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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
SIXTH APPELLATE DISTRICT

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

H042873  
(Monterey County  
Super. Ct. Nos. J47706, J47707)

MONTEREY COUNTY DEPARTMENT  
OF SOCIAL & EMPLOYMENT  
SERVICES,

Plaintiff and Respondent,

v.

J.M.,

Defendant and Appellant.

In March 2014, the Monterey County Department of Social and Employment Services (Department) filed two petitions under Welfare and Institutions Code section 300, subdivisions (b) and (g),<sup>1</sup> alleging the failure of the Mother, I.B., and Father, J.M., to protect and supervise their son, J.B. (11 months old; now three), and their daughter, L.B. (a newborn, now two; collectively, the minors). At the time of L.B.'s birth, Mother and L.B. tested positive for methamphetamine. L.B. was placed in protective custody

<sup>1</sup> Further statutory references are to the Welfare and Institutions Code unless otherwise stated.

and was subject to immediate placement into foster care after her discharge from the hospital. Arrangements were made for J.B. and his two older half-siblings, C.B. (now 12) and J.D.B. (now 5), to live temporarily with their maternal aunt. The Department alleged that Mother had a history of substance abuse and an extensive history with child protective services. It also alleged that Father had a history of substance abuse, an extensive criminal record, and was incarcerated.

Reunification services were provided to Mother and Father. Father was imprisoned outside the county throughout the time services were offered. The court terminated Father's services at the six-month review hearing in October 2014. Mother's services were terminated in May 2015, and the court set a selection and implementation hearing pursuant to section 366.26 (.26 hearing). In September 2015, shortly after he was released from prison, Father filed a petition pursuant to section 388 seeking an order vacating the .26 hearing and requesting custody of the minors, or, alternatively, reunification services. On September 29, 2015, the court denied Father's section 388 petition. It then conducted a .26 hearing that was contested by Father. The court (1) found the minors to be adoptable by clear and convincing evidence, and (2) ordered the termination of Mother's and Father's parental rights.

Father appealed from the order denying his section 388 petition. He also appealed from the order after the .26 hearing. But Father presents no argument challenging these orders. Instead, he contends the juvenile court erred throughout the proceedings by denying him visitation with the minors, and that his counsel was ineffective because he failed to raise the issue of visitation until he filed the section 388 petition. Father's appellate claims concerning issues of visitation are not cognizable on appeal, and his ineffective assistance of counsel claim lacks merit. We will therefore affirm the orders.

## FACTS AND PROCEDURAL HISTORY

### *I. Initial March 2014 Petitions and Detention Orders*

On March 6, 2014, the Department filed two petitions alleging that Mother and Father had failed to protect or supervise the minors. (§ 300, subd. (b).)<sup>2</sup> The petitions also alleged the minors had been left without any provision for support due to Father's incarceration. (§ 300, subd. (g).)

L.B. was born at Watsonville Community Hospital in March 2014. L.B. and Mother both tested positive for methamphetamine. Mother admitted having used methamphetamine during her pregnancy. A few days after her birth, L.B. was taken into protective custody to be placed directly into foster care after her discharge from the hospital. In addition, due to Mother's inability to maintain sobriety or to provide a safe environment for her children, the Department made arrangements for C.B., J.D.B., and J.B. to live temporarily with their maternal aunt.

The Department alleged in the petitions<sup>3</sup> that Mother had given birth to five children. Mother had a lengthy history with the Department "dating back to 2005 due to [M]other's substance abuse, [the] physical and sexual abuse of [the minors' half-sister, C.B.] and neglect of the children." In April 2008, C.B. and J.D.B. were detained as a result of Mother's substance abuse and her sexual abuse of C.B. J.D.B. died in July 2008, two months after his birth. In May 2009, C.B. was returned to Mother's care. In November 2009, the dependency proceedings that had commenced in 2008 were dismissed. Since that time, there had been nine referrals.

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<sup>2</sup> Separate petitions were filed on behalf of the minors' half-siblings, C.B. and J.D.B. Those proceedings are not at issue in this appeal.

<sup>3</sup> The statements made in this paragraph and in the succeeding paragraphs of this section are based upon the allegations made by the Department in its petitions. For simplicity and to avoid repetition, we have generally omitted the phrase "the Department alleges in its petitions" in describing the allegations in the petitions.

Father had “a criminal and substance abuse history that impair[ed] his ability to care for his children.” There was a four-year protective order issued by the court in February 2013 protecting Mother from Father’s perpetration of domestic violence. Father was arrested shortly after L.B.’s birth and was in custody in the Monterey County Jail on multiple warrants.

On March 7, 2014, the court ordered the minors detained pursuant to section 319, subdivision (b).

*II. April 2014 Jurisdiction/Disposition Report, Assessment, and Hearing*

In its April 2014 jurisdiction/disposition report, the Department reported that C.B. and JD.B. had been placed with their maternal uncle and aunt. The minors, J.B. and L.B., had been placed in a concurrent foster home in Campbell.

While Mother was pregnant with JD.B., she met Father and they moved in together shortly thereafter. During her pregnancy with J.B., Father physically abused Mother, who reported the abuse to police. Father was arrested and was in custody at the time J.B. was born. Mother indicated that she had attempted unsuccessfully to end the relationship. After he was released from jail, Father moved into the one-bedroom trailer where Mother lived, despite the existence of a restraining order preventing him from contacting Mother. Shortly thereafter, Mother became pregnant with L.B. Mother said she had used methamphetamine only once during her pregnancy, and immediately thereafter went into labor.

Father was arrested on March 4, 2014, because he had failed to report to his probation officer. He was also charged with conspiracy, child endangerment, and selling or furnishing methamphetamine based upon Mother’s report that he had supplied her with drugs while she was pregnant with L.B.

