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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

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

B239463  
(Los Angeles County Super. Ct.  
No. CK74499)

LOS ANGELES COUNTY  
DEPARTMENT OF CHILDREN AND  
FAMILY SERVICES,

Plaintiff and Respondent,

v.

L.M.,

Defendant and Appellant.

APPEAL from the orders of the Superior Court of Los Angeles County,  
Jacqueline H. Lewis, Juvenile Court Referee. Affirmed.

Kimberly A. Knill, under appointment by the Court of Appeal, for Defendant and  
Appellant.

John F. Krattli, County Counsel, James M. Owens, Assistant County Counsel, and  
Jessica Paulson-Duffy, Associate County Counsel, for Plaintiff and Respondent.

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L.M. (mother) appeals from orders denying her petition under section 388 of the Welfare and Institutions Code<sup>1</sup> and terminating parental rights to daughter Milagros. She contends denial of the section 388 petition was an abuse of discretion and substantial evidence does not support the order terminating parental rights. We affirm.

## **FACTS AND PROCEDURAL HISTORY**

Milagros was born in Mexico in 2005 to mother and H.P. (father), who were married but did not live together. The parents engaged in domestic violence. A methamphetamine user, mother gave birth to Milagros prematurely. On numerous occasions, while Milagros was in her sole care, mother packaged and sold methamphetamine in Milagros's presence.

In December 2008, mother was arrested when she was found in the home in possession of narcotics for sale and narcotics packaging materials. She denied past or current substance abuse and claimed no knowledge of the drugs. Milagros was detained in the care of maternal grandmother, and a section 300 petition was filed.

On January 15, 2009, Milagros was declared a dependent of the court, based on sustained allegations under section 300, subdivision (b), that Milagros was at substantial risk of suffering serious physical harm as a result of mother's failure to adequately supervise her and mother's inability to provide regular care due to substance abuse. Father's whereabouts were unknown. Custody was taken from mother, reunification services were ordered, and monitored visitation was granted twice a week. Mother was ordered to participate in counseling, a parent education program, a drug treatment program, and drug testing.

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

On May 1, 2009, mother was convicted of possession of controlled substance with intent to sell (Health & Saf. Code, § 11378). She was sentenced to 3 years formal probation and 180 days in jail. She was released from custody on July 9, 2009.

On July 15, 2009, the dependency court reduced mother's visitation to once a month and added the requirement that she participate in Alcoholics Anonymous ("AA") or Narcotics Anonymous ("NA") and provide proof of attendance.

Mother failed to reunify with Milagros. On May 5, 2010, reunification services were terminated and a section 366.26 hearing to determine a permanent plan was set ("setting order"). She had made no progress in rehabilitation. Most of her drug tests were positive,<sup>2</sup> she did not participate in counseling or drug rehabilitation, and she did not visit the child regularly. Mother denied she had ever used drugs. She threatened to kidnap Milagros and return to Mexico.

In early 2011, mother gave birth to another child, who was placed in the home of maternal grandmother. The baby was a dependent of the court in Orange County.

Mother was incarcerated from January to May 2011 after violating probation. She remained on probation after her release.

Milagros had a strong attachment to maternal grandmother and thrived in her home. Both Milagros and maternal grandmother wanted maternal grandmother to adopt Milagros. Milagros did not want to reside with mother.

On January 27, 2012, mother filed a petition under section 388 to vacate the setting order and for return of the child to her custody or further reunification services. Mother enrolled in a drug program in July 2011, and she expected to graduate in May or June 2012. All drug tests were clean, except for one missed test in August 2011 and another in September 2011. She had one monitored visit per week. Mother denied the facts underlying her conviction for drug possession with intent to sell, and she denied she participated in domestic violence, threatened to kidnap Milagros, or placed Milagros at

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<sup>2</sup> She missed almost all tests, and the Department considered a missed test a positive test.

risk at any time. She did not present proof of attendance in AA or NA. She alleged the requested modifications were in the child's best interest, in that the child was young and would benefit from a good relationship with mother.

