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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
SECOND APPELLATE DISTRICT  
DIVISION TWO

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

B233960

(Los Angeles County  
Super. Ct. No. CK60422)

LOS ANGELES COUNTY  
DEPARTMENT OF CHILDREN AND  
FAMILY SERVICES,

Plaintiff and Respondent.

v.

NANCY A.,

Defendant and Appellant.

APPEAL from orders of the Superior Court of Los Angeles County. Terry  
Truong, Juvenile Court Referee. Affirmed.

Patti L. Dikes, under appointment by the Court of Appeal, for Defendant and  
Appellant.

Tarkian & Associates and Arezoo Pichvai for Plaintiff and Respondent.

Nancy A. (mother) appeals from orders denying her petitions for modification pursuant to Welfare and Institutions Code section 388 and terminating her parental rights to two of her four children under Welfare and Institutions Code section 366.26.<sup>1</sup> We affirm.

### **CONTENTIONS**

First, mother contends that the juvenile court erred in summarily denying her modification petitions filed pursuant to section 388.

Second, mother contends that the Department of Children and Family Services (DCFS) failed to comply with orders granting her visitation with her children while she was incarcerated, thus improperly precluding her from asserting that her parental rights should not be terminated under the exception set forth in section 366.26, subdivision (c)(1)(B)(i).

Finally, mother contends that her children's sibling relationships with one another were not adequately protected by DCFS or the court, thus improperly precluding mother from asserting that her parental rights should not be terminated under the exception set forth in section 366.26, subdivision (c)(1)(B)(v).

### **STATEMENT OF FACTS AND PROCEDURAL HISTORY**

Mother is the biological mother of four children: Alondra (born in July 1997); Angel (born in April 2003); Adrian (born in May 2005); and M. (born in August 2008).<sup>2</sup> The children's fathers are not parties to this appeal.

#### **Initial detention**

On April 6, 2008, mother took two-year-old Adrian to the hospital, reporting that dogs had injured the child two days earlier. Adrian was having continuous seizure episodes and was struggling to breathe. He was very lethargic, and had to be carried into the emergency room. The doctors found that Adrian was severely malnourished,

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<sup>1</sup> All further statutory references are to the Welfare and Institutions Code.

<sup>2</sup> Alondra and Angel are not subjects of this appeal, but will be discussed throughout the opinion where relevant.

dehydrated, and had less than half his total blood count. Adrian had very thinning hair with bald spots, and there were many bruises in different stages of healing on his scalp. The pupil in his left eye was blown, and after further testing, the doctors discovered that Adrian had heavy bleeding in his brain. Adrian was rushed into surgery because the heavy bleeding in his brain was placing extreme pressure on his brain. The surgical doctors relieved some of the pressure but did not know if the bleeding on the brain had stopped.

Adrian was intubated. He was struggling so hard to breathe that the doctors placed him on a ventilator. He went into cardiac pulmonary arrest on two occasions.

The doctors noted that Adrian had fresh bloody cuts on his abdomen and his ear. He had bruises on the back of his legs, his right hip, the left side of his face, and his lower chin. He also had burn marks and old scars throughout his body. In addition, he had scabs covering the lower part of his scrotum. When the doctor lifted Adrian's right arm, she found a round scar inside his armpit. The doctor opined that Adrian had less than a 10 percent chance of survival.

Los Angeles Sheriff's Department detectives investigated the matter and found that Adrian's injuries were not consistent with mother's explanation. When they showed mother photographs of Adrian's injuries, she admitted to causing some of them. Mother was arrested for felony child abuse and DCFS was notified. Mother was four months pregnant at the time.

The investigating social worker noted that mother had an extensive history with DCFS. Mother had received family reunification and maintenance services from August 30, 2005 through May 8, 2007, as a result of mental and emotional problems that limited her ability to provide her children with appropriate care.

The social worker interviewed Alondra, who was 10 years old at the time. Alondra admitted that mother hit Adrian on a daily basis with a big "huarache" or Mexican slipper. Mother would hit Adrian across the body, legs, and arms with the huarache on many occasions. Alondra reported that Adrian spent most days in the playpen, and rarely wanted to come out. Mother would try to get Adrian to come out of

the playpen to eat. Alondra stated that Adrian would throw toys at her and her brother, Angel. Alondra described an incident in which the mother was hitting Adrian with the huarache across his body when Adrian bit mother's finger, making her bleed. This made mother angrier and she kept on hitting Adrian. Mother would also push Adrian to the ground and slap him repeatedly across the face. Mother made Adrian stay in the playpen as a form of punishment. Alondra stated that she asked her mother why she was hitting Adrian so much, and told her to stop. Alondra did not tell anyone about mother's abuse of Adrian, because she was afraid of being taken away. Alondra reported that she and Angel had been abused in their prior foster home.

On the day mother took Adrian to the hospital, Alondra and Angel were playing on the computer and mother was preparing food in the kitchen. Alondra went into the kitchen and found Adrian lying on the ground. Mother attempted to wake him and told Alondra that she did not know what was wrong with the child.

