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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA**

**FOURTH APPELLATE DISTRICT**

**DIVISION TWO**

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

RIVERSIDE COUNTY DEPARTMENT  
OF PUBLIC SOCIAL SERVICES,

Plaintiff and Respondent,

v.

K.P. et al.,

Defendants and Appellants.

E055601

(Super.Ct.No. RIJ120860)

OPINION

APPEAL from the Superior Court of Riverside County. Matthew C. Perantoni,  
Temporary Judge. (Pursuant to Cal. Const., art. VI, § 21.) Affirmed.

Rosemary Bishop, under appointment by the Court of Appeal, for Defendant and  
Appellant K.P.

Nicole Williams, under appointment by the Court of Appeal, for Defendant and  
Appellant J.M.

Pamela J. Walls, County Counsel, and Anna M. Deckert, Deputy County Counsel,  
for Plaintiff and Respondent.

## I. INTRODUCTION

K.P. (mother) appeals from the termination of parental rights as to her son, A.R. (born in March 2009) and daughter, J.P. (born in March 2011) under Welfare and Institutions Code<sup>1</sup> section 366.26. She contends the juvenile court abused its discretion in denying her petition under section 388 because she showed material changed circumstances, and the trial court's findings are unsupported by the record. J.M.<sup>2</sup> (father) has not filed a separate brief but has joined in mother's opening brief. (Cal. Rules of Court, rule 8.200(a)(5).) We find no error, and we affirm.

## II. FACTS AND PROCEDURAL BACKGROUND

On December 30, 2010, the Riverside County Department of Public Social Services (Department) filed a petition under section 300, subdivisions (b) (failure to protect), (e) (severe physical abuse) and (j) (abuse of sibling) to remove A.R., then age 21 months, and his two older siblings<sup>3</sup> from mother's custody. As relevant to the issues raised on appeal, the petition alleged that father, who was mother's boyfriend, had inflicted severe physical harm on A.R., who had suffered a skull fracture, bruising to both

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

<sup>2</sup> J.M. is the father of J.K. The whereabouts of A.R.'s father are unknown.

<sup>3</sup> The two older siblings, D.D. (born in May 2003) and M.D. (born in May 2004), have a different father and are not the subjects of this appeal.

ears, and linear bruises to his face and buttocks, and mother should have known that father administered inappropriate discipline but failed to intervene and allowed father to care for the children. The petition further alleged that mother abused alcohol while caring for the children.

The detention report stated that mother had brought A.R. to the hospital, where it was found he had a skull fracture and bruises on his face, ears, and buttocks. Mother stated she did not know how the child had sustained the injuries. She insisted that father would never hurt the children. However, mother also stated she allowed father to discipline her older son with a belt. Father later confessed that when mother was at the store, he had beaten A.R. with a belt to punish him for jumping on the bed, and when A.R. tried to run away, he had fallen and hit his head on a dresser. Father was arrested for the physical abuse of A.R.

Mother had prior unfounded referrals to the Department for smoking marijuana in the home, for leaving her children in the care of others, and for failing to arrange for adequate supervision when her daughter was injured while under the supervision of her maternal grandmother.

D.D. told the social worker that father beat him with a belt and sometimes left bruises. Both older children said mother used to “drink to get drunk,” but not lately.

At the detention hearing, the juvenile court found a prima facie showing had been made and detained the children in foster care.

In March 2011, J.P. was born prematurely, and the Department filed a petition under section 300, subdivisions (b) and (j), alleging J.P. was at risk of harm because

mother was still living with father and had a recent history of abusing alcohol. The juvenile court ordered J.P. detained, and she was placed in the same foster family as her siblings.

In April 2011, mother filed a petition under section 388 asking the court to change its order denying her reunification services for A.R. The petition stated the following changed circumstances: “I left the alleged abuser and got into a safe environment for my children and I also get [a] lot of help on thing[s] I need to know as a mother like how to manage my money, job skills, family skills, and to find affordable housing, how to be independent and how to do appropri[a]te dis[ci]pline for my children.” The court denied the petition without holding a hearing.

