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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

In re ANDREW E., a Person Coming Under the Juvenile Court Law.	B158494 (Super. Ct. No. CK43209)
DEPARTMENT OF CHILDREN AND FAMILY SERVICES, LOS ANGELES COUNTY, Plaintiff and Respondent, v. MARTIN E., Defendant and Appellant.	

APPEAL from orders of the Superior Court of Los Angeles County, D. Zeke Zeider, Temporary Judge. (Pursuant to Cal. Const., art. VI, § 21.) Affirmed.

Orren & Orren and Tyna Thall Orren, under appointment by the Court of Appeal, for Defendant and Appellant.

Lloyd W. Pellman, County Counsel, Thomas P. Fagan, Deputy County Counsel, for Plaintiff and Respondent.

I. INTRODUCTION

In this consolidated appeal, Martin E., the father, challenges a juvenile court order summarily denying his February 26, 2002, Welfare and Institutions Code[1] section 388 modification petition. The section 388 petition sought the reinstatement of reunification services and unmonitored and overnight visits with the child, Andrew E.[2] The father also appeals from the July 17, 2002, section 366.26 parental rights termination order. We affirm.

II. BACKGROUND

On August 9, 2000, the Los Angles County Department of Children and Family Services, the department, filed a section 300 petition on behalf of the child, who was born in February 1995. In the detention report, the department reported that the child had been detained on August 6, 2000. The mother, Sharlene R.,[3] left the child with Flora Williams, a stranger, at a park. Ms. Williams spoke with Long Beach police officers. The mother approached Ms. Williams on August 3, 2000, at about 8 p.m. The mother said she was homeless and needed somewhere for the child to stay. The mother needed to leave the child so she could work as a prostitute. According to Ms. Williams, the mother had done this before with other strangers. The mother said this so she could work as a prostitute and use drugs. The child told a police officer that the father's name was Martin. However, the child he did not know where the father lived. At the detention

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

[2] The petition referred to Andrew as Anthony E. also known as Andrew E. The first name on his birth certificate is Andrew.

[3] The mother has not appealed from the order terminating her parental rights.

hearing, the juvenile court ordered the child detained and the department to use due diligence to locate the father.

In September 2000, the department reported Ms. Williams called the police when the mother had not returned by August 5, 2000. The mother did not call Ms. Williams until August 8, 2000. The child told police officers that he sometimes slept on the street. The child spoke with a social worker. The child denied sleeping in the street but admitted that he had slept in the park before. The child said that the father's name was Roy G. who was in jail.

The child's foster parents reported that he was very fearful and suspicious. The child became agitated when anyone spoke Spanish or had a disagreement. The child said that the mother and the father fought. When this would happen, the mother would become angry with the child. The mother would then hit the child with a belt or a shoe. When the mother fought with the father, she would speak in Spanish. The child described being beaten by bigger children. The child wanted to become "bigger" so he can "beat someone up." The child was fearful of being left and made his caretakers promise they would pick him back up whenever they took him to daycare.

Larry Le Vesque was the child's godparent. Mr. Le Vesque and his wife were raising two of the child's older siblings, Alondra, age 11, and Martina, age 7. The Le Vesques have cared for Alondra since she was one. They cared for Martina since 1999. Alondra was not the father's child. Martina was the father's child but is not a subject of this appeal. Mr. Le Vesque stated the mother had a long-standing substance and alcohol abuse problem. The mother had been in many drug treatment programs but always dropped out after about 10 days. According to Mr. Le Vesque, the father had an alcohol abuse problem. The Le Vesques gave the mother some kitchen utensils. One day, Mrs. Le Vesque attempted to hug Martina. The child's sister said Martina did not want to be hugged because it hurt. The mother had hit Martina on the back with a spoon. The spoon had been given to the mother by the Le Vesques. Martina asked the Le Vesques not to give the mother any more spoons. The mother had stabbed herself with a

fork and tried to hang herself in front of the children. Martina was in the first grade when she came to live with the Le Vesques. Martina only weighed 19 pounds but her weight doubled in the first six months she lived with the Le Vesques. While in the mother's care, Mr. Le Vesques heard Martina ask for food. The mother refused to give Martina any food. Martina was warned she would be injured if she asked for food again.

The father was in the California Rehabilitation Center on September 6, 2000. On September 15, 2000, the father called a social worker, Pat Breit, and stated he wanted to attend the pretrial resolution conference set for September 18, 2000. The father stated to Ms. Breit that: the mother was physically abusive to him; he had not seen the mother abuse the children; he acknowledged a history of alcohol and drug abuse; he no longer used narcotics but that the mother had a drug abuse problem; and he was incarcerated as a result of an 11-year-old warrant based on his non-compliance with probation conditions. On September 18, 2000, the department filed a first amended petition. On September 18, 2000, the juvenile court continued the hearing to October 30, 2000, so that the father could be present.

On October 30, 2000, the department reported that the mother had been interviewed on October 17, 2000, in the county jail. The mother related: she never struck the children with a spoon but said she did hit them with her hand; she admitted physically fighting the father and Mr. G. in front of the child; she admitted stabbing herself in the head with a fork but denied that it was in front of the children; she never tried to hang herself but conceded she put a shoe string around her neck; and the mother subsequently stated that Martina was present at two attempted suicides.

The father sent a letter to the department in which he stated: prior to being incarcerated, he cared for the child; while incarcerated, the father left the child in the custody of a paternal aunt; the child's mother then went to an aunt's home and dropped off the youngster; and the father wanted the child to be placed with a paternal aunt, Cristina G. or the maternal grandmother, Denise S. Also, in the letter, the father related: he did not want to attend the scheduled hearing because he wanted to complete his time;

he did not want to lose his 'programming"; he was attending AA meetings and was signing up for a parenting class; his anticipated release date was October 6, 2001; but his release date would be advanced if he got a job or entered a school program.

The department explored relative placement for the child. Ms. Gomez told the department that she was the father's distant cousin. Although Ms. Gomez was initially interested in caring for the child, she said that the adults in her home were unwilling to undergo criminal record checks. The maternal grandmother was to complete her "live-scan" on October 14, 2000. The maternal grandmother had not contacted the department to indicate that she had done so.

