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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

In re D.F. et al., Persons Coming Under the
Juvenile Court Law.

SAN BERNARDINO COUNTY
CHILDREN AND FAMILY SERVICES,

Plaintiff and Respondent,

v.

O.C.,

Defendant and Appellant.

E056029

(Super.Ct.Nos. J236293, J236294,
J236295, J236296)

OPINION

APPEAL from the Superior Court of San Bernardino County. Christopher B.
Marshall, Judge. Affirmed.

Michelle L. Jarvis, under appointment by the Court of Appeal, for Defendant and
Appellant.

Jean-Rene Basle, County Counsel, and Jeffrey L. Bryson, Deputy County
Counsel, for Plaintiff and Respondent.

Defendant and appellant O.C. (Mother) appeals from orders denying her petition under Welfare and Institutions Code¹ section 388 and terminating her parental rights to her four younger children. On appeal, Mother contends (1) the juvenile court erred in denying her a full evidentiary hearing before summarily denying her section 388 petition, and (2) there was insufficient evidence to support the juvenile court's order terminating her parental rights because the "beneficial parental relationship" exception to termination applied. (§ 366.26, subd. (c)(1)(B)(i).) We reject these contentions and affirm the judgment.

I

FACTUAL AND PROCEDURAL BACKGROUND

Mother had eight children by two men:² Four older children, born between February 1994 and July 2001 (the older children),³ and four younger children, born between April 2006 and December 2009 (the younger children). The younger children's father is D.F.H. (Father).

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

² The fathers are not parties to this appeal.

³ The older children are not parties to this appeal.

All eight children came to the attention of the San Bernardino County Children and Family Services (CFS) on November 19, 2010, when a referral was received reporting that an 11-month-old baby (the baby)⁴ was at the hospital with a fractured skull and hematoma. Both parents reported that Father was feeding the baby, and when Father did not give him the spoon, the baby threw “himself [back] on the [tile] floor and hit his head.” Mother explained that she did not see the baby falling backward, but heard the falling noise and crying. Mother also stated that the baby fell off a bed about three to four weeks earlier. She then took the baby to his pediatrician and was told to monitor him closely.

Medical evaluations showed that the baby had suffered two skull fractures. He had “an occipital parietal right temporal fracture (backbone of the head)” that could have been from the fall [Mother] claimed occurred about a month prior. However, the examining doctor noted that the fracture on the parietal right side was more complex. The doctor explained that complex fractures would not be caused by a child falling back, but instead by a “high-energy impact,” such as a higher fall, a blow, or a child being slammed against a wall. The doctor suspected physical child abuse.

Mother stated that Father had never been aggressive toward any of the children. The older children denied any physical abuse and reported no concerns regarding Father. Mother and Father also denied any domestic violence in the home. However, Father had

⁴ To provide anonymity as required by California Rules of Court, rule 8.401, we will refer to the individual children by their age at the time of the December 6, 2010 detention report.

been charged with inflicting corporal injury on a spouse or cohabitant in July 2007. He also had several theft-related and driving under the influence of alcohol charges. Father also had a history of abusing methamphetamine, but claimed he had stopped using in 2007. Mother believed Father was not currently using methamphetamine, but stated he was abusing alcohol.

On December 1, 2010, the younger children were removed from parental custody and placed in a foster home. The older children were not removed at that time because they had denied any physical abuse and were verbal enough to tell someone if they felt unsafe.

While transporting the younger children to the foster home, the social worker noticed “pink marks” on the female twin’s arm, which looked like old burn marks. Mother explained that she had accidentally dropped boiling water on the child’s arm and then applied ointments, but she did not take the child to a doctor.

On December 3, 2010, CFS filed a petition on behalf of all eight children under section 300, subdivisions (a) (serious physical harm), (b) (failure to protect), (e) (severe physical abuse of child under the age of five), and (j) (abuse of sibling).⁵ The younger children were formally removed from parental custody at the detention hearing and placed in a foster home. Initially, the older children were detained with Mother.

⁵ The original petition was later amended several times.

On December 27, 2010, a public health nurse reported that the female twin had numerous unusual scars all over her body. Additionally, three days later, CFS learned that the 15-year-old child ran away from home and went to the home of the younger children's foster mother. She ran away because she was afraid of Father, and Mother had allowed Father to move back into the home. The 15-year-old stated that shortly before the younger children were removed from parental custody, Father was suicidal, got a butcher knife, and was walking around the home cutting his arms with the knife. Mother hid from Father, but left the children with Father. In addition, Mother never called law enforcement. The 15-year-old also stated that Father drank heavily, broke items in the home, and assaulted Mother.

The 15-year-old also reported that Father made her feel uncomfortable when he looked at her body, that both parents blamed her for the younger children's removal, and that if Father killed himself it would be her fault. She also disclosed that both Mother and Father had been abusive toward the baby. She explained that when Mother became frustrated with the baby, she would drop him on the floor, and that on one occasion, Father had pushed him off the bed, causing him to hit his head. Other children were overheard saying that the baby had fallen off the bed because Father either pushed him or did not watch him.

The 15-year-old child admitted that she had lied to the social worker because Mother had told her and her siblings not to say anything that would get Mother into trouble. She also stated that the older children did not disclose any negative information because they were trying to protect Mother. In addition, the 13-year-old child was

overheard saying that Father had choked the 16-year-old child, and the 13-year-old had to hit Father on the head to get him off the 16-year-old. Furthermore, the four-year-old child reported that he had seen Father throwing Mother “off the car while they were in the driveway.” The four-year-old child explained that he did not disclose the incidents earlier because Mother had told him what to say.

The social worker subsequently contacted Mother and asked to meet with Mother and the older children. However, after Mother discovered what the 15-year-old child had disclosed to the social worker, Mother failed to follow through on the meeting. Instead, Mother stated that she was going to hide away with the older children and take them to Mexico to avoid further CFS intervention.

On December 30, 2010, CFS took the older children into protective custody, with the exception of the eldest child because he refused to leave Mother’s home and said he felt safe with her.

