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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

In re J.G. et al., Persons Coming Under the
Juvenile Court Law.

SAN DIEGO COUNTY HEALTH AND
HUMAN SERVICES AGENCY,

Plaintiff and Respondent,

v.

A.G. et al.,

Defendants and Appellants.

D069948

(Super. Ct. No. EJ3871A-B)

APPEAL from an order of the Superior Court of San Diego County, Gary M.
Bubis, Judge. Affirmed.

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

Amy Z. Tobin, under appointment by the Court of Appeal, for Defendant and
Appellant E.G.

Thomas E. Montgomery, County Counsel, John E. Phillips, Chief Deputy County Counsel, and Lisa Maldonado, Deputy County Counsel, for Plaintiff and Respondent.

A.G. (mother) appeals from an order summarily denying her Welfare and Institutions Code section¹ 388 petition seeking modification of an order terminating reunification services and her parental rights.² Mother contends the court abused its discretion when it refused to grant her an evidentiary hearing in connection with her section 388 petition. As we explain, we disagree and, thus, leave intact the order terminating mother's parental rights.

FACTUAL AND PROCEDURAL BACKGROUND

Mother gave birth to J.G. in February 2011 and to L.G. in April 2013 (sometimes collectively the children). E.G. is the children's presumed father. Father had two other children independent of mother who also became dependents of the court. Father's parental rights to his two other children were terminated in 2010.

On or about December 22, 2014, the San Diego County Health and Human Services Agency (agency) received a referral for general neglect of the children. The children's maternal grandfather reported to agency concern for the welfare of the children after visiting them in a hotel on December 24, 2014. When he arrived, the maternal grandfather found the children "locked in the back room, the mother appeared under the

¹ All statutory citations refer to the Welfare and Institutions Code.

² E.G. (father) separately appeals but does not raise any arguments independent of those made by mother (sometimes collectively parents). Rather, father specifically requests that if this court reverses the order terminating mother's parental rights, that the reversal should also apply to him.

influence and had been sleeping and the children had not eaten since the night before, and neither of the children [then aged three and one] had diapers on."

As discussed in its January 21, 2015 detention report, agency investigated. Mother avoided an agency social worker's three attempts to contact her. Nonetheless, agency's investigation found hotel staff were concerned for the children because mother's boyfriend—who was living with mother and the children—used drugs and because "people [were] coming in and out of the hotel [room] at all hours of the night." Hotel residents also expressed concern for the children, as they believed drugs were being used by mother and her boyfriend and heard the children crying "and banging around at all hours of the night." As a result of its inability to contact mother, agency requested a welfare check, which was conducted by law enforcement on January 15, 2015.

On contact, law enforcement found the hotel room where the children were living so full of smoke that they could not enter. Law enforcement also found the children coughing; there was no food to eat; L.G. had a large "bump" on her head; and the room was filthy. Mother consented to a search. Law enforcement found "meth pipe[s]" under a child's "teddy bear," in a child's blanket and on a shelf above the bed. In the nightstand, law enforcement found a lighter, a straw and empty baggies in a first aid kit. All the drug paraphernalia was within the children's reach.

Agency social workers responded and found that L.G.'s diaper was "full and hanging to her mid[-]thigh"; that J.G. was not wearing underwear or a diaper, had defecated on himself and had dried feces up his back; that there was virtually nothing for

the children to eat; that the cat litter box was full and the hotel room was filthy, with trash on the floor; and that the children smelled like cat urine and feces.

Mother then denied using drugs and claimed not to have used drugs since 2010, when she was treated for substance abuse. She further claimed the drug paraphernalia found in the room belonged to her boyfriend. He admitting using methamphetamine five days earlier, although he claimed the first aid kit belonged to someone else. The children were removed.

The following day, mother tested positive for amphetamine and methamphetamine. Agency informed father the children had been removed from mother's care. In a follow up interview, mother admitted using methamphetamine a "few days" earlier. Father admitted to a history of domestic violence involving mother and to testing positive for methamphetamine in late 2014, which led to a short incarceration. The record shows agency had multiple prior contacts with mother and father before the children were removed.

Agency on January 20, 2015 filed section 300, subdivision (b)(1) petitions on behalf of J.G. and L.G. alleging the children had suffered, or there was a substantial risk they would suffer, serious physical harm or illness by the inability of the parents to provide the children regular care as a result of substance abuse (count 1) and by the parents' willful or negligent failure to provide the children adequate food, clothing, shelter or medical treatment (count 2).

At the detention hearing on January 21, 2015, the court found each petition made a prima facie showing the children were persons described by section 300, subdivision

(b)(1). The court ordered the children detained and the parents to receive reunification services "as soon as possible" and have "liberal" supervised visits with the children; the court set the jurisdiction/disposition hearing for February 11, 2015.

