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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

In re A.Y. et al., Persons
Coming Under the Juvenile
Court Law.

B298338
(Los Angeles County
Super. Ct. No. CK40537)

LOS ANGELES COUNTY
DEPARTMENT OF
CHILDREN AND FAMILY
SERVICES,

Plaintiff and Respondent,

v.

KRISTEN G.,

Defendant and Appellant.

APPEAL from the jurisdictional and dispositional orders of the Superior Court of Los Angeles County, Stephanie Davis, Commissioner. Affirmed in part, reversed in part, and remanded with directions.

John L. Dodd, under appointment by the Court of Appeal,
for Defendant and Appellant.

Mary C. Wickham, County Counsel, Kristine P. Miles,
Assistant County Counsel, and Navid Nakhjavani, Principal
Deputy County Counsel, for Plaintiff and Respondent.

Kristen G. (mother) appeals from two sets of orders entered
by the juvenile court: the juvenile court's denial of her requests
under Welfare and Institutions Code¹ section 388 to change
earlier orders terminating her reunification services with her
children A.Y., M.M., and R.M., and its termination of her
parental rights as to those children.

Mother contends that her section 388 petitions, which
described her completion of certain court-ordered programs and
enrollment in others, established a change of circumstance
entitling her to a hearing, and that the court erred by denying
her petitions without that hearing. Mother further contends that
the juvenile court erred by failing to request an offer of proof from
her before denying her a contested hearing under section 366.26
and terminating her parental rights. In the alternative, mother
argues the juvenile court should have accepted her counsel's
statements when requesting the contested hearing as a sufficient
offer of proof.

We conclude the juvenile court did not abuse its discretion
by denying mother's section 388 petitions without a hearing.
Most of the information in the petitions arose before the

¹ Further unspecified statutory citations are to the Welfare
and Institutions Code.

juvenile court entered the orders mother sought to change, and thus in and of itself could not constitute a change of circumstance. To the extent the petitions contained new information concerning mother's enrollment in and partial completion of additional programs, the juvenile court was within its discretion to conclude that, in light of mother's prior lack of commitment to the case plan, this new information did not show a substantial change in circumstances sufficient to entitle mother to a hearing.

The juvenile court did err, however, by denying mother a contested section 366.26 hearing without first requesting an offer of proof from her identifying the contested issues and the evidence mother intended to produce at a hearing regarding those issues. In requesting the hearing, mother's counsel made some general representation of the evidence mother wished to introduce. The record is unclear, however, that counsel intended the unsolicited statements as a complete offer of proof, and thus the juvenile court could not rely on those statements to deny a hearing absent further inquiry. We do not reach mother's alternative argument that counsel's statements were adequate to justify a contested hearing.

Accordingly, we affirm the orders denying mother's section 388 petitions, reverse the orders terminating mother's parental rights, and remand with instructions that the juvenile court either grant mother a contested section 366.26 hearing or request an offer of proof.

PROCEDURAL BACKGROUND

1. Detention

On March 15, 2017, respondent Los Angeles County Department of Children and Family Services (DCFS) filed a petition under section 300 seeking to detain mother's children A.B. (age 12)², A.Y. (age 10), M.M. (age 2), and R.M. (age 20 months).) The petition alleged under section 300, subdivision (b)(1) that mother "has a history of substance abuse and is a current abuser of alcohol which renders the mother incapable of providing regular care and supervision of the children."

At the detention hearing, the juvenile court found Anthony B. to be the presumed father of A.B.; Brandon Y. to be the presumed father of A.Y.; and Richard M., who was deceased, to be the presumed father of M.M. and R.M.³ The juvenile court ordered the children detained and granted mother monitored visits twice a week. A.B. was released to his father Anthony B., and the younger three children were placed with the paternal grandparents of M.M. and R.M.

2. Jurisdiction and adjudication

DCFS filed a jurisdiction and disposition report on April 14, 2017. The report said that mother had not visited with the

² On May 17, 2018, the juvenile court issued a family law order granting A.B.'s father sole physical custody with mother sharing legal custody. Mother does not contest on appeal any orders regarding A.B.