In April 2011, the Department filed a jurisdiction/disposition report. The social worker stated she had interviewed D.D., who said father had hit him and A.R. with a belt, and mother knew about it and allowed it. D.D. said mother drank alcohol “to get drunk.” M.D. told the social worker that father “whoops” D.D. and A.R., and mother knew about it and allowed it. She said mother drank alcohol, but was not drinking while she was pregnant. The social worker reported that mother had left father and was living in a family shelter. She did not plan to get back into a relationship with father, but she spoke highly of him and appeared to still love him. Mother also told the social worker that father had kicked her out of her home. Mother said she sometimes disciplined her children by spanking them. Father spanked them with his hand or a belt; mother knew he did so and thought it was all right. Mother had been sexually molested by her own father when she was six and seven years old and had been in and out of foster homes. She was

adopted at age nine, and her adoptive mother hit her with belts and shoes. She left home at 17. Mother was currently unemployed, but she planned to go to Kings Hall where she could get a small apartment. Mother denied any recent drug or alcohol abuse.

At the jurisdiction/disposition hearing as to A.R., the juvenile court struck an allegation from the petition that mother had failed to obtain medical care for the two older siblings and found true the remaining allegations. The court found by clear and convincing evidence that section 361.5, subdivision (c) applied, and the court denied reunification services under section 361.5, subdivision (b)(5).

At the jurisdiction/disposition hearing as to J.P., the court found true the allegations in the petition and adjudged her a dependent of the court. The court denied reunification services under section 361.5, subdivision (b)(6), (b)(7), and (b)(10), and set the matter for a permanency planning hearing.

The Department filed a status review report in July 2011. The report stated that mother had one-hour weekly supervised visitation. A.R. was on track developmentally and was bonded with his caregivers and siblings.

In July 2011, mother filed section 388 petitions requesting reunification services. Mother alleged the following changed circumstances: “Mother now has stable housing. She has been actively engaged in her therapy and is making good progress. She has shown insight into the issue[] that brought this case to the attention of the court.” As to the best interest of the children, mother alleged, “She is participating in consistent visitation with all of her children. The mother recently gave birth and is wanting all of her children to have a relationship not only with her but with each other.” In support of

the petition, mother attached handwritten documents listing her goals in therapy and addressing child discipline;<sup>4</sup> certificates indicating completion of a 10-session parenting program on April 5, 2011; letters documenting attendance at 10 therapy sessions between February 9 and June 21, 2011; an undated letter stating that mother had volunteered at a preschool throughout the school year; a letter dated March 11, 2011, stating that mother was living at a family shelter in Riverside and was going out every day to pursue employment and housing and was attending classes; a letter indicating that mother had left the shelter on June 1, 2011, but she had participated satisfactorily in shelter services while there; and a progress report from her counselor dated April 18, 2011. The progress report stated mother was “rethinking the use of corporal punishment that was used with her” as a child, and she appeared to understand the negative effect of that type of discipline. Mother wanted to use the positive discipline strategies she had learned in her parenting class and in therapy, and she appeared to understand her responsibility to protect her children. She stated she would not be in relationships with men who

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<sup>4</sup> The document stated: “I used to spank my children. At the time, I felt that spanking was an approp[r]iate disciplinary tool to use against negative behavior. Whenever my children didn’t listen to me nor did something they weren’t supposed to do, I would spank them as a punishment. Growing up, I was spanked I [felt] that spanking was the only form of punishment against bad behavior. As I have come to learn, there are other alternative[s] to spanking. It[] is better to take away toys, privileges, TV social time with friends, or isolate them in th[eir] room for a certain period of time. Time-outs are especially helpful for very small children. You should be paying attention to determine what of those types of punishment the[y] dislike the most and use it. It is important to be consistent and make certain you enforce whatever punishment you decide to impose. It is also important to make certain you[r] child understands what they did wrong and why they were punished.”

compromised her children's safety, and she was "starting to understand the skills needed to take care of her children, provide for their safety, and protect them in the future."

