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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

In re PRISCILLA V., a Person Coming  
Under the Juvenile Court Law.

B278837

LOS ANGELES COUNTY  
DEPARTMENT OF CHILDREN AND  
FAMILY SERVICES,

(Los Angeles County  
Super. Ct. No. CK55733)

Plaintiff and Respondent,

v.

JESSICA N.,

Defendant and Appellant.

APPEAL from a judgment of the Superior Court of Los  
Angeles County, Terry Troung, Juvenile Court Referee.

Affirmed.

Liana Serobian, under appointment by the Court of Appeal,  
for Appellant.

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

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Mother, Jessica N., appeals a judgment of the juvenile dependency court terminating her parental rights over her youngest child. We affirm the judgment.

## **FACTS**

### ***Background***

Mother is the parent of four children: E.D. (born in 2002); J.D. (born in 2004); A.D. (born in 2007); and Priscilla V. (born in 2015). The dependency court terminated Mother's parental rights as to E.D. and J.D. in an earlier dependency case after Mother failed to comply with programs to address her drug abuse problems. Mother's present appeal arises from a dependency case initially filed on behalf of her two younger children, A.D. and Priscilla. The dependency case came about after Priscilla tested positive for amphetamine and methamphetamine at birth. The dependency court dismissed A.D. from the case at the time of the detention hearing after a paternal relative agreed to file for legal guardianship. Accordingly, the arguments in Mother's opening brief concern only Priscilla.

### ***The Present Dependency Proceedings***

Priscilla came to the attention of the Los Angeles County Department of Children and Family Services (DCFS) on April 17, 2015, when it received a referral reporting that Mother had tested positive for amphetamine at the hospital when Priscilla was born. A DCFS case social worker responded to the hospital and spoke to Mother and she admitted that she had used drugs during her pregnancy. Mother said she previously lived with the maternal grandmother and great-grandmother, but left to move in with a friend. Mother reported that she relapsed into drug use at this friend's home. Mother acknowledged she had a history of substance abuse, but claimed she had been "clean and sober" for

about seven or eight years before recently beginning to use drugs again. Further, Mother acknowledged that she lost custody of her two oldest children, J.D. and E.D., in a prior dependency case. When Priscilla's toxicology report came back, it showed positive tests for amphetamine and methamphetamine.

DCFS arranged for Mother and Priscilla to be admitted to an inpatient substance abuse treatment program at Foley House. However, DCFS quickly assessed that it was unable to provide Mother with a voluntary family maintenance plan because of her history with DCFS and her failure to reunify with her two older children, and, on May 21, 2015, DCFS filed a non-detained Welfare and Institutions code section 300<sup>1</sup> petition on behalf of A.D. and Priscilla. The petition alleged Mother's history of substance abuse, her failure to reunify with her older children in an earlier dependency case, and Priscilla's positive toxicology screen for methamphetamine and amphetamine at birth justified intervention. The petition alleged that Mother's drug use history endangered A.D. and Priscilla.<sup>2</sup> The dependency court placed Priscilla with Mother.

In late June 2015, Mother left the inpatient substance abuse program at Foley House and dropped Priscilla at her paternal grandmother's house. In July 2015, DCFS placed

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<sup>1</sup> All undesignated section references are to the Welfare and Institutions Code.

<sup>2</sup> The petition further alleged that G.V., Priscilla's father, had his own history of substance abuse rendering him incapable of providing regular care for Priscilla. Although the dependency court ordered reunification services for G.V., he was incarcerated for most of the case and failed to reunify with Priscilla. G.V. is not involved in the present appeal.

Priscilla with a foster family, and filed a section 385 petition to change the dependency court's previous order placing Priscilla with Mother. At all times since July 2015, Priscilla has lived with her foster parents. From mid August to October 2015, Mother was in custody. After being released from custody, Mother tried and quit at least one outpatient program before enrolling in December 2015 in a residential substance abuse treatment program at Mujeres Recovery Home (Mujeres).

Meanwhile, beginning in September 2015, the paternal grandparents had twice weekly visits with Priscilla in their home.