On December 6, 2000, the department filed a second amended petition. The department reported that: Andrew was placed in the foster home of Shirley S., the foster mother, in September 2000; the child's level of aggression had diminished since he had been placed in his current foster home; and the father was incarcerated and attending AA meetings.

On December 6, 2000, the juvenile court declared the child to be a dependent of the court under section 300, subdivision (b). The juvenile court dismissed the first amended petition and sustained the second amended petition as further modified during mediation. The sustained second amended petition alleged that, on August 5, 2000, the mother placed him in an endangering situation. The mother permitted a stranger she met at a park to take care of the child. The mother had a history of drug use which periodically rendered her incapable of providing regular care for the child. The father was currently incarcerated and unable to provide care for the child. On prior occasions, the mother used inappropriate discipline with the child in that she threatened to hit him with a wooden spoon. The child had been exposed to violent episodes between the mother and the father. Also, the mother had similarly allowed the child to see violent encounters between the mother and her boyfriend, Mr. G. The mother had displayed actions consistent with emotional problems with prior suicidal ideations that placed the child at risk of harm. The father had a history of substance abuse prior to 1995. At the

end of the December 6, 2000, jurisdictional and disposition hearing, the juvenile court ordered reunification services.

In a report dated December 26, 2000, the department reported that attempts to place the child with Ms. Gomez and the maternal relatives had been unsuccessful. All the adults in the Gomez home had not completed the live-scan criminal background checks. The department had attempted to contact maternal relatives but they refused to respond to telephone messages.

In a report filed February 9, 2001, the department reported that the child was doing well in his foster home and at school. The child's ability to get along with other children had increased a great deal. The Gomez adults still had not undergone the background record checks. Ms. Gomez stated that when the father was released from prison, she was planning to move to a larger apartment. She was currently living in a two-bedroom apartment with her husband and two sons. The father's expected release date was May 2001.

In a report filed June 6, 2001, for the six-month review, the department reported that the father's expected release date was October 2001. The child remained with the foster mother, Shirley S., where he had experienced stability. The child was being counseled to address his anxiety about returning home with the biological mother. The child did not want to return home to the mother. The mother had court ordered weekly visits with the child. However, the mother visited sporadically. The visits were appropriate. The father called the child once or twice a week from prison. The foster mother monitored the calls. On one occasion, the father inappropriately asked the child about the mother.

The case social worker spoke with Ms. James, the father's counselor at the California Rehabilitation Center. Ms. James stated that the programs offered at the California Rehabilitation Center were not state certified. The department's report indicated that, once the father was released, he would need to enroll and participate in:

domestic violence counseling, a parenting class, substance abuse counseling, and random drug testing. Monthly contact letters were mailed to the father.

On June 6, 2001, the court ordered the department to provide family reunification services. The matter was continued for the department to provide a supplemental report regarding reasonable services provided to the father.

On July 12, 2001, the department reported that: the case social worker mailed monthly contact letters to the father; the classes the father was participating in while incarcerated were not state certified; upon being paroled, the case social worker would provide the father with referrals; while incarcerated, the father had not requested to visit with the child; the case social worker contacted the rehabilitation center to ascertain the visitation requirements; and the rehabilitation center required that the inmate must initiate the request and mail an application to the person he wanted to visit. The father had spoken to the foster mother. Upon being paroled, the father intended to visit the child. The department attached copies of the monthly contact letters, which advised the father that the programs he needed to complete included domestic violence counseling and random drug testing. The social worker, June Jackson, also informed the father that upon his release from prison, he should call her for reunification program referrals.

On July 16, 2001, the juvenile court found that reasonable services to reunite the child and the father had been provided. The department was ordered to provide further family reunification services to the father.

For the 12-month review, in a report filed December 5, 2001, the department reported that the child was still placed with Shirley S., who continued to provide him with a safe, stable, and nurturing home environment. The child, a first grader, was doing fine in school which he enjoyed attending. The child's counselor, Christine Martinez, wanted to terminate sessions because his progress had been very positive. The mother's contact with the child remained sporadic. The mother had not enrolled in any of the court ordered programs and was not participating in random drug testing. The child was upset that the mother scheduled a visit with him but never arrived.

The father was paroled in August 2001. Upon being paroled, the father was to have weekly visits with the child. The father could not visit with the child during the week. This was because he did not get off from work until 5 p.m. The foster mother agreed to Saturday visits. The father had requested one visit, which went well. The father telephoned the child once a week. The father asked the child questions about the mother. The foster mother monitored the calls and had to redirect the father several times during the course of the conversation. The foster mother terminated one telephone call because the father continued to ask the child about the mother. The father had not scheduled an appointment with the case social worker, Ms. Jackson, who had sent the father monthly contact letters. Ms. Jackson informed the father that he was required to maintain monthly contact with the department. The department recommended that family reunification services be terminated and permanent placement services be provided for the child.

On December 5, 2001, the juvenile court conducted the 12-month review hearing pursuant to section 366.21, subdivision (f). The father did not attend the hearing. The juvenile court terminated family reunification services for the father and the mother and ordered permanent placement services for the child. The department was ordered to initiate an adoptive home study on the foster mother. A selection and implementation hearing was scheduled for April 3, 2002.

On February 20, 2002, the father filed a section 388 modification petition pursuant to section 388. The petition alleged that the father had completed a parenting program, an anger management program, and a Narcotics Anonymous course. The petition further alleged that the father had visited weekly with the child and it would be in the youngster's best interest to reinstate family reunification services. The petition made no reference to participation in a domestic violence class. On February 26, 2002, the father filed a second modification petition, which was the same as the first.

On February 27, 2002, the juvenile court held a pre-trial resolution conference concerning the child's half-sister, Maqenizee S., who was removed from the mother's

custody at birth in January 2002. On January 14, 2002, Maqenizee was placed in the home with the child. The mother was not receiving reunification services with Maqenizee. The juvenile court ruled, based upon the parties' agreement, that the father's February 20, 2002, modification petition was superceded by the same petition filed on February 26, 2002. The petition was set for hearing on April 3, 2002, which was the same date as the permanent planning and implementation hearing.

