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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

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

B237029  
(Los Angeles County  
Super. Ct. No. CK78551)

LOS ANGELES COUNTY  
DEPARTMENT OF CHILDREN AND  
FAMILY SERVICES,

Plaintiff and Respondent,

v.

CRYSTAL M. et al.,

Defendants and Appellants.

APPEAL from an order of the Superior Court of Los Angeles County, Marilyn H. Mackel, Commissioner. Affirmed.

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

William Hook, by appointment of the Court of Appeal, for Defendant and Appellant Steven V.

James F. Krattli, Acting County Counsel, James M. Owens, Assistant County Counsel, and Melinda White-Svec, Deputy County Counsel, for Plaintiff and Respondent.

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A mother of minor children appeals an order summarily denying her petition, filed pursuant to Welfare and Institutions Code section 388,<sup>1</sup> seeking to have her reunification services reinstated and to delay the section 366.26 hearing, and terminating her parental rights. The father of one child also appeals from the order terminating parental rights. We find no merit in the mother's appeal, and affirm. The father's appeal is dismissed.

### **FACTUAL AND PROCEDURAL BACKGROUND**

Appellant Crystal M. (mother) is the mother of Christopher M. (born February 2007) and Michelle V. (born December 2008). Appellant Steven V. (father) is Michelle's presumed father. Christopher's father is not a party to this appeal.

The children came to the attention of respondent Department of Children and Family Services (DCFS) in mid-August 2009, after mother took Christopher to the emergency room with an injured arm saying he had fallen from a slide, an explanation which was inconsistent with the child's injury (spiral fracture of upper arm). The attending physician thought the injury was suspicious and hospital staff noticed that mother and father moved slowly, looked disheveled, had a foul smell and believed they could be under the influence of some substance. When interviewed by police, father admitted having used methamphetamine the day before Christopher's fall, and having used heroin "about a week" before. Mother told the police she had smoked methamphetamine the day Christopher fell. Both parents were arrested for felony infliction of injury to a child and being under the influence of a controlled substance. The children were detained and, ultimately, placed in foster care.

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<sup>1</sup> Further statutory references are to the Welfare and Institutions Code.

DCFS filed a section 300 petition which, as later amended and sustained, alleged the children came within the jurisdiction of the juvenile court under section 300, subdivisions (b) [failure to protect] and (j) [sibling abuse].

In its detention report, DCFS noted the parents brought Christopher to the emergency room on August 14, 2009 at 11:00 p.m., saying he had broken his arm at about 7:00 p.m. At the hospital, both parents claimed to have been present when Christopher fell off a two-to-three-foot tall slide at a park with his arm behind his back. DCFS also reported that mother had a prior history with DCFS; one of her children was adopted in 2004 after she failed to reunify with him.<sup>2</sup>

Mother told a children's social worker (CSW) from DCFS that she was with Christopher who had been playing on a three-to-four-foot tall plastic slide in a portable pool in the backyard at about 7:00 p.m. Christopher fell off the top of the slide and his left arm twisted under his body as he hit the ground. The child cried, but mother did not believe his arm was broken. She put an ice pack on the arm and Christopher fell asleep. When he woke up at 10:30 a.m. he could not move his arm and he cried even harder if the arm was touched. The doctor at the hospital told mother the arm had been broken by a twisting motion. The doctor who treated Christopher later told DCFS it was not clear whether the fracture was the result of child abuse, but some "red flags" indicated that it might have been. Mother denied that she or anyone else had twisted her son's arm. Mother also said Christopher had been diagnosed in July 2009 with "Kawasaki heart disease," but was not taking any medication or receiving any treatment for that disease.

The CSW described father as hysterical, crying, having loud outbursts, deferring to mother and being difficult to interview. He claimed he had not seen the injury, and only saw Christopher after he was on the ground and mother picked him up.

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<sup>2</sup> In the amended petition, DCFS noted mother's parental rights to the children's half-sibling, Aaron, were terminated in January 2003 after she failed to reunify with him. Aaron became a juvenile court dependent as an infant after a skeletal fracture was discovered during a medical examination.

Following the detention hearing, the juvenile court ordered DCFS to provide the parents with reunification services, and ordered the parents to participate in drug and alcohol counseling and testing, parenting and individual counseling.

