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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

In re BRIANNA T., a Person Coming Under the Juvenile Court Law.	B239276 (Los Angeles County Super. Ct. No. CK80972)
LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent. v. BRITTANY T., Defendant and Appellant.	

APPEAL from orders of the Superior Court of Los Angeles County. Anthony Trendacosta, Commissioner. Affirmed.

Thomas S. Szakall, under appointment by the Court of Appeal, for Defendant and Appellant.

John F. Krattli, Acting County Counsel, James M. Owens, Assistant County Counsel, and Kimberly A. Roura, Deputy County Counsel for Plaintiff and Respondent.

Brittany T. (mother), mother of Brianna (born in January 2008), appeals from orders denying her Welfare & Institutions Code section 388[1] petition and terminating her parental rights pursuant to section 366.26. We affirm the orders of the juvenile court.

CONTENTIONS

Mother contends that the juvenile court abused its discretion by summarily denying mother's section 388 petition; that the juvenile court exceeded its jurisdiction and violated due process by ruling on mother's section 388 petition de novo, without notice to mother; and that the juvenile court erred in finding that the exception to termination of parental rights found under section 366.26, subdivision (c)(1)(B)(i) did not apply.

COMBINED STATEMENT OF THE CASE AND FACTS

1. Initial referral and safety plan

On October 29, 2009, the Department of Children and Family Services (DCFS) received a referral for Brianna, alleging that mother and Andrew T. (father) engaged in verbal and physical altercations in Brianna's presence.[2] The reporting party also alleged that the parents were using drugs. An emergency social worker repeatedly attempted to visit the family at their apartment in October and November 2009, and left messages on the parents' cell phones.

While looking for the family, the social worker spoke to some of the family's neighbors, who stated that they had witnessed mother purchasing drugs and witnessed domestic disputes between mother and father.

The social worker got in touch with paternal grandmother (grandmother) who reported that the family had lived with her until the previous February. Grandmother indicated that father was using drugs, and she believed that mother was as well. Grandmother had to give the couple food recently as they had none in their home.

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[1] All further statutory references are to the Welfare & Institutions Code.

[2] Father is not a party to this appeal.

A second referral on November 13, 2009, alleged that the parents left Brianna with grandmother without a plan for ongoing care, and that the parents were abusing drugs.

Finally, on November 19, 2009, the social worker found father at the apartment. Father called mother, and they all met at the paternal grandparents' home, where Brianna had stayed the preceding few days. The parents denied the allegations; denied that they lived at the apartment where the social worker was looking for them; and denied that they were aware that the social worker was looking for them. Father admitted that he abused OxyContin, and that he was in a methodone program for heroin addiction. Mother admitted to past cocaine abuse. The parents agreed to a safety program which permitted Brianna to stay with the paternal grandparents. Both parents were tested for drugs that day, and both were positive for opiates and morphine.

2. Voluntary family reunification period/section 300 petition

On November 25, 2009, the parents signed a voluntary family reunification agreement, in which they agreed that Brianna would stay with the paternal grandparents while they participated in drug abuse programs, drug testing, and counseling, including domestic violence counseling.

By the next team decision making meeting on March 9, 2010, mother was incarcerated and had criminal cases pending involving stealing and drug possession. Mother was not in compliance with the case plan, and father was minimally compliant. Father admitted that he had previously left Brianna in mother's care when he knew mother was using drugs, and that he and mother were responsible for emotional abuse of Brianna.

3. Section 300 petition and initial detention

On March 11, 2010, DCFS detained Brianna, and on March 16, 2010, DCFS filed a petition pursuant to section 300 alleging domestic violence and substance abuse. On March 16, 2010, the juvenile court ordered the child detained with the paternal grandparents, and granted mother visits to begin after her release from custody. Mother had visited with Brianna only once in the past three months.

4. Jurisdiction/disposition reports

DCFS filed a jurisdiction/disposition report on April 16, 2010. Mother had been interviewed and explained that she and father began dating when they were 15. She stated that they used cocaine for about a year and a half, and that she had been prescribed pain medication, anti-anxiety medication, and anti-depressant medication following car accidents in 2004 and 2007. Father paid a doctor to prescribe him OxyContin. The couple then started using heroin, which mother admitted to doing once a day. When she found out that she was pregnant with Brianna, mother stopped using drugs. Mother did not use drugs other than her prescription pills from the date that Brianna was born until November 2009.

