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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

In re DRAKE S., a Person Coming Under  
the Juvenile Court Law.

LOS ANGELES COUNTY  
DEPARTMENT OF CHILDREN AND  
FAMILY SERVICES,

Plaintiff and Respondent,

v.

DRAKE S.,

Defendant and Appellant.

B234149

(Los Angeles County  
Super. Ct. No. CK64912)

APPEAL from the judgment of the Superior Court of Los Angeles County.  
Debra Losnick, Commissioner. Affirmed.

Cristina Gabrielidis Lechman and Lechman & Lechman, under appointment by  
the Court of Appeal, for Defendant and Appellant.

Andrea Sheridan Ordin, County Counsel, James M. Owens, Assistant County  
Counsel, and Frank J. DaVanzo, Principal Deputy County Counsel, for Plaintiff and  
Respondent.

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## INTRODUCTION

Derrick S. (father) is the father of Drake S. Father appeals a juvenile court order denying his petition under section 388 of the Welfare and Institution Code.<sup>1</sup> Finding no abuse of discretion, we affirm the court's order.

## FACTS AND PROCEDURAL HISTORY

### A. *Petition and Jurisdiction*

Drake was born prematurely and in frail health in February 2009. Both he and his mother (T.W.) tested positive for cocaine. Mother had used cocaine that same day and did not even realize she had given birth to Drake. She admitted she had a history of drug abuse and could not care for her newborn. Father was a drug dealer and drug abuser, and had a long criminal history related to his drug abuse. They both had other children who had been declared dependents of the juvenile court for reasons related to the parents involvement with drugs. As a result, the Department of Children and Family Services (DCFS) detained Drake in the hospital's intensive care unit and commenced dependency proceedings.

At the May 2009 jurisdiction hearing, the juvenile court sustained allegations that the parents' had an extensive history of drug abuse, Drake was born with cocaine in his system, and mother had failed to reunify with her three older children due to her drug abuse, thus placing Drake at risk of physical and emotional harm. The juvenile court ordered mother and father to attend parenting classes and a drug rehabilitation program with random testing. Both parents were allowed monitored visitation with Drake, who at the age of two months was released from the hospital to foster care with Mary S.

### B. *Six-Month Review Hearing*

The social worker reports leading to the juvenile court's six-month review hearing showed both parents had enrolled in outpatient drug treatment programs. Father had

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<sup>1</sup> All code references are the Welfare and Institutions Code.

completed parenting classes and his drug treatment program on October 22, 2009. His drug tests were negative, with the exception of one test where he could not provide a sample, and another where he failed to show up for testing. But just one week after he completed his drug treatment program, father relapsed and tested positive for cocaine and marijuana.

Father's monitored visits with Drake were now unmonitored. But Drake's foster mother was concerned that father was not feeding Drake properly because he returned with most of the food that she had sent along for the visit. Father's visits reverted to monitored after he tested positive for cocaine and marijuana on October 28, 2009.

At the sixth-month review hearing on November 12, 2009, the juvenile court allowed the parents six more months of reunification services.

### **C. *12-Month Review Hearing***

By the time of the 12-month review hearing in May 2010, Drake was happy and doing well in the care of his foster mother, Mary, who was interested in adopting Drake if his parents failed reunify with him.

After he tested positive for cocaine in October 2009, father entered a relapse program. His drug tests were negative, but he had two diluted tests in January, failed to appear for one test in March, and in March tested positive for alcohol (at a level of 0.04 percent). The social worker was concerned with possible drug use and another relapse because father never had diluted tests until after he relapsed in October 2009. Another concern was father's continued relationship with mother, raising doubts as whether he was able to protect Drake from mother's continued drug use. Father would not commit to intervene on Drake's behalf if mother was using drugs.

At the May 2010 review hearing, the juvenile court concluded the parents, who had been entitled to only six months of services, were not in a position to care for Drake. The court terminated services and scheduled a section 366.26 hearing. Both mother and father filed writ petitions challenging the court's ruling, which we denied. (Case No. B224646.)