On April 8, 2008, Detective Reid from the Los Angeles County Sheriff's Department informed the social worker that mother had made a full confession to abusing Adrian. Mother stated that she had "just had it" with the child and continued to hit him over and over again.

On April 9, 2008, DCFS filed a petition pursuant to section 300, subdivisions (a), (b), (g), and (j), on behalf of 10-year-old Alondra, four-year-old Angel, and two-year-old Adrian. The court detained the children in shelter care, ordered Alondra and Angel to be enrolled in individual grief counseling, and granted mother monitored visits.

#### **Jurisdiction/disposition report**

On June 4, 2008, DCFS submitted a jurisdiction/disposition report. Mother was incarcerated and was pregnant. Alondra and Angel had been placed together in foster care, and Adrian remained hospitalized in serious condition.

Adrian had lived with his mother from November 2007 until he was detained in April 2008.<sup>3</sup> Alondra reported that when Adrian first came to live with them, mother had to teach him how to eat with a spoon. Adrian did not like the food that mother cooked, so he would spit it out. Mother would sometimes punish the child by not giving him food. Adrian lost weight.

Alondra further reported that Adrian would throw toys at her and her brother and would say bad words. Mother would punish Adrian by putting him in timeouts, making him face the wall and placing his hands on the wall, tying his hands behind him with a sock and hitting him, and only letting him out when he stopped struggling. Mother pushed Adrian, pulled his hair, shook him, hit him with a green “huarache” on his buttocks, arms, and head, and picked him up and threw him against the wall. Alondra stated that she would tell her mother to stop, and she would stop. Alondra reported that mother rarely hit Alondra or Angel, but would hit Adrian on a daily basis.

Angel confirmed that mother would push Adrian, tie his arms behind his back, and hit him. Angel also confirmed that when Alondra would tell mother to stop hitting Adrian, she would stop. Angel stated that mother did not love Adrian because he would “poo and pee in his diaper.”

On May 28, 2008, the social worker visited Adrian in the hospital. Adrian opened his eyes and smiled while they played with a stuffed animal. Adrian was able to lift his right arm, but the left side of his body was weak and he could not move it. Adrian could not speak because of the feeding tube, but he laughed when the social worker tickled him. Adrian was learning to sit up with assistance.

Adrian’s doctor informed the social worker that Adrian may not have complete use of his left arm, leg, and side of the face. The neurological damage was still undetermined. The doctors stated that Adrian “improved daily, but he will never be normal.” Alondra stated that she wished to visit Adrian in the hospital, but the hospital staff opined that a visit would be very traumatic for Alondra.

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<sup>3</sup> For the first two years of his life, Adrian had lived with a great aunt in Mexico, Maria A.

On June 4, 2008, the court authorized mother to make monitored phone calls to Alondra and Angel from her place of incarceration.

### **Adjudication/disposition hearing**

The adjudication/disposition hearing took place on July 9, 2008. The court sustained the petition and declared Alondra and Angel dependents of the court under section 300, subdivisions (a), (b), and (j), and Adrian a dependent of the court under section 300, subdivisions (a), (b), (e), (i), and (j). The court denied mother reunification services under section 361.5, subdivision (b)(5), explaining, “I’ve been doing juvenile law for over ten years now, and the injuries this child suffered [have] got to be the worse [sic] I’ve seen done to a child by a parent.” The court stated, “I understand that Alondra and Angel are bonded to the mother, but given the severity of the injuries to Adrian, I do not see how reunification services are warranted in this case to the mother.” Minor’s counsel informed the court that maternal aunt Maria L. and her husband were seeking placement of Alondra and Angel.

### **Supplemental reports**

In an information for court officer filed on July 30, 2008, DCFS reported that Maria L. was waiting to have the children placed in her home. She wanted to have Adrian but she could not take him to the hospital for three hours, three times a week for physical therapy, occupational therapy, and speech therapy. According to the social worker, Alondra would be visiting Adrian with her therapist.

On July 25, 2008, Adrian was placed at GE Pediatric Care (GEPC). In an August 1, 2008 evaluation, it was reported that Adrian had difficulty isolating his jaw, tongue, and lip movements for speaking and swallowing. Adrian exhibited impairments in both his primary and secondary languages, and he was functioning between 12 and 18 months below his chronological age in all developmental areas.

On August 7, 2008 Alondra had a monitored visit with Adrian. Initially, she was hesitant and fearful at seeing her brother, but then they began to play together, and both children had a good time. Alondra stated that she noticed that Adrian looked “fatter, has more hair and does not have any bruises, unlike the last time she saw [him].” Alondra

and Adrian hugged at the end of the visit, and Adrian told Alondra that he loved her. Adrian was able to communicate using two-word sentences.

### **Section 300 petition regarding M.**

In August 2008, mother gave birth to a baby girl, M. DCFS took the baby into protective custody and placed her in the home of maternal aunt, Maria L. On September 4, 2008, DCFS filed a petition pursuant to section 300, subdivisions (a), (b), and (g) on behalf of M. The court ordered M. detained in Maria L.'s care. Mother was granted monitored visitation.