On January 6, 2011, CFS received information that Mother had stated the baby had fallen on two different occasions, and had hit his head on a filing cabinet. On January 11, 2011, the three-year-old twins and the four-year-old child were examined by a doctor. The doctor found that the female twin had “excessive scarring,” which could be from “neglect or prior abuse,” including “probable healed burns to the left shoulder, forearm, and anterior chest.”” The doctor also noted “linear parallel scars to [the child’s] back and [a] linear scar to the right hip [that is] high[ly] suspicious for prior inflicted injury.”” The doctor further documented that the female twin had “absent lingual frenula tissue indicative of prior facial trauma,” and possible language delay. In

regard to the male twin, the doctor observed possible nail gouge marks to his arms, a possible burn scar on his leg, and possible language delay. As to the four-year-old child, the doctor found evidence of dental neglect. In regard to the twins' skin discoloration, the 15-year-old child explained that the children had "'got into [Mother's] supplies from cosmetology school'" and burned themselves. The four-year-old stated that Father had burned his arm with a lamp.

On January 31, 2011, two of the older children disclosed further acts of domestic violence by the parents. The 15-year-old child revealed that Father was "often crazy," drank beer daily, and was drunk once or twice a week. She further stated that Mother had slapped her, causing a split lip and bruising. The 15-year-old child described an incident where Mother was mad at the female twin for acting out. Mother put her car in reverse, knowing the child was between two cars, and hit the three-year-old's chest bone with the car. Mother had to be persuaded to take the child to the doctor. Mother later confirmed this incident, stating that "she did not realize" the child was behind her vehicle. "[Mother] could tell she had hit something," but did not hear the child "scream or make any sound." Mother stated that "as a result of the accident," the child "had difficulty breathing," as well as "a bone possibly dislocated in her chest area."

The parents continued to deny any wrongdoing, and had changed their statements several times as to how the baby sustained two skull fractures. The parents also continued to deny domestic violence and blamed the doctors and their children for CFS intervention.

All the children, with the exception of the eldest child, remained together in foster care. Mother visited regularly with the children, and the visits appeared to be going well. Mother eventually admitted that the children had been terribly neglected and that the family was in need of intervention. Mother, however, continued to believe that Father had done nothing wrong, and that the baby had fallen off a bed accidentally. In addition, when the social worker informed Mother of Father's positive drug test. Mother stated that she did not believe he was using drugs. She hoped that Father would change and desired to stay with him. She also explained that she had told Father not to discipline the children because he would often "yell or be too hard on the kids." She did not believe that domestic violence was an issue. When the social worker pointed out that the children had reported ongoing domestic violence, Mother said, "I don't know why [the 15-year-old child] makes this stuff up."

Mother had been referred to Catholic Charities for counseling and had completed 12 sessions on domestic violence by May 2011. Nevertheless, it appeared that Mother had not benefited from the services, and she continued to place her own and Father's needs above those of her children. When asked for an insight on what she has learned during her sessions, Mother did not believe domestic violence was an issue despite her own admissions that Father desired to control her life.

In May 2011, the Fontana Police Department concluded their child abuse investigation. The parents' cases were referred to the district attorney's office for possible prosecution.⁶

The jurisdictional hearing was held on May 17, 2011. The juvenile court found the allegations in the second amended petitions true and took jurisdiction over the children.

The contested dispositional hearing was held on June 3, 2011. Following an in-chambers discussion with all parties, the juvenile court announced its tentative decision to bypass reunification services as to the younger children. The court explained: "It was represented to me that Mother has been engaged in services since the beginning . . . and . . . the way I view it . . . a contested . . . trial on services to Mother is something that would be mounted again, I would imagine, by virtue of the 388 [¶] I encourage Mother to file a 388 in that regard . . . and right now I am inclined to . . . I don't know if she will . . . but . . . I will say this now, to allow an evidentiary hearing on the 388 at that time. But that is not to say I wouldn't [*sic*] want a bare bones 388 if Mom has progressed and she has continued to work [on] the plan. I would hope that her 388 would contain attachments of her progress in services and any reports from any therapists about her progress as well, and any declarations that would help in that regard."

⁶ Mother and Father were later convicted of willful child cruelty (Pen. Code, § 273a, subd. (a)) and placed on probation for a period of 48 months.

Mother's counsel responded: "[Mother] is requesting . . . that the Court order services. She has been engaged in services since the onset of this case. She believes she is making progress . . . [¶] . . . [A]lthough we're not going to present any affirmative evidence this afternoon . . . she wants the Court to know she loves her children, and she is willing to do what she needs to do. [¶] . . . Unfortunately, even six months going by, it is very hard to present any affirmative evidence [to show she could prevent further abuse]."

Following further argument, the children were declared dependents of the court, and the parents were denied services as to all the children except the eldest child pursuant to section 361.5, subdivisions (b)(5), (b)(6), and (b)(7). The juvenile court noted it was unable to find that "services would prevent further abuse." As to the eldest child, Mother was ordered to participate in family maintenance services. Three of the younger children, except the four-year-old, were maintained together. The court ordered that once a concurrent planning home was identified, all four younger children should be placed together. A section 366.26 hearing was thereafter set.

On June 8, 2011, Mother filed a notice of intent to file a writ petition. On July 8 2011, this court dismissed Mother's writ petition, case No. E053743, following a no-issue letter from her counsel.

On July 22, 2011, all four of the younger children were placed with their maternal aunt and uncle. However, on August 30, 2011, the uncle reported to the social worker that they could no longer care for the younger children and requested their removal. The younger children were subsequently removed on September 15, 2011, and placed in the

home of their former foster parents, Mr. and Mrs. B.⁷ The younger children had known these foster parents since February 4, 2011, and had adjusted well to the placement. Mrs. B. was described as “very positive, energetic and a loving foster parent.” Mr. and Mrs. B. desired to adopt the four younger children, and wanted to provide them with a stable, secure, and happy life.

Mother continued to participate in several domestic violence classes on her own, and was showing progress. However, Mother told the program facilitator that she continued to have contact with Father, which was contrary to the impression Mother had given to the social workers. Mother also completed six months of therapy sessions. In addition, Mother continued to visit the children two hours a week, and the visits appeared to be going well.