Father reported that he had begun smoking methamphetamine and drinking alcohol when he was 20, and that he had become addicted. This addiction resulted in his criminal prosecution for drug possession and drug sales. He had also been convicted of

battery, assault, making criminal threats, and violation of a restraining order. He admitted that he had anger management issues that were exacerbated when he was under the influence of intoxicants. He also admitted that he had been physically abusive toward Mother. Father advised that Mother—contrary to her statements that she had used methamphetamine only once shortly before she gave birth to L.B.—began using methamphetamine when she was four-months pregnant with L.B., and she had continued to use methamphetamine once or twice a week throughout her pregnancy. Father stated that he would use methamphetamine with Mother and would supply her with the drug during her pregnancy.

Father expressed a desire to do whatever was required to be with the minors, but he had been unable to participate in most of his case plan due to his incarceration. Father had completed his workbooks and had regularly contacted the social worker to ask about the minors and to inquire what actions he needed to take. Although Father had said he would do whatever was required to be with the minors, including not resuming a relationship with Mother, he continued to try to contact Mother despite the existence of a restraining order. On April 2 and 3, for instance, he left a total of 45 voicemail messages for Mother.

There had been no visitation between Father and the minors because of Father's incarceration. Father advised that he expected to be released from jail on April 25, 2014. The Department recommended that (1) the minors be made dependents under section 300, subdivision (b), (2) the minors remain in out-of-home care, (3) the minors, C.B., and J.D.B. be considered a sibling group (§ 361.5, subd. (a)(3)), (4) Mother and Father receive reunification services; (5) Mother receive supervised visitation, and (6) Father receive supervised visitation upon his release from custody.

In a family mental health assessment filed by Kelli McDougall, Psy.D., after the filing of the Department's report, Dr. McDougall noted that C.B. had said that Father "yells a lot" and that Father and Mother fought and "he hit her." C.B. also said that

when Father “was ‘being mean’ to [Mother], they would . . . go visit a friend of [Mother’s]. Later in the assessment, [C.B.] seemed to relax and admitted that [Mother] and [Father] ‘should not be together.’” C.B. said that Mother had “tried to ‘get away’ from [Father] and that people kept telling him where they were living.”

The jurisdiction/disposition hearing was held on April 22, 2014. Father (still in custody) appeared and was represented by counsel. Counsel for the Department stated that “the parents need to understand that [services] may be limited to just six months. We need to see some consistent hard work on their part.” Father’s counsel indicated that his client had completed his workbooks and anticipated being released from custody within a week. Father was “interested in being active in reuniting with his children.” Father’s counsel submitted on the question of jurisdiction. Neither Father nor his counsel raised the issue of visitation.

The court sustained the allegations of the petitions, found it had jurisdiction over the minors pursuant to section 300, subdivisions (b) and (g), and adopted the recommendations of the Department. The court ordered family reunification services for Mother and Father, supervised visitation of the minors by Mother, and, upon his release from custody, supervised visitation by Father.

### *III. Department’s October 2014 Status Report and Six-Month Review Hearing*

In an October 9, 2014 status report, the Department reported that the minors continued to reside in a concurrent foster family home in Campbell. Mother entered a residential treatment program, Door to Hope, on May 15 and completed the program on September 22, 2014. The Department noted that Mother had “taken full responsibility for her action, ha[d] been motivated to learning new coping skills, and parenting skills[, and] . . . ha[d] demonstrated on several occasions to be committed to her recovery process and emotional healing process.”

After Father pleaded no contest to aggravated assault (Pen. Code, § 245, subd. (a)(4)) and making a threat to commit a criminal act resulting in death or serious bodily

injury (Pen. Code, § 422, subd. (a)), he was sentenced on April 25, 2014, to three years eight months in prison. As of the date of the report, Father was incarcerated in Avenal State Prison, where it was anticipated he would remain until approximately June 2015. Father had maintained regular contact with the Department. He reported that he was participating in domestic violence classes and Alcoholics Anonymous meetings.

In a letter of August 28, 2014, the social worker advised Father to contact his attorney “as the Department will be recommending terminating your services at the 6[-]month hearing scheduled for October 21, 2014.” In the same letter, the social worker said she had previously asked that Father not inquire about Mother due to the outstanding restraining order. The social worker noted that she had learned that Father had been sending letters to Mother at her brother’s home and this was a concern “due to the . . . domestic violence dynamics in [Father’s] home.” The social worker also responded to Father’s request for visits with the minors, stating that “due to their young age, the distance of the drive, and amount of travel time in the car<sub>[,]</sub> visits at this time would not be beneficial to [the minors].”

The Department reported there had been no visits between Father and the minors because of Father’s incarceration at Avenal State Prison, and it did not recommend that any visits take place there. The Department recommended that the court grant Mother an additional six months of reunification services, indicating it was likely Mother would reunify with her children within the time permitted by law. But the Department noted that Father’s incarceration was expected to continue through approximately June 2015. It said, “Given the extensive domestic violence and [Father’s] apparent lack of insight into how his behavior impacted [M]other and his children<sub>[,]</sub> it is not likely that he would be able to be a safe or appropriate parent for [J.B.] and [L.B.]” It also noted that Father “continues to struggle with the dynamics of domestic violence” as demonstrated by his conversations with the social worker regarding Mother and the fact that, despite his denials, he continued to write letters to Mother that included “inappropriate comments

and statements.” The Department concluded that return of the minors to Father would create a substantial risk of detriment to the minors’ safety, protection, and physical and emotional well-being, and that it was unlikely that, if Father were granted more time, he would be able to reunify with the minors within the time allowed by law. It accordingly recommended that Father’s reunification services be terminated.

