Filed 12/1/15 In re I.E. CA4/2

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

In re I.E. et al., Persons Coming Under the Juvenile Court Law.	
SAN BERNARDINO COUNTY CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. M.E. et al., Defendants and Appellants.	E063827 (Super.Ct.Nos. J255094, J255095) O P I N I O N

APPEAL from the Superior Court of San Bernardino County. Cheryl C. Kersey, Judge. Affirmed.

Daniel G. Rooney, under appointment by the Court of Appeal, for Defendant and Appellant M.E.

Karen J. Dodd, under appointment by the Court of Appeal, for Defendant and Appellant C.A.

Jean-Rene Basle, County Counsel, and Jamila Bayati, Deputy County Counsel for Plaintiff and Respondent.

I. INTRODUCTION

Defendant and appellant, M.E. (Mother), is the mother of two children declared dependents of the juvenile court: I.E., a girl born in May 2012, and I.J., a boy born in October 2006. Defendant and appellant, C.A. (Father), is the biological father of I.E. The parents appeal the June 4, 2015, orders of the juvenile court terminating parental rights and placing the children for adoption. (Welf. & Inst. Code, § 366.26.)[1]

Mother claims the section 366.26 orders must be reversed because the court abused its discretion in denying her section 388 petition to grant her reunification services for the children. Mother was originally denied services because she failed to reunify with and lost her parental rights to two older children, and she failed to benefit from previously-ordered substance abuse treatment programs. (§ 361.5, subd. (b)(10), (11), (13).)

Father joins Mother's claim in order to preserve his parental rights to I.E., but he raises no claims of his own. Plaintiff and respondent, San Bernardino County Children and Family Services (CFS), claims Mother's petition was properly denied; Father lacks standing to appeal in any event because he is a mere biological father, and his appeal must therefore be dismissed. We affirm the challenged section 366.26 orders. Mother's

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

petition was properly denied; thus, it is unnecessary to address CFS's claim that Father lacks standing to appeal.

II. FACTS AND PROCEDURAL BACKGROUND

A. *The Children's Removal (May 2014)*

On May 30, 2014, Mother and her boyfriend "Ed" were arrested for possessing methamphetamine for sale and child endangerment following a probation check on Mother. I.E., age two, and I.J., age seven, were living with Mother and Ed in a second floor apartment. Methamphetamine and drug paraphernalia were found within reach of the children, the home was "extremely messy," unsafe, and unsanitary, and the children appeared to be dirty.

When the social worker came to the home and spoke with Mother, Mother said the biological father of I.J. was incarcerated and she did not know who I.E.'s father was, saying she was "not going to get into that" and was "partying" when she became pregnant with I.E. When asked to pack a bag of belongings for the children, she said "nothing is clean. I don't know where [I.E.'s] shoes are."

Mother told the social worker that I.J. had to be closely supervised when playing with other children because "he hurts other children." He also had to be watched when playing with I.E. because he was "overly aggressive" with her and had hurt her before. I.J. had been diagnosed with attention deficit/hyperactivity disorder (ADHD) and dissociative disorder.

I.J. told the social worker that Ed "was a fucking bitch that does dope" and, when admonished not to use that kind of language, said, "that is the way we talk in our house especially when Ed is punching my mother in her face and kicking [her]." It appeared to the social worker that both children had been "exposed to adult material on a regular basis," including pornography. The children were taken into protective custody, placed in foster care, and ordered detained.

During the June 10 jurisdictional/dispositional interview with the social worker, Mother admitted using methamphetamine daily for two months before her May 30 arrest, and using methamphetamine between her pregnancies with I.J. and I.E. She claimed I.J. was "a liar," that I.J. lied about Ed using drugs, and that I.J. must have seen other people using drugs at his father's house. She wanted to enroll in an inpatient program because she no longer had a place to live. On June 11, Mother was convicted of possessing a controlled substance for sale, stemming from her May 30 arrest, and was released on probation. She had two prior convictions for possessing controlled substances for sale.