³ The fathers are not parties to this appeal, and we do not discuss their part in the underlying proceedings except insofar as it is pertinent to mother's appeal.

children since March 17, 2017 and had not made herself available to schedule visitation or receive services. An addendum report filed May 10, 2017, however, indicated mother was participating in visitation at that point.

DCFS filed a last minute information on May 15, 2017 indicating mother had not appeared for any drug tests between March 29 and May 3, 2017.

On September 15, 2017, the juvenile court adjudicated the section 300 petition, now amended, sustaining the original allegations of substance and alcohol abuse as well as allegations that mother physically abused A.Y. and had “a history of engaging in verbal and physical altercations including, but not limited to[,] domestic violence” with the fathers of the children. The juvenile court ordered mother to submit to weekly drug and alcohol testing and to participate in a drug and alcohol program, a 52-week domestic violence program, parenting classes, and mental health counseling.

3. Reunification period

DCFS filed a status review report on February 14, 2018, five months after the adjudication hearing. M.M. and R.M. remained with their paternal grandparents, while A.Y. then was living with a nonrelative extended family member.

The report stated that mother had not participated in any court-ordered programs and had not appeared for any drug tests. Mother claimed she was visiting her children weekly, but the caregivers said visits were monthly, and mother had not seen the children since the holidays. The report stated that mother “when seen in the community . . . reportedly smells of alcohol and does not appear to be sober.” DCFS recommended the juvenile court terminate reunification services to mother.

In an interim review report filed April 26, 2018, DCFS stated that mother did not appear for any drug tests between January 23, 2018 and April 4, 2018, but appeared for a test on April 14, 2018, which was negative. Mother reported that she missed her April enrollment appointment for substance abuse treatment at the Tarzana Treatment Center, which had been rescheduled. DCFS had no documentation showing enrollment in mother's other required programs for domestic violence, parenting, and mental health counseling. Mother remained inconsistent with visitation, having not shown up for one April visit and cancelling another.

A last minute information filed May 17, 2018 stated that mother missed three more drug tests after her negative test and missed two May visits with the children. The report also stated that A.Y. was in a new placement with his paternal grandmother.

A supplemental report filed May 31, 2018 stated that mother had enrolled at the Tarzana Treatment Center on May 10, 2018, but the center discharged her for nonparticipation after she missed five of eight days of treatment. Mother also did not appear at a residential treatment facility holding a bed for her, and thus forfeited her place.

The report stated that the Tarzana Treatment Center tested mother twice for drugs. The first test, on May 9, 2018, was positive for morphine, amphetamine, and cocaine. The second, on May 16, 2018, was negative. Mother did not appear for a third test on May 23, 2018.

The report stated that at a scheduled visit with the children in May, mother appeared with a swollen jaw, black eye, and bruises. Mother claimed her roommate attacked her for no reason. Mother would not stop talking and kept stating she

needed money, and the social worker monitoring the visit believed mother was “high.” Mother reportedly missed another May visit as well.

DCFS filed last minute information reports in June and July confirming that mother entered residential treatment at the Tarzana Treatment Center on May 30, 2018 and had been attending and participating in all required treatment activities, although the center had determined she was not qualified for individual therapy. DCFS suspected this was because mother “was not forthcoming in the assessment process.” Mother had consistently tested negative for drugs while at the center, and her test results for DCFS were a mix of negative results and no-shows. DCFS later received confirmation that mother attended six sessions of a domestic violence program while at the Tarzana Treatment Center, but stopped attending after leaving the center.

In a last minute information filed September 11, 2018, DCFS reported that mother had completed the 30-day residential program at the Tarzana Treatment Center and had transitioned to a sober living home. The sober living home discharged mother on August 31, 2018 after she violated its rules by leaving the home without a “parent partner” and missing curfew. Mother also had “sporadic absence for [outpatient] treatment” at the Tarzana Treatment Center and was discharged after not attending since August 3, 2018. Mother told a DCFS social worker she would not be attending outpatient treatment because “she needs to work,” but said she would continue to attend 12-step meetings. She later provided the social worker with a “notebook of signed [12-step] meetings that she had attended.”

