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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

In re L.P. et al., Persons Coming Under the Juvenile Court Law. _____ LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. R.M. et al., Defendants and Appellants.	B266829 (Los Angeles County Super. Ct. No. CK42835)

APPEALS from orders of the Superior Court of Los Angeles County, Julie F. Blackshaw, Judge. Affirmed in part and reversed in part.

Christina Gabrieldis and Rich Pfeiffer, under appointment by the Court of Appeal, for Defendant and Appellant R.M.

Jeff P., in pro. per. for Defendant and Appellant.

Mary M. Goode under appointment by the Court of Appeal, for Defendant and Appellant Paul M.

Amir Pichvai for Plaintiff and Respondent Los Angeles County Department of Children and Family Services.

Pamela Deavours for Respondent Minors L.P. and E.P.

In this dependency action, the mother (appellant R.M.), half-brother (mother's son, appellant Paul M.), and presumed father (appellant Jeff P.) of dependent minors L.P. and E.P. appealed from orders terminating parental rights, freeing L.P. and E.P. for adoption, and denying petitions for modification. (Welf. & Inst. Code, §§ 300, 366.26, 388.)[1]

In order to terminate the parental rights of a non-offending, non-custodial presumed father, the law requires a finding, based on clear and convincing evidence, that it would be detrimental to place the children with that parent. We conclude that the order terminating father's parental rights must be reversed because it is not supported by a proper finding of detriment. The order selecting adoption as the permanent plan also is reversed and the matter is remanded for further proceedings.

As to mother and Paul, the case is now final. We conclude mother has not demonstrated the existence of reversible error, and affirm the termination of her parental rights and denial of

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

her section 388 petition. We also find no error as to Paul, and affirm the denial of his section 388 petition.

FACTUAL AND PROCEDURAL BACKGROUND

Mother, a single parent, gave birth to Paul in 1999. Paul's alleged father, Bruce M., is not a party to this appeal. In 2006, mother gave birth to twin daughters, L.P. and E.P. (the twins). In 2008, mother filed a family law action against Jeff, the biological father of the twins. (*R.M. v. Jeff P.* (Super. Ct. L.A. County, 2008, No. SF001073).) The family court issued a November 14, 2008 order granting mother sole legal and physical custody of the twins, with monthly child support of $1,351 from Jeff, commencing November 27, 2008. The family court also awarded mother $1,400 in past due child support from Jeff.

Referral and Investigation

In May 2011, the Department of Children and Family Services (Department) received a referral concerning Paul's allegedly inappropriate sexual language and behavior.[2] A children's social worker (CSW) interviewed the twins, who disclosed being sexually abused by Paul when left in his care. Upon being informed of this, mother refused to believe that sexual abuse may have occurred and instructed the twins to deny the sexual abuse by Paul. The department obtained a warrant to remove all three children on June 20, 2011. On the following day, Paul was detained in a group home, and the twins were detained in a foster home with Ms. B.

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[2] The Department had received 22 child protection hotline referrals regarding this family, most of which were determined to be inconclusive or unfounded.

On June 21, 2011, CSW Kim informed Jeff that the twins had been detained, and asked whether he or other family members could take care of them. Jeff stated that he was not able to care for them "at this time," and that mother had been given full physical and legal custody of the twins in November 2008. Jeff agreed to attend the detention hearing on June 24, 2011.

CSW Sampson spoke with Jeff the following day, June 22, 2011. Jeff stated that he may be seeking full custody of the twins. He explained he was a practicing attorney with his own law firm and the single parent of a 9-year-old daughter. He stated that both he and a former girl friend had obtained restraining orders against mother in the past.

Detention Hearing

At the June 24, 2011 detention hearing, the court found a prima facie case had been established for detaining the children. The court found Jeff to be the presumed father of the twins, and granted him unmonitored reasonable visitation, including weekends and overnights. It ordered the Department to provide family reunification services to the three children and their parents.

Section 300 Petition

The Department filed a section 300 petition on behalf of all three children on June 24, 2011. The petition contained allegations against mother and Bruce, but none against Jeff. The first amended petition, filed in August 2011, alleged in relevant part that mother had engaged in physical abuse (striking the children with belts) and inappropriate physical discipline (striking, slapping, or kicking the children), and that Paul had engaged in sexually inappropriate behavior, including exposing

his penis to the twins and having them orally copulate his penis. The petition further alleged that mother had been repeatedly made aware of Paul's unusual and problematic behavior by educational and mental health professionals, but she had denied that he had any mental health, emotional or behavioral issues and failed to seek the recommended and appropriate treatment for him. It alleged that all three children were at risk of physical harm, sexual abuse, and damage as a result of mother's inability to seek the appropriate treatment for Paul, lack of parenting skills, and failure to protect the twins from sexual abuse.

August 9, 2011 Report

The August 9, 2011 report contained Jeff's statement that he would be willing to take custody of the twins if he could be assured that mother would be out of the picture, but he knew that was not realistic. Jeff said that mother had stalked him while pregnant with the twins and had called him up to 100 times per day. He claimed that mother was a "pathological liar, very self-centered, vindictive, and a megalomaniac." He attributed part of his reason for not visiting or establishing a relationship with the twins to his fear of becoming embroiled in mother's "antics," and his desire to keep his older daughter away from mother.

The August 9, 2011 report contained a similar statement by Bruce: he would be willing to become more involved with Paul if he could be assured mother would be completely out of the picture. Bruce described mother as a "scary woman" who made him fear for his safety and that of his other children. Bruce

described an incident in Arizona when mother had entered the apartment of his ex-girlfriend and police were called.[3]

Disposition and Adjudication Hearing

At a contested adjudication and disposition hearing on March 27, 2012, the court considered the documentary evidence and sustained the amended petition on several grounds, including sexual abuse of the twins by Paul. All three children

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[3] The attachments to the August 9, 2011 report included a psychological assessment of mother conducted during an earlier dependency action regarding Paul. (*In re Paul M.* (Super. Ct. L.A. County, 2000, No. CK042835).) In the earlier case, mother was interviewed by Ronald R. Fairbanks, Ph.D., who had been given a copy of the sheriff report regarding the incident in Arizona.