In a supplemental submission, the Department attached six letters from Father that had been sent to Mother. Each was delivered by Mother to the social worker sealed and unopened. In the letters—despite the social worker’s having told Father that he should refrain from inquiring about or writing to Mother and that Mother wanted no contact with him—Father repeatedly (1) instructed Mother to “be faithful”; (2) cautioned her, “Remember<sub>[,]</sub> we are engaged”; (3) referred to their upcoming wedding after his release from prison; and (4) identified himself as her fiancé or husband.

On October 21, 2014, the court conducted a six-month review hearing that was uncontested. Father’s counsel appeared, but Father was not present due to his incarceration. Father’s counsel submitted the matter on the Department’s report. Father’s counsel did not oppose the Department’s recommendation to terminate Father’s services, and he did not raise an objection or issue concerning visitation of the minors. Father’s counsel stated: “Although [Father’s] services are being terminated, he’s still taking advantage of what’s available in prison. He’s doing workbook[s], taking classes. I told him to continue with that. [¶]I’ll submit on the report.”

The court continued reunification services for Mother, but terminated Father’s services. It concluded that, based upon clear and convincing evidence, there was not a substantial probability the minors would be returned to Father within a six-month period. The court ordered that there be no visitation between Father and the minors until either the Department determined it would be safe or the court so ordered.

#### *IV. Department's April 2015 Report and 12-Month Review Hearing*

On April 1, 2015, the Department submitted its report in connection with the 12-month review hearing. It reported that both minors were in good health and they had adjusted well to their foster home. Mother's visits with the minors had gone well for the review period. But in March, the Department learned that Mother had relapsed, testing positive for methamphetamine. The Department also reported that Father, due to his incarceration, had not had any visits with the minors, and it did not recommend visitation at the present time. It recommended that Mother's reunification services be terminated.

On May 26, 2015, the court conducted a 12-month review hearing that was contested by Mother. Mother and her counsel were present. Father's counsel appeared, but Father was not present. After hearing an unsworn statement by Mother, the court found there was not a substantial probability the minors would be returned to Mother's physical custody and safely maintained in the home within 18 months of the minors' initial removal. It therefore adopted the Department's recommended findings and terminated Mother's reunification services. The court scheduled a .26 hearing pursuant to section 366.26 on September 22, 2015.

#### *V. October 2015 Selection and Implementation Hearing Report*

On September 8, 2015, the Department submitted its report for the .26 hearing. It reported that the minors continued to be doing well in their foster home. It also reported that due to Father's incarceration, visitation with the minors had not been arranged. Father had been released from prison on August 17, 2015. Father reported that he was sober, had "changed his ways," and was employed at Taylor Farms, working a graveyard shift. He also gave conflicting information to the Department regarding his living arrangements. He initially stated he was living with his sister and provided an address. After certified mail was sent there, Father's brother-in-law became upset and refused the mail. Father later reported he was living with his father, but could not provide his father's address because he did not have it memorized.

The minors had lived in the same foster home for approximately one and one-half years, and it was the only home L.B. had known. The minors' foster family had expressed that they were fully committed to adopting the minors. They had "an approved adoption home study through The Kinship Center." The Department concluded that although the minors were too young to understand adoption, they were both "clearly bonded to their current prospective adoptive parents . . . [and appeared to be] well cared for, comfortable, and safe in their prospective adoptive parents' home."

The prospective adoptive parents were open to having some form of contact with Mother and Father. They indicated that since Father was out of prison, they were amenable to meeting him before the permanency planning hearing so that they could get acquainted with each other.

The Department recommended there be no visitation between Father and the minors. It was concerned with: (1) the length of Father's incarceration; (2) the fact that Father's services had been terminated nearly a year earlier; (3) the fact that the minors were "establishing permanence with their prospective adoptive parents"; (4) the absence of any relationship between Father and L.B., since Father was incarcerated a few days after L.B.'s birth; and (5) the uncertainty of how J.B. would receive contact with Father, since it was known that J.B. had observed domestic violence between Father and Mother.

The Department concluded that the minors were adoptable both generally and specifically, and it recommended that the juvenile court select adoption for the minors as the permanent plan. It also recommended further that Mother's and Father's parental rights be terminated.

#### *VI. Petition for Change of Order*

On September 17, 2015, Father filed a petition pursuant to section 388. He sought an order returning the minors to his care or, at a minimum, that he be provided reunification services. He alleged that he had been released from prison, had completed

various educational courses, and had been denied reasonable visitation with the minors while he was incarcerated and after his release in August.

*VII. September 2015 .26 Hearing*

At the .26 hearing held on September 29, 2015, the court initially considered Father's section 388 petition. After argument, the court denied the petition, finding that Father had not made a prima facie showing entitling him to a hearing on the petition. The court then conducted the .26 hearing. After hearing argument, the court found by clear and convincing evidence that the minors were adoptable, and it approved the permanent plan of adoption for both minors. The court terminated the parental rights of Mother and Father. It set a permanent placement review hearing for March 22, 2016.

Father filed a timely notice of appeal in connection with the order entered in L.B.'s proceeding. Although Father did not file a notice of appeal in J.B.'s proceeding, we have deemed the notice of appeal filed in L.B.'s proceeding—after liberally construing the notice (Cal. Rules of Court, rule 8.100(a)(2))—to be a timely notice of appeal of the order entered in J.B.'s proceeding.<sup>4</sup> We also issued a temporary stay of the two proceedings to consider the merits of this appeal. The orders entered in the two proceedings are ones from which an appeal lies. (§ 366.26, subd. (i)(1); see *In re Matthew C.* (1993) 6 Cal.4th 386, 393, superseded by statute on another point as stated in *People v. Mena* (2012) 54 Cal.4th 146, 156.)