The last minute information also stated that mother had four negative drug tests in July 2018, then one negative and four no-show tests in August and the first week of September 2018. Maternal grandmother, who monitored visits with the children, said mother had missed at least one visit and during others “does not apply her time and focus on the children well.”

In a last minute information filed October 24, 2018, DCFS reported that mother as of September 14, 2018 was back in a sober living and transitional home. Mother reported she was attending 12-step meetings three times a week and the program manager of her sober living home was her sponsor, although mother did not provide documentation of the meetings. Since the last DCFS report, she had missed one drug test but then tested negative on the subsequent five tests. This led DCFS to liberalize her visits with the children so they could take place in-home. Mother also had reenrolled in a domestic violence program and had attended one class.

DCFS opined that mother “has recently created a solid support system for herself in order to succeed in reunifying with her children,” and while DCFS “continues to be concerned with [mother’s] ability to provide consistency in her progress,” DCFS changed its earlier recommendation and requested that the juvenile court continue to offer mother reunification services.

4. Review hearing

The juvenile court held a review hearing pursuant to section 366.21, subdivision (e) on November 8, 2018. DCFS reiterated its recommendation that mother receive reunification services. Mother asked that the children be released to her, or in the alternative, that she receive reunification services.

Children's counsel opposed continuing reunification services, noting that the 18-month mark for reunification fell the following week, and mother had not complied with the case plan prior to May 30, 2018, when she enrolled at the Tarzana Treatment Center. Children's counsel argued "this is too little too late."

The juvenile court noted that it had ordered the case plan in September 2017, and at the time the six-month review report was filed in February 2018, mother had yet to enroll in any programs. The juvenile court further noted that since that time, mother had tested positive for drugs, been discharged from numerous programs and treatment facilities for nonparticipation or failing to follow the rules, and missed drug tests in August and September. The court found mother's progress to be "minimal." The court stated, "It seems that only in the last month or so has she appeared to be focusing on the plan that was ordered over a year ago, and while the court is commending her for her progress in the last month or two, the court does agree with minors' counsel that it is late, and the court is going to terminate family reunification services and set a [section 366.26] hearing."

Mother's counsel requested that DCFS continue to provide drug testing for mother. DCFS objected to such an order but did not object to making best efforts to provide the drug testing. The juvenile court made "an order for best efforts to provide testing to mother."

5. Further reports

DCFS filed a section 366.26 report on February 26, 2019 recommending that A.Y. be adopted by his paternal grandmother, who had cared for him since May 2018, and that M.M. and R.M. be adopted by their paternal grandparents, who had cared for

them since their initial detention in March 2017. The report stated that mother's visits with A.Y. had been "inconsistent," and that M.M. and R.M. had not visited with their mother in a few weeks. The report stated that "[m]other's visits were reverted to the DCFS office and monitored by [a social worker]."

A status review report filed April 10, 2019 stated that mother had been making efforts to visit the children but was "at times inconsistent." DCFS stated that her visits had reverted to monitored visits because she had failed to show up for a drug test and tested positive for alcohol: "Mother currently visits in her home only with her step-mother as an approved monitor."

The status review report attached adoption assessments for A.Y., M.M., and R.M. According to the assessments, which were dated December 2018, mother had visited or had contact with the children 20 times over the previous six months. A.Y.'s assessment reported that his caregiver had said A.Y.'s visits with his parents "are going well." M.M.'s and R.M.'s caregiver said M.M. visited with mother at mother's sober living home, and R.M.'s visits with mother were "inconsistent" and should be "return[ed] to monitored visits."

A supplemental section 366.26 report filed May 10, 2019 stated that M.M. and R.M. referred to their paternal grandparents as "mama" and "papa" and sought them out when they had a need.