On February 9, 2012, Mother filed a section 388 petition and supporting documentation, seeking return of the younger children or, in the alternative, reunification services. In support, Mother claimed that she had completed 10 sessions of a parenting class and a 10-week domestic violence program, and was participating in counseling, and additional parenting and domestic violence classes. She further asserted that she was no longer with Father, who was in custody for domestic violence; and that she had unsupervised and overnight visits with her older children. Mother further asserted that granting her petition would be in the younger children’s best interests because they had a

⁷ We note that Mr. and Mrs. B. are variously referred to as Mr. E., Ms. B., Mr. and Mrs. E., the E. foster family, the E. family, Gloria B., Gloria E., Ms. E., and the B. family.

“very strong bond,” she loved them, and she believed the younger children should be raised by their mother.

The social worker recommended that parental rights be terminated; that Mother’s section 388 petition be denied; and that the juvenile court approve the permanent plan of adoption. Although the social worker was proud of Mother’s accomplishments, the social worker did not believe that Mother would be able to protect the younger children. The social worker pointed out that it was still unknown how the baby sustained two skull fractures. The social worker further noted that Mother had a history of abusive relationships, and that Mother still seemed unwilling to protect herself from Father. The social worker reported that in November 2011, Father came by Mother’s house to pick up some papers. Mother stated that she could not prevent Father from coming to the house. Mother also reported that she had seen Father drive by her house. Mother did not call law enforcement or share this information with CFS until the social worker pressed Mother for the information. Moreover, on December 28, 2011, while Mother was at her domestic violence class in the parking lot, Father snuck up on her and began hitting her. Mother “was encouraged to call police.” Father was subsequently arrested and jailed. The social worker also believed that Mother had anger control issues and that Mother appeared to be “overwhelmed” by the younger children at visits and would “yell as a way of getting their attention.” The social worker concluded that the younger children, who were all under the age of six, were “too vulnerable to return to [M]other’s care” and “would not be able to protect themselves.” The social worker further stated that Mother “could not handle custody of all eight of her children and . . . attempting to return the

youngest four would be setting [her] up for failure and placing the young children at serious risk for abuse and neglect.

Meanwhile, the younger children were thriving with Mr. and Mrs. B., who were described as “very patient, protective and caring to these children.” The social worker reported that “Each child has a very different personality and requires a different approach to parenting to meet their needs. They will have ongoing issues as a result of their early traumas and will require exceptional parenting to heal.”⁸ The social worker did not believe that Mother would be able to provide “this type of individualized assistance, whereas the caretakers, who are committed to adoption have demonstrated that they can.”

At a pretrial settlement hearing on March 21, 2012, the juvenile court was prepared to hear Mother’s section 388 petition. However, Mother was not present, and her counsel was unsure why Mother was absent. Mother’s counsel requested that Mother’s section 388 petition be considered at the same time as the section 366.26 hearing and noted that the only witnesses would be Mother and the social worker. The juvenile court granted the request.

A combined hearing under sections 388 and 366.26 was held on March 29, 2012. At that time, the court stated, “. . . we would consider the 388 petition with respect to initially whether it states a prima facie showing for having further evidence on.”

⁸ The male twin displayed aggressive behavior, including tantrums and impulsivity. In addition, the twins were difficult to understand and were assessed for language and speech services. The baby also had tantrums, including hitting his head against a wall and aggressiveness.

Mother's counsel asked the court to find that a prima facie case had been presented "for a full hearing on our 388," and submitted four additional documents in support of the 388 petition. The new documents consisted of a letter of recommendation from a pastor; a letter from House of Ruth stating that Mother was an "active participant" in its programs; a letter from Mother's therapist stating that Mother had attended four therapy sessions, and that she appeared to be "motivated to do the work necessary to provide a safe" home for her children; and an informal probation report indicating that Mother had completed about half of the 52-week child abuse program.

Following argument, the juvenile court found the 388 petition did not meet "the prima facie threshold for this." The court stated, ". . . while there have been submissions of counseling and participation in programs[, and] that may reflect some changes, . . . it does not reflect changed circumstances. And so the Court does not find that there is a change in circumstances and equally important how this will promote the best interest of the children. [¶] . . . The Court is going to deny the 388 petition finding that it doesn't make a prima facie showing."

The juvenile court subsequently held the section 366.26 hearing wherein Mother and the social worker testified. Mother testified that she consistently visited the younger children once a week; that she kissed them, played with them, and fed them; that the children told her they wanted to go home with her and that they missed her; and that they called her "mommy." Mother denied that she was overwhelmed during visits and stated that she could control the situation. Mother believed that not returning the children to her care would be "hurtful" both to herself and the children.

The social worker testified that the younger children were excited to see Mother and their siblings at visits; that Mother was affectionate toward them; and that they looked forward to the visits. However, the social worker did not observe any of the children being upset to leave a visit, and they seemed ready to go home with the foster mother at the end of the visits. The social worker explained that “[s]ometimes towards the end of the visit the kids will actually stick their heads out of the visit room and look for foster mom and then run towards her when she walks into the lobby.” The social worker had not read or heard from anyone about the children saying they wanted to go home with Mother or telling Mother that they loved her. On one occasion, when asked what he liked about the visits, the four-year-old child stated that he enjoyed visiting Mother and liked playing with certain toys. The social worker explained that when Mother yelled at the children, it appeared to be partly out of frustration and partly because of the chaotic environment in the room with all eight children. She also indicated that Mother was able to calm the children at times. The social worker further noted that the younger children were “very comfortable” and “happy” with their foster parents; that they deserved a “stable, safe, and secure environment”; and that the benefits of adoption outweighed the need to maintain a relationship with the parents and their older siblings.

The juvenile court concluded that no exceptions to adoption applied, found the children to be adoptable, and terminated the parental rights. This appeal followed.

II

DISCUSSION

A. *Section 388 Petition*

Mother contends that the juvenile court erred in denying her section 388 petition without a hearing, and requests the case be remanded to the juvenile court for a “full evidentiary hearing.” Specifically, she contends that the juvenile court at the June 2011 dispositional hearing had represented that it would grant her an evidentiary hearing if her petition was not bare bones; and that she had made a prima facie showing of changed circumstances or new evidence and best interests of the children to hold a “full” evidentiary hearing.