## DISCUSSION

*I. Applicable Law*

*A. Dependency Law Generally*

Section 300 et seq. provides “a comprehensive statutory scheme establishing procedures for the juvenile court to follow when and after a child is removed from the

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<sup>4</sup> All rule references are to the California Rules of Court.

home for the child’s welfare. [Citations.]” (*In re Celine R.* (2003) 31 Cal.4th 45, 52.) As our high court has explained: “The objective of the dependency scheme is to protect abused or neglected children and those at substantial risk thereof and to provide permanent, stable homes if those children cannot be returned home within a prescribed period of time. [Citations.] Although a parent’s interest in the care, custody and companionship of a child is a liberty interest that may not be interfered with in the absence of a compelling state interest, the welfare of a child is a compelling state interest that a state has not only a right, but a duty, to protect. [Citations.] The Legislature has declared that California has an interest in providing stable, permanent homes for children who have been removed from parental custody and for whom reunification efforts with their parents have been unsuccessful. [Citations.] This interest is a compelling one. [Citation.]” (*In re Marilyn H.* (1993) 5 Cal.4th 295, 307.)

After it has been adjudicated that a child is a dependent of the juvenile court, the exclusive procedure for establishing the permanent plan for the child is the selection and implementation hearing as provided under section 366.26. The essential purpose of the hearing is for the court “to provide stable, permanent homes for these children.” (§ 366.26, subd. (b); see *In re Jose V.* (1996) 50 Cal.App.4th 1792, 1797.) There are six statutory choices for the permanency plan; the preferred choice is adoption, coupled with an order terminating parental rights. (§ 366.26, subd. (b); see also *In re Celine R.*, *supra*, 31 Cal.4th at p. 53.) The court selects this option if it “determines . . . by a clear and convincing standard, that it is likely the child will be adopted.” (§ 366.26, subd. (c)(1).) Thus, at the .26 hearing, “in order to terminate parental rights, the court need only make two findings: (1) that there is clear and convincing evidence that the minor will be adopted; and (2) that there has been a previous determination that reunification services shall be terminated.” (*Cynthia D. v. Superior Court* (1993) 5 Cal.4th 242, 249-250.)

## B. Section 388 Petitions to Request Change of Order

After the court has determined the child to be a dependent of the juvenile court, “[a]ny parent or other person having an interest in the child” may petition the court to change, modify or set aside a previous juvenile court order based upon a change of circumstances or new evidence. (§ 388, subd. (a)(1).) A petition under section 388 is appropriate to seek a change of a prior guardianship order and to change custody to have a child returned to the parent. (*In re Michael D.* (1996) 51 Cal.App.4th 1074, 1090, 1086-1087.)

If the court determines from the petition that “it appears that the best interests of the child . . . may be promoted by the proposed change of order,” it shall schedule a hearing on the matter. (§ 388, subd. (d) (hereafter, § 388(d)).) A section 388 petition is to be liberally construed in favor of its sufficiency. (*In re Jasmon O.* (1994) 8 Cal.4th 398, 415; see also rule, 5.570(a).) A parent seeking modification of a prior court order pursuant to a section 388 petition must “make a prima facie showing to trigger the right to proceed by way of a full hearing. [Citation.]” (*In re Marilyn H., supra*, 5 Cal.4th at p. 310.) “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 Anthony W.* (2001) 87 Cal.App.4th 246, 250; see also rule 5.570(d).)

The parent’s burden of showing that changed circumstances are sufficient such that the child’s interests would be promoted by modifying a prior order “is a difficult [one] to meet in many cases, and particularly so when . . . reunification services have been terminated or never ordered. After the termination of reunification services, a parent’s interest in the care, custody and companionship of the child is no longer paramount. [Citation.] Rather, at this point, the focus shifts to the needs of the child for permanency and stability. [Citation.]” (*In re Angel B.* (2002) 97 Cal.App.4th 454, 464.)

A determination on whether to change an order by granting a section 388 petition “is ‘committed to the sound discretion of the juvenile court, and [its] ruling should not be disturbed on appeal unless an abuse of discretion is clearly established.’ [Citation.] An abuse of discretion occurs when the juvenile court has exceeded the bounds of reason by making an arbitrary, capricious or patently absurd determination. [Citation.]” (*In re Marcelo B.* (2012) 209 Cal.App.4th 635, 642, quoting and citing *In re Stephanie M.* (1994) 7 Cal.4th 295, 318.) This abuse of discretion standard also applies where the court denies a section 388 petition without an evidentiary hearing. (*In re G. B.* (2014) 227 Cal.App.4th 1147, 1158.)

## *II. Father’s Appeal*

### A. Background and Parties’ Contentions

Father made several assertions in support of his section 388 petition. First, he stated that prior to his incarceration in March 2014, he had been J.B.’s primary caregiver, and he had quit his job to care for J.B. Second, he identified a number of courses and programs he had completed in prison while the proceedings were pending. Third, he indicated he had been released from prison, was living in Salinas, and had fulltime employment. And fourth, he asserted that he was denied reasonable visitation with the minors, both while in prison and after his parole. He stated that the Department made “no effort to ever provide or *attempt to provide* visitation.” (Original italics.)

At the proceedings on September 29, 2015, the court concluded there were changed circumstances. But it found that the best interests of the minors would not be promoted by the requested change of order. Accordingly, the court denied Father’s petition without an evidentiary hearing. In his reply brief, Father makes clear that he does *not* contest that ruling here. Nor do his appellate briefs specifically address a challenge to the order entered after the .26 hearing. Instead, Father’s overarching contention is that throughout the proceedings he was denied visitation with the minors,

and that this denial was without justification. He therefore asserts that the ultimate termination of parental rights at the .26 hearing cannot stand.