The February 11, 2015 jurisdiction/disposition report included interviews with mother and father. Mother admitted she "agreed" with the allegations in the petitions and to the removal of the children from her care. Mother stated that the hotel room where they had been living was "messy" because she "was never taught how to clean"; that she relapsed and began to use methamphetamine when she and father broke up; that she and her boyfriend would use methamphetamine "on a regular basis" while the children were in another room; that the children allegedly were never exposed to the drug; and that the children allegedly were not "impact[ed]" by their drug use because they were not present when they were using. Mother also admitted she needed to enroll in a residential drug treatment program.

Father stated that, although he was suspicious mother was using drugs, he was "not around enough to do anything about it"; that he saw the children about once a month; and that he was not in a position to care for the children because he was living with the paternal grandfather after being released from custody.

The February 11 report noted both J.G. and L.G. were drug tested on January 16, 2015. J.G. tested positive for methamphetamine, and L.G. for methamphetamine and amphetamine. As such, agency determined the children were "under the influence" when removed from mother's care.

This report further noted that mother had an "extensive history of substance abuse dating back to her early teens"; that mother's boyfriend was a "heavy drug user," as noted by the maternal grandmother (who had previously dated mother's boyfriend); that mother had no criminal history until she was arrested on January 15, 2015 for child endangerment and possession of drug paraphernalia; and that mother had never held a job, but instead depended on the maternal grandmother and public aid to live and support the children.

Agency recommended a case plan for mother that included counseling, a psychological evaluation, parenting education and a drug treatment program that involved substance abuse testing and a community-based 12-step program.

At the February 11, 2015 hearing, the court made true findings on the children's petitions. Key to the instant appeal, the court then advised the parents that because a "child was under three years old or was a member of a sibling group described in [section] 361.5[, subdivision] (a)(3) when removed from parents' care, the parents have *six months* to participate regularly and make substantive progress in court-ordered treatment programs and to cooperate with or use department services provided by [agency], or parental rights could be terminated and a permanent plan made for the children." (Italics added.) The court ordered agency to provide services to the parents "consistent with their case plan(s)," and the parents were ordered to comply with their plans. The court set a six-month review hearing for August 5, 2015.

The agency in its August 5, 2015 status review report recommended that reunification services be terminated for both mother and father and that the court set a

section 366.26 hearing. That report noted that mother's situation had deteriorated since agency's last report; that mother and her boyfriend had been moving from one hotel to another; that mother was living on food stamps and from funds provided by the maternal grandmother; that mother had been arrested on a bench warrant on April 10, 2015 on the felony charge of child cruelty as a result of the initial removal of the children; that mother was initially detained at Las Colinas Detention Facility (Las Colinas), where she resided until she was released on May 21, 2015 to an inpatient drug treatment program, where she was to serve the remainder of her sentence; that on May 29, 2015, mother self-discharged from this program "in violation of her release agreement"; that mother was again arrested on or about June 8, 2015, this time for being under the influence of a controlled substance; and that mother was then detained at Las Colinas, where she would remain until her potential release date of October 22, 2015.

The August 5 report further noted that once released from Las Colinas, mother intended to enter an " 'intensive *outpatient*' " (italics added) drug program and go back to living with the maternal grandmother *and* mother's boyfriend; that mother had become pregnant in late January 2015 and miscarried, but nonetheless admitted to using methamphetamine "actively" during the pregnancy; and that, as a minor while dating father, mother engaged in prostitution at father's request in return for money and drugs.

Regarding father, the report noted that his situation had improved "slightly" after he "minimally engaged in treatment," but that he had been discharged from substance abuse treatment as a result of poor attendance and a "positive test" for methamphetamine in April 2015 and for alcohol in July 2015. Father denied ever " 'pimping out' " mother.

Father disclosed he was taking prescribed medications but refused to explain why out of concern it would be used " 'against [him]' " by agency.

As to the children, they were then in their third placement since removal. The August 5 report noted that their situation had "improved" somewhat as they were each engaged in services and were comforted by their caregivers; and that J.G.'s defiant and aggressive behaviors had decreased after he began behavioral therapy in his new placement. That report also noted the caregivers had "incorporated" the children into their lives, were protective of the children and were willing to adopt them if the parents did not reunify. Both J.G. and L.G. were noted to actively seek out their caregivers for "guidance and comfort."