In its September 2009 Jurisdiction/Disposition report, DCFS reported that mother had been a juvenile court dependent as a minor. At age 16, she was a victim of sexual abuse with her 31-year-old boyfriend, with whom she had a baby, Aaron. In 2001, when Aaron was 11 months old he was taken to the hospital for a rash, where marks, bruises and an unexplained skull fracture were discovered. General neglect allegations were substantiated. Mother also had a history of smoking meth and an extensive criminal history. Mother agreed to, but failed to comply with, a family maintenance plan and Aaron was ultimately adopted in early 2004.

With regard to Christopher's injury, mother claimed he had climbed the ladder to the slide improperly, and fell off. She told father she thought Christopher broke his arm, but her brother-in-law (who is not a doctor) told mother the arm might be fractured, but was not broken. The parents applied ice to Christopher's arm and gave him an over-the-counter pain medication; he fell asleep. When he awoke, they took him to the hospital. Mother said she passed a lie detector test given by the police.

Both parents admitted having used methamphetamine the day before Christopher's fall. Mother acknowledged that the drug was still in her system at the time of that incident. The parents denied having used drugs in front of the children, and denied that they kept any drugs or paraphernalia in their home. Mother said she began using methamphetamines when she was about 13 years old (presumably stopped for a time), and resumed using them again when she was about 21 or 24 years old. Father told DCFS he and mother had met about three years before, and said she had used drugs consistently since they met. Mother denied having been arrested for drug-related reasons, but admitted she had an upcoming criminal court hearing for having been arrested for being under the influence of a controlled substance. She acknowledged that her parental rights to Aaron were terminated in 2003 after she failed to participate in the dependency proceedings. Christopher's alleged father, Andrew S., who had no involvement in his

son's life, told DCFS that he and mother had used drugs between 2005 and 2006, before Christopher was born.

Mother enrolled in an outpatient treatment program in late September. By early November, her counselor informed DCFS that mother had done well in that program; she had perfect attendance at multiple group and individual counseling sessions and 12-step meetings, had participated in random testing (all negative), and was taking parenting classes. Father was also reportedly attending parenting education classes. The children's foster mother told DCFS that the parents visited weekly and the visits went well. But both parents were consistently late and the foster mother thought they might have been "stoned" during at least one visit.

DCFS recommended that the juvenile court deny reunification services for mother based on her history of substance abuse, her failure to reunite with Aaron, and the fact that the allegations in the instant action mirrored those in Aaron's case—both boys suffered bone fractures while under mother's supervision. (§ 361.5, subd. (b)(10).) DCFS also recommended that the parents be given monitored visitation.

In an interim review report filed in early December 2009, DCFS recommended that mother be denied reunification services, that father receive such services and that both parents continue to have monitored visitation. The children had been re-placed, but remained in foster care. A physical exam revealed that in addition to Kawasaki Syndrome, Christopher was born with macrocephaly (large head), his fine and gross motor skills and speech and language skills were impaired, and some of his teeth were visibly decayed. Michelle was developing in an age-appropriate manner and had no impairments.

At the adjudication hearing on December 2, 2009, the parents waived their rights and the court sustained an amended petition. The children were declared juvenile court dependents. (§ 300, subds. (b), (j).) DCFS was ordered to provide the parents reunification services, including drug rehabilitation programs with random testing, parenting and individual counseling. The parents were given monitored visits, and DCFS was given discretion to modify their visitation.

DCFS filed a report in preparation for the six-month review hearing on May 25, 2010. The children remained in foster care. Mother had completed the substance abuse program, appeared motivated to keep making changes in her life and was in compliance with the case plan. She had one no-show and seven negative drug tests. She had completed a parenting program and volunteered to take more classes after that program ended, but had not yet enrolled in individual counseling. The parents consistently visited the children once weekly, for four-hour monitored visits. The caregiver reported the parents were appropriate and interacted well with the children. They had rented a room in a friend's house, and DCFS believed the home was appropriate for the children. Father failed to show for one drug test, tested positive in another one, and had five negative tests. He too had completed a parenting program. Mother and father told DCFS that father would move out if his positive drug test posed an impediment to mother's ability to reunify with the children. DCFS recommended that mother be given unmonitored visitation, so long as father was not present, and that the parents receive reunification services for six more months.

Following the hearing, the juvenile court gave mother unmonitored visits and continued the review hearing for a contested hearing in early August 2010.