At age 18, mother and father married. They lived with the paternal grandparents for several months, but in early 2009, when Brianna was just over a year old, they moved into their own apartment. Mother reported that she left father in November 2009, stopped using drugs, and started going to Narcotics Anonymous (NA) meetings. However, at the end of February 2010 she started using methamphetamine. Mother stated that she was using methamphetamine "twice a day for a week and a half prior to my arrest." In addition to prescription pills, heroin, methamphetamine, and cocaine, mother also abused marijuana on occasion. She denied ever doing drugs around Brianna.

Mother also described serious domestic violence inflicted by father.

Father was also interviewed. He acknowledged that he and mother were "heavy coke users for about [two] years" and that mother drank a lot before she found out she was pregnant. Father stated that the couple had smoked heroin at his parents' home, that mother at one point had moved a drug dealer into their apartment, and that mother left him in the apartment alone with Brianna for a month when he was using heroin. Father denied instances of domestic violence against mother.

Grandmother acknowledged that mother and father used drugs. They were both using cocaine before mother found out that she was pregnant, and mother had also used methamphetamine, heroin, and OxyContin. Grandmother stated that mother was using drugs heavily during the summer of 2009, and as a result left Brianna with the paternal

grandparents from July to October 2009. During that time, mother rarely visited. Grandmother denied that father was violent towards mother. Instead, she said, the violence started with mother and she would "ultimately cause him to react towards her."

Mother was arrested for possession of a controlled substance on September 28, 2009, and was released. On December 22, 2009, sheriffs responded to a call that mother was using drugs and was suicidal. Mother denied being suicidal. On January 22, 2010, mother was arrested for burglary and theft. She was arrested for another burglary on February 7, 2010. On March 2, 2010, she was arrested for possession of a controlled substance, and she remained in custody until April 1, 2010. On March 16, 2010, mother pled no contest to the February 7 burglary, and in exchange the other charges were dismissed. On April 1, 2010, mother was convicted of felony second degree burglary and sentenced to probation, 60 days in jail (time served), and 120 days in a residential treatment program.

In a last minute information for the court filed on April 20, 2010, DCFS reported that mother did not enroll in the substance abuse treatment program ordered by the criminal court. In addition, mother had not completed any drug tests, claiming that she did not have an identification card.

A separate last minute information for the court filed on April 20, 2010, DCFS reported that father was arrested on April 17, 2010, following an altercation with mother. Father was released on bail on April 18, 2010.

In a supplemental report filed on May 11, 2010, DCFS reported that the criminal court revoked mother's probation and issued a bench warrant for mother on April 22, 2010, because she had not enrolled in an inpatient substance abuse program. Mother missed her first random drug test on April 21, 2010.

A last minute information filed on May 25, 2010, reported that mother had still not submitted to a single drug test. Also a warrant remained outstanding for mother's failure to enter a residential substance abuse program. Mother reported that she was working to become enrolled in a program. Grandmother reported that mother had not visited in two weeks and had not been calling regularly.

5. Adjudication hearing

The adjudication hearing took place on May 26, 2010. Mother did not appear at the hearing.

The juvenile court found Brianna to be a child described by section 300, subdivision (b), due to the counts of substance abuse and domestic violence. The juvenile court ordered mother to participate in drug rehabilitation with weekly random testing, parent education, counseling, and weekly NA meetings.

6. Six-month review

In a status report signed on October 25, 2010, DCFS reported that mother had not visited Brianna at all since May 12, 2010. Grandmother reported that mother had only visited Brianna six times since Brianna was placed with paternal grandparents in November 2009. Grandmother reported that she sometimes received inappropriate phone calls from mother. Mother would make false promises to Brianna and sounded as if she were under the influence of drugs. Mother had been arrested again on June 14, 2010, for burglary and was incarcerated from mid-June through late July. Mother was also arrested and taken to jail in September or October 2011 for violating the conditions of her probation. Mother did not drug test at all, and had missed 13 random drug tests through September 2010. Mother had not shown proof of enrollment in a drug rehabilitation program, parenting classes, counseling, or NA meetings. DCFS recommended that the juvenile court terminate reunification services, as mother and father had shown a complete lack of compliance with court orders.