The caregivers reported that J.G.'s aggressive behaviors had "almost disappeared" until late June 2015, when J.G. had his first visit with mother since March 3, 2015. However, during the six-month review period, J.G. had displayed numerous behaviors that were of concern to his caregivers. J.G.'s negative behaviors increased around visits with mother. The August 5 report noted that J.G. was beginning to verbalize "his fears and memories of living with his mother and the fighting he ha[d] witnessed"; that he told an agency social worker *and* his caregivers that he was " 'mad at mommy' "; that she " 'threw [him] into a wall and [he] bonk[ed] [his] head' "; but that he " 'love[d] mommy.' "

In connection with its recommendation to terminate mother's reunification services, the agency in its August 5 report noted that mother had made "no progress" in identifying and creating a network to check on the welfare of the family; that mother had made "no progress" to reduce or eliminate domestic violence in the home, as she had

failed to engage in any domestic violence services as a result of her incarceration and her inability to remain sober; that mother had made "minimal progress" to meet the physical, emotional, medical and educational needs of the children due to her incarceration, her lack of sobriety and her limited visitation with them; that mother had made "minimal progress" in complying with medical and psychological treatment, noting that when she completed the court-ordered psychological evaluation in late March 2015, she was " 'high' " and had not addressed her mental health concerns, which included hearing voices telling her to " 'hurt others' "; and that she had made "no progress in being active in recovery" for substance abuse, although she reported being sober since her re-arrest on June 8, 2015.³

With regard to her sobriety, the August 5 report noted mother had not provided a "clean drug test" during the prior six months; that she was a " 'no show' " for a drug test on March 3, 2015; and that she had tested positive for methamphetamine on March 20 and April 8, 2015. Mother also was scheduled to begin inpatient substance abuse services on March 13, 2015. However, after completing intake, she " 'self[-]discharged' " a few hours later. Mother in late March went to a meeting at another drug treatment facility. The person at this facility recommended mother enter a residential treatment program because mother needed a " 'higher level of care.' "

³ The report noted father had made "minimal progress" in implementing a domestic violence prevention plan and in abstaining from alcohol and drug use, and "some progress" in creating a support system. Father continued to deny that he had an "issue" with domestic violence or that the children were "impacted at all" by such violence.

Mother visited the children on February 24 and March 3, 2015; after she missed three visits, the referral was closed. Agency submitted new referrals for visits on March 25, April 10 and May 27, 2015. Each referral was closed because mother did not answer or return calls in connection with the visits. After being incarcerated at Las Colinas in early June 2015, mother began one-hour supervised visits beginning on or about June 29, 2015.

During the June 29 visit, J.G. was quick to embrace mother. L.G. ignored mother for the first 10 minutes and, when she fell while playing, sought comfort from an agency social worker and the court-appointed special advocate (CASA). After the visit, it was reported that J.G. experienced constipation, which had been an ongoing problem for him that had required medical treatment, and that there was a "spike" in his aggressive behaviors, including "hitting, kicking, pinching and being defiant." It was further noted it took J.G. "two weeks to settle."⁴

Agency in its August 5 report noted the children were "young [and] in need of ongoing safety, permanency and the assurance that all [of] their basic needs are going to be met. Unfortunately, neither parent has demonstrated any surmountable progress in alleviating the protective issues and providing these children what they need and deserve." As noted, agency thus recommended that J.G. and L.G. remain dependents of

⁴ The August 5 report noted father was "consistent" in his visits with the children but failed to take redirection from visitation monitors, including requests he bring sunscreen, avoid sugary drinks and snacks (because J.G. had severe dental issues requiring surgery), and change diapers when needed. Father also was cautioned to be more attentive to the children when out with them in public places and to select more safe/age appropriate play structures for the children.

the court; that parents' reunification services be terminated; and that a section 366.26 hearing be set to implement a permanent plan.

The court at the August 5 hearing set the contested six-month review hearing for September 18, 2015. In connection with the September 18 hearing, agency submitted a September 2, 2015 addendum report in which it reiterated the recommendations of its August 5 report. The September 2 report included a summary of an interview with mother on August 21.

During that interview, it was noted that mother had completed all six of her parenting classes at Las Colinas, attended three AA/NA meetings and one CODA (codependent anonymous) group meeting. Of concern, however, mother then indicated her intention to return living with the maternal grandmother *and* mother's boyfriend on release from custody. Mother further indicated her boyfriend then was "not using as much" and was "only drinking." When an agency social worker asked mother whether on release she should be around alcohol, mother responded, " I know I can't drink but I don't think I should stop drinking, I don't think drinking would be that much of a problem."⁵

⁵ The September 2 report noted father was upset by the August 5 agency report and repeatedly commented to an agency social worker that agency " 'wo[uld]n't help' " him and there was no use in meeting with the social worker because agency's recommendations were not going to change. Father also stated he had not been in substance abuse treatment because the services were "just wasting [his] hours and [his] time." As it turns out, father had been discharged from a recovery center because of missed appointments.