Whether to conduct a hearing on a section 388 petition alleging changed circumstances or new evidence is within the juvenile court’s discretion. (*In re Aljamie D.* (2000) 84 Cal.App.4th 424, 431 (*Aljamie D.*)) A hearing must be held if the petition states a prima facie case, which has been analogized to a showing of probable cause. (*Id.* at p. 432.) ““There are two parts to the prima facie showing: The parent must demonstrate (1) a genuine change of circumstances or new evidence, and that (2) revoking the previous order would be in the best interests of the children. . . .’ [Citation.]” (*In re C.J.W.* (2007) 157 Cal.App.4th 1075, 1079 [Fourth Dist., Div. Two] (*C.J.W.*)) “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.]” (*In re Zachary G.* (1999) 77 Cal.App.4th 799, 806 (*Zachary G.*); see also *In re Daijah T.* (2000) 83 Cal.App.4th 666, 673.) The petition should be

liberally construed. (*In re Jeremy W.* (1992) 3 Cal.App.4th 1407, 1414.) If the petition fails to state sufficient change of circumstances or new evidence or facts showing it would be in the best interests of the child to modify the order, the petition may be denied without a hearing. (*Zachary G.*, at p. 808.) The juvenile court may rely on its own knowledge of the facts of the case to summarily deny a section 388 petition. (*In re Jamika W.* (1997) 54 Cal.App.4th 1446, 1451.)

The summary denial of a section 388 petition is reviewed for abuse of discretion. (*In re Aaron R.* (2005) 130 Cal.App.4th 697, 705.) The trial court's ruling will not be disturbed on appeal unless the trial court has exceeded the limits of discretion by making an arbitrary, capricious, or patently absurd determination, i.e., the decision exceeds the bounds of reason. (*In re Stephanie M.* (1994) 7 Cal.4th 295, 318-319 (*Stephanie M.*)) "It is rare that the denial of a section 388 motion merits reversal as an abuse of discretion" (*In re Kimberly F.* (1997) 56 Cal.App.4th 519, 522 (*Kimberly F.*)) Having reviewed the record as summarized above, we conclude the juvenile court properly exercised its discretion by denying Mother's section 388 petition without a "full hearing."

1. Denial of Evidentiary Hearing

For purposes of our discussion, we assume, without necessarily deciding, that Mother's petition satisfied both elements of the required prima facie showing and triggered a right to a "full hearing" on the petition. The question presented is whether, as CFS suggests, a hearing based solely on documentary evidence constitutes a "full hearing," or whether Mother was entitled to present additional evidence at the hearing in

the form of her own and others' live testimony in order to refute the evidence submitted in opposition to her petition. Although our state courts have not squarely addressed this question, existing case law and rule 5.570 of the California Rules of Court⁹ indicate that the juvenile court has discretion to determine what, if any, additional evidence is received at a hearing on a section 388 petition, in addition to the documentary evidence previously submitted, except when the petitioner has a procedural due process right to confront and cross-examine witnesses.

Rule 5.570(h) governs the conduct of hearings on section 388 petitions. (*In re Lesly G.* (2008) 162 Cal.App.4th 904, 913 (*Lesly G.*)). It provides that a hearing on a section 388 petition “must be conducted as a disposition hearing under rules 5.690 and 5.695 if: [¶] . . . [¶] . . . There is a due process right to confront and cross-examine witnesses. [¶] Otherwise, proof may be by declaration and other documentary evidence, or by testimony, or both, at the discretion of the court.” (Rule 5.570(h)(2)(C).)

Rule 5.570(h) reflects well established case law. First, it has long been held that juvenile proceedings, including hearings on section 388 petitions, “need not be ‘conducted with all the strict formality of a criminal proceeding.’ [Citations.]” (*Lesly G.*, *supra*, 162 Cal.App.4th at p. 914.) “Due process is a flexible concept which depends upon the circumstances and a balancing of various factors. [Citation.]” (*In re Jeanette V.* (1998) 68 Cal.App.4th 811, 817 (*Jeanette V.*); accord, *Lesly G.*, at p. 914.)

⁹ All further references to rules are to the California Rules of Court.

Furthermore, and as a general rule, “[t]he due process right to present evidence is limited to relevant evidence of significant probative value to the issue before the court.” (*Jeanette V.*, *supra*, 68 Cal.App.4th at p. 817.) Indeed, even in criminal proceedings, “the trial court may properly request an offer of proof if an entire line of cross-examination appears to the court to be irrelevant to the issue before the court.” (*Ibid.*) The juvenile court also has a statutory duty and power to identify issues relevant to the particular hearing and to make relevancy determinations. (*Ingrid E. v. Superior Court* (1999) 75 Cal.App.4th 751, 760; § 350, subd. (a)(1).)

Still, parents in dependency proceedings have a due process right to be “‘heard in a meaningful manner.’” (*Lesly G.*, *supra*, 162 Cal.App.4th at p. 915 & cases cited therein.) This means that, “in particular circumstances,” a parent must be afforded “a ‘meaningful opportunity to cross-examine and controvert the contents’” of CFS reports, including hearsay statements contained within those reports. (*Jeanette V.*, *supra*, 68 Cal.App.4th at pp. 816-817; accord, *Lesly G.*, at p. 915.) “The essential characteristic of due process in the statutory dependency scheme is fairness in the procedure employed by the state to adjudicate a parent’s rights.” (*In re James Q.* (2000) 81 Cal.App.4th 255, 265.)

At the March 21, 2012, pretrial hearing, the court was prepared to hear Mother’s section 388 petition. However, Mother was inexplicably absent. At that time, Mother’s counsel indicated that her only witnesses on the 388 petition would be Mother and the social worker. The court thereafter continued the hearing to March 29, 2012. At the March 29 hearing, the court had before it Mother’s petition and supporting documents,

and the social worker's response. Mother also requested leave to add four additional documents to her petition, which the court granted. The court thereafter evaluated all the evidence presented to determine whether the testimony of Mother and the social worker was needed in light of all the circumstances. Following argument, the court concluded a full evidentiary hearing was not required and denied Mother's petition. Mother maintains she made a prima facie showing of changed circumstances or new evidence, as well as best interests of the children, to justify a full evidentiary hearing. However, she does not argue what additional evidence she would have presented if provided with a "full hearing" or live testimony from Mother and the social worker.