In March 2016, the dependency court ordered DCFS to prepare an assessment plan (see § 366.21, subd. (i)), including an adoptive home study.<sup>3</sup>

In April 2016, the maternal grandmother requested that Priscilla be placed with her. DCFS denied the request on the grounds that the maternal grandmother had visited Priscilla on only a few occasions and because her history showed that she had trouble setting boundaries with Mother.

Mother initially visited with Priscilla in the paternal grandparents' home during the two-days-per-week visits, and was reported to attend to her daughter's needs, such as feeding

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<sup>3</sup> In a report filed in July 2016, DCFS stated that Priscilla's foster parents were approved to adopt Priscilla. The foster parents had no child abuse or criminal histories. They had two biological children and wanted to expand their family through adoption. The foster father worked outside of the home; the foster mother stayed at home and homeschooled her children. Priscilla and her foster family were bonded. DCFS recommended that the court find Priscilla adoptable and terminate parental rights.

and changing her. In July 2016, Mother started visiting with Priscilla in her foster parents' home on Saturdays, and visits in the paternal grandparents' home were reduced to once a week. The foster parents generally reported that Mother was appropriate during her visits with Priscilla.

In July 2016, Mother filed a section 388 petition seeking to change the dependency court's existing orders. In support of her section 388 petition, Mother reported that she had completed six months of treatment at Mujeres on May 29, 2016; a 12-week parenting class on May 27, 2016; and a 90-day alcohol and drug residential program at Mujeres on May 14, 2016. Further, Mother reported that she had been enrolled in individual counseling at the Northeast Mental Health Center since March 25, 2016, and that she had been residing in a sober living facility, Jacob's Ladder, since May 29, 2016. She stated that she participated in NA/AA meetings, and planned to continue to do so. Mother stated that she believed it was in Priscilla's best interests for her to reunify with Mother because they shared a mother-daughter relationship.

In September 2016, Mother submitted further materials showing that she had enrolled in an outpatient alcohol/drug treatment program at Latino Family Center on July 8, 2016, and that the program randomly tested for drugs. A letter from a patient supervision at the center stated that Mother had eight negative tests in the time she had been in the program and that she attended N/A meetings weekly. The center's letter closed with the following recommendation: "It has been an absolute pleasure working with [Mother]. In the past four months I have seen [Mother] grow up right in front of my eyes. I feel that [Mother] can do great things in the future and I am honored to

have gotten an opportunity to meet and work with this amazing woman.”

In a September 2016 initial responsive report to Mother’s section 388 petition, DCFS acknowledged that Mother had completed a five and a half months inpatient substance abuse treatment program. At the same time, however, DCFS recommended that the dependency court deny Mother’s section 388 petition on the ground that, while it might have been true that Mother’s circumstances were “changing,” a modification of the court’s existing orders was not justified. DCFS expressed that it was still concerned with Mother’s history of substance abuse and related child welfare involvement.

In October 2016, DCFS filed an addendum report. The case social worker reported that she had telephoned the Mujeres treatment program and Jacob’s Ladder sober living home to verify Mother’s ongoing attendance. The social worker learned that Mother left the Jacob’s Ladder home sometime at the end of August 2016. Further, the social worker also had a series of contacts with a psychiatric social worker with the Los Angeles County Department of Mental Health (DMH). The DMH social worker reported that it appeared Mother had not been in for services since early July 2016. Mother had completed three group therapy sessions, the last one on July 5, 2016. Mother’s case was still open with DMH.

On October 12, 2016, the dependency court held a contested hearing on Mother’s section 388 petition. Mother testified she completed six months of residential treatment program at Mujeres on May 30, 2016, and that she had learned the “triggers” of her drug addiction “that [she] had before,” and what to do “when [she felt] like using or getting loaded.” Mother spoke to

her sponsor at Mujeres on daily basis to strengthen her sobriety, and learned “not to hang around with people, places and things where [she] used to hang out before.” After completing the Mujeres program, Mother resided in a sober living facility, Jacob’s Ladder, from May 30, 2016, until toward the end of July 2016. She left Jacob’s Ladder because she could not afford the rent of \$400 (for one room that she shared with three other women). At Latino Family Center, Mother completed a 12-week parenting class, and also participated in weekly individual counseling. At the time of the hearing, Mother lived with the maternal grandmother. She continued to attend weekly NA/AA meetings with her sponsor. According to Mother, she had submitted to random drug tests at Latino Family Center since December 2015. Mother testified that she had visited Priscilla twice a week from September 2015 to July 2016, when she started visiting Priscilla once a week at the foster parents’ home. In the month prior to the hearing, Mother restarted visiting Priscilla at paternal grandmother’s home once a week.