On January 30, 2012, the section 388 petition was heard and denied. The dependency court found that being halfway through a 12-month drug program was not a substantial change of circumstance. "[M]other's testimony today . . . that none of the allegations were true to begin with[] doesn't lead this court to believe that she's made any real progress here. [¶] It appears that the only reason that she is participating in a program . . . is to stay out of jail." "[Concerning] Milagros's best interests, [Milagros has] been pretty clear[] for quite an extended period of time[] that she wants to remain with her grandmother. . . . [T]here's no showing that . . . it would be in Milagros's best interests . . . to even take the chance of waiting to see whether mother [is] going to finish her program here or not and be able to provide [a] clean and stable situation for her daughter."

The dependency court terminated parental rights on February 14, 2012, after finding the child is adoptable and the exception to adoption in section 366.26, subdivision (c)(1)(B)(i) does not apply. Mother testified she had a monitored visit with Milagros once a week for two hours and talked to her on the telephone once a day. She visited with Milagros's half-sibling at the same time. The court found that "the reason mother's visitations are limited [is because] mother has spent the last, almost, three years without complying with the case plan. [¶] . . . [Mother sees] the maternal grandmother as a baby-sitter. . . . She can go out and do what she wants. Her child is taken care of, provided money, medical care, and everything else. 'I don't want to actually have to take care of my drug problem,' although she's started in the last few months, 'but don't terminate my parental rights.'" "It is clear to me in this case that it is the maternal grandmother who meets the physical and emotional needs of Milagros on a daily basis, not the mother[.] Certainly, at least until recently, mother has been busy in her drug lifestyle. . . . [Mother has not] presented evidence showing that the benefits of maintaining her . . . relationship with Milagros outweigh those of giving this child

permanence.” “This court is not . . . a baby-sitting service. It is a place where, if the child is at risk, we remove them. We make every attempt to reunite a family[.]” [¶] . . . [I]f a parent chooses a different kind of lifestyle versus reuniting with the child, which certainly mother did here, then it’s the court’s obligation to look for the most stable and permanent home for a child. . . . [A]doption is absolutely that most stable and permanent home.”

## DISCUSSION

### I. Denial of Mother’s Section 388 Petition Was Not an Abuse of Discretion

Mother contends denial of her section 388 petition was an abuse of discretion. We conclude the dependency court did not abuse its discretion.

Under section 388,<sup>3</sup> the dependency court should modify an order if circumstances have changed such that the modification would be in the child’s best interest. (*In re Kimberly F.* (1997) 56 Cal.App.4th 519, 526 & fn. 5.) We review the ruling for abuse of discretion. (*In re Michael B.* (1992) 8 Cal.App.4th 1698, 1704.) “‘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.’ [Citations.]” (*In re Stephanie M.* (1994) 7 Cal.4th 295, 318-319.) Abuse of discretion is established if the determination is not supported by substantial evidence. (*Michael U. v. Jamie B.* (1985) 39 Cal.3d 787, 796.) In determining whether substantial evidence supports the factual findings, “all intendments are in favor of the judgment and [we] must accept as true the

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<sup>3</sup> Section 388 provides in pertinent part that a parent “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 may be promoted by the proposed change of order, . . . the court shall order that a hearing be held . . . .”

evidence which tends to establish the correctness of the findings as made, taking into account as well all inferences which might reasonably have been drawn by the trial court.” (*Crogan v. Metz* (1956) 47 Cal.2d 398, 403-404.) The party requesting the change of order has the burden of proof. (*In re Michael B.*, *supra*, at p. 1703.)