As the foregoing discussion demonstrates, a section 388 petitioner has no absolute, unfettered right to present live, direct testimony at a hearing on the petition, once the court determines whether the petitioner has made the required prima facie showing. Juvenile courts are not required to allow section 388 petitioners to present any and all additional evidence they may wish to present at a hearing on the petition, simply because the petition states a prima facie case or because the proffered evidence is relevant to the issues presented in the petition. A "full hearing" on a section 388 petition is not synonymous with allowing the petitioner to control the proceedings or present unnecessary, duplicative, or irrelevant evidence. (*Jeanette V.*, *supra*, 68 Cal.App.4th at p. 817.)

Nevertheless, a section 388 petitioner has a due process right to be heard in a meaningful manner. (*Lesly G.*, *supra*, 162 Cal.App.4th at p. 915 & cases cited therein.) In this matter, the question before the court was whether Mother's circumstances had

changed such that it would be in the best interests of the younger children to return them to her care, or in the alternative, grant her services. The question we must determine is whether the juvenile court abused its discretion in refusing to hear her testimony, and that of the social worker, prior to denying her section 388 petition. Also, whether Mother had a procedural due process right to present testimony before the petition was denied. We believe Mother had a due process right to present the testimony if, without it, she would not have been heard in a meaningful manner.

As discussed, Mother wanted to present her testimony and that of the social worker. However, she does not argue for what purpose. It was undisputed that Mother had been participating in services and making progress for the past several months. It was also undisputed that Mother had been regularly visiting the children and applying her parenting skills during visitation. It was further undisputed that Father was no longer residing in the family house and Mother was no longer with Father. But how much Mother had learned and was capable of caring for all eight of her children on her own, without the older children's assistance and without placing the younger children at serious risk, were disputed. The social worker did not believe Mother could "handle custody of all eight of her children and that attempting to return the youngest four would be setting [Mother] up for failure and placing the young children at serious risk for abuse and neglect." Mother's testimony presumably would have been that, with additional time, services, and liberalized visitation, she would become capable of caring for and protecting her younger children.

Given the high level of care and attention the younger children required, their young ages, the past physical and emotional abuse they had suffered by the parents, Mother's past conduct in placing her and Father's needs over the needs of her children, and the unknown cause of the baby's skull fractures, we cannot say the juvenile court abused its discretion in refusing to allow testimony from Mother and the social worker. Nor can we say Mother had a procedural due process right to present live testimony or that presenting any testimony was necessary for her to be heard in a meaningful manner. It was undisputed that the younger children required a high level of care and attention in order to develop and thrive. What was disputed was whether Mother was or soon would be capable of meeting the younger children's needs. On this record, the juvenile court reasonably determined that even if Mother was fully dedicated to meeting the younger children's needs, it was unlikely she was or would soon be able to provide the care and attention the younger children required. Mother was still in the process of attempting to resolve her issues after having been involved in services for over a year. The challenge of remaining independent from Father and becoming independent of the older children's assistance in caring for the younger children was a lot for Mother to contend with. Mother had to learn how to care for four additional children, all under the age of six, three of whom had special needs and behavioral issues, without emotionally and physically abusing them.

Mother urges this court not to follow the reasoning of this court's decision in *C.J.W.*, *supra*, 157 Cal.App.4th 1075 on the grounds that the case is distinguishable. Although *C.J.W.* is somewhat distinguishable, that does not change our conclusion that

the juvenile court neither violated Mother's procedural due process rights nor abused its discretion in refusing to conduct a "full hearing." In *C.J.W.*, we held the juvenile court did not violate the parents' procedural due process rights in refusing to allow them to cross-examine the social workers and present unspecified evidence in addition to the documentary evidence they presented in support of their petition. Like in this case, in *C.J.W.* the juvenile court received written evidence and heard argument from counsel for the parties. (*C.J.W.*, at pp. 1080-1081.) Furthermore, similar to this case, the parents in *C.J.W.* failed to identify what additional evidence they wanted to present, and a fair reading of the record showed the juvenile court denied the parents' petition based on the "paucity of evidence" supporting it rather than on information or hearsay statements provided by the social workers. Thus, the hearing in *C.J.W.*, as conducted by the juvenile court, comported with due process. (*Id.* at p. 1081.)

The same is true here. The court held a hearing on Mother's petition. It considered the documentary evidence filed in support of and in opposition to the petition, and allowed Mother's counsel to submit additional documentary evidence. It also allowed Mother's counsel, if counsel chose to do so, to argue the merits of the petition and why the court should have heard additional, live testimony from Mother and the social worker. Although it appears Mother's counsel's argument focused on whether Mother had made a prima facie showing to justify a full hearing, the record does not show that the court prevented Mother's counsel from arguing the merits of the petition or why the court should hear the testimony from Mother and the social worker. Nothing in the record suggests that the court in this case violated Mother's procedural due process

rights in failing to conduct a “full hearing” or hear the testimony of Mother and the social worker. Moreover, like *C.J.W.*, we conclude that “[i]t is not reasonably likely additional testimony would have persuaded the court to grant the section 388 petition[] and offer reunification services to [Mother]. [Citation.]” (*C.J.W.*, *supra*, 157 Cal.App.4th at p. 1081.)

Mother relies on *Aljamie D.*, *supra*, 84 Cal.App.4th 424 and *In re Hashem H.* (1996) 45 Cal.App.4th 1791 (*Hashem H.*), in which the appellate courts reversed the juvenile courts’ summary denial of the parent’s section 388 petitions. Those cases, however, are factually distinguishable. “[T]he petition [in *Aljamie D.*] alleged several concrete changes in the mother’s situation, . . . as well as consistent visitation and strong bonding with the children,” who “repeatedly expressed” their desire to live with their mother. (*In re Angel B.* (2002) 97 Cal.App.4th 454, 462-463.) The mother’s two children in *Aljamie D.* were removed from her care based on the mother’s substance abuse. (*Aljamie D.*, at p. 427.) Eventually, the mother “had tested clean in weekly random drug tests for *over two years*” with the agency conceding the mother had shown changed circumstances. (*Ibid.*, italics added.) These factors are not present here.

