

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

In re SAMANTHA M. et al.,
Persons Coming Under the
Juvenile Court Law.

LOS ANGELES COUNTY
DEPARTMENT OF CHILDREN
AND FAMILY SERVICES,

Plaintiff and Respondent,

v.

JESSICA M.,

Defendant and Appellant.

B279698 c/w B280974
(Los Angeles County
Super. Ct. No. DK03236)

APPEAL from orders of the Superior Court of Los Angeles County, Rudolph Diaz, Judge. Affirmed.

Joseph T. Tavano, under appointment by the Court of Appeal, for Defendant and Appellant.

Mary Wickham, County Counsel, R. Keith Davis,
Assistant County Counsel and Jacklyn K. Louie, County
Counsel, for Plaintiff and Respondent.

Appellant Jessica M., mother of Samantha M., Jennifer M. and Y. M., appeals from the order of the juvenile court denying a hearing on her Welfare and Institutions Code section 388 petition for modification and the subsequent order terminating her parental rights to the three girls.¹ Finding no error, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

A. Original Petition

In May 2014, when Samantha was three and Jennifer was an infant, the court asserted jurisdiction over the children under section 300, subdivision (b), finding that Mother and Jennifer's father, Jose G., had engaged in two violent altercations in the presence of the children, and that Jose abused alcohol, leading him to become physically and verbally aggressive.² In the most recent altercation, on

¹ Undesignated statutory references are to the Welfare and Institutions Code.

² References to "Jose" are to Jennifer's father, Jose G. Mother reported that Samantha's father was Jose A., who had been deported to El Salvador when she was pregnant.

January 22, 2014, Jose grabbed and pushed Mother while she was holding Jennifer, and tried to pull Jennifer from her arms. In a prior incident, he had pushed Mother while she was pregnant with Jennifer. Jose was arrested for domestic violence on January 22, 2014. When the Department of Children and Family Services (DCFS) intervened in January 2014, the children appeared to be well cared for and Mother told the caseworker she did not intend to remain in a relationship with Jose. Accordingly, they were not detained from Mother.

Neither Mother nor Jose contested jurisdiction or disputed any of the allegations of the petition. Mother was directed to participate in a domestic violence program for victims, a parenting class, and individual counseling to address case issues. She was provided family preservation services. The court issued a three-year restraining order protecting Mother and the girls from Jose. Jose was permitted monitored visitation only.

B. Supplemental Petition

In November 2014, DCFS received information that Mother was having contact with Jose, was not properly caring for the children, and might be using drugs. At the time, Mother was not regularly participating in individual counseling or domestic violence counseling, had not enrolled in a parenting class, and had not obtained a court-ordered speech and language assessment for Samantha, whose verbal skills were poor for her age. The caseworker asked

Mother to drug test, but she refused. DCFS filed a supplemental petition under section 387. Samantha and Jennifer were detained and placed in foster care.

Investigating the referral, the caseworker interviewed maternal aunt Bertha M., with whom Mother and the children lived. Bertha said Mother slept “almost all day” and was not properly feeding the children.³ Bertha was concerned that Mother might be depressed or drinking, as Mother had had a drinking problem in the past.⁴ In addition, Mother left Bertha’s home on weekends without saying where she was going, and Bertha suspected she was seeing Jose.⁵ Norma C., Mother’s in-home counselor, reported that when she arrived at Mother’s home for their weekly appointment at 10:00 a.m., Mother was often still sleeping. Although Norma was generally positive about Mother’s parenting skills, she said Mother appeared at times “confused,” and Norma was concerned Mother might have been “under the influence” on those occasions. Maternal aunt Celia M. and her husband reported that Mother was with them on weekends, not with Jose. Both said Jose stopped by their home to leave money and diapers, but not

³ When the caseworker interviewed Mother on November 19, at approximately 10:00 a.m., the children had not yet been fed, and Samantha said she was hungry.

