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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

In re GRACE P. et al., Persons  
Coming Under the Juvenile Court  
Law.

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LOS ANGELES COUNTY  
DEPARTMENT OF CHILDREN  
AND FAMILY SERVICES,

Plaintiff and Respondent,

v.

MARCO P.,

Defendant and Appellant.

B284585

(Los Angeles County  
Super. Ct. No. DK00969)

APPEAL from orders of the Superior Court of Los Angeles  
County, Robert Draper, Judge. Affirmed.

Jacques A. Love, under appointment by the Court of  
Appeal, for Defendant and Appellant.

Mary C. Wickham, County Counsel, R. Keith Davis,  
Assistant County Counsel, and Jessica S. Mitchell, Deputy  
County Counsel, for Plaintiff and Respondent.

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## INTRODUCTION

Father, Marco P., appeals from an order summarily denying his petition to modify prior dependency orders pursuant to Welfare and Institutions Code<sup>1</sup> section 388, and a subsequent order terminating his parental rights under section 366.26. He contends his section 388 petition presented a prima facie showing of the elements necessary to warrant modification, and the juvenile court abused its discretion by denying the petition without an evidentiary hearing on the merits. And he argues the ruling on the section 388 petition “infected” the subsequent section 366.26 proceeding, such that the order terminating his parental rights also must be reversed. We conclude the court’s ruling on the section 388 petition was supported by the record and within the legal standards authorizing summary denial of a section 388 petition. Accordingly, we affirm both orders.

## FACTS AND PROCEDURAL BACKGROUND

Consistent with our standard of review, we state the record in the light most favorable to the juvenile court’s decision, drawing all reasonable inferences from the facts in support of the court’s ruling. (*In re Stephanie M.* (1994) 7 Cal.4th 295, 318-319.)

### 1. *Termination of Reunification Services for Father’s Three Older Children*

The children, Grace P. (born October 2010), Marco P. (born October 2011), and Michael P. (born January 2014), were subjects of a prior appeal decided by this court.<sup>2</sup> While the appeal was

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<sup>1</sup> Statutory references are to the Welfare and Institutions Code, unless otherwise designated.

<sup>2</sup> Father and Mother filed the prior appeal in May 2016. The appeal resulted in a published decision by a different panel of this court. (*In re Grace P.* (2017) 8 Cal.App.5th 605.) Mother is not a party to this appeal.

pending, the parents had a fourth child, Mario P. (born May 2016), who became the subject of a subsequent dependency action.

In September 2013, the juvenile court detained Grace and Marco after concluding they were at high risk of abuse due to the parents' ongoing domestic violence, Father's abuse of marijuana, their exposure to Father's drugs, and Father's gang-related activities (Father is a member of the Mara Salvatrucha gang). Because Mother continued to associate with Father, the court detained Michael in February 2014, shortly after his birth. In April 2014, the children were adjudged dependents of the juvenile court as a result of the parents' domestic violence and Father's abuse of marijuana.

Upon detention, the Department of Children and Family Services (the Department) assessed that the two older children had serious mental health, emotional, and developmental issues. It placed all three children in the same foster home and enrolled them in therapy and services to address their mental health, behavioral, and developmental needs. Over the course of the nearly three years preceding the prior appeal, the children's issues were largely corrected via participation in these services and the nurturing environment created by the foster family. The children, however, never reunited with their parents. On November 19, 2015, the juvenile court terminated reunification services and ordered the Department to initiate an adoptive home study for the children.

During the same period, Father was in and out of jail as a result of his gang activities. Although he completed a substance abuse program, he did not complete the court-ordered domestic violence counseling or drug testing. His weekly visitation with all three children remained monitored throughout the case, but was consistent. Early on, the visits were three hours per week. The

foster parent, who monitored the visits, reported Father was always on time, interacted well with the three children and that he was attuned to their needs. He said the children were bonded with Father and that the children said they missed their parents.

Father's counsel requested a contested section 366.26 hearing to determine the applicability of the beneficial parent-child relationship exception to termination of parental rights. Counsel asserted that Father had consistently and regularly visited all three children, those visits were positive, he actively engaged each child during visits, and he was attuned to their individual needs. The juvenile court denied Father's request, concluding his offer of proof was insufficient to warrant a contested hearing. The parents' appeal from that ruling was the subject of our prior opinion.

