Filed 8/14/12 In re M.S. CA2/4

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

In re M.S. et al., Persons Coming Under the Juvenile Court Law.	B234956 (Los Angeles County Super. Ct. No. CK77002)
LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. MARYANN P., Defendant and Appellant.	

APPEAL from an order of the Superior Court of Los Angeles County, Veronica S. McBeth, Judge. Affirmed.

Valerie N. Lankford, under appointment by the Court of Appeal, for Defendant and Appellant.

Office of the County Counsel, John F. Krattli, Acting County Counsel, James M. Owens, Assistant County Counsel, and Aileen Wong, Deputy County Counsel, for Plaintiff and Respondent.

INTRODUCTION

Maryann P. (Mother) appeals from an order of the juvenile court terminating her parental rights to her sons M.S. and D.S. Mother contends that, given the nature of her relationship with the boys, the juvenile court erred in failing to find applicable the exception which would have avoided termination of her parental rights. (Welf. & Inst. Code, § 366.26, subd. (c)(1)(B)(i).)[1] Mother further contends that the juvenile court abused its discretion by denying her section 388 petition for modification by which she sought an order reinstating her family reunification services and allowing unmonitored visitation. We conclude the juvenile court did not abuse its discretion as to either order, and affirm.

FACTUAL AND PROCEDURAL BACKGROUND

M.S. (born in June 2007) came to the attention of the Los Angeles County Department of Children and Family Services (DCFS) in January 2009 due to domestic violence between Mother and M.S.'s father (Father), the parents' drug use, and Father's mental health issues.[2] The parents were offered voluntary family maintenance services, and agreed to submit to mental health evaluations and random drug testing and to participate in programs for substance abuse, parenting, and domestic violence.

In February 2009, Mother began living in a domestic violence shelter, but returned to live with Father in April 2009. Soon thereafter, Father forcibly held his hand over Mother's mouth and slapped her, in the presence of M.S. Father was arrested and Mother, who was pregnant, agreed to reside with M.S.'s paternal great aunt and uncle, Tania and Paul G. (the G.'s).

---

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

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

DCFS filed a section 300 petition regarding M.S. on April 24, 2009, alleging that the domestic violence between the parents (which remedial services failed to resolve) endangered the child's physical and emotional safety and placed him at risk of harm, that Mother had physically abused M.S. by biting him and pulling his hair, and that Mother and Father had a history of marijuana abuse which rendered them incapable of caring for M.S. and placed him at risk of harm.

At the detention hearing on April 24, 2009, the court ordered DCFS to place M.S. in the G.'s home and ordered Mother to obtain a restraining order. DCFS was ordered to provide the parents with family reunification services, including referrals for parenting classes, individual counseling, and domestic violence counseling. Both parents were ordered to have a psychological evaluation. The parents were granted monitored visits two to three times per week, for two to three hours per visit; however, the parents were not permitted to visit M.S. at the same time.

DCFS reported in June 2009 that Mother and Father began their relationship when she was 16 and he was 14. Both parents smoked marijuana. Father had emotional problems stemming from childhood abuse for which he was prescribed medication, but he did not take it. Mother said she last used marijuana in late February 2009 and she tested negative for drugs in late March 2009. The parents frequently engaged in verbal altercations which sometimes became physical. Mother had completed a 45-day shelter program at Angel Step, where she received domestic violence counseling, parenting classes, and substance abuse treatment. Both parents denied that Mother physically abused M.S.

At the adjudication hearing on June 8, 2009, Mother submitted on the petition as modified. The court sustained the allegations that domestic violence between the parents endangered M.S.'s physical and emotional safety and placed him at risk of harm and that Mother and Father had a history of marijuana abuse which rendered them incapable of caring for M.S. and placed him at risk of harm. The court struck the allegation regarding Mother's physical abuse of M.S. M.S. was declared a dependent of the juvenile court. The court ordered Mother to enroll in a drug rehabilitation program with random testing,

a 52-week domestic violence program, parenting education, and individual counseling; Mother was also required to submit to a psychological evaluation. Mother's weekly visits remained monitored.

Mother gave birth to D.S. in early September 2009 and DCFS received a referral alleging general neglect while Mother and D.S. were still in the hospital. Mother tested negative for drugs when D.S. was born. Mother said she did not have contact with Father and that she had obtained a restraining order against him. She had enrolled in July 2009 in a parenting class, domestic violence counseling, and a substance abuse program. Mother had also been submitting to random drug testing, and had consistently tested negative. Father was in a psychiatric hospital at the time of D.S.'s birth. D.S. was detained and placed in the G.'s home along with M.S. DCFS filed a section 300 petition regarding D.S., alleging the parents engaged in domestic violence and had a history of substance abuse. However, at the detention hearing on September 11, 2009, the court found no prima facie case for detaining D.S. and ordered him released to Mother's custody. The court ordered that if Father wished to have contact with D.S., he was required to contact the social worker and have monitored visits at the DCFS office.

In October 2009, DCFS learned that Mother had gone to visit Father with D.S. a few days after the baby was returned to her custody. DCFS detained D.S. and filed a new section 300 petition on his behalf, alleging the parents had an unresolved history of domestic violence, that the child's sibling was a current dependent of the juvenile court, that the parents had a history of substance abuse, and that Father suffered from emotional problems. Finally, DCFS alleged that Mother had placed D.S. in an endangering situation by taking D.S. to see Father, in violation of the court order limiting Father's contact with D.S. to monitored visits at the DCFS office.

DCFS reported for the jurisdictional hearing scheduled for December 10, 2009, that Mother acknowledged that she had violated the court order by taking D.S. to see Father. Mother also told the social worker that Father had gotten drunk and beaten her up on Thanksgiving Day. The social worker observed that although Mother was participating in all of the court-ordered services, she continued to have contact with

Father despite his violent behavior. She obtained a temporary restraining order against Father on December 2, 2009.

The G.'s expressed a desire to adopt M.S. Mother and Tania G. had frequent disputes, and therefore DCFS made arrangements for Mother and Tania G. not to have contact with one another when Mother visited the children. Mother felt that the social worker "took sides" with Tania G.

I. Six-Month Review Hearing

On December 10, 2009, the court held a six-month review hearing regarding M.S. and a jurisdiction hearing for D.S. The court found true amended allegations in D.S.'s section 300 petition and also found that Mother had made substantive progress with her case plan. The court ordered that family reunification services be provided with regard to D.S. and continued Mother's family reunification services regarding M.S. Mother had consistently visited with the children, and she continued to be given monitored visitation two to three times per week. The court also ordered both parents to undergo Evidence Code section 730 evaluations.

Dr. Timothy Collister evaluated both parents in February 2010. In his report, Dr. Collister discussed the results of the psychological testing and interview he conducted with Mother. Based on Mother's responses to testing, Dr. Collister said, "[r]ecurrent and disruptive problems of impulse control are indicated, with a potential for amoral, if not openly antisocial behavior. She may act as if manipulation and counter-manipulation were the central realities of survival. Family conflict and estrangement may be more severe and chronic than she would initially admit." "The proposed diagnosis . . . is the alienated predator syndrome, with that an adaptation to pervasive, deeply alienating abuse with the traditional diagnosis as an antisocial personality disorder. Again, the most common diagnosis with this pattern would be a personality disorder such as an antisocial and borderline personality disorder. Similar patients have also been seen as narcissistic with paranoid traits, or described as a chronic 'borderline psychotic character.'" Dr. Collister continued, "With respect to treatment considerations, Ms. P[.] should be

considered possