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 Marcelo B.* (2012) 209 Cal.App.4th 635, 642 [recent sobriety from long-standing alcoholism was insufficient]; *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, 49 [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 J.P.* (2014) 229 Cal.App.4th 108, 123-126 [can terminate services before the 6 month review hearing]; *id.* at pp. 127-128 [inconsistent visitation by the father is a sufficient ground]; *In re D.B.* (2013) 217 Cal.App.4th 1080, 1092-1094 [continued problems with visitation was new evidence]; *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 *In*

re Katelynn Y. (2012) 209 Cal.App.4th 871, 876-881 [can rescind services while continuing to offer services to the other parent and without setting the matter for a § 366.26 hearing]; but see *In re H.S.* (2010) 188 Cal.App.4th 103, 107-110 [new evidence must been unavailable earlier]; *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].)

A claim in the superior court of ineffective assistance of counsel should be raised by a habeas petition, not a modification petition, which could permit relief even if it is not in the minor's best interests. (*In re Jackson* (2010) 184 Cal.App.4th 247, 258-260.)

A change in circumstances can be that the an appellate court reversed, though the decision is not yet final. (*In re Anna S.* (2010) 180 Cal.App.4th 1489, 1500-1502.) The court can reconsider past factual findings in light of a reversal on appeal. (*In re Ryan K.* (2012) 207 Cal.App.4th 591, 597-598.)

A change in circumstances 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.)

Collateral estoppel has limited application in juvenile cases. "Allegations of child molestation are *serious*; they merit more than a rubber stamp. With the exception of death penalty cases, it is hard to imagine an area of the law where there is a greater need for reliable findings by the trier of fact. The consequences of being wrong—*on either side*—are too great." (*Blanca P. v. Superior Court* (1996) 45 Cal.App.4th 1738, 1754.) Accordingly, "substantive justice is best served in sexual abuse cases when the common law doctrine of collateral estoppel

is applied narrowly." (*In re Jessica C.* (2001) 93 Cal.App.4th 1027, 1039, fn. 11.) In *In re Nathaniel P.* (1989) 211 Cal.App.3d 660, the juvenile court found at a jurisdictional hearing that the father had sexually and physically abused his children. (*Id.* at p. 664.) Subsequently, the Department of Social Services (DSS) sought to terminate the father's parental rights under former Civil Code section 232, subdivision (a)(7). The Court of Appeal held that it was error for the juvenile court "to conclude that collateral estoppel barred the father from producing evidence he had not sexually or physically abused his children since DSS previously had prevailed on that issue only under the lesser standard of preponderance of the evidence. The father is entitled in the termination proceeding to have the issue redetermined under the standard of clear and convincing evidence." (*Id.* at p. 672.)

There was not a change of circumstances for no longer doing a bonding study simply because CPS could not find a local expert. (*In re S.R.* (2009) 173 Cal.App.4th 864, 871.)

The court can modify an order made erroneously, improvidently, or inadvertently under Welfare and Institutions Code section 385 without requiring a modification petition to be filed under section 388. (*Nickolas F. v. Superior Court* (2006) 144 Cal.App.4th 92.)

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.)

When a modification petition is filed at the time of the section 366.26 hearing, the child's bond to the foster parent "cannot be dispositive . . . lest it create its own self-fulfilling prophecy." (*In re Kimberly F.* (1997) 56 Cal.App.4th 519, 531; cf. *In re Cheryl E.* (1984) 161 Cal.App.3d 587, 606-607 ["we cannot encourage, under the guise of 'best interests' or 'home stability,' the arbitrary determination by a governmental agent that a well-educated 'professional' couple will be better parents than 'red-necked hillbillies' (AW's words, not ours) who are on welfare and have six other children."].) But "at this point 'the focus shifts to the needs of the child for permanency and stability' (*In re Marilyn H.* [1993] 5 Cal.4th 295, 309) . . . . A court hearing a motion for change of placement at this stage of the proceedings must recognize this shift of focus in determining the ultimate question before it, that is, the best interests of the child." (*In re Stephanie M.* [1994] 7 Cal.4th [294,] at p. 317; see also *In re Edward H.* (1996) 43 Cal.App.4th 584, 594 [on eve of .26 hearing, children's interest in stability was court's foremost concern and outweighed any interest in reunification].) Thus, the Fourth District, Division Three decided not to follow *Kimberly F.* (*In re J.C.* (2014) 226 Cal.App.4th 503, 527.)