2. *Termination of Reunification Services for Father's Fourth Child*

In May 2016, while their earlier appeal was pending, Mother gave birth to the parents' fourth child, Mario. A day later, the Department received a referral alleging Mother tested positive for methamphetamine at Mario's birth. When a social worker arrived the next day, she observed Mother's room smelled of marijuana. When asked about the smell, the parents denied they used the drug. Mother nevertheless admitted she had used methamphetamine three days prior to Mario's birth. She confirmed she remained in a relationship with father and that father smoked marijuana.

Father initially denied using drugs and said he was unaware of Mother's drug use. When confronted with Mother's statement, he admitted using marijuana to increase his appetite, but claimed he stopped using the drug a month earlier due to the pending dependency case. He denied ongoing domestic violence and affirmed he remained in a relationship with Mother.

The Department detained Mario in foster care and filed a dependency petition on his behalf. With respect to Father, the petition alleged Mario was at risk due to Father's history of illicit drug use and current marijuana use, Father had a criminal history for possession of controlled substances, and Mario's siblings were current dependents of the juvenile court due to Father's substance abuse.<sup>3</sup>

Despite completing a substance abuse program as part of the reunification plan for his older children, Father had continually failed to comply with a random drug testing order. On May 2, 2016, he submitted to a test and tested positive for marijuana. On May 18, 2016, he enrolled in a substance abuse program at the Los Angeles Centers for Alcohol and Drug Abuse (LACADA).

On June 16, 2016, the juvenile court sustained the petition, including the substance abuse allegations against Father, and removed Mario from parental custody. The court granted Father family reunification services, and ordered him to complete a full drug treatment program, a 12-Step program, random drug testing, a parenting program, individual counseling, and to attend medical appointments and assessments for Mario.<sup>4</sup>

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<sup>3</sup> With respect to Mother, the petition alleged Mother had a history of illicit drug use, including marijuana, was a current user of methamphetamine, abused illicit drugs during the pregnancy with Mario, and tested positive for methamphetamine at the child's birth.

<sup>4</sup> The court also sustained the allegations against Mother and denied her reunification services pursuant to section 361.5, subdivisions (b)(10) and (11).

On June 17, 2016, Father was arrested for violating his probation, after police found him in possession of a small bag of marijuana. On December 6, 2016, Father was terminated from his drug treatment program with LACADA. According to his LACADA counselor, Father “struggled with attending treatment as directed,” came into the facility “smelling of marijuana,” stopped attending classes, and declined to respond to telephone calls from the facility. As of December 2016, Father had also been terminated from individual therapy, failed to submit to court-ordered drug testing multiple times, tested positive for marijuana multiple times, failed to enroll in a 12-Step program, and, despite enrolling in parenting education, failed to attend the scheduled sessions. In January 2017, Father reported he was attending a new substance abuse program at Clinica Monsenor Oscar A. Romero (Clinica). When the Department attempted to confirm the report, Clinica’s program director advised that Father was discharged from the program because he regularly attended meetings smelling of marijuana.

On January 27, 2017, the juvenile court terminated Father’s family reunification services for Mario and set the matter for a section 366.26 hearing. The court also ordered the Department to initiate an adoptive home study for the child.

3. *Decision in Prior Appeal and Proceeding After Remand*

On February 10, 2017, this court reversed the order terminating parental rights with respect to Grace, Marco and Michael. Our opinion concluded Father made a sufficient offer of proof and the juvenile court erred by denying him a contested hearing to present evidence on the applicability of the beneficial parent-child relationship exception. We remanded the matter for the juvenile court to conduct the contested hearing, and expressed no opinion as to how the court should exercise its

discretion in determining whether a beneficial parent-child relationship existed. On March 13, 2017, after receiving the remittitur, the juvenile court reinstated parental rights, set the matter for a contested section 366.26 hearing, and ordered hourly visits for the parents three times a week.

4. *Proceedings in Advance of Permanent Plan Hearing*

Father visited Grace, Marco and Michael twice in March 2017. The visits were appropriate and Father interacted well with the children. Grace and Marco said they were happy to see Father, and Grace told Father she missed him.

