Filed 8/10/06

CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

In re MADISON W., a Person Coming Under the Juvenile Court Law.	
TULARE COUNTY HEALTH AND HUMAN SERVICES AGENCY, Plaintiff and Respondent, v. OFELIA W., Defendant and Appellant.	F049851 (Super. Ct. No. J05-59555) **O P I N I O N**

APPEAL from a judgment of the Superior Court of Tulare County. Charlotte A. Wittig, Juvenile Court Referee.

Mario de Solenni, under appointment by the Court of Appeal, for Defendant and Appellant.

Kathleen Bales-Lange, County Counsel, and Bryan Walters, Deputy County Counsel, for Plaintiff and Respondent.

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Ofelia W. appeals from an order terminating her parental rights (Welf. & Inst. Code, § 366.26) to her daughter Madison.[1] Appellant contends the court erred three days

*Pursuant to California Rules of Court, rules 976(b) and 976.1, this opinion is certified for publication with the exception of the Procedural and Factual History and Discussion II.

earlier by denying her petition for reunification services (§ 388). On review, we will affirm.

In the published portion of our opinion, we hold liberal construction of a parent's notice of appeal from an order terminating parental rights encompasses the denial of the parent's section 388 petition provided the trial court issued its denial during the 60-day period prior to the parent's filing the notice of appeal

PROCEDURAL AND FACTUAL HISTORY*

Madison W. tested positive for methamphetamine at birth on May 18, 2005. Confronted with the test results, appellant admitted using the narcotic throughout her pregnancy. Appellant claimed in a May 18th interview with a social worker from respondent Tulare County Health and Human Services Agency (the agency) that she was going to go to a drug program but "figured" she would just have the baby first and then "'clean up.'" The agency social worker detained the newborn and initiated the underlying dependency proceedings.

The agency's investigation revealed this was not the first time that a child of appellant's required juvenile court protection. In early 2003 and following an arrest for methamphetamine use, appellant lost custody of two other children. Furthermore, despite more than a year of court-ordered services, including substance abuse treatment, appellant made no effort to reunify. Notably, a court once commented that appellant and the children's father were "'torturing'" the children by not arriving for visits and giving them hope that they might return home when the parents made it clear by their actions they did not intend to reunify.

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1 All statutory references are to the Welfare and Institutions Code unless otherwise indicated.

***** See footnote *ante*, page 1.

On May 23, 2005, the date for Madison's detention hearing, appellant was not present because purportedly she was unable to locate the juvenile center. The Tulare County Superior Court nevertheless ordered respondent to make available services for appellant consisting of a substance abuse evaluation, parenting and CPR/DEI classes as well as weekly, one-hour supervised visits with Madison. The court agreed to conduct a further detention hearing the following day for appellant. Once again, however, appellant was not present.

Notably, the social worker who interviewed appellant at the hospital gave her a business card with contact information and instructed appellant to call the worker and immediate visitation could begin. The worker also sought contact information from appellant but the telephone number appellant provided was disconnected when the social worker called. Appellant did not contact the social worker for visitation until June 15, 2005, at which point she claimed she did not try earlier because she was depressed. The following day, the social worker referred appellant for court-ordered services and random drug testing.

Appellant made her first court appearance on June 21, the date set for a jurisdictional hearing. The court appointed counsel on her behalf and continued the matter to July 26, 2005, when it would conduct a dispositional hearing as well. Meanwhile, the agency filed a report recommending the court not only exercise its dependency jurisdiction over Madison but also deny appellant reunification services. As grounds for denying her services, the agency cited appellant's failure to reunify with her older children (§ 361.5, subd. (b)(10)) and her resistance to prior court-ordered substance abuse treatment (§ 361.5, subd. (b)(13)).

In an addendum report filed shortly before the continued hearing date, the agency informed the court that appellant "no showed" twice for random drug tests. She also did not appear for CPR training nor for her drug and alcohol evaluation. As for visitation, appellant was late for her first scheduled visit. However, that visit still took place and

appellant was appropriate with the baby. Appellant was late again for her second scheduled visit but this time the foster mother left with the baby after waiting for more than 15 minutes. Appellant did not appear at all for either of the next two scheduled visits. Based on appellant's failure to appear for visits as scheduled, the agency recommended that the court terminate visitation.

When the court called the case on July 26, 2005, appellant was once again absent. Indeed, she had not even contacted her court-appointed counsel. The case was submitted on the agency's reports. The court exercised its dependency jurisdiction over Madison, removed her from parental custody, and denied appellant services under section 361.5, subdivisions (b)(10) and (13). The court also terminated visitation with the proviso that if appellant appeared and requested visits, the matter would be placed on the court's calendar. Having denied appellant services, the court set a section 366.26 hearing to select and implement a permanent plan for Madison.