In order to determine if it is in a child's best interest to reinstate services or return her home after reunification services have been terminated, the court shall consider "(1) the seriousness of the problem which led to the dependency, and the reason for any continuation of the problem; (2) the strength of relative bonds between the dependent children to *both* parent and caretakers; and (3) the degree to which the problem may be easily removed or ameliorated, and the degree to which it actually has been. While this list is not meant to be exhaustive, it does provide a reasoned and principled basis on which to evaluate a section 388 motion." (*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.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 see *In re Jacob P.* (2007) 157 Cal.App.4th 819, 832 [the *Kimberly* factors are not exhaustive]; *In 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]; but see *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; accord, *In re L.S.* (2014) 230 Cal.App.4th 1183, 1193-1196 [to undo bypass order]; *In re D.B.* (2013) 217 Cal.App.4th 1080, 1089-1092 [to end visitation after the termination of reunification services].) 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, 543-545 [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]; but see *A.H. v. Superior Court* (2013) 219 Cal.App.4th 1379, 1393 [change placement of minor not in custody of parent or guardian by preponderance of the evidence]; *In re Jessica C.* (2007) 151 Cal.App.4th 475, 480-481 [the Department was required to file a section 387 petition to remove the minor to be in a more restrictive placement].)

An order changing orders during the period of reunification services, but not made

at a periodic review hearing, should be made through a section 388 petition. (*In re Lance V.* (2001) 90 Cal.App.4th 668, 674-677.)

When a section 388 petition is filed to start reunification services after being a bypass, section 361.5, not section 388, provides the standards the court shall employ. (*In re A.M.* (2013) 217 Cal.App.4th 1067, 1075-1077.)

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.) The sibling does not have a due process right to a contested hearing. (*In re E.S.* (2011) 196 Cal.App.4th 1329, 1339-1340.)

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

The court can find a prima facie case but deny modification based only on the documentary evidence or oral argument. (*In re G.B.* (2014) 227 Cal.App.4th 1147, 1160; *In re C.J.W.* (2007) 157 Cal.App.4th 1075, 1080-1082; contra *In re Lesly G.* (2008) 162 Cal.App.4th 904, 914 [based on an an older version of the form].)

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.)

Terminate a Probate Code guardianship under Welfare and Institutions Code section 728, subdivision (a), not under section 388. (*In re Angel S.* (2007) 156 Cal.App.4th 1202, 1206-1207.) Need not have a section 388 petition to hold a section 366.26 hearing to convert the guardians to adoptive parents. (*People v. Bolton* (2008) 166 Cal.App.4th 343, 392-394.)

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].)

Standing: Father did not have standing to challenge the denial of mother's modification petition. (*In re D.S.* (2007) 156 Cal.App.4th 671, 674.)

Standing: Someone who is not a party or a de facto parent might have sufficient interest in the child to file a modification petition and appeal the outcome. (See, e.g., *In re Hirenia C.* (1993) 8 Cal.App.4th 504, 514-516.)

Standard of review: Review granting a 388 petition for substantial evidence. (*In re Stephanie M.* (1994) 7 Cal.4th 295, 318; *In re D.B.* (2013) 217 Cal.App.4th 1080, 1088-1089; *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 because it is akin to a summary judgment. (See *In re Hirenia C.* (1993) 8 Cal.App.4th 504, 512; *In re Jeremy W.* (1992) 3 Cal.App.4th 1407, 1413-1414; but see *In re R.J.* (2008) 164 Cal.App.4th 219, 224; *In re Michael R.* (1992) 5 Cal.App.4th 687.)

Mootness: The juvenile court did not have jurisdiction to consider parent's 388 petition after the dependency was dismissed. (*In re A.S.* (2009) 174 Cal.App.4th 1511, 1514-1515.)

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.)

Prejudicial error: A court cannot presume the erroneous lack of a hearing was harmless. (*In re Lesly G.* (2008) 162 Cal.App.4th 904, 916; but see *In re G.B.* (2014) 227 Cal.App.4th 1147, 1162-1163.)

Remedy: Reversing the denial of contested section 388 hearing at permanent plan hearing requires reversal of the permanent plan order as well. (*In re Hunter W.* (2011)

200 Cal.App.4th 1454, 1465; *In re Lesly G.* (2008) 162 Cal.App.4th 904, 916; *In re Clifton V.* (2001) 93 Cal.App.4th 1400, 1406; *In re Hashem H.* (1996) 45 Cal.App.4th 1791, 1800-1801.)

Remedy: Remand for a new section 388 hearing requires considering evidence developed after the notice of appeal. (*In re Vincent M.* (2008) 161 Cal.App.4th 943, 960-961.)