At the contested six-month review hearing on September 18, 2015, after hearing testimony of an agency social worker and considering the various reports summarized *ante* and the argument of counsel, the court found that return of the children to the custody of parents would create a "substantial risk of detriment to the children's physical and emotional well-being"; and that agency provided reasonable services to both parents, "in particular with regard to mother. And I understand her past and I understand that she, herself, has been a victim of her own childhood and her own parents. But the law is the law, and in order to take advantage of services you have to *stay sober and out of jail, and she has consistently not been able to do that.* The social worker is not in a position where they have to follow mom around, she has certain responsibilities. And, again, because these children are younger the reunification time can be shorter. So I'm acknowledging her struggles, but I'm also indicating that there are obligations to reform to take advantage of these services. Truly, with the type of childhood she had and traumatic events she went through, I would suspect there's going to be some lengthy therapy in order to recover from some of the experiences she had as a teenager.

"Neither parent ha[s] made substantive progress with the provisions of the plan. [L.G.] was under the age of three at the time of the filing [of the petition]. By clear and convincing evidence I find the parents have failed to participate regularly and make substantive progress in court[-]ordered treatment programs. There's not a substantial probability that the child[ren] will be returned within the next six months. Mandated services are terminated." (Italics added.) The court set the section 366.26 hearing for January 14, 2016, which was subsequently continued to February 24, 2016.

Agency in connection with the section 366.26 hearing filed a January 14 "WIC report" and a February 24, 2016 addendum report. In addition, the children's CASA filed a January 14, 2016 report. Agency in its January 14 and February 24 reports continued to recommend termination of parental rights and order adoption as the children's permanent plan. The CASA report agreed with these recommendations.

The January 14 report described two visits between mother and the children. The first visit took place on December 10 at the CRASH drug treatment center, which mother entered on November 23. L.G. was reserved during most of the visit and did not engage with mother. J.G. called mother " 'teacher.' " When mother responded she was not his teacher but rather his " 'momma,' " J.G. responded, " 'No you're not.' " While the children watched a movie with mother, J.G. also stated, " 'My mommy knows how to spank people's butts.' " At the conclusion of the visit, neither J.G. nor L.G. showed "any emotional distress" leaving mother. On the drive home, J.G. told an agency social worker he " 'missed his daddy, the one at home.' "

In a second visit 10 days later, the record shows when the visit ended the children again showed no signs of distress leaving mother. During this second visit, J.G. informed mother that father had failed to visit them the day before as previously arranged.

The January 14 report noted that the children's caregivers expressed a desire to adopt the children; that the caregivers had completed a home study; that the caregivers were married and resided in a three-bedroom home; that they had passed a criminal and child welfare history as part of their initial home approval; that they "love[d]" J.G. and L.G. and "want[ed] to provide them with the loving and stable home they deserve[d]";

that they had known the children since April 2015, when the children came to live with them; and that both J.G. and L.G. referred to them as "mom" and "dad."

The January 14 report concluded that J.G. and L.G. are "generally adoptable children due to their young age, excellent health, and generally happy disposition. They appear to be meeting all of their developmental milestones. They have also shown that they are able to develop a loving relationship with both of their caregivers. [J.G.] and [L.G.] are specifically adoptable due to their dedicated caregivers who wish to adopt both children if parental rights are terminated."

That report further concluded there would be no detriment to the children if mother's (and father's) parental rights were terminated, noting: "[Mother] continues to struggle with substance abuse and criminal activity. Although [mother] is attentive and affectionate with the children during her visits, the relationship she has with the children does not rise to the level of a parent-child relationship. For example, during visits she looks to the [agency social worker] for guidance. [Mother] has demonstrated inconsistent visitation due to her instability. [J.G.] and [L.G.] do not look to [mother] to get their basi[c] needs met but instead look to their caregivers. Therefore, it would not be detrimental if [mother's] parental rights were terminated." As such, the report found the "best interest" of J.G. and L.G. was the permanent plan of adoption with their current caregivers.

The CASA report noted that J.G. was in diapers in April 2015—at the age of four—when he initially was placed with his current caregivers; that he was now potty trained, although he tended to have "accidents" when at therapy and during or after visits

with mother or father; that J.G. during the last "reporting period" appeared more relaxed, as he was playing "more imaginatively" and no longer was taking on the "role of his sister's protector, but as her brother"; and that he told his caregivers "things such as 'I'm safe here. You're not a mean Mommy.' " In addition, J.G. told his caregivers he was no longer "the boss and instead sa[id] that he [was] 'the kid.' "

The CASA report noted that J.G. has repeatedly stated that mother, whom he referred to as his " 'mean Mommy,' " " 'threw [him] against the wall.' " In addition, the report noted J.G. was no longer experiencing constipation due to stress since living with his caregivers, although J.G. continued to experience constipation after visits with mother or father, sometimes grabbing his stomach. J.G.'s night terrors also had diminished, although his foster mother reported J.G. experienced night terrors after visits with mother.

The CASA report noted that L.G. also was thriving in her placement, as she was then dressing herself, brushing her teeth and was in the process of being potty trained. The report further noted that L.G.'s preschool teachers "prepare for when they know [L.G.] is having a visit with [mother] because she can be more withdrawn and throws tantrums" after such visits.