A month later, appellant's court-appointed attorney noticed a hearing for early September 2005 to re-establish visitation between Madison and appellant. At the hearing which appellant did attend, her attorney asked for visits to resume. Counsel advised the court that appellant was enrolled in a substance abuse program and was "testing and doing NA/AA meetings." The agency opposed appellant's request citing her failure to visit in the past, the lack of any "track record," and the fact that there was a section 366.26 hearing pending. Appellant's counsel countered visitation would not be detrimental to Madison and added appellant was trying to prove she could reunify with her other children so she would not lose her rights to Madison. Having found no benefit to Madison, the court denied the visitation request.

In anticipation of the section 366.26 hearing, the agency prepared a "366.26 WIC Report" in which it recommended the court find Madison adoptable and terminate parental rights. The child's foster parents, with whom she had been placed since the day after her birth, were very committed to adopting her.

On the date set for the section 366.26 hearing, a new attorney substituted in as counsel for appellant and requested a short continuance. The court eventually conducted the hearing on January 13, 2006. In the interim on December 28th, appellant filed a section 388 petition requesting that the court order reunification services. According to the petition, appellant's circumstances had changed since the court denied her services in that:

> "She has been regularly attending 2 or more AA meetings a week. She is currently participating in an inpatient substance abuse treatment program provided by Cornerstone in Hanford. This program will be completed in the next 4 to 6 weeks at which point she will begin an after care program. As part of this program she has been subject to random drug tests and has consistently tested clean. [In] fact she has been drug free since July of 2005.
>
> "She has successfully completed a parenting education program along with several classes relating to children that were not required in the case plan. Once she enters the after care portion of her treatment she will continue to participate in individual counseling at Kingsview Mental Health or another counseling service to deal with codependency issues, boundaries and children's educational needs."

Modification of the no-services order allegedly would be in Madison's best interests because:

> "[i]t is in the best interest of the child that she be raised by a loving birth parent when that parent is capable of providing a safe, stable, nurturing and loving environment for the child. It is in the child's best interests to know of and have contact with her siblings."

The court granted a hearing on the modification petition which was conducted on January 10, 2006. Appellant testified she last used a controlled substance on July 28, 2005. A few weeks later, she entered Walnut Grove which, according to appellant, was a clean and sober environment consisting of drug testing and an out-patient program. Then on October 3, 2005, she entered an inpatient drug treatment program at Cornerstone. According to appellant, the inpatient treatment included parenting, relapse prevention,

substance abuse classes, Alcoholics Anonymous/Narcotics Anonymous (AA/NA), anger management, and random weekly drug testing, although she claimed she drug tested at least once-a-month. She further testified she completed her inpatient phase on December 31st and was currently in Cornerstone's aftercare follow-up. She was attending AA or NA meetings every day, was on step one in AA, and did not have a sponsor. Also, she was living with her mother and was employed by In-Home Care Support Services.

The women's services manager for Cornerstone also testified. She confirmed much of appellant's testimony and added that none of her drug tests had been positive. Appellant last called her brother as a witness. He had regular contact with her and attested to the positive difference he had seen in appellant.

Appellant's counsel argued that had the court ordered services in July, appellant would be in effect where she was now, participating in drug treatment with an upcoming status review hearing. Thus, in counsel's view, Madison would not be prejudiced by an order for services at this point and was "in no different situation" than had there been services from the start. With regard to the order terminating visits, counsel offered his theory that the court terminated visits because of appellant's nonappearance at the dispositional hearing and the agency's recommendation against services.

Following argument, the court denied appellant's petition. The court acknowledged appellant was making efforts to change, although the court was not convinced she had totally changed. The court thought her circumstances were "changing." In addition, the court observed there was no evidence the proposed modification was in Madison's best interests. As to the issue of visits, the court explained, having reviewed the file, it would have considered appellant's "no shows" as opportunities to visit in deciding to terminate visits.

On the request of appellant's counsel, the court continued the section 366.26 hearing for three days. At the permanency planning hearing, appellant testified she agreed with adoption as the court's plan although she would prefer if one of her relatives

could adopt Madison. After argument, the court determined placement was not at issue that day, found Madison adoptable and terminated parental rights.

DISCUSSION

I. *Appealability*

Appellant's trial counsel filed a notice of appeal on February 23, 2006, stating she was appealing from the January 13, 2006 order terminating parental rights. The notice of appeal contained no reference to the January 10th order denying the section 388 petition.