On March 17, 2017, however, Father was arrested for taking a vehicle without the owner's consent. Due to his arrest, Father missed the remaining two visits in March and the first two visits in April. After his release, Father resumed visits with the children.

Father had several visits with Mario after reunification services were terminated. The monitor reported Father had appropriate interactions with the child, although he smelled of marijuana during one of the visits.

On May 18, 2017, the Department filed a status report regarding Grace, Marco and Michael. The children remained together in their prospective adoptive parents' home, where they had been placed since May 2016. Grace was attending kindergarten, academically on track, and enjoyed reading books. Marco was attending transitional kindergarten and receiving mental health services. Michael was receiving therapy for his speech delay. The children referred to the foster parents as "mommy" and "daddy," and the foster parents remained committed to adopting the children.

Mario continued to reside with his prospective adoptive parents, with whom he had been placed since shortly after his birth. The child celebrated his first birthday with them, and the foster parents affirmed their commitment to adopting Mario.

5. *Father's Section 388 Petition*

On June 9, 2017, Father filed the section 388 petition that is the subject of this appeal. The petition requested unsupervised visits and sought reinstated family reunification services with all four children. Father submitted three documents in support of the petition: (1) a letter from an addiction counselor at LACADA, reporting Father was admitted to a substance abuse treatment program on May 2, 2017, noting the program offered drug education, relapse prevention, and weekly drug testing, and Father had attended nine out of 11 group sessions since re-enrollment; (2) a document from LACADA titled "Progress Notes" that set forth Father's May 2017 sessions for the substance abuse program; and (3) a letter from the Project Fatherhood facilitator at LACADA, reporting Father originally enrolled in the program in June 2014 and, though he had had "his up and down battles," Father "remains determine[d] to be active in the lives of his children." Father alleged his participation in the LACADA programs, coupled with his positive visits with the children, constituted changed circumstances warranting a modification of the visitation order and reinstatement of reunification services. He maintained the requested relief would promote the children's best interests because they continued to express a strong attachment to him.

On June 16, 2017, the juvenile court held a preliminary hearing on Father's section 388 petition. The judge concluded Father's petition showed he was "certainly changing, not changed." The judge added, "I also don't believe that it's in the best interest of the children to grant the [section] 388 [petition]."



Based on those findings, the court summarily denied the section 388 petition, without an evidentiary hearing.

6. *Termination of Parental Rights*

On August 3, 2017, the juvenile court held a contested section 366.26 hearing with respect to all four children. The Department and the children's counsel asked the court to terminate parental rights with respect to all four children. Father argued the beneficial parent-child relationship exception applied and offered testimony in support of the contention, including testimony regarding his visits and relationship with his children. The court found Father's testimony was not credible and concluded the exception did not apply, the children were adoptable, and the permanency and stability of adoption was in the children's best interests. Thus, the court terminated parental rights and released the children for adoption.

**DISCUSSION**

1. *Legal Principles and Standard of Review*

Father contends the juvenile court erred by summarily denying his section 388 petition without an evidentiary hearing on its merits. Under section 388, a parent may petition to modify a prior order "upon grounds of change of circumstance or new evidence." (§ 388, subd. (a)(1); see Cal. Rules of Court, rule 5.570(a).) The juvenile court shall order a hearing where "it appears that the best interests of the child . . . may be promoted" by the new order. (§ 388, subd. (d).) "Thus, the parent must sufficiently allege *both* a change in circumstances or new evidence *and* the promotion of the child's best interests." (*In re G.B.* (2014) 227 Cal.App.4th 1147, 1157 (*G.B.*)). "A parent need only make a prima facie showing of these elements to trigger the right to a hearing on a section 388 petition and the petition should be liberally construed in favor of granting a hearing to

consider the parent's request." (*In re Zachary G.* (1999) 77 Cal.App.4th 799, 806 (*Zachary G.*).

