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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

In re E.L. et al., Persons Coming Under the
Juvenile Court Law.

B257431
(Los Angeles County
Super. Ct. No. CK50079)

LOS ANGELES COUNTY
DEPARTMENT OF CHILDREN AND
FAMILY SERVICES,

Plaintiff and Respondent,

v.

TERESA L.,

Defendant and Appellant.

APPEAL from orders of the Superior Court of Los Angeles County, Daniel Zeke Zeidler, Judge. Affirmed.

Aida Aslanian, under appointment by the Court of Appeal, for Defendant and Appellant.

Mark J. Saladino, County Counsel, Dawyn R. Harrison, Assistant County Counsel, and Aileen Wong, Deputy County Counsel, for Plaintiff and Respondent.

Teresa L. (mother) appeals from orders denying her petition under Welfare and Institutions Code section 388¹ and terminating her parental rights to her twin daughters. We affirm.

FACTS

The Los Angeles Department of Children and Family Services (DCFS) filed a first amended petition on March 7, 2012, alleging that when mother, a daily abuser of alcohol, entered a residential treatment program in September 2011, she left her seven minor children in the care of their 25-year-old adult sibling, F.L., knowing that F.L. abused alcohol. The oldest minor child was 16 years old; the youngest were 19-month-old E.L. and S.L., the twins who are in issue in this case. This plan was inappropriate and detrimental, as F.L. abused alcohol in the children's presence. When DCFS visited the home in January 2012, the home was in an unsafe and unsanitary condition, which placed the children at risk of harm in violation of section 300, subdivision (b). Mother had a history of substance abuse and currently abused alcohol (including when the children were under her care and supervision), endangering the children's health and safety. The petition also alleged that the children's fathers failed to provide the basic necessities, in violation of section 300, subdivision (g).² Mother had lost custody of six children in 2002 when she went to Mexico and left them with the oldest, F.L., who was then 15 years old. The court returned the children to mother in September 2003, and terminated its jurisdiction over the children in 2004.

The detention report, filed January 26, 2012, stated that DCFS responded to a referral on January 17, 2012, alleging sexual abuse of then 16-year-old M.L. by her sibling F.L., who was then 25 years old. All the older children denied the allegations of sexual abuse. The social worker saw a mattress on the living room floor and trash all over; windows were broken in the bedroom where all five girls (including the then 17-

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

² The father of the twins is not a party to this appeal.

month-old twins) slept; and the twins were sitting on the dirty, stained bedroom floor wearing dirty diapers and dirty, minimal clothing with no socks or shoes. M.L. told the social worker the twins were small because they were premature. The social worker noticed that the twins had features indicating fetal alcohol syndrome, but the siblings said the children had no medical diagnosis. The house's backyard was full of furniture, with an open fire where the family stated they boiled water to bathe as there was no gas. The house smelled of smoke and urine, with soiled diapers on the floor, and dangerous and exposed wiring. There were no handles to turn on the water in the bathroom, the kitchen was unkempt and dirty and smelled of rotten food, and there was minimal food in the refrigerator (and no baby food). The social worker noticed that F.L.'s eyes were red, but he denied drinking (although a sheriff who was present stated he smelled alcohol on his breath). F.L. had no transportation and no documentation that he was the children's caregiver, and no medical information for the twins, who had last been taken to the doctor before mother left. A family friend stated that she provided some support for the family, and that F.L. was drinking less than before, when he drank every day.

The social worker interviewed mother on January 19, 2012 at the facility where mother was living. (Mother's program was a voluntary Alcoholics Anonymous (AA) program, which was not court-approved and did not comply with court regulations.) Mother stated that she was in a 90-day program and would be leaving on February 1, 2012, when she would return to get the house in order. Mother had no concern about F.L. caring for the children. Mother stated that she was arrested when she was on her way to the park with a beer, but drank only half; and during her pregnancy with the twins she had one beer every 15 days. The twins had no medical conditions, and they were just small because they were born prematurely.

When the social worker visited the home on January 20, 2012, the twins were barefoot and wearing dirty clothing and their hands were "freezing." On January 23, 2012, the children's social worker again found the twins in dirty clothing; one twin was stuck between the wall and the door, and one was unattended in the bedroom. E.L. had small black pieces of wood in her mouth. The twins appeared to have developmental

delays; although they were one and a half years old, they looked only six months old. DCFS took the children into protective custody on January 23, 2012, and that same day mother left her program.

At a January 26, 2012 detention hearing, all seven children were detained and placed in foster homes. The court ordered mother to submit to weekly random and on demand alcohol testing, and provided mother with twice-weekly monitored visits with the twins, with discretion to liberalize.

