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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

In re Paul M. et al., Persons Coming Under  
the Juvenile Court Law.

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LOS ANGELES COUNTY  
DEPARTMENT OF CHILDREN AND  
FAMILY SERVICES,

Plaintiff and Respondent,

v.

R.M.,

Defendant and Appellant.

B257518

(Los Angeles County  
Super. Ct. No. CK42835)

APPEAL from an order of the Superior Court of Los Angeles County,  
Julie F. Blackshaw, Judge. Affirmed.

Rich Pfeiffer, under appointment by the Court of Appeal, for Defendant and  
Appellant.

Amir Pichvai for Plaintiff and Respondent.

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R.M. (mother) appeals the order denying her Welfare and Institutions Code section 388 petition.<sup>1</sup> She argues the juvenile court abused its discretion in summarily denying the petition. We disagree and affirm the order.

### **FACTUAL AND PROCEDURAL SUMMARY**

Mother's children, Paul M. (born in 1999) and twin daughters L.P. and E.P. (born in 2006) were removed from her custody on sustained allegations that Paul had sexually molested the twins. The jurisdictional and dispositional order was affirmed in *In re Paul M.* (Jan. 30, 2013, B240325 [nonpub. opn.]). The order terminating mother's reunification services and returning Paul, but not the twins, to her custody was affirmed in *R.M. v. Superior Court* (May 14, 2014, B251998 [nonpub. opn.]). The order summarily denying mother's section 388 petition for a new trial on the jurisdictional finding of sexual molestation was affirmed in *In re Paul M.* (Oct. 16, 2014, B251989 [nonpub. opn.]).

On June 4, 2014, mother filed another section 388 petition, seeking replacement of the twins because their current foster father had forced E.P. to eat a banana she had thrown in a trash can in a women's restroom. Mother claimed the Department of Children and Family Services (DCFS) had failed to investigate fully, and the twins were "afraid of getting in trouble with the foster parents."

Mother's section 388 petition incorporates by reference her declaration recounting the incident. According to mother, during a monitored visit at a facility on April 29, 2014, E.P. was visibly upset, but initially was reluctant to speak up because "she did not want to get in trouble with her foster parents." After some encouragement, she said, "I didn't want to eat the banana, I did not finish it and I threw it in the trash and he said to eat it." L.P. added, and E.P. confirmed, that E.P. "ate a banana from the trash." Mother immediately confronted the foster father, who was waiting outside the visitation

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<sup>1</sup> Statutory references are to the Welfare and Institutions Code.

room. He explained he had taken the banana out of the trash can, broken off the piece that touched the trash, and asked E.P. to eat the rest as a lesson about not wasting food.

Mother reported the incident to her social worker and his supervisor, as well as to her therapist, who called the child abuse hotline. On May 1, DCFS advised mother the incident “would be ‘fully investigated.’” During mother’s visit on May 6, E.P. said, “I did not eat the banana from the trash. . . . I spit it out,” and L.P. told mother, “[Y]ou make me upset, do not talk about the banana. Why do you make such a big deal out of nothing? He took the part that touched the trash! . . . We do not want to be moved.” Mother learned the banana incident occurred in a public restroom from DCFS’s May 12 last minute information report.

Mother claimed E.P. had been forced to eat a peeled banana from a trash can in a public restroom. She claimed further that, after the disclosure of this incident, the twins said “they are afraid to get into trouble. [E.P.] recanted after a week of being in the home of the foster parents. The foster parents are confusing the children and causing them emotional distress.”

DCFS’s May 12 report is also incorporated by reference into the section 388 petition. It summarizes the investigative interviews of E.P., L.P., and the foster mother on May 8. E.P. is reported saying she likes living in the foster home and does not want to be replaced, which is what mother told her would happen. The foster father apologized to E.P. about the banana incident and instructed her to tell the truth because she had done nothing wrong and he had made a mistake. According to E.P., before the visit on April 29, the foster father bought fruit, and she ate half an apple and half a banana. She tossed the uneaten, unpeeled part of the banana in the trash can for used paper towels in the restroom at the visitation center. After L.P. told the foster father E.P. was wasting food, he went into the restroom, took the banana out of the trash, peeled it, broke off a piece and told her to eat the rest. E.P. was unhappy and spit out the banana. When she told mother about the incident, mother started screaming that the twins would be removed, which upset them. E.P. denied anything like that had happened before.