Father acknowledges he did not seek timely review of prior orders concerning visitation or of the order terminating his reunification services. But he contends he did not forfeit his right to challenge the prior orders at this stage because he was not given proper contemporaneous advisements of his appellate rights. He argues that his failure to object below should not result in a forfeiture of his appellate challenge to the denial of visitation because the forfeiture rule is not automatic and is not applied when it conflicts with due process. Alternatively, he argues, if we were to conclude that he forfeited his claims, he is nonetheless entitled to consideration of them because his trial attorney was ineffective in failing to raise the denial of his visitation rights throughout the proceedings.

#### B. Failure to Raise Appellate Challenges to Prior Orders

Father's argument that he was improperly denied visitation rights is fundamentally a challenge to three orders made prior to the September 29, 2015 orders from which this appeal is taken: (1) the order after the jurisdiction/disposition hearing on April 22, 2014, in which the court granted Father services and visitation of the minors based upon a finding that such visitation, "upon [Father's] release from incarceration, . . . would not be detrimental to the children"; (2) the order at the six-month review hearing on October 21, 2014, terminating Father's services and finding that Father's visitation of the minors would be detrimental to the children; and (3) the order after the twelve-month review hearing on May 26, 2015, terminating Mother's services, finding that Father's visitation of the minors would be detrimental to the children, and setting a .26 hearing.

A disposition order is the first appealable order in a dependency case. (§ 395, subd. (a)(1); see *In re T.W.* (2011) 197 Cal.App.4th 723, 729.) And an order terminating services after a six-month review hearing, where a court does not set a .26 hearing, is appealable. (§ 395, subd. (a)(1); *Wanda B. v. Superior Court* (1996) 41 Cal.App.4th 1391, 1395-1396.) But an order setting a .26 hearing is not immediately appealable.

Appellate review of that order must first be sought by an extraordinary writ to preserve a right to appeal. (§ 366.26(l).) Here, Father did not appeal the jurisdiction/disposition order or the order terminating services at the six-month review hearing. Nor did he challenge the order setting a .26 hearing by filing an extraordinary writ.

A party may not, through an appeal of the most recent dependency order, challenge a prior order for which the statutory time for a notice of appeal has expired. (*In re Liliana S.* (2004) 115 Cal.App.4th 585, 589; see also *In re Meranda P.* (1997) 56 Cal.App.4th 1143, 1150 [“an unappealed disposition or postdisposition order is final and binding and may not be attacked on an appeal from a later appealable order”].) “[This] rule serves vital policy considerations of promoting finality and reasonable expedition, in a carefully balanced legislative scheme, and preventing late-stage ‘sabotage of the process’ through a parent’s attacks on earlier orders. [Citation.]” (*In re Jesse W.* (2001) 93 Cal.App.4th 349, 355; accord, *Dwayne P. v. Superior Court* (2002) 103 Cal.App.4th 247, 259.) Thus, settled principles of appellate review and finality generally prevent us from addressing Father’s concerns that he was not offered reasonable visitation. (*In re Liliana S.*, at p. 589; *In re Megan B.* (1991) 235 Cal.App.3d 942, 950; *In re Elizabeth M.* (1991) 232 Cal.App.3d 553, 563.)

Father acknowledges these general principles. But he contends that under rule 5.590, and under *In re A.O.* (2015) 242 Cal.App.4th 145, his appellate challenges to the three prior orders are not barred because he was not properly advised of his appellate rights after entry of those orders. Each of these orders is discussed below.

### 1. *The Disposition Order*

In *In re A.O.*, the mother appealed from orders after the six- and twelve-month review hearings and she challenged the disposition order. (*In re A.O.*, *supra*, 242 Cal.App.4th at p. 147.) She did not file a timely appeal from the disposition order, but argued that her challenge should be heard because the court failed to advise her of her right to appeal when the disposition hearing concluded, as required by rule 5.590(a). (*In*

*re A.O.*, at p. 147.) Rule 5.590(a) provides: “If at a contested hearing on an issue of fact or law the court finds that the child is described by Welfare and Institutions Code section 300, 601, or 602 or sustains a supplemental or subsequent petition, the court after making its disposition order . . . must advise, orally or in writing, the child, . . . and, *if present*, the parent or guardian of: [¶] (1) The right of the child, parent, and guardian to appeal from the court order if there is a right to appeal; [¶] (2) The necessary steps and time for taking an appeal; [¶] (3) The right of an indigent appellant to have counsel appointed by the reviewing court; and [¶] (4) The right of an indigent appellant to be provided with a free copy of the transcript.” (Emphasis added.) The *In re A.O.* court agreed with the mother’s position in that case, concluding that the failure to advise the mother of her appellate rights as required by rule 5.590(a) was “a ‘special circumstance[] constituting an excuse for failure to timely appeal.’” [Citation.]” (*In re A.O.*, at p. 149.) The court then considered the mother’s challenge to the jurisdiction/disposition order as an extraordinary writ petition. (*Ibid.*)

Recently, in *In re Albert A.* (2016) 243 Cal.App.4th 1220, the same court that decided *In re A.O.* rejected a mother’s claim that she was excused from timely appealing a disposition order due to a lack of notification of appellate rights. There, the mother was not present at the time of the jurisdiction hearing. (*In re Albert A.*, at pp. 1229, 1236.) The mother’s counsel did not object to the submission of the agency’s reports into evidence, but counsel did not object to the allegations in the petitions and argued that the mother had not caused her children severe emotional damage. (*Id.* at pp. 1229-1230.) The agency argued that the mother was not entitled to notice of her right to appeal the disposition order because “(1) the jurisdiction hearing was not ‘contested’; and (2) mother was not ‘present’ at the hearing.” (*Id.* at p. 1235.)