A last minute information for the court attached a letter from mother in jail dated October 26, 2010. Mother's letter stated that she was attending parenting education, domestic violence classes, and NA meetings in jail, but later stated that she was waiting to start these programs. Mother stated that she was scheduled for release in January, and that she had spent the last few months getting and staying sober. Mother asked the social worker to recommend another six months of reunification services so that she could participate in classes while in jail and then after her release.

On November 24, 2010, the juvenile court set a contested hearing for January 18, 2011, and ordered a supplemental report on the parents' progress.

In an interim review report signed on December 15, 2010, DCFS reported that mother had a brief visit with Brianna in jail on December 8, 2010. Brianna asked to go back to her Papa (paternal grandfather) after 15 minutes so the visit ended. On December 12, 2010, mother was moved to a jail module where she could participate in parenting and anger management classes.

Mother had been released and appeared at the January 18, 2011 six-month review hearing. (§ 366.21, subd. (e).) The juvenile court found that mother was not in compliance with her case plan and that father was in partial compliance. It ordered an additional six months of reunification services. The court stated that services were being continued because both parents had been incarcerated, and the court would be interested in seeing substantial compliance with the case plan now that they were no longer in custody.[3]

7. Twelve-month review

In a status review report filed on July 19, 2011, DCFS reported that mother had visited Brianna only once since the last hearing, on January 28, 2011. Mother had visits scheduled for March 2 and March 9, 2011, but did not attend either visit. Mother did not participate in random drug testing and had not shown proof of enrollment in drug treatment, parenting, individual counseling, or NA meetings. Mother's address was unknown. DCFS concluded that mother had shown no progress.

Brianna appeared to be well bonded to her paternal grandparents, with whom she had been living for 14 months. DCFS again recommended termination of reunification services.

At the section 366.21, subdivision (f), 12-month review hearing, the juvenile court found that mother was not in compliance with her case plan and terminated family reunification services for both mother and father. The court noted that the parents had

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[3] Father had been incarcerated in September 2010 for driving under the influence, and was released in November 2010.

not consistently contacted their child. The court set a section 366.26 permanency planning hearing for November 15, 2011.

8. Mother's section 388 petition

On November 14, 2011, mother filed a section 388 petition asking the court to reinstate reunification services and grant her unmonitored visits due to changed circumstances.

As to changed circumstances, mother asserted that she had entered the Rena B. Recovery Center 12-Step Based Program, had attended 13 anonymous groups, had enrolled in parenting and anger management classes, and had obtained an Alcoholics Anonymous sponsor. Mother also stated that she had tested negative for drugs at random tests.

As to Brianna's best interest, mother stated that "Reinstatement of mother's Family Reunification Services would allow her to successfully complete her Court Ordered Case Plan and assist in Reunification between mother and child."

Mother attached a letter from the treatment program she had entered on September 22, 2011. The letter was dated October 27, 2011, and suggested that mother was no longer in the program.[4] A letter dated November 1, 2011, reported that mother had enrolled in a 10-week parenting class on September 22, 2011, and had attended four weekly meetings. Two negative drug test results and records of attendance at an Alcoholics Anonymous group during January through June 2011 were also attached.

9. Maternal grandmother's section 388 petition

On December 1, 2011, maternal grandmother filed a section 388 petition asking for her boyfriend to be allowed to be present for overnight visits; for overnight visits to

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[4] Another letter from the Rena B. Recovery Home was attached to DCFS's January 2012 status review report. This letter indicated that mother exited the program on October 20, 2011. Mother was required to leave the program due to her inability to follow program treatment rules, regulations and protocol.

take place pending adoption; and for the court to refer the matter to Consortium for Children regarding post-adoption visitation.[5]

10. Permanency planning hearing -- November 15, 2011

At the November 15, 2011 hearing, mother's counsel objected to DCFS's report on the ground that it was inadequate. The report merely stated that mother's visits had been sporadic. The juvenile court agreed that DCFS's report was not sufficiently specific as to the visits, and continued the hearing for a proper report including more detail and a log of mother's visits. The court ordered DCFS to prepare the report for December 19, 2011, and set the hearing for January 23, 2012.