Dr. Fairbanks stated that during the interview, mother "seemed extremely aggressive, rigid and controlled." He said that mother utilized "a very defensive approach, a very strong way to try to manipulate the situation and control it," and although he "resisted it intently[,] she seemed at times to win out." Dr. Fairbanks found that mother was "extremely compulsive, extremely controlling, very rigid and demanding. While she can present in a somewhat likeable manner, she will show up [unannounced] as she did at [Dr. Fairbanks's] office on two occasions with no sense of interfering with other people's schedules. She is extremely compulsive and organized as evidenced by her having documents repeatedly in front of the examiner. She also appears to have her own perception of the facts and is insistent that they are the facts in contrast to the way others see it. Clinically the examiner would say that she appears to have personality factors that are problematic for her." Dr. Fairbanks concluded, "this was the most frustrating evaluation the examiner has done in years and as a result, it is not very productive."

were declared dependent minors under section 300.

The court then turned to disposition issues. In its March 27, 2012 order, it found "[b]y clear and convincing evidence pursuant to WIC 361(b): Substantial danger exists to the physical health of minor(s) and/or minor(s) is suffering severe emotional damage, and there is no reasonable means to protect without removal from parent's or guardian's physical custody." Based on this finding, the children were removed from the custody of the parents.

In contrast to the March 27, 2012 written order, which stated that removal of the children from "parent's custody"—singular—was necessary to protect the children, the reporter who transcribed the oral statement of the trial judge (Judge S. Patricia Spear) wrote that removal from "parents' custody"—plural—was necessary to protect the children. As will be discussed, at a subsequent hearing on Jeff's objection to termination of his parental rights, a different bench officer (Judge Julie F. Blackshaw) held that the reporter's transcript, which said "parents' custody," was controlling.

At the conclusion of the March 27, 2012 adjudication and disposition hearing, the court granted reunification services for mother and Jeff. Jeff was ordered to participate in a counseling program if directed to do so by the Department, and in conjoint counseling with the children when recommended. The record contains no evidence that Jeff was directed by the Department to participate in a counseling program, or that conjoint counseling was recommended for Jeff.

Mother's First Appeal

Mother appealed from the March 27, 2012 jurisdictional and dispositional orders, which we affirmed in January 2013.

Our opinion did not mention Jeff, who was not a party to that appeal. (*In re Paul M.* (Jan. 30, 2013, B240325 [nonpub. opn.].)

Six-Month Review Hearing Continued

The Department filed a September 25, 2012 six-month status review report, stating that Paul was in a group home, and the twins were in a foster home with Mr. and Mrs. F. The six-month review hearing (§ 366.21, subd. (e)) was continued to November 19, 2012, for a contested hearing. The 12-month review hearing (§ 366.21, subd. (f)), scheduled for November 28, 2012, was continued to December 7, 2012.

After witness and exhibit lists were filed for the six-month review hearing, the hearing was repeatedly continued. It eventually was rescheduled as a 12-month review hearing. Much of the delay was due to the substitution of a new attorney for mother.

12-Month Review Hearing Continued

The department filed a 12-month status review report which recommended termination of reunification services for both parents based on mother's insufficient progress with case issues. It requested that a permanency planning hearing (§ 366.26) be scheduled for the children.

The trial court began the contested 12-month review hearing on December 7, 2012. After documents were submitted into evidence, the hearing was continued several times. Eventually, the 12-month hearing was merged with the 18-month hearing. (§ 366.22.)

Paul's Behavioral Issues

Between December 2012 and March 2013, the group home issued seven reports regarding Paul's behavioral issues, one report of danger to self, and three health-related reports. After

mother, who was prohibited from bringing Paul kosher food, instructed him not to eat food provided at the group home, he was hospitalized twice in February 2013 for refusing to eat or drink, and was placed on a psychiatric hold. Following his discharge from the hospital, he began eating, but refused to participate in services such as therapy. Paul emphatically stated his opposition to being adopted and his desire to return home to mother.

Conjoint Counseling Plan for Paul

In April 2013, the court requested a conjoint counseling assessment. A plan for conjoint counseling was created at a May 2, 2013 team decision making meeting: First, Paul would begin individual sexual awareness counseling, and then he would have conjoint counseling with mother. Later, when the twins were ready, all three children would have conjoint counseling with mother.

Family Therapy Not Recommended for Twins

The twins' therapist, Catherine Lippincott, Psy.D., stated in a May 20, 2013 letter that family therapy was not recommended at that time because of the twins' continued resistance to discussing past interactions with family members. Dr. Lippincott believed that as a result of mother's repeated insistence that the sexual abuse allegations were false, the twins would not have the protection and support they would need to express their own thoughts and feelings.

18-Month Review Hearing

The Department provided an 18-month status report on May 23, 2013, stating that mother had made only limited progress. Mother had completed her court ordered parenting class and individual counseling, but continued to have behavioral

problems. There were numerous reports that mother had interfered with Paul's compliance at the group home and had negative interactions with group home staff. In addition, mother had spent a great deal of time and effort complaining to the Department and the Board of Supervisors about the Department's investigation and services in this case. The report stated that after refusing visits with the twins because of her disagreement with the Department, mother had resumed visits in March 2013, which were successful. The twins were well-bonded with mother, responded well to her at visits, and drew pictures for her and shared gifts with her. The twins were stable in their foster home and the foster parents wanted to adopt them.

Because deadlines for the provision of reunification services had expired, the department stated that it was required by law to recommend termination of family reunification services. But the department also stated the new conjoint therapy plan for Paul that was adopted in May 2013 appeared promising, and sought a continuance to consider a new psychological evaluation of mother's and Paul's progress in therapy.

In his Evidence Code section 730 evaluation of mother, the court-appointed mental health examiner concluded that mother did not exhibit signs of severe psychiatric illness. After reviewing the documents provided to him, he met with mother and observed her interactions with the children. He concluded from what he had observed that the children reacted positively to her, and she displayed insight and sensitivity to their needs. He believed they had a healthy and intact attachment to mother.

As to visitation, the 18-month report stated that mother had acted inappropriately by repeatedly attempting to discuss the case with the twins during monitored visits. When told to

stop, mother had argued with the monitor. In violation of visitation rules, mother brought in a large pair of scissors and began cutting L.P.'s hair. When a social worker asked mother to stop cutting the child's hair, a security guard had to be called to secure the scissors. The department recommended that future visits be monitored in a therapeutic setting because of mother's behavior.