In August 2010, DCFS reported that the parents no longer lived together. Mother saw the children during unmonitored day-long visits on Saturdays, and father had weekly monitored visits on another day. The visits went well. Mother still had not enrolled in individual counseling, and had missed two drug tests since the previous hearing. The juvenile court found mother in partial compliance with her case plan and noted its concern regarding her missed drug tests. The 12-month review hearing was continued to mid-November 2010. (§ 366.21, subd. (f).)

In its November 18, 2010 report, DCFS informed the court that father had been arrested for driving under the influence of a controlled substance and without a driver's license. He had three positive drug tests and missed six others; the rest of his tests were negative. Mother also continued to struggle with drug testing—she had missed 8 of 27 tests, but the tests she did take were negative. She still had not enrolled in individual

counseling, and was homeless. She was always late when she came to pick up the children for visits, but called them every night. In July 2010, the children's foster mother told DCFS that, when mother brought the children back they were dirty and unkempt. The children had no problem separating from mother at the end of visits. By mid-August, mother was no longer bringing the children back looking dirty. DCFS recommended that the juvenile court discontinue reunification services due to the parents' problems with drug testing, failure to enroll in individual counseling and information DCFS had received indicating the parents were continuing their relationship, which could place the children at risk—because of father's drug use—if returned to mother's care.

The juvenile court ordered that mother revert to monitored visitation, and set a contested review hearing for early January 2011.

When DCFS filed its report for the continued hearing, mother still had not enrolled in individual counseling. She had not been called to test since the previous hearing. Mother remained homeless, living with friends when possible. She told DCFS she was “no longer involved with” father and wanted to reunify with the children. Mother's visitation was consistent; she saw them twice a week for two hours and called them daily. DCFS recommended that reunification services be terminated because mother had only partially complied with her plan. By the time the January 2011 hearing was conducted, both mother and father were reported to have missed drug tests in December 2010.

At the hearing on January 4, 2011, the court terminated reunification services for both parents, noting they had received 17 months' worth of services, and scheduled a section 366.26 hearing for May 3, 2011.

In its report for the section 366.26 hearing in May, DCFS reported that mother had been incarcerated and had not visited for the past three months. She tried to place collect phone calls from jail, but the foster mother refused to accept the calls. The foster mother told DCFS that, in the three months leading up to her incarceration, the quality of mother's visits had been poor. She had consistently been late and unprepared to buy food for or to discipline the children. In addition, Christopher threw tantrums at almost every

visit, and neither parent had any idea how to handle him when he became angry. The foster mother would intervene and end the visit to deescalate the child's tantrum.

Michelle did not interact with father during visits and pushed him away if he tried to play with or talk to her. After mother was incarcerated, father continued to visit the children once each month. He would call in the evening and demand to visit the children the following day. The foster mother tried to accommodate his demands. Father had not shown up for his last scheduled visit about six weeks earlier, and had not called to reschedule. Christopher mentioned father a lot, but appeared happy and did not ask why his parents stopped visiting. Michelle called the foster mother "Mami," but Christopher called her by her first name. DCFS stated that "[t]hroughout this period of supervision, there is no evidence to support that there is a parent-child relationship between the children and the parents."

The agency reported that Michelle and Christopher were adoptable, but their foster parents did not wish to adopt. Two families had expressed interest in adopting the children, and DCFS requested an additional 90 days in order to match them with a prospective adoptive family. Attached to DCFS's report was a letter mother wrote while incarcerated, stating she did not want to relinquish her parental rights, and requesting contact with her children. In its report, DCFS also noted that, in addition to the seven drug tests she had missed before January 2011, mother missed four more tests between early January and her incarceration in February 2011. Between mid-January and early June 2011, father had missed an additional seven drug tests, and had four positive tests.

The section 366.26 hearing was continued to August 29, 2011 in order to obtain a completed adoptive homestudy.

In early July 2011, DCFS filed a status review report indicating that mother's expected release date was September 2011. She had continued trying to call the children from jail, but the foster mother rejected her collect calls. DCFS also attached a February 2011 letter from mother stating she did not want the children to be adopted. She said that, while in custody, she had requested an intense program to continue working on her addiction, including appropriate decision making and parenting skills.