The court noted that it had the section 388 petitions filed by mother and maternal grandmother. The court indicated that it would rule on these petitions after the hearing.

11. December 1, 2011 orders

On December 1, 2011, the juvenile court filed two orders: it denied mother's section 388 petition without a hearing, noting that the petition did not state new evidence or a change of circumstances, and that the proposed change of order did not promote the best interests of the child; and regarding maternal grandmother's section 388 petition, the court granted and set a hearing for March 12, 2012.

12. Supplemental report

DCFS filed a supplemental report on December 19, 2011. Mother had been arrested and incarcerated again on December 2, 2011. She was released on December 20, 2011. The supplemental report contained a log of mother's eight visits with Brianna in 2010, including one visit in jail. Mother visited with Brianna 12 times in 2011.[6] A last minute information indicated that mother visited with Brianna three times in January 2012. Mother went almost seven months without seeing Brianna in 2010, and over six

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[5] Maternal grandmother's section 388 petition was signed on November 10, 2011, and it was before the juvenile court at the November 15, 2011 hearing. However, the petition was not actually filed until December 1, 2011.

[6] Mother may also have seen Brianna on dates when the maternal grandparents had visits. She also claimed to have visited Brianna once with her father in May 2010.

months without seeing Brianna in 2011. Mother failed to appear at nine scheduled visits between December 2009 and August 2011. On November 16, 2011, mother arrived for a visit but the grandparents failed to bring Brianna.

The log showed that mother acted inappropriately at some visits. On January 2, 2010, the visit ended early because mother appeared to be under the influence of drugs. On April 27, 2010, mother arrived late and spent most of the visit lying on the couch. On January 20, 2011, mother brought six of her friends to the visit. On two occasions, mother brought her brother, whom the juvenile court had ordered to exclude at visits. And on August 18, 2011, at a visit at the mall, the dependency investigator observed that mother appeared to be under the influence of drugs. Mother was "jittery, twisted and her hands were shaking, she had dry mouth, white gums and pick marks and acne all over her face and arms." Mother also spoke inappropriately about the case in front of Brianna.

The log also reported some positive visits. On November 19, 2011, mother was greeted with hugs and kisses. She read a book to Brianna, and the two put on makeup. On November 30, 2011, the monitor reported that Brianna appeared very comfortable in the presence of mother. The January 2012 report stated that mother appeared to act appropriately during visits, and on January 4, 2012, Brianna asked to spend her birthday with mother. Brianna appeared to enjoy the January visits.

13. Permanency planning hearing -- January 23, 2012

The case, which had been before Referee Mordetzky through December 2011, was transferred to Referee Skeba, and then to Commissioner Trendacosta on January 5, 2012.

At the January 23, 2011 hearing, the court indicated at the outset that the matter was set for a section 366.26 permanency planning hearing, and that there was also a section 388 petition pending that was "filed on behalf of maternal grandmother by [her private attorney]." The court specified that the only issue in maternal grandmother's 388 petition was "whether her significant other can visit."

Father submitted on the department's recommendation to terminate parental rights. However, mother indicated that she wanted to present evidence "about the nature of the child's relationship with her." Mother testified that she had seen Brianna almost every

week for the past six months. Brianna knew mother right away and was really happy to see her. During recent visits, mother brought food, walked and played outside with Brianna. Mother testified that, in previous months, when mother left, Brianna cried and did not want mother to leave. Mother testified that she tried to teach Brianna new things, and that she often read Brianna books.

When mother offered to testify as to the difficulty of getting visits from the paternal grandparents, the court questioned the relevance of this, instructing mother to focus on the "C1, B1 exception."[7] Mother testified that Brianna likes seeing her, and that Brianna learns from her.