⁴ Mother had been convicted of DUI when she was 17.

⁵ Bertha initially stated she had seen Mother and Father together, but subsequently retracted that allegation, and refused to speak further with the caseworker.

when Mother was there. Celia had observed Mother taking adequate care of the children, and expressed the belief that Bertha was lying about Mother's behavior because she wanted Mother and the children out of her home. The caseworker interviewed Mother, who denied having contact with Jose or failing to care for the children. She claimed to have missed counseling sessions and classes due to illness.

By the time of the hearing on the supplemental petition, Mother's compliance with services had improved.⁶ DCFS concluded the evidence did not support a finding that Mother had violated court orders and recommended the supplemental petition be dismissed. On January 20, 2015, the court dismissed the petition, returned the children to Mother, and ordered family preservation and maintenance services.

C. Subsequent Petition and New Petition

Seven months later, in July 2015, Mother gave birth to Y. Both Mother and newborn tested positive for methamphetamine. DCFS filed a section 342 subsequent petition on behalf of the older girls, and a section 300 petition on behalf of Y. Mother initially denied smoking methamphetamine. Later, she admitted smoking it without knowing what it was, but claimed she had only tried it once. She denied Jose

⁶ Mother completed the domestic violence counseling for victims ordered by the court in the 2014 disposition in January 2015, and the individual counseling in April 2015.

was Y.'s father, although she could provide no information about the man she claimed to be the father, other than a first name. Ultimately, she admitted having intercourse with Jose around the time Y. was conceived, and acknowledged that he was probably the father.

The children were detained. Samantha and Jennifer were placed in one foster home; Y. was placed in another. Samantha had trouble adjusting and began wetting the bed. Initially, Mother's visits were not good. She was always accompanied by the maternal grandmother. The older girl's foster mother reported Mother brought tablets for the children to play with rather than interact with them. Y.'s foster Mother reported Mother would hold Y. briefly before handing her to the grandmother. Mother sometimes wandered away during the visit. Both foster mothers reported Mother appeared fidgety and inattentive. Y.'s foster mother suspected Mother was sometimes under the influence. However, Mother consistently tested negative for all substances in July and August 2015.

In August 2015, the two new petitions were adjudicated. Mother pled no contest.⁷ Mother was ordered

⁷ The court found true that Mother "has a history of substance abuse including alcohol and is a current user of methamphetamine which renders [her] incapable of providing regular care and supervision of the [children]," "used drugs during [her] pregnancy with [Y.]," and "was under the influence of drugs while [Samantha and Jennifer] were in [her] care and supervision."

to participate in a substance abuse program, drug testing, a 12-step program, and counseling and to take parenting classes as she had not yet completed that requirement. The three girls were placed together in a new home with foster mother Jenny F. Samantha again had trouble adjusting, but Jennifer and Y. gave all appearances of thriving from the start.

In March 2016, prior to the first review hearing, Mother said she was having difficulty complying with the case plan while working four days a week as a house cleaner. In July 2015 and September 2105, she had begun two substance abuse programs, but quit, claiming she was forced to do so because she did not have Cal Works or Medi-Cal. Recommended to another program in December 2015, she claimed she was unable to start it because she had not been medically cleared by her doctor.⁸ Mother was consistent with visits, bringing toys, coloring books and crafts to engage with the children. During her visits, she fed, diapered and read to them. In the meantime, the children had begun to bond with Jenny, and she expressed interest in becoming their permanent guardian. DCFS recommended termination of reunification services. The matter was set for contest.

In February 2016, Mother had enrolled in the New Hope Drug & Alcohol Treatment Program, Inc. (New Hope). She tested clean on March 2, 16 and 23 and April 7 and 12.

⁸ Between August 1, 2015 and January 2016, Mother tested negative eight times, but was a no-show six times.