The March 7, 2012 Jurisdiction/Disposition Report stated that mother did not know the whereabouts of the four fathers of the children, including the father of the twins. The children had been under F.L.'s care from November 2011 through January 2012. Mother had been arrested in February 2011 for drinking in public and had been ordered by the court to complete a 90-day inpatient program. Mother's seven-year-old daughter L.L. stated that F.L. could not take good care of that many children. He drank a lot, and her older sister would rub alcohol around his face and legs when he passed out. The other older children confirmed that F.L. drank a lot, but mother stated that he did not drink while she was in the program. While the children described the house as dirty, mother stated she could not imagine that the house was as dirty as described. The older children also confirmed that mother drank, but mother did not believe she had a serious alcohol problem; when she was arrested for public drinking, she was at the park and only had drunk a half can of beer. Mother also stated that she drank infrequently at the beginning of her pregnancy with the twins.

Mother stated that she was born in Mexico, could not read or write, and did not know how to ride the bus. She had never worked and was not looking for work. The social worker stated that mother showed a genuine and sincere concern for the children's well being, voluntarily sought help for her alcohol problem, and had cared for the children for a significant period of time. The older children wanted to return home to her and believed she would stop drinking.

A medical exam showed that the twins were underweight, and showed signs of developmental delays and failure to thrive. Both were to be tested for Fetal Alcohol Syndrome.

Mother had visited all seven children at least twice a week, with monitoring by the caregivers. She showed up drunk for one of her visits with the twins. DCFS recommended that the children be named dependents, as the family suffered from serious alcohol abuse, mother used irrational planning in leaving the children with F.L., and mother minimized the severity of her abuse. Given that mother's program was not approved by DCFS, mother had not addressed her alcohol abuse.

At a pretrial resolution conference on June 25, 2012, mother submitted a signed waiver of rights form pleading no contest, and regarding all the children, the court sustained section 300 subdivision (b) allegations as to mother. No reunification services were provided to any of the fathers. The court declared the children dependents, and ordered them removed from parental custody. The court granted mother monitored visitation and allowed her to be present at a weekend sibling visit. Reunification services included parenting education, individual counseling, a full alcohol program with aftercare, weekly and on demand testing for drugs and alcohol, a 12-step program with court card and sponsor, and three Alcoholics Anonymous meetings each week.

Mother filed a section 388 petition on December 19, 2012 requesting that the children be returned to her custody. The court denied the petition, stating that the issues could be resolved at the six-month review hearing.

A status review report filed December 20, 2012 reported that mother had provided a letter dated August 23, 2012 from IMPACT Drug and Alcohol Treatment Center, stating that mother had attended all her individual sessions, groups, 12-step meetings, and scheduled tests, at which the results were negative. Mother was addressing step 4, staying in touch with her sponsor, and had a positive attitude. Although she had not completed the program, IMPACT had decided to grant her a program completion effective August 23, 2012. Mother had not tested since. She had regularly attended an AA group in Spanish.

The twins progressed “a little at a time within the Fetal Alcohol Spectrum Disorder they suffer.” They were two years old but wearing sizes 12 to 18 months. The twins were thriving under the care of their foster parents and receiving multiple Regional Center services for their developmental delays, including physical, occupational, and speech therapy; they were learning sign language and were able to say one or two words. Mother did not accept that her drinking may have caused the twins’ developmental issues. Mother visited the twins twice a week and during the weekend sibling visit, but the social worker noticed that during the sibling visit, mother did not relate to the twins. Instead, mother’s daughters changed the twins’ diapers and played with them. “Mother does not seem to have a bond with the girls despite all the hours she visits. The twin[s] . . . are still in a fragile state and need constant care.” While the two oldest children could return home as they were old enough to care for themselves, the report recommended that the five younger children, including the twins, remain in foster care.

The twins’ foster parents submitted a caregiver information form on December 20, 2012, reporting that the twins had been diagnosed with failure to thrive when they arrived but had rapidly improved since. The twins received services through the regional center, had doctor’s checkups once a month, and saw a fetal alcohol specialist every six months. They also had a daily schedule to keep them on track, and required constant supervision. Although their limited communication skills meant they threw tantrums or pinched and bit others, the foster parents worked to redirect their energies. The couple’s two biological sons considered the twins their sisters. “If ever the opportunity arises we would love to adopt them.”

After hearing on December 20, 2012, the trial court denied the section 388 petition, the issues in which would be addressed at the contested hearing set for February 4, 2013. The court gave DCFS discretion to liberalize visitation, including extended and holiday visits.

The foster parents filed a De Facto Parent Statement on January 30, 2013, explaining that the twins had arrived in their home on February 24, 2012 unable to crawl, walk, or talk; now they “walk, talk, run, jump, play, laugh, help dress themselves, feed

themselves and have become very social.” The couple accompanied the twins to their numerous appointments with doctors and specialists. The twins had been diagnosed with fetal alcohol exposure with development delays and health issues, including eye and ear problems. Although this caused some frustration and tantrums, by working with them constantly the foster parents had helped them redirect their energies.