DCFS argued that although mother had a friendly relationship with Brianna, it did not rise to the level required for an exception to termination of parental rights. DCFS specified, "mother had every opportunity to express to the court how she truly stood in a parental role and she really described something of almost a playmate." DCFS emphasized that Brianna had been placed with paternal grandparents for two years, and "those are the people she sees as her parents."

Brianna's counsel agreed with DCFS. When Brianna's counsel erroneously referred to the matter as a section 388 petition, the court corrected her: "That's not a 388 to the extent that the -- it's grandmother's 388." Brianna's counsel corrected herself, referring to section 366.26.

Father's counsel also agreed with DCFS, indicating that any benefit the child would receive from maintaining contact with mother was outweighed by the child's need for permanency.

Mother's counsel argued that mother did some things a parent would do, like make sure Brianna had a jacket and that her shoes were tied. She pointed out that Brianna wanted to spend her birthday with mother. Mother's counsel asked that the information

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[7] The court was referring to the exception to termination of parental rights found in section 366.26, subdivision (c)(1)(B)(i), under which the court may find that termination of parental rights is detrimental to the child because the parent has maintained regular visitation and the child would benefit from continuing the relationship.

on mother's last few visits "raise questions in the court's mind" as to whether legal guardianship might be a better plan.

The court took the matter under submission.

14. The court's written decision -- January 30, 2012

The juvenile court indicated in its written decision filed on January 30, 2012, that "[p]rior to convening the 366.26 hearing, the court held a hearing on the mother's 388 petition." No such hearing appears in the record, so it seems that the court was mistaken. The court then explained that mother had failed to prove either prong of section 388.

The court then addressed the issue of termination of parental rights under section 366.26. It found that the section 366.26, subdivision (c)(1)(B)(i) exception did not apply. Specifically, the court found that Brianna had been living with the paternal grandparents for over two years, and looked to them for all her needs. Mother had been inconsistent with visitation, although she recently had shown some improvement. Mother's visitation had always been monitored, and Brianna's relationship with mother did not outweigh the benefits of adoption by her paternal grandparents.

At a hearing on January 30, 2012, the court announced its ruling that maternal grandmother's section 388 petition was denied as it was not in the best interest of the minor. Mother's counsel pointed out that the previous hearing officer had actually granted a hearing on the petition, and that counsel for maternal grandmother was not present. The court responded that it was difficult to tell what the previous hearing officer had done on the section 388 petition.

Mother filed her notice of appeal on January 31, 2012.

DISCUSSION

I. Section 388

A. Applicable law and standard of review

Section 388 provides, in relevant part: "Any parent or other person having an interest in a child who is a dependent child of the juvenile court . . . may, upon grounds of change of circumstance or new evidence, petition the court . . . for a hearing to change, modify, or set aside any order of court previously made." "Section 388 provides the

'escape mechanism'. . . built into the process to allow the court to consider new information. [¶] . . . Even after the focus has shifted from reunification, the scheme provides a means for the court to address a legitimate change of circumstances . . . . [¶] . . . [T]he Legislature has provided the procedure pursuant to section 388 to accommodate the possibility that circumstances may change after the reunification period that may justify a change in a prior reunification order." (*In re Marilyn H.* (1993) 5 Cal.4th 295, 309.)

That being said, "[i]t 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. [Citation.]" (*In re Kimberly F.* (1997) 56 Cal.App.4th 519, 529; § 388, subd. (b).) "[T]he burden of proof is on the moving party to show by a preponderance of the evidence that there is new evidence or that there are changed circumstances that make a change . . . in the best interests of the child. [Citations.]" (*In re Stephanie M.* (1994) 7 Cal.4th 295, 317.)

A section 388 petition must be liberally construed in favor of its sufficiency. (Cal. Rules of Court, rule 5.570(a).) That being said, when a section 388 petition fails to allege changed circumstances or fails to explain how the proposed change in the juvenile court's orders would serve the child's best interests, the juvenile court may deny the petition without setting a hearing on the petition. (*Id.*, rule 5.570(d); *In re Angel B.* (2002) 97 Cal.App.4th 454, 461.)