Hashem H., *supra*, 45 Cal.App.4th 1791, is likewise distinguishable. There, the appellate court found a *prima facie* case of changed circumstances. The mother’s section 388 petition alleged that she had continuously participated in individual therapy for more than 18 months; she had regularly and consistently visited with her six-year-old son for over one year (including overnight visits); she had participated in conjoint counseling with him; she had a stable job and religious affiliations; and she was able to provide a

stable home for him. (*Hashem H.*, at p. 1799.) These allegations were supported by a letter from the mother’s therapist, which recommended that the child be returned to the mother’s custody. (*Id.* at pp. 1798-1799.) The appellate court held that the juvenile court abused its discretion in denying the mother an evidentiary hearing. (*Id.* at p. 1799.)

Here, there was no similar evidence of completion in this case or a recommendation that the younger children be returned to Mother’s care. Mother still was in therapy and participating in additional parenting and domestic violence classes. In addition, there was no evidence to suggest that Mother was capable of freeing herself from Father or caring for four young children with special needs without becoming frustrated and abusing them emotionally or physically. Additionally, the contents of Mother’s petition and supporting documents come nowhere close to the evidence submitted in *Hashem H.* Mother’s petition here was unsupported by any professional opinion that she had resolved her anger, domestic violence, and parenting concerns noted in the record.

Based on the foregoing, we conclude that the juvenile court did not err by not conducting a “full hearing” on Mother’s section 388 petition.

2. Denial of Mother’s Section 388 Petition

Mother also appears to argue that the juvenile court abused its discretion in denying her section 388 petition on its merits. She argues she met her burden of proving she had changed her circumstances, and that returning the younger children to her care or granting her services and liberalized visitation would have served the children’s best interests.

The procedure under section 388 accommodates the possibility that circumstances may change so as to justify a change in a prior order. (*In re Marilyn H.* (1993) 5 Cal.4th 295, 309 (*Marilyn H.*)) In this case, Mother sought to set aside the juvenile court’s prior order denying her reunification services. Of course, a change of circumstance or new evidence that would justify granting her services must address the basis for the juvenile court’s original order. (*In re A.A.* (2012) 203 Cal.App.4th 597, 612 (*A.A.*) [Fourth Dist., Div. Two].) The juvenile court denied Mother services pursuant to section 361.5, subdivisions (b)(5), (b)(6), and (b)(7), due to the finding that her 11-month-old baby suffered from severe physical harm.

The baby was detained from parental custody and declared a dependent under section 300, subdivision (e), because he had unexplained, nonaccidental skull fractures. When a child under the age of five has suffered severe physical abuse as described in section 300, subdivision (e), because of the parent’s conduct, the juvenile court generally denies services. (§ 361.5, subd. (b)(5); *Raymond C. v. Superior Court* (1997) 55 Cal.App.4th 159, 164.) In such cases, the court can order services only if the court finds services are likely to prevent future abuse or denial of services would be detrimental to the child. (§ 361.5, subd. (c).)

The difficulty faced by Mother in making her case in the juvenile court or on appeal is that neither she nor Father revealed “the problem that initially brought the [baby] within the dependency system” so that the juvenile court could determine whether the problem had been “removed or ameliorated” by the changes in circumstances advanced in Mother’s section 388 petition. (*A.A.*, *supra*, 203 Cal.App.4th at p. 612.) On

an unhelpful and abstract level, one may say that the problem was the fractured skull, which has healed. But without knowing the cause of how the skull was fractured, neither the juvenile court nor we can determine whether circumstances have changed so as to make it likely that the baby will not suffer from severe physical harm again. Likewise, neither the juvenile court nor we can conclude that the circumstances have changed as to make it likely the younger children will not suffer from severe physical harm.

Nevertheless, Mother offers as a changed circumstance that Father is not residing in the family home and she has terminated her relationship with Father. But, Father has not admitted causing the abuse, and Mother has not accused him of causing the abuse. In fact, the record discloses that the abuse could have been caused by Mother as well. Moreover, the record shows that not only was the baby physically abused, but his siblings were abused as well. The female twin had “excessive scarring” and healed burn marks on her body. She also had “absent lingual frenula tissue indicative of . . . facial trauma.” The male twin had possible nail gouge marks and burn scars. Furthermore, Mother drove her car into the female twin and squished her between two cars. Mother thereafter, had to be persuaded to take the child to a doctor. The juvenile court could reasonably determine that it could not neglect the possibility that Mother caused (alone or in concert with Father or by failure to rescue or restrain) some or all of the children’s physical harm, especially in light of her conviction for child abuse. Therefore, since Mother and Father could not or would not explain what really caused the fractures, scars, and marks on the children, which are consistent with child abuse, Mother cannot show any change in the circumstances resulting in her loss of custody of the younger children. Under the

circumstances, the juvenile court could reasonably infer that Mother would fail to prevent future abuse of the children.

Similarly, the juvenile court could reasonably find that receiving reunification services such as parenting training, domestic violence classes, and individual counseling would *not* reduce the likelihood of more physical abuse of the younger children.

Therefore, the juvenile court could reasonably find that Mother had not proven by a preponderance of the evidence that any of the occurrences advanced by Mother qualified as changed circumstances.

Thus, because Mother has never revealed the circumstances resulting in the baby's fractured skull and the scars and marks on his siblings, nor established how she benefitted from the efforts she made, the juvenile court did not abuse its discretion in finding that Mother had not proved by a preponderance of the evidence that her recent efforts at rehabilitation were changed circumstances warranting a modification of the court's denial of reunification services order. (See *Marilyn H.*, *supra*, 5 Cal.4th at p. 309 [burden on parent to show changed circumstances].)

Even assuming *arguendo* that Mother showed changed circumstances, she did not establish that returning the younger children to her care or offering reunification services would be in the younger children's best interests.

