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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

In re TAMARA M., a Person Coming
Under the Juvenile Court Law.

B265696
(Los Angeles County
Super. Ct. No. CK94267)

LOS ANGELES COUNTY
DEPARTMENT OF CHILDREN
AND FAMILY SERVICES,

Plaintiff and Respondent,

v.

J.L. et al.,

Defendants and Appellants,

TAMARA M.,

Respondent Minor.

APPEALS from orders of the Superior Court of Los Angeles County, Robin Kesler, Referee and Nichelle L. Blackwell, Commissioner. Affirmed.

Nicole Williams, under appointment by the Court of Appeal, for Defendant and Appellant J.L.

Catherine C. Czar, under appointment by the Court of Appeal, for Defendant and Appellant Q.M.

Mary C. Wickham, County Counsel, R. Keith Davis, Acting Assistant County Counsel, and Peter Ferrera, Deputy County Counsel, for Plaintiff and Respondent.

Michele Anne Cella, under appointment by the Court of Appeal, for Respondent Minor Tamara M.

In this dependency case (Welf. & Inst. Code, § 300 et seq.),¹ J.L. (Father) and Q.M. (Mother) appeal from orders denying their section 388 petitions and terminating parental rights to their then two-year-old daughter, Tamara M.

While Father was incarcerated, and after the juvenile court had found another man to be Tamara's presumed father, Mother informed Father and then later the Los Angeles County Department of Children and Family Services (DCFS) that Father might be Tamara's biological father. Father first appeared in the juvenile court 20 months after these dependency proceedings commenced and four months after the court terminated Mother's reunification services. After a paternity test revealed Father was Tamara's biological father, he filed a section 388 petition, seeking custody of Tamara or reunification services. The juvenile court

¹ Further statutory references are to the Welfare and Institutions Code.

denied his section 388 petition and later terminated parental rights. Father contends this court must reverse the order terminating parental rights as well as the dispositional orders because (1) DCFS violated his due process rights by failing to notify him of the proceedings in a timely manner, and (2) the juvenile court erred in failing to grant him presumed father status.

Mother contends the juvenile court erred in denying her section 388 petition, seeking custody of Tamara or reinstatement of reunification services. She also contends the court erred in finding the parent-child relationship exception to termination of parental rights (§ 366.26, subd. (c)(1)(B)(i)) did not apply to the relationship between her and Tamara.

Both DCFS and Tamara's appellate counsel filed respondent's briefs, urging this court to affirm the juvenile court orders. Finding no reversible error, we affirm.

BACKGROUND

Detention, Jurisdiction and Disposition

When Tamara was born in July 2013, she and Mother tested positive for marijuana. The hospital referred the matter to DCFS. Mother already had an open case with DCFS involving her one-year-old daughter, T.P. (Tamara's half sister), who lived with the maternal grandmother (Mother's mother). Mother was not complying with her case plan in that case, specifically the court order requiring her to submit to random drug testing and refrain from marijuana use.

As set forth in the July 18, 2013 detention report, Mother told a DCFS social worker that Tamara's biological father was

M.M.² He and Mother were not in a dating relationship, but he came to the hospital to visit Tamara. Jonathan L. also came to the hospital. He was Mother's boyfriend, whom she said she had been dating for approximately one year, according to the detention report.

On or about July 15, 2013, DCFS obtained a court order removing Tamara from Mother and M.M.'s custody. DCFS placed Tamara with her maternal grandmother, in the same home as her half sister, T.P.

On July 18, 2013, DCFS filed a dependency petition under section 300, subdivisions (b) and (j), asserting allegations about Mother's and M.M.'s use of marijuana (counts b-2 & b-3), Tamara's positive toxicology screen for marijuana and benzodiazepines at birth (count b-1), and the dependency case against Tamara's half sister arising from Mother's substance abuse (count j-1). At the detention hearing, the juvenile court ordered Tamara detained with the maternal grandmother, and found M.M. to be Tamara's presumed father.

On September 4, 2013, M.M. told a DCFS dependency investigator that Mother was denying he was Tamara's biological father. M.M. requested the investigator arrange a paternity test. On September 5, 2013, the investigator contacted Mother, who confirmed her denial that M.M. was Tamara's biological father. As stated in DCFS's September 13, 2013 jurisdiction/disposition report, Mother claimed Tamara's father was a man she met "on Facebook," who "came over once." Mother asserted "she was

² M.M. is not a party to this appeal. In June 2015, he stopped participating in the dependency proceedings, after a paternity test revealed Father is Tamara's biological father.

unable to remember the name of the father” and was “no longer in contact with him as he [had] ‘disappeared.’”

Mother also informed the investigator that she had begun using marijuana when she was 15 or 16 years old (she was then 20). She used it every day or every other day to maintain her appetite and avoid weight loss due to stress. She had obtained a medical marijuana card after Tamara’s birth. She told the investigator “she did not see the big deal with her smoking [marijuana] as she [was] capable of caring for her children.” She further stated she had “no desire to ever stop smoking marijuana.”

At the September 13, 2013 jurisdiction/disposition hearing, Mother pleaded no contest to the allegations in the petition (with amendments not material to our discussion), and the juvenile court sustained counts b-1, b-2 and j-1 against her. M.M. argued there was insufficient evidence supporting count b-3 regarding his marijuana use, but the court disagreed and sustained the count as pleaded. The court declared Tamara a dependent of the court, removed her from Mother and M.M.’s custody, and ordered reunification services and monitored visitation for Mother and M.M.

Also in September 2013, DCFS placed Tamara in the home of foster parents, C.P. and W.P. (the P.’s), after Tamara was hospitalized for three weeks due to severe sepsis, breathing problems requiring intubation, a subdural hemorrhage, and fluid on the brain. DCFS determined the maternal grandmother, who had been caring for Tamara, would have difficulty meeting Tamara’s ongoing special medical needs, which required close monitoring and transportation to appointments with several doctors.

Reunification Period

In its March 14, 2014 status review report, DCFS stated that Tamara was thriving under the P.'s care. The P.'s had been taking eight-month-old Tamara to her neurology, endocrinology, general pediatric, and infectious disease appointments. During monthly visits, the social worker observed that Tamara "is clearly attached to Foster Mother [Mrs. P.] as she looks to her, tries to find her when held by others, recognizes her voice, is easily soothed by her when crying and smiles when Foster Mother talks to her." The P.'s informed DCFS they were willing to adopt Tamara if Mother failed to reunify.

DCFS also stated in the March 14, 2014 report that Mother's visits and telephone calls with Tamara had been sporadic, and Mother had not been complying with the weekly drug testing requirement in her case plan, although she had been participating in a substance abuse program. When the social worker attended Mother's visits with Tamara, the social worker did not observe any attachment between Mother and Tamara. In February 2014, Mother informed DCFS she was pregnant.³

Father's name appeared for the first time in this case in the March 14, 2014 status review report. Therein, DCFS reported: "Mother has stated to this [social worker] on several occasions that she does not know how the Court got the name, M[.]M[.] for the father because Tamara's father is a man named J[.]L[.] [Father] who is in prison. She stated that she thinks he is in prison in Wasco, but denies having any contact or additional

³ In November 2013, the juvenile court terminated Mother's reunification services in the dependency proceedings involving Mother's 23-month-old daughter, T.P. (Tamara's half sister).

information for J[.]L[.]”⁴ DCFS also reported that the social worker had not had any contact with presumed father M.M. since the September 4, 2013 telephone call during which M.M. requested a paternity test based on Mother’s denial that he was Tamara’s biological father. The social worker determined that M.M. was incarcerated in county jail, and she submitted a request for a removal order so that he could appear at the next hearing.

On July 9, 2014, in a last minute information for the court, DCFS updated the juvenile court on Mother’s compliance with her case plan and visitation with Tamara. DCFS stated that Mother had completed a substance abuse program and her case manager reported that Mother submitted to five drug tests for marijuana between April 4 and May 19, 2014, and all tests were negative. As part of her court-ordered case plan regarding Tamara, Mother was scheduled to submit to 12 drug tests between August 1, 2013 and June 12, 2014, but she had only submitted to two of them and they were both negative. In April or May 2014, Mother told the social worker that she had stopped smoking marijuana. Mother provided DCFS with completion certificates for a parenting course and individual counseling. Regarding visitation with Tamara, Mother attended three visits and one doctor appointment between March 5, and May 15, 2014, and failed to show for eight scheduled visits during this period.

DCFS also informed the juvenile court that it had failed to notify presumed father M.M. about the July 9, 2014 section 366.21, subdivision (e), hearing. The social worker discovered she had incorrectly filled out the request for a removal order. By the

⁴ M.M. is listed as the father on Tamara’s birth certificate.

time she learned about the error and conducted another inmate locator search, M.M. apparently had been released from custody and the social worker did not know how to contact him. DCFS reported in the last minute information for the court: “It should be noted that Mother continues to state that she does not know the whereabouts of Father M[M.] and he is not the biological father of Tamara.” DCFS initiated a due diligence search for M.M. and requested a continuance of the review hearing. The juvenile court continued the section 366.21, subdivision (e), hearing.

As noted in DCFS’s log of contacts, services and visits, on July 28, 2014, Mother contacted the social worker and again provided Father’s name (J.L.) and reiterated that he was incarcerated in Wasco State Prison. Mother also provided a booking number for Father and represented that his release date would be in September 2014. According to Mother, Father was “going to try to come to Court.”

On August 27, 2014, in a last minute information for the court, DCFS again updated the juvenile court on Mother’s visitation with Tamara. DCFS attached a contact log provided by Mrs. P., indicating Mother attended all four of her scheduled visits in June 2014, but only stayed for three and one-half hours total, instead of the eight hours scheduled (two hours per visit). In July 2014, Mother attended one of her seven scheduled visits, staying for only 45 minutes. Mother failed to attend either of Tamara’s two doctor appointments in July. Mother visited with Tamara for 45 minutes on August 6, 2014 and one hour and 20 minutes on August 13, 2014.

In mid-September 2014, Mother contacted the social worker to inform DCFS that she had just given birth to daughter

J.H. with father Jonathan H. DCFS did not detain J.H. from Mother, but instead filed a non-detain petition. Mother asked the social worker whether her visits with Tamara could occur earlier in the day because she did not want to travel late in the evening with newborn, J.H. According to the social worker, Mrs. P. agreed to alter the visitation time. Mrs. P. also sent the social worker a summary of the numerous requests Mother had made over the past year for changes to the time and location of visits with Tamara, which Mrs. P. had accommodated. Between August 20 and October 8, 2014, Mother did not attend any visits with Tamara, nor did she contact Mrs. P. to cancel the scheduled visits.

On October 8, 2014, the juvenile court again continued the section 366.21, subdivision (e), hearing regarding Tamara. Mother requested a contested hearing to challenge DCFS's recommendation for termination of her reunification services. The court set the contest for November 17, 2014. Regarding Tamara's half sister, T.P., the court ordered legal guardianship with the maternal grandmother and terminated dependency jurisdiction.

On November 5, 2014, Mrs. P. filed a caregiver information form with the juvenile court, indicating Mother had attended 30 hours of visitation with Tamara out of the 132 hours that had been scheduled since Tamara was placed with the P.'s in September 2013. Mother's last visit was August 13, 2014, approximately one month before she gave birth to J.H. Mrs. P. also reported: "Tamara is developing normally, according to her primary care physician, and is being checked by her specialists, but they have no specific concerns." At 16 months old, Tamara

was walking, running, climbing, beginning to color, and working on her social skills, such as sharing with other children.