On February 4, the court gave DCFS discretion to permit mother to have overnight visits with the twins. On February 6, 2013, the court continued reunification services and allowed mother overnight visits with no more than three of the children (including the twins, who were not on that day’s calendar) at a time, on the condition that mother comply with her case plans. On February 21, 2013, mother filed a request for walk on, alleging that the social worker had refused to allow overnight visitation with the twins because they were “too medically fragile.” That same date, the court relieved minors’ counsel (who had declared a conflict) as to the twins, and appointed new counsel for the twins.

DCFS filed section 388 petitions as to the twins on March 22, 2013, asking the court to change the visitation order to monitored visitation, and to order mother to participate in the twins’ therapy and to attend medical appointments and appointments at the Fetal Alcohol Syndrome Clinic, so she could understand the effects and consequences of fetal alcohol syndrome. On March 15, 2013, mother’s sponsor told the social worker that mother’s difficulty in reading and writing had affected her ability to understand her disease and make progress toward recovery, most notably in her ability to accept responsibility for the impact of the disease on the twins’ development. On March 21, mother had stated that she drank one beer a day while pregnant with the twins, and continued to minimize the amount of alcohol she consumed. Pending a hearing on the petition, the court ordered mother’s visits monitored once again with discretion to liberalize.

On May 8, 2013, the court granted the section 388 petition, granted the foster mother de facto parent status, and ordered mother’s visits to be monitored. The court also ordered mother to attend therapy sessions, continue alcohol testing, attend AA

meetings, follow the recommendations of Dr. Lyn Laboriel, receive a formal assessment of her cognitive skills, and attend parent training regarding developmental disabilities and fetal alcohol syndrome. Mother was in partial compliance with the case plan, and the court set the matter for a section 366.26 hearing.

A status review report dated July 25, 2013 regarding the five older children stated that they all had been placed in mother's home. Mother's test results in 2013 were all negative. Her 12-step sponsor, however, stated that while mother attended meetings she had not followed through, and mother still refused to acknowledge the effect of her alcoholism on her children. The sponsor was at the point of recommending that mother get a new sponsor. Mother's oldest daughter, who was 17, was still "parentified and she seems to pick up where the mother is lacking [and] waiting for the other shoe to drop." The oldest daughter took over for mother, who did not seem to be able to set rules and chores.

The July 25, 2013 status review report for the now nearly three-year-old twins explained that the assessment of mother's cognitive skills could not be done by the Regional Center, but they would accept a psychological evaluation identifying mother's IQ. Mother did not have insurance or the money to pay for those services. The services for the twins would be transferred to the public school system in September 2013, when they would start attending school. E.L. was receiving speech therapy twice a week and occupational therapy twice a month. S.L. also received speech therapy twice a week and both twins received physical therapy. The twins' speech, while indistinct, was improving, and the foster mother seemed to understand their sounds. They both were seen at the Fetal Alcohol Clinic by Dr. Laboriel every six months. The social worker had tried to arrange for mother to attend the scheduled speech therapy, but the therapist would not conduct the sessions at the agency (which was too far away), only in the foster home.

Mother visited the twins twice a week at the foster family agency, usually bringing them food and feeding them. The twins liked mother's soup. They interacted with mother more as a play date than a parent, running to the foster mother at the end of the visit. During the Saturday family visits, the older children and mother did not pay

attention to the twins, although the oldest daughter sometimes played with the twins and changed their diapers. Mother talked to the older children but not much with the twins.

The report's assessment was that the twins required a lot of services, but mother did not seem to understand that they needed special education. The twins related to her "as a nice adult that plays with them and treats them nicely." The report recommended adoption for the twins.

September 10, 2013 termination of reunification services

On August 19, 2013, mother filed as exhibits AA meeting attendance cards, drug test information, a translated transcription of her futile attempts to call the social worker, and her counsel's email to counsel for DCFS asking what mother could do to get an evaluation of her cognitive skills and asking, "please advise when the Social Worker assists [mother] with complying" with Dr. Laboriel's recommendation that mother attend parent training about developmental disabilities and fetal alcohol syndrome. The social worker filed a last minute information with information on getting an evaluation and IQ test for mother. After a hearing on August 20 and September 10, 2013, the court found mother was in compliance with the case plan. Nevertheless, returning the twins to mother would create a substantial detriment to the children and there was no substantial probability the children would be returned within six months. The court terminated reunification services.

The court advised mother of her right to file a writ petition and served her personally with the notice of intent to file writ petition, setting the section 366.26 hearing for January 9, 2014. Although mother filed a notice of intent to file writ petition, this court deemed it a nonoperative writ on October 25, 2013.