On October 1, 2008, the court sustained the petition as to M. Alondra and Angel were placed with M. in Maria L.'s home on October 8, 2008.

### **Interim reports**

In a supplemental report filed October 31, 2008, it was reported that the children continued to have monitored telephone calls with mother. According to a concurrent planning assessment report, mother had monitored telephone calls with Adrian every Wednesday at 3:00 p.m.

At a department multidisciplinary assessment team meeting on October 29, 2008, Maria L. was described as cooperative and able to meet M.'s needs. She was providing her with love and stability. Maria L. was happy to take care of M., Alondra, and Angel, but she was feeling overwhelmed as her family size was increasing from five to eight people. Maria L. continued to express concern that she would be unable to care for Adrian due to his disabilities. Because of Adrian's medical condition and geographic location, he had been unable to participate in visits with M.

### **Mother's conviction**

On November 5, 2008, mother was convicted of felony child abuse. Mother was sentenced to eight years in state prison.

In November 2008, DCFS reported that Maria L. had decided against adopting Alondra, Angel and M. because she heard that mother was sentenced to eight years instead of the 19 years they had expected.

Adrian's great aunt in Mexico, Maria A., and her daughter were interested in adopting Adrian. The great aunt was denied a visa to come to the United States to visit Adrian. She was aware of Adrian's medical problems, and had contacted the government agency in Mexico in an effort to obtain a home evaluation.

#### **Adjudication/disposition of M.'s petition**

On November 20, 2008, the juvenile court declared M. a dependent of the court under section 300, subdivisions (b), (g), and (j), and denied family reunification services to mother pursuant to section 361.5, subdivision (b)(5). A section 366.26 hearing was set, with a plan of permanent placement with Maria L. and a specific goal of adoption or legal guardianship. As to Adrian, the court again ordered DCFS to submit an update on efforts to place him in relative care with the maternal great aunt in Mexico.

#### **Section 366.26 report and January 2009 review hearing**

DCFS prepared a report for a December 2, 2008 hearing in Adrian's case. The social worker reported that Adrian had little contact with maternal relatives and had not had visits with mother. The social worker considered Adrian adoptable. He was not in an adoptive home, however, and the home study of the great aunt in Mexico had not been completed.

At a status review hearing on January 30, 2009, DCFS requested an order for a home study for placement of Adrian with his maternal great aunt and her daughter in Mexico. DCFS had received a letter indicating that Adrian had decreased motivation to communicate and did not appear to be attached to his GEPC caretaker. The hospital social worker questioned whether this was the appropriate placement for him. Adrian's speech therapist was also concerned.

At the hearing, the children's trial counsel informed the court that Alondra had been able to visit Adrian on only one occasion and requested that the court order sibling visitation for the children. The court ordered DCFS to ensure that sibling visits occurred no less than once per month.

At the hearing, the juvenile court granted DCFS a six-month continuance to conduct a home study with the great aunt in Mexico.



### **March 2009 review reports and hearing**

DCFS submitted a 366.26 report for all four of the children for the March 20, 2009 hearing. Adrian was not meeting his developmental milestones and continued to need daily medical monitoring. On February 19, 2009, Adrian's service coordinator held a meeting at GEPC and reported that three-year-old Adrian had severe mental retardation, cerebral palsy, and subdural hematoma from the nonaccidental head injuries he had suffered. His diet consisted of soft, nectar-like foods. Adrian was verbal and understood both Spanish and English. He was able to answer simple questions and follow one-step directions.

Adrian had been having limited visits since being placed at GEPC in July 2008. The other three children continued to live together with Maria L. Alondra and Angel spoke weekly with mother on the telephone. DCFS continued to assess Adrian as adoptable, although an adoptive parent still had not been identified.

Maria L. had originally wanted to adopt M., but changed her mind. She said a nonrelative extended family member (NREFM) in San Francisco was interested in adopting M. Maria L. had also decided against taking legal guardianship of Alondra and Angel; she wanted to continue to be their foster parent.

DCFS again requested a 180-day continuance to obtain a home evaluation of relatives in Mexico. It needed a specifically worded order, which the court provided at the hearing.

Counsel for the minors emphasized that she wanted the three children -- Alondra, Angel, and M. -- to remain placed together. She was also concerned about sibling visits with Adrian. Maria L. was unable to transport the three children to visit Adrian due to her schedule. The court stated that DCFS should work on sibling visitation with Adrian and wanted an update for the next hearing. The court ordered DCFS to work with the caretakers to ensure "regular and consistent sibling visits with Adrian."

Counsel also represented that Alondra wanted more visits with mother. The court ordered DCFS to increase visits for Alondra and Angel with mother in custody.

