests positive for methamphetamine." The court concluded: "So I do find today that . . . in terms of disposition . . . that reunification services are not going to be ordered for the mother . . . in that today the court finds that she's had reunification services terminated for siblings or half-siblings. She also had—gone into legal guardianship. At least Francine has. [¶] I find that she has not subsequently made a reasonable effort to treat the problems that led to the removal of the sibling or half-sibling from her. She's still on drugs. She's still got that problem, and she's not treated it adequately." The court set a hearing to select a permanent plan.

In November 2011, the children's maternal aunt expressed an interest in adoption of the four older girls, but that was not an appropriate placement since the aunt lived with the maternal grandmother. DCFS recommended termination of Mother's parental rights.

On February 28, 2012, Mother filed a request to change court order pursuant to section 388 ("388 petition") as to Destiny, St., Jeannie, S., and Miracle, requesting "a home of parent mother order or in the alternative an order authorizing more reunification under [section] 366.3." She stated that she had completed her drug program, was testing clean, had completed parenting and leadership classes, and was seeing a therapist. She had made substantial progress, and "[the c]hildren desperately wish to come home." An attached final progress letter from the drug treatment program, dated February 1, 2012, said Mother had failed to test on September 8, 2011 and tested positive on September 12. The letter also stated that Mother had made progress, increased her support system, implemented parenting strategies, and expressed "I have much hope in her abilities to

remain abstinent." Mother also volunteered in a community group located at the program center through the "Parent Café" and the group organizer stated that she was "becoming the model group member."

The court granted a hearing on Mother's section 388 petition, and ordered DCFS to prepare and submit a report addressing the petition.

The DCFS interim review report, filed April 5, 2012, repeated Mother's history with DCFS, and included in her criminal history an arrest for possession of a controlled substance on October 15, 2008. Mother had a history of depression since 1992, and a drug history since 1990, had received extensive services, "[did] not want her daughters to go to permanent plan as she is free from drugs and depression" and despite her past mistakes "want[ed] a chance to mend the mistakes and parent her children," with professional help and services. A counselor at the drug treatment center reported that Mother "never thought she would lose her children forever. . . it appears that this time she really got it. Mother has removed her self [sic] from bad influences and has learned to identify her drug triggers. . . . *Mother did relapse but part of addiction is to relapse*." Mother's individual therapist stated that Mother attended weekly sessions, was open, and spoke about her feelings. Mother's sponsor since November 2011, a marriage and family therapist, said she had noticed a "big change" in Mother, who now had the capabilities to fight substance abuse, and participated in daily Narcotics Anonymous meetings. "She is daily building foundation. Mother has a good attitude and does not give up. She is now a role model for other parents that are beginning treatment."

Mother stated "she understands that it appears she is manipulating the department with having a history with DCFS however she is requesting a chance to prove herself and to her family that she wants to be together with her daughters." She stated she did not use drugs from 2003 to 2011, until she started to feel depressed. She began using drugs, with PCP her drug of choice, when she was nine years old; she was around PCP all the time because of her mother's drug use. "Mother recognizes that she has a drug problem and is accepting of professional help to rectify her mistakes."

DCFS commended Mother for her "sincere efforts to continue to address her 22 year history of drug addiction," and noted that mother had undergone multiple outpatient treatments after repeated relapses. Drug addiction was "a complex but treatable brain-disease," and an individual had to do more than stop using; she had to change aspects of her personality. Mother tested dirty for PCP and cocaine in June 2011, and in September 2011, Mother claimed someone put drugs (methamphetamine) in her coffee, and repeatedly denied she had relapsed. DCFS recommended that Mother complete a six-month inpatient residential program to demonstrate she had truly overcome her addiction, as the effects of her substance abuse were "far reaching" and inpatient treatment had not yet been explored. DCFS determined that the best interest of the children was to stay in the permanent plan, and recommended denial of the section 388 petition.

Jeannie, St., S., and Destiny each wrote a letter requesting to go home to live with Mother, saying that they missed their mother and their home. Destiny stated: "[M]y mom is a good mom she just has a drug problem. . . . I know that if me and my sisters go home I would push my mom into the right direction." The DCFS report for the six-month review hearing stated that Destiny, St. and Jeanne "have adamantly stated that they are not interested in being adopted." S. was only 10 years old, and efforts would be made to locate "an adoptive home for the sibling set." A February 12, 2012 letter from the therapist with whom the girls participated in weekly therapy stated that they were all doing well, cooperated in therapy, but kept to themselves in the foster home and looked forward to their visits with Mother.