The January 9, 2014 section 366.26 report stated that the twins, then three years and five months old, had received regional center services until the age of three for their developmental delays, continued to receive speech therapy from the local school district, and had been evaluated for, and were awaiting, physical and occupational therapy. They continued to progress, understood what was said to them, and could say a few words and otherwise express their wishes. They appeared happy and well adjusted, and

appropriately attached to their caregivers. The foster mother continued to work with S.L. to decrease her angry outbursts. Mother visited twice a week, with the foster mother as a monitor, and was nurturing and affectionate. She “is not able to guide the girls to appropriate behavior and is usually able to pay attention to only one girl at a time.” The twins did not see her as a mother or seek comfort from her, but responded appropriately and appeared to enjoy the visits, which they saw as an opportunity to go out and play. During the sibling visits at a park, only one of their siblings played with them. The twins had been with the foster parents since they were a year and a half, and the foster parents were committed to adopting the twins, with an approved home study. They were very attached to the girls and willing and able to advocate for them to receive all the services they required. The foster parents also were capable of facilitating contact with the birth family when appropriate.

Attached medical reports by Dr. Laboriel diagnosed the twins as having “Full Fetal Alcohol Syndrome whether or not we are able to obtain confirmation of more extensive drinking from the mother,” including severe growth retardation, dysmorphic facial features, and developmental delay, with secondary failure to thrive. Mother appeared to be in denial about her role in the serious disability. Dr. Laboriel added that the twins were at very high risk for lifelong serious neurodevelopmental disability and needed care in a “nurturing, stable environment providing maximum support for development.” Dr. Laboriel was concerned about the possibility of family reunification and whether mother could provide the necessary care. If reunification was contemplated, she urged that mother be required to meet with her to learn about Fetal Alcohol Syndrome and the consequences of prenatal alcohol exposure. Mother would also need to be trained in care for disabled children.

March 27, 2014 section 388 petition

Mother filed a section 388 petition on March 27, 2014. She requested the reinstatement of reunification services, increased and unmonitored visitation with the twins, and return of the twins to her care. As evidence of changed circumstances, the petition attached her negative test results for alcohol, her record of attendance at AA

meetings, and a representation that she had been in individual therapy for three months and that her therapist could provide a letter. She stated that the twins enjoyed her twice-weekly supervised visits. “The proposed changes are in the children’s best interests because they are bonded to their mother and would benefit emotionally from being parented by and/or having extended contact with her as well as . . . having more interaction with their older siblings. The children have been enjoying . . . all visits with their mother and it is in their best interests to proceed to this next step in the reunification process. The mother has demonstrated her ability to properly parent and protect her children during the visitation. The children would benefit from what petitioner has learned in her various counseling programs while being parented by her on a daily basis.”

The court summarily denied the petition in part in an order filed April 1, 2014, finding that the request did not state sufficient new evidence or changed circumstances or serve the best interests of the children, there was no legal basis to reinstate family reunification with a pending section 366.26 hearing, and it was premature to place the young special needs twins with mother before unmonitored visitation. The court ordered a hearing regarding solely the issue of whether to allow unmonitored visits, and ordered DCFS to submit a report addressing the petition.

A caregiver information form filed April 22, 2014 reported that after the twins aged out of their regional center physical and occupational therapy, the foster parents obtained private services for the twins once a week. The girls would need foot orthotics and elbow braces. The girls’ hearing had been tested and S.L. would need hearing aids. Both twins wore prescription eyeglasses. The twins were enrolled in behavioral and play therapy to address aggression due to their poor communication skills, but otherwise they were happy and playful. They continued to see Dr. Laboriel every six months, and she was pleased with their progress. They were attending preschool daily and had an individual education plan, with weekly progress reports from their special education teacher. They had numerous friends at preschool and a good relationship with their teachers. The twins loved Disney and Disneyland and playing at the park. They were small for their age, but healthy, smart, and adventurous. After more than two years with

the twins, the foster parents had seen them grow into beautiful little girls who looked up to the couples' two sons. The couple would love to be their "forever family."

The court terminated jurisdiction over the twins' four older siblings (the fifth, the oldest boy, had turned 18 in April 2014).