Regarding the children's visits with mother (and father), the CASA report concluded the children's weekly visits "with the parents continue to cause a great deal of angst for both children and the children's reactions to the weekly visits are intensifying. [J.G.] is now displaying alarming violent tendencies. The foster mother shared an example of a time when [L.G.] was sleeping on the floor at nap time and [J.G.] dragged a

chair over, got up on it and began to prepare to jump on [L.G.'s] stomach. The caregivers were watching carefully and caught him before he could jump on [L.G.] These behaviors have escalated in the form of hitting, scratching, throwing things and screaming. The caregivers report . . . that anticipation of the visits result in defiant behavior and [J.G.] has told the foster parents he does not want to go."

The CASA report also concluded the children already had experienced "much trauma and seemed incredibly damaged when removed from the home" as a result of the "neglect and abuse [they] suffered" living with mother. As such, the children's defiance and "escalating violence" was occurring in connection with each visit with mother (and father), which included behaviors such as "hitting, scratching, throwing things, and screaming." The CASA report thus concluded these visits were "detrimental" to the children and recommended termination of parental rights and adoption as the permanent plan.

The February 24 agency report included a detailed summary of eight additional visits between mother and the children, beginning in late December through mid-February 2016.⁶ In a visit with mother on December 31 at the CRASH treatment center, J.G. twice told mother, "I hate you." When mother asked J.G. why he was being mean, he responded, "I don't like you, that's why I'm mad." Toward the end of the visit after mother helped L.G. open a gift mother had given L.G. for Christmas, L.G. went behind a television stand and stood near a window. When mother inquired, L.G. said, "Go

⁶ The February 24 report also summarized seven visits between father and the children during this same general time period.

away.' " At the end of the visit, the children said goodbye to mother and then ran to the front door. Once outside, the children ran to their caregivers. J.G. said, " 'Mommy and Daddy' " as he ran to them. L.G. also ran to her caregiver and motioned to be picked up.

In another visit about a week later, when J.G. saw mother he referred to her as " 'Mommy,' " as he had done during the late December visit. During the visit, while mother was changing L.G.'s diaper, L.G. said, " 'Momma, I love you.' " Also during the visit, J.G. told mother he too loved her. During the middle of the visit, after mother told J.G. it was not nice to pull his sister's jacket, J.G. said, " 'No one ever tells me what to do' " and " 'I'm the boss.' " Toward the end of the visit, J.G. rebuffed mother's attempts for him to help clean up, telling mother, " 'You can't tell me what to do,' " which statement L.G. then repeated.

While being transported by the agency social worker to another visit with mother in mid-January 2016, J.G., referred to mother as the " 'mommy with the black hair [who] can't take care of me.' " During this visit, J.G. again told mother " 'No one is the boss of me' " when mother told J.G. to remain in a designated visiting area. Also during this visit, J.G. hit mother in the stomach, after hitting his sister L.G. At the conclusion of the visit with mother, the children when leaving displayed no emotional distress.

On the January 21 visit, J.G. hugged mother when they arrived. L.G. said " 'hi momma' " and then stood to the side of mother. When mother encouraged the children to cuddle during a movie, J.G. sat on mother's lap. L.G., however, sat off to the side and began wandering around the room. L.G. next asked an agency social worker to go outside. When L.G. was told she could not go outside, L.G. said " 'outside' " in a louder

voice and then said " 'no' " when mother asked her to come and sit. As the visit was coming to an end, mother asked J.G. to help clean up. J.G. in response said, " 'I hate you. I don't want to clean up.' " At the end of the visit, mother told the children she loved them. J.G. replied " 'Love you too' " and then ran through the front door towards his caregiver saying " 'My daddy is outside.' "

In the visit with mother on January 28, while watching a movie J.G. said, " '[R]emember when you had black hair with Brian [i.e., the boyfriend] and were a bad mommy?' " Mother in response said, " 'I was a bad mommy? I'm sorry. I love you.' " Later during the visit mother told L.G. she liked her "pig tails." L.G. in response said, " '[M]y mommy made my hair pretty.' "

During this same visit, L.G. said she was cold. L.G. walked over to her bag and pulled out a jacket. L.G. then took the jacket to an agency social worker and "put her arm out." The agency social worker instead handed the jacket to mother. L.G. said, " 'I don't want it' " and pushed the jacket away. When mother asked L.G. if she wanted to put on the jacket by herself, L.G. said, " 'no.' " During the visit, when mother told J.G. he had to share a game with his sister, J.G. said, " '[G]irls aren't the boss of boys. Boys beat up girls.' " At the conclusion of the visit, it was again noted the children showed no emotional distress when leaving mother. Once outside, J.G. saw his caregiver and said, " 'Daddy.' " L.G. also went to the caregiver.