The juvenile court referred the section 388 petitions to the Department for investigation, and the Department filed an addendum report recommending denial of the petitions. The report stated mother had remained with father until March 2011, when he kicked her out of the house, and she then had stayed in a shelter. Mother reported she was currently living with friends, and she was not currently employed. Mother had been visiting the children weekly for two hours and had missed three visits. During the visits, she paid more attention to her daughters and ignored D.D., which caused him great anxiety. She spoke inappropriately to the older children and tried to get them to tell the judge they did not want to go with their father and that their father would lock them in a room and leave them there. Mother had reportedly told friends that she "didn't have time for the kids, but the money would be nice." The social worker stated she had no information that mother had addressed substance abuse issues.

The juvenile court denied the petitions after a hearing. The court commended mother for her efforts but did not find a substantial change "that would warrant a change in the previous court's orders." The court expressed concern about the lack of appropriate housing and stated that if mother continued "on this road, that perhaps at some future date, it may be more appropriate for the court to reconsider the granting of reunification services. [¶] But, at this time, I do not find a sufficient substantial change, or that it would be in the best interest of the children that mother be provided with reunification services."

In August 2011, the juvenile court held a contested six-month review hearing for A.R. and the two older siblings. The court set a permanency planning hearing for A.R. under section 366.26 and later scheduled the permanency planning hearing for J.P. to be held concurrently.

The Department filed a section 366.26 hearing report in December 2011. A.R. and J.P. had been placed together with a prospective adoptive family, and they were thriving in their new home and were bonding with their new caregivers. Mother continued to have supervised visitation with the children for at least one hour per week; however, several visits had been cancelled because of the children's illnesses. The report included a positive adoption assessment for the prospective adoptive parents.

Mother filed section 388 petitions in January 2012, again requesting reunification services. With respect to changed circumstances, mother alleged she was "involved in individual counseling. She has completed parenting classes, as well as obtained suitable housing." With respect to best interests of the children, mother alleged, "Mother has been consistent with her visitation with the children, and has a very strong bond with them." In support of the petitions, mother attached the same documentation as she had provided to support her previous petition. In addition, she provided a rental agreement for an apartment in Riverside; however, her name was not shown as a lessee.

The juvenile court held a hearing on the petitions, at which mother testified she had taken parenting classes and had gone to counseling on her own. She testified that the counseling had "helped [her] out a lot to figure out what [she] need[ed] to do as a mother" and that she had to discipline her children "the right way and take [her] time and

all that.” She was working full time, and she planned to reduce her hours so she could go back to school. She had a room for the children and had daycare available. The court found that neither prong of the required showing under section 388 had been met. The court explained that “although it looks like mother is in the process of trying to change her circumstances,” the court could not find that the circumstances had changed. As to best interests of the children, the court noted that “the children have been in a loving adoptive home for over five months now. This is a case on track for adoption. Appears children have bonded to their current caretakers. I cannot find it’s in the best interest of the child to change the current orders.” The court therefore denied the petitions.

The court continued to the permanency planning hearing under section 366.26. The court found the children were likely to be adopted, and no exceptions to adoption applied, and the court terminated mother’s parental rights to A.R. and J.P.

### III. DISCUSSION

Mother contends the juvenile court abused its discretion in denying her section 388 petition because she showed material changed circumstances, and the court’s findings are unsupported by the record.

#### **A. Standard of Review**

We review the juvenile court’s ruling on a section 388 petition under the deferential abuse of discretion standard. (*In re Stephanie M.* (1994) 7 Cal.4th 295, 318.)

## **B. Section 388 Petition**

### *1. Required Showing*

Section 388, subdivision (a) allows a parent to petition the juvenile court for modification of a prior order “upon grounds of change of circumstance or new evidence.” The parent bears the burden of showing, by a preponderance of the evidence, changed circumstances or new evidence that makes modification in the best interests of the minors. (*In re Andrew L.* (2004) 122 Cal.App.4th 178, 190.) The parent “must show *changed*, not *changing*, circumstances.” (*In re Mickel O.* (2011) 197 Cal.App.4th 586, 615.) In ruling on a section 388 petition, “the juvenile court may consider the entire factual and procedural history of the case. [Citation.] The court may consider factors such as the seriousness of the reason leading to the child’s removal, the reason the problem was not resolved, the passage of time since the child’s removal, the relative strength of the bonds with the child, the nature of the change of circumstance, and the reason the change was not made sooner. [Citation.]” (*Mickel O., supra*, at p. 616.)