For the April 3, 2002 hearings, the department reported on that date that: the child had been in his foster home since September 18, 2000; the child called the foster mother "mom" and was happy residing with her; the child's younger sister, Maqenizee, had been living there since January 2002; the child had bonded with Maqenizee; the foster mother was interested in adopting both youngsters; the child wanted to stay with the foster mother; and it would not be in the children's best interest to separate them.

In a separate report filed April 3, 2002, directed to the selection and implementation hearing, the department reported: the child was still being counseled; the father had weekly monitored visits with the child; however, the father had only about six visits with the child since being paroled in August 2001; the proposed permanent plan of adoption was appropriate for the child; the foster mother had provided the child with a safe, stable, and nurturing home environment since September 2000; the foster mother and the child had a parent-child relationship; the foster mother loved the child and provided him with comfort and guidance; the foster mother facilitated visits with the child and his biological parents; the foster mother was willing to commit to adoption and wished to provide the child with a permanent home; and the child stated, "'I want to stay with mom,'" referring to the foster mother.

On April 3, 2002, the department also filed a report in response to the father's section 388 petition. The department reported that the father was paroled in August 2001. On September 18, 2001 and October 23, 2001, the case social worker, Ms. Jackson, telephoned the father's residence and reminded him to resubmit to the live-scan check. The father was unavailable. The social worker left messages for the father.

On February 20. 2002, Ms. Jackson met the father during a monitored visit with the child. The father told the social worker, Ms. Jackson, that he worked seven days a week but would try to come to a department office regarding the live-scan. However, as of the date of the report, April 3, 2002, the father had not submitted to the live-scan check. The child said, "[I]f I can't live with my father I want to stay with 'mom.'" The foster mother stated that the child visited the father: twice in September 2001; once on December 8, 2001; once in January 2002; on February 20, 2002; and on February 24, 2002. The father telephoned the child on March 12, 2002. The father told the foster mother he did not visit more often because he worked two jobs. When asked, the foster mother indicated that in February 2002, the father had come to the child's birthday party intoxicated. According to the department's written report, the foster mother stated that the father's behavior was appropriate but that the mother had to walk him to a nearby bus stop.

Ms. Jackson told the father that he needed to visit with the child on a consistent basis. The father continued to work seven days a week. Since being paroled in August 2001, as of April 3, 2002, the father had only visited the child six times. The father did not have housing of his own. Rather, the father resided in two-bedroom apartment with Ms. Gomez, her husband, and three adult sons. This is the same family who would not come to a department office to submit to a live-scan background check. The report stated that the father had completed court ordered programs while incarcerated. The father had submitted to four months of drug testing under the supervision of a parole agent. The report concluded: the sustained petition alleged that the father had a history of substance abuse; the father's substance abuse placed the child at risk of harm; the father had recently consumed alcohol at the child's birthday party; and the father had not provided the child's elder sibling, Martina, with a home.

On April 3, 2002, at the father's request, the juvenile court continued the section 388 petition hearing to May 2, 2002. The section 366.26 hearing was continued to June 5, 2002.

On May 2, 2002, the juvenile court noted that the section 388 hearing request had been granted ex parte. The court then heard argument as to whether the father had established a prima facie showing which required that a hearing was warranted on the section 388 petition. The department's counsel argued: the anger management course completed by the father did not comply with the court's order; this was because the course did not include individual counseling to address domestic violence and the father's criminal history; the evidence cited in the petition by the father was not new because it existed before reunification services were terminated; and the father's drug testing had been done during parole supervision and consisted of only about four tests between August 2001, his parole date, and the May 2, 2002, hearing rather than weekly tests ordered by the court.

The trial court found that there was no prima facie showing of sufficient changed circumstances or that it was in the best interest of the child to change any of the prior court orders. In so doing, the trial court stated that it disagreed with the father's counsel that the anger management course sufficiently complied with the its December 6, 2000, order regarding domestic violence. The trial court stated, "[It's] a very different dynamic . . . ." The trial court also stated that the drug testing conducted by the parole agent was insufficient to comply with the dependency court order for random testing. The trial court then vacated its February 27, 2002, order granting a hearing because the section 388 petition showed prima facie evidence of changed circumstances. The court then denied the section 388 petition. On May 6, 2002, the father filed a notice of appeal from the order summarily denying the section 388 petition.

On May 22, 2002, the department reported that: the child and Maqenizee remained with the foster mother, who wanted to adopt both of the children; the foster mother provided the children with a safe, stable, and nurturing home environment; the child was doing well in school and enjoyed playing with his sister; and the maternal grandmother, who had not visited with the children, believed the children should stay with the foster mother. The social worker, Ms. Jackson, mailed the father information

regarding random drug testing on May 15, 2002. Ms. Jackson had not received any test results. The father visited with the child on eight occasions. The father did not visit with the child during April 2002.

On June 5, 2002, the juvenile court continued the section 366.26 hearing for the father's contested hearing. This was to allow preparation of an evaluation of the maternal grandmother and a home study for the caretakers. The court also ordered the department to provide referrals for the father to address alcohol testing questions.

On July 11, 2002, the department reported Ms. Jackson mailed the father a referral for random alcohol testing on June 25, 2002. On July 5, 2002, Ms. Jackson received a telephone call from staff at "St. Anthony's" where the father was to submit to random alcohol testing. The staff indicated that the father did not provide a picture identification as required in order to be tested. The referral stated the test would not be administered without a picture identification. The maternal grandmother again stated that there was no need for a home study because the foster mother ought to adopt the child and Maqenizee.

On July 17, 2002, the juvenile court conducted the selection and implementation hearing for the child. The parties stipulated that, if called, the child would testify as follows: "That the [child] likes to see his father, and he loves his father. If [the child] can't live with his father, [the child] wants to stay and live with [the foster mother]. That he loves [the foster mother], likes living with [the foster mother] and his baby sister [Maqenizee]."