The *In re Albert A.* court rejected the agency’s first argument, concluding that although the mother’s counsel agreed to submit the case on the agency’s reports and did not offer affirmative evidence, these actions did not constitute a waiver of appellate

rights. (*In re Albert A., supra*, 243 Cal.App.4th at p. 1236.) The court concluded that the mother “ ‘contested’ the jurisdiction findings for purposes of rule 5.590(a)” given the objection to the allegations in the petition. (*Ibid.*) But the court went on to hold that because the mother was not present at the jurisdiction hearing, she was not entitled to notice of her right to appeal, since under rule 5.590(a), the parent, “ ‘*if present,*’ ” is entitled to written or oral notice of his or her right to appeal. (*In re Albert A.*, at p. 1236, original italics.)

Here, the record shows that Father was present for the jurisdiction/disposition hearing on April 22, 2014. But the record is unclear as to whether the court advised Father of his right to appeal the order. The minute order recites that an oral advisement was given to the parents. But there is nothing in the reporter’s transcript indicating that the court gave such an advisement. And the record does not show that Father was given written notice of his appellate rights.

The minute order reflects that the jurisdiction hearing was uncontested. Father’s counsel indicated he would “[s]ubmit on jurisdiction.” Likewise, Mother’s counsel indicated she would “submit on the report.” Neither counsel offered evidence, argument, or objections to the petitions’ allegations or to the Department’s recommendations. Thus, unlike the circumstances in *In re Albert A., supra*, 243 Cal.App.4th 1220, there was no objection to the allegations of the petitions or to the Department’s recommendations. Nor was there any other opposition voiced on behalf of the parents in connection with the jurisdiction/disposition hearing. Under these circumstances, we conclude this was not a “contested hearing on an issue of fact or law” that would have triggered the notice requirements of rule 5.590(a). Therefore, Father’s reliance on *In re A.O., supra*, 242 Cal.App.4th 145, is misplaced, and he is barred from challenging the order entered after the jurisdiction/disposition hearing. (*In re Liliana S., supra*, 115 Cal.App.4th at p. 589.)

## 2. *Order After Six-Month Review Hearing*

Father objects repeatedly in his opening brief that he was not mailed an advisement of his right to challenge the order after the six-month hearing. But he cites no authority for the proposition that he was entitled to written notice from the court of his right to challenge the order. And he acknowledges he did not appear at the hearing, and that his counsel submitted the matter on the Department's report. Since rule 5.590(a)—assuming its potential application to a contested six-month review hearing—requires notice only to a parent who has attended the hearing, it has no application here. Therefore, Father's challenge to the order terminating his services is barred. (*In re Liliana S.*, *supra*, 115 Cal.App.4th at p. 589.)

## 3. *Order After Twelve-Month Review Hearing*

Father did not appear at the twelve-month review hearing on May 26, 2015, but his counsel was present. After conducting the hearing, which was contested by Mother, the court, among other things, terminated Mother's services and scheduled a .26 hearing. Although the minute order includes an advisement that any party wishing to preserve an appeal was required to seek an extraordinary writ by filing a notice of intention to file a writ petition within seven days of the order, there is no record that this order, or any other notice containing such an advisement, was sent to the parties.

“An order setting a section 366.26 hearing ‘is not appealable; direct appellate consideration of the propriety of the setting order may be had only by petition for extraordinary writ review of the order. [Citations.]’ [Citation.]” (*Jennifer T. v. Superior Court* (2007) 159 Cal.App.4th 254, 259; see § 366.26, subd. (l).) Ordinarily, unless a party has filed a writ petition supported by an adequate record that challenges specific issues in the order *and* the petition is summarily denied or otherwise not decided on the merits, that party may not seek review of the order through an appeal. (§ 366.26, subd. (l).) Rule 5.590(b)(1) requires that the court orally advise “all parties, and if present, the child's parent, guardian, or adult relative” that a party wishing to challenge the order

setting a .26 hearing must seek an extraordinary writ. In addition, within one day after ordering a .26 hearing, the court is required to send written notice of that advisement. (Rule 5.590(b)(2).)

As noted, the record does not reflect that written notice about seeking an extraordinary writ was sent by the court within one day of the hearing. We will therefore relieve Father of the requirement under subdivision *l* of section 366.26 of filing an extraordinary writ petition, and we will address his contentions concerning the merits of the order setting the .26 hearing. (*In re Cathina W.* (1998) 68 Cal.App.4th 716, 721-724 [notwithstanding her failure to seek writ review, mother entitled to review of an order setting a .26 hearing in later appeal of order terminating parental rights due to untimely and defective notice]; see also *Maggie S. v. Superior Court* (2013) 220 Cal.App.4th 662, 671 [mother's appeal of order setting .26 hearing deemed a timely petition for extraordinary writ, due to absence of oral notice of the writ requirement].)

### C. Father's Challenges to Prior Orders Are Forfeited

Father argues that a series of rulings by the court concerning visitation were erroneous and “[pre]ordained his loss of parental rights.” (Emphasis omitted.) He argues that “the juvenile court’s elimination of visitation since [the] inception of this case, without clear and convincing evidence of detriment to his children, which lead [sic] inevitably to the loss of his parental rights, was an abuse of discretion that stripped Father of his due process rights to parent his children with minimal government interference.” He identifies (1) the order at the jurisdiction/disposition hearing providing for “no visitation until his release [from incarceration]”; (2) the order terminating services, which included a finding that visitation of the minors by Father “would be detrimental to the child”; and (3) the order after the twelve-month review hearing, which included in an attachment the finding that “[v]isitation with the children by the father[s], as set forth in the report of [the] court social worker, would be detrimental to the child.”

As discussed, the disposition and six-month review orders, having not been the subject of timely appeals, are not subject to challenge. (*In re Liliana S.*, *supra*, 115 Cal.App.4th at p. 589.) With respect to Father’s challenge to the order after the twelve-month review hearing, we find this claim is forfeited.