Mother's Motion to Remove CSW Wilkins

In July 2013, mother filed a motion seeking to remove CSW Gerald Wilkins from the case. Mother also sought to strike all reports by Wilkins, arguing he was not objective. The Department opposed the motion.

Mother's 388 Petition

Mother filed a section 388 petition requesting that reunification services be extended beyond the section 366.22 hearing on the ground that she had not received reasonable services.

Mother's motion to remove CSW Wilkins and her section 388 petition were both considered at the contested section 366.22 hearing, which was a continuation of the 6- and 12-month review hearings.

Contested 18-Month Hearing and Orders

On August 19, 2013, the court began hearing live testimony, including testimony by mother and CSW Wilkins. After 11 days of testimony, the court issued its findings and orders on September 20, 2013.

Mother's motion to remove CSW Wilkins for actual bias was denied. The court found there was no bias despite evidence of conflict between Wilkins and mother.

Mother's section 388 petition for additional reunification services was denied. The court found she had received at least 18 months of reasonable services.

Paul was removed from the group home and placed at home with mother, on the condition that he continued to remain in therapy.

The twins remained in their placement at the foster home. The court found the twins could not be safely returned to mother, notwithstanding the love and affection they had for one another. The court believed that mother was obsessed with proving the sex abuse allegations were false and would persist in trying to convince the twins they were wrong in saying the abuse had occurred.

The court terminated family reunification services as to the twins, and scheduled a permanency planning hearing under section 366.26. The court ordered continued counseling (but not conjoint counseling) for the twins, with home services and monitored visits. It denied a last minute request for a sibling bonding study.

Mother's Writ Petition

Mother petitioned for writ of mandate seeking to overturn the denial of her section 388 petition for additional services, the denial of her motion to remove CSW Wilkins, the denial of the last minute request for a sibling bonding study, and the scheduling of a permanency planning hearing. We denied the petition on the merits. (*R.M. v. Superior Court* (May 14, 2014, B251998) [nonpub. opn.].)

In reviewing the denial of mother's motion to remove CSW Wilkins, we noted there were multiple witnesses, including Wilkins, Hawkins, and mother, who were extensively examined

about each of mother's claims of bias. We found that mother was given a full opportunity to present the bias issue, and deferred to the juvenile court's findings as to the credibility and weight of the testimony presented to the juvenile court. (*R.M. v. Superior Court*, *supra*, B251998) [nonpub. opn.].)

Mother's Second Appeal

Mother also appealed the denial of her section 388 petition, which was filed during the section 366.22 hearing, seeking to set aside the finding of sexual abuse of the twins by Paul. Mother contended there was new evidence supporting her denial of the sexual abuse allegation. After reviewing the record and finding the evidence cited by mother did not constitute new evidence, we affirmed the order summarily denying mother's section 388 petition. (*In re Paul M.* (Oct. 16, 2014, B251989) [nonpub. opn.].)

Mother's Third Appeal

Mother's next section 388 petition sought a different placement of the twins because their foster father had forced E.P. to eat a banana E.P. had thrown in a trash can in a restroom at a visitation center. We affirmed the summary denial of that petition in *In re Paul M.* (Mar. 4, 2015, B257518 [nonpub. opn.]), noting the foster father's immediate apology to E.P. for what apparently was an isolated incident, and the girls' distress over mother's repeated discussion of that incident during visitation.

Meanwhile, in June 2014, DCFS recommended termination of mother's parental rights and adoption of the twins by the foster parents. The foster parents, whose home study had been approved, had continued to care for the girls despite mother's "offensive racial comments" against the foster mother and her "ongoing complaints" about the foster parents.

Section 388 Petitions by Paul and Mother

Several section 388 petitions followed.

Paul's petition sought reinstatement of reunification services for mother and "more liberal sibling visitation."

Mother's petition sought a return of the twins to her, unmonitored visits, or additional reunification services. Mother relied on her completion of 40 weekly therapy sessions, which, she asserted, addressed parenting and sexual awareness issues and provided her with techniques for stress reduction, as well as on reports of the family's successful participation in wraparound services.

Section 388 Petitions by Jeff and Department

Jeff, who had not maintained regular contact with the twins and had favored their adoption by the foster parents, also filed a section 388 petition, for the first time asserting his desire to raise his daughters. Before Jeff filed his petition on September 16, 2014, the Department had offered him no counseling or reunification services other than visitation. Earlier, the court had granted Jeff unmonitored visits, including weekends and overnight. On the same day that Jeff filed his section 388 petition, the Department filed its own section 388 petition which sought to limit Jeff's visits to monitored visits. On September 24, 2014, the court heard the department's section 388 petition. It declined to require monitored visits, but limited Jeff's visits to two hours per week.

As to Jeff's section 388 petition asserting his desire for custody of the twins, the juvenile court did not hear his petition for 11 months, during which he was provided no reunification services other than the two-hour visits which he later testified were insufficient to establish a better relationship with the twins.

His section 388 petition was heard in August 2015, just before the section 366.26 hearing began.

Bonding Study

The court ordered a bonding study of the relationship between mother, Paul, and the twins, in which the foster parents—but not Jeff—later were included. The bonding study described the interaction between mother and the children at the office of the evaluator, Alfredo Crespo, M.D., in November 2014. Dr. Crespo observed that the twins mostly ignored mother, who instead of engaging them repeatedly questioned their lack of affection and suggested they had been coached to act distant. Dr. Crespo noted that mother failed to appreciate that her own abrasiveness may have undermined her reunification efforts and that he could not rule out an underlying personality disorder. He nevertheless opined that mother's distrust of the dependency system and her sense of injustice would not prevent her from successfully parenting, as was shown in the case of Paul, whom Dr. Crespo found to be well adjusted and not currently posing any risk to his half-sisters. Dr. Crespo attributed the twins' stated preference for adoption to the foster parents' unconscious influence, since adoption was the foster parents' main goal. He was concerned that the foster parents' negative view of Paul and mother would prevent the latter two from having any meaningful relationship with the twins if the court ordered adoption. Dr. Crespo concluded that the family had maintained "a positive visiting relationship," and the twins' successful adaptation in foster care suggested they could be reintegrated into mother's home with conjoint therapy.

Mother's Section 388 Petition Denied

Mother's section 388 petition was heard in December 2014.