Father Contacts DCFS

In a last minute information for the court, dated November 17, 2014, DCFS reported that Father was released from prison on October 12, 2014. Shortly thereafter, Father contacted the social worker, leaving a voice mail message with a call-back number. The social worker made contact with Father on October 28, 2014. Father reported that he had been incarcerated for possession with intent to sell marijuana and a probation violation. He asserted that he was Tamara's father and wanted to be involved in her life. The social worker told him about the November 17, 2014 court date, "and suggested that he go to Court to get legal advice as to his rights to the child." The social worker also informed him that Mother initially "named another man as the father who is now listed in the Court records." On November 14, 2014, the social worker called Father "to remind him of the Court date," but the telephone number Father had provided was disconnected.

Termination of Reunification Services and Mother's First Section 388 Petition

At the contested section 366, subdivision (e), hearing, held on November 17, 2014, the juvenile court terminated family reunification services. The court noted Mother's visitation had been inconsistent and Mother had not visited Tamara since before J.H. was born. The court informed Mother it would not consider reinstatement of reunification services unless she started visiting Tamara "on a consistent basis" and demonstrated "a change of circumstances." Presumed father M.M. did not appear at the hearing, and his counsel informed the court she

had not had any contact with him. Father did not appear either, and no one mentioned his name. The court set a section 366.26 hearing to select a permanent plan for Tamara.

On March 13, 2015, Mother filed a section 388 petition, requesting reinstatement of reunification services and an order granting her unmonitored visitation with Tamara. Mother articulated the following change of circumstances: “Since [November 17, 2014], the mother has been submitting to random drug testing and the results have been negative. Additionally, the mother has been visiting with the minor weekly and has had a new baby that remains in her care, on the condition that she continue testing for the department and testing clean.” Mother argued the proposed orders would be better for Tamara because “It is in the best interest of the minor to ultimately be reunified with the mother for her overall well-being and emotional stability. The minor has an older sibling in placement with the maternal grandmother, and a younger sibling that remains in the care of the mother. It is imperative that the mother has the opportunity to foster these sibling relationships which will promote the minor’s emotional stability through a strong and bonded family unit.”

Permanency Planning, Father Appears in Court

In its report for the March 16, 2015 section 366.26 hearing, DCFS stated that Tamara was a Regional Center client, receiving speech therapy once a week and progressing well.⁵ Mrs. P. also

⁵ In the P.’s request for de facto parent status, submitted to the juvenile court in February 2015, Mrs. P. explained that Tamara suffered from the speech disorder apraxia, resulting from the neurological damage she sustained during her sepsis infection.

arranged for Tamara to be assessed by an early intervention center where she could receive additional services, if accepted into the program. Tamara had no reported mental or emotional problems and Mrs. P. described her as “a very happy, loving and easy going baby.” The P.’s remained willing to provide a permanent home for Tamara, and DCFS identified adoption as the appropriate permanent plan.

DCFS also stated in the section 366.26 report that, since November 19, 2014, Mother had been consistent with her weekly monitored visitation with Tamara. Mrs. P. reported, however, that the visits were “not productive or age appropriate” in that Mother was “generally on her cell phone the entire visit” and had “to be reminded to change” Tamara’s diaper. Presumed father M.M. had not had any contact with Tamara since the child was placed in the P.’s home.

Father appeared at the March 16, 2015 section 366.26 hearing, and the juvenile court appointed counsel who made a special appearance on his behalf. The court ordered paternity testing for Father and M.M. to determine Tamara’s biological father. The court continued the section 366.26 hearing regarding Tamara to May 20, 2015, and scheduled a hearing on the P.’s de facto parent request for the same day. The court also set a hearing on Mother’s section 388 petition for May 20, 2015, but only as to her request for unmonitored visitation. The court denied Mother’s request for reinstatement of reunification services without a hearing.

In a May 5, 2015 last minute information for the court, DCFS recommended Mother’s visitation with Tamara remain monitored due to Mother’s inconsistent visits and inattentiveness to Tamara during her sporadic visits. Out of the 9 scheduled

visits between March 4 and May 4, 2015 where a monitor was available to supervise the visit, Mother attended two visits.⁶ According to Mrs. P., during a March 4, 2015 visit, “Mother sat in the McDonald’s booth and allowed Tamara to play by herself on the playground for the full 2 hours of the visit.” On April 15, 2015, Mother appeared for the visit, but was one hour late. There were five scheduled visits between March 17 and April 13, 2015, for which Mother did not show and did not contact Mrs. P. to cancel. Regarding four of these missed visits, Mother told the social worker she had been waiting for Mrs. P. to contact her to confirm the visit, but Mrs. P. did not call. Mrs. P. told the social worker she had previously confirmed her availability with Mother. On April 20, 2015, the first scheduled visit with the human services aide as monitor, Mother canceled the visit, reporting that her daughter, J.H., was ill and she did not have a babysitter. On April 27, 2015, Mother canceled the visit, reporting that she did not have a stroller for J.H. and she could not hold J.H. during the bus ride to visit Tamara because J.H. was too heavy.

Father’s Motion and Section 388 Petition

After the results of the paternity test indicated Father was Tamara’s biological father, on May 14, 2015, Father filed an

⁶ On May 4, 2015, Mother contacted the social worker, apparently indicating she was available for a visit, but the monitor (a human services aide) was unavailable. Beginning on April 20, 2015, a human services aide was assigned to monitor the visits. DCFS wanted “to get a second perspective on the visits” in addition to that of Mrs. P. Mother did not show for the two scheduled visits in April 2015 for which a human services aide was available to monitor the visit.