On April 13, she was caught trying to use a device to trick the drug test. At the April 21, 2016 review hearing, the court terminated reunification services, finding that Mother had not made significant progress in resolving the problems that led to the children's removal, that she had not demonstrated the capacity and ability to complete the objectives of the treatment plan or to provide for the children's safety, protection, physical and emotional well being and special needs, and that there was not a substantial probability that the children would be returned to her custody within the next period of review. The court set a section 366.26 hearing for August 18, 2016.

D. Section 388 Petition and Order Terminating Parental Rights

Prior to August 2016, Mother continued to visit the children weekly. The foster mother Jenny said Mother brought toys for the children and interacted affectionately with them. Samantha and Jennifer cried when she left. Y., however, cried when she saw Mother, and turned to Jenny for protection. Samantha said she loved Mother and wanted to reunify with her. In July 2016, a prospective adoptive family was tentatively identified. DCFS requested that the section 366.26 hearing be continued for 120 days, and the court complied.

On September 6, 2016, Mother filed a petition under section 388, asking that reunification services be reinstated or that the children be returned to her. The petition stated

Mother was “in full compliance with [the] case plan,” and was “ready, able and willing to take custody of [the] minors.” She presented evidence of having completed the New Hope drug/alcohol program in August, and having consistently tested negative for drugs between March and August 2016. She also presented evidence of regularly attending individual counseling and completing a parenting class. The court summarily denied the petition, finding it did not state new evidence or a change of circumstances, and that the proposed change did not promote the best interests of the children. On November 29, 2016, Mother appealed that ruling.

In October 2016, the foster mother reported that Mother was visiting regularly and calling the children daily. Y. was still not comfortable with her. Samantha told the caseworker that she enjoyed visiting with Mother. The caseworker believed there was a positive bond between Mother and the children. At the same time, the children were doing well with the foster mother. In addition, they had had two visits with the prospective adoptive family and appeared comfortable with them. DCFS recommended the section 366.26 hearing be continued a second time so the caseworker could continue to work with the prospective adoptive family, and the court complied.

On October 21, 2016, the children were placed with the prospective adoptive family. The children appeared comfortable in the home and were developing a strong attachment to the prospective adoptive parents. Their home study had been approved in June 2016.

At the February 16, 2017 section 366.26 hearing, the court terminated parental rights. Mother did not appear.⁹ Mother's counsel offered no evidence and made no argument. The court found that no exception to adoption applied. Mother appealed the termination order on February 21, 2017, and her appeals were consolidated.

DISCUSSION

A. *Order Summarily Denying Section 388 Petition*

Mother contends the court erred in summarily denying her section 388 petition. As explained below, we disagree.

“Section 388 permits ‘[a]ny parent or other person having an interest in a child who is a dependent child of the juvenile court’ to petition ‘for a hearing to change, modify, or set aside any order of court previously made . . .’ on grounds of ‘change of circumstance or new evidence.’” (*In re Lesly G.* (2008) 162 Cal.App.4th 904, 912, quoting § 388, subd. (a).) A section 388 petition may be filed and heard at any time, up to and including the time of the section 366.26 hearing. (*In re Marilyn H.* (1993) 5 Cal.4th 295, 308-309.) “A petition for modification must be liberally construed in favor of its sufficiency.” (Rules of Court, rule 5.570(a).) However, “[t]o support a section 388 petition, the change in circumstances must be substantial.” (*In re Ernesto R.* (2014) 230 Cal.App.4th 219, 223.) Moreover, “[o]nce reunification

⁹ In her notice of appeal, Mother stated she arrived 15 minutes late for the hearing.

services are ordered terminated, the focus shifts [from reunification] to the child’s need for permanency and stability,” and a presumption arises that “continued care [under the dependency system] is in the best interest of the child.” (*In re Marilyn H.*, *supra*, at pp. 309-310.) After reunification services are terminated, inquiry into a child’s best interests include consideration of his or her need for permanency and stability. (*In re J.C.* (2014) 226 Cal.App.4th 503, 526-527.)¹⁰