The twins, who had just turned eight, were ambivalent about whether they wanted to continue to see Paul and mother. L.P. testified she would like longer visits with Paul and she "kind of" wanted to visit with mother. After a pause and having become visibly upset, L.P. stated she did not want to visit with mother; she later stated she was worried mother would find out about her answers. L.P. was saddened by mother's frequent disparaging comments about the foster parents and did not want to hear them. L.P. claimed the monitor resolved conflicts during visitation. E.P. was unsure she wanted to visit with mother, and she did not want to return to mother's care. She wanted a monitor present at the visits because that made her feel "safe." She testified mother was "mean" at times, as when she showed E.P.'s underwear to everyone, when she yelled at E.P., or when she repeatedly told the girls they would go home with her, "and it never happens." In contrast, E.P. thought the foster parents were nice to her all the time.

The wraparound services facilitator, Stephen Singleton, testified he had monitored the family's weekly visits since the beginning of 2014. He stated it had taken some effort by mother to adjust to the rules of not discussing the foster parents or the case during the visits, and some visits were almost cancelled because of mother's failure to follow those rules. Overall, Singleton thought the family got along "pretty well," Paul was a "mediating influence" and "pretty positive" with the twins, mother brought a "breadth of creativity" to the visits, and neither Paul nor mother were "mean" to the girls.

The court ruled there had been a change in circumstances, based on mother's "significant progress, . . . much of it ha[ving] to do with her relationship with Paul, dealing with issues as to

Paul, and the fact that the family has, in many ways, dealt with the issues that brought us to court initially." Nevertheless, the court found it would not be in the twins' best interests to order additional reunification services for mother. The court relied on the twins' testimony about their strong bond with the foster parents. The court acknowledged the girls' "warm relationship" with mother and Paul, but noted their hesitancy about continued visitation, and mother's non-parental role during the visits. The court also noted the girls were "very torn between their foster parents and the birth mother. . . . They call their mother 'mean' when she says critical things about the foster parents. That is not good for them. This is—it is not in their best interest to continue in a tug-of-war between these two families." The court acknowledged that the wraparound services had provided "an incredible opportunity," but "the children's best interests are served by permanency with the foster parents."

The court denied mother's section 388 petition and Paul's request for additional reunification services for mother, and granted the foster parents' pending motion to be recognized as de facto parents. As the court delivered the ruling, mother interrupted, asking whether her son was "dangerous to society" and commenting that "after four years, the girls keep saying my son puts his pee-pee . . . in the mouth," in an apparent reference to the alleged sexual molestation. The court admonished mother to be quiet, and clarified that its ruling was not based on a finding that Paul presented a danger to the girls. Mother, and Paul, made disruptive comments as the court wrapped up the hearing and continued unresolved issues to future hearings.

Mother's Fourth Appeal

Mother appealed the denial of her section 388 petition. In our opinion affirming the order of denial, we pointed out that once reunification services are terminated, the focus shifts from "family reunification to promoting the child's need for permanency and stability. (*In re Marilyn H.* (1993) 5 Cal.4th 295, 309.) '[I]n fact, there is a rebuttable presumption that continued foster care is in the best interest of the child. [Citation.] A court hearing a motion for change of placement at this stage of the proceedings must recognize this shift of focus in determining the ultimate question before it, that is, the best interest of the child.' (*In re Stephanie M.* [(1994)] 7 Cal.4th [295,] 317.) In light of the changed focus of the post-reunification inquiry, the court was correct to emphasize the children's paramount interest in permanency and stability in the foster parents' home where they had thrived for more than three years." (*In re Paul M.* (Aug. 25, 2015, No. B261469) [nonpub. opn.].)

We considered and rejected mother's assertion "that her refusal to accept the sexual molestation allegations and her distrust of the dependency system have nothing to do with her ability to parent the girls." To the contrary, "mother's antagonistic attitude towards the twins after they made the allegations of sexual molestation was the basis for the juvenile court's decision not to return them to her care at the end of the reunification period. Dr. Crespo noted mother's failure to appreciate that her 'abrasive nature' has 'undermined her reunification efforts.' Singleton's testimony shows mother's visitation with the twins has been successful largely because it has been monitored and subject to strict rules not to discuss the case or the foster parents in front of the twins. Even so, the girls

testified to being upset by mother's repeated unrealistic insistence that they would go home with her on particular occasions and by her disparaging comments about the foster parents. Dr. Crespo's observation of mother's interaction with the girls in his office does not inspire confidence in mother's ability to refrain from discussing case issues in the girls' presence in an unmonitored environment. E.P.'s stated preference for monitored visits similarly suggests she does not feel 'safe' with mother and Paul without a monitor." (*In re Paul M.* (Aug. 25, 2015, No. B261469) [nonpub. opn. at p. 10].)

March 9, 2015 Status Review Report

The department's report for the March 9, 2015 hearing stated that according to Singleton, mother and Paul were having successful visits with the twins. However, the twins' therapist stated that the girls were "expressing frequent heightened levels of negative affect and discomfort during monitored visits with their biological mother and half-brother." According to the therapist, mother was causing the twins anxiety and sadness by repeatedly stating that she would be taking them home soon, criticizing the foster parents, telling them what to tell the court, and whispering in their ears that she heard what they said to the judge. As to father, the report stated that he was given weekly Saturday visits with the girls, but was inconsistent in his visits.

Father's Motion Regarding Lack of Finding of Detriment

On April 20, 2015, father filed a motion arguing that as a non-offending, non-custodial presumed father, his parental rights may not be terminated without a finding by clear and convincing evidence that he is an unfit parent.

Addendum Report

In its August 20, 2015 report, the Department described a March 24, 2015 visit during which mother made repeated complaints about the case to the monitor, dependency investigator Mercedes Mendoza, and abruptly ended the visit 20 minutes early after stating that she could not participate with Mendoza present. The twins sought to reassure Mendoza that she was not at fault and that mother behaved that way when angry. The report stated that subsequent visits were better, and that mother was more successful at not talking about the case in front of the children.

The report stated that father had attended most of his visits, and there were no incidents to report. There was no mention in the report of any effort made by the department to assist father in his reunification efforts.

Mother's Section 388 Petition.