At a hearing on April 5, 2012, with the children and Mother present, the court allowed weekly overnight visits for the children in the home of the maternal grandmother, with DCFS discretion to liberalize further, although Mother was not to stay in the home after 10:00 p.m. The court explained: "My job is to protect the children that come through this court. It's called children's court. And it's the best interest of the children. And a lot of times the children—what they want is not something I can give them because it's detrimental to them. It's not good for them. I need to encourage your

mother to understand that this a lifetime thing. She's got to change. . . . We have to protect you from yourselves a lot of times and what your desires are."

On April 6, 2012, Mother enrolled in another outpatient program, Plaza Community Center. The program required three 90-minute group meetings a week, evidence of three 12-step meetings a week, and random drug testing. At a hearing on April 18, 2012, with Mother and the four children present, the court found by a preponderance of the evidence that there was a continuing necessity for court jurisdiction, the placements were appropriate, and DCFS was making reasonable efforts to finalize the permanent plan of adoption. The court also extended Mother's visitation, including one-hour unmonitored visits.

In the interim review report dated May 31, 2012, DCFS reported that Destiny, St., Jeannie and S. were placed together in the same foster home. All four children stated they loved Mother and wanted to reunify with her. Mother was working consistently in her programs to get the girls back. She stated that she did not use drugs between 2003 and 2011, but began to feel depressed in 2011 as she was caring for everyone. She had recently tested negative for drugs from April 30 through May 23, 2012. "The Department commends the mother for her sincere efforts to continue to address her 22 year history of drug addiction. DCFS records reveal that [Mother] has undergone (5) multiple-episodes of *outpatient* drug-treatment after repeated relapses." As recently as September 11 Mother stated that someone put drugs in her coffee to explain why she tested positive for methamphetamine. DCFS continued to recommend that Mother complete inpatient drug treatment, and concluded it was in the best interest of the children to remain in a permanent plan.

On May 31, 2012 the court held the section 388 hearing with Mother and the four children present. The children's counsel represented that they all wanted to reunify with Mother. Mother's counsel outlined Mother's participation in programs and counseling and noted that Mother had tested clean for eight months. Counsel requested a home-of-parent order order "on the condition that the children live with the mother in the grandmother's home, and the maternal grandmother is in the back. . . . It's a duplex." In

the alternative, Mother's counsel requested six months of family reunification services, which was in the best interests of the four children.

Counsel for DCFS noted, "mother has been down this road before on several occasions, and each time, drug use pulls her back down." Counsel commended Mother's "sincere efforts to continue to address her 22-year history of drug addiction," but Mother did not own up to the fact of relapse when she tested positive for methamphetamine, instead giving "excuse number one or two in these types of cases where somebody puts something in her drink." Mother's last positive test was for methamphetamine, and drug testing was less useful for that drug because methamphetamine stays in the system for a shorter time so that weekly testing would not be definitive. Mother's former outpatient treatments "haven't exactly filled the bill" and the court should "make a finding that Mother's circumstances may be changing, but are not changed to the point where it would justify returning the children to her or providing reunification services, given the fact that has been done many times before." Counsel for the children joined Mother's counsel in arguing that Mother had shown a change of circumstances in the last eight or nine months, the court should grant the section 388 petition, return the children to the home of Mother, or at least provide six months of reunification services.

The court addressed Mother: "I know it can be done. But it takes time. You have got a very long history. It's not going to happen overnight. It will happen if you keep working. I have faith in you in that regard. [¶] . . . [¶] I am impressed with the efforts that you have made over the course of the last eight months, but I have to weigh a very long history that you have. . . . [¶] . . . But I have to weigh eight months of good work versus virtually a lifetime of drug use, and slipping back and slipping back and slipping back over the course of four other similar motions, where reunification services were extended to you and you didn't complete them." The court stated that it understood Mother's situation, but "I have the safety of your children to consider. This is not the time to put them back with you. . . . [¶] . . . Recurring relapses are very often the case, and I can't blind myself to that and I can't sit still with the notion that I gave the kids back to you and you slipped into something, into a relapse, and that they are left without

having you the primary parent, . . . being the one that is responsible, not being able to take care of them when they need help." The court continued that Mother would "have to show me more before I can believe that the circumstances have changed so dramatically that it outweighs the long drug history that you have," and encouraged Mother to "go right back to work doing what you're doing. And ramp[] it up even." The court suggested, without ordering, that Mother consider finding an inpatient drug program. "This is a situation where we need more time."

The court stated, "I am going to deny the 388 without prejudice. That means you haven't won today, but you could win again in the future if you do what you need to do." The court liberalized overnight visitation to three weekends a month, with discretion to allow Mother to stay overnight with the children at maternal grandmother's home if things went well.

Mother filed this timely appeal. Destiny, St., Jeannie, and S. joined in the appeal pursuant to section 395, subdivision (b)(1), and filed a separate brief.