Mother and the father of I.J. had two older children, born in 2004 and 2005, who were removed from parental custody at the time of their births due to Mother's substance abuse and homelessness, or failure to provide for their support. The father of I.J. had an extensive criminal history and a history of abusing controlled substances, including heroin and methamphetamine. The parents failed to reunify with their older children, their parental rights were terminated in 2005 and 2006, and the children were adopted.

By June 25, 2014, four possible fathers of I.E. had been identified, including Father. Paternity tests later confirmed that Father was the biological father of I.E.

B. *Jurisdiction/Disposition (September 2014)*

At the jurisdictional/dispositional hearing on September 16, 2014, the court sustained several jurisdictional allegations for the children, including that they were at risk of harm due to Mother's ongoing substance abuse problem. The court denied Mother services based on her failure to reunify with and loss of parental rights to her older children, her ongoing substance abuse problem, and her resistance to prior court-ordered treatment. (§ 361.5, subd. (b)(10), (11), (13).) County counsel emphasized Mother had been "a habitual user over a long period of time, 15 years or so." Minors' counsel joined CFS in recommending no services for Mother.

The court also denied reunification services to Father for I.E., after finding he was "merely" I.E.'s biological father and it was not in the best interests of I.E. to offer him services. Despite knowing that Mother was pregnant with I.E. and that he could be I.E.'s father, Father did not attempt to establish his paternity and had never provided support for I.E. Father also refused to drug test after learning that paternity tests results had confirmed he was I.E.'s father.

A section 366.26 hearing was originally scheduled on January 14, 2015. Mother and Father were each granted supervised visitation. Mother was granted weekly, two-hour visits, and CFS was authorized to liberate the frequency and duration of Mother's visits.

C. *Mother's Testimony at the Dispositional Hearing (September 2014)*

Mother contested the recommendation to deny her services and testified at the dispositional portion of the September 16 hearing. She claimed she had been sober for 110 days, or since May 30, and argued she should be granted services for I.J. and I.E. because she loved them, she understood she had a substance abuse problem, and she was making efforts to stay sober. She was 34 years old and "not the same person [she] was" before May 30.

In July 2014, Mother enrolled in an inpatient program, Gibson House, but left the program in August 2014. She left the program because she felt unsafe and other women in the program were still using drugs. As CFS recommended, Mother was attending an outpatient program, a domestic violence program, parenting classes, and individual therapy.

Mother began using drugs in 2001 when she was 21 years old; she stopped when she was six months pregnant with I.J. in 2006; and she was clean for five and one-half years, until 2011. She relapsed in 2011, but again stopped using drugs in late 2011 when she was two months pregnant with I.E., who, as noted, was born in May 2012. Both I.J. and I.E. were born drug free. Mother relapsed a second time, in late 2013, six months before her May 30 arrest. She had not used drugs since May 30; and she had not seen her former boyfriend Ed since May 30.

Mother did not recall being offered any substance abuse treatment or other services during the dependency proceedings for her older children. She explained that

she was homeless during that time and CFS had no way to contact her. At the behest of CFS, she participated in a six-month substance abuse program after I.J. was born in October 2006 and participated in a four-month outpatient program before I.E. was born in May 2012. She finally understood that her drug abuse was "inappropriate" and she was "glad that you guys stepped in to help me fix my life."

D. *Further Proceedings and Reports* (*Through January 2015)*

The section 366.26 hearing, originally set for January 14, 2015, was continued in order to allow CFS to locate an adoptive home for the children. On January 5, CFS reported that I.J. and I.E. had been in three foster homes since May 31, 2014. I.J., then age eight, was taking psychotropic medication for his ADHD, aggression toward others, and impulsivity. He initially had encopresis, got into physical altercations with children at school, and exhibited "some oppositional defiant behaviors." He had an individual education plan. I.E., then age two, had no developmental concerns.

On January 8, I.J. was placed in an intensive therapeutic foster care home due to his behavioral problems. He had been "yelling, screaming and throwing objects," his behavioral problems were escalating, and the foster mother reported being fearful for herself and the other children in the home.

CFS also reported "ongoing concerns" with Mother's "erratic behavior" during visits, as reported by the foster mother and the visitation center where Mother's visits were supervised. For example, Mother reported to the visitation center that the foster mother had sexually abused the children, and was "adamant" that only a certain brand of

diapers and wipes be used for I.E. Thereafter, I.E. developed a severe diaper rash and was taken to the doctor on several occasions.