Mother filed a new section 388 petition on August 18, 2015, seeking modification of the order terminating reunification services and reinstatement of her services. Mother submitted a declaration stating that she had completed all of her requirements, and that the reports prepared by CSW Wilkins were inaccurate.

At the August 20, 2015 hearing on mother's section 388 petition, her counsel, Frank Ostrov, asked to call CSW Wilkins as a witness. The trial court denied the request, stating that a court has discretion to summarily deny a section 388 petition, and mother had not made a sufficient showing to establish, by a preponderance of the evidence, the existence of changed circumstances. Finding the documents provided by mother were old, none was "more recent than September of 2014," the court

concluded mother was simply disagreeing with the manner in which her previous attorney had presented evidence at the section 366.22 hearing, which does not constitute new evidence.

Without offering any citation to the record, Ostrov argued that mother was told by an unnamed "prior judicial officer, 'You must wait until the investigation is done internally.'" Ostrov stated that because the "prior court had said there's really nothing that I can do until this investigation is completed," the time had come for mother to present evidence of fraud by the social worker.

The trial court inquired how the completion of the department's internal investigation and rejection of mother's allegations against the social worker were relevant to the termination of reunification services. Ostrov replied that contrary to the social worker's representation, mother had consented to the dissemination of reports and other information to the experts, and because these reports and information were not provided to the experts by the social worker, their expert opinions were deemed null and void, and "she had to repeat the services."

The trial court observed that the documents attached to the petition were "very old," and asked whether they had been presented at a prior hearing. Ostrov said they were being presented for the first time. Counsel for the department, Amir Pichvai, disagreed, and argued the documents "have already been received into evidence by this court." Pichvai stated: "If memory serves me correctly, it's a letter from Kendall Evans [phonetic]; it has come in. If memory serves me correctly, it's from Southern California Counseling Center. It has come in. This is not new evidence. This court has seen it time and again."

Ostrov insisted the completion of the two-year internal investigation by the Department constituted a change in circumstances: "The issue of the fraud by the department . . . caused her not to be in compliance with the case plan. Because if the social worker had done what he was supposed to do, and that is present authorizations and releases for the mother to sign, then her—then the therapy and the assessment that she did would not have been rendered, deemed invalid. And the change in circumstance was the completion of this two-year internal investigation by the department."

Pointing out that the department had completed its internal investigation one year before, the court inquired how notice of completion— "two short paragraphs saying the allegations were not substantiated"—constituted new information.

Pichvai argued there was no new information to support the motion for reconsideration. He stated the issues raised in the motion for reconsideration previously had been litigated during "two days' proceedings in this court. That happened after this response from the department." Pichvai also stated he had been assigned to this case "for a while" and had no recollection of "any judicial officer telling mother that you need to first wait on the outcome of this internal investigation before I will do anything. . . . It does not stand to reason. It's unrelated to anything we've been doing here." Pichvai asserted that mother was not entitled to reargue an issue that "time and again, including on appeal, . . . has been ruled on by this court and affirmed by the court of appeal." Pichvai stated that mother "has filed five appeals," which he had handled, and "these issues are all old issues, water under the bridge."

After ascertaining that September 2013 was when mother's previous section 388 petition was denied and her reunification services were terminated, the court found that not even the most recent document, dated July 10, 2013, qualified as new evidence. The court also pointed out an error in the petition, which stated that reunification services had been terminated in May 2013, rather than September 2013.

When the court remarked that mother's visits with the twins had not risen to the level that would show reinstatement of reunification services would serve the best interests of the children, mother interjected, "We want to prove fraud, Your Honor, and you don't allow me to prove fraud." The court explained that fraud was not a relevant issue, and the two relevant issues were the existence of changed circumstances, and whether reinstatement of reunification services would be in the best interest of the children. Mother began yelling that the court was not allowing her to prove Wilkins committed fraud. The court admonished mother for yelling, and denied the section 388 petition.

Father's Section 388 Petition

The hearing on father's section 388 petition was held on August 21, 2015. Father testified that he had visited the twins regularly on a weekly basis for about a year. They had gone to a museum, an art center, restaurants, and a mall. The twins have enjoyed the visits, and have stated that they want to spend time with his daughter, O. L.P. recently told father that she loves him. Father has asked his attorney for longer visits, but the issue was never litigated. He would like to have the twins come live with him and O. If this were to happen, he would try to facilitate their relationship with Paul.

Father explained that when the case began, he did not seek custody of the twins for several reasons. One is that he did not wish to co-manage and co-parent with mother, particularly given the serious and devastating nature of sexual abuse. Another is his recent change in employment. He switched from handling federal criminal trials to doing appellate work, which is less stressful, less time-consuming, and affords him the flexibility that will allow him to raise the twins. He also feels he is better able to care for the twins because his daughter O. is now 13 years old, and the twins also are older.

Father testified that he was unaware any reunification services were available to him. He was not told about any classes related to sexual abuse and children, nor was he told to take such classes. Nor was he ever asked to participate in a "MAT" assessment. He has never been in individual counseling related to this case. He does not know what conjoint counseling is, nor has he ever requested it.

Father's attorney argued that father was never ordered or requested to participate in parenting classes, individual counseling, sexual abuse counseling, or conjoint counseling. As to the implication that father was at fault for not initiating or requesting services, there was no evidence that any services were mentioned or recommended to him by the department. After he filed his section 388 petition, it was left "on the back burner for an entire year."

Counsel for mother and Paul argued that father had demonstrated a change in circumstances, and that it would be in the twins' best interest to be placed with father. Paul's counsel suggested that father be given reunification services if necessary.

Counsel for the twins, however, argued to deny father's petition because he had abandoned the twins for his own convenience, and allowed them to languish in foster care for years. The department agreed with this assessment, but not with the assertion the children were languishing in foster care. The department argued that father's logic was faulty: "If his 388 is granted, I would—have news for [father]: He would have to co-manage and co-parent with the mother going forward. So that is just a fundamentally faulty understanding of where he's at."