Once reunification services are terminated, the focus shifts from reunification to the child’s need for permanency and stability. (*In re Marilyn H.* (1993) 5 Cal.4th 295, 309.) For a parent “to revive the reunification issue,” the parent must prove under section 388 that circumstances have changed such that reunification is in the child’s best interest. (*In re Marilyn H.*, *supra*, 5 Cal.4th at pp. 309-310.) “[O]ur Supreme Court made it very clear in [*In re Jasmon O.* (1994) 8 Cal.4th 398, 408, 414-422] that the disruption of an existing psychological bond between dependent children and their *caretakers* is an extremely important factor bearing on any section 388 motion.” (*In re Kimberly F.*, *supra*, 56 Cal.App.4th at p. 531.) Moreover, time is of the essence, especially to young children; when it comes to securing a stable, permanent home for children, prolonged uncertainty is not in their best interest. (*In re Josiah Z.* (2005) 36 Cal.4th 664, 674 [“‘There is little that can be as detrimental to a child’s sound development as uncertainty over whether he is to remain in his current ‘home,’ under the care of his parents or foster parents, especially when such uncertainty is prolonged.’ [Citation.]”].) “Childhood does not wait for the parent to become adequate.” (*In re Marilyn H.*, *supra*, at p. 310.)

When reunification services were terminated, mother was using drugs, and she was not enrolled in a drug treatment program, testing clean, or participating in AA or NA. She denied the truth of the allegations of the sustained section 300 petition. Visitation was monitored. She was on probation. She threatened to kidnap Milagros. When the section 388 petition was heard, a year and a half later, mother still denied the allegations of the petition. She denied threatening to kidnap Milagros. She had not completed a drug treatment program and presented no proof of attendance in AA or NA. She missed a drug test within four months of the hearing. Visitation with Milagros remained monitored and was only once per week. Mother violated probation, spent months in jail, and was back on probation. Her second child was a court dependent. This is substantial

evidence supporting the dependency court’s finding on the first prong of section 388 that circumstances had not changed.

Reinstating mother’s reunification services would delay permanency for this young child, whose status was in limbo for more than three years. Milagros was bonded to her caretaker, wanted to be adopted by her, and did not want to reunify with mother. The dependency court did not abuse its discretion in concluding that whatever progress mother was making did not make delaying permanency in Milagros’s best interest.

## **II. Substantial Evidence Supports the Finding That the Exception in Section 366.26, subdivision (c)(1)(B)(i), Does Not Apply**

Mother contends the dependency court abused its discretion in terminating parental rights, because she presented sufficient evidence of the exception to termination under section 366.26, subdivision (c)(1)(B)(i). We disagree with the contention.

We apply the substantial evidence rule to review her challenge to the finding the exception did not apply. (*In re L. Y. L.* (2002) 101 Cal.App.4th 942, 947; *In re Autumn H.* (1994) 27 Cal.App.4th 567, 576; compare *In re Aaliyah R.* (2006) 136 Cal.App.4th 437, 449 [abuse of discretion standard of review].)<sup>4</sup> If supported by substantial evidence, the judgment or finding must be upheld, even though substantial evidence may also exist

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<sup>4</sup> “The practical differences between the two standards of review [substantial evidence and abuse of discretion] are not significant. ‘[E]valuating the factual basis for an exercise of discretion is similar to analyzing the sufficiency of the evidence for the ruling. . . . Broad deference must be shown to the trial judge. The reviewing court should interfere only “if [it] find[s] that under all the evidence, viewed most favorably in support of the trial court’s action, no judge could reasonably have made the order that he did.’ . . .” [Citations.] However, the abuse of discretion standard is not only traditional for custody determinations, but it also seems a better fit in cases like this one, especially since the statute now requires the juvenile court to find a ‘compelling reason for determining that termination would be detrimental to the child.’ (§ 366.26, subd. (c)(1)(B)). That is a quintessentially discretionary determination. The juvenile court’s opportunity to observe the witnesses and generally get ‘the feel of the case’ warrants a high degree of appellate court deference.” (*In re Jasmine D.* (2000) 78 Cal.App.4th 1339, 1351.)