CFS suggested Mother *knew* I.E. was highly allergic to the diaper products Mother insisted be used, reporting that "[i]t is unknown what [Mother's] motives were in insisting on products that [Mother] likely knew [I.E.] was highly allergic to." In response, Mother claimed she noticed I.E. was developing a diaper rash during her initial visits and reported her concerns to the visitation center.

For his part, Father had "sporadically called" the social worker to arrange visits with I.E., but he still refused to drug test and had not visited I.E.

E. *Mother's First Section 388 Petition (January 12, 2015)*

On January 12, 2015, Mother filed the first of two section 388 petitions asking the court to grant her reunification services for the children. In her January 12 petition, she submitted proof that she entered an inpatient substance abuse treatment program at Inland Valley Recovery Services on September 9, 2014, and completed the program on November 6. As of January 12, she was enrolled in an aftercare program, was attending Alcoholics Anonymous/Narcotics Anonymous (AA/NA) meetings on a daily or twice-daily basis, and had completed courses in parenting and domestic violence. She was in compliance with the terms of her probation, was living with her brother, and expected to be in a position to reunite with the children within six months.

The court denied the petition, summarily and without a hearing, on January 14. In its order, the court noted Mother had not submitted proof that she had been testing

negative for drugs, or that she had, or would have, an appropriate home for the children, and there had been "problems" with Mother's visits.

F. *Mother's Second Section 388 Petition (May-June 2015)*

On May 5, 2014, Mother filed a second section 388 petition seeking reunification services. Along with her petition, Mother submitted evidence that she was continuing to attend AA/NA meetings, daily or twice-daily, she had completed 16 aftercare sessions, additional parenting and domestic violence courses, and she completed an anger management course in November 2014. She did not have the funds to drug test but had been "drug free" since May 30. She was living with her AA/NA sponsor, and was looking for housing and employment.

CFS recommended denying the petition, terminating parental rights, and placing the children for adoption. The court initially scheduled argument on the petition, then granted an evidentiary hearing after receiving additional evidence, including "visitation reports" from Mother's visits with the children, and hearing argument on June 4, 2015. The petition was heard and denied on June 4, prior to the section 366.26 hearing.

1. CFS's Evidence

On May 14, CFS reported that the children were living in a new foster home and their foster parents were willing to adopt them. I.E. was placed in the home on January 20, and I.J. was placed in the home on February 28. I.J. had been receiving weekly "wraparound" services, and both children were doing "exceptionally well" in the home.

When asked whether he wanted to be adopted, I.J., then age eight, said, "Yes, I want them to adopt me." I.E. was too young to understand adoption.

CFS further reported that Mother had to be "redirected" several times during visits for making negative and "belittling" comments to I.J., including that I.J. "smelled of urine" and was schizophrenic. The monitors also noted a "significant lack of attachment" between Mother and the children, and that I.E. was "having a difficult time" separating from her prospective adoptive father prior to visits. According to the prospective adoptive parents, I.J. was "trying really hard to be good" because Mother always told him "he was a bad kid." The social worker opined it "would be devastating" to remove the children from their prospective adoptive parents.

2. Mother's Evidence

Mother' counsel presented "visitation reports" from Mother's weekly visits with the children. Counsel argued that the reports showed Mother had made a "huge amount" of progress with the children. Counsel conceded that the reports showed "there were problems" during the earlier visits. In October 2014, the children were not interacting with Mother or each other, but that had changed by March and April 2015, and the monitor was no longer recommending that Mother make any changes. The reports showed that Mother consistently visited the children, she was never late to a visit, and she never appeared to be under the influence of drugs or alcohol. During the later visits, Mother and the children were very affectionate toward each other, and Mother acted in a parental role.

Mother testified in support of her petition. She understood the children were removed because she was "a drug addict" and had relapsed, but she had since learned how to be a better parent. She now had a "wonderful" relationship with the children; they listened to her, and she knew how to appropriately discipline them. She had not used drugs since May 30, 2014, and she tested negative for drugs on June 3, 2015. Since January 2015, she had been seeing a therapist on a weekly basis.