¹⁰ Mother contends the court in *J.C.* was wrong to emphasize the children’s need for permanence and stability over other factors that have been found to be significant. (See, e.g., *In re Amber M.* (2002) 103 Cal.App.4th 681, 685, citing *In re Kimberly F.* (1997) 56 Cal.App.4th 519, 530 [“The juvenile court may modify an order if a parent shows, by a preponderance of the evidence, changed circumstance or new evidence and that modification would promote the child’s best interests. [Citations.] This is determined by the seriousness of the problem leading to the dependency and the reason for its continuation; the strength of the parent-child and child-caretaker bonds and the time the child has been in the system; and the nature of the change of circumstance, the ease by which it could be achieved, and the reason it did not occur sooner”].) Mother points out that the court in *J.C.* “declined to apply” the *Kimberly F.* factors because, in its view, they failed to give “full consideration” to the shift in focus that occurs after reunification services are terminated. We do not perceive the *Kimberly F.* factors to be incompatible with the test applied in *J.C.*, as *Kimberly F.* required the court to consider such factors as the time the child had been in the system and his or her bond with the caretaker. To the extent they cannot be harmonized, we agree with *J.C.* that the child’s need for permanence and stability should take precedence when the
(*Fn. is continued on the next page.*)

On receipt of a section 388 petition, the court may either summarily deny the petition or order a hearing held. (*In re Lesly G.*, *supra*, 162 Cal.App.4th at p. 912.) The petition will be summarily denied unless the petitioner makes a prima facie showing in his or her favor. (*Ibid.*) ““There are two parts to the prima facie showing: The parent must demonstrate (1) [either] a genuine change of circumstances or new evidence, and . . . (2) [that] revoking the previous order would be in the best interests of the [child]. [Citation.]” (*In re C.J.W.* (2007) 157 Cal.App.4th 1075, 1079; accord, *In re G.B.* (2014) 227 Cal.App.4th 1147, 1157; see Rules of Court, rule 5.570(d)(1) & (2).) “If the liberally construed allegations of the petition do not show changed circumstances such that the child’s best interests will be promoted by the proposed change of order, the dependency court need not order a hearing.” (*In re C.J.W.*, *supra*, at p. 1079.) We review the juvenile court’s summary denial of a section 388 petition for abuse of discretion. (*In re C.J.W.*, *supra*, at p. 1079.)

Here, the children’s interest in permanency and stability would not have been served by the requested change in the order. At the time Mother filed the petition, the children had been involved in dependency proceedings

parent submits a petition for modification after reunification services have been terminated, particularly where, as here, the children have been waiting for permanence and stability for many years.

for over two and a half years, and had been out of Mother's custody for over a year. Y. had virtually no relationship with her, having been cared for by others since her birth.

Jennifer was in a similar situation, as she was not yet two when Mother and Y. tested positive for methamphetamine, the subsequent petition was filed, and she and her siblings were detained. At the time of the petition, there were two families offering the children stability and permanency: the foster mother who had cared for them since August 2015 wished to become their permanent guardian, and a prospective adoptive family had been identified.

Nor did other factors militate in favor of the petition. From the beginning of the case, Mother was slow to comply with court orders or simply disregarded them, and was not honest with DCFS. She did not complete the domestic violence program until January 2015. She did not present evidence of completing the parenting class ordered in 2014 until the petition for modification was filed. Not long after the original petition was adjudicated and while receiving family maintenance services, Mother secretly met with Jose, despite the existence of a restraining order. She repeatedly denied doing so, and continued to cover up their relationship even after becoming pregnant. Mother also attempted to cover up her serious methamphetamine problem.¹¹ After the

¹¹ Although there was only a single positive test, the evidence supported the inference that Mother was using regularly. She refused to drug test in November 2014, when the issue first arose. She missed multiple tests between August 2015 and
(*Fn. is continued on the next page.*)

substance abuse problem came to light in July 2015 and the children were detained, she waited six months before enrolling in a program. The petition presented evidence the Mother had successfully completed the drug program and tested drug free for seven months. But even assuming she had not devised a new way to cheat the tests, the fact that she was able to remain drug free while in a substance abuse program was not evidence that she could maintain long-term sobriety. The court was not required to disrupt the children's lives at that late stage of the proceeding in the hope that she would.