In its submission for the section 366.26 hearing in August 2011, DCFS reported that mother, who had been incarcerated since January 5, was released on August 22, 2011. She had a monitored visit with the children the next day. According to the CSW, both children seemed ““confused and uninterested”” in mother. The visit did not go well; mother arrived late and the children did not seem to remember her well nor did there appear to be any close bond between mother and either child. DCFS reported that the children had been placed in a prospective adoptive home in early August 2011, with two male parents. One of the prospective adoptive parents was a psychologist with a practice devoted to children, the other was a data base architect. The couple had been in a happy, stable relationship for about five years, were strongly committed to adopting the children and their homestudy had been approved in November 2009. The children were adjusting well to life with their prospective adoptive parents—each of whom had taken a month off work to ease the children’s adjustment to their home—and were already calling them ““Daddy.””

The court continued the contested 366.26 hearing to October 2011.

DCFS filed a supplemental report on October 19, 2011. The children remained placed with their prospective adoptive parents, to whom they had become attached, and had adjusted well. Both children were attending preschool, Christopher was playing soccer and Michelle was taking parent-child swimming lessons. Christopher told the CSW he was “happy.” The children were attending family therapy with their prospective adoptive parents and “ha[d] not responded well to the mother’s recent appearance back into their lives.” At the visit on August 23, 2011, mother had told a CSW she was planning to enter a rehabilitation facility, but she never did. She had no current address, and said she was staying with friends until she found a place to live. Mother was arrested for a misdemeanor charge in early September, and scheduled to return to court for that arrest in November 2011.

Mother had a scheduled visit with the children on October 3. As the children waited in the lobby for mother to arrive, each one of them would ask the CSW “every time a woman entered the lobby if that was their mother.” The children waited about 45

minutes. Mother did not show up and the visit was canceled. The children were excited to see their prospective adoptive father when he returned to pick them up. Michelle saw him first and said, “Daddy’s here,” and Christopher climbed into his lap and hugged him. The CSW had also arranged for the children to call mother on Mondays between 5:00 p.m. and 5:30 pm. They called her on September 26, but there was no answer. They did not call her the next week.

On October 19, 2011, mother filed a section 388 petition requesting reinstatement of reunification services, and asking that the section 366.26 hearing be taken “off calendar.” In connection with the petition, mother said she had consistently attended AA meetings ever since the juvenile court terminated reunification services, had been “connected to” a drug rehabilitation program since her release from jail and had completed a course in life skills and conflict resolution. She said the requested change was in the children’s best interest because she had been visiting the children since her release from custody, and reinstatement of reunification services would allow the children to continue to bond with her.

The court denied the petition without a hearing, after it found there had been no change of circumstances and that the proposed order would not promote the children’s best interest.

The court proceeded with the section 366.26 hearing at which both parents objected to termination of their parental rights, but neither argued that any enumerated exception under section 366.26, subdivision (c) applied. The court found the children adoptable, found that adoption was the most appropriate permanent plan for them and terminated parental rights. Mother filed an appeal from the order summarily denying her section 388 petition, and both parents appeal from the order terminating parental rights.

## **DISCUSSION**

### *I. Mother’s appeal*

Mother maintains the juvenile court abused its discretion in summarily denying her petition for modification because she had made a prima facie showing of changed circumstances or new evidence entitling her to an evidentiary hearing.

A. *The standard for granting a section 388 petition and appellate 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 evidence or changed circumstances exist and (2) the proposed change would promote the best interests of the child. [Citation.] 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. [Citation.]” (*In re Zachary G.* (1999) 77 Cal.App.4th 799, 806.) But, in order to obtain a hearing, the parent must show both changed circumstances and promotion of the child’s best interests. Failure to show either of these elements defeats the prima facie showing. (*Id.* at pp. 806–807.)

We review a denial of a hearing on a section 388 petition for abuse of discretion. (*In re Ramone R.* (2005) 132 Cal.App.4th 1339, 1348.)

B. *The juvenile court did not abuse its discretion by summarily denying mother’s section 388 petition.*

Mother did not meet her burden of demonstrating sufficiently changed circumstances.

When dependency proceedings reach the stage of the section 366.26 permanency planning hearing, the parent’s interest in the care, custody and companionship of the minor is subordinate to the child’s needs for permanency and stability. (*In re Stephanie M.* (1994) 7 Cal.4th 295, 317.) A section 388 petition for modification that alleges “merely changing” circumstances and would, if granted, delay the child’s placement in a permanent home to see if a parent who has already failed to reunify with older siblings may some day be able to reunify with the child “does not promote stability for the child or the child’s best interests.” (*In re Casey D.* (1999) 70 Cal.App.4th 38, 47.)