"A prima facie case is made if the allegations demonstrate that these two elements are supported by probable cause. [Citations.] It is not made, however, if the allegations would fail to sustain a favorable decision even if they were found to be true at a hearing. [Citations.] While the petition must be liberally construed in favor of its sufficiency [citations], the allegations must nonetheless describe specifically [the changed circumstances and] how the petition will advance the child's best interests." (*G.B., supra*, 227 Cal.App.4th at p. 1157; *Zachary G., supra*, 77 Cal.App.4th at p. 806.) "In determining whether the petition makes the required showing, the court may consider the entire factual and procedural history of the case." (*In re K.L.* (2016) 248 Cal.App.4th 52, 62 (*K.L.*); *In re Jackson W.* (2010) 184 Cal.App.4th 247, 258.)

We review a juvenile court's decision to deny a section 388 petition without an evidentiary hearing for abuse of discretion. (*K.L., supra*, 248 Cal.App.4th at p. 62; *In re Anthony W.* (2001) 87 Cal.App.4th 246, 250.) We will not disturb the decision " " "unless the trial court has exceeded the limits of legal discretion by making an arbitrary, capricious, or patently absurd determination." ' ' ' (*Stephanie M., supra*, 7 Cal.4th at p. 318.)

## 2. *The Juvenile Court Did Not Abuse Its Discretion*

We begin with section 388's change of circumstances prong. Father asserts his "new evidence" showed "he was participating in programs and his children had a bond with him." He maintains this was sufficient to satisfy his prima facie burden, and the juvenile court erred by requiring proof of *changed* circumstances, as opposed to a mere "change of circumstances or new evidence that even might require a change of order." Although he concedes he "had prior opportunities to complete the

programs” and “had only re-entered his programs for a short time prior to filing his petition,” Father insists these facts were insufficient to support the juvenile court’s exercise of discretion. He argues he “was not required to establish a probability of prevailing on his section 388 petition to be entitled to a hearing on the merits,” and the court erred by demanding that he do so.

We disagree. In view of Father’s history of drug abuse, his multiple past failures to comply with the requirements of his case plan, the extensive history of the case and the advanced stage of the dependency proceedings, the juvenile court reasonably concluded Father failed to make a prima facie showing of changed circumstances.

*In re Mary G.* (2007) 151 Cal.App.4th 184 (*Mary G.*) supports our conclusion. The mother in *Mary G.* lost custody of her three older children due to her persistent drug abuse, and was denied reunification services with her fourth child as a result. (*Id.* at pp. 192-193; see § 361.5, subds. (b)(10) & (11).) After the court continued a permanency planning hearing for the fourth child, the mother filed a section 388 petition alleging a change of circumstances “because she had been attending Narcotics Anonymous (NA) meetings and drug testing, and was ‘seeking mental health treatment as well.’” (*Mary G.*, at p. 195.) She “submitted evidence” with the petition showing “she completed a residential detoxification program . . . ; she regularly attended NA meetings . . . ; and, she passed two or three drug tests performed [earlier that month].” (*Ibid.*) The juvenile court denied an evidentiary hearing on her section 388 petition. (*Ibid.*) The appellate court affirmed.

The *Mary G.* court concluded the mother “did not make a prima facie showing of changed circumstances.” (*Mary G.*, *supra*, 151 Cal.App.4th at p. 205.) Although her petition showed “she completed a detoxification program, and she was in drug treatment and attending NA meetings,” the appellate court reasoned this new evidence did not compel a hearing on the merits, because the juvenile court could “reasonably find” the mother’s recent encounter with sobriety “was not particularly compelling,” given her long history of drug abuse and her past failure to reunite with her three older children. (*Ibid.*) Further, the late stage of the case reinforced the reasonableness of that determination. In joining with the juvenile court’s assessment that there was “‘no way based on the . . . extensive history of this case that [the mother’s] recent activity amount[ed] to even a prima facie case of changing circumstances,’ ” the *Mary G.* court stressed that 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 . . . *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.’ ” ’ ” (*Ibid.*, italics added.) Much of the same must be said for Father’s petition in this case.