The children next visited with mother on February 4. During this visit, L.G. sat next to the agency social worker while mother and J.G. sat together watching a movie. When mother prompted L.G. to come sit with them, L.G. said, " 'No.' " L.G. later went

and sat next to mother. During the visit, L.G. told the agency social worker, and not mother, she wanted some water. Toward the end of this visit, after mother tried to take a pen away from L.G. because she was writing on the furniture, J.G. shouted, " 'Leave [L.G.] alone.' " At the end of the visit, mother told the children she loved them. The children in response each told mother they loved her too. The children next ran to the front door and left without showing any emotional distress. Once outside, they were met by their foster mother. The children ran to her and stated, " 'Mommy.' "

At the February 11 visit, L.G. again refused to sit next to mother to watch a movie. Instead, L.G. sat next to an agency social worker that had transported the children to the visit. When mother encouraged L.G. to sit with her, L.G. stated, " 'No.' " Later, L.G. retrieved a chair and sat next to mother. Toward the end of the visit, J.G. said he did not want to leave. However, when the visit ended, the children showed no sign of emotional distress leaving mother.

The February 24 report noted J.G. and L.G. were "generally adoptable children," as there were "22 San Diego County Adoptive Families approved to adopt a child matching J.G.'s characteristics"; 39 such families approved to adopt a child matching L.G.'s characteristics; and 14 such families approved to adopt children matching this "sibling set."

The February 24 report further noted that although mother was then enrolled in a drug treatment program, her "sobriety" was maintained while living in a "controlled environment"; that mother had a "history of participating in drug treatment programs and relapsing once she is no longer in a controlled environment"; that mother had "struggled

with substance abuse and engaged in unhealthy relationships since her early teenager years"; that participating in a "few months of drug treatment" was "not an adequate amount of time for [mother] to establish stability and life-long sobriety"; that mother had been unable to show agency she was "capable of maintaining sobriety and dealing with the challenges of providing adequate care for two children under five, one of which has behaviors"; that, "[d]uring the course of family reunification services, [mother] continued to abuse substances which resulted in her incarceration in 2015"; and that J.G. and L.G. "deserve[d] parents that [were] able and willing to provide them with . . . stability, . . . safety, and permanency."

The record shows on the day of the section 366.26 hearing, mother filed a section 388 petition seeking to change the court's September 18, 2015 order terminating reunification services to mother and to request additional services. In support of her petition, mother stated her circumstances had changed because she had been in a residential treatment program since November 23, 2015, had tested negative for the presence of drugs while in treatment, had been attending weekly NA meetings and parenting classes, and had secured "stable housing."⁷ Mother further stated it was in the children's best interest for her to receive additional services because the children were "bonded" to her and because she had maintained "consistent contact" with them.

⁷ Mother provided no evidence to support her allegation that she had secured stable housing at the time of her section 388 petition, as she then remained in treatment at the CRASH center.

Agency opposed the petition. Although it applauded mother for being enrolled in a drug treatment program for the last few month, it once again argued mother was only able to remain sober in a "controlled environment"; that mother had a "long history of substance abuse"; that L.G. had spent half her life, and J.G. had spent a quarter of his life, out of her care; and that it was not in the children's best interest to give mother more time in services, as the children needed permanency and stability. The children (through counsel) agreed with agency and asked the court not to make a "prima facie" showing on the section 388 petition.

After hearing argument, the court noted that it had read and considered the entire file; that the 12-month review date was previously set for February 4, which had past; and that if services were offered it would be looking at an 18-month date. In finding mother did not make a prima facie showing on the section 388 petition, the court ruled as follows:

"I'm fully acknowledging that the mother is participating in a program and has for the last couple of months, two to three months. However, I'm very concerned about the history of the substance abuse; the fact that the mother has had other periods of sobriety; has trouble maintaining the sobriety; the age of these children; the fact we're past the 12-month date. [¶] To request placement at this time there is no showing that that would be in the best interests, because the mother is new to her sobriety. She's changing. But considering the length of her struggle with substance abuse, three months is truly early on in her sobriety. [¶] We're at a [section 366.]²⁶ hearing. The children at this point deserve some type of permanency. I couldn't find that either a prime [*sic*] facie showing

has been made or there has been a change of circumstances -- clearly there are changing circumstances -- nor could I make a best interests showing at this point. [¶] I'll deny the [section] 388."

DISCUSSION

As noted, mother contends the court erred in summarily denying her section 388 petition.

A. *Guiding Principles*

We review a court's denial of a section 388 petition—as well as a summary denial of such a petition—for abuse of discretion. (*In re Angel B.* (2002) 97 Cal.App.4th 454, 460-461.) The court's ruling will not be disturbed on appeal " ' "unless the trial court has exceeded the limits of legal discretion by making an arbitrary, capricious, or patently absurd determination." ' ' " (*In re Stephanie M.* (1994) 7 Cal.4th 295, 318.)

