



Legal Services for Prisoners with Children

388 Motion FAQ

What is a 388 Motion?

388 Motion refers to WIC 388 which is the law that governs how and why to request the court change something that the court did previously (a previous “order”) or make a new order at any time while (or in some cases after) a dependency case is ongoing. In Alameda County, you can file the motion through a JV-180 form.

Who can file one?

The law says: “Any parent or other person having an interest in a child” which means anyone who has some direct tie to the child who is the subject of the case. This includes family, the child themselves, friends of the family, the Agency in some cases, and foster parents or other caregivers. A parent cannot file a 388 motion after their parental rights have been terminated.

When will the court grant your motion?

The change requested must show two things:

1. There has been a **change of circumstance or new evidence** discovered since the order you want changed was made and now it would be best to change that previous order
2. The proposed change promotes the **best interests of the child**.

What is an example of the two-prong test?

For example, in an intimate partner violence case, where the court had previously ordered supervised visitation for the victim of violence because there was not sufficient evidence that she had separated from the alleged abuser; she could submit a 388 motion where she had sufficient proof of separation asking for unsupervised visits or return.

1. **Change of circumstance** = proof of

separation (e.g. alleged abuser has moved out of state, is willing to testify to this fact)

2. **Best interests of the child** = there is a presumption, at least in reunification, that the child’s best interests are served by reunifying with the parent if they have “fixed” the problem that brought them under supervision of CPS, so here, the mother would say it is in the best interest of the child to be reunited with her mother (and return to the child’s original school, family, and community) as soon as possible if there is no safety risk, which there is now not.

What happens after you submit the paperwork and follow the instructions for service (meaning giving the paperwork to the other people and attorneys in the court case involving your child)?

In some cases, a court might grant your request without a hearing. This usually only happens if everyone is in agreement, but could in very rare circumstances happen because the court feels that the request has no reasonable opposition. Otherwise, the court will grant a hearing if your request satisfies a “prima facie” standard of proof. Prima facie is the lowest standard of proof (the highest is “beyond a reasonable doubt”) and it means you have presented sufficiently good reasons to satisfy the legal standard for changing an order. The court will then give you a chance to put on testimony and present documents which prove the two things above at an evidentiary hearing.

What happens at a 388 evidentiary hearing?

This is a trial where you have the burden of proof because you are asking for the change. That means you are instructed to go first—providing evidence either through witnesses or documents.

Documents have to be either agreed to by other people and attorneys on the case to come into evidence or verified by a person on the witness stand (or, in some cases, meet an exception to hearsay, like a business record). To prepare for this, gather witnesses and documents that prove your point and provide them to your attorney in advance if you have one. If you do not have an attorney, you have to ask the court clerk what the process is for entering exhibits before trial starts, because courthouses vary a lot in local practices around this.

What are common 388 motions made by parents?

Common 388 motions for parents include requests for:

1. Return of the child or more reunification services right before a **366.26**.
 - This is the only method to have the 366.26 hearing address whether you have become a “fit” parent in the time between your termination of reunification services (or by-pass of those services) and the 366.26 hearing.
 - Changes in visitation, especially moving to unsupervised visitation or overnights.
 - Return of the child between hearings.
 - Moving the child to family when the Agency is going too slowly or has turned down a family member
 - Return the child to the parent after the case is closed in legal guardianship.

What are common pitfalls in 388 motions?

1. Providing evidence of changing circumstance rather than changed circumstance. This is what the Agency or Judge will often say when arguing against or rejecting your

388 motion. They are saying, for example, that you've had some positive progress but haven't provided enough evidence of a true change of position. For example, people often submit 388 right before a 366.26 where their parental rights are to be terminated saying they are now sober and can provide negative tests. Judges often say that a "few" negative tests and sobriety for a couple months is a nice change, but not one that gives them a lot of confidence if you failed to be sober during a longer period of reunification services. What you would need in that case is either another very positive circumstance proving your fitness or a reason that you've been able to achieve sobriety in the past two months when you haven't in the past year of reunification services and that reason needs to be pretty convincing both as a reasonable excuse for not getting sober in the timeline and as a convincing indication that you will remain sober now. An example of a positive circumstance is you getting another child returned to you by the Agency. An example of a convincing reason might be that you had an undiagnosed mental health problem that was the cause of your failure to maintain sobriety and has since been diagnosed and medicated or that you were in a relationship with someone using (or was abusive) and have since left the relationship.

2. You provide feelings, not facts. For example, you say you have had many good visits and are ready for overnights. To the judge, this is your opinion without more supporting information. Instead, you need to provide a list of people who can testify to your good visits and what they will likely say, some factual evidence that whatever risk the Agency thought you posed is no longer a risk, and a potential alternative plan (for example, having a relative check in with you during

the overnight). The judge needs to look at your document and be able to imagine how you will prove that in a trial. So instead of "my mental health is now under control," you would have the amount of times you see a psychiatrist and psychologist, what your psychologist would testify to regarding your progress, medical evaluation, medicine dosage, how those meds might work better than meds in the past, people in your life who can testify to how you have changed since getting on these meds and what you expect them to say.

1. You say why the change is good for you but not why it is best for the child. The best interest hurdle means that you have to look at your child the way the dependency court & dependency law look at your child. So for example, if you are asking for return, obviously the fact that you and your child love each other and you are your child's parent are good reasons that return is in the child's best interest. If your reunification services have been terminated, though, your love of your child and the fact that you are the parent have to be weighed against the law's preference at this stage for **stability** and **permanency** for the child (meaning continuing in the same placement). If the child has been living with a home that wants to adopt them for the entire length of your case and, especially, if your child was removed as an infant, you need something more than love & status as parent. For example, you should add connection with family (all the family you can think of who would be positive and can testify), siblings, links to heritage or culture, important family traditions. Another example would be if the foster parents are white and you are Black, you might discuss the ways you and your family can best support the child in confronting racism, but be prepared again to show this as a fact not feeling (either from personal experience that can become

testimony or studies which would require expert witnesses).

What are some examples of successful 388 motions?

- Case came in because minor was ill in parent's care and it was alleged they were made ill by parent; parent filed 388 motion because minor remained ill in the exact same way in foster care (new evidence).
- Parent did not have knowledge of the removal of the child until after jurisdiction and files a 388 motion to have a rehearing of detention and jurisdiction (new evidence).
- All parties agreeing to a visitation change for overnights for a parent in in-patient treatment between jurisdiction and the 6 month hearing (changed circumstance).
- Parent gets an older child back after the reunification timeline by continued efforts in visitation and programming and having a new baby that remained in her care (changed circumstance).

How do you file a 388 motion?

You can use the JV 180 form. Contact the clerk's office for your juvenile court for local instructions on filing (for example, some people want a certain amount of copies, some people ask that you have proof of service attached and that you serve everyone). If you are represented by an attorney, you can bring them your completed JV 180 and ask them to file, but follow up to make sure they have done that within a week (or less if it is an emergency).

What happens if the 388 motion is denied?

You can appeal this. Also, you can listen to why it was denied and try to have better evidence for the next request. You can always re-file a 388 motion.