***D. Section 366.26 Hearing***

For the section 366.26 hearing, the social worker's report indicated Drake remained with his foster mother, the only mother he had ever known. The social worker noted that Mary had been a foster parent for over five years and had fostered many children. Mary was committed to providing Drake with a stable, safe, and loving home. The social worker recommended that the juvenile court terminate parental rights as soon as Mary's adoption home study was approved. The juvenile court therefore continued the hearing pending the home study and ordered that Drake not be removed from Mary's home.

At the continued section 366.26 hearing, DCFS reported that Mary's home study would not be approved based upon allegations by another foster child that Mary had spent a night outside her home while leaving that foster child to look after Drake. Thus, DCFS recommended that Drake be removed from Mary's home. DCFS indicated that because Drake was a highly adoptable child and his paternal grandmother's application to adopt him was pending, parental rights should be terminated upon approval of a home study. Drake's counsel argued against Drake's removal from the only home he had ever known, noting Mary disputed the allegations and even asked for de facto parent status. (RT 134-135.)

The juvenile court agreed with Drake's counsel, pointing out there was no indication of an emergency requiring Drake to be removed from Mary's home and that Mary should be given a chance to give her side of the story. The court ordered Mary to not allow anyone else to care for Drake and continued the hearing.

***E. Father's Section 388 Petition***

In December 2010, father filed a section 388 petition asking the juvenile court to modify its previous order terminating reunification services. Father asked for further reunification services with Drake, with the goal that he be placed in father's home. Father argued he could provide permanence for Drake and that he would receive support

from his extended family. Father supported the petition with a letter from his case manager at Now and Forever Foundation, his outpatient drug and alcohol program. The manager indicated father had attended 19 drug relapse prevention sessions since his enrollment on June 1, 2010, that he had a positive attitude toward treatment, and had been “taking full responsibility for his old behaviors and actions.”

In advance of the April hearing on father’s petition, DCFS reported that father could not demonstrate he was free from drug use because he continued to give diluted drug tests. The department was also concerned that father had no permanent address. Father had given four diluted tests since reunification services were terminated, the most recent on February 10, 2011. A technician from the toxicology laboratory reported that a “diluted test” is invalid and usually occurs when the subject has taken too much liquid prior to the test. DCFS continued to be concerned with Drake’s safety if he were returned to father who continued to have a relationship with mother, and mother had yet to complete a drug program. It also appeared father was still using drugs based upon the diluted tests.

At the section 388 hearing, Brenda Hanssen, the supervising social worker, testified that DCFS was recommending father’s petition be denied because he had (1) been given over two years to reunify with Drake, but had failed to do so; (2) completed one rehabilitation program, only to test positive for drugs, then re-do the same program; (3) recently submitted diluted drug tests; and (4) demonstrated a lack of stability in his residence. Hanssen testified that the day prior to the hearing father had called to inform her he had found a place to rent and would occasionally stay with his mother. But prior to this call, father had not had a stable residence and she did not know the location of the new residence or if father was employed. She indicated Drake deserved a permanent home and that the plan was to find him an adoptive family.

Father testified he was no longer using drugs or alcohol, that he was attending a drug and alcohol program at Now and Forever Foundation one or twice per week, and that he also attended Narcotics Anonymous (NA) with his sponsor. Father stated he would drink water when he appeared for his drug test, as instructed, and denied drinking

too much in order to wash alcohol or drugs out of his system. He indicated he had moved into a two-bedroom condominium with a friend in the past month or month and a half and also had been working at a moving company for two months. Father denied that he was still in a relationship with mother and said he regularly visits with Drake at the offices of DCFS.

The juvenile court denied father's petition, finding he had failed to show a sufficient change in circumstances. The court stated father had been trying to reunify with Drake for 26 months, yet only very recently had he obtained employment and a residence. The court indicated that based upon father's long history of drug use it could not rely on his diluted drug tests as proof that he was free of substance abuse. The court did not believe that drinking water immediately before a test produced the four diluted drug test results.

This appeal followed.