6. Mother's section 388 petitions to change court orders

On May 30, 2019, pursuant to section 388, mother filed three form requests to change a court order, one for each child, asking the juvenile court either to return A.Y., M.M., and R.M. to mother or, in the alternative, reinstate family reunification services. Mother's basis for the proposed change of order was

identical on each form, as was the supporting documentation. She stated that since the juvenile court terminated reunification services, she “has completed 5 months of a domestic violence program and is continuing towards this path as she is enrolling in more domestic violence classes starting on the week of May 13, 2019. Mother completed her treatment at Tarzana Treatment Center on July 26, 2018. Mother actively attended and participated in meetings. Furthermore, Mother made great strides in her treatment progress reports throughout her treatment.”

As for why a change of order would be better for the children, mother referred to the “strong pre-existing bond” between the children and herself and asserted “[a] relationship with a biological parent will provide the children with stability, family history, and family connections. . . . [M]other has done well to address the issues that led to removal of the child[ren] and is able [to] provide a safe environment filled with love and support.”

Mother attached documentation showing her July 2018 discharge from the Tarzana Treatment Center, a log of her “individual group attendance” (capitalization omitted) at the center in June and July 2018, a certificate awarded on July 30, 2018 for mother’s volunteering 160 hours in the kitchen at the center, and a document dated May 22, 2019 indicating enrollment in a domestic violence program.

7. Section 366.26 hearing

The juvenile court held a section 366.26 hearing on June 3, 2019. At the outset, the juvenile court stated that it had an “off-the-record conversation” with the parties regarding mother’s section 388 petitions and had denied the petitions without a

hearing, “finding that there is no change in circumstance and that the proposed order does not promote the best interest of the minors.” The juvenile court stated that “mother’s circumstances are changing, not changed, as required by law.”

Mother’s counsel asked the juvenile court to reconsider not setting a hearing on the section 388 petitions, representing that mother had been sober for over a year, had completed her treatment at the Tarzana Treatment Center, was visiting with the children weekly, and was continuing to submit to drug tests for DCFS.

Mother’s counsel continued: “I’d also ask that regardless of whether the court grants the hearing on the [section] 388 [requests,] that the court allow us to set a contested [section 366.26 hearing] based off a lot of the same facts I just delineated, as well as the mother’s relationship with the children, specifically [A.Y.] and [A.Y.’s] age, and she tells me she has been visiting consistently and does engage in all parental duties when she is allowed to visit.”

Children’s counsel argued the juvenile court should stand by its order denying the section 388 petitions. Children’s counsel argued that mother had missed drug tests in September, and had only recently enrolled again in domestic violence classes, so her “circumstances are still changing but have not yet changed.”

Children’s counsel also opposed setting a contested section 366.26 hearing, arguing that A.Y. had stated that he wished to be adopted by his paternal grandparent, foreclosing mother’s position “that the bond [A.Y.] has with his mother is so great that adoption would be detrimental to him.” Children’s counsel further argued that mother’s monitored, weekly visits

were insufficient for her to be “acting in the sort of parental role required” to establish “the parental bond exception” to adoption.

A.Y.’s father submitted as to mother’s section 388 petitions. He favored A.Y. staying with A.Y.’s paternal grandmother but objected to termination of his parental rights. DCFS submitted.

The juvenile court reasserted its denial of mother’s section 388 petitions, further noting it did not have proof of mother’s progress in her domestic violence program or individual counseling, and that mother’s visitation with the children was inconsistent. The juvenile court also denied the request for a contested section 366.26 hearing: “[B]ased on the information that has been presented and the statements made on behalf of the mother . . . there is not even a prima facie showing that any of the exceptions to adoption would apply” Mother’s counsel objected to the denial of a contested hearing, which the juvenile court noted.

The juvenile court proceeded with the section 366.26 hearing. Mother’s counsel asked the court to consider legal guardianship in place of terminating mother’s parental rights. Mother’s counsel asked the court to “consider the documents attached to the mother’s [section] 388 [requests] as evidence for today and give them the weight they’re worth, as well as note and incorporate the statements that I made regarding mother’s visitation with the children.” Mother’s counsel asked the court “to find that a relationship with the children’s mother would benefit the children and that it would be detrimental to terminate parental rights.”