On May 5, 2014, DCFS filed a report to address the section 388 petition's request for unmonitored visitation. DCFS stated that mother's visits had not changed since the detention, as she had not shown she was able to meet the twins' special needs on her own. While mother was nurturing and caring in a supervised setting, she was not able to take full charge and responsibility even during the visits, requiring prompting or a request before doing something. Although mother was compliant and cooperative, it was not safe for the girls to be alone with her if she did not know how to handle them when they were not at their best. The caregiver monitored the visits and intervened before problems arose. The children had never seen mother in a parental role. When they needed help, they sought the caregiver, and if mother tried to help they refused her help. The children had had enough contact with mother to have a comfortable relationship and feel safe with her but did not; she was more of a play buddy than a parent. Mother would follow one of the twins around to keep her from getting hurt, but was oblivious to the other twin, leaving her vulnerable. The twins were not bonded to mother or their siblings, knowing them the way they knew the therapists they saw for their special needs. They left mother and the siblings without any distress and never asked for them. Mother reported she loved the twins, but she did not seem to understand the severity of their needs. While mother cared for the older children, none of them had severe special needs, and they attended school all day and relied on their older sister to guide and parent them. Even with the older children mother was only minimally able to meet their needs, failing to timely sign paper work, set up meetings for their educational plans, or meet deadlines. While any delay in services might not change the lives of the older children, given the twins' needs such delay would greatly affect their quality of life.

While mother had complied with all court orders and had continuously visited the twins, this was not enough to demonstrate she was able to meet their needs, and even

after so many visits they had not bonded to her. It was not in the twins' best interest to have unsupervised visitation with mother because they were not able to verbalize their needs.

The social worker had a face-to-face meeting with mother on April 23, 2014. Mother had not taken any parenting classes to learn to care for special needs children, and said she would ask about them at the agency where she had joint counseling with the older daughters. Mother stated she never drank more than one beer a day during her pregnancy with the twins. When asked about the medical report that stated she must have drunk more given the severity of the twins' fetal alcohol syndrome, she said she drank maybe two drinks. Asked again how it was that the twins' needs were so severe, mother said she drank two to three 40-ounce bottles. This minimizing of her drinking was potentially dangerous as mother did not understand how her actions can affect the children. Mother had been sober for two years and had not had a positive drug test during the supervision period, but "she remains limited in her ability to care for, understand and meet the needs of [the twins]." DCFS recommended the section 388 petition requesting unmonitored visits be denied.

DCFS also submitted delivered service logs from July 25, 2013 through April 1, 2014. The logs reported the social workers' contacts with mother, the twins, the older children, and the foster family. The foster mother stated that the weekly Saturday visits were time-consuming, and when adoption was finalized they might reduce the weekend visits to once a month. Among other observations, the logs noted that the twins' speech was undiscernable but the foster mother appeared to understand, and the twins were active and very happy in the caregivers' home. Mother and the older children were also doing well in mother's home, which showed that the family was needy but was tidy and clean. Mother appreciated that the DCFS interventions were necessary. When mother visited the twins, the observing social worker reported she communicated with them in Spanish and she was attentive, patient, and nurturing. Mother told the social worker she was frustrated not to have her twins with her, as she loved them and wanted them back.

The May 5, 2014 contested section 366.26 hearing

At the May 5, 2014 hearing, mother was present with counsel and an interpreter. The foster mother also was present. The court stated: “We’re here for a contested .26. The [section] 388 was only granted as to the issue of unmonitored visits for the mother. Since it’s not about custody, we can proceed with the .26 before the [section] 388. [¶] Anyone not ready to proceed with the contested .26 at this time?” There was no objection. The court admitted documentary evidence (including the service logs). The court advised mother’s counsel: “I think that [the record] basically, shows that the mother has had somewhat regular and consistent visitation and contact. So it’s up to you to show whether that was to the level that it conferred a parental role and relationship to the extent that that would outweigh the benefits of the permanence in adoption, the extent to which there’s any common sibling experience that would outweigh the benefits of adoption.”

Mother’s counsel argued that the other children had been returned to mother, who had complied with all the court’s orders. Mother had had consistent and regular monitored visitation. The caregiver, who monitored the sibling visits at the park, was biased because she wanted to adopt the twins. In mother’s other visits, which were monitored by a social worker, mother was able to feed, nurture, and watch over the twins, and could communicate with them in Spanish. There was a bond between the twins and mother, which “is exactly what the court is looking for when it’s looking for . . . the 366 exception.”

Counsel for the twins asked that parental rights be terminated. Although mother had regular visitation, counsel did not believe that she had a parental role. The twins had special needs and were differently situated from the other children. The court interjected that mother had “even gone over their ABC’s with them” and the children had lived with mother for the first year and a half. Counsel responded that the conditions during that time were “deplorable” and unsafe, and the twins had fetal alcohol syndrome because of mother’s drinking. The court replied that whether or not the conditions were safe, mother did have a parental relationship to the twins prior to detention and through her visitation.

The twins' counsel countered that mother left them in the care of their adult brother, who drank, and the oldest daughter took a parental role. Mother did visit regularly, and none of the monitors reported that she did not pay attention to the twins, love them, and care for them. "The problem is she does not have the tools to make sure they are safe going forward." Mother had missed an educational plan meeting for an older daughter. While "[t]hat's not such a big deal for a child that does not have disabilities," the twins had fetal alcohol syndrome and would need braces, stints, and hearing aids, as well as occupational, speech, and physical therapy.