that would support a contrary judgment and the dependency court might have reached a different conclusion had it determined the facts and weighed credibility differently. (*In re Dakota H.* (2005) 132 Cal.App.4th 212, 228.) Thus, the pertinent inquiry when a finding on the section 366.26, subdivision (c)(1)(B)(i), exception is challenged is whether substantial evidence supports the finding, not, as mother argues, whether a contrary finding might have been made. “We do not reweigh the evidence or exercise independent judgment, but merely determine if there are sufficient facts to support the findings of the trial court. [Citations.] “[The] [appellate] court must review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence . . . such that a reasonable trier of fact could find [that the order is appropriate].” [Citations.]” (*In re Matthew S.* (1988) 201 Cal.App.3d 315, 321; see also *In re Dakota H., supra*, at p. 228 [“[w]e do not reweigh the evidence”].)

Under section 366.26, subdivision (c)(1)(B)(i), if reunification services have been terminated and the child is adoptable, the dependency court must terminate parental rights unless it “finds a compelling reason for determining that termination would be detrimental to the child due to [the circumstance that the parent has] [¶] . . . maintained regular visitation and contact with the child and the child would benefit from continuing the relationship.”

Once reunification services are ordered terminated, the focus shifts to the needs of the child for permanency and stability.’ [Citation.] . . . ‘The Legislature has declared that California has an interest in providing stable, permanent homes for children who have been removed from parental custody and for whom reunification efforts with their parents have been unsuccessful.’ [Citation.]” (*In re Celine R.* (2003) 31 Cal.4th 45, 52-53.) “At this stage of the proceedings, if an appropriate adoptive family is or likely will be available, the Legislature has made adoption the preferred choice. [Citation.]” (*Id.* at p. 49; see also § 366.26, subd. (b)(1) [adoption is the preferred plan].) “[I]t becomes inimical to the interests of the [child] to heavily burden efforts to place the child in a permanent alternative home.’ [Citation.] The statutory exceptions merely permit the



court, in *exceptional circumstances* [citation], to choose an option other than the norm, which remains adoption.” (*In re Celine R.*, *supra*, at p. 53.)

“[T]he exception does not permit a parent who has failed to reunify with an adoptable child to 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 Jasmine D.* (2000) 78 Cal.App.4th 1339, 1348.) The type of parent-child relationship that triggers the exception is a relationship which “‘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. . . .’ [Citation.]” (*In re Brandon C.* (1999) 71 Cal.App.4th 1530, 1534; accord, *In re Jasmine D.*, *supra*, at pp. 1347-1350.)

Substantial evidence supports the finding that no exceptional circumstances existed under section 366.26, subdivision (c)(1)(B)(i) that required depriving Milagros of a permanent, adoptive home.

Regarding the second prong<sup>5</sup>—Milagros would benefit from continuing the relationship with mother—substantial evidence establishes that mother’s relationship with Milagros did not promote her well-being “‘to such a degree as to outweigh the well-being the child would gain in a permanent home with [a] new, adoptive parent[. . . .]’ [Citation.]” (*In re Brandon C.*, *supra*, 71 Cal.App.4th at p. 1534.) Maternal grandmother, who provided Milagros with a safe, stable, loving home for half her life, wanted to adopt Milagros. Mother’s care had exposed Milagros to grave risks and insecurities: trafficking in methamphetamine; a risk of caretaker absence due to criminal activity; domestic violence; and a drug-abusing lifestyle. Mother continued to deny her role in endangering Milagros. After she was detained in maternal grandmother’s care, Milagros had very little contact with mother. Milagros learned to turn to maternal grandmother to play the parental role. Milagros did not want to live with mother; she wanted maternal grandmother to adopt her. These facts indicate Milagros did not have an

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<sup>5</sup> Regarding the first prong of the exception, the dependency court found mother had maintained regular contact with Milagros.

important bond with mother. The conclusion reached by the dependency court that no compelling reason existed to conclude termination of parental rights would be detrimental is amply supported by substantial evidence and not an abuse of discretion.

### **DISPOSITION**

The order is affirmed.

KRIEGLER, J.

We concur:

TURNER, P. J.

MOSK, J.