L.P. confirmed the foster father had taken the banana out of the trash, had peeled it, and had given a piece to E.P., who got upset and cried. L.P. claimed the foster father had eaten the rest of the banana because he did not like to waste food. L.P. denied that the banana had been dirty or that the foster parents force the twins to eat food out of the trash. L.P. said she liked living with the foster parents and did not want to be removed. She asked the investigator if mother had told her “to take us away because of the banana.” Both twins stated that mother continued to be angry about the incident, and it was all she talked about during visitations.

The foster mother told the investigator that her husband had immediately told her about the banana incident, admitting he had done “[s]omething really stupid.” She assured the investigator nothing like that had happened in the past or would happen in the future because it was inappropriate and upsetting to the children.

The juvenile court summarily denied mother’s section 388 petition because the children’s best interests would not be promoted by a replacement order. This appeal followed.

## **DISCUSSION**

Initially, we disagree with DCFS’s contention that mother lacks standing to appeal the denial of her section 388 petition seeking replacement of the children to a new foster home. To have standing to appeal, a party must be aggrieved, or in other words “a party must have a legally cognizable interest that is injuriously affected by the court’s decision. [Citations.] We liberally construe the issue of standing and resolve doubts in favor of the right to appeal. [Citation.]” (*In re Esperanza C.* (2008) 165 Cal.App.4th 1042, 1053.) “Until parental rights are terminated, a parent retains a fundamental interest in his or her child’s companionship, custody, management and care. [Citations.]” (*Ibid.*) DCFS inconsistently argues mother lacks standing, while recognizing her parental rights have not been terminated and suggesting she has an interest in the children’s replacement from their foster home in an effort to “sabotag[e]” the section 366.26 permanency hearing.

We also disagree with the proposition that mother may not use a section 388 petition to seek replacement of the children from one foster home to another because the placement is pursuant to a general “suitable placement” order, and mother may petition only for the return of the children to her custody. DCFS cites no authority for this proposition, nor does it suggest what other means a parent may use to challenge a placement claimed to have become injurious to the child. To the contrary, section 388 is a recognized means “to change the placement of a child who is a dependent of the court.” (*In re A.C.* (2010) 186 Cal.App.4th 976, 981.)

That said, we are not persuaded by mother’s contentions that the court abused its discretion in summarily denying her section 388 petition. To be entitled to a hearing on a petition to set aside or modify an earlier order of the juvenile court, the petitioner must make a prima facie showing that there is a change of circumstances or new evidence, and that the new order would be in the best interest of the child. (§ 388, subd. (a)(1); *In re Zachary G.* (1999) 77 Cal.App.4th 799, 806.) “The prima facie requirement is not met unless the facts alleged, if supported by evidence given credit at the hearing, would sustain a favorable decision on the petition. [Citation.]” (*Ibid.*)

Mother’s evidence in support of her section 388 petition does not establish a prima facie case that replacement was required by changed circumstances or would be in the twins’ best interest. Mother assumes the foster father forced E.P. to eat a peeled banana out of a public restroom trash can, and then “intimidated” her to change her story. Yet, in mother’s own version of the incident, E.P. never said the banana was entirely peeled, and the foster father readily admitted to mother what he had done. Mother’s version of the incident also contradicts her claim that the foster parents “intimidated” the twins after the initial disclosure. Mother reported E.P. saying she was afraid to get in trouble with the foster parents before, not after, she disclosed the incident. After the disclosure, mother reported the twins were afraid that they would be removed from the foster home, and they were upset at mother’s obsession with the incident. That is in line with the results of DCFS’s investigation, which showed the twins did not want to be removed and were upset not with the foster parents, but with mother.

Mother contends DCFS did not conduct a full investigation because it did not interview the foster father, but rather allowed the foster mother to “cover” for him. The investigation revealed that the banana incident was isolated; the foster father admitted to E.P. and his wife he had acted inappropriately and apologized to E.P. There is no basis for concluding that if interviewed the foster father would have revealed a different attitude towards the incident. Mother’s assumption that an isolated lapse in judgment by a parent who immediately acknowledges his mistake and apologizes for it, as was the case here, would automatically result in the child’s removal from the parent’s custody is unsupported by authority.

The summary denial of mother’s petition was reasonable in light of the isolated nature of the banana incident, the foster parents’ response to it, and the twins’ stated desire to remain at their current placement. The evidence supporting mother’s 388 petition indicates that mother’s reaction, rather than the incident itself or the foster parents’ attitude, was what caused the children any lasting emotional distress. The court did not abuse its discretion in concluding that a replacement would not be in the children’s best interest under the circumstances.

### **DISPOSITION**

The order is affirmed.

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We concur:

EPSTEIN, P. J.

WILLHITE, J.

COLLINS, J.