Mother claims that this court's decision in *In re Hashem H.* (1996) 45 Cal.App.4th 1791 supports the existence of a prima facie case. In *Hashem H.*, the mother had been successfully participating in therapy for 18 months, was having conjoint counseling with her son, and had a recommendation from her counselor that her son be returned to her custody. (*Id.* at p. 1799.) Mother's petition indicated she had just completed a six-month substance abuse program. She had no letters from any of the

January 2016. She was found to be using a cheat device in April 2016. In addition, several witnesses attested to behavior indicative of substance abuse. Bertha described Mother sleeping late and neglecting the children, theorizing she might be drinking. Norma confirmed that Mother habitually slept late and believed her "confused" behavior was the result of being "under the influence" of something. The foster parents with whom the children had been placed in 2015 described her as fidgety and inattentive during visits.

counselors in the program or a therapist suggesting she was ready to take custody of the children. Under these circumstances, the court did not abuse its discretion in summarily denying her petition.

B. Order Terminating Parental Rights

Mother contends the juvenile court's conclusion that no exception to termination of parental rights existed was erroneous. She contends the court should have found applicable the exception of section 366.26, subdivision (c)(1)(B)(i), precluding termination of parental rights where "[t]he parents have maintained regular visitation and contact with the child and the child would benefit from continuing the relationship." Mother did not raise this issue at the hearing and has, therefore, forfeited it. As the court explained in *In re Erik* (2002) 104 Cal.App.4th 395, 403: "The application of any of the exceptions enumerated in section 366.26 subdivision (c)(1) depends entirely on a detailed analysis of the relevant facts by the juvenile court. [Citations.] If a parent fails to raise one of the exceptions at the hearing, not only does this deprive the juvenile court of the ability to evaluate the critical facts and make the necessary findings, but it also deprives this court of a sufficient factual record from which to conclude whether the trial court's determination is supported by substantial evidence." (*Ibid.*)

Even were we to review the matter on the merits, we would not reverse the juvenile court's termination order.

Satisfying the section 366.26, subdivision (c)(1)(B)(i) exception “requires the parent to prove that ‘severing the natural parent-child relationship would deprive the child of a substantial positive emotional attachment such that the child would be greatly harmed,’” and that the relationship ““promotes the well-being of the child to such a degree as to outweigh the well-being the child would gain in a permanent home with new, adoptive parents.”” (*In re Marcelo B.* (2012) 209 Cal.App.4th 635, 643, italics omitted.) “A biological parent who has failed to reunify with an adoptable child may not derail an adoption merely by showing the child would derive some benefit from continuing a relationship maintained during periods of visitation with the parent.” (*In re Angel B.* (2002) 97 Cal.App.4th 454, 466.) “[A] parental relationship is necessary for the exception to apply, not merely a friendly or familiar one.” (*In re Jasmine D.* (2000) 78 Cal.App.4th 1339, 1350.) “[A] child needs [a] parent. Where a biological parent . . . is incapable of functioning in that role, the child should be given every opportunity to bond with an individual who will assume the role of a parent.” (*Ibid.*) The record indicated Mother was visiting the children regularly, and had a bond with them. Nothing indicated that the children would be greatly harmed by severing that bond or that it outweighed the benefit the children would receive by being adopted into a permanent home.

DISPOSITION

The order denying the petition for modification and the order terminating parental rights are affirmed.

**NOT TO BE PUBLISHED IN THE OFFICIAL
REPORTS**

MANELLA, J.

We concur:

EPSTEIN, P. J.

WILLHITE, J.