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.) By the time of the section 366.26 hearing, the primary consideration in determining the child's best interest is assuring stability and continuity. (*Stephanie M.*, *supra*, 7 Cal.4th at p. 317; see

also *In re Amber M.* (2002) 103 Cal.App.4th 681, 685 [citing *Stephanie M.*, at p. 317, the appellate court reasoned that after services are terminated, the focus shifts to the child's need for permanency and stability].) “[I]n fact, there is a rebuttable presumption that continued foster care is in the best interest of the child. [Citation.]” (*Stephanie M.*, at p. 317.) Accordingly, “[a]t this point in the proceedings, on the eve of the selection and implementation hearing, the children’s interest in stability was the court’s foremost concern, outweighing any interest mother may have in reunification.” (*In re Anthony W.* (2001) 87 Cal.App.4th 246, 251-252.) We review the lower court’s denial of a section 388 petition for abuse of discretion. (*Ibid.*)

On this record, Mother did not establish that the younger children’s need for stability and continuity would be advanced by returning them to her care or by reunification efforts. The past conduct of Mother indicated that there was no guarantee that Mother could adequately protect the younger children or prevent further abuse. By the time of the section 366.26 hearing, Mother was still participating in therapy and parenting and domestic violence services, but had not shown that she was capable of caring for eight children on her own. Moreover, Mother has never explained the cause of the baby’s skull fracture or the scars and marks on his siblings. The injuries could have been caused by Mother or Father or both parents. Significantly, the younger children had not received any new fractures or injuries since being removed from their parents’ custody, and they were thriving in their foster home.

A permanent plan that offered stability was in the younger children's best interests at this stage of the proceedings. The placement is stable and positive for them, and they are adoptable. The opportunity for the younger children to have a permanent adoptive home could be lost as time passed while Mother was given further opportunity to demonstrate the ability to provide a permanent, safe, and stable home for the children. It is not in their best interests for permanence to be delayed for an unknown or indefinite period of time, with no certainty or even likelihood Mother could progress to the point of obtaining custody of the younger children. The juvenile court therefore did not abuse its discretion in determining that it was not in the younger children's best interests to grant Mother's section 388 petition.

In arguing that the requested change in this case is in the younger children's best interests, Mother focuses on the three factors set out in *Kimberly F.*, *supra*, 56 Cal.App.4th 519. The *Kimberly F.* court, after rejecting the juvenile court's comparison of the biological parent's household with that of the adoptive parents as the test for determining the child's best interest, identified three factors, not meant to be exclusive, that juvenile courts should consider in assessing the issue of the child's best interest: (1) the seriousness of the problem that led to dependency and the reason the problem had not been resolved by the time of the final review; (2) the strength of the relative bonds between the child to *both* the child's parent and the child's caretakers and the length of time the child has been in the dependency system in relation to the parental bond; and (3) the degree to which the problem that led to the dependency may be easily removed or ameliorated, and the degree to which it actually has been. (*Id.* at pp. 530-532.)

These factors, however, focus primarily on the parent and fail to take into account our Supreme Court's emphasis on the child's best interest once reunification efforts have failed. (*Stephanie M., supra*, 7 Cal.4th at p. 317.) "[A] primary consideration in determining the child's best interest is the goal of assuring stability and continuity." (*Ibid.*) "When custody continues over a significant period, the child's need for continuity and stability assumes an increasingly important role." (*Ibid.*) Thus, we consider the *Kimberly F.* factors only as they *aid in determining how best to achieve continuity and stability.*

Mother acknowledges that the younger children had "a bond with their caretakers" and "the seriousness" of the problems that led to the younger children's removal, but claims that she also had a bond with the younger children and had demonstrated changed circumstances. She further states that she "was no longer with [F]ather" and "had the tools she needed to avoid exposing her children to abuse and neglect in the future."

Mother had indeed made progress in addressing her parenting and domestic violence issues that led to the younger children's dependency. In addition, she regularly visited them, they were happy to see her, and some of the children may have had a bond with her. Still, the court did not abuse its discretion in denying her petition on its merits. Based on Mother's unhealthy relationship with Father and her past conduct in placing her own and Father's needs over her children, four recent sessions of therapy and about six months of domestic violence and parenting classes are not going to result in ameliorating

the problems that may have led to the younger children's removal.¹⁰ In addition, Mother has never addressed the problem of how the baby and his siblings sustained their physical injuries. She also had not shown that she was capable of caring for four young children, three of whom had special needs, without the assistance of her older children. Thus, with or without live testimony, there was no showing of how granting the petition would have served the best interests of the younger children.

In sum, as much as Mother was to be commended for her efforts to become an effective parent and address her domestic violence and parenting issues, the fact remained that the younger children could not safely be maintained in Mother's home. Therefore, pursuant to *Stephanie M., supra*, 7 Cal.4th at page 317, the juvenile court did not abuse its discretion by denying Mother's section 388 petition.

B. Termination of Parental Rights

Mother also contends that the juvenile court erred by failing to find that the "beneficial parental relationship" exception to termination applied as to the younger children.

In general, at a section 366.26 hearing, if the juvenile court finds that a child is adoptable, it must terminate parental rights. (§ 366.26, subds. (b)(1), (c)(1).) This rule, however, is subject to a number of statutory exceptions (§ 366.26, subds. (c)(1)(A), (c)(1)(B)(i)-(vi)), including the beneficial parental relationship exception, which applies

¹⁰ Mother had completed six months of therapy sessions with her first therapist; however, she did not submit any progress report from that therapist. In addition, the letter submitted from Mother's current therapist is devoid of any progress on the part of Mother.

when “termination would be detrimental to the child” because “[t]he 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).)

“When applying the beneficial parent-child relationship exception, the court balances the strength and quality of the parent-child relationship in a tenuous placement against the security and sense of belonging that a stable family would confer on the child. If severing the existing parental 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.’ [Citation.]” (*In re B.D.* (2008) 159 Cal.App.4th 1218, 1234-1235.)