"'Whether a previously made order should be modified rests within the dependency's court's discretion, and its determination will not be disturbed on appeal unless an abuse of discretion is clearly established.' [Citation.]" (*In re Amber M.* (2002) 103 Cal.App.4th 681, 685.) "'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 deducted 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.) Thus, we will not reverse a juvenile court's denial of a section 388 petition "'" unless the trial court has exceeded the limits of legal discretion by making an arbitrary,

capricious, or patently absurd determination [citations].”’ [Citations.]” (*Stephanie M.*, at p. 318.)

B. Summary denial -- December 1, 2011

Mother first challenges the juvenile court’s summary denial of her section 388 petition on December 1, 2011. Mother asserts that she made a prima facie showing sufficient to trigger a full hearing on the merits of her petition. While she had shown no compliance in July 2011, mother argues, less than four months later she showed evidence that she was enrolled in a 12-step program, parenting and anger management classes, and had tested negatively for drugs.

We find that the trial court did not err in summarily denying mother’s section 388 petition. Mother did not make a prima facie showing of changed circumstances or that further reunification services would be in the best interest of Brianna.

Mother’s alleged change of circumstance was her enrollment in a drug treatment program and various classes two months after the juvenile court terminated reunification services. This is insufficient to show changed circumstances -- particularly under the circumstances of this case. Mother had a seven-year history of drug use, starting when she was 15 years old. She had been in and out of jail for the past few years, and had been convicted of felony burglary. Following that conviction, mother was given a suspended sentence, and was ordered to spend 120 days in a residential drug treatment program, which she failed to do, resulting in the issuance of a warrant for her arrest. Mother’s commencement of a drug treatment program -- which she never completed -- was not sufficient evidence of changed circumstances.

To require a hearing, a parent must show changed, not merely changing, circumstances. (*In re Casey D.* (1999) 70 Cal.App.4th 38, 47 [“A petition which alleges merely changing circumstances and would mean delaying the selection of a permanent home for a child to see if a parent, who has repeatedly failed to reunify with the child, might be able to reunify at some future point, does not promote stability for the child or the child’s best interests”].) “‘[C]hildhood does not wait for the parent to become adequate.’ [Citation.]” (*In re Baby Boy L.* (1994) 24 Cal.App.4th 596, 610.)

Furthermore, mother made no showing that the change of order would be in Brianna's best interests. Her only statement in the petition was that further reunification services could facilitate reunification. This is insufficient. Brianna had lived with her paternal grandparents for the majority of her life, and she was happy and healthy in their care. Brianna had not lived with mother since she was two years old, and at the time of mother's petition, she was nearly four. Mother had visited sporadically, and was absent from Brianna's life for six and seven months at a time. When visits did take place, mother was occasionally under the influence of drugs, and often made inappropriate comments about the case.

"[A]fter a child has spent a substantial period in foster care and attempts at reunification have proved fruitless, the child's interest in stability outweighs the parent's interest in asserting the right to the custody and companionship of the child. [Citation.]" (*In re Jasmon O.* (1994) 8 Cal.4th 398, 419-420.) Mother failed to make out a prima facie case of either changed circumstances or that a change of order would be in Brianna's best interests. Therefore the juvenile court did not err in summarily denying her section 388 petition.

C. Written decision -- January 30, 2012

Despite its summary denial of mother's petition in December 2011, the juvenile court purported to rule on the petition in its written order of January 30, 2012, stating that a hearing had been held. The record shows that this was an error on the part of the new judicial officer who had been put in charge of the case only a month before. Based on the record before us, we conclude that this mistake was harmless.

Mother takes the position that the court's written decision attests that the court held a de novo hearing on mother's section 388 petition which she filed on November 14, 2011. No notice of the de novo hearing was provided to mother, and mother was not permitted to provide evidence pertinent to her petition. Mother argues that the juvenile court denied her due process and exceeded its jurisdiction by failing to follow the procedures mandated by sections 386 and 388. Mother cites *Judith P. v. Superior Court* (2002) 102 Cal.App.4th 535, 540, for the proposition that failure to provide complete and

timely notification to a parent at every stage of the proceeding denies a parent due process. Mother contends that such an error mandates reversal per se. (*Id.* at p. 558.)