Mother further testified that was unable to work because she had "severe arthritis" in her back and neck which required surgery. She applied for social security disability and was denied, but was still hoping to qualify for benefits. She could support herself and the children through welfare. She was currently living in a sober living home, paid for by the probation department, and planned to rent an apartment with her sister.

Mother's counsel also called the social worker, Ana Chronopoulos, and the adoption social worker, Sandra Guerrero, to testify. Ms. Chronopoulos agreed that Mother's behavior had "evolved" during her visits, and there were no longer any concerns about Mother's behavior during visits. Based on the visitation reports, Ms. Guerrero agreed Mother's visits had been "positive" and Mother appeared to be functioning in a parental role. Ms. Guerrero believed that adoption was in the best interests of the children, however.

3. Closing Argument and the Court's Ruling

Minors' counsel acknowledged that Mother had made "a lot of progress," she should be commended for that progress, and it was "clear" her visits had improved. But

counsel indicated it had been difficult to place the children due to I.J.'s behavioral problems, and the children were now in a prospective adoptive home. Granting Mother reunification services would be detrimental to the children, especially I.J.; I.J. was making good progress, and granting Mother services would jeopardize his progress. Counsel for CFS argued Mother was in no position to take the children, in part because she lacked stable living arrangements, and that her lack of stability had been ongoing from the beginning. Her circumstances were changing but not changed. After commending Mother for her progress, the court concluded that even if Mother showed changed circumstances, it would not serve the children's best interests to grant her services, and denied the petition.

G. *The Section 366.26 Hearing*

At the section 366.26 hearing, the court terminated parental rights and selected adoption as the children's permanent plan. Father was present at the hearing and objected to terminating his parental rights to I.E. Father never had visited I.E., but his counsel said he felt he may have been treated unfairly.

III. DISCUSSION

Section 388 allows the parent of a dependent child to petition the juvenile court to modify or set aside a previous order of the court. (§ 388, subd. (a).) The parent must show by a preponderance of the evidence that there is new evidence or changed circumstances and that granting the requested change would serve the best interest of the child. (*In re Stephanie M*. (1994) 7 Cal.4th 295, 317; *In re Marcelo B.* (2012) 209

Cal.App.4th 635, 641-642; § 388, subds. (a), (b).) We review the grant or denial of a section 388 petition for an abuse of discretion. (*In re. R.T.* (2015) 232 Cal.App.4th 1284, 1300-1301.) Judicial discretion "'implies absence of arbitrary determination, capricious disposition or whimsical thinking. . . .'" (*In re Cortez* (1971) 6 Cal.3d 78, 85-86, fn. omitted.)

Here, the court by no means abused its discretion in denying Mother's petition for reunification services. It is unnecessary to address whether Mother showed changed or only changing circumstances. By all accounts, Mother made significant progress in addressing her long-standing substance abuse problem and in learning to interact appropriately with the children during visits. The court appropriately commended Mother for her progress.

By the time Mother's petition was heard on June 4, 2015, the children were living in the only stable home they had ever known, with two parents willing to adopt them. The children were bonded to these parents, and I.J. made it clear he wanted to stay in the home and wanted his prospective adoptive parents to adopt him. Further, and perhaps most important, the prospective adoptive home was difficult to find due to I.J.'s severe behavioral problems. The children were subjected to terrible conditions under Mother's care. These conditions were especially damaging to I.J. because he was seven years old when he was removed from Mother's custody in May 2014. I.E. was barely two years of age. As minors' counsel argued, offering Mother services would have destabilized the children, especially I.J. It was too risky to gamble with I.J.'s progress by offering Mother

services. It would have placed the children in "limbo," delayed their permanency, and worse, it would have risked I.J.'s fragile progress and I.E.'s well-being. The juvenile court did what was very clearly best for the children in denying Mother's petition.

IV. DISPOSITION

The June 4, 2015, orders denying Mother's section 388 petition, terminating parental rights, and selecting adoption as the children's permanent plan are affirmed.

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KING
J.

We concur:

RAMIREZ
P. J.

MILLER
J.