After Mother testified, the dependency court listened to arguments from the lawyers, accepted DCFS’s reports into evidence, and then ruled that it would deny Mother’s section 388 petition. The court explained that, while, Mother’s circumstances were “changing,” it found that it was unclear that the individual counseling had addressed the case issues. The court noted it was only one month before the 18-month-date since Priscilla was placed into foster care and found that continued services would not be in the child’s best interests.

At the ensuing section 366.26 hearing on October 21, 2016, Mother’s counsel argued against terminating parental rights and urged that her case warranted application of the “parental

benefit exception” to adoption. Counsels for DCFS and Priscilla urged the dependency court to follow the department’s recommendations and terminate parental rights. The court found the parental benefit exception to adoption did not apply, found Priscilla adoptable, and terminated Mother’s parental rights.

Mother filed a timely notice of appeal.

## **DISCUSSION**

### **I. Mother’s Section 388 Petition**

Mother contends the judgment terminating her parental rights over Priscilla must be reversed because the dependency court abused its discretion in denying her section 388 petition. We disagree.

Section 388 is recognized to be a form of “ ‘escape mechanism’ ” allowing a parent to show a “complete . . . reformation in the short, final period after the termination of reunification services but before the actual termination of parental rights.” (*In re Kimberly F.* (1997) 56 Cal.App.4th 519, 528, citing *In re Marilyn H.* (1993) 5 Cal.4th 295, 309.) As such, section 388 provides the dependency court with a means “to address a legitimate change in circumstances” and afford a parent a last opportunity for continued reunification services prior to final resolution of custody status. (*In re Marilyn H.*, *supra*, 5 Cal.4th at p. 309.) To prevail on a section 388 petition, the petitioner must establish two elements: first, the petitioner must show the existence of new evidence or changed circumstances justifying a change in the dependency court’s prior orders, and, second, the petitioner must show that the proposed change would promote the best interests of the child. (*In re A.A.* (2012) 203 Cal.App.4th 597, 611.) The burden of proof on a



section 388 petition is preponderance of the evidence. (*In re Stephanie M.* (1994) 7 Cal.4th 295, 317.)

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.” (*In re A.A., supra*, 203 Cal.App.4th at p. 612.) A reviewing court may determine that the dependency court abused its discretion upon finding its decision was ““arbitrary, capricious or patently absurd.”” (*In re Mark V.* (1986) 177 Cal.App.3d 754, 759.)

Here, Mother contends the dependency court abused its discretion in denying her section 388 petition because the presentation by her petition showed that she had completed a drug program, parenting classes and was participating in counseling. While Mother undisputedly has accomplished much, we are not persuaded that the dependency court abused its discretion.

As a preliminary matter, we note that the dependency court was not mandated to ignore Mother’s failure to comply with a reunification plan to address her substance abuse problems when she lost her parental rights over her two older children in a prior dependency case. While a prior dependency case outcome is not an automatic or absolute disqualifier, the published cases have long recognized that chronic substance abuse is a problem that cannot be easily ameliorated. (See, e.g., *In re Amber M.* (2002) 103 Cal.App.4th 681, 686-687 [dependency court properly denied section 388 petition where parent showed completion of initial steps of 12-step plan and that she had been “clean for 372 days;” parent’s lengthy history of substance abuse, including a relapse during the course of the case, justified denial of petition]; and see also *In re Clifton B.* (2000) 81 Cal.App.4th 415, 423-424

[in addressing parent's section 388 petition, showing that parent had been sober from drugs for 200 days "was not enough to reassure the juvenile court that the most recent relapse would be his last"].) Despite losing her two older children in a prior dependency case, Mother resumed abusing drugs, and, much worse, did so during pregnancy with Priscilla. The dependency court could consider this history in assessing whether Mother had truly turned a drug-free corner.