The trial judge criticized father for his neglect of the twins: "Actually, I am stunned at the lack of involvement and complete detachment you have had in your children's lives. And I would [not] go so far as to agree with counsel who called it an abandonment, but you certainly have neglected your girls for their entire lives." "When asked why now you want the children in your life, there was not one mention of any kind of affection for them, any kind of caring for them, any kind of love or wanting to take care of them or share your life with them. It was all about the fact that you thought you wouldn't have to deal with the mother." The court rejected father's explanation as to why he did not seek custody earlier in the proceedings, stating he thought the real reason is . . . "you really don't care about your children and you would just as soon have them out of your life. You didn't know you had a case plan. You didn't know you had been given reunification services. I am, as I said earlier, just stunned with your lack of involvement in this dependency case relating to the children."

Finding no evidence of a change of circumstance and no evidence that placing the children in father's custody would be in the best interest of the twins, the court denied the petition. In

addition, the court stated: "[O]n top of it, I will make an additional factual finding that by clear and convincing evidence the children will suffer substantial detriment if they were placed in your care." When counsel for Paul and mother objected that the petition did not raise the detriment issue, which had not been argued, the court stated: "[I]t is not up for discussion. Everybody has had lots and lots of time to present evidence and argument in this case. I have made that finding."

Father's Motion Regarding Detriment

The trial judge (Judge Blackshaw) then turned to the issue of detriment. Based on the reporter's transcript of the section 361 hearing conducted by Judge Spear, Judge Blackshaw found that a proper finding of detriment had been made against father. Judge Blackshaw stated: "Father was represented at that hearing by counsel, there was no objection made at that hearing, and it was never appealed. And so it is now the law of the case. It is not appropriate at this point to challenge that detriment finding."

Counsel for Paul argued that the required finding of detriment was never made at any time in this case as to father. Counsel pointed out that the "minute order states that the 'parent'—it says singular possessive—was—the findings were made as to the 'parent,' with singular possessive. [¶] I understand that the transcript reflects a plural possessive. However, if the court looks at the transcript, those findings were made as to 'parents'—which would be phonetically transcribed by the court reporter. . . ." Counsel argued that neither Jeff nor his attorney would have had notice that "the word that could not be deciphered as singular possessive or plural possessive would have referred to him. The most proper notice that he would have had

would have been . . . [the] minute order, which is the one that has singular possessive. He didn't appeal it because as to his knowledge, there's no finding of detriment made against him."

Father's attorney concurred in these remarks. He argued the department had failed to show that a proper finding of detriment was made against father.

Mother's counsel argued the finding of detriment was made only against mother—the "minute order clearly says single possessive." The trial court disagreed, stating that the reporter's transcript "supersedes" the minute order. Mother's counsel argued that unless someone says "'apostrophe s'" or "'s apostrophe,'" the reporter simply "makes a guess and types it that way." Counsel stated, "we may not be thrilled with father's presence in the lives of his daughters, but clearly it's not detrimental; otherwise, if it was detrimental, he wouldn't have unmonitored visits."

Counsel for the twins argued that it was reasonable to infer a finding of detriment from the removal of the children from the custody of their parents.

Section 366.26 Hearing

Dependency investigator Mendoza testified the twins were happy and affectionate during their visits with mother and Paul.

E.P. testified she lives with her "mommy and daddy," referring to her foster parents, and does not want to visit her birth mother because "sometimes she gets really mad and, like, overreacts." E.P. said that she feels sad when mother gets really mad. The last time mother overreacted was one week ago. E.P. also stated that she does not want to visit Paul "because of what he did." She testified that she loves her birth mother "in the middle," meaning "not really." She loves her foster parents, and

they say that her birth mother yells too much. When asked how she would feel if she never saw her birth mother again, E.P. answered, "I'd feel happy because I get to be with my foster parents."

L.P. testified that she feels sad when her birth mother yells and that it is a little stressful. She said she is not sure if she wants to visit her birth mother and Paul if she is adopted. Later, she stated that she does not want to have visits with mother and Paul if she is adopted. L.P. testified that her birth mother does not go to her doctor's appointments, do homework with her, or attend her activities, and she does not want her to do these things. L.P. stated that she loves her father, and has a pretty good relationship with him.

Paul testified that he enjoys seeing his sisters every week. They do homework, talk about Harry Potter books, and play games.

Dr. Crespo, the court-appointed evaluator, testified that during a family visit in November 2014, Paul enjoyed seeing the twins and behaved in a warm, sensitive, and appropriate manner. The twins sought "a little" attention from Paul, but not from mother. When the twins entered the room, one of them hugged mother but the other did not. The twins told Dr. Crespo that they wanted to be adopted. During the visit, mother "seemed focused on complaining about what was wrong rather than enjoy the visit. She appeared to be continually combative, challenging, somewhat difficult." Dr. Crespo stated that if the twins are not adopted, an evaluation of their biological father, Jeff, should be conducted. It would not surprise Dr. Crespo if the girls said they loved their biological father. The twins are "very loving girls. I think that they love everybody, everybody around

them. That's just part of the way in which they may be coping with a difficult situation."

Mother testified that during their visits, the twins call her "Mommy" and greet her with a kiss. She was present when the twins were asked whether they wanted to visit with mother and Paul, and they said yes. In August 2011, the twins said that she was their "Mommy," but the foster parents had asked to be called "Mommy" and "Daddy." In May 2014, E.P. was crying when she told mother that the foster father had taken a half-eaten banana from the trash and forced her to eat it. During the bonding study, the twins were distant and did not hug mother. L.P. likes to embrace mother, but E.P. is more reluctant. E.P. said she was told by the foster mother that she was too old to sit in her mother's lap. During visits, the children are happy, and they play games and sing songs.

The trial court concluded that neither mother nor Paul had established the benefit exception to termination of parental rights. The court terminated the parental rights of mother and Jeff.

DISCUSSION

I

Mother contends the juvenile court abused its discretion in denying her section 388 petition for reinstatement of her reunification services as to the twins. We do not agree.

Section 388 provides in relevant part: "(a)(1) Any parent or other person having an interest in a child who is a dependent child of the juvenile court . . . may, upon grounds of change of circumstance or new evidence, petition the court in the same action in which the child was found to be a dependent child of the

juvenile court . . . for a hearing to change, modify, or set aside any order of court previously made or to terminate the jurisdiction of the court."