The foster mother testified that: the father and the child were very close; the child had lived with her for about two and half years; the child loved the father; the child remembered doing a lot of things with the father; they had a strong emotional bond with each other; the child looked forward to visiting the father; since being paroled, the father visited until February about once a month; lately, the father had visited once or twice a month; they had rented movies and gone out to dinner with the child; and the father and the child laughed, joked, and played with each other. While incarcerated, the father sent letters on the child's birthday, in June and at Christmas. However, the foster mother

stated that the interaction between the two was based much on what the father brought to the child. The foster mother did not think that the father utilized his time well during the visits. The father told her that he worked all the time. Before the father appeared at the child's party, the foster mother had never seen him under the influence. The father was about to leave the party with a beer in his hand. The foster mother told the social worker the father was intoxicated because as he was leaving he was unstable. The foster mother offered to give the father a ride. The biological mother said she would walk the father to the train station. The foster mother had alcohol at the party but she also had sodas. She did not necessarily offer the father alcohol.

The foster mother testified that she loved the child. The foster mother testified that she had "seen him become not so angry, but a loving child." This was particularly true as to the child's relationship with his baby sister, Maqenizee. The foster mother wanted the child to have the opportunity to be raised with his sibling. The foster mother testified: she intended to keep allowing the father to visit the child; she thought the father deserved to be with the child; she wanted the child to keep the father's name; she wanted the child to have the father's heritage and culture; the father had been respectful; and the child did not act up during visits with the father. Finally, the child wanted to call the foster mother "mommy" rather than "mom."

The father testified on his own behalf. The father's testimony concerning his living situation was somewhat unclear. At one point, the father testified he lived with the child for three years. The father testified, "Me and his mom, we were living together for like until he was three years old." Then the father testified that when the child was three years old: "Yes. His mother came over and dropped him off, him and his sister. And I wasn't there at the house at the house at the time, but then I went back and yes, he was living with me. He was living with me until-- for like two years." During this two-year period, the father purchased clothes for the child "every week." After being imprisoned, the father telephoned the child "about once a week." While imprisoned, the father sent the child three letters.

The father left the child with a relative. Upon being released from prison, the father initially visited the child twice a month. Then the father visited the child once a week or three times a week. At the time of the selection and implementation hearing, the father visited the child weekly. The father testified: that during their visits they would talk about the child's sisters and school; their bond was "too strong"; the child referred to the father as "dad"; the father had a paternal role in the child's life; this is because the child listened to the father; additionally, during the visits, the child would talk about his life; the two had always been physically "touchy"; in their relationship, there were "lots of hugs and kisses"; and he desired to continue to be a "father figure." The father was asked the following question, "Do you want your child to be adopted or to go to legal guardianship with [the foster mother]?" The father responded, "I would pick legal guardian." The father twice testified he desired that a legal guardianship be established. Finally, while subject to direct examination, the father was asked, "Do you love your child very much?" The father responded, "Yes."

When cross-examined, the father admitted that he actually lived with the child for a period of only two years. Additionally, upon been paroled, the father admitted that he did not visit the child for several months. The father admitted that he could not recall when he first telephoned the social worker, Ms. Jackson, after being paroled. Also, the father admitted he did not attend a December 2001, court proceeding after being paroled. Further, the father admitted that he had two other daughters, neither of whom are living with him. Moreover, the father admitted that after being paroled, he had *never* visited with the child alone. Also, the father agreed the foster mother was doing a good job of taking care of the child. Finally, the father testified that the foster mother had agreed that even if adoption was adopted as the permanent plan, he would still be able to visit the child.

After argument, the juvenile court found the child adoptable and terminated parental rights. In so doing, court stated: "This is one of the more difficult types of contested .26 hearings. I've read and considered the evidence and listened to and

considered the testimony. . . . [¶] The problem in this case is that while I think it's a case where there is more than some incidental benefit of – to some minimal level of interaction that the court describes as always conferring some incidental benefit to a child. The court says that a relationship of continuing benefit arises from day to day interaction, companionship and shared experience. [¶] The foster mother's description of [the child's] memories of the early days with his father goes to the shared experience, although the father might not be visiting as much as – or might not have had as much contact in the last two plus years as we would like, he still has enough of a relationship with [the child] that [the child] enjoys the relationship with him, views him as a father figure and has that shared experience. [¶] So, although there hasn't been the day-to-day interaction in the last two years, there was that day-to-day interaction before [the child] came into the system and this length of companionship that has caused [the child] to still feel a bond to his father. [¶] The biggest problem for the father is whether that outweighs a benefit that [the child] would have in a permanent adoptive home and the stability of an adoptive placement over a more tenuous placement of legal guardianship or [long term] foster care. [¶] And in this case we have a caretaker who has a strong – who [the child] has a strong bond to, who [the child] views as a parental figure, as a mother figure. And it's a little questionable. The fact that the caretaker was so honest and supportive of the father causes me to have to give high weight to the role that money and gifts plays in the relationship that [the child] has with his father. [¶] As an attorney I represented a father who had weekend visits, overnights every weekend, but the caretaker, the great aunt was still the mother in that child's life who was the full-time caretaker that the court at that time found outweighed that parental role that this father who was having every weekend visits had. [¶] This case isn't even as strong as that father's and at the time as an attorney I said to the court that I wish there was some way the code allowed to only terminate one parent's parental rights because you have the same situation here that you have there, which is the child has a mother figure, which is the current caretaker, the foster mother, and a father figure, who's the biological father.

And if there is some way to keep him the father and allow the caretaker to become the mother, and have the mother and father in his life, that would be wonderful. [¶] But at this point the code doesn't allow for that and it requires us to determine which is best for [the child] and it appears that the relationship with the father is not one that rises to the level that outweighs the benefit [the child] would have in a permanent, stable home with a legal mother who's the person that he views as his mother and the person who has the parental role in his life. [¶] Although the father might be a father figure, the parental role in his life is not the father's, it appears to be the foster mother's alone. And that it what is going to cause the court to make its ruling. [¶] I am confident that although this has nothing to do with my ruling, I at least am happy to know that the foster mother currently has a plan to allow the father to continue to have a relationship and place in [the child's] life."

The father filed a timely notice of appeal from the order terminating his parental rights. On October 10, 2002, we ordered the appeal from the order denying the section 388 petition consolidated with the appeal from the order terminating parental rights.