### *2. Forfeiture*

Mother did not appeal the juvenile court’s denial of her April 2011 and August 2011 petitions, and the time for doing so has long expired. She has therefore forfeited any challenge to those orders. (Cal. Rules of Court, rule 8.406.)

### *3. Mother Failed to Meet Her Burden of Showing Changed Circumstances*

#### (a) Ability to protect children

The section 300 petition as to A.R. alleged that mother knew or should have known father inappropriately disciplined her children, including striking D.D. with a belt,

but mother failed to intervene and allowed father to care for the children. The petition as to J.P. alleged that mother had been denied reunification services as to A.R. and the two other children based on mother's failure to protect them. D.D. told the social worker that father had hit D.D. and A.R. with a belt, and that mother knew that and allowed it. M.D. told the social worker father "whoop[ed]" D.D. and A.R., and mother knew that and allowed it. Mother admitted to the social worker that she had allowed father to discipline D.D. with a belt. The juvenile court found the allegations true.

Mother contends she met her burden of showing changed circumstances because she was no longer living with the abuser and she had obtained services and had learned alternative forms of punishment and how to protect her children. To support her petition, she provided her own handwritten statement, the text of which is set forth above in footnote 4, as well as a progress report from a counselor dated April 18, 2011. Mother stated that she formerly believed spanking was an appropriate form of discipline, but she had learned other effective means of punishment. However, her statement did not address the issue of protecting the children from an abusive live-in boyfriend.

Mother relies on *Blanca P. v. Superior Court* (1996) 45 Cal.App.4th 1738 (*Blanca P.*) to support her contention that her circumstances had changed in that she showed her ability to protect her children. In *Blanca P.*, children were removed from their parents' custody after the mother struck her 17-year-old son in the face several times. A subsequent petition alleged the father had sexually molested one of the children, and that petition was sustained (*id.* at pp. 1741-1742); however, later evidence, including a psychological evaluation of the father, indicated that no molestation had in fact occurred.

(*Id.* at pp. 1745-1746.) At the 18-month review hearing, the court found it would be detrimental to return the children to the parents and terminated reunification services. (*Id.* at p. 1747.) On appeal, the court held that a new hearing was required to determine if the father had molested the child, and if the juvenile court found he had not done so, no evidence in the record supported a finding of detriment to the children. (*Id.* at p. 1760.) In reaching the conclusion that there was no other evidence of detriment, the court addressed the finding of excessive corporal punishment as to the mother. (*Id.* at pp. 1747-1752.) The court noted that “the evidence [wa]s undisputed that [the mother] has said she has learned that she should not use excessive force in child discipline” (*id.* at p. 1751), and the parents had completed every objective measure of their reunification plans (*id.* at p. 1747).

*Blanca P.* is distinguishable from the present case because the procedural and factual issues are different. At an 18-month review hearing, the juvenile court must return a dependent child to his parents unless it would be detrimental to do so, and the state has the burden of showing detriment. (*Blanca P.*, *supra*, 45 Cal.App.4th at p. 1748; see also § 366.22.) Here, in contrast, mother bore the burden of proving changed circumstances at the section 388 hearing. (*In re Andrew L.*, *supra*, 122 Cal.App.4th at p. 190.) In her statement provided in support of her petition, mother stated she used to spank the children and had believed spanking was an appropriate disciplinary tool, but she had learned of better alternative punishments. However, the issue in this case, unlike in *Bianca P.*, was not that mother herself spanked the children, but that she allowed

father, her live-in boyfriend, to beat them with a belt. Even after father confessed to child abuse, mother continued to live with him for several more months until he kicked her out.