## **DISCUSSION**

### **A. *Standard of Review***

“A juvenile court order may be changed, modified or set aside under section 388 if the petitioner establishes by a preponderance of the evidence that (1) new or changed circumstances exist, and (2) the proposed change would promote the best interest of the child. [Citation.]” (*In re S.J.* (2008) 167 Cal.App.4th 953, 959.) “The parent bears the burden to show both “a legitimate change of circumstances” and that undoing the prior order would be in the best interest of the child. [Citation.] The petition is addressed to the sound discretion of the juvenile court, and its decision will not be overturned on appeal in the absence of a clear abuse of discretion. [Citation.]” (*Id.* at pp. 959-960; see also *In re B.C.* (2011) 192 Cal.App.4th 129, 141.)

**B.     *The Juvenile Court Did Not Abuse Its Discretion***

Father claims the juvenile court erred in concluding he was still using drugs based upon the four diluted tests and that the court should have considered the fact that DCFS was asking the court to move Drake from Mary's home. We disagree.

Father testified that he believed the tests were diluted because he had been instructed to drink water at the testing site. But there is no evidence drinking such water caused the diluted tests. The technician from the toxicology laboratory reported that if a person cannot provide a sample at the testing site, he will have the person drink something to produce a sample. He emphasized "this will not affect the testing" and that a person "has to drink a lot of liquid to get a diluted test." The technician said sometimes a person drinks too much fluid in order to purposefully "water down" the test. There was no evidence that father had been instructed to drink excessive amounts of liquid when submitting his drug tests or that there was an innocent explanation for the four diluted test results.

Given the circumstances, the reasonable inference from the evidence was that father had purposefully diluted the tests. The juvenile court was entitled to weigh all of this evidence and question father's credibility as to his drug use, a determination to which we must defer. (See *In re Angelia P.* (1981) 28 Cal.3d 908, 924; *In re Sheila B.* (1993) 19 Cal.App.4th 187, 199-200.) Father simply failed to shoulder his burden that a significant change of circumstances justified modifying the order terminating reunification services. (See *Ansley v. Superior Court* (1986) 185 Cal.App.3d 477, 486 [change of circumstances or new evidence must be of a significant nature].)

Likewise, father failed to demonstrate that more reunification services or Drake's eventual return was in Drake's best interest. In any given case, "[i]t 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. [Citation.]" (*In re Kimberly F.* (1997) 56 Cal.App.4th 519, 529.) Also, "A petition which alleges merely changing circumstances and would mean delaying the selection of a permanent home for a child to see if a parent, who has repeatedly failed to reunify with

the child, might be able to reunify at some future point, does not promote stability for the child or the child's best interests. [Citation.] “[C]hildhood does not wait for the parent to become adequate.” [Citation.]” (*In re Casey D.* (1999) 70 Cal.App.4th 38, 47.)

As the juvenile court concluded, father had been seeking to reunify with Drake for 26 months. Despite this extended period of time, father only *very* recently obtained a job and a stable residence, and the evidence indicated father had still not overcome his long history of drug addiction. Based upon the evidence in the record, the court was entitled to conclude that waiting even longer to see if father might be able to reunify with Drake would not promote stability for Drake or be in his best interest.

We reject father’s contention that the juvenile court should have granted his petition because Drake was going to be moved out of Mary’s home and by default he would have the most meaningful relationship with Drake. The court specifically declined to factor Drake’s possible move from Mary’s custody into the section 388 ruling because a decision had yet to be made on that issue. We believe the juvenile court acted properly for the very reason it gave. In an event, father’s argument overlooks the fact that he failed to shoulder his burden of proof under section 388, and even if the court knew Drake would eventually be removed from Mary’s home, it would only be for the purpose of placing him in an adoptive home with the stability Drake deserved. Not only had Drake’s grandmother’s applied for adoption, but six other families had been approved as adoption families for Drake.

In sum, father has failed to demonstrate the juvenile court abused its discretion in denying his section 388 petition.



## **DISPOSITION**

The juvenile court's order denying father's section 388 petition is affirmed.

RUBIN, Acting J.

WE CONCUR:

FLIER, J.

GRIMES, J.