At a section 388 hearing, "the burden of proof is on the moving party to show by a preponderance of the evidence that there is new evidence or that there are changed circumstances that make [the requested] change [or modification of a prior order] in the best interests of the child. (§ 388; *In re Audrey D.* (1979) 100 Cal.App.3d 34, 45; Cal. Rules of Court, [former] rule 1432(f) [presently found at rule 5.570].) [¶] 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' (*In re Marilyn H.* [(1993)] 5 Cal.4th 295, 309), and in fact, there is a rebuttable presumption that continued foster care is in the best interests of the child. (*Id.* at p. 302.)" (*In re Stephanie M.* (1994) 7 Cal.4th 295, 317.)

Mother argues the trial court abused its discretion in denying her request to call social worker Wilkins as a witness in order to demonstrate that as a result of the bias he harbored against her, he falsified various statements throughout the reports. The problem with this contention is that the allegation of bias is not a changed circumstance: the juvenile court previously considered and rejected the same allegation of bias at the section 366.22 hearing, which we affirmed on the merits in *R.M. v. Superior Court, supra*, No. B251998,). Mother has not addressed the doctrine of law of the case or explained why it should not apply to the findings made at the section 366.22 hearing, which were affirmed on appeal. (See *Joyce v. Simi Valley Unified School Dist.* (2003) 110 Cal.App.4th 292, 304

[doctrine applies where issues are substantially the same and there is no material change in the evidence].)

A juvenile court has broad discretion to control dependency proceedings. (§ 350.) Limitations imposed upon re-examination of a subject previously adjudicated by the juvenile court and affirmed by the appellate court does not, in itself, demonstrate an abuse of discretion. The juvenile court examined the documents provided in support of mother's section 388 petition and found they did not constitute new evidence. We agree with that determination, which is supported by substantial evidence. Because the court's denial of mother's section 388 petition is supported by substantial evidence and is not beyond the bounds of reason, we must affirm it. (*In re Stephanie M.*, *supra*, 7 Cal.4th at pp. 318–319.)

II

Mother and Paul contend the trial court erred in refusing to apply the benefit exception to termination of parental rights.

The benefit exception is one of the few grounds for not terminating parental rights. (§ 366.26, subd. (c)(1)(B)(i).) It "applies if termination of parental rights would be detrimental to the child because the '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).)" (*In re Jason J.* (2009) 175 Cal.App.4th 922, 936.)

As the parent or half-sibling of the dependent children, mother and Paul had the burden of establishing the benefit exception by showing that "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 re Autumn H.* (1994) 27 Cal.App.4th 567, 575.)

"The exception must be examined on a case-by-case basis, taking into account the many variables which affect a parent/child bond. The age of the child, the portion of the child's life spent in the parent's custody, the 'positive' or 'negative' effect of interaction between parent and child, and the child's particular needs are some of the variables which logically affect a parent/child bond." (*Id*. at pp. 575–576.)

Persons seeking to apply the benefit exception must "do more than demonstrate 'frequent and loving contact' (*In re Beatrice M.* (1994) 29 Cal.App.4th 1411, 1418), an emotional bond with the child, or that the parents and child find their visits pleasant. (*In re Elizabeth M.* (1997) 52 Cal.App.4th 318, 324.) Rather, [they] must show that they occupy 'a parental role' in the child's life. (*In re Beatrice M.*, *supra*, 29 Cal.App.4th at p. 1419.) . . . 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 Autumn H.*[, *supra*,] 27 Cal.App.4th [at p.] 575.)" (*In re Andrea R.* (1999) 75 Cal.App.4th 1093, 1108–1109.)

It is difficult for a parent to show that her children will benefit from preserving their relationship where, as here, the parent has not "advanced beyond supervised visitation." (*In re Casey D.* (1999) 70 Cal.App.4th 38, 51.) Based on all of the circumstances in this case, we conclude the record supports the juvenile court's finding that mother, Paul, and the twins loved

each other, but because neither mother nor Paul had advanced beyond monitored visits, the benefit exception does not apply. The twins have issues regarding the sexual abuse, and they are not ready for family or conjoint therapy. The close alignment of Paul with his mother indicates the twins may be reluctant to share their own feelings and thoughts during therapy with either Paul or mother, particularly because mother repeatedly insisted the abuse did not occur. Applying the benefit exception under these difficult circumstances would not be in the best interest of the twins. The nurturing and supportive familial relationships that would warrant the application of the benefit exception have not been demonstrated in this case.

III

Father argues the termination of his parental rights without a proper finding of detriment constituted a violation of his right to due process. We agree.

A parent's right to custody of his or her children is a fundamental right. (*Santosky v. Kramer* (1982) 455 U.S. 745, 758.) "'*Santosky* establishes minimal due process requirements in the context of state dependency proceedings. 'Before a State may sever completely and irrevocably the rights of parents in their natural child, due process requires that the State support its allegations by at least clear and convincing evidence.' [Citation.] 'After the State has established parental unfitness at that initial proceeding, the court may assume at the *dispositional* stage that the interests of the child and the natural parents do diverge.' [Citation.] 'But until the State proves parental unfitness, the child and his parents share a vital interest in preventing erroneous termination of their natural relationship.' [Citation.] [¶] California's dependency system comports with

Santosky's requirements because, by the time parental rights are terminated at a section 366.26 hearing, the juvenile court *must* have made prior findings that the parent was unfit. (*Cynthia D. v. Superior Court* (1993) 5 Cal.4th 242, 254.)" (*In re Gladys L.* (2006) 141 Cal.App.4th 845, 848.)

"The linchpin to the constitutionality of the section 366.26 hearing is that prior determinations ensure '*the evidence of detriment is already so clear and convincing that more cannot be required without prejudice to the interests of the adoptable child, with which the state must align itself.*' Citation.]" (*In re Gladys L.*, *supra*, 141 Cal.App.4th 845, 848.) "[F]indings of detriment by clear and convincing evidence can provide an adequate foundation for an order terminating parental rights, if supported by substantial evidence. (*In re P.A.* [(2007) 155 Cal.App.4th 1197,] 1212–1213.)" (*In re Frank R.* (2011) 192 Cal.App.4th 532, 537, 538.)

Here, there were no jurisdictional findings against father, and even if there were, that would not be sufficient to satisfy due process. "[A] *jurisdictional* finding is not an adequate finding of parental unfitness because it is made by a preponderance of the evidence. [Citations.] Therefore, even if the dependency petition had alleged [the father's] unfitness, the order sustaining the petition would [be] inadequate, by itself, to terminate [the father's] parental rights without a subsequent finding of detriment by clear and convincing evidence." (*In re P.A.*, *supra*, 155 Cal.App.4th at p. 1212.)