III. DISCUSSION

A. The Section 388 Petition

The father contends the juvenile court erred in summarily denying his section 388 petition which provides in part: "(a) Any parent or other person having an interest in a child who is a dependent child of the juvenile court or the child himself or herself through a properly appointed guardian may, upon grounds of change of circumstance or new evidence, petition the court in the same action in which the child was found to be a dependent child of the juvenile court or in which a guardianship was ordered pursuant to Section 360 for a hearing to change, modify, or set aside any order of court previously made or to terminate the jurisdiction of the court. The petition shall be verified and, if

made by a person other than the child, shall state the petitioner's relationship to or interest in the child and shall set forth in concise language any change of circumstance or new evidence which are alleged to require such change of order or termination of jurisdiction. . . . [¶] (c) If it appears that the best interests of the child may be promoted by the proposed change of order, . . . or termination of jurisdiction, the court shall order that a hearing be held and shall give prior notice, or cause prior notice to be given, to the persons and by the means as prescribed by Section 386, and, in those instances in which the means of giving notice is not prescribed by those sections, then by means the court prescribes."

Our Supreme Court stated the applicable standards in a section 388 petition as follows: "The petition for modification must contain a 'concise statement of any change of circumstance or new evidence that requires changing the [previous order.' [Citation.] The petition must be liberally construed in favor of its sufficiency. [Citations.] . . . '[I]f the petition presents any evidence that a hearing would promote the best interests of the child, the court will order the hearing.' [Citation.]" (*In re Jasmon O.* (1994) 8 Cal.4th 398, 415.) Whether the order should be modified rests within the sound discretion of the juvenile court and its decision will not be disturbed on appeal in the absence of a clear abuse of discretion. (*Ibid*.) The parent has the burden of showing changed circumstances by a preponderance of the evidence. (*Ibid*; *In re Stephanie M.* (1994) 7 Cal.4th 295, 317; *In re Marilyn H.* (1993) 5 Cal.4th 295, 309-310; *In re Kimberly F.* (1997) 56 Cal.App.4th 519, 526.)

The request for change must be viewed in the context of the dependency proceedings as a whole. (*In re Marilyn H.*, *supra*, 5 Cal.4th at p. 307; *In re Heather P.* (1989) 209 Cal.App.3d 886, 891.) As our Supreme Court explained in the case of *In re Marilyn H.:* "The requirement of petitioning the court for a hearing pursuant to section 388 to show changed circumstances must be viewed in the context of the dependency proceedings as a whole. (*Cynthia D. v. Superior Court* [(1973) 5 Cal.4th 242,] 253 [].) Dependency proceedings are proceedings of an ongoing nature. While different hearings

within the dependency process have different standards and purposes, they are part of an overall process and ongoing case. One section of the dependency law may not be considered in a vacuum. It must be construed with reference to the whole system of law of which it is a part so that all may be harmonized and have effect. (*Dyna-Med, Inc. v. Fair Employment & Housing Com.* (1987) 43 Cal.3d 1379, 1386-1387 [].)" (*In re Marilyn H.*, *supra*, 5 Cal.4th at p. 307.) After reunification services have been terminated, the court's focus has shifted to the needs of the child for permanency and stability. (*In re Zacharia D.* (1993) 6 Cal.4th 435, 447; *In re Marilyn H.*, *supra*, 5 Cal.4th at p. 309.) When, as in the case at bench, the section 388 modification petition was filed after reunification services had been terminated and the section 366.26 selection and implementation hearing had been set, the juvenile court must recognize that the focus of the proceedings has shifted from the parent's interest in the care, custody and companionship of the child to the youngster's best interests. (*In re Stephanie M.*, *supra*, 7 Cal.4th at p. 317; *In re Janee J.* (1999) 74 Cal.App.4th 198, 211.)

The father argues that the juvenile court abused its discretion by summarily denying his section 388 petition. As noted previously, the court should order the hearing if the petition presents any evidence a hearing would promote the best interests of the child. (§ 388; *In re Jasmon O.*, *supra*, 8 Cal.4th at p. 415; *In re Heather P., supra,* 209 Cal.App.3d at p. 891.) The Supreme Court has held: "The parent need only 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 295, 310; *In re Hirenia C.* (1993) 18 Cal.App.4th 504, 516; *In re Jeremy W.* (1992) 3 Cal.App.4th 1407, 1414.) The prima facie requirement is by presenting facts which, if given credit at the hearing, would sustain a favorable decision on the modification petition. (*In re Zachary G.* (1999) 77 Cal.App.4th 799, 806; *In re Edward H.* (1996) 43 Cal.App.4th 584, 592-594.) However, a hearing is not required in every case but pursuant to the express terms of the section 388 itself the court shall grant the hearing "[i]f it appears that the best interests of the child may be promoted by the proposed change of order . . . ." Section 388 permits an opportunity for a hearing

if the statutory requirements, which include a "legitimate" change of circumstance or new evidence and the best interests of the child, will be promoted by a different order. (*In re Marilyn H.*, *supra*, 5 Cal.4th at p. 309; *In re Michael B.* (1992) 8 Cal.App.4th 1698, 1703.) The Supreme Court has held: "In any custody determination, a primary consideration in determining the child's best interest is the goal of assuring stability and continuity. [Citation.] 'When custody continues over a significant period, the child's need for continuity and stability assumes an increasingly important role. That need will often dictate the conclusion that maintenance of the current arrangement would be in the best interests of that child.' [Citations.]" (*In re Stephanie M., supra,* 7 Cal.4th at p. 317.) The juvenile court's determinations on these issues will not be reversed unless the dissatisfied litigant can show an abuse of discretion. (*In re Cliffton B.* (2000) 81 Cal.App.4th 415, 423-424; *In re Casey D.* (1999) 70 Cal.App.4th 38, 48-49.)

The parties initially dispute whether the applicable standard of review for the juvenile court's determination that the prima facie showing had not been established is an abuse of discretion or substantial evidence. The father claims that the abuse of discretion standard is only applicable after the hearing to determine whether a change of order is in the child's best interests. The father claims that an order denying the hearing is subject to independent review for a sufficiency of the evidence is necessary to ensure the constitutional protections afforded by section 388.