Section 388 permits any person having an interest in the child to petition for a hearing to change, modify, or set aside any court order previously made on grounds of change of circumstance or new evidence. (*In re Lesly G.* (2008) 162 Cal.App.4th 904, 912.) To prevail, the petitioner must demonstrate by a preponderance of the evidence that new or changed circumstances warrant a change in the prior order and that changing the order will serve the child's best interests. (*In re S.J.* (2008) 167 Cal.App.4th 953, 959; *In re Daijah T.* (2000) 83 Cal.App.4th 666, 672.)

The court "shall" order a hearing where "it appears that the best interests of the child . . . may be promoted" by the new order. (§ 388, subd. (d).) As a result, the moving parent "must sufficiently allege *both* a change in circumstances or new evidence *and* the

promotion of the child's best interests." (*In re G.B.* (2014) 227 Cal.App.4th 1147, 1157.)

"Section 388 thus gives the court two choices: (1) summarily deny the petition or (2) hold a hearing." (*In re Lesly G., supra*, 162 Cal.App.4th at p. 912.)

"The parent seeking modification must 'make a prima facie showing to trigger the right to proceed by way of a full hearing.' " (*In re Anthony W.* (2001) 87 Cal.App.4th 246, 250.) "If the liberally construed allegations of the petition do not show changed circumstances such that the child's best interests will be promoted by the proposed change of order, the dependency court need not order a hearing." (*Ibid.*)

B. *Analysis*

Having reviewed the record as summarized *ante*, we conclude the court properly exercised its discretion by summarily denying mother's section 388 petition. The record shows mother had entered an inpatient drug treatment program about three months before she filed her petition. Although it appears mother had maintained her sobriety while in that program, as noted that was in a controlled environment.

What's more, the record shows that mother had a long history of substance abuse dating back to her teenage years; that when the children were removed from her care in January 2015, they *both* tested positive for methamphetamine; that she subsequently admitted regularly using methamphetamine with her boyfriend—who previously was the maternal grandmother's boyfriend—while taking care of the children; that she wanted to return to living with the maternal grandmother and her boyfriend after substance abuse treatment; that she responded to the concerns of an agency social worker that it was not a good idea to return living with the maternal grandmother and her boyfriend by stating the

boyfriend was not "using as much," he was "only" drinking alcohol, and it was not a problem for her also to drink alcohol; that she had become pregnant in late January 2015, but nonetheless continued to use methamphetamine actively during that pregnancy; that she had never held a job to support herself *or* the children but instead depended on the maternal grandmother and public assistance for support; that she at one time was involved in prostitution, where she traded sex for drugs or money; that she claimed the hotel room where she and the children had been living was filthy by making the excuse that no one had ever "taught" her how to clean; that in the six-month period leading up to the August 5, 2015 agency report—when she was being provided reunification services—she had not provided a single "clean drug test" but instead had either been a no-show for such tests or tested positive for methamphetamine; that she was slated to begin an inpatient drug treatment program in mid-March 2015 but self-discharged a few hours later; that, during this same period of time, she had suicidal tendencies and, at one point, expressed a desire to " 'hurt others' "; that she was arrested in April 2015 for felony child cruelty arising from this case; that, after starting an inpatient drug treatment program on or about May 21, 2015, she self-discharged from that program in violation of her release agreement; that she was re-arrested on or about June 8, 2015 for being under the influence of a controlled substance and was detained at Las Colinas; that she made "no progress" during the reunification period in complying with various requirements of her case plan, including developing a positive support system or structure, engaging in services to address and eliminate domestic violence in the home and, of course, addressing her long history of substance abuse; and that she did not visit with the children

from early March until late June 2015 because of her lack of sobriety and her incarceration.

Although we commend mother for staying sober for about three months while in the CRASH treatment program, on this record we conclude the court did not abuse its discretion when it found mother's circumstances were changing, as opposed to changed, for purposes of her section 388 petition. (See *In re Casey D.* (1999) 70 Cal.App.4th 38, 49 [noting merely showing changing circumstances, as opposed to changed circumstances, is insufficient to grant a section 388 petition].)

Moreover, even if we assumed mother established a genuine change in circumstances, as opposed to merely changing circumstances, after her reunification services were terminated (see *In re Casey D.*, *supra*, 70 Cal.App.4th at p. 49), we nonetheless conclude mother failed to make a prima facie showing that providing her six months of additional reunification services was potentially in the children's best interest. "It is not enough for a parent to show just a genuine change of circumstances under the statute. The parent must show that the undoing of the prior order [may] be in the best interests of the child. [Citation.] [Citation.] The fact that the parent 'makes relatively last-minute (albeit genuine) changes' does not automatically tip the scale in the parent's favor. [Citation.] Instead, 'a number of factors should be examined.' [Citation.] First, the juvenile court should consider 'the seriousness of the reason for the dependency' [Citation.] 'A second important factor . . . is the strength of the existing bond between the parent and child' [Citation.] Finally, as 'the essence of a section 388 motion is that there has been a change of circumstances,' the court should consider 'the nature of the

change, the ease by which the change could be brought about, and the reason the change was not made before' [Citation.] 'While the bond to the caretaker cannot be dispositive . . . , our Supreme Court made it very clear . . . that the disruption of an existing psychological bond between dependent children and their caretakers is an extremely important factor bearing on any section 388 motion.' " (*In re D.R.* (2011) 193 Cal.App.4th 1494, 1512, italics omitted.)

