

MODIFICATION

Prima Facie Case
Change in Circumstances
Best Interests of the Minor
Procedure

PRIMA FACIE CASE:

Elements: (1) change of circumstance or new evidence that may require a change in previous orders; (2) best interests of the minor promoted by the proposed change of order. (*In re Daijah T.* (2000) 83 Cal.App.4th 666, 672, 674-675 [completed own reunification plan and siblings returned, though not allege anything special about the minor-sibling relationship]; *In re Kimberly F.* (1997) 56 Cal.App.4th 519, 527; *In re Amber M.* (2002) 103 Cal.App.4th 681, 685; *In re Aljaime D.* (2000) 84 Cal.App.4th 424, 432 [parent did own case plan and increased contact would be in the minor's best interests]; *In re Clifton V.* (2001) 93 Cal.App.4th 1400, 1405-1406 [deny due process to deny hearing if petition alleges prima facie case]; see *In re Matthew P.* (1999) 71 Cal.App.4th 841 [must give parent opportunity to cross-examine the social worker].)

“A prima facie showing refers to those facts which will sustain a favorable decision if the evidence submitted in support of the allegation by the petitioner is credited.” (*In re Josiah S.* (2002) 102 Cal.App.4th 403, 418, internal quotation marks omitted.)

The juvenile court shall summarily deny 388 petition if it fails to show change in circumstance or new evidence which might require change in previous orders. (*In re Zachary G.* (1999) 77 Cal.App.4th 799, 806-808 [and that would be in minor's best interest]; *In re Hirenia C.* (1993) 8 Cal.App.4th 504, 516 [must be in minor's best interests]; *In re Jeremy W.* (1992) 3 Cal.App.4th 1407; *In re Heather P.* (1989) 209 Cal.App.3d 886, 891; *In re Jamika W.* (1997) 54 Cal.App.4th 1446.)

At the juvenile court, the party need not show will prevail, only that there is probable cause or prima facie case. The juvenile court should liberally construe and cannot deny without comment. (*In re Marilyn H.* (1993) 5 Cal.4th 295, 310; *In re Angel B.* (2002) 97 Cal.App.4th 454, 461 [if the petition presents any evidence that modification might promote best interests of the minor, must hold a hearing]; *In re Clifton V.* (2001) 93 Cal.App.4th 1400, 1401 [must hold hearing to resolve credibility and factual disputes]; *In re Zachary G.* (1999) 77 Cal.App.4th 799, 807 [if every fact true would be entitled to relief]; *In re Aljaime D.* (2000) 84 Cal.App.4th 424, 432 [need only show prima facie case or probable cause]; *In re Edward H.* (1996) 43 Cal.App.4th 584,

593 [“A ‘prima facie’ showing refers to those facts which will sustain a favorable decision if the evidence submitted in support of the allegation by the petitioner is credited.”]; *In re Jeremy W.* (1992) 3 Cal.App.4th 1407, 1413-1414 [“[A] petition must be liberally construed in favor of its sufficiency [citation] and a hearing may be denied only if the application fails to reveal any change of circumstances or new evidence which might require a change of order. Only in this limited context may the court deny the petition ex parte. [Citation.]”]; *In re Jasmon O.* (1994) 8 Cal.4th 398, 415 [liberally construed].)

The court can rely on declarations to substitute for evidence or allegations missing in the pleading. (*In re Daijah T.* (2000) 83 Cal.App.4th 666, 674, fn. 2; *In re Angel B.* (2002) 97 Cal.App.4th 454, 461 [considering information already in the court file]; *In re Hashem H.* (1996) 45 Cal.App.4th 1791, 1799 [considering an unverified letter submitted in support of the petition].)

There is not a requirement to exercise due diligence. (*Nickolas F. v. Superior Court* (2006) 144 Cal.App.4th 92, 109-110 & fn. 14.)