Under either standard, we conclude the father did not make a prima facie showing triggering the right to a full hearing. On December 5, 2001, the juvenile court terminated reunification services and set the selection and implementation under section 366.26 for April 3, 2002. Over three months later, the father filed his section 388 modification petition on February 26, 2002. In the petition, the father requested reinstatement of reunification services, unmonitored visitation, and overnight visits. The juvenile court initially set a hearing but upon reconsideration concluded that neither a prima facie case of changed circumstances nor best interests of the child had been established. The

juvenile court then summarily denied the petition and continued the matter for the section 366.26 hearing.

The matter came to the court's attention in August 2000. At that time and during a substantial portion of the time the matter was pending, the father was incarcerated. In December 2000, the juvenile court ordered the father to participate in counseling that included issues related to his criminal history and domestic violence. While incarcerated, the father completed programs for parenting, anger management, and drugs. In June 2001, the father was advised that these classes were not state certified and he would need to enroll in classes once he was released from incarceration. In August 2001, the father was released from prison. Ms. Jackson sent the father letters in September, October, and November 2001 asking him to contact her to discuss the case. The father did not appear at the December 5, 2001, hearing when reunification services were terminated. Furthermore, the juvenile court concluded that the anger management program was insufficient to comply with the case plan. The trial court had not ordered defendant attend anger management classes. Rather, the trial court had ordered participation in domestic violence counseling. The father had never participated in domestic violence counseling.

With respect to the drug and alcohol testing, on December 6, 2000, the juvenile court had ordered the father to undergo random drug and alcohol testing after sustaining the allegation that he had a history of substance abuse prior to 1995. The juvenile court found the father's substance abuse endangered the child. In the brief seven-page February 26, 2002, section 388 petition, the father alleged that he had been testing clean through parole for four months. The petition, however, did not allege that the unspecified testing was sufficient to comply with the court ordered random testing. Furthermore, in February 2002, the foster mother gave the child a party to celebrate his seventh birthday. The father was so intoxicated at this birthday party that the mother had to walk him to a nearby bus or train. Thus, it cannot be said that the father presented prima facie evidence that he had complied with the case plan.

More importantly, however, completely absent from the petition was *any* evidence to establish it would be in the child's best interests to modify the trial court's orders. Even if a litigant establishes changed circumstances, a hearing need not be held unless it appears the child's best interests may be promoted by the proposed change of order. (*In re Zachary G.*, *supra*, 77 Cal.App.4th at p. 808; *In re Kimberly F.*, *supra*, 56 Cal.App.4th at p. 529; *In re Jamika W.* (1997) 54 Cal.App.4th 1446, 1450-1451; *In re Edward H., supra,* 43 Cal.App.4th at pp. 593-594.) The absence of evidence to establish a change of the order was in the child's best interests justified summary denial of the petition. (*In re Sylvia R.* (1997) 55 Cal.App.4th 559, 562-563; *In re Heather P.*, *supra* , 209 Cal.App.3d at p. 891.) By contrast, the juvenile court could easily have concluded that it was not in the child's best interests to modify the order. The father had been incarcerated during a substantial portion of the dependency proceedings. When the father was released from prison in August 2001, he did not contact the social worker from September through November 2001. As late as December 5, 2001, the father did not attend a hearing where the juvenile court terminated reunification services. In February 2002, the father, who admittedly had a substance abuse problem, became intoxicated at the child's birthday party. There was no evidence to show that the father had done anything of substance to address his substance abuse problem. The juvenile court thus acted well within its discretion in summarily denying the section 388 petition.

B. The Section 366.26 Hearing

The father also contends that juvenile court erred in terminating his parental rights because he established the beneficial relationship exception under section 366.26, subdivision (c)(1)(A) which provides in part: "If the court determines, based on the assessment provided . . . and any other relevant evidence, by a clear and convincing standard, that it is likely the child will be adopted, the court shall terminate parental rights and order the child placed for adoption. . . . A finding . . . that the court has continued to

remove the child from the custody of the parent or guardian and has terminated reunification services, shall constitute a sufficient basis for termination of parental rights unless the court finds a compelling reason for determining that termination would be detrimental to the child due to one or more of the following circumstances: . . . (A) The parents or guardians have maintained regular visitation and contact with the child and the child would benefit from continuing the relationship." (§ 366.26, subd. (c)(1)(A).) At a section 366.26 hearing, the trial court is required to select and implement a permanent plan for the dependent child. If the child is likely to be adopted, adoption is the preferred permanent plan. (*In re Tabatha G.* (1996) 45 Cal.App.4th 1159, 1164; *In re Edward R.* (1993) 12 Cal.App.4th 116, 122; *In re Heather B.* (1992) 9 Cal.App.4th 535, 546.) As the Court of Appeal explained in the case of *In re Tabatha G.*, *supra*, 45 Cal.App.4th at page 1164: "In order for the court to select and implement adoption as the permanent plan, it must find, by clear and convincing evidence, the minor will likely be adopted if parental rights are terminated. (§ 366.26, subd. (c)(1).) The parent then has the burden to show termination [of parental rights] would be detrimental to the minor under one of four specified exceptions. (§ 366.26, subd. (c)(1)(A)[-](D).) In the absence of evidence termination [of parental rights] would be detrimental to the minor under one of these exceptions, the court '*shall* terminate parental rights . . . .' (§ 366.26, subd. (c)(1), italics added; [citation].)" (Italics in original.) Under section 366.26, subdivision (c)(1)(A), a parent must show that regular visitation and contact has occurred plus the child would benefit from continuing the relationship. The burden is on the parent to prove that termination of parental rights would be detrimental to the child. (*In re Jasmine D.* (2000) 78 Cal.App.4th 1339, 1350; *In re Andrea R.* (1999) 75 Cal.App.4th 1093, 1108; *In re Derek W.* (1999) 73 Cal.App.4th 823, 826-827; *In re Lorenzo C.* (1997) 54 Cal.App.4th 1330, 1343-1345; *In re Tabatha G.*, *supra*, 45 Cal.App.4th at p. 1164.)