### **May 21, 2009 status review reports and hearing**

DCFS filed reports regarding all four children in connection with the May 21, 2009 hearing. DCFS reported that mother had been transferred from Los Angeles to the Central California Women's Facility in Chowchilla on April 14, 2009. Mother understood that she had been denied reunification services but she was participating in the in-services on her own. She mailed DCFS letters from her instructors stating that she was involved in classes in psychology, computer operation, and job skills. She was in a re-entry program and parenting classes.

On April 8, 2009, the social worker met with Maria L. about sibling visitation. Maria L. said she could not provide transportation because it was too far. She felt she was neglecting her own children and her husband. The social worker asked if another relative could provide transportation. Another maternal aunt, Jacquelyn A., called and offered to provide transportation, but she had to use public transportation because she did not have a valid driver's license or insurance. DCFS approved her boyfriend to transport her and the children. A visit was set up for May 16, 2009, but the boyfriend had to work so the visit did not take place.

The three children were doing well under Maria L.'s care. However, both Alondra and Angel wanted to go back to their mother. Jacquelyn A. said she was interested in legal guardianship and DCFS was exploring that possibility.

In a status review report regarding Adrian, DCFS reported that Adrian had not visited with his siblings for 10 months. Maria L. was not interested in adopting Adrian and she supported the idea of placing Adrian under the care of relatives in Mexico.

At the hearing on May 21, 2009, mother's counsel reported that mother had not had any visitation with her children. Mother's counsel requested an order specifying that mother does have monitored visitation with Angel, Alondra, and Adrian.

Minors' counsel again stressed that it was important for sibling visits to take place. Minors' counsel requested a do-not-remove order for Alondra, Angel and M. so that there could be a plan put into place regarding sibling visits to ensure that the children would still be able to have contact with each other if it were necessary for them to be separated.

The two older children understood that it could be difficult to avoid separating them from M. but they desired to have visits with her. The court ordered DCFS to continue its efforts to find a placement for Alondra, Angel and M. that would allow them to stay together.

### **Interim reports and July 17, 2009 hearing**

On June 15, 2009, DCFS completed an assessment of the maternal aunt, Jacquelyn A.'s home. The home did not have adequate space and was not clean or safe. In a report filed with the court, the social worker reported that an adoptive home had been identified for M.

In a last minute information for the court filed on July 17, 2009, the social worker stated that M.'s prospective adoptive parents, Maria L.'s half-sister and her partner, were afraid of what mother was going to do with regard to the children when she was released from prison. The prospective adoptive parents were aware that mother said she would do whatever she had to do to get her children back once she was released. The prospective adoptive parents understood the importance of allowing contact between M. and her siblings once the adoption was finalized, but they were afraid if they took M. to visits with Alondra and Angel, mother would find out their identities.

At the hearing on July 17, 2009, the court ordered that mother have monitored visits with Alondra, Angel, and M.

### **Continued efforts to place the children**

M.'s prospective adoptive parents traveled 300 miles each way to visit M. on a weekly basis. On September 17, 2009, DCFS placed M. in the prospective adoptive parents' home. The family lived out of the county, appeared to be capable of meeting the child's needs, and continued to understand the importance of maintaining contact with Alondra and Angel.

On October 30, 2009, Adrian's prospective adoptive parent in Mexico, Maria A., informed the social worker that she was no longer able to provide a home for Adrian. Maria A. said that she was suffering from financial hardship and separating from her

husband. She believed that Adrian would have better opportunities and medical care in the United States.

The social worker transported Alondra and Angel to visits with Adrian on a monthly basis. On February 26, 2010, M.'s prospective adoptive parents had a visit with Adrian. The visit went well, and M.'s prospective adoptive parents informed the social worker that they wished to adopt Adrian. However, on March 4, 2010, M.'s prospective adoptive mother contacted the social worker and stated that she was unable to adopt Adrian due to a job contract issue.

Adrian's therapist, Esther B., also expressed a desire to adopt Adrian. Esther B. had been Adrian's recreational therapist since he was first placed at GEPC. On March 31, 2010, DCFS opened an adoption home study for Esther B.

Another maternal aunt of Alondra and Angel, Rosalba A., requested that the children reside with her. Alondra and Angel were moved to Rosalba A.'s home. Alondra and Angel had visits with Adrian on May 21, July 10, and October 16, 2009, and February 4, 2010. The pediatric care staff reported that the visits were productive and Adrian enjoyed them.

Alondra and Angel had visits with M. on November 20, 2009, January 15, and February 27, 2010. Alondra and Angel appeared excited to see M. at the beginning of the visit, but after the first few minutes, they would go off and do other things.

At a hearing on May 4, 2010, the children's trial counsel informed the court that there had been some issues with regard to the visits between Alondra, Angel, and M. M.'s prospective adoptive parents lived in Northern California and had to travel a great distance to take M. for visits with Alondra and Angel. The children's trial counsel opined that the visits were important and indicated that the prospective adoptive parents wished for the social worker to facilitate a meeting so there could be more balance in transporting the children for the visits.