As noted above, when the juvenile court summarily denied Father’s petition to alter visitation and reinstitute reunification services, this case had been pending for almost four years with respect to his three older children, and for the entire year of his youngest son’s life. During that period, Father had been ejected from two drug treatment programs, regularly failed to submit to court-ordered drug testing, tested positive for prohibited marijuana use on numerous occasions, was in and out of jail for gang related activities, was charged with a probation violation for

possessing marijuana, and appeared at visits with his children, including his infant son, smelling of the drug. This conduct persisted unabated for several years even though Father had lost custody of his children and faced the profound prospect of having his parental rights permanently terminated. In view of this history, it was entirely reasonable for the juvenile court to conclude Father's belated efforts to restart drug treatment and parenting education, at most, showed possibly "changing" circumstances. But even when accepted as true, this showing did not demonstrate the "change of circumstances" required to support relief under section 388. The juvenile court did not err in summarily denying Father's petition for failure to make a prima facie showing on the statute's first prong. (See *In re Jamika W.* (1997) 54 Cal.App.4th 1446, 1451 [juvenile court was well aware of the mother's past failures to comply with case plan, "[c]ontrasting this history with the weak and inadequate changes of circumstances alleged in the section 388 petition, the trial court was well within its discretion in denying without hearing"].)

Nor did the juvenile court err in concluding Father failed to make a prima facie showing on the statute's second prong. In his petition, Father alleged permitting unmonitored visits and reinstituting reunification services would be "better for the child[ren]" because "[t]he children continue to express a strong attachment to their father," and "[t]hey express that they miss their father, and a desire to continue to see him." On appeal, Father maintains these allegations were sufficient, without more, to meet his prima facie burden because they suggested "the best interest of the children may have been promoted by setting father's section 388 petition for a hearing." His contention, however, fails to account for the delay in establishing a permanent, stable home for the children that would necessarily accompany the requested modifications.

“After the termination of reunification services . . . , the goal of family reunification is no longer paramount, and ‘the focus shifts to the needs of the child for permanency and stability” [citation], and in fact, there is a rebuttable presumption that continued foster care is in the best interests of the child.’ ” (*K.L.*, *supra*, 248 Cal.App.4th at p. 62.) A court ruling on a modification petition “at this stage of the proceedings must recognize this shift of focus in determining the ultimate question before it, that is, the best interests of the child.’ ” (*Ibid.* [affirming denial of section 388 petition without hearing where the mother offered only the conclusory allegation that the children would be better with their grandmother than their current placement].)

In November 2015, the juvenile court terminated reunification services with respect to Father’s three older children, after Father failed for almost two years to comply with his court-ordered case plan, including the requirement that he submit to random drug testing. In January 2017, the court terminated reunification services with respect to Father’s infant son, after Father was ejected from two drug treatment programs and court-ordered individual therapy. Before and after the termination of reunification services, Father’s three older children thrived in their prospective adoptive parents’ care, where they had developed a bond with their caregivers and enjoyed the stability of a safe home. Likewise, Father’s infant son had become bonded to his prospective adoptive parents, with whom he had lived for essentially all of his young life. Although Father continued to have appropriate visits with the children, who expressed a fondness for him, he remained unwilling or unable to demonstrate the reliability and responsibility necessary to assume custody of his children within any meaningful period of time. The juvenile court was obliged to consider this context in determining whether Father’s conclusory allegations warranted

an evidentiary hearing on his section 388 petition. (*K.L., supra*, 248 Cal.App.4th at pp. 61–62.)

In view of the children’s need for permanency, and the lack of any indication that Father was equipped to provide it, the court did not abuse its discretion by summarily denying Father’s petition. (See *In re Angel B.* (2002) 97 Cal.App.4th 454, 463 [affirming denial of section 388 petition without hearing, observing, “there was no evidence that Mother was ready to assume custody of [the child] or provide suitable care for her; while she had completed the drug program, the time she had been sober was very brief compared to her many years of drug addiction . . . , and in the past she had been unable to remain sober even when the stakes involved were the loss of her other child”].)

Because we conclude the juvenile court did not err in summarily denying Father’s petition for modification, we reject his contention that the “erroneous denial” of that petition “infected the subsequent proceeding to terminate his parental rights,” and requires us to vacate the section 366.26 order.

**DISPOSITION**

The orders are affirmed.

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

CURREY, J.\*

We concur:

EDMON, P. J.

LAVIN, 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.