Further, the dependency court could consider Mother's initial stumbles after her present case commenced in May 2015. DCFS arranged with Mother and Priscilla to enroll in an inpatient substance abuse program at Foley House, and Mother agreed to abide by a safety plan. Despite Mother's words, she failed to complete the program. According to a substance abuse counselor at Foley House, Mother had "been up to something" and was "doing anything to get out" of the facility. Mother did not act committed to the program and treated it "more like a bed and breakfast." Mother also failed to complete another drug treatment program. Shortly thereafter, she was arrested in August 2015 for taking a vehicle and possession of a controlled substance. Given the past history, and this start of her present case, Mother had a significant burden to show changed circumstances justifying a "last chance" to reunify with Priscilla.

We acknowledge that Mother enrolled in a program at Mujeres and that she completed that program in late May 2016, roughly one year after DCFS filed the present case on behalf of Priscilla. Further, we note that Mother enrolled in another sober living residential program, Jacob's Ladder, from May 2016 to July 2016, and apparently left the program not due to any resumption of drug behavior, but due to costs. Still, when the

fairly short time that Mother participated in drug abuse programs, including a series of negative random drug test results, is juxtaposed against her long history of substance abuse and its detrimental effect on her children, we will not declare the dependency court's decision to deny her section 388 petition to be irrational. Given Mother's substance abuse history, multiple attempts at completing treatment programs, and her prior relapses, the evidence viewed as a whole supports the dependency court's determination that Mother's circumstances were only changing, but had not changed. The court's finding that Mother failed to demonstrate changed circumstances was a proper exercise of its judicial discretion.

Further, we do not find irrationality in the dependency court's conclusion that Priscilla's best interests would not be served by ordering additional family reunification services. Again, it was Mother's burden to demonstrate to the dependency court, and to our court, that providing family reunification services would be in Priscilla's best interests. (*In re Stephanie M.*, *supra*, 7 Cal.4th at p. 317.)

In our view, Mother's present case fits within the reasoning and result of *In re J.C.* (2014) 226 Cal.App.4th 503.) There, the Court of Appeal correctly recognized that a juvenile court's assessment of a section 388 petition should take into account that dependency law shifts towards promoting the child's need for permanency and stability at later stages of dependency proceedings. (*In re J.C.*, *supra*, at pp. 526-527, discussing *In re Stephanie M.*, *supra*, 7 Cal.4th at pp. 317-318.) The *J.C.* court also noted that the child was bonded with her caretaker, and that the parent there failed to present evidence the child's interests in

permanency and stability would be better served by the proposed modification. (*J.C.*, at p. 526.)

The same analysis focusing on Priscilla’s stability and permanency, and the circumstances of her present placement in a prospective adoptive foster family supports affirmance here. As the *J.S.* court reasoned, the statutory timelines limiting reunification services in the case of children under three years of age is of significant importance, and a juvenile court may consider the “need to quickly find a secure and stable placement.” (*In re J.C.*, *supra*, 226 Cal.App.4th at p. 528.) Those sentiments support the juvenile court’s decision in the instant matter, made 17 months into the proceedings, to deny Mother’s section 388 petition.

## **II. ICWA**

Mother argues the judgment terminating her parental rights should be reversed, and that the case should be remanded for further proceedings in the dependency court to assure that DCFS complies with its statutory inquiry and obligations under the Indian Child Welfare Act (ICWA; see 25 U.S.C. § 1901 et seq.) In its respondent’s brief, DCFS impliedly acknowledges that the record supports a conclusion that more could have done to assure inquiry and “proper notice to any appropriate tribes,” and has indicated that it “does not oppose a conditional affirmance [with] a limited remand” for compliance with ICWA. In light of DCFS’s offer to pursue better consideration of ICWA’s requirements, we will conditionally affirm the dependency court’s judgment terminating Mother’s parental rights, with a limited remand to address her ICWA concerns. (See *In re Michael V.* (2016) 3 Cal.App.5th 225, 235; *Tina L. v. Superior Court* (2008) 163 Cal.App.4th 262, 268.)

### **DISPOSITION**

The dependency court's judgment terminating Mother's parental rights is conditionally affirmed. The matter is remanded to the dependency court for compliance with ICWA's inquiry and notice provisions. If no tribe deems Priscilla to be an Indian child, then the dependency court shall reinstate its judgment unconditionally.

BIGELOW, P.J.

We concur:

RUBIN, J.

FLIER, J.