“‘[F]or the exception to apply, the emotional attachment between the child and parent must be that of parent and child rather than one of being a friendly visitor or friendly nonparent relative, such as an aunt.’ [Citation.]” (*In re Jason J.* (2009) 175 Cal.App.4th 922, 938.) The parent must show more than frequent and loving contact or pleasant visits. (*In re Dakota H.* (2005) 132 Cal.App.4th 212, 229.) “‘A biological parent who has failed to reunify with an adoptable child may not derail adoption merely by showing the child would derive *some* benefit from continuing a relationship maintained during periods of visitation with the parent. [Citation.] A child who has been adjudged a dependent of the juvenile court should not be deprived of an adoptive parent when the natural parent has maintained a relationship that may be *beneficial to some degree*, but that does not meet the child’s need for a parent.’ [Citation.]” (*Jason J.*, at p. 937.)

“The parent contesting the termination of parental rights bears the burden of showing both regular visitation and contact and the benefit to the child in maintaining the parent-child relationship. [Citations.]” (*In re Helen W.* (2007) 150 Cal.App.4th 71, 80-81.) This court must affirm a juvenile court’s rejection of these exceptions if the ruling is supported by substantial evidence. (*Zachary G., supra*, 77 Cal.App.4th at p. 809.) We review “the evidence most favorably to the prevailing party and indulg[e] in all legitimate and reasonable inferences to uphold the court’s ruling.” (*In re S.B.* (2008) 164 Cal.App.4th 289, 297 (*S.B.*)) Because Mother had the burden of proof, we must affirm unless there was “indisputable evidence [in her favor, which] no reasonable trier of fact could have rejected” (*In re Sheila B.* (1993) 19 Cal.App.4th 187, 200.)

Here, Mother could satisfactorily demonstrate that she had maintained regular contact with the younger children within the confines of her visitation order. The social worker acknowledged that Mother was consistently visiting them, and that the visits were appropriate. The social worker also reported that they were excited to see Mother and their half siblings, and that Mother was affectionate toward them. Hence, Mother could adequately show that she had regularly and consistently visited the younger children.

Nonetheless, Mother failed to show that the younger children, who were all under the age of four when they were removed from parental custody, would benefit from continuing the relationship. There was no evidence that they would be harmed, much less “greatly harmed,” by termination of parental rights. (*In re B.D., supra*, 159 Cal.App.4th at pp. 1234-1235.) Although the younger children were affectionate with Mother, were happy to see her, and may have stated that they missed Mother, the

evidence shows that none of them were ever upset at the end of the visits. Additionally, notwithstanding Mother's self-serving statement that the younger children desired to go home with her, there is no evidence in the record to corroborate Mother's claim. In fact, the social worker testified that "[s]ometimes towards the end of the visit the kids will actually stick their heads out of the . . . room and look for [their] foster mom and then run towards her when she walks into the lobby." And, there are no incidents to suggest that the younger children's *primary* attachment was to Mother.

Furthermore, there is insufficient evidence that the younger children would benefit more from continuing their parent-child relationship with Mother than from adoption. They had been out of Mother's care for about 17 months by the time of the 366.26 hearing, and they were doing exceptionally well in the prospective adoptive home, where they had lived for about 12 months. Mother simply did not meet her burden to show that the bond between her and the younger children was so strong and beneficial to the children that it outweighed the benefit the children would receive from having a stable, adoptive home. The prospective adoptive parents had been "very patient, protective and caring to the [younger] children." Also, they were willing to adopt all four of the children and meet their emotional, physical, and educational needs. The children were receiving parental care and guidance from the prospective adoptive parents, going on outings, and receiving individualized care. They appeared to be bonded to the prospective parents and interacted with them as their parental figures.

After having lived through repeated neglect and abuse by Mother, the younger children needed stability, safety, and permanency. Despite the relationships between

Mother and the younger children, and the younger children and their half siblings, having some positive aspects, the evidence was insufficient to establish that the younger children were so bonded with Mother that it would be in their best interests to forego the benefits of adoption. Considering all of the circumstances in this case, the juvenile court reasonably determined that the younger children's need for permanence, stability, and safety outweighed the benefits they would derive from maintaining a relationship with Mother.

Citing to the factors listed in *In re Angel B.*, *supra*, 97 Cal.App.4th 454, Mother claims that termination of parental rights would be detrimental to the younger children because of their ages, the positive interaction between her and the younger children, the time they had spent in Mother's care, and the evidence showing that she could address their particular needs. The record belies this contention. As previously mentioned, the younger children were all under the age of four when they were removed from parental custody. Also, despite some positive interaction with Mother, the younger children appeared to have a greater attachment to their prospective adoptive parents. Moreover, the record fails to show that Mother could meet each of their particular special needs, besides being able to redirect them and calm them down during visits.

Mother also cites *S.B.*, *supra*, 164 Cal.App.4th 289, in which the appellate court concluded that the juvenile court erred in declining to apply the beneficial parental relationship exception since the evidence showed that the child would be "greatly harmed by the loss of her significant, positive relationship" with the father. (*Id.* at p. 301.) In that case, unlike here, the child continued to display a strong attachment to the father

after her removal; she was unhappy when visits ended and tried to leave with the father; and she had desired to live with her father. (*Id.* at pp. 293-294, 298-301.) Most significantly, unlike here, a bonding expert testified there was a potential for the six-year-old child to be harmed if the relationship with her father were severed, and the juvenile court found that the child shared “an emotionally significant relationship” with her father. (*Id.* at pp. 295-296.) Further, the father in that case “complied with ‘every aspect’ of his case plan” and placed the child’s needs above his own. (*Id.* at p. 298.) Here, there was no such testimony from a bonding expert or finding by the juvenile court that the younger children shared an “emotionally significant relationship,” or that Mother placed their needs over her own. Thus, *S.B.* is entirely distinguishable from the instant case. “*S.B.* is confined to its extraordinary facts,” none of which are present here. (*In re C.F.* (2011) 193 Cal.App.4th 549, 558.)

In sum, substantial evidence shows that the younger children were doing very well in their prospective adoptive home, and they were emotionally stable. The younger children were happy in their placement and were building a strong bond with their prospective adoptive parents. They looked to the prospective adoptive parents for comfort and safety, and the prospective adoptive parents were committed to providing a permanent home for the children. We, therefore, conclude that there is substantial evidence to support the juvenile court’s finding that the beneficial parental relationship exception did not apply.

III

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

RAMIREZ
P. J.

We concur:

HOLLENHORST
J.

KING
J.