Mother’s counsel also invoked the sibling bond exception to adoption, arguing that the children were not being placed together, that A.Y. “may not realize the significant impact that

legally severing the bond between the children can have,” and that the juvenile court could not be assured that the various adoptive parents would maintain a bond among the children.

Children’s counsel argued in favor of adoption, representing that A.Y. consented to adoption by his paternal grandmother and understood his siblings would be placed with different adoptive parents. Children’s counsel argued that adoption was in M.M.’s and R.M.’s best interest “because of their familiarity with [their paternal grandparents’] home and length of time they have been placed there.” DCFS also supported adoption as the permanent plan.

The juvenile court found the children to be adoptable and that no exception to adoption applied. The juvenile court terminated mother’s and A.Y.’s father’s parental rights.

Mother timely appealed.

DISCUSSION

I. The Juvenile Court Did Not Abuse Its Discretion By Denying Mother’s Section 388 Petitions Without A Hearing

Mother argues the juvenile court erred by denying her section 388 petitions without holding a hearing. We disagree.

A. Applicable law and standard of review

Under section 388, subdivision (a)(1), a parent of “a dependent child of the juvenile court” may, “upon grounds of change of circumstance or new evidence,” petition the juvenile court “for a hearing to change, modify, or set aside any order of court previously made” The juvenile court must hold the hearing “[i]f it appears that the best interests of the

child . . . may be promoted by the proposed change of order” (*Id.*, subd. (d).)

“A petition for modification must be liberally construed in favor of its sufficiency.” (Cal. Rules of Court, rule 5.570(a).) However, the juvenile court may deny a section 388 petition without a hearing if the petition “fails to state a change of circumstance or new evidence that may require a change of order or termination of jurisdiction or fails to show that the requested modification would promote the best interest of the child” (Cal. Rules of Court, rule 5.570(d)(1).)

To support a section 388 petition, “the change in circumstances must be substantial.” (*In re Ernesto R.* (2014) 230 Cal.App.4th 219, 223.) “A [section 388] petition which alleges merely changing circumstances and would mean delaying the selection of a permanent home for a child to see if a parent, who has repeatedly failed to reunify with the child, might be able to reunify at some future point, does not promote stability for the child or the child’s best interests.” (*In re Casey D.* (1999) 70 Cal.App.4th 38, 47 (*Casey D.*).)⁴

We review the juvenile court’s decision to deny a section 388 petition without a hearing for abuse of discretion. (*In re G.B.* (2014) 227 Cal.App.4th 1147, 1158.)

⁴ *Casey D.* affirmed the denial of a section 388 petition following a hearing, unlike the instant case in which the juvenile court did not hold a hearing on mother’s petitions. (*Casey D.*, *supra*, 70 Cal.App.4th at pp. 41–43.) *Casey D.* nonetheless is instructive on what constitutes a sufficient change in circumstance for purposes of section 388.

B. Analysis

The juvenile court did not abuse its discretion when it found mother's requests failed to satisfy the requirements for a hearing under section 388 and the California Rules of Court. Most of the information in the requests and the attached documentation pertained to matters occurring before the juvenile court issued its order terminating reunification services, such as mother's completion of treatment at the Tarzana Treatment Center and her participation in 12-step meetings. Although a juvenile court in deciding a section 388 petition "may consider the entire factual and procedural history of the case" (*In re Jackson W.* (2010) 184 Cal.App.4th 247, 258), evidence predating the order mother sought to change cannot establish a change of circumstance in and of itself.

Mother did provide some new information in her requests, namely that she had completed five months of a domestic violence program and had enrolled in additional domestic violence classes. Assuming *arguendo* that completion of court-ordered programs alone constitutes a change of circumstance under section 388, mother nonetheless does not dispute that she had yet to complete the classes. In light of mother's history of failing to complete programs after starting them, the juvenile court was within its discretion to find mother's participation in domestic violence programs was not a substantial change of circumstance, and did not justify "delaying the selection of a permanent home for" the children. (*Casey D.*, *supra*, 70 Cal.App.4th at p. 47.)