Subsequently, after briefing was complete, we granted on January 17, 2013, a motion by counsel for Destiny, St., Jeannie, and S. to take judicial notice of the minute order of proceedings on November 16, 2012. The minute order reflects that on November 16, the court *granted* Mother's section 388 petition as to Destiny, St., Jeannie, and S., ordered six months of reunification services, continued the children's current placement, and allowed unmonitored visitation, with discretion to DCFS to allow weekend overnights and holiday visits. DCFS was ordered to evaluate the overnight visits. The court also ordered family counseling, and the minors remained dependent children of the court. The order states that the matter was continued to April 10, 2013 for another section 388 hearing.[4]

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[4] We have not been provided with a record transcript of the hearing, or any other court documents.

DISCUSSION

In her brief on this appeal, Mother's counsel requests that we reverse the May 31, 2012 denial of Mother's section 388 petition requesting that the children be returned to her care and she be provided family reunification services. The children's counsel requests that we reverse the order denying Mother's section 388 petition and remand the matter with instructions to hold a new hearing.

Given the court's subsequent order on November 16, 2012, all the relief requested in the children's brief and in Mother's brief has been granted, with the exception that the children remain in their placement. The only relief requested and not granted is an order returning Destiny, St., Jeannie and S. to the home of mother.

Section 388, subdivision (a), provides: "Any parent or other person having an interest in a child who is a dependent child of the juvenile court . . . or the child himself or herself . . . through a properly appointed guardian may, upon grounds of change of circumstance or new evidence, petition the court . . . to change, modify, or set aside any order of court previously made or to terminate the jurisdiction of the court." When the placement of the minor children is in issue, "the burden of proof is on the moving party to show by a preponderance of the evidence that there is new evidence or that there are changed circumstances that make a change of placement in the best interests of the child." (*In re Stephanie M.* (1994) 7 Cal.4th 295, 317.) "This determination [is] committed to the sound discretion of the juvenile court, and the trial court's ruling should not be disturbed on appeal unless an abuse of discretion is clearly established." (*Id.* at p. 318.)

"[S]ection 388 *really is* an 'escape mechanism' when parents complete a reformation in the short, final period after the termination of reunification services but before the actual termination of parental rights. [Citation.]" (*In re Kimberly F.* (1997) 56 Cal.App.4th 519, 528.) "It is not enough for a parent to show *just* a genuine change of circumstances under the statute. The parent must show that the undoing of the prior order would be in the best interests of the child." (*Id.* at p. 529.) In deciding a section 388 motion, the court should consider the seriousness of the reasons for the dependency in the

first place, the strength of the existing bond between the parent and the child, and "the degree to which the problem may be easily removed or ameliorated, and the degree to which it actually has been." (*Id.* at p. 532.)

Given the state of the record, we need not decide whether the court abused its discretion in denying reunification services, as those services have been restored to Mother by the order of November 16, 2012. That issue therefore is moot.

As for the remaining relief Mother requested, the return of the four children to her home, we conclude the juvenile court did not abuse its discretion in determining that Mother did not show the existence of changed circumstances that made a change of placement in the best interests of the minors.

First, the reasons for the dependency were serious. Mother had a 22-year history of recurrent drug addiction, in the course of which her children were removed from her in 1994, 1999, and 2007 (on the basis of abuse of an older daughter, while Mother was on probation after a 2006 arrest for possession of a controlled substance) before this case began with her children's removal in 2011. The second factor weighs in Mother's favor, as the facts in support of Mother's section 388 motion showed a strong bond between Mother and her children, who desired to be returned to her and had strong sibling bonds. (See *In re Kimberly F.*, *supra*, 56 Cal.App.4th at p. 532.)

The third inquiry is the degree to which the problem—Mother's drug addiction—may easily be remedied, and the degree to which it actually has been. "[E]ach child's best interests would necessarily involve eliminating the specific factors that required placement outside the parent's home [citation], here, Mother's drug addiction." (*In re Angel B.* (2002) 97 Cal.App.4th 454, 463–464.) Drug abuse and addiction is an intractable problem, as Mother's repeated relapses show. Her participation in an outpatient program is laudable, but even in the program she completed, only eight months before the May 31, 2012 section 388 hearing, Mother tested positive for methamphetamine. The transcript of the section 388 hearing shows that the court gave credit to Mother for her efforts, but balanced her progress against her history and concluded that more time was necessary to judge whether circumstances had changed.

The court exercised its discretion, and the denial of the section 388 petition's request for an order returning the children to home of mother was not an abuse of that discretion.

DISPOSITION

The May 31, 2012 court order denying Yvonne G.'s Welfare and Institutions Code section 388 petition is affirmed.

NOT TO BE PUBLISHED.

JOHNSON, J.

We concur:

MALLANO, P. J.

CHANEY, J.