*Ansley*⁷ motion, asking the juvenile court “to vacate and void all orders from the dispositional hearing and all orders subsequently made regarding father and return to the arraignment/detention in the instant matter due to the failure of [DCFS] to give proper notice to the father” Father argued he “had statutory and due process rights to notice of the jurisdictional/dispositional hearing” (although the record indicates Mother did not provide DCFS with Father’s name until after the jurisdiction/disposition hearing). Father also argued “DCFS thwarted his opportunity to reunify with his daughter even after he was released from incarceration and availed himself to the social worker by failing to properly notice or inform him of the impending court date of November 17, 2014,” the hearing at which the juvenile court terminated family reunification services.

Father submitted a declaration in support of his motion. He stated he was incarcerated from August 19, 2013 to October 12, 2014. From December 6, 2013 to October 12, 2014, he was housed at Folsom State Prison. In October 2013, about two months after Tamara’s dependency proceedings commenced, Mother wrote to him and informed him that he might be Tamara’s father. Mother did not disclose the dependency proceedings or the fact she did not have custody of Tamara. In July or August 2014, Mother wrote again and informed him that she did not have custody of Tamara, but was participating in court proceedings and was confident she would regain custody.

⁷ *Ansley v. Superior Court* (1986) 185 Cal.App.3d 477, 480 [“parent claiming lack of due process notice of a juvenile dependency petition can challenge the resulting dependency judgment by filing a petition pursuant to section 388 in the same dependency proceedings”].

After his release from prison, Father contacted Mother about visiting Tamara, and Mother advised him to contact the social worker. The social worker explained he would be required to submit to a paternity test and appear in court before he could visit Tamara. According to the declaration, Father “never received any notice of the Dependency proceedings” In February 2015, he went to the juvenile court to inquire about Tamara’s case and was informed the next hearing would be March 16, 2015 (as set forth above, he appeared at that hearing). On May 5, 2015, his counsel informed him about the paternity test results. As of May 13, 2015, the date he signed his declaration, Father had visited Tamara on three occasions. He played with her and gave her a toy guitar he bought for her.

In the declaration, Father also discussed his employment and his housing situation. Father stated he was “gainfully employed through ‘The Green Station’ where [he worked] in customer service and unloading/loading merchandise.” He lived with his mother, stepfather, and younger brother, and stated he had “full support from [his] extensive familial network and [he] would desperately like for Tamara to be integrated into [his] family.” Father’s 14-month-old daughter, Ja.L., stayed with him every weekend and he watched her everyday while her mother attended school. Father stated he “assist[ed] in providing all essentials for [his] daughter [Ja.L.] and ensure[d] she [was] well taken care of and loved.” He had lived with Ja.L. full time for seven months, but no longer did “[f]or logistical reasons” he did not explain.

On May 18, 2015, Father filed a section 388 petition, requesting the juvenile court vacate the dispositional orders and either place Tamara in his home or grant him reunification

services. In articulating the change of circumstances supporting the petition, Father summarized the information set forth in the above-referenced declaration, arguing: “[Father] came forward at the earliest possible opportunity to obtain custody of his biological daughter. Paternity results ordered by the court show he is the biological father. The father has visited Tamara as often as he has been allowed to. Father is gainfully employed, has extensive familial support and his 14-month-old daughter J[a.]L[.], is in his custody.” Father argued the proposed order would be better for Tamara because “It is in Tamara’s best interest to be reunified with her biological father because he is a fit parent who has made a timely appearance in this case, given the circumstances. . . . [Father] is Tamara’s biological father and she will be raised with cultural and familial ties.”

On May 20, 2015, the juvenile court continued the section 366.26 hearing, as well as the hearing on the de facto parent request, Mother’s section 388 petition, Father’s *Ansley* motion, and Father’s section 388 petition, to allow DCFS to respond to Father’s filings. The court asked Father’s counsel if Father was “seeking to be elevated to presumed [father] status,” and counsel answered affirmatively. The court did not rule on Father’s request for presumed father status. The court authorized a statewide removal order for presumed father M.M., who apparently was incarcerated.

On June 9, 2015, Mrs. P. submitted another caregiver information form to the juvenile court. According to the contact log Mrs. P. attached, between May 11 and June 8, 2015, Mother attended two visits with Tamara and failed to show for three other scheduled visits. Mrs. P.’s log indicates Father first visited with Tamara on February 4, 2015, and visited four additional

times between then and June 4, 2015. Although Father could have attended 18 visits with Tamara between February 4 and June 4, 2015, he attended a total of five.

On June 12, 2015, DCFS submitted to the juvenile court an interim review report, responding to Mother's section 388 petition seeking unmonitored visitation, and Father's section 388 petition seeking custody of Tamara or reunification services. DCFS reported that, since Mother filed her section 388 petition, she had attended one visit monitored by a human services aide. The aide stated that "the visit went well, Mother interacted with Tamara. . . [T]hey met at McDonald's, Tamara played most of the visit, but Mother was appropriate and attentive to the child."

DCFS reported that Father had been "appropriate" during visits with Tamara and Mrs. P. had not expressed any concerns about the visits. DCFS believed Father was "dedicated to having a relationship with" Tamara. Father had been in "regular contact" with the social worker since his release from prison and had been calling the social worker "more frequently since the paternity test." On June 5, 2015, the social worker visited the apartment Father shared with his mother, stepfather, and younger brother, and found the apartment "to be an appropriate environment for the family." Father told the social worker he split his time between his mother's apartment and the home of his daughter Ja.L.'s mother, so he could visit Ja.L. DCFS recommended the juvenile court grant Father reunification services and unmonitored visitation with Tamara.

In a last minute information for the court, dated June 12, 2015, DCFS reported that Father was on formal probation in good standing, with a projected probation completion date in October 2015. He was submitting to random drug tests as a

condition of his probation, but DCFS did not have access to the test results.