After court-appointed appellate counsel filed his opening brief challenging the denial of appellant's section 388 petition, the agency disputed this court's jurisdiction to resolve the issue given the terms of appellant's notice of appeal. Appellate counsel thereafter moved to amend the notice of appeal or to request this court's liberal construction of the notice of appeal to include a challenge to the denial of the section 388 petition. We deferred the issue until now.

Because this is not the first time such a situation has presented itself to this court, we take this opportunity to hopefully resolve it once and for all, at least as to this court. We frequently receive notices of appeal challenging the termination of a parent's rights and nothing more despite the fact that on or before the same day as the termination order but within 60 days of when the notice of appeal was filed (Cal. Rules of Court, rule 2), the court also denied the parent's eleventh-hour, section 388 petition. When counsel brings the issue to our attention during record preparation or before briefing occurs, we routinely deem the notice of appeal amended to include the additional ruling.

Our rationale is as follows. First, the denial of such a section 388 petition is an appealable order. (§ 395.) Second, the parent's notice of appeal is entitled to our liberal construction. (*Vibert v. Berger* (1966) 64 Cal.2d 65, 67.) Third, appellate jurisdiction to review an appealable order depends upon a timely notice of appeal. (*In re Jonathan S.* (2005)129 Cal.App.4th 334, 340.) Fourth, the notice of appeal would be timely as to the denial of the parent's section 388 petition, provided the trial court denied the parent's

section 388 petition within 60 days of when the parent filed the notice of appeal. (Cal. Rules of Court, rule 2.) And, finally, respondent is not prejudiced. (*Vibert v. Berger*, *supra*, 64 Cal.2d at p. 67.)

Here, by contrast, neither appellant, trial counsel, nor appellate counsel asked this court to grant such relief until after respondent filed its brief.[2] However, to reach a different result because appellate counsel sought relief after the fact appears ill-advised.

By no means do we condone the practice of only citing the termination order in the notice of appeal if there was also an order denying the parent's section 388 petition made at or close to the termination hearing, which appellate counsel would likely raise as an appellate issue. Nor do we condone any omission on appellate counsel's part to carefully review the notice of appeal and promptly bring the issue to this court's attention. However, we are pragmatic. We can well imagine claims of ineffective assistance of appellate, if not trial, counsel and the unnecessary consumption of limited judicial resources reviewing such claims as well as individual motions to dismiss on such grounds. This case is a classic example, especially in light of appellant's concession in the trial court that adoption was best for Madison. Thus, we will henceforth liberally construe a parent's notice of appeal from an order terminating parental rights to encompass the denial of the parent's section 388 petition provided the trial court issued its denial during the 60-day period prior to filing the parent's notice of appeal.

II. *Denial of the section 388 Petition*[*]

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[2] Perhaps anticipating our resolution of the question or at least recognizing the need for expedited review (Cal. Rules of Court, rule 37.4 (e)), respondent wisely addressed the merits of appellant's claim as well as the appellate jurisdiction issue.

[*] See footnote *ante*, page 1.

In challenging the trial court's denial of her section 388 petition, appellant claims she established the circumstances had "changed" since the dispositional order denying her services, rather than were "changing" as the court found. Further, she argues the court should have permitted her to rely on the state's interest in preserving the natural family rather than to affirmatively show services would be in Madison's best interests so that the court's alleged error denied her due process.

By way of background, a parent may petition the court to modify or set aside a prior order on grounds of change of circumstance or new evidence. (§ 388, subd. (a).) The parent, however, must also show the proposed change would promote the best interests of the child. (*Ibid.*; *In re Michael B.* (1992) 8 Cal.App.4th 1698, 1703.) Whether the juvenile court should modify a previously made order rests within its discretion and its determination may not be disturbed unless there has been a clear abuse of discretion. (*In re Stephanie M.* (1994) 7 Cal.4th 295, 318.) Having reviewed the record as summarized above, we conclude the court did not abuse its discretion by denying appellant's petition.

"**Changed" Versus "Changing" Circumstances**

In criticizing the court's reference to "changing" as opposed to "changed" circumstances, appellant argues she supplied substantial evidence to satisfy the first prong of section 388. We take this opportunity to address the word choice and the statutory requirement given the numerous appellate records we review in which respondent or the trial court characterizes a parent's circumstances as merely changing and the many arguments similar to the one now raised by appellant.