The record undermines mother's argument that a hearing took place on mother's section 388 petition. At the commencement of the hearing on January 23, 2012, the juvenile court made it clear that there were two pending matters before it: termination of parental rights pursuant to section 366.26, and maternal grandmother's section 388 petition. The court articulated at other times during the hearing that mother's testimony should be restricted to exceptions to section 366.26, and that the only section 388 petition before the court at that time was maternal grandmother's. Mother's position that the juvenile court conducted a de novo hearing on her section 388 petition at the time of the section 366.26 hearing is simply wrong. There was no reason for the court to give mother notice of such a hearing. Mother's due process rights were not violated, and the court did not act in excess of its jurisdiction. No hearing on mother's section 388 petition ever took place.

In its written order of January 30, 2012, the court stated its mistaken understanding that a hearing on mother's section 388 petition had occurred before the January 23, 2012 hearing. A new judicial officer had taken over the case, and apparently misunderstood the proceedings that had occurred up to the point when he took over. In fact, the court made it clear on the record that it was not easy for the court to discern what had taken place with maternal grandmother's section 388 petition. It is apparent, given the court's statement that "[p]rior to convening the 366.26 hearing, the court held a hearing on mother's 388 petition," that the court had equal difficulty determining what exactly occurred with mother's section 388 petition. The juvenile court's statement that a hearing had been conducted on mother's section 388 petition was a factual error. Instead of stating that a hearing took place on mother's section 388 petition, the juvenile court should have noted that mother's section 388 petition was summarily denied.

We find this mistake of fact to be harmless. Therefore, we may affirm the order. (See *In re Janee W.* (2006) 140 Cal.App.4th 1444, 1452 [affirming juvenile court orders despite juvenile court's decision to proceed under the wrong statute]; see also *Tutti*

Mangia Italian Grill, Inc. v. American Textile Maintenance Co. (2011) 197 Cal.App.4th 733, 744 [trial court's mistaken finding that appellants had participated in arbitration process was harmless because it was not necessary to sustain the judgment].) The January 30, 2012 order did not purport to change the prior order of the juvenile court. Instead, it reached the same conclusion: that mother had failed to show that circumstances had truly changed, and that there was no evidence that a change of order would serve Brianna's best interests. These findings are amply supported in the record, and were implicit in the juvenile court's summary denial of mother's petition on December 1, 2011. The new judicial officer's apparent misunderstanding of the proceedings that took place before he took over was harmless and reversal is not required.

Even if the juvenile court's actions could be interpreted as purporting to have granted mother a de novo hearing on her section 388 petition, any defects in the provision of such a hearing would be harmless error. Reversal is not warranted if the outcome would have been the same if the alleged error had not occurred. (Cal. Const., art. VI, § 13; *In re Kobe A.* (2007) 146 Cal.App.4th 1113, 1122-1124 [no prejudice to father where there was inadequate notice of dependency proceedings, since lack of notice to father did not affect the outcome of dependency proceedings]; *In re Jesusa V.* (2004) 32 Cal.4th 588, 625-626 [where presumed father was not involved in dependency proceedings, any error was harmless because no other result was possible even if he had been present].) As set forth above in detail, the record demonstrates that mother would not be able to meet her burden as to either changed circumstances or Brianna's best interests, even if she were granted a full hearing. Mother does not attempt to suggest what evidentiary showing she might have made at such a hearing. On the record before us, mother could not have shown changed circumstances or that delaying Brianna's adoption by her paternal grandparents would be in Brianna's best interests. Therefore, any error of the juvenile court in not providing or not properly noticing a hearing was harmless.

II. Section 366.26, subdivision (c)(1)(B)(i) exception

At a section 366.26 hearing, the juvenile court must make a permanent plan for the child. (§ 366.26, subds. (b)(1)–(5).) The permanent plan preferred by the Legislature is adoption. If a juvenile court finds a child adoptable, it must terminate parental rights absent specified circumstances in which termination of parental rights would be detrimental. (§ 366.26., subds. (c)(1)(A) & (B).) "After the parent has failed to reunify and the court has found the child likely to be adopted, it is the parent's burden to show exceptional circumstances exist" to justify a decision not to terminate parental rights. (*In re Autumn H.* (1994) 27 Cal.App.4th 567, 573-574.)