On June 12, 2015, the juvenile court held a hearing on the parties' various petitions. Upon M.M.'s request, the court vacated the finding that he was Tamara's presumed father and relieved his counsel. Father's counsel asked the juvenile court to declare Father to be Tamara's presumed father, to allow Father to reunify with Tamara, and to grant Father unmonitored visitation. Mother's counsel joined in Father's requests. Counsel for DCFS argued, in pertinent part: "It does appear that [DCFS] was made aware of [Father] possibly being the father when the mother first referenced this back in 2013⁸. . . . [T]here is no evidence that [DCFS] made an effort to locate him, and the fact that he was not notified deprived him of due process, and at this time we are asking the court provide him with reunification services" and unmonitored visitation.

Tamara's counsel argued against the court granting Father reunification services and unmonitored visitation, stating it was not in Tamara's best interests. Counsel referenced Father's criminal history, and the fact he had been incarcerated off and on since 2006, as reflected in DCFS's June 12, 2015 interim review report. Counsel expressed doubt that Father would have convinced the juvenile court to offer him reunification services, even if the court had been aware of him at the inception of the case, because Father's prison sentence extended beyond the six months of reunification services to which he might otherwise

⁸ As discussed above, there is no indication in the record that Mother provided DCFS with Father's name prior to the September 13, 2013 jurisdiction/disposition hearing.

have been entitled in a case involving a newborn.⁹ Counsel also referenced Tamara’s special medical and therapeutic needs, and pointed out that Father had only attended five monitored visits with Tamara even though he could have visited on many other occasions.

In deciding Father’s *Ansley* motion, the juvenile court questioned if notice to Father of the dependency proceedings was required (and if so at what point), given that DCFS was unaware of Father’s name prior to the jurisdiction/disposition hearing and M.M. already had been declared Tamara’s presumed father. Ultimately the court concluded that “notice . . . should have probably been given to” Father “somewhere between the jurisdictional findings and the March [2014] report.” The court stated it was granting Father’s *Ansley* motion based on DCFS’s failure “to give proper notice,” but it did not grant Father the relief he requested in the motion (vacation of the disposition order and either custody of Tamara or reunification services). Instead, the court moved on to consider Tamara’s best interests in ruling on Father’s section 388 petition. The court found it was not in Tamara’s best interests to grant Father reunification services or unmonitored visitation for all of the reasons Tamara’s

⁹ Section 361.5, subdivision (a)(1)(B), provides: “For a child who, on the date of initial removal from the physical custody of his or her parent or guardian, was under three years of age, court-ordered services shall be provided for a period of six months from the dispositional hearing as provided in subdivision (e) of Section 366.21, but no longer than 12 months from the date the child entered foster care as provided in Section 361.49 unless the child is returned to the home of the parent or guardian.” Father’s prison term exceeded the 6-month and 12-month periods outlined in the statute.

counsel articulated, as summarized above. Thus, the court denied Father's section 388 petition. The court also denied Mother's section 388 petition requesting unmonitored visitation, granted the P.'s request for de facto parent status, and continued the section 366.26 hearing.

On July 2, 2015, the social worker referred Father for random alcohol and drug testing. He tested negative on July 9, July 22, and August 10, 2015, but then missed four tests on August 25, September 2, September 23, and October 28, 2015.

According to Mrs. P.'s contact log, which she attached to the caregiver information form she filed with the juvenile court on December 15, 2015, Father attended 17 out of 29 visits between June 8 and December 7, 2015. Mrs. P. reported that Tamara typically would scream and resist when Father attempted to interact with her during visits, and Father sometimes would express frustration. Father declined to change Tamara's diaper during visits.

Mother's Second Section 388 Petition

As stated in Mrs. P.'s contact log, between June 12 and December 7, 2015, Mother attended 10 out of 28 visits with Tamara. According to DCFS's section 366.26 report, Mother told the social worker it was "difficult for her to attend visits, because she ha[d] to take the bus and [was] not able to carry her youngest child, J[.]H[.], for long periods of time due to medical issues."

On December 15, 2015, Mother filed her second section 388 petition, seeking custody of Tamara or, in the alternative, unmonitored visitation and reinstatement of reunification services. Mother submitted a declaration, indicating she had addressed the problem that led to the removal of Tamara—her marijuana use. Mother stated she had "completed a full drug

program,” had been “clean and sober” for two and one-half years, and continued to drug test consistently for DCFS. Mother noted that circumstances had “substantially changed” since the juvenile court terminated her reunification services in that she was “the custodial parent” of one-year-old, J.H. (Tamara’s half sibling), who was thriving in her care.

Regarding visitation, Mother asserted in her declaration that circumstances had changed in recent months in that she had been visiting Tamara consistently.¹⁰ On a weekly basis, Mother and one-year-old J.H. would ride the bus from Los Angeles County to Orange County to visit Tamara at a McDonald’s restaurant.¹¹ During “a typical visit,” Mother would spend time with Tamara in the play area, watching Tamara climb on the jungle gym and play with the toy fish. Mother would bring food for Tamara, “including fruit, because she enjoy[ed] it,” or purchase food for Tamara at McDonald’s. Mother stated she had “a strong bond” with Tamara and “the girls [Tamara and J.H.] like[d] to play together. According to Mother, Tamara called her “mommy” and called J.H. “baby.” Mother stated she attempted to foster the sibling bonds between Tamara, J.H. and their older,

¹⁰ According to Mrs. P.’s log, between October 5 and December 7, 2015, Mother attended seven out of 10 visits with Tamara. In her declaration, Mother represented she had not “missed a visit in months,” but Mrs. P.’s log indicated Mother failed to show for visits on November 30 and December 7, 2015. Mother blamed her prior inconsistent visitation on her pregnancy with J.H. and subsequent caesarean section surgery and recovery.

¹¹ DCFS provided Mother and Father with transportation funds to attend visits with Tamara.

half sibling, T.P. As an example, she noted that she threw a party at Chuck E. Cheese's for Tamara's second birthday, and J.H., T.P. and the maternal grandmother attended.