An appellate court, as a general rule, “will not consider a challenge to a ruling if an objection could have been but was not made in the trial court. [Citation.]” (*In re S.B.* (2004) 32 Cal.4th 1287, 1293, superseded by statute on other grounds as stated in *In re S.J.* (2008) 167 Cal.App.4th 953, 962.) The rationale for this principle of forfeiture “is to encourage parties to bring errors to the attention of the trial court, so that they may be corrected. [Citation.]” (*In re S.B.*, at p. 1293; see also *Doers v. Golden Gate Bridge etc. Dist.* (1979) 23 Cal.3d 180, 184-185, fn. 1 (*Doers*) [explaining that permitting appellant to assert unpreserved claims would be unfair to adverse party and trial judge when matter “ ‘could easily have been corrected at the trial’ ”].)

The forfeiture rule applies to dependency cases. (*In re S.B.*, *supra*, 32 Cal.4th at p. 1293.) Thus, in a variety of instances, reviewing courts have not considered claims that were not preserved at trial by appellants. (See, e.g., *Kevin R. v. Superior Court* (2010) 191 Cal.App.4th 676, 685 [forfeiture of claim that court unlawfully delegated its visitation authority to father’s parole officer]; *In re Erik P.* (2002) 104 Cal.App.4th 395, 403 [forfeiture of father’s claim that sibling relationship applied as exception to termination of parental rights at .26 hearing]; *In re Anthony P.* (1995) 39 Cal.App.4th 635, 640-642 [forfeiture of claim for failure to raise sibling visitation issue in superior court].)

Father’s counsel appeared at the twelve-month review hearing. At the hearing, he did not address any issues, other than to state his appearance and to note that Father was not receiving services. He did not object to his client’s lack of visitation of the minors. Thus, Father has forfeited his appellate challenge to the finding that his visitation with the minors would be detrimental to them. (*In re S.B.*, *supra*, 32 Cal.4th at p. 1293; see also

*In re Anthony P.*, *supra*, 39 Cal.App.4th at pp. 640-642 [appellate challenge to sibling visitation issue forfeited].) His failure to raise the issue of visitation below precluded the trial court from addressing those concerns. (*Doers*, *supra*, 23 Cal.3d at pp. 184-185, fn. 1.)

Father argues that application of the forfeiture rule is not automatic, and that it is appropriate for an appellate court to excuse forfeiture where there is an important legal issue presented. He argues that appellate courts are particularly averse to apply the forfeiture rule where doing so conflicts with due process.

It is true that the forfeiture rule is not automatically applied, but “the appellate court’s discretion to excuse forfeiture should be exercised rarely and only in cases presenting an important legal issue. [Citations.]” (*In re S.B.*, *supra*, 32 Cal.4th at p. 1293.) The Supreme Court has emphasized that while the discretion to hear forfeited claims exists with dependency cases, “the discretion must be exercised with special care in such matters. ‘Dependency proceedings in the juvenile court are special proceedings with their own set of rules, governed, in general, by the Welfare and Institutions Code.’ [Citation.] Because these proceedings involve the well-being of children, considerations such as permanency and stability are of paramount importance. [Citation.]” (*Ibid.*)

Here, we do not find the forfeited issue to implicate an important legal issue or present a conflict with due process. Because “considerations such as permanency and stability are of paramount importance” (*In re S.B.*, *supra*, 32 Cal.4th at p. 1293), we disagree that Father’s challenge presents the rare instance in which it would be appropriate to excuse forfeiture. We will therefore not address Father’s forfeited challenge to the visitation order entered at the twelve-month review hearing.

#### D. Father’s Ineffective Assistance of Counsel Claim

Father contends that his trial counsel was ineffective in failing to raise the issue of visitation or to question the denial of visitation at various stages of the proceedings. He urges that “[t]he cumulative effect of these deficiencies in advocacy was the denial of an

evidentiary hearing on Father’s section 388 petition, promptly followed by the prejudicial termination of his parental rights.”

It is generally the case that a writ of habeas corpus, rather than an appeal, is the proper method of raising an ineffective assistance of counsel claim in a dependency proceeding. (*In re Eileen A.* (2000) 84 Cal.App.4th 1248, 1253, overruled on another ground in *In re Zeth S.* (2003) 31 Cal.4th 396, 413-414.) “The establishment of ineffective assistance of counsel most commonly requires a presentation which goes beyond the record of the trial. . . . Action taken or not taken by counsel at a trial is typically motivated by considerations not reflected in the record. . . . Evidence of the reasons for counsel’s tactics, and evidence of the standard of legal practice in the community as to a specific tactic, can be presented by declarations or other evidence filed with the writ petition.” (*In re Arturo A.* (1992) 8 Cal.App.4th 229, 243.) The only exception to the requirement of a writ to raise an ineffective assistance claim is where “ ‘there simply could be no satisfactory explanation’ for trial counsel’s action or inaction.” (*In re Eileen A.*, at p. 1254.)

We disagree with Father that this is an appropriate case in which an ineffective assistance claim may be raised in an appeal because the “ineffective assistance is clear from the record.” But even were an appeal an appropriate vehicle to raise this claim, we nonetheless find Father’s contention to be without merit.

We first note that there is some disagreement as to the extent to which a federal due process right to effective assistance of counsel applies to parents’ claims in dependency proceedings. (See, generally, Seiser & Kumli on Cal. Juvenile Courts Practice and Procedure (Matthew Bender 2015) §§ 2.193[2][a] to 2.193[2][i], pp. 2-687 to 2-689.) We need not address or resolve that question here, but will assume without deciding that Father may assert a constitutionally-based ineffective assistance of counsel claim here.