On July 8, 2010, Maria L. contacted the social worker and expressed her desire to adopt Adrian. She stated that at the time she declined Adrian's placement with her, she had too many children in her home and was unable to meet Adrian's needs. She stated

that since Alondra and Angel had been removed from her home, she had the space for him. Maria L. stated that she had not had any visits with Adrian in the past two years, because she was too busy with the other children under her care, but she was ready to have visits with Adrian.

The social worker believed that since Adrian had had a loving and nurturing relationship with Esther B. for the past two years, it continued to be in Adrian's best interest to proceed with adoption with Esther B. Esther B. indicated that she was willing to maintain contact with Adrian's relatives for as long as he liked. Esther B.'s home study was completed on August 30, 2010.

Alondra and Angel's caregiver, Rosalba A., expressed her desire to adopt Alondra and Angel. DCFS opened an adoption home study for Rosalba A.'s home.

On September 7, 2010, Alondra submitted letters to the court stating that she wished that Adrian and M. would be moved to Maria L.'s home so that it would be easier for her to see them more often. At the hearing on September 7, 2010, the children's counsel informed the court that there continued to be a problem with sibling visits.

Mother's trial counsel stated that mother opposed the pending adoptions of M. and Adrian, and wanted the children placed with family members. The court ordered DCFS to look into placing Adrian and M. with an appropriate relative and to work on sibling visitation for all four children.

Maria L. wrote two letters to the court asking for the opportunity to adopt Adrian and M. Maria L. explained that when she was offered the opportunity to take custody of Adrian in 2008, she was overwhelmed with change and extra responsibility. She was now asking that Adrian be placed with her, so that the children could communicate and know that they are loved. Maria L. attached her certification as a foster parent for the medically fragile (F-rate certification). Maria L.'s daughter Julie also wrote a letter to the court, in which she informed the judge that her family missed seeing M. M.'s prospective adoptive parents had told the family that they would be able to see M. and talk to her, but they had not been able to see or talk to the baby despite their efforts. M.'s prospective adoptive parents changed their phone number so that the family could not

make contact with her, and M.'s birthday was approaching. Julie asked the court to allow M. to come back to them so that they could keep the family together.

On October 14, 2010, Maria L. and her family visited Adrian. The social worker explained the visitation rules, but had to keep reminding Maria L. not to talk about the case. Despite redirection, Maria L. asked continually about her ability to adopt Adrian and questioned why M.'s caretakers did not return their telephone calls.

On October 28, 2010, Adrian was placed in Esther B.'s home. In a report for the November 2, 2010 hearing, the social worker reported that Maria L. had no relationship with Adrian. She had made no effort to maintain contact with him since he had been placed at GEPC. She had never facilitated sibling visits during the time that she cared for Adrian's siblings. Further, DCFS gave Maria L. an opportunity to adopt M., who had been placed in her home right after birth. Maria L. was not interested in offering any type of permanency to the children and instead found an adoptive home for M. with another relative. The social worker recommended that both Adrian and M. continue towards permanency with their current prospective adoptive parents.

With regard to sibling visits, the social worker indicated that due to the distance between the siblings, the sibling visits were to take place every three months. The children's last visit was September 3, 2010, and the next visit was scheduled for December 2010.

At the hearing on November 2, 2010, the court found that Maria L. could be a back-up if either Adrian or M.'s placement fell through, but declined to remove either child from the child's current placement. The court ordered a permanent plan of placement of Alondra and Angel with Rosalba A., Adrian with Esther B., and M. with her caretakers, with a specific goal of adoption for all four children. The court requested that the section 366.26 report address sibling visitation if adoption was to proceed for the children.

### **Mother's section 388 petitions**

On November 9, 2010, mother filed a section 388 petition for modification regarding Adrian and M. Mother indicated that she had been participating in Alcoholics

Anonymous and Narcotics Anonymous meetings while incarcerated, and that she had completed a codependency and anger management class. Mother also stated that maternal aunt Maria L. had completed F-rate training and was ready, willing and able to care for both minors.

Mother asked the court to release the minors to mother, with mother making an appropriate plan with Maria L. for placement. Mother believed this arrangement would be better for the children because they would have the opportunity to maintain familial ties.

On November 12, 2010, the juvenile court summarily denied mother's section 388 petition, finding that the proposed change of order did not promote the best interests of the children.

On February 14, 2011, mother filed a second section 388 petition, again requesting that the court change the September 4, 2008 order detaining Adrian and M. from her care. As changed circumstances, mother stated that she completed two anger management classes, a domestic violence course, a life skills course, and a women of purpose course while incarcerated. Further, Maria L. had completed F-rate training and wished to have both children placed in her care. Mother again requested that the court release the children to mother making arrangements for Maria L. to care for the children, or that Adrian and M. be placed directly in Maria L.'s care. Mother argued that the change of order would be in the best interests of the children, because they would be able to maintain a relationship with their siblings, who lived with maternal aunt Rosalba A.

On March 1, 2011, the court summarily denied mother's second section 388 petition, finding that the proposed change of order did not promote the best interests of the children. The court further noted that "maternal aunt needs to show connection/bonding with the children."