CHANGE IN CIRCUMSTANCES:

A change in circumstances must be substantial and permanent. (*In re Heraclio* (1996) 42 Cal.App.4th 569, 577; *In re Ramone R.* (2005) 132 Cal.App.4th 1339, 1348 [now out of custody (for injuring the minor) and wanting to provide stable housing not sufficient]; *In re Edward H.* (1996) 43 Cal.App.4th 584, 594; *In re Casey D.* (1999) 70 Cal.App.4th 38 [mother showed changing circumstance with efforts after case plan but not that circumstances have yet changed]; *In re Jeremy S.* (2001) 89 Cal.App.4th 514, 521 [doing group twice per month as a condition of probation but not doing NA/AA or drug rehab program; self-serving affidavit that drug free insufficient]; but see *In re Amber M.* (2002) 103 Cal.App.4th 681, 686 [no abuse of discretion when mother clean for two years but for one relapse from a 17 year drug problem, minor comfortable in caretaker’s home for two years].)

Can be based on new evidence. (*In re Hirenia C.* (1993) 18 Cal.App.4th 504, 513 [even if old information]; *In re Josiah S.* (2002) 102 Cal.App.4th 403 [prima facie case when allege minor still ill in foster care to counter basis of jurisdiction that parent made minor ill]; *Sheila S. v. Superior Court* (2000) 84 Cal.App.4th 872, 877-879 [to rescind reunification services]; *In re Brandon C.* (1993) 19 Cal.App.4th 1168, 1170-1171 [habeas petition alleging new evidence to challenge jurisdiction dismissed because a 388 petition provided an adequate remedy at law]; see *Nickolas F. v. Superior Court* (2006) 144 Cal.App.4th 92, 119 [court rescinded services after six months under § 387 because the parent severely injured a sibling]; but see *In re Aryanna C.* (2005) 132 Cal.App.4th 1234, 1241-1243 [the court can terminate services after six months for a minor more than six years old without the filing of a petition for modification].) A parent can challenge

the original basis for jurisdiction with new evidence at a dependent review hearing without necessarily filing a 388 petition. (*In re Jessica C.* (2001) 93 Cal.App.4th 1027, 1039-1040; *Blanca P. v. Superior Court* (1996) 45 Cal.App.4th 1738, 1757-1759; see *In re Desiree B.* (1992) 8 Cal.App.4th 286, 291-283 [collateral estoppel not apply to dependency cases, at least to custody issues in juvenile court even though they have been litigated in family court].)

Can be because a parent lacked notice of earlier proceedings. (*In re Justice P.* (2004) 123 Cal.App.4th 181, 189 [but can deny the petition if modification would not be in the minor's best interest]; *Ansley v. Superior Court* (1986) 185 Cal.App.3d 477, 481-, 487-488.)

“A request for presumed father status after the expiration of the reunification period is made by filing a section 388 petition.” (*In re Eric E.* (2006) 137 Cal.App.4th 252, 258; *id.* at pp. 260-262 [thus, must show it is in the minor's best interests].)

No change in circumstances when only allege problems with the caretakers. (*In re Brittany K.* (2005) 127 Cal.App.4th 1497, 1506-1507.)

BEST INTERESTS OF THE MINOR:

“It is not enough for a parent to show *just* a genuine change of circumstances under the statute. The parent must show that the undoing of the prior order would be in the best interests of the child.” (*In re Kimberly F.* (1997) 56 Cal.App.4th 519, 529.)