The court pointed out that the issue that day was not whether the twins would be placed with mother, but "is it detrimental to terminate the parental relationship in light of the relationship they have?" The children's counsel argued that mother did not have a parental role. The twins did not go to her for comfort, left the visits without crying, and did not ask about her when she was gone. Mother was "[l]ike a familiar friend," but the children went to the caregiver if they needed something or got hurt. DCFS counsel agreed with the twins' counsel, and pointed out that while the social worker's logs described mother's behavior, the caregiver/monitor had described the twins' behavior. The caregiver's observations of the twins should not be discounted for bias. The caregiver knew the twins best. They had been out of mother's care for the majority of their lives. The older children helped in mother's home. Mother did not meet the exception: "I believe she's sincere and she's trying very hard. She is using all of the resources available to her to have a parental role, but I don't think the children have responded to that."

The court stated, "this has been a very difficult case for me from the beginning." The twins came into the system for one reason, and although mother was able to regain custody of the other children, the twins "have more specific and severe needs, that it was not clear yet that the mother was able to meet." The court had tried to get mother some training to be able to meet the twins' needs. Mother had resolved the issues that brought the other children into the system, but although mother visited the twins consistently, "there have been different reports about the level of interaction and care." Without

additional training for mother, the court had been unable to liberalize visits or return the children to mother. The twins had been with the current caregivers for quite some time, who were providing day-to-day and hour-to-hour care and were in the parental role, and mother's limited parental role during visitation "definitely doesn't outweigh the benefits of permanence and adoption." The court found that return to mother would be detrimental and the twins were adoptable. The court terminated mother's parental rights. The court gave the caregivers discretion to permit ongoing visitation with mother and the twins' siblings, adding: "The 388 is now moot. As I said, if we're discussing home of parent so the 388 would have made the .26 moot, then I would have done the 388 first. But when we're talking about visitation, which wouldn't change the [section] 388 issues, the .26 was handled first."

Mother filed her notice of appeal from the May 5, 2014 termination of parental rights on May 16, 2014.

DISCUSSION

We "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." (*In re Madison W.* (2006) 141 Cal.App.4th 1447, 1451.) The court denied in part mother's section 388 petition in part on March 28, 2014, within 60 days of mother's filing of this appeal on May 16, 2014. The order denying mother's section 388 petition in part is therefore appealable, as is the order terminating her parental rights. (§ 366.26, subd. (i)(1).)

The trial court was not required to hold a hearing on the entire section 388 petition.

Mother first argues that the trial court abused its discretion by denying her section 388 petition without a hearing. We review the court's denial of a hearing on a section 388 petition for a clear abuse of discretion. (*In re Jasmon O.* (1994) 8 Cal.4th 398, 415.) "The parent need only make a prima facie showing [of changed circumstances] to trigger the right to proceed by way of a full hearing." (*In re Marilyn H.* (1993) 5 Cal.4th 295,

310.) In order to obtain a hearing, the parent must also show that a hearing would promote the child's best interests. (*In re Zachary G.* (1999) 77 Cal.App.4th 799, 806.) Failure to show either changed circumstances or best interests defeats the prima facie showing. (*Ibid.*) In her petition filed March 27, 2014, mother had the burden to show that circumstances had changed in the approximately six months since the September 10, 2013 termination of her reunification services for the twins. The court denied a hearing on mother's requests for reinstatement of reunification services and return of the twins to her custody, so the first issue is whether circumstances had changed since September 10, 2013 as to those two requests.

We agree with the trial court that mother did not show changed circumstances. Mother's section 388 petition argued that she had substantially complied with the service plan, and on appeal she points out that all the older children had been in her custody since June 2013. Mother had custody of the older children for three months before the termination of her reunification services, so that is not a circumstance that changed since September 2013. Mother's toxicology reports had been negative since January 2013, she had attended AA meetings since February 2012, and she had supervised visitation with the twins since January 2012; again, all those circumstances existed before the termination of reunification services for the twins in September 2013, and therefore they are not *changed* circumstances. Mother also stated that she had attended therapy since December 23, 2013, but did not explain how that changed her circumstances as to the twins, stating only that her therapist would provide a letter on request.

That mother had complied with the case plan as to the older children was undisputed, as they had been returned to her care. Her section 388 petition as to the twins, however, is silent on how mother's circumstances had changed relevant to the special needs twins, whose fetal alcohol syndrome required a different level of care than the older siblings who did not similarly suffer from the effects of mother's alcoholism. Mother did not show changed circumstances as to the twins.

Further, we note that mother did not show changed circumstances as to her understanding of how her drinking had affected the twins. DCFS reported that as of

April 23, 2014, two weeks before the hearing, mother continued to deny that she drank enough during pregnancy to cause fetal alcohol syndrome, as she had throughout the dependency case. Only when repeatedly pressed by the social worker did mother stop claiming she had maybe one beer a day and admit that she drank two to three 40-ounce bottles of beer a day.