### **Permanency planning**

In an information for the court filed on May 3, 2011, the social worker reported that all four children continued to thrive in their placements. The sibling visits between M. and Alondra and Angel were difficult. M.'s prospective adoptive parents wished to

keep their identity and contact information unknown because they had received a threatening phone call regarding adopting M. Further, M.'s prospective adoptive parents indicated that the 16-hour round-trip drive was too difficult for M. The visits continued to occur every three months.

Rosalba A. also expressed concern regarding the long drives for sibling visits. The social worker stated that Alondra seemed to understand that it is hard to get together, while Angel had his mind set on keeping sibling contact. The social worker suggested that the families use a video conferencing program such as Skype for sibling contact, but M.'s prospective adoptive parents were not in agreement. The social worker opined that once M.'s adoption was final, the sibling visits were likely to stop.

Adrian was thriving in Esther B.'s home. He continued to have enjoyable monthly visits with Alondra and Angel. Esther B. had no objection to taking Adrian to visit M., and she attended church outings with Adrian's biological family and participated in visits at the maternal aunt's home.

At the section 366.26 hearing on May 3, 2011, mother's trial counsel requested that the court not terminate mother's parental rights as to Adrian and M. Mother's counsel noted that mother had been focused on rehabilitation while incarcerated. Mother's counsel also noted that mother objected to the court's denial of her section 388 petitions. Mother's counsel also argued that due to her incarceration, mother had not been able to maintain contact with her children. Mother requested that the court not terminate parental rights, and place the children in the care and custody of her family.

The children's counsel argued that there were no exceptions to adoption in this case. Both children were stable and doing well in their placements. The children's trial counsel requested that the children's caregivers continue to make efforts for sibling visits.

The court found by clear and convincing evidence that Adrian and M. were likely to be adopted. The court further found that no exceptions to adoption applied and terminated mother's parental rights to both Adrian and M.



The court also noted for the record that it denied the two section 388 petitions that mother had filed in the past. The court stated: “I did not find there has been a changed circumstance,” and that “there was very little contact between the children and the maternal aunt . . . who was requesting placement of the children.” Additionally, the court noted, it “did not find that this would be in the children’s best interest for them to be removed from their placements where they have been stable for quite some time.”

On May 20, 2011, mother filed a notice of appeal challenging the order terminating her parental rights as to Adrian and M., and the orders denying her section 388 petitions filed on November 9, 2010 and February 14, 2011.

## **DISCUSSION**

### **I. Mother’s section 388 petitions**

Mother first argues that the trial court abused its discretion in summarily denying her section 388 petitions.

#### ***A. Section 388***

Section 388 provides in relevant part: “Any parent . . . [of] a child who is a dependent child of the juvenile court . . . may, upon grounds of change of circumstance or new evidence, petition the court . . . to change, modify, or set aside any order of court previously made . . . .” To obtain the requested modification, the parent must demonstrate both a change of circumstance or new evidence, and that the proposed change is in the best interests of the child. (§ 388; Cal. Rules of Court, rule 5.570(e).) The parent bears the burden of proving the requested modification should be granted. (Cal. Rules of Court, rule 5.570(h); *In re Stephanie M.* (1994) 7 Cal.4th 295, 317 (*Stephanie M.*).)

To obtain an evidentiary hearing on a section 388 petition, the petitioner must plead facts sufficient for a prima facie showing that (1) the circumstances have changed since the prior juvenile court order, and (2) the proposed modification will be in the best interests of the child. (*In re Marilyn H.* (1993) 5 Cal.4th 295, 310; *In re Daijah T.* (2000) 83 Cal.App.4th 666, 672.)

In determining whether the petitioner has made a prima facie showing that modification of the prior order is in the child's best interests, it is important to consider the stage of the dependency proceedings. "After the termination of reunification services, the parents' interest in the care, custody and companionship of the child are no longer paramount. Rather, at this point, 'the focus shifts to the needs of the child for permanency and stability' [citation], and in fact, there is a rebuttable presumption that continued foster care is in the best interests of the child. [Citation.]" (*Stephanie M., supra*, 7 Cal.4th at p. 317.) "[S]uch presumption obviously applies with even greater strength when the permanent plan is adoption rather than foster care." (*In re Angel B.* (2002) 97 Cal.App.4th 454, 464.)

Factors to be considered in determining what is in the best interests of a child under section 388 include "(1) the seriousness of the problem which led to the dependency, and the reason for any continuation of that problem; (2) the strength of relative bonds between the dependent children to *both* parent and caretakers; and (3) the degree to which the problem may be easily removed or ameliorated, and the degree to which it actually has been." (*In re Kimberly F.* (1997) 56 Cal App.4th 519, 532.)