““[C]hildhood does not wait for the parent to become adequate.”” (*Ibid.*) There is a rebuttable presumption that continued foster care is in the child’s best interest; that presumption applies with greater strength if the permanent plan is adoption rather than foster care. A court hearing a section 388 petition at this stage of the proceedings must

recognize that its focus has shifted to determining the pivotal question before it, that is, what is in the child's best interest. (*In re Angel B.* (2002) 97 Cal.App.4th 454, 464; *In re Stephanie M.*, *supra*, 7 Cal.4th at p. 317.)

If the allegations of the petition, even liberally construed, fail to make a prima facie showing of either changed circumstances or that the proposed modification would promote the child's best interests, the court need not order a hearing on the petition. (*In re Jamika W.* (1997) 54 Cal.App.4th 1446, 1450–1451.) “A ‘prima facie’ showing refers to those facts which will sustain a favorable decision if the evidence submitted in support of the allegations by the petitioner is credited.” (*In re Edward H.* (1996) 43 Cal.App.4th 584, 593.) A petition containing only general or conclusory allegations, does not rise to the level of a “prima facie” showing. (*Ibid.*)

The petition here alleged the following changes in mother's circumstances. During her incarceration: (1) she consistently attended AA meetings; (2) completed a course in life skills and conflict resolution; (3) participated in an adult school program; and (4) was “connected to” a drug rehabilitation program upon her release (which she never entered). In light of mother's extensive history of substance abuse, her failure to drug test consistently throughout this proceeding prior to her incarceration, and her failure to reunify with Aaron, who suffered physical abuse not unlike that suffered on Christopher, mother's evidence of belated progress simply made an insufficient showing to entitle her to a hearing on her section 388 petition. In addition, mother sought additional reunification services, but throughout this action had failed fully to avail herself of those services when they were available or, as importantly, to consistently visit her children or to play a parental role in their lives. Although mother's belated developments were positive, they did not constitute significantly changed circumstances within the meaning of section 388. At most, they showed “changing circumstances” with regard to her ability to parent. (*In re Casey D.*, *supra*, 70 Cal.App.4th at pp. 48–49 [court did not abuse its discretion in denying § 388 petition given mother's short drug recovery period and failure to complete prior treatment programs, which showed only changing circumstances].)

The trial court justifiably found this evidence would show mother's circumstances might be changing but had not yet changed, which "is not sufficient to require a hearing on the merits of [a] section 388 petition." (*In re A.S.* (2009) 180 Cal.App.4th 351, 358.) A petition which alleges only changing circumstances and which would require "delaying 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." (*In re Casey D.*, *supra*, 70 Cal.App.4th at p. 47.)

As mother failed to carry her burden under section 388 to present prima facie evidence of a change in circumstances, the juvenile court did not abuse its discretion in summarily denying her section 388 petition. We need not address the second part of mother's prima facie case, *viz.*, whether granting the petition would promote the children's best interest.

## *II. Father's appeal*

Father filed an independent appeal from the order terminating his parental rights pursuant to section 366.26. Citing *In re Sade C.* (1996) 13 Cal.4th 952 (*Sade C.*) and *In re Phoenix H.* (2009) 47 Cal.4th 835, father's appointed counsel asked this court to exercise its discretion to provide father an opportunity to file a supplemental brief in propria persona. On January 19, 2012 we instructed father's counsel to advise father he had 30 days to submit by brief or letter any grounds of appeal, contentions, or arguments he wished us to consider. Father has not presented any issues for our consideration.

From an abundance of caution and in connection with our consideration of mother's appeal, we independently reviewed the record and, like father's counsel, found nothing to indicate that an arguable issue exists. Accordingly, father's appeal is dismissed as abandoned. (*Sade C.*, *supra*, 13 Cal.4th at p. 994.)

**DISPOSITION**

The order denying mother's petition for modification and terminating parental rights is affirmed. Father's appeal is dismissed.

NOT TO BE PUBLISHED.

JOHNSON, J.

We concur:

MALLANO, P. J.

ROTHSCHILD, J.