As to the second issue, mother does not argue that it was in the twins' best interests to be returned to her care.

It was not a denial of due process to hold the section 366.26 hearing first.

Mother argues that it denied her due process not to hold the section 388 hearing before holding the section 366.26 hearing after which the court terminated her parental rights. Before proceeding at the May 5, 2014 hearing, the court asked whether any party objected to holding the section 366.26 hearing before the section 388 hearing regarding unmonitored visitation, and mother's counsel did not object. We ordinarily do not consider procedural defects when an objection could have been made but was not. (*In re Dakota S.* (2000) 85 Cal.App.4th 494, 501.) Mother has forfeited this objection.

Even considering the issue, the court did not err. When a section 388 petition requests that the court set aside its order terminating reunification services or restore custody to the parent, at a consolidated hearing with a section 366.26 determination "a court must *decide* a section 388 petition first, because an order granting services would be inconsistent with selecting a child's permanent plan." (*In re G.B.* (2014) 227 Cal.App.4th 1147, 1163, fn. 6; *In re Jeremy W.* (1992) 3 Cal.App.4th 1407, 1416, fn. 14.) Under those circumstances, "a fair hearing on the section 388 petition was a procedural predicate to proceeding to the section 366.26 hearing and disposition." (*In re Jeremy W.*, at p. 1416.) "Whether the hearings are combined or heard separately, the court must determine whether to grant the *petition for return or further reunification services* first, since the granting of the petition would be inconsistent with the holding of a selection and implementation hearing [citations]." (Seiser & Kumli, Cal. Juvenile Courts Practice and Procedure (2014 ed.) Supplemental and Subsequent Petitions, § 2.140[3], p. 2-470, italics added.)

Here, the court explained that it would have held the section 388 hearing first if custody were in issue. The court had already denied mother's section 388 petition requests for custody of the twins and reinstatement of reunification services. The only remaining issue in mother's section 388 petition was whether the court should change its visitation order to grant mother unmonitored visitation with the twins. When a parent files a section 388 petition seeking to modify the court's visitation orders, this "is not necessarily inconsistent with the selection of a permanent plan for the child, even if the recommended plan is adoption. Visitation between a parent and child may be positive and pleasant, yet not enough to make the beneficial relationship exception to the termination of parental rights applicable." (Seiser & Kumli, *supra*, § 2.140[3], p. 2-470.) If parental rights are terminated and the permanent plan is adoption, "any prior orders for visitation . . . may be moot. . . . Thus, when the modification petition does not seek return or resumption of reunification services, but only seeks . . . additional visitation, in most instances the court should determine the selection of the permanent plan first, and thereafter consider whether it can or should grant the requested modification of prior court orders." (*Ibid.*) Once parental rights are terminated, the trial court does not have authority to make further orders, including those regarding visitation. (§ 366.26, subd. (i)(1); *In re Jacob E.* (2004) 121 Cal.App.4th 909, 925.) The court recognized that once it terminated mother's parental rights, the section 388 request for a change in the visitation order was moot, adding that the caretakers had discretion to permit ongoing visitation. The court did not err in holding the section 366.26 hearing first.

The court did not err in concluding that the parental benefit exception to adoption did not apply.

Mother argues that she had a parental relationship with the twins, who were in her care for their first 18 months and whom she visited regularly throughout the dependency proceedings. At the time of the section 366.26 hearing, mother's reunification services had been terminated for eight months. "Once reunification services are ordered terminated, the focus shifts to the needs of the child for permanency and stability." (*In re Marilyn H.*, *supra*, 5 Cal.4th at p. 309.) The court "'must recognize this shift of focus in

determining the ultimate question before it, that is, the best interests of the child.” (*In re J.C.* (2014) 226 Cal.App.4th 503, 527.) If the children are adoptable, there is a strong preference for adoption over the alternatives of guardianship or long-term foster care. (*Id.* at p. 528.) “[A] parent seeking a less restrictive plan has the burden of showing that the termination of parental rights would be detrimental under one of the exceptions listed in section 366.26, subdivision (c)(1)(B).” (*Ibid.*)