We cannot reverse a summary denial of an evidentiary hearing on a section 388 petition unless the ruling constituted an abuse of discretion, i.e., it was arbitrary, capricious, or beyond the bounds of reason. (*In re Anthony W.* (2001) 87 Cal.App.4th 246, 250; *In re Zachary G.* (1999) 77 Cal.App.4th 799, 805.) If no prima facie evidence exists there is no due process requirement to hold a hearing. (See *In re Jeremy W.* (1992) 3 Cal.App.4th 1407, 1416.)

***B. Appeal from mother's section 388 petitions is untimely***

DCFS argues that “[a]s a general rule, an appeal from a juvenile court order must be filed within 60 days after pronouncement of the order in open court.” (Citing Seiser & Kumli, Cal. Juvenile Courts Practice and Procedure (2011 ed.) Dependency, § 2.190[4], p. 2-519.) Because mother’s second section 388 petition was denied in court on March 1, 2011, DCFS argues that mother should have filed her challenge to the court’s order no later than April 30, 2011.

Mother argues that the juvenile court effectively reconsidered her petitions at the May 3, 2011 hearing when it reiterated that it had previously denied those petitions. We disagree. The court made it clear on the record that it was simply making a note of an earlier decision. Specifically, the court stated: “I also want to note for the record that with regards to [mother’s] 388 petitions that she has filed in the past; I did deny those requests.” We therefore conclude that the juvenile court’s summary denials of mother’s section 388 petitions occurred on the dates those orders were issued: November 12, 2010 and March 1, 2011.

Section 395 governs the right to appeal in juvenile dependency cases. It provides, “A judgment in a proceeding under Section 300 may be appealed in the same manner as any final judgment, and any subsequent order may be appealed as an order after judgment.” (§ 395, subd. (a).) The term “judgment” in this provision refers to the disposition order in a dependency proceeding. (*In re Meranda P.* (1997) 56 Cal.App.4th 1143, 1150.) “Subsequent orders subject to appeal as ‘orders after judgment’ include orders denying section 388 petitions to modify an order of the juvenile court.” (*In re Aaron R.* (2005) 130 Cal.App.4th 697, 703; *In re Madison W.* (2006) 141 Cal.App.4th 1447; 1450.)

Appellate jurisdiction to review an appealable order depends on a timely notice of appeal. (*In re Jonathon S.* (2005) 129 Cal.App.4th 334, 340.) In a juvenile dependency case, “a notice of appeal must be filed within 60 days after the rendition of the judgment or the making of the order being appealed.” (Cal. Rules of Court, rule 8.406(a)(1).)

Mother's section 388 petitions were denied on November 12, 2010 and March 1, 2011. Mother did not file her appeal until May 20, 2011. Mother's challenge to the denials of her section 388 petitions are untimely.<sup>4</sup>

***C. No abuse of discretion occurred***

Even if we were to review the denials of mother's section 388 petitions, we would find that the juvenile court did not abuse its discretion.

In summarily denying mother's section 388 petitions, the court found that it was not in the children's best interests to be removed from their placements, where they had been stable for some time.

The record reveals no abuse of discretion in these rulings. Mother had been denied reunification services due to the severity of the abuse that she inflicted upon Adrian. Her participation in programs while incarcerated was insufficient to show that mother had addressed or overcome the central issue that led to the children's detention. There was no evidence of a reformation sufficient to be considered changed circumstances warranting relief under section 388. Furthermore, Maria L. had been offered an opportunity to provide a permanent home for both children years earlier, and had declined. As the court noted, at the time of mother's section 388 petition, she had no relationship with either child.

In addition, mother did not make a prima facie showing that a change of order would be in the best interests of the children. Where reunification services are not provided, a parent's interest in the care, custody and companionship of her child is not paramount. (*Stephanie M.*, *supra*, 7 Cal.4th at p. 317.) Rather, the focus is on the needs of the child for permanence and stability. (*In re Marilyn H.*, *supra*, 5 Cal.4th at pp. 309-310.) In determining the best interests of the child, the court is required to consider the reasons for the dependency, the reason the problem was not overcome, the strength of the

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<sup>4</sup> Pursuant to sections 250 and 252, the order of a referee becomes effective without approval of a judge 10 days after service of a written copy of the order. The parties have not addressed these statutes. However, it appears that even considering the additional time under these statutes, the appeal from the section 388 petitions is still untimely.

parent/child and child/caretaker bonds, the length of time the child has been a dependent, the nature of the changed circumstance, and the ease by which the change could be achieved and the reason it was not made sooner. (*In re Aaliyah R.* (2006) 136 Cal.App.4th 437, 446.) Here, the children had been in stable circumstances for some time. They had no relationship with the caretaker that mother proposed. The reasons for the dependency were very serious and mother made insufficient progress in addressing those problems. There was no evidence that mother would be prepared to assume custody once she was released from prison. The evidence overwhelmingly showed that maintenance of Adrian and M.'s placements were in their best interests.

In sum, the juvenile court did not abuse its discretion in summarily determining that mother's proposed modification was not in the children's best interests. Because mother failed to make a prima facie showing that her proposed modification would be in the best interests of the children, she was not entitled to a hearing. (*In re Jeremy W.*, *supra*, at p. 1416.)