To determine best interests of the minor, when the question is increasing contact with parent, consider: (1) seriousness of the problems leading to dependency and reasons for any continuation; (2) strength of the bond between parent and minor and between minor and foster parent; (3) the degree the problem decreased. (*In re Kimberly F.* (1997) 56 Cal.App.4th 519, 532; *In re Edward H.* (1996) 43 Cal.App.4th 584, 593 [must have specific facts why in the minor's best interests]; *In re Anthony W.* (2000) 87 Cal.App.4th 246, 251 [must show specific facts how would be in minor's best interests; conclusory statements insufficient]; *Dailah T., supra*, 83 Cal.App.4th at p. 674-675; *In re Michael D.* (1996) 51 Cal.App.4th 1074 [need not show foster parent deficient, only that in best interests of minor to increase contact with parent]; see *In re Jasmon O.* (1994) 8 Cal.App.4th 398, 415 [minor's bond with caretaker relevant]; *In re S.M.* (2004) 118 Cal.App.4th 1108, 1120 [deny modification when minor sees the foster parents as the parents]; but cf. *Im re Aaliyah R.* (2006) 136 Cal.App.4th 437, 447 [deny petition when reason for dependency was serious and long term, mother made little progress though more aware, minor bonded with mother but spent most of the life with the caretakers].)

388 petition at permanent plan hearing may be summarily denied unless show a change of custody to the parent might be in minor's best interest. (*In re Angel B.* (2002) 97 Cal.App.4th 454, 463, 465 [mother not ready to take minor home and never cared for minor before]; *In re Jeremy W.* (1992) 3 Cal.App.4th 1407, 1416 [one of three declarations is from doctor stating mother was presently able to provide suitable care for her son]; *In re Hashem H.* (1996) 45 Cal.App.4th 1791, 1798 [included letter from doctor saying mother could adequately care for child and recommended change of placement]; *In re Aljamie D.* (2000) 84 Cal.App.4th 424, 432 [did own case plan including frequent visitation, 9 year-old and 1 year-old repeatedly ask to be with her]; *In re Jerome D.* (2000) 84 Cal.App.4th 1200, 1206-1207 [9 year-old minor lived with mother for 6½ years, had overnight visits, wish to live with mother, minor not adoptable]; cf. *In re Jamika W.* (1997) 54 Cal.App.4th 1446, 1449-1451 [still in residential program not a change of circumstance, infrequent contact, not presently capable of caring for the minor].)

“[S]tability and continuity in a child’s living arrangement are so important *in themselves* that there must be a ‘persuasive showing of changed circumstances affecting the child’ to overcome the disruption necessarily inherent in any change of custody.” (*Guardianship of Kassandra H.* (1998) 64 Cal.App.4th 1228, 1239, emphasis in original.) “[T]he paramount need for continuity and stability in custody arrangements – and the harm that may result from disruption of established patterns of care and emotional bonds with the primary caretaker – weigh heavily in favor of maintaining ongoing custody arrangements.” (*In re Marriage of Burgess* (1996) 13 Cal.4th 25, 32-33.)

Petition to revive visits because the minor was allowed to veto them could not be lawfully denied because lack of visitation was not in the minor’s best interests. (*In re Hunter S.* (2006) 142 Cal.App.4th 1497, 1506-1508.)

PROCEDURE:

388 petition is an “escape mechanism” to permit consideration of parent’s fitness at the permanent plan hearing. (*In re Jasmon O.* (1994) 8 Cal.4th 398, 415 [liberally construed]; *In re Marilyn H.* (1993) 5 Cal.4th 295, 309; *In re Stephanie M.* (1994) 7 Cal.App.4th 295, 317; *In re Kimberly F.* (1997) 56 Cal.App.4th 519, 526; *In re Baby Boy L.* (1994) 24 Cal.App.4th 596, 607; *In re Michael R.* (1992) 5 Cal.App.4th 687 [can continue permanent plan hearing for parent to finish drug program and file 388 petition].)

Parent cannot file 388 after parental rights were terminated. (*In re Ronald V.* (1993) 13 Cal.App.4th 1803, 1806.) A relative cannot file a 388 petition in order to contest the court’s decision to terminate parental rights. (*In re Carl R.* (2005) 128 Cal.App.4th 1051, 1071.)

With a limited remand for ICWA notice, a parent cannot file a section 388 petition. (*In re Terrance B.* (2006) 144 Cal.App.4th 965, 973-974.)

