



CASE ALERT

Guidance on Rebutting WIC §388 Presumption where Domestic Violence is Sole Basis for Dependency Petition

Welfare and Institutions code 388 allows a parent to petition to change, or set aside, any previous juvenile court order if the parent shows new evidence or a change of circumstances that is in the child's best interests. Where reunification services have been terminated, there is a rebuttable presumption that foster care is in the child's best interests due to their need for permanency and stability. When determining whether the presumption has been rebutted, the court must consider (1) the seriousness and potential continuation of the problem that led to the dependency, (2) strength of the bonds between the children to parent and caretakers, and (3) nature of the changed circumstances and why the change was not made sooner.

In re J.M. (2020) 50 Cal.App.5th 833 provides trial courts with clear guidance on how to evaluate whether a section 388 presumption is rebutted by a domestic violence survivor who has completed reunification services. The appellate court is clear that **evidence of a parent being slow to break free from the cycle of domestic abuse, stay away from the abuser, or engage in domestic violence and other services does not mean the survivor parent cannot overcome the section 388 presumption.**

Summary of the Case

The juvenile court removed J.M. from Mother's custody after finding domestic violence by Father against Mother. Mother participated in 16 months of court-ordered reunification services which included completing various courses and counseling, individual therapy, and maintaining employment and stable housing. However, during this time Mother spent time with Father, despite a restraining order protecting her from father, and did not comply with the court's order to complete a mental health evaluation. The court, therefore, terminated Mother's reunification services.

Mother then asked the court to return her child, saying that circumstances had changed. In determining whether Mother had rebutted the section 388 presumption, the appellate court found that Mother's evidence regarding participation in individual therapy, completion of parenting and anger management courses, obtaining and maintaining stable employment and housing constituted a substantial change for the purposes of Mother's section 388 petition. The appellate court recognized the fact that "Mother did not immediately break free from the cycle of abuse does not render it in J.M.'s best interests to deny him the opportunity to be raised with his biological mother and extended family." (Op. at 21-22.)

Further, the appellate court held that, as is often the case when attempting to break free from the cycle of abuse, Mother was initially unwilling to acknowledge her status as a domestic violence survivor and struggled to stay away from Father. At the time of the hearing for Mother's section 388 petition, she had avoided contact with Father for over a year and had maintained a strong relationship with J.M. Therefore, Mother rebutted the section 388 presumption.

The child in this case was diagnosed with autism during the proceeding. The trial court found that the foster parent's care would be in the child's best interests as they had participated in sign

language and other trainings to address the child's special needs and Mother had not. Despite this lack of training, DCFS had no concerns about Mother's ability to care for the child. The appellate court held that the trial court's finding that mother required special training to care for her child was an unreasonable basis for deciding that returning her child was not in the child's best interests and that **requiring mother to "prove an above average level of parenting ability" in order to meet her burden of proving it was in the child's best interest to be raised by his mother was an abuse of discretion.**

PRACTICE TIPS

1. Use this case to argue that an initial failure to end contact with an abuser may not serve as a basis for terminating reunification services, citing the appellate court's understanding of the difficulties surrounding breaking the cycle of abuse.
2. Use this case to argue that the court cannot devise a list of ways that parents must prove themselves as parents that are wholly unrelated to the issues that brought the child within the juvenile court's jurisdiction in order to "earn" their children back.
3. The court noted that a section 388 petition necessarily involved parents who had made mistakes that were serious enough to warrant a termination of services and that the question must be whether the changes the parents has made since "are substantial enough to overshadow the prior determination." Use this case to contextualize a client's prior failure to adequately address concerns and focus the court's attention on your client's actions since the termination.

For questions or clarifications, contact Family Violence Appellate Project: info@fvaplaw.org or (510) 858-7358. Thank you!