Section 366.26, subdivision (c)(1), provides that the court “shall terminate parental rights” if the minor is likely to be adopted, unless termination would be detrimental to the child under one or more statutory exceptions. (§ 366.26, subd. (c)(1)(B).) Mother invokes section 366.26, subdivision (c)(1)(B)(i), which provides an exception to termination of parental rights when “[t]he parents have maintained regular visitation and contact with the child and the child would benefit from continuing the relationship.” “The ‘benefit’ necessary to trigger this exception has been judicially construed to mean, ‘the relationship promotes the well-being of the child to such a degree as to outweigh the well-being the child would gain in a permanent home with new, adoptive parents. In other words, the court balances the strength and quality of the natural parent/child relationship in a tenuous placement against the security and the sense of belonging a new family would confer. If severing the natural parent/child relationship would deprive the child of a substantial, positive emotional attachment such that the child would be greatly harmed, the preference for adoption is overcome and the natural parent’s rights are not terminated.’” (*In re J.C.*, *supra*, 226 Cal.App.4th at pp. 528–529.) “It is not enough to show that the parent and child have a friendly and loving relationship. [Citation.] “Interaction between [a] natural parent and a child will always confer some incidental benefit to the child” [Citation.] For the exception to apply, ‘a *parental* relationship is necessary.’” (*Id.* at p. 529.)

Whether we review the court’s determination that the parental benefit exception did not apply for substantial evidence, for an abuse of discretion, or both (*In re J.C.*, *supra*, 226 Cal.App.4th at p. 530), we affirm the court’s conclusion that mother’s limited parental role “definitely doesn’t outweigh the benefits of permanence and adoption.” The

court's conclusion that mother's parental role was limited is supported by substantial evidence in the record, which reported that throughout her regular visitation with the twins mother was nurturing and affectionate, but did not take full charge during the visits. The twins saw her as a play buddy or a friend, not seeking mother out for comfort, running to the foster mother at the end of the visit, and showing no distress at leaving mother. During the sibling visits, mother related more to the older siblings than to the twins. "[T]he beneficial relationship exception must be examined on a case-by-case basis, taking into account the many variables that can that can affect the parent-child relationship." (*Id.* at p. 532.) The twins, three years and nine months old at the May 5, 2014 hearing, had been with the prospective adoptive parents for more than two years, more than the 18 months they had spent with mother. During those two years, the twins had relied on the adoptive parents for all their needs, which included their medical appointments, physical, occupational, and speech therapy, prescription glasses, hearing aids, and play and behavioral therapy. The twins were attached to the caregivers and were happy and active in their home.

Nevertheless, mother argues that her visits were positive, she interacted with the twins appropriately, and they shared a good relationship. "But a successful parental benefit exception claim rests not on whether the parent-child contacts "confer some incidental benefit to the child."'" (*In re J.C.*, *supra*, 226 Cal.App.4th at p. 532.) The parent must show "compelling evidence" that the benefits of the parental relationship outweighed the benefit of adoption. (*Ibid.*) At the permanency stage, the child's bond with the parent must be weighed against what was to be gained in a permanent, stable home, and only in an "extraordinary case" will preservation of the parent's right prevail over adoptive placement. (*Id.* at p. 533.)

Here, as in *In re J.C.*, *supra*, 226 Cal.App.4th 503, "[n]othing in the record suggests the benefit [the twins] might gain by continuing [their] relationship with mother is outweighed by the well-being [they] would gain from having a permanent home." (*Id.* at p. 533.) Mother argues that the emotional loss to the children must not be "reflexively dismissed" simply because DCFS advocates adoption by loving caregivers. The record,

however, is devoid of evidence that the twins would experience a significant emotional loss if parental rights terminated. And while mother also argues that special needs children might experience a more significant loss, the record is clear that the twins' special needs were being served admirably by the prospective adoptive parents. The court did not abuse its discretion in concluding that mother did not have a parental role that outweighed the benefits of the twins being adopted by the caregivers, to whom the twins were attached and who had shepherded them through the last two years and what by all accounts was significant progress despite their fetal alcohol syndrome.

Mother suggests that although she did not have "specialized insight" in caring for the twins, the foster parents had such insight only because they participated in the twins' everyday care. This ignores that mother cared for the twins for eighteen months and nevertheless was unable to recognize, accept responsibility for, or treat their fetal alcohol syndrome. Mother also states that she was "not allowed to participate in the therapy and the special services provided to her children," but she points to no evidence in the record that she was barred from attending outside of the speech therapist's refusal to conduct sessions at the foster care center. Mother also implies that the court was swayed by the more comfortable financial situation of the foster parents, but that is not supported by the record. What is clear from the record is that the twins did not have the compelling attachment to mother that is required to establish the parental benefit exception.

As the trial court stated, this was a difficult case in which mother had regained custody of the five older children, and yet it remained unclear whether mother could meet the more specific and severe needs of the twins. The court reasonably concluded that the record did not show that the twins had a deep attachment to mother, so that the detriment from ending the parental relationship did not outweigh the benefit of adoption. It was not an abuse of discretion to terminate mother's parental rights.

DISPOSITION

The orders are affirmed.

NOT TO BE PUBLISHED.

JOHNSON, J.

We concur:

CHANEY, Acting P. J.

BENDIX, J.*

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.