Mother also stated in her declaration that she had "tried to maintain telephonic communications with Tamara," but the P.'s did not return her telephone calls. She also claimed the P.'s did not share Tamara's medical information with her, despite repeated inquiries. Mother understood that Tamara had "special needs," as well as "a speech problem, which she addresse[d] in therapy." Mother stated, "When I go to visits, I try to work with Tamara on her speech problems. I bring flash cards to her and I practice words with her. She has trouble with some words, and I try to work with her and repeat certain words until she can pronounce them."

Hearing on Mother's Section 388 Petition/Section 366.26 Hearing

On December 18, 2015, the juvenile court held a hearing on Mother's section 388 petition and then proceeded with the section 366.26 hearing regarding Tamara.

Mother testified in support of her section 388 petition. To the extent she reiterated the information set forth in her declaration (summarized above), we will not repeat that information here. Mother explained that she missed her November 30, 2015 visit with Tamara because J.H. was sick. She missed her December 7, 2015 visit with Tamara because she was in a car accident. Mother testified about the party she threw for Tamara's second birthday at Chuck E. Cheese's. In addition to J.H., T.P. and the maternal grandmother, Father and some of his relatives also attended. According to Mother, Tamara called the

maternal grandmother, “Grandma, Gaga,” called T.P., “Neesha,” and called Mrs. P., “Connie.”

Mother stated she did not attend Tamara’s medical appointments with the P.’s because Mrs. P. did not notify her about the appointments. Mother claimed she had asked the social worker for information about Tamara’s medical appointments, but the social worker also failed to provide the information. Mother did not know the names of any of Tamara’s doctors or therapists, and did not know how often Tamara attended speech therapy. Nor did she know much about Tamara’s daily routine (e.g., what time she ate or went to sleep). Mother testified that she did not “have a connection” with Mrs. P. and barely spoke to her.

When asked why it was in Tamara’s best interests to return to her custody, Mother responded: “Because, basically, I am the mother. She knows me and basically she’s been in my womb so basically we have a connection. So even if I’m not around, she still knows who her mother is at the end of the day.” Mother believed Tamara should live with her because she is Tamara’s biological mother.

After hearing oral argument, the juvenile court denied Mother’s section 388 petition, finding it was not in Tamara’s best interests to grant Mother’s request for custody or, in the alternative, unmonitored visitation and reinstatement of reunification services.

The juvenile court then proceeded with the section 366.26 hearing, noting for the record that the P.’s were prepared to adopt Tamara, the adoption home study had been approved, and DCFS was recommending termination of parental rights.

Mother's counsel argued that both the parent-child and sibling relationship exceptions to termination of parental rights applied. Father's counsel argued the juvenile court could not terminate his parental rights without making a finding of detriment because he is a non-offending parent who qualified for presumed father status.¹² Counsel for the de facto parents, DCFS and Tamara argued in favor of termination of parental rights.

The juvenile court found by clear and convincing evidence that Tamara was adoptable. The court did not find that either of the exceptions to termination of parental rights applied. The court commented: "[T]he visits have been sporadic. The parents have missed many more visits than they have participated in and the quality of the visits have not been of sufficient quality to demonstrate there is a parental bond or that the parents have taken on a parental role with the child." The court terminated parental rights and identified adoption as the permanent plan. The court designated the P.'s as the prospective adoptive parents.

DISCUSSION

Father's Appeal

When Father first appeared in the juvenile court on March 16, 2015—20 months after these dependency proceedings commenced—he wanted the court to vacate the disposition order and place Tamara in his home or grant him reunification services. The juvenile court had terminated Mother's reunification services four months earlier on November 17, 2014, and the case was in the permanency planning stage, making it

¹² The juvenile court never made a finding that Father was Tamara's presumed father.

more difficult for Father to plead his case than it would have been if the case were still in the reunification stage.

As our Supreme Court has held, “if a man fails to achieve presumed father status prior to the expiration of any reunification period in a dependency case, whether that period be 6, 12, or 18 months . . . , he is not entitled to such services under section 361.5,” the statute outlining the requirements for the provision of reunification services. (*In re Zacharia D.* (1993) 6 Cal.4th 435, 453.) “His only remedy” is “to file a motion to modify under section 388,” which requires him to demonstrate that “a change of circumstance exists and that the proposed change is in the child’s best interests.” (*Ibid.*; *In re Casey D.* (1999) 70 Cal.App.4th 38, 47 [setting forth parent’s burden on a section 388 petition].) “The rule is the same whether his paternity was concealed from him or not.” (*In re Vincent M.* (2008) 161 Cal.App.4th 943, 947.)

Father appeared in these dependency proceedings on March 16, 2015, four months after the juvenile court terminated family reunification services on November 17, 2014, and 18 months after DCFS placed Tamara with the P.’s. Father filed a section 388 petition, seeking custody of Tamara or reunification services. The juvenile court denied the petition, finding it was not in Tamara’s best interests to change the orders in the manner Father requested. On appeal, Father does not contend he can demonstrate Tamara’s best interests would be served by the proposed change in order. Instead, he argues the juvenile court never should have considered Tamara’s best interests in ruling on his request for reunification services.

Father asserts he would have appeared in the dependency proceedings and achieved presumed father status during the

reunification period, entitling him to reunification services, if DCFS had notified him about the dependency proceedings in a timely manner. Father contends his lack of timely notice of the dependency proceedings is a structural error, requiring automatic reversal of the order terminating his parental rights as well as the dispositional orders. We do not find any reversible error.