Mother argues that if avoiding delay in implementing a permanent plan justifies denying a section 388 petition seeking additional reunification services, no such petition would ever be

granted. We reject this premise. Should a parent show a substantial change in circumstances, delay to allow further reunification services may well be justified. In this case, however, the juvenile court did not abuse its discretion in concluding that mother had failed to present prima facie evidence of a substantial change of circumstances.

Mother argues that her counsel represented to the juvenile court that mother had been sober for a year, which she claims “is a sufficiently long period of sobriety to establish a prima facie case of changed circumstances requiring an evidentiary hearing.” (*Italics omitted.*) Mother’s section 388 petitions, however, did not contain allegations regarding the duration of her sobriety, nor did they assert her sobriety as a basis for a change of order. Mother cites no authority suggesting that her counsel’s unsworn statements constitute prima facie evidence of a change of circumstance under section 388, particularly when those statements were contradicted by the April 2019 DCFS report stating that mother had missed a drug test and tested positive for alcohol.⁵ The juvenile court did not err by declining to consider mother’s purported sobriety as a basis for a change of order when mother never properly presented that basis to the court.⁶

⁵ Mother contends that “[o]ne missed test and one test positive for alcohol since [the juvenile court terminated services] is a significant improvement: a *changed* circumstance, more than merely *changing*.” We fail to see how missed or positive tests for an abuser of alcohol suggest the abuser has substantially changed his or her behavior.

⁶ Because mother did not properly assert her sobriety as a basis for her section 388 petitions, we do not address her argument that her period of sobriety for purposes of the

Even if mother properly raised the issue of her sobriety in her section 388 petitions, the basis of the juvenile court's order terminating reunification services was not that mother had not been sober long enough, but that she had only recently shown commitment to a case plan that the court ordered a year earlier. After reviewing mother's past spotty compliance with the case plan, the juvenile court found mother's more recent commitment to the case plan was not sufficiently substantial and was "late." The juvenile court thus opted to move towards a permanent plan of adoption for the children rather than give mother yet more time to attempt to comply with the case plan. Even if mother progressed after termination of services, the court was within its discretion to find that it was not in the children's best interest to deviate from the intended permanent plan when mother's alleged progress came late in the proceedings, and the children were well established with caregivers ready and willing to adopt them.

Mother notes that DCFS itself changed its recommendation and urged the juvenile court to continue to provide reunification services. The juvenile court was aware of the changed recommendation at the November 8, 2018 review hearing and nonetheless terminated reunification services. Mother did not challenge that ruling via extraordinary writ. (See *M.L. v. Superior Court* (2019) 37 Cal.App.5th 390, 398, fn. 3 ["[a]ll orders issued at a hearing in which a section 366.26 hearing is ordered are subject to section 366.26, subdivision (d) and must be reviewed by extraordinary writ'"].) DCFS did not reassert its changed recommendation when mother brought her

section 388 petitions should include the period of sobriety prior to termination of services.

section 388 petitions, nor did DCFS argue in support of the petitions. Under those circumstances, the juvenile court did not abuse its discretion by not considering the prior changed recommendation as a basis to grant a hearing on mother's section 388 petitions.

II. The Juvenile Court Erred By Denying A Contested Section 366.26 Hearing Without Requesting An Offer Of Proof

Mother claims the juvenile court erred by denying her a contested section 366.26 hearing without requesting an offer of proof. Alternatively, she argues statements by her counsel constituted a sufficient offer of proof to entitle her to a hearing. We conclude mother's first argument has merit. We do not reach mother's alternative argument.