We begin our analysis with the language of section 388 which expressly authorizes a parent of a dependent child to:

> "upon grounds of change of circumstance or new evidence, petition the court in the same action in which the child was found to be a dependent child of the juvenile court . . . for a hearing to change, modify, or set aside any order of court previously made . . . or to terminate the jurisdiction of

> the court. The petition shall be verified and . . . shall set forth in concise language any change of circumstance or new evidence which are alleged to require the change of order or termination of jurisdiction." (§ 388, subd. (a).)

The procedure under section 388 accommodates the possibility that circumstances may change so as to justify a change in a prior order. (*In re Marilyn H.* (1993) 5 Cal.4th 295, 309.)

The advent of "changing" circumstances to be distinguished from a change of circumstances appears to have been *In re Casey D.* (1999) 70 Cal.App.4th 38 (*Casey D.*). There, the circumstances of a petitioning parent who had not prevailed were characterized as "changing, rather than changed." (*Id.* at p. 49.)

The mother in *Casey D.* petitioned days before a section 366.26 hearing for the return of her daughter to her custody or the provision of additional reunification services. The trial court previously terminated services at the six-month stage when the mother, a long-time heroin addict, had not complied with her reunification plan. Soon after the order terminating services, the mother switched treatments for her addiction and her drug treatment counselor reported a noticeable difference in several positive respects. The mother began regularly attending her outpatient drug treatment and NA meetings and had a sponsor for several months. On the other hand, she was not yet working on a 12-step program nor was she satisfying a significant program requirement that she write an autobiography. (*Casey D., supra,* 70 Cal.App.4th at pp. 42-43.)

The *Casey D.* court ruled the trial court did not abuse its discretion by denying the petition. (*Casey D., supra,* 70 Cal.App.4th at p. 48.) The appellate court noted the mother had been drug-free only for approximately four to five months and had an extensive drug history with a tendency to engage in treatment programs when outside agencies required her to do so and then relapse once the requirement was lifted. The appellate court also cited the fact that she was not yet working on a 12-step program nor had she written her autobiography. (*Ibid.*) It was in this context that the *Casey D.* court

twice referred to the circumstances as "merely changing" (*Id.* at p. 47) and "changing, rather than changed" (*Id.* at p. 49.)

Since then, the same appellate division that decided *Casey D.* cited a showing of "changing" circumstances as being insufficient to warrant a hearing under section 388. (*In re Carl R.* (2005) 128 Cal.App.4th 1051, 1072.)

We interpret these decisions as essentially using the word "changing" as a shorthand method to describe a change insufficient to justify modifying the court's prior order (*In re Marilyn H., supra,* 5 Cal.4th at p. 309). While we do not disagree with the trial court's determination that appellant's showing was insufficient, we offer the following approach to avoid future semantic arguments.

Appellant petitioned to set aside the prior order denying her services. Thus, as a matter of logic, a change of circumstance or new evidence which would justify setting aside the order denying her services (*In re Marilyn H., supra,* 5 Cal.4th at p. 309) would have to address the basis for the court's original denial of services. As summarized above, the court denied appellant reunification services on two independent grounds: her failure to reunify with her other dependent children (§ 361.5, subd. (b)(10)) as well as her history of extensive, abusive and chronic use of drugs and resistance to prior court-ordered substance abuse treatment (§ 361.5, subd. (b)(13)). Appellant's showing she was currently participating in drug treatment and AA as well as her claim she had been sober since late July 2005 was obviously a change from her total lack of effort if not interest prior to the dispositional hearing. However, it was insufficient to call into question either, much less both, of the court's grounds for denying her services.

The elements of a section 361.5, subdivision (b)(10) finding are:

> "[t]hat the court ordered termination of reunification services for any siblings or half-siblings of the child because the parent or guardian failed to reunify with the sibling or half-sibling after the sibling or half-sibling had been removed from that parent or guardian pursuant to Section 361 and that parent or guardian is the same parent or guardian described in subdivision

> (a) and that, according to the findings of the court, this parent or guardian has not subsequently made a reasonable effort to treat the problems that led to removal of the sibling or half-sibling of that child from that parent or guardian."

Appellant's showing obviously did not address the first element, namely the termination of services for Madison's siblings and failure to reunify, and arguably did not address the second element regarding a subsequent reasonable effort to treat the problems that led to the siblings' removal. Even appellant admitted in her petition that she had yet to address her codependency issues, which apparently was part of the problem that led to her loss of custody of the siblings. Moreover, appellant's showing was internally inconsistent so that the court may not have been persuaded appellant's showing was entirely credible, much less reasonable. For example, attached to her petition was documentation that Cornerstone's inpatient program was four months long and in her petition filed December 28th, appellant claimed she had four to six weeks remaining of her inpatient treatment. However, at the January 10, 2006 hearing, appellant testified she had completed the inpatient portion on December 31, 2005.