M.M. held himself out as Tamara's father, visiting her at the hospital after she was born and signing her birth certificate. When DCFS detained Tamara, Mother told the social worker M.M. was Tamara's father. At the detention hearing, the juvenile court found M.M. to be Tamara's presumed father. "Once a presumed father has been identified, the social services agency is not expected to wait for other potential fathers to come forward." (*In re Julia U.* (1998) 64 Cal.App.4th 532, 542, citing *In re Zacharia D.*, *supra*, 6 Cal.4th at p. 453.)

Under section 291, DCFS must provide notice of the jurisdiction/disposition hearing to "fathers, presumed and *alleged*." (§ 291, subd. (a)(2), italics added.) In his *Ansley* motion, Father argued he "had statutory and due process rights to notice of the jurisdictional/dispositional hearing." The defect in Father's argument is that there is no evidence in the record indicating DCFS knew about him prior to the September 13, 2013 jurisdiction/disposition hearing. Although DCFS learned in early September 2013 that Mother was denying M.M. was Tamara's biological father, the record indicates Mother failed to disclose the name of the biological father. On September 5, 2013, about a week before the jurisdiction/disposition hearing, Mother told the social worker Tamara's father was a man she met "on Facebook," who "came over once." Mother further stated she could not

remember the man's name and was "no longer in contact with him as he [had] 'disappeared.'"

At some point after the jurisdiction/disposition hearing, Mother revealed Father's name to the social worker, asserting that he was Tamara's biological father. The earliest mention of Father's name in the record is in the March 14, 2014 status review report. Therein, DCFS reported: "Mother has stated to this [social worker] on several occasions that she does not know how the Court got the name, M[.]M[.] for the father because Tamara's father is a man named J[.]L[.] [Father] who is in prison. She stated that she thinks he is in prison in Wasco, but denies having any contact or additional information for J[.]L[.]"

Father has not cited any authority establishing at what point DCFS had a legal duty to provide Father with notice of the review hearings. Under section 293, DCFS must provide notice of section 366.21 review hearings to the "presumed father or any father receiving services." The statute does not mention alleged fathers, which was Father's status. Section 294, on the other hand, requires DCFS to provide notice of the section 366.26 selection and implementation hearing to "fathers, presumed and alleged." Father received proper notice of the section 366.26 hearing.

To the extent DCFS had some duty to provide Father with notice of the hearings earlier than it did—although there were no paternity test results demonstrating M.M. was not Tamara's biological father, and Mother had previously insisted she did not know the name of the biological father because he had come to her home once and then vanished—we find any error was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18.) We disagree with Father's contention that

the error was a structural defect requiring automatic reversal. “[I]n a dependency proceeding when the welfare of the child is at issue and delay in resolution of the proceeding is inherently prejudicial to the child,” errors are amenable to harmless error analysis where the appellate court is capable of determining whether the parent suffered prejudice. (*In re James F.* (2008) 42 Cal.4th 901, 913-915, 917.)

Had DCFS provided Father with notice of the review hearings between March 2014 (the earliest date on which the record establishes DCFS was aware of his existence) and the November 17, 2014 hearing at which the juvenile court terminated family reunification services, the outcome would not have been more favorable to Father. The juvenile court would not have found him to be Tamara’s presumed Father prior to the termination of family reunification services (for the reasons set forth below), and he would have been in the exact same position in which he actually found himself: having to file a section 388 petition demonstrating that a change of circumstances existed and that the proposed change in order was in Tamara’s best interests.

Under Family Code section 7611, subdivision (d), if a man has not legally married or attempted to marry the child’s mother, he may qualify as a “presumed parent” if he “receives the child into his . . . home and openly holds out the child as his . . . natural child.” According to Father, in October 2013, Mother wrote to him and informed him that he might be Tamara’s father. Father was incarcerated and could not receive Tamara into his home, even if he had the inclination to do so. After Father was released from prison, he could not receive Tamara into his home because she was in foster care under DCFS supervision.

Father relies on *Adoption of Kelsey S.* (1992) 1 Cal.4th 816, a case that arose in the context of a private adoption, not dependency proceedings. There, the California Supreme Court decided: “If an unwed father promptly comes forward and demonstrates a full commitment to his parental responsibilities—emotional, financial, and otherwise—his federal constitutional right to due process prohibits the termination of his parental relationship absent a showing of his unfitness as a parent. . . . [¶] . . . The father’s conduct both *before and after* the child’s birth must be considered. Once the father knows or reasonably should know of the pregnancy, he must promptly attempt to assume his parental responsibilities as fully as the mother will allow and his circumstances permit. In particular, the father must demonstrate ‘a willingness himself to assume full custody of the child—not merely to block adoption by others.’ [Citation.] A court should also consider the father’s public acknowledgement of paternity, payment of pregnancy and birth expenses commensurate with his ability to do so, and prompt legal action to seek custody of the child.” (*Id.* at p. 849.)

Father argues he “made a sufficient, timely, and full commitment to his parental responsibilities and did everything he could do under the unique circumstances of this case” to achieve presumed father status. We disagree. Father has presented no evidence indicating that, once he learned about Tamara in October 2013, he openly held her out as his child. He did not ask Mother to bring her to the prison for a visit, or attempt to provide support for her, or ask his mother (with whom he lived when he was not incarcerated) to connect with the child. Father concedes Mother informed him about the dependency proceedings in July or August 2014, a couple of months before his

release from prison. Father did not immediately contact DCFS and assert his parental rights.

Prior to the termination of the family reunification period, Father qualified as a biological father, but not a presumed father. Thus, he was not entitled to reunification services unless he prevailed on his section 388 petition by demonstrating a change in order was in Tamara's best interests. He made his case, and the juvenile court decided it was not in Tamara's best interests to reunify with Father, a man she did not know, rather than proceed in permanency planning with a family she had lived with for nearly two years by that point. Father does not argue he can demonstrate it was in Tamara's best interests to reunify with him.