Petitioner has burden of proof by the preponderance of the evidence. (*In re Michael B.* (1992) 8 Cal.App.4th 1698, 1086.) But the party requesting removal has the burden of proof by clear and convincing evidence. (*In re M.V.* (2006) 146 Cal.App.4th 1048, 1058-1059; *In re Victoria D.* (2002) 100 Cal.App.4th 536, 545 [noncustodial parent may try to remove from custodial parent]; *In re Michael D.* (1996) 51 Cal.App.4th 1074, 1084 [holding that a parent only need provide preponderance of the evidence to remove from legal guardian]; see *Kimberly R. v. Superior Court* (2002) 96 Cal.App.4th 1067, 1077 [holding was that clear and convincing evidence applies to supplemental petitions].)

A non-custodial parent may file a section 388 petition to change the dispositional order and remove the child from the mother in order to place the child with the father. (*In re Victoria C.* (2002) 100 Cal.App.4th 536, 543.)

A sibling may file a section 388 petition to consider the sibling exception to the termination of parental rights. (*In re Hector A.* (2005) 125 Cal.App.4th 783, 793.) The sibling need not show will win but only a prima facie case. “The petitioning sibling need show only that there is a sufficient bond with the adoptive child that the best interests of that child require full consideration of the impact of interfering with that relationship before a decision is reached on the permanency planning.” (*In re Hector A.* (2005) 125 Cal.App.4th 783, 793.) It was enough that alleged they enjoyed regular visits and they had a positive relationship. (*In re Hector A.* (2005) 125 Cal.App.4th 783, 796.)

Standard of review: Abuse of discretion. (*In re Hector A.* (2005) 125 Cal.App.4th 783, 798.)

The court shall hold 388 hearing before the permanency plan hearing. Failure to grant 388 hearing shall result in reversing the permanency plan hearing. (*In re Jeremy W.* (1992) 3 Cal.App.4th 1407, 1416; see *In re Aljaime D.* (2000) 84 Cal.App.4th 424, 433.)

Appealability: Denial of a 388 petition is appealable. (*In re Ronald V.* (1993) 13 Cal.App.4th 1803, 1807, fn. 2; *In re Harry N.* (2001) 93 Cal.App.4th 1378, 1395 [paternal aunt and uncle can appeal denial of their 388 petition], questioned in *In re Carl R.* (2005) 128 Cal.App.4th 1051, 1072 on whether relatives can file a petition to contest the adoptive placement of the minor].)

Standard of review: Review granting a 388 petition for substantial evidence. (*Sheila S. v. Superior Court* (2000) 84 Cal.App.4th 872, 880.)

Standard of review: Review denying a 388 petition for abuse of discretion. (*In re Stephanie M.* (1994) 7 Cal.4th 295, 318-319; *Sheila S. v. Superior Court* (2000) 84 Cal.App.4th 872, 880; *In re Amber M.* (2002) 103 Cal.App.4th 681, 685 [denial of 388 petition will rarely be an abuse of discretion]; *In re Anthony W.* (2001) 87 Cal.App.4th 246, 250 [summary denial].) “The petition is addressed to 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.” (*In re Jasmon O.* (1994) 8 Cal.4th 398, 415-416, citations omitted; *In re Michael B.* (1992) 8 Cal.App.4th 1698, 1704.)

“The trial court’s determination to deny a section 388 petition without a hearing is reviewed for abuse of discretion.” (*In re Brittany K.* (2005) 127 Cal.App.4th 1497, 1505.) Arguably, the summary denial of a section 388 petition is reviewed independently. (See *In re Jeremy W.* (1992) 3 Cal.App.4th 1407, 1413-1414.)

Prejudicial error: Court’s erroneous dismissal of parent’s 388 petition based on lack of jurisdiction harmless when parent could not have prevailed. (*In re Victoria D.* (2002) 100 Cal.App.4th 536, 544.)

Remedy: Denial of contested section 388 hearing at permanent plan hearing requires reversal of the permanent plan order as well. (*In re Clifton V.* (2001) 93 Cal.App.4th 1400, 1406.)