Although a parent and child share a fundamental interest in reuniting up to the point at which reunification efforts cease (*In re R.H.* (2009) 170 Cal.App.4th 678, 697, overruled on other grounds in *John v. Superior Court* (2016) 63 Cal.4th 91, 99), mother's reunification services were terminated on September 18, 2015. Thus, by the time of a section 366.26 hearing to select and implement a child's permanent plan, the interests of the parent and the child have diverged. (*Cynthia D. v. Superior Court* (1993) 5 Cal.4th 242, 254.) Therefore, after reunification efforts have terminated, the court's focus shifts from family reunification toward promoting the child's needs 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 interests 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 interests of the child." (*In re Stephanie M., supra*, 7 Cal.4th at p. 317.)

Here, the court did not abuse its discretion in finding mother failed to establish that providing her an additional six months of reunification services with the goal of returning the children to her care may be in the best interests of the children. The record

clearly shows the reason for dependency was quite serious, as summarized *ante* in connection with counts 1 and 2 of the petitions. The record further shows that both J.G. and L.G. were very bonded to their caregivers, as opposed to mother (discussed *post*), as the children continuously referred to their caregivers as "mommy" and "daddy"; that both children were happy, well adjusted, and thriving in their caregivers' home; that they looked to their caregivers as their parental figures; and that the caregivers were committed to providing the children with a safe, loving, stable, and nurturing home. In fact, the caregivers expressed a desire to adopt the children and already had completed a home study and passed various background checks.

The stability provided by the caregivers was particularly important with respect to J.G., the older of the two young siblings, who, the record shows, began to verbalize to his current caregivers and to agency social workers the trauma he had experienced from the neglect and abuse he suffered while living with mother. (See *In re Anthony W.*, *supra*, 87 Cal.App.4th at pp. 251-252 [noting when a section 388 petition is filed "on the eve of the selection and implementation hearing, the children's interest in stability [is] the court's foremost concern, outweighing any interest [the parents] may have in reunification"].)

The record shows that when J.G. was placed with his current caregivers in April 2015, he was still in diapers, despite being four years old; that he showed aggressive and defiant behaviors there were alarming; that he (along with L.G.) was then experiencing night terrors; that he had problems with constipation due to stress; and that his oral hygiene was so poor he needed dental surgery.

The record further shows that both before and after visits with mother, the aggressive and defiant behavior of both J.G. and L.G. resurfaced, as did their night terrors; that J.G. repeatedly told his caregivers and an agency social worker he did not want to participate in such visits; that the children's CASA determined the visits with mother were "detrimental" to the children, as it brought back bad memories for the children, particularly for J.G.; that J.G. frequently referred to mother as his "mean mommy"; that although J.G. sometimes referred to mother as his "mommy," he also called her "teacher," at times rejected her statement she was in fact *his* mother, and on myriad occasions engaged in openly defiant behavior in her presence, including telling mother he "hated" her and she was "not the boss" of him; that L.G.'s teachers had to prepare for L.G.'s visits with mother because L.G. would be withdrawn and throw tantrums after such visits; that during many of the visits, as summarized *ante*, L.G. refused to sit with, and interact with, mother, and instead would sit with an agency social worker; that when mother at one point attempted to help L.G. put on a jacket, L.G. refused that help despite being cold; and that, after each visit, according to the agency social worker, neither J.G. nor L.G. displayed *any* emotional distress when leaving mother.

Under these circumstances, it does not appear that the best interests of the children may be promoted by the change(s) sought by mother in her section 388 petition. (See § 388, subd. (d).) As such, for this separate reason we conclude the court properly exercised its discretion in denying mother's petition without a full evidentiary hearing. (See *In re C.J.W.* (2007) 157 Cal.App.4th 1075, 1081 [summary denial of a section 388

petition was proper where there was no showing of how the children's best interests would be served by depriving them of a permanent stable home in exchange for an uncertain future].)

DISPOSITION

The order summarily denying mother's section 388 petition is affirmed. As such, we leave intact the order terminating mother's parental rights. In light of our decision, we also do not disturb the order terminating father's parental rights.

BENKE, Acting P. J.

WE CONCUR:

McDONALD, J.

O'ROURKE, J.