Turning to the section 361.5, subdivision (b)(13) finding, which the trial court also previously made, the subdivision states:

> "[t]hat the parent or guardian of the child has a history of extensive, abusive, and chronic use of drugs or alcohol and has resisted prior court-ordered treatment for this problem during a three-year period immediately prior to the filing of the petition that brought that child to the court's attention, or has failed or refused to comply with a program of drug or alcohol treatment described in the case plan required by Section 358.1 on at least two prior occasions, even though the programs identified were available and accessible." (§ 361.5, subd. (b)(13).)

Appellant's situation clearly fell within the first scenario of this alternative provision, that is she had a history of extensive, abusive, and chronic use of drugs or alcohol and resisted prior court-ordered drug abuse treatment during a three-year period immediately prior to the filing of the petition in Madison's case. Once again, appellant's showing that she was now involved in drug treatment did not alter the applicability of the

section 361.5, subdivision (b)(13) finding to her case, namely she still had the requisite history and resisted prior court-ordered treatment during the three years before the agency filed Madison's dependency petition.

Once a court denies services on grounds such as section 361.5, subdivision (b)(10) or section 361.5, subdivision (b)(13), let alone on both grounds, it may be impossible for a parent to show a sufficient change of circumstance to justify setting aside the denial pursuant to section 388. However, reunification services constitute a benefit; there is no constitutional "entitlement" to those services. (*In re Joshua M.* (1998) 66 Cal.App.4th 458, 476.) Our point, nonetheless, is the court does not abuse its discretion by finding an insufficient change of circumstance to set aside an order denying services if the parent does not show a change of circumstance which challenges, if not refutes, the basis for the original denial of services.

Because section 388 sets forth a two-part test and, as we have determined above, the trial court did not abuse its discretion by rejecting her showing for the first element of change of circumstance, we technically need not address appellant's remaining argument regarding best interests. However, in an abundance of caution, we will address the second part of appellant's argument.

Best Interests Evidence

According to appellant, she was in no position to offer evidence regarding Madison and her best interest as required by section 388. Thus, appellant argues the court should have allowed her to rely on the state's interest in preserving the family unit (*In re Melissa S.* (1986) 179 Cal.App.3d 1046, 1059) rather than having to offer evidence that reunification services were in Madison's best interest. In the alternative, appellant complains the statutory requirement that she show modification of the prior order would be in Madison's best interests is unconstitutional. As discussed below, appellant's argument is meritless.

First, appellant essentially asks this court to take on the role of the Legislature and rewrite section 388 to provide an exception for her or, as she puts it, someone in her position. However, it is our role as part of the judicial branch of government to interpret laws, not to write them. (*Kopp v. Fair Pol. Practices Com*. (1995) 11 Cal. 4th 607, 675.)

Second, the state's interest in preserving the family unit (*In re Melissa S., supra*,. 179 Cal.App.3d 1046, 1059) has its limits. At the stage appellant filed her petition for reunification, her interest in Madison's care, custody and companionship was no longer paramount. Appellant's prevailing interest in family reunification came to a close when the court denied her services pursuant to section 361.5, subdivision (b) and set the section 366.26 hearing. The focus then shifted to Madison's needs for permanency and stability. (*In re Marilyn H., supra*, 5 Cal.4th at p. 309.)

Third, appellant's effort to create a class of parents allegedly victimized by section 388's best interest requirement ignores the facts in her case. Through no fault of the statutory scheme, the agency or the court, appellant had no relationship whatsoever with Madison. It was appellant who chose to use methamphetamine throughout her pregnancy and then "'clean up.'" It was appellant who failed to maintain contact with her social worker to set up visits during the first month after Madison's birth. It was appellant who was then late to the first two scheduled visits with Madison and who failed to appear at all for the next two visits. It was appellant who did not take advantage of the court-ordered service referrals that the social worker made. Given appellant's apparent total lack of interest in Madison, visitation and consequently appellant's opportunity to develop a relationship with Madison was terminated. It was under these circumstances, all of which were of appellant's making, that she could not show Madison's best interests would be furthered by an order for reunification services. Accordingly, we perceive no due process violation as appellant claims.

In the final analysis, the trial court properly could find Madison's needs for permanency and stability would not be furthered by an order for services to benefit appellant.

DISPOSITION

The order denying appellant's section 388 petition as well as the order terminating parental rights are affirmed.

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Vartabedian, Acting P.J.

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Harris, J.

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Cornell, J.