Mother also relies on *In re Eileen A.* (2000) 84 Cal.App.4th 1248 (*Eileen A.*), overruled on another point in *In re Zeth S.* (2003) 31 Cal.4th 396, 413-414. In *Eileen A.*, the court held that the mother's counsel had provided ineffective assistance by failing to file a section 388 petition because there was a reasonable likelihood the petition would have been granted. (*Eileen A.*, *supra*, at pp. 1260-1262.) The child's father, who cared for the child while the mother worked, committed serious physical abuse of the child. (*Id.* at pp. 1260-1261.) As in the instant case, the juvenile court denied reunification services for the mother because of the severity of the physical abuse. (See § 361.5, subd. (b)(5).) (*Eileen A.*, *supra*, at p. 1252.) The mother nonetheless attended weekly parenting classes, went to Al-Anon meetings, went to individual counseling, visited the child as often as she was allowed, and consulted an attorney about divorce proceedings. The father was sentenced to prison for five years for felony child abuse. (*Id.* at pp. 1252, 1261.) In addition, the prospective adoptive parents, a maternal aunt and uncle, had indicated they were no longer willing to adopt. (*Id.* at p. 1253.)

The present case is distinguishable from *Eileen A.* Here, mother admitted she knew father beat D.D. with a belt. D.D. and M.D. told the social worker that father also beat A.R. with a belt, and mother knew that and allowed it. The social worker stated in the detention report that mother was adamant that father would not hurt the children, and if she found out he had injured A.R., she would move out and file for a restraining order. Nonetheless, even after father's admission of his guilt and his arrest for child abuse,

mother continued to live with him until March 2011, and she told the social worker that he had kicked her out of the house, not that she had left him because of his abuse of her child. Moreover, the counselor's report on which mother relies states that mother was "*rethinking* the use of corporal punishment" and was "*starting* to understand the skills needed to take care of her children, provide for their safety, and protect them in the future." (Italics added.) While we commend mother for her attempts to address the issues that led to the removal of her children we conclude, as did the juvenile court, that the record shows only that mother's circumstances were changing, not that they had changed.

(b) Alcohol abuse

The section 300 petition as to A.R. alleged mother had abused alcohol while caring for the children. The petition as to J.P. alleged mother had "a recent history of abusing alcohol." In interviews with the social worker, the older children said mother had played "beer pong," had acted "drunk," and used to drink a lot of beer when people visited, although they also said she had not been drinking lately. Mother admitted she had used marijuana in the past "recreationally and on very rare occasions." At the jurisdiction hearings, mother's counsel offered no affirmative evidence, and the juvenile court found the allegations true.

Mother now contends she was not abusing alcohol because she provided documentation that she lived successfully in a sober environment and passed all random drug testing. To support her petitions, she provided a letter dated May 11, 2011, from the shelter where she was then living. The letter stated, "This is a sober environment there is

random testing for all adults in which [mother] has passed all to date.” However, mother provided *no* evidence that her sobriety had continued between May 2011 and the February 6, 2012, hearing on her section 388 petition, and she provided no evidence she had sought or received treatment related to alcohol abuse. We conclude her showing was inadequate to meet her burden of establishing changed circumstances.

*4. Mother Failed to Meet Her Burden of Showing Modification of the Order Would Be in the Children’s Best Interests*

The second prong of a successful petition under section 388 is that “[t]he parent must show that the undoing of the prior order would be in the best interests of the child. [Citation.]’ [Citation.]” (*In re S.J.* (2008) 167 Cal.App.4th 953, 960 [Fourth Dist., Div. Two].) In her petitions, mother alleged the modification of the order would be in the best interests of the children because she had been consistent with her visitation and had a strong bond with the children. However, other than mother’s conclusory assertion, there was no evidence the children were bonded to her. A.R. was removed from mother’s custody at the age of 21 months, and J.P. was removed from mother’s custody when she was only three days old. At the hearing on the petition, mother testified she visited the children once a month for an hour, but she had missed the past four visits because the children had been sick. She testified that A.R. cried at the end of visits, but J.P. was newborn.

At the time of the hearing on the petition, A.R. was nearly three years old, and J.P. was nearly a year old. They had then spent more than five months in the prospective adoptive home, and the social worker’s report stated they were well bonded with their

prospective adoptive family and were thriving and secure in that home. We conclude mother’s petition “made no showing of how the minors’ best interests would be served by depriving them of a permanent, stable home in exchange for an uncertain future.

[Citations.]” (*In re Jackson W.* (2010) 184 Cal.App.4th 247, 260.)

IV. DISPOSITION

The orders appealed from are affirmed.

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HOLLENHORST

Acting P. J.

We concur:

KING

J.

MILLER

J.