To establish an ineffective assistance claim in a dependency proceeding, the party must meet the two-part test enunciated in *Strickland v. Washington* (1984) 466 U.S. 668 and *People v. Pope* (1979) 23 Cal.3d 412, overruled on another ground in *People v. Berryman* (1993) 6 Cal.4th 1048, 1081, fn. 10. (*In re Dawn L.* (1988) 201 Cal.App.3d 35, 37.) “First, there must be a showing that ‘counsel’s representation fell below an objective standard of reasonableness . . . [¶] . . . under prevailing professional norms.’ [Citations.] Second, there must be a showing of prejudice, that is, ‘reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.’ [Citation.]” (*In re Emilye A.* (1992) 9 Cal.App.4th 1695, 1711.) “ ‘In determining whether counsel’s performance was deficient, a court must in general exercise deferential scrutiny . . .’ and must ‘view and assess the reasonableness of counsel’s acts or omissions . . . under the circumstances as they stood at the time that counsel acted or failed to act.’ [Citation.]” (*People v. Scott* (1997) 15 Cal.4th 1188, 1212 (*Scott*)). “If the record does not shed light on why counsel acted or failed to act in the challenged manner, we must reject the claim on appeal unless counsel was asked for and failed to provide a satisfactory explanation, or there simply can be no satisfactory explanation.” (*Ibid.*)

A court evaluating an ineffective assistance of counsel claim need not proceed first with the inquiry into whether counsel’s performance was deficient. “[A] court may reject a claim if the party fails to demonstrate that but for trial counsel’s failings, the result would have been more favorable to the [party claiming ineffective assistance].” (*In re Nada R.* (2001) 89 Cal.App.4th 1166, 1180; see *In re Cox* (2003) 30 Cal.4th 974, 1019-1020.) The burden of establishing ineffective assistance is upon the party claiming it. (*People v. Pope, supra*, 23 Cal.3d at p. 425.) “Surmounting *Strickland*’s high bar is never an easy task. [Citations.]” (*Padilla v. Kentucky* (2010) 559 U.S. 356, 371 (*Padilla*)).

Father's claim of ineffective assistance of counsel is overly broad and ill-defined. He claims his counsel's performance was deficient in that he "never raised the issue of visitation or questioned the denial of visitation." But it appears that Father's claim centers around three hearings: (1) the April 2014 jurisdiction/disposition hearing; (2) the October 2014 six-month review hearing; and (3) the May 2015 twelve-month review hearing.

At the April 22, 2014 jurisdiction/disposition hearing attended by Father and his counsel, the issue of Father's visitation was not addressed. The order after hearing, however, included a finding that visitation by Father, after his release from incarceration, would not be detrimental to the minors. At the time, Father was in custody at the local jail, and he had indicated to the social worker that he expected to be released on April 25, 2014.<sup>5</sup> Father's counsel noted this circumstance in addressing the court. We conclude that under these circumstances, it cannot be said that counsel's performance was deficient in failing to specifically address visitation at the hearing. Since the record shows it was anticipated at the date of the hearing that Father was to be released in just three days, this is not an instance in which "there simply can be no satisfactory explanation" for counsel's failure to raise the issue. (*Scott, supra*, 15 Cal.4th at p. 1212.) But even assuming counsel should have raised the issue, there is no showing that having done so would have led to a more favorable result for Father. (*In re Nada R., supra*, 89 Cal.App.4th at p. 1180.)

Father's visitation of the minors was not specifically raised at the six-month review hearing on October 21, 2014. At the time, Father was incarcerated out-of-county in Avenal State Prison. We take judicial notice that a distance of more than 200 miles

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<sup>5</sup> In fact, on that date, he was sentenced to three years eight months in state prison.

separated Father from the minors, who were then living with their foster family in Campbell. (Evid. Code, §§ 452, subd. (h), 459, subd. (a); see *People v. Traugott* (2010) 184 Cal.App.4th 492, 497, fn. 4 [judicial notice taken of distance from Banning courthouse to Fontana].) Less than two months before the hearing, the social worker wrote to Father to advise him that his visitation of the minors at prison “would not be beneficial” to them, “due to their young age, the distance of the drive, and amount of travel time in the car.” Nothing in the record shows that Father responded to the social worker’s concerns about visitation not being beneficial to the minors. And at the time of the hearing, it was anticipated that Father would remain in prison until June 26, 2015.

Under these circumstances, Father’s ineffective assistance claim fails. In light of the young ages of the minors, and the substantial distance involved, we cannot say that counsel’s performance was deficient because he did not object to the visitation plan. This is not a case where “there simply can be no satisfactory explanation” for counsel’s failure to raise the issue. (*Scott, supra*, 15 Cal.4th at p. 1212.) But even assuming counsel should have raised the issue at the six-month review hearing, there is no showing that having done so would have led to a more favorable result for Father. (*In re Nada R., supra*, 89 Cal.App.4th at p. 1180.)

A similar conclusion follows with respect to the twelve-month review hearing on May 26, 2015. The circumstances since the six-month review hearing had remained unchanged. Father was still incarcerated in Avenal State Prison with an expected release date of June 25, 2015, and the minors were still very young and lived a considerable distance (i.e., over 200 miles) from Father. Under these circumstances, the failure of Father’s counsel to object to the Department’s proposed finding that visitation would be

detrimental to the minors was not deficient, and, in any event, Father has not shown prejudice.<sup>6</sup>

#### DISPOSITION

The September 29, 2015 order denying Father's petition pursuant to section 388, and the order after the .26 hearing finding the minors adoptable and terminating parental rights are affirmed. The temporary stay of the proceedings below issued by this court on March 15, 2016, is discharged.

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<sup>6</sup> We have already concluded that Father's challenges to the prior orders concerning visitation are not cognizable. Because Father makes no direct argument in this appeal concerning the orders (1) denying his section 388 petition, or (2) finding the minors adoptable and terminating parental rights after the .26 hearing, we affirm those orders without addressing them further.

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Márquez, J.

WE CONCUR:

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Rushing, P. J.

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Grover, J.