A. Applicable law and standard of review

“The selection and implementation hearing under section 366.26 takes place after the juvenile court finds that the parents are unfit and the child cannot be returned to them.’” (*In re Grace P.* (2017) 8 Cal.App.5th 605, 611 (*Grace P.*)). If “the court has found the child likely to be adopted, the burden shifts to the parents to show exceptional circumstances exist such that termination [of parental rights] would be detrimental to the child.” (*Ibid.*) Among these exceptional circumstances is what is commonly referred to as the “beneficial parent-child relationship exception” (*id.* at p. 612), requiring a showing that “[t]he parents have maintained regular visitation and contact with the child and the child would benefit from continuing the relationship” (§ 366.26, subd. (c)(1)(B)(i)). Another exception, sometimes referred to as the “sibling bond exception” (see, e.g., *In re D.O.*

(2016) 247 Cal.App.4th 166, 174), requires a showing that termination of parental rights would substantially interfere with a child's sibling relationship (§ 366.26, subd. (c)(1)(B)(v)).

"Parents can request a contested hearing . . . to present evidence supporting their claim that an exception to termination of parental rights exists." (*Grace P.*, *supra*, 8 Cal.App.5th at p. 611.) A parent's right to a hearing comes from the language of section 366.26 itself, which states, "At the hearing, . . . the court . . . shall receive other evidence that the parties may present" (§ 366.26, subd. (b).) Similarly, constitutional due process entitles a parent facing possible termination of parental rights to "a meaningful opportunity to be heard, present evidence, and confront witnesses." (*Grace P.*, at p. 612.)

Courts have held, however, that "[d]ue process is 'a flexible concept' " that is "subject to evidentiary principles." (*Grace P.*, *supra*, 8 Cal.App.5th at p. 612.) Thus, a court need not "hold a contested hearing if it is not convinced the parent will present relevant evidence on the issue he or she seeks to contest." (*In re Tamika T.* (2002) 97 Cal.App.4th 1114, 1122 (*Tamika T.*)). "The trial court can therefore exercise its power to request an offer of proof to clearly identify the contested issue(s) so it can determine whether a parent's representation is sufficient to warrant a hearing involving presentation of evidence and confrontation and cross-examination of witnesses." (*Ibid.*; accord, *Grace P.*, at p. 612.)

A juvenile court's decision to deny a contested hearing after receiving a parent's offer of proof is reviewed for abuse of discretion. (*In re A.B.* (2014) 230 Cal.App.4th 1420, 1434.) Here, however, mother argues that the juvenile court denied her

hearing without requesting an offer of proof. This is, in essence, a due process challenge, which we review de novo. (*Ibid.*)

B. Analysis

1. *The juvenile court erred by not requesting an offer of proof*

We conclude the juvenile court erred by denying mother a contested hearing without requesting an offer of proof.

After mother's counsel asked for a hearing and briefly outlined the issues mother wished to address, the juvenile court invited responses from the other parties. Then, without requesting an offer of proof or seeking any more information from mother or her counsel, the juvenile court found that "based on the information that has been presented and the statements made on behalf of the mother . . . there is not even a prima facie showing that any of the exceptions to adoption would apply" This conclusion, reached without the juvenile court requesting an offer of proof, does not comport with due process.

DCFS argues the juvenile court did not err because it denied mother's request "after her counsel informed the court regarding the evidence the mother intended to present." In so arguing, DCFS contends that mother's counsel's statements to the juvenile court constituted an offer of proof.

We disagree. We recognize that mother's counsel, in requesting the hearing, made some general representation of what evidence mother sought to introduce. Mother's counsel referred to the facts and contentions she referenced in arguing for a section 388 hearing, namely mother's purported long period of sobriety, completion of treatment programs, and consistent visitation with the children. Mother's counsel also referenced

“mother’s relationship with the children, specifically [A.Y.] and [A.Y.’s] age” and the fact that, according to mother, mother “engage[s] in all parental duties when she is allowed to visit.”

It is not clear to us that in making these brief statements mother’s counsel intended to make a formal offer of proof, or merely was apprising the juvenile court generally of the issues mother wished to address at the requested hearing. Certainly mother’s counsel had no obligation to make an unsolicited offer of proof—mother had the right to a hearing under both due process and section 366.26, subdivision (b) without any representations by her counsel at all. It is only when the juvenile court “exercise[s] its power to request an offer of proof” (*Tamika T.*, *supra*, 97 Cal.App.4th at p. 1122) that a parent must make further representations before receiving a hearing.