In the decision of *In re Autumn H.* (1994) 27 Cal.App.4th 567, 575, the Court of Appeal for the Fourth Appellate District, Division One, addressed the section 366.26, subdivision (c)(1)(A) exception as follows: "In the context of the dependency scheme

prescribed by the Legislature, we interpret the 'benefit from continuing the [parent/child] relationship' exception to mean the relationship promotes the well-being of the child to such a degree as to outweigh the well-being the child would gain in a permanent home with new, adoptive parents. In other words, the court balances the strength and quality of the natural parent/child relationship in a tenuous placement against the security and the sense of belonging a new family would confer. If severing the natural parent/child 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. [¶] Interaction between natural parent and child will always confer some incidental benefit to the child. The significant attachment from child to parent results from the adult's attention to the child's needs for physical care, nourishment, comfort, affection and stimulation. [Citation.] The relationship arises from day-to-day interaction, companionship and shared experiences. [Citation.] The exception applies only where the court finds regular visits and contact have continued or developed a significant, positive, emotional attachment from child to parent. [¶] . . . The exception must be examined on a case-by-case basis, taking into account the many variables which affect a parent/child bond. The age of the child, the portion of the child's life spent in the parent's custody, the 'positive' or 'negative' effect of interaction between parent and child, and the child's particular needs are some of the variables which logically affect a parent/child bond." (*Id*. at pp. 575-576; accord, e.g., *In re Cliffton B., supra,* 81 Cal.App.4th at pp. 424-425; *In re Lukas B.* (2000) 79 Cal.App.4th 1145, 1155-1156; *In re Jasmine D.*, *supra*, 78 Cal.App.4th at pp. 1344-1345, 1347, 1349; *In re Brittany C.* (1999) 76 Cal.App.4th 847, 853; *In re Andrea R.*, *supra*, 75 Cal.App.4th at p. 1109; *In re Derek W.*, *supra*, 73 Cal.App.4th at p. 827; *In re Brandon C.* (1999) 71 Cal.App.4th 1530, 1534; *In re Amanda D.* (1997) 55 Cal.App.4th 813, 821-822; *In re Lorenzo C.*, *supra*, 54 Cal.App.4th at p. 1342; *In re Jason E.* (1997) 53 Cal.App.4th 1540, 1548; *In re Elizabeth M.* (1997) 52 Cal.App.4th 318, 324; *In re Teneka W.* (1995) 37 Cal.App.4th 721, 728-729; *In re Beatrice M.* (1994) 29 Cal.App.4th 1411, 1418.)

Other courts have expanded on the *Autumn H.* standard. The Court of Appeal in the decision of *In re Beatrice M.*, *supra*, 29 Cal.App.4th at page 1418, summarized the *Autumn H.* standard as follows: "Although the kind of parent/child relationship which must exist in order to trigger the application of section 366.26, subdivision (c)(1)(A) is not defined in the statute, it must be sufficiently strong that the child would suffer detriment from its termination." The *Beatrice M.* court concluded that "frequent and loving contact" was insufficient to establish the exception applied. The *Beatrice M.* court noted: "No matter how loving and frequent their contact with the girls, [the parents] had not occupied a parental role in relation to them at any time during their lives." (*Id*. at pp. 1418-1419; see also *In re Jasmine D.*, *supra*, 78 Cal.App.4th at p. 1349 [the court is to provide "'a compelling reason for determining that termination would be detrimental to the child'" which requires parent to demonstrate some benefit from a continued relationship]; *In re Brittany C.*, *supra*, 76 Cal.App.4th at p. 854 [parents must show at least one biological parent occupies a parental role rather than a friendship]; *In re Andrea R.*, *supra*, 75 Cal.App.4th at pp. 1108-1109 [parents are required to establish more than "'frequent and loving contact'" or an "emotional bond" accompanied by pleasant visits but must show "parental role"]; *In re Casey D., supra,* 70 Cal.App.4th at p. 51 [there is legislative preference for adoption which should be ordered unless exceptional circumstances are established by showing "the existence of such a strong and beneficial parent-child relationship" which "outweighs the child's need for a stable and permanent home"]; *In re Amanda D.*, *supra*, 55 Cal.App.4th at p. 821 [beneficial test requires parent to show "a parental role to the minors" and "strength and quality of the biological relationship outweighs the security and sense of belonging a new family would confer"]; *In re Jason E.*, *supra*, 53 Cal.App.4th at p. 1548 [exception applies by showing the existence of "'a significant, positive, emotional attachment from child to parent' and that relationship of the parent to the minor is one of parent and child rather than one of being a friendly visitor or friendly nonparent relative such as an uncle"].)

There is disagreement among the appellate courts as to the appropriate standard of review for the trial judge's determination. The Supreme Court has stated that custody determinations are reviewed for abuse of discretion. (*In re Stephanie M., supra,* 7 Cal.4th at p. 318.) The Court of Appeal in the decision of *In re Jasmine D.*, *supra*, 78 Cal.App.4th at page 1351 concluded that the abuse of discretion standard applies to determinations of whether placement of child for adoption would be detrimental. (See *In re Jamie R.* (2001) 90 Cal.App.4th 766, 774 ["[t]he trial court did not err"]; *In re Lukas B.*, *supra*, 79 Cal .App.4th at p. 1156 ["the trial court did not err"]; *In re Andrea R.*, *supra*, 75 Cal.App.4th at p. 1109 ["[The parents] fail[ed] to establish that the trial court erred or abused its discretion . . ."].) The Supreme Court explained in *Stephanie M.*: "[W]hen a court has made a custody determination in a dependency proceeding, '"a reviewing court will not disturb that decision unless the trial court has exceeded the limits of legal discretion by making an arbitrary, capricious, or patently absurd determination [citations]."' [Citations.] . . . 'The appropriate test for abuse of discretion is whether the trial court exceeded the bounds of reason. When two or more inferences can reasonably be deduced from the facts, the reviewing court has no authority to substitute its decision for that of the trial court."' [Citations.]" (*In re Stephanie M.*, *supra*, 7 Cal.4th at pp. 318-319.)