## **II. Parental relationship exception to termination**

Mother next argues that her rights were violated by DCFS's noncompliance with orders granting her visitation with her children. Mother contends that lack of visitation and contact between mother and her children denied her the opportunity to qualify for the statutory exception to termination of parental rights found in section 366.26, subdivision (c)(1)(B)(i).<sup>5</sup> We reject mother's contention.

Preliminarily, we note that mother did not articulate this argument at the section 366.26 hearing, thus depriving the juvenile court of the opportunity to address it. Therefore she has forfeited the issue. (*In re S.B.* (2004) 32 Cal.4th 1287, 1293 ["a reviewing court ordinarily will not consider a challenge to a ruling if an objection could have been but was not made in the trial court"].)

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<sup>5</sup> Section 366.26, subdivision (c)(1)(B)(i) provides an exception to the termination of parental rights if "[t]he parents have maintained regular visitation and contact with the child and the child would benefit from continuing the relationship."

Even if we were to consider mother's argument, we would reject it. At the selection and implementation hearing held pursuant to section 366.26, a juvenile court must make one of four possible alternative permanent plans for a minor child. The permanent plan preferred by the Legislature is adoption. (*In re Brian R.* (1991) 2 Cal.App.4th 904, 923-924.) If a court finds a child adoptable, it must terminate parental rights absent specified circumstances in which it would be detrimental. (§ 366.26, subd. (c)(1)(B)(i) – (vi).) (See *In re Beatrice M.* (1994) 29 Cal.App.4th 1411, 1416.) The parent bears the burden of establishing that an exception applies. (*In re Mary G.* (2007) 151 Cal.App.4th 184, 207.) “‘The exception [under section 366.26, subdivision (c)(1)(B)(i)] applies only where the court finds regular visits and contact have continued or developed a significant, positive, emotional attachment from child to parent.’ [Citation.]” (*In re Beatrice M.*, *supra*, at p. 1419.)

The reasons for mother's failure to establish the exception set forth in section 366.26, subdivision (c)(1)(B)(i), are not relevant at a section 366.26 hearing. The focus of the proceedings has long since shifted from maintaining biological ties to providing the children with permanence and stability. (*Maricela C. v. Superior Court* (1998) 66 Cal.App.4th 1138, 1148.) Excuses for lacking a bond cannot establish the exception. (*Ibid.* [mother's excuses regarding difficulties obtaining visits with minors are irrelevant after reunification services have been terminated].)

The juvenile court did not err in terminating parental rights. Mother failed to establish the parental benefit exception, and her reasons for failing to establish this exception are irrelevant.<sup>6</sup>

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<sup>6</sup> The cases cited by mother are distinguishable, as all involved a finding that adequate reunification services were not provided to the parent. Here, reunification services were not offered to the parent, therefore the adequacy of a reunification plan is not at issue. (*In re Precious J.* (1996) 42 Cal.App.4th 1463, 1480; *In re Monica C.* (1995) 31 Cal.App.4th 296, 307; *In re David D.* (1994) 28 Cal.App.4th 941, 953.)

### III. Sibling relationship exception to termination

Finally, mother argues that the proceedings violated Legislative policy favoring sibling relationships. Mother argues that DCFS's failure to adequately comply with court orders regarding sibling visitation deprived mother of access to a basis for preservation of her parental rights under section 366.26, subdivision (c)(1)(B)(v).<sup>7</sup>

We reject mother's argument for the same reasons that we rejected her argument concerning the parental relationship exception set forth in section 366.26, subdivision (c)(1)(B)(i). First, mother failed to make this argument below and has therefore forfeited it. (*In re S.B.*, *supra*, 32 Cal.4th at p. 1293.) Further, by the time of the section 366.26 hearing, the court's obligation was to make a permanent plan for the children. Mother bore the burden of showing that termination of parental rights would be detrimental to the children under one of the enumerated exceptions. (*In re Mary G.*, *supra*, 151 Cal.App.4th at p. 207.)

Mother failed to establish the sibling relationship exception or any other exception. The reasons for mother's inability to establish the exception are irrelevant. Under the circumstances, the trial court was required to terminate parental rights. (§ 366.26, subd. (c)(1).)

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<sup>7</sup> Section 366.26, subdivision (c)(1)(B)(v) provides an exception to termination of parental rights if "[t]here would be substantial interference with a child's sibling relationship, taking into consideration the nature and extent of the relationship, including, but not limited to, whether the child was raised with a sibling in the same home, whether the child shared significant common experiences or has existing close and strong bonds with a sibling, and whether ongoing contact is in the child's best interest, including the child's long-term emotional interest, as compared to the benefit of legal permanence through adoption."

## DISPOSITION

The orders are affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

\_\_\_\_\_, J.  
CHAVEZ

We concur:

\_\_\_\_\_, Acting P. J.  
DOI TODD

\_\_\_\_\_, J.  
ASHMANN-GERST