The parent-child exception to terminate parental rights is found in section 366.26, subdivision (c)(1)(B)(i). To satisfy this exception, the parent must provide evidence that he or she has "maintained regular visitation and contact with the child and the child would benefit from continuing the relationship." (§366.26, subd. (c)(1)(B)(i).) The "benefit" prong of the exception requires the parent to prove his or her relationship with the child "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 re Autumn H., supra*, 27 Cal.App.4th at p. 575 ["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"].) No matter how loving and frequent the contact, and notwithstanding the existence of an "emotional bond" with the child, "the parents must show that they occupy 'a parental role' in the child's life." (*In re Andrea R.* (1999) 75 Cal.App.4th 1093, 1108; *In re Beatrice M.* (1994) 29 Cal.App.4th 1411, 1418-1419.) The relationship that gives rise to this exception to the statutory preference for adoption "characteristically aris[es] from day-to-day interaction, companionship and shared experiences. Day-to-day contact is not necessarily required, although it is typical in a parent-child relationship." (*In re Casey D., supra*, 70 Cal.App.4th at p. 51.)

"Because a section 366.26 hearing occurs only after the court has repeatedly found the parent unable to meet the child's needs, it is only in an extraordinary case that

preservation of the parent's rights will prevail over the Legislature's preference for adoptive placement." (*In re Jasmine D.* (2000) 78 Cal.App.4th 1339, 1350.)

In reviewing a challenge to a juvenile court ruling rejecting a claim that an adoption exception applies, we incorporate both the substantial evidence and the abuse of discretion standards of review. (*In re K.P.* (2012) 203 Cal.App.4th 614, 621.) The first determination, as to whether a beneficial parental relationship exists, is a factual determination that is properly reviewed for substantial evidence. (*Id.* at p. 622.) The second determination, as to whether such a relationship constitutes a compelling reason for determining that termination of parental rights would be detrimental to the child, is a discretionary decision, reviewed under the deferential abuse of discretion standard. (*Ibid.*)

Mother argues that the trial court erred in finding that the section 366.26, subdivision (c)(1)(B)(i) exception did not apply. Mother argues that she held, fed, and clothed Brianna, and taught her to read and write her name. She helped the child apply lip gloss and paint her nails; she directed and played with her. Mother argues that Brianna had a strong and loving bond with mother. Mother cites *In re Casey D., supra*, 70 Cal.App.4th at page 51, for the proposition that day-to-day visits are not required to establish the beneficial parental relationship exception.

We find that the juvenile court did not err in determining that mother failed to establish the section 366.26, subdivision (c)(1)(B)(i) exception to termination of parental rights. Substantial evidence supports the juvenile court's finding that mother did not consistently visit with Brianna. Mother went almost seven months without visiting Brianna in 2010, and over six months without seeing Brianna in 2011. While the juvenile court noted that mother had improved somewhat recently -- with the exception of her recent incarceration -- her recent weekly visits with Brianna did not add up to the type of regular visitation and contact required by the statute. Further, the trial court noted that the quality of the visits was not "of the type that would compel this court to find it would be detrimental to terminate parental rights." Mother occasionally showed up for visits under the influence of drugs, and rarely visited for more than a few hours.

Further, the trial court did not abuse its discretion in determining that mother did not meet the "benefit" prong of the section 366.26, subdivision (c)(1)(B)(i) exception. There was no evidence of Brianna's attachment to mother, and all of mother's visits had occurred in the presence of a monitor and under supervision. By contrast, Brianna's paternal grandparents had cared for her on a daily basis since she was 20 months old. They were involved in all aspects of her life and were willing and able to provide her with a permanent and stable home.

On the evidence before it, the juvenile court did not err in finding that mother failed to establish the exception to termination of parental rights found under section 366.26, subdivision (c)(1)(B)(i).

DISPOSITION

The orders are affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.
CHAVEZ

We concur:

_____, P. J.
BOREN

_____, J.
DOI TODD