As noted by *Jasmine D.*, however, there are several appellate courts which have concluded that the determination is subject to review under the substantial evidence standard. (*In re Jasmine D.*, *supra*, 78 Cal.App.4th at p. 1351; *In re Autumn H.*, *supra*, 27 Cal.App.4th at pp. 575-576; see *In re Cliffton B.*, *supra*, 81 Cal .App.4th at pp. 424-425; *In re Derek W.*, *supra*, 73 Cal.App.4th at p. 827; *In re Brandon C.*, *supra*, 71 Cal.App.4th at pp. 1532, 1533; *In re Sylvia R, supra,* 55 Cal.App.4th at p. 563; *In re Teneka W.*, *supra*, 37 Cal.App.4th at p. 729.) As the Court of Appeal explained in the case of *In re Autumn H.*, *supra*, 27 Cal.App.4th at page 576: "On review of the sufficiency of the evidence, we presume in favor of the order, considering the evidence in the light most favorable to the prevailing party, giving the prevailing party the benefit of

every reasonable inference and resolving all conflicts in support of the order. [Citations.]" Similarly, in the decision of *In re Casey D.*, *supra*, 70 Cal.App.4th at pages 52-53, the Court of Appeal held: "It is the trial court's role to assess the credibility of the various witnesses, to weigh the evidence to resolve the conflicts in the evidence. We have no power to judge the effect or value of the evidence, to weigh the evidence, to consider the credibility of witnesses or to resolve conflicts in the evidence or the reasonable inferences which may be drawn from that evidence. [Citations.] Under the substantial evidence rule, we must accept the evidence most favorable to the order as true and discard the unfavorable evidence as not having sufficient verity to be accepted by the trier of fact. [Citation.]" We cannot reweigh the evidence and substitute our judgment for that of the trial court. (*Id*. at p. 53.) In any event, as *Jasmine D.* noted: "The practical differences between the two standards of review are not significant. '[E]valuating the factual basis for an exercise of discretion is similar to analyzing the sufficiency of the evidence for the ruling . . . . Broad deference must be shown to the trial judge. The reviewing court should interfere only "'if [it] find[s] that under all the evidence, viewed most favorably in support of the trial court's action, no judge could reasonably have made the order that he did . . . .'"' [Citations.]" (*In re Jasmine D.*, *supra*, 78 Cal.App.4th at p. 1351, citing *In re Robert L.* (1993) 21 Cal.App.4th 1057, 1067.)

In this case, under either standard of review, the trial court's determination must be upheld. Application of the factors to consider in determining whether a liaison is important and beneficial establishes the court did not err in concluding that the child's need for a permanent, stable adoptive home outweighed a continued relationship with the father. The factors include: the child's age; the portion of the child's life spent in the parent's custody; the positive and negative interaction between the parent and the child; and the child's particular needs. (*In re Jerome D.* (2000) 84 Cal.App.4th 1200, 1206; *In re Autumn H.*, *supra*, 27 Cal.App.4th at p. 576.)

According to the father, they resided together for only two years. Since being paroled, the father had never been alone with the child. In any event, the child was attached to the father. Although the child was bonded to the father, it cannot be said that this is an extraordinary case which forecloses selection of adoption as the permanent plan. Adoption must be the permanent plan unless there is a strong and beneficial parent-child relationship, which outweighs the child's need for stability and permanency. As the above-cited cases clearly establish, a loving relationship is insufficient to provide a basis for an exception under section 366.26, subdivision (c)(1)(A) in the face of a nonexistent parental role. (*In re Jamie R.*, *supra*, 90 Cal.App.4th at p. 774 ["pleasant and emotionally significant" liaison does not establish daily nurturing marking parent-child relationship]; *In re Jasmine D.*, *supra*, 78 Cal.App.4th at pp. 1349-1350 [it makes no sense to forego adoption where biological parent has maintained a liaison that is of some benefit and might be detrimental to some extent but is insufficient to outweigh need of permanency where there is no "real parental relationship"]; *In re Brittany C.*, *supra*, 76 Cal.App.4th at p. 854 [parent must show a parent-child relationship rather than a friendship]; *In re Andrea R.*, *supra*, 75 Cal.App.4th at pp. 1108-1109 ["'frequent and loving contact'" and emotional bond with pleasant visits are insufficient to establish exception when parents do not occupy a "'parental role'"]; *In re Casey D.*, *supra*, 70 Cal.App.4th at p. 51 [relationship should be a "strong and beneficial parent-child relationship" rather than a "friendly visitor" to outweigh need for stability and permanent home]; *In re Beatrice M.*, *supra*, 29 Cal.App.4th at pp. 1418-1419 ["frequent and loving" contact in the absence of a parental relationship does not outweigh a dependent's need for permanency and stability accomplished through adoption].) The bond must be weighed against the youngster's need for permanency and stability, which the child's biological parents have demonstrated repeatedly that they are incapable of providing. The father never demonstrated an ability to provide for the child's needs for physical care, comfort, safety, stability, and permanency. The father shared a residence with individuals who refused to undergo criminal background checks. There was no evidence there was even a place for

the child to live in the residence. In the absence of one parent functioning in a parental role, a loving relationship is insufficient to foreclose adoption. (*In re Angel B.* (2002) 97 Cal.App.4th 454, 466; *In re Jasmine D.*, *supra*, 78 Cal.App.4th at p. 1350.) In *Jasmine D.*, the Court of Appeal held, "'While friendships are important, a child needs at least one parent. Where a biological parent . . . is incapable of functioning in that role, the child should be given every opportunity to bond with an individual who will assume the role of a parent.' [Citation.] Thus, a child should not be deprived of an adoptive parent when the natural parent has maintained a relationship that may be beneficial to some degree but does not meet the child's need for a parent. It would make no sense to forego adoption in order to preserve parental rights in the absence of a real parental relationship." (*Ibid.*; see *In re Angel B.*, *supra*, 97 Cal.App.4th at p. 466.) In this case, the child has a person, the foster mother, who has assumed the parental role. The child should not be deprived of the opportunity to have a safe, nurturing, and stable home environment. The juvenile court candidly, judiciously, and properly weighed the needs of this child and under applicable legal standards its determination cannot be set aside.

IV. DISPOSITION

The orders summarily denying the section 388 petition and terminating parental rights pursuant to section 366.26 are affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

TURNER, P.J.

We concur:

ARMSTRONG, J.

MOSK, J.