Father argues that this case is similar to *In re Frank R.*, *supra*, 192 Cal.App.4th 532, in which a non-custodial, non-offending father did not seek custody at the adjudication and disposition hearing, and did not want the department to prepare

a case plan for him. When the juvenile court removed the children, it made the requisite finding of detriment by clear and convincing evidence only as to the offending parent, the mother. It never made an initial finding of unfitness as to the father, because he was not seeking custody. (*Id.* at pp. 538–539.) "Over the ensuing two years of the dependency, father's visits and telephone contact with the twins were irregular and infrequent. There were long periods of time without contact at all. His last visit with the children was three months before the section 366.26 hearing. Nor did father contact the Department much to inquire about the twins' well-being or request custody." (*Id.* at pp. 535–536.) "At the six-month review hearing (§ 366.21, subd. (e)), the court reiterated that father was both nonoffending and not requesting custody of the children. At the 12-month review hearing (§366.21, subd. (f)), the court summarized that father was not offered reunification services and was not requesting placement." (192 Cal.App.4th at p. 536.) The juvenile court terminated the parental rights of both parents at the conclusion of the section 366.26 hearing. (*Ibid.*)

On appeal, the father in *Frank R.* challenged the termination of his parental rights without a proper finding of detriment. The appellate court reversed, stating that "the juvenile court failed to meet the *Santosky* requirements and overlooked the safeguards established by the California dependency scheme because the court never made a finding father was unfit, having never made a finding of detriment by clear and convincing evidence with respect to father. At the jurisdiction hearing, father was deemed a nonoffending parent. Hence, the juvenile court never even made the initial finding of unfitness as required by *In re Gladys L.* [*supra*, 141 Cal.App.4th

845] and *In re G.S.R.* [(2008) 159 Cal.App.4th 1202]. [¶] More important, when the juvenile court was called upon to make the requisite finding of detriment by clear and convincing evidence in order to remove the children from a parent's custody (*In re P.A.*, *supra*, 155 Cal.App.4th at p. 1212; § 361, subd. (c)(1)), it made no such finding as to father because he was noncustodial and did not request custody. Rather, the court stated at the hearing that it was proceeding as to mother only and then found in the singular that, 'clear and convincing evidence . . . [that] Substantial danger exists to the physical health of minor(s) and/or minor(s) is suffering severe emotional damage, and there is no reasonable means to protect without removal from parent's or guardian's physical custody.' . . . At no time during the dependency did the court ever make the requisite detriment finding by clear and convincing evidence as to father. (§ 361, subd. (c)(1).) [¶] Father did not forfeit his right to contest the termination of his parental rights by failing to act sooner or to file a petition for extraordinary writ from the setting of the section 366.26 hearing (§ 366.26, subd. (l)). The juvenile court did not duly advise father of his writ rights, with the result he is entitled to challenge the merits of the setting order on appeal from the termination order. (*Jennifer T. v. Superior Court* (2007) 159 Cal.App.4th 254, 260.) The court never notified father of his writ rights exactly because in its view, it never ordered reunification services for father, and so such services were never terminated at the hearing setting the section 366.26 hearing. In any event, we are reluctant to enforce the waiver rule when it conflicts with due process. (*In re Gladys L.*, *supra*, 141 Cal.App.4th at p. 849.)" (*In re Frank R., supra*, 192 Cal.App.4th at pp. 538–539, fn. omitted.)

In this case, the juvenile court relied on the reporter's transcript in resolving the conflict between the clerk's transcript and the reporter's transcript. "However, as the Supreme Court has reasoned in *People v. Smith* (1983) 33 Cal.3d 596, though the older rule is to give preference to the reporter's transcript where there is a conflict, the modern rule is that if the clerk's and reporter's transcripts cannot be reconciled, the part of the record that will prevail is the one that should be given greater credence in the circumstances of the case. (*Id*. at p. 599; *People v. Harrison* (2005) 35 Cal.4th 208, 226.)" (*People v. Pirali* (2013) 217 Cal.App.4th 1341, 1346.)

Where, as here, there are no allegations against the non-custodial parent who does not seek custody of the children at the adjudication and disposition hearing, the conflict between clerk's and reporter's transcript cannot always be reconciled under the older rule of giving preference to the reporter's transcript. It makes no sense in this case to infer that a proper finding of detriment was being made against Jeff when there were no allegations against him and the children were not living with him when the petition was filed.

The department asserts that a proper finding of detriment was made at the dispositional hearing based on the juvenile court's finding which "tracked" the language of section 361, subdivision (c)(1): "There is or would be a substantial danger to the physical health, safety, protection, or physical or emotional well-being of the minor if the minor were returned home, and there are no reasonable means by which the minor's physical health can be protected without removing the minor from the minor's parent's or guardian's physical custody." However, this language applies only to custodial parents. By its terms,

subdivision (c) of section 361 prohibits the removal of a child from the physical custody of the parent(s) or guardian(s) *with whom the child resides at the time the petition was initiated* unless the court finds by clear and convincing evidence that one of the enumerated circumstances in paragraphs (1) to (5) exists. Subdivision (c) does not apply to Jeff, who has never lived with the twins or had physical custody of them.

Notwithstanding the trial court's finding at the section 366.26 hearing that placing the twins with Jeff would be detrimental, there was no evidence, much less substantial evidence, to support that finding. To the extent the trial court was making a forfeiture finding, there also is no support in the record for making such a finding. The record does not show that reasonable reunification services were offered to Jeff after he sought custody of the twins. Inexplicably, there was no hearing on his section 388 petition for 11 months, a period that could have been spent assisting father to gain custody of his children.

DISPOSITION

The order terminating the parental rights of R.M. is affirmed. The orders denying the section 388 petitions of R.M. and Paul are affirmed.

The order terminating the parental rights of Jeff P. is reversed. The case is remanded to the juvenile court with directions to conduct a new hearing, based on the facts as they exist at this time, whether there is clear and convincing evidence that returning the children to the custody of their presumed father, Jeff P., would be detrimental, and to thereafter make such other orders as are necessary and appropriate.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

EPSTEIN, P. J.

We concur:

WILLHITE, J.

COLLINS, J.