The trial court did not err in declining to grant Father presumed father status prior to the termination of parental rights because he never established he qualified as a presumed father. Thus, *Adoption of Kelsey S.* is inapplicable and the juvenile court was not required to make a finding of unfitness before terminating Father's parental rights.

Mother's Appeal

Mother contends the juvenile court abused its discretion in denying her December 15, 2015 section 388 petition, seeking custody of Tamara or, in the alternative, unmonitored visitation and reinstatement of reunification services. She also contends the court erred in finding the parent-child relationship exception to termination of parental rights (§ 366.26, subd. (c)(1)(B)(i)) did not apply to the relationship between her and Tamara.

Section 388 petition

Under section 388, "Any parent . . . 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.” (§ 388, subd. (a).) “The parent bears the burden of showing both a change of circumstances exists and that the proposed change is in the child’s best interests.” (*In re Casey D.*, *supra*, 70 Cal.App.4th at p. 47.) We will not reverse an order denying a section 388 petition unless the parent demonstrates the trial court abused its discretion. (*In re Stephanie M.* (1994) 7 Cal.4th 295, 318.)

Mother has not demonstrated an abuse of discretion. When Mother filed her section 388 petition in December 2015, Tamara had been living with the P.’s for more than two years. Tamara was bonded with the P.’s and they had consistently provided the medical and therapeutic care Tamara required for her special needs. The evidence shows Mother did not attend Tamara’s doctor or therapy appointments, was a sporadic visitor during the two and one-half years of dependency proceedings, and was not particularly interactive with Tamara during visits. Although Mother visited Tamara more consistently in the couple of months before she filed her second section 388 petition, Mother still could not establish it would be in Tamara’s best interests to return to her custody, to reinstate reunification services, or to grant Mother unmonitored visitation. When Mother testified, the only reason she could articulate supporting the best interests element of her petition is that she is Tamara’s biological Mother. That reason is insufficient to upset the stability Tamara had achieved with the P.’s.

Exception to termination of parental rights

“At a hearing under section 366.26, the court is required to select and implement a permanent plan for a dependent child. Where there is no probability of reunification with a parent, adoption is the preferred permanent plan.” (*In re Tabatha G.* (1996) 45 Cal.App.4th 1159, 1164.) When the juvenile court finds by clear and convincing evidence that a child is likely to be adopted, the court must terminate parental rights unless the parent opposing termination can show that one of the exceptions set forth in section 366.26, subdivision (c)(1) applies. (*Ibid.*) “Because a parent’s claim to such an exception is evaluated in light of the Legislature’s preference for adoption, it is only in exceptional circumstances that a court will choose a permanent plan other than adoption.” (*In re Scott B.* (2010) 188 Cal.App.4th 452, 469.)

“The burden falls to the parent to show that the termination of parental rights would be detrimental to the child under one of the exceptions.” (*In re C.B.* (2010) 190 Cal.App.4th 102, 122.) To satisfy the burden of proving the parent-child relationship exception to termination of parental rights under section 366.26, subdivision (c)(1)(B), a parent must demonstrate 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 second prong of this exception requires the parent to demonstrate that 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.* (1994) 27 Cal.App.4th 567, 575.)

Even frequent and loving contact between a child and a parent is not sufficient, by itself, to establish the significant parent-child relationship required under section 366.26, subdivision (c)(1)(B). (*In re Beatrice M.* (1994) 29 Cal.App.4th 1411, 1418-1419.) A “parental relationship is necessary for the exception to apply, not merely a friendly or familiar one” because “[i]t would make no sense to forgo adoption in order to preserve parental rights in the absence of a real parental relationship.” (*In re Jasmine D.* (2000) 78 Cal.App.4th 1339, 1350.)

The juvenile “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.” (*In re Derek W.* (1999) 73 Cal.App.4th 823, 827.) “The factors to be considered include: ‘(1) the age of the child, (2) the portion of the child’s life spent in the parent’s custody, (3) the positive or negative effect of interaction between the parent and the child, and (4) the child’s particular needs.’” (*In re Helen W.* (2007) 150 Cal.App.4th 71, 81.)

“Reviewing courts have applied various standards of review when considering trial court determinations of the applicability of these statutory exceptions to termination of parental rights. In *In re Jasmine D.* [, *supra.*] 78 Cal.App.4th [at page] 1351, the court observed that both the substantial evidence test and the abuse of discretion test have been applied, and the court stated that ‘[t]he 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 [or she] did.” . . .” [Citations.] However, the abuse of discretion standard is not only traditional for custody determinations, but it also seems a better fit in cases like this one, especially since the statute now requires the juvenile court to find a “compelling reason for determining that termination would be detrimental to the child.” (§ 366.26, subd. (c)(1)[(B)].) That is a quintessentially discretionary determination. The juvenile court’s opportunity to observe the witnesses and generally get “the feel of the case” warrants a high degree of appellate court deference. [Citation.]” (*In re Scott B.*, *supra*, 188 Cal.App.4th at p. 469.)

Under either the substantial evidence or abuse of discretion standard of review, we will not disturb the juvenile court’s decision terminating parental rights because Mother did not establish the parent-child relationship exception applied to her relationship with Tamara. As discussed above, during the two and one-half years of dependency proceedings, Mother had been a sporadic visitor, not a parent to Tamara. Mother was not involved in or knowledgeable about Tamara’s medical care. Mother was not familiar with Tamara’s habits or daily routine. The evidence shows Mother typically watched Tamara play on the jungle gym during visits, although Mother represented she helped two-and-one-half-year-old Tamara with her speech issues by showing her flash cards and asking her to pronounce words. There is no evidence Mother met any of Tamara’s emotional

needs. The attachment between Mother and Tamara was not strong enough to warrant having Tamara forego the security of an adoptive family.

DISPOSITION

The orders are affirmed.

NOT TO BE PUBLISHED.

CHANEY, J.

We concur:

ROTHSCHILD, P. J.

LUI, J.