Here, the juvenile court did not do so. The importance of the interests at issue at a section 366.26 hearing are self-evident—the potential permanent removal of a child from his or her parent. Given the unclear record here, the juvenile court could not rely on counsel’s summary statements to deny a contested hearing without determining whether counsel’s statements constituted a complete offer of proof, or whether counsel had more to say if the court had requested an offer of proof. Absent that clarification, the juvenile court did not satisfy the requirements of due process. We thus do not reach mother’s alternative argument that the statements, if construed as an offer of proof, entitled her to a hearing.

2. *The error was prejudicial*

DCFS argues that mother cannot show prejudice from any error by the juvenile court because “the evidence demonstrated mother could not meet her burden that one of the exceptions to

the termination of parental rights applied.” Mother contends that the error is reversible per se. We disagree that the error was harmless, and therefore do not decide whether it is reversible per se.

In requesting a hearing, mother’s counsel referred to mother’s visitation and relationship with the children, thus invoking the beneficial parent-child relationship exception under section 366.26, subdivision (c)(1)(B)(i). This exception involves a two-prong analysis. (*Grace P.*, *supra*, 8 Cal.App.5th at p. 612.)

“The first prong inquires whether there has been regular visitation and contact between the parent and child.” (*Grace P.*, *supra*, 8 Cal.App.5th at p. 612.) The second prong “asks whether there is a sufficiently strong bond between the parent and child that the child would suffer detriment from its termination.” (*Ibid.*)

DCFS contends mother cannot satisfy the first prong because mother’s visits with the children were “inconsistent” and did not progress beyond monitored visitation. We note, however, that “‘[p]arent-child relationships do not necessarily conform to a particular pattern,’ and no single factor—such as supervised visitation or lack of day-to-day contact with a noncustodial parent—is dispositive.” (*Grace P.*, *supra*, 8 Cal.App.5th at p. 613.)

The record indicates that mother visited with her children with some frequency, albeit sometimes inconsistently, and some visits were in-home or unmonitored. Thus mother maintained a presence in her children’s lives, and her testimony may have shed light on the lapses in visitation. Without knowing, through an offer of proof, what evidence mother intended to present at the

contested hearing, we cannot conclude on this record that she would be unable to satisfy the first prong.

DCFS also contends mother cannot satisfy the second prong because A.Y. indicated he did not want to live with her, and the record “is devoid of any facts, observations, or statements suggesting [M.M. and R.M.] were having difficulty in the home of the paternal grandparents or suffered any harm or trauma from being apart from their mother.” We cannot assume, however, that the record would remain “devoid” of such facts if the juvenile court had requested an offer of proof or allowed mother to testify, and therefore cannot conclude on the existing record that mother would have been unable to satisfy the second prong.

DCFS argues that mother has not explained on appeal what evidence she would have offered if given the opportunity. Any such representation would be outside the appellate record, because the juvenile court never requested an offer of proof. We will not fault mother for not providing information on appeal that the juvenile court’s erroneous ruling may have prevented her from introducing below.

Because we conclude the juvenile court’s failure to request an offer of proof as to the beneficial parent-child relationship exception prejudiced mother, we do not address the parties’ arguments regarding mother’s ability to show the sibling bond exception under section 366.26, subdivision (c)(1)(B)(v).

DISPOSITION

The orders denying mother's section 388 petitions are affirmed. The orders terminating mother's parental rights as to A.Y., M.M., and R.M. are reversed. The matter is remanded for the juvenile court either to grant mother a contested hearing under section 366.26 or, in the alternative, to request that mother make an offer of proof identifying the contested issues and the evidence mother intends to produce regarding those issues. If the juvenile court chooses to request an offer of proof, the juvenile court shall thereafter exercise its discretion whether to grant a contested hearing.

NOT TO BE PUBLISHED.

BENDIX, J.

We concur:

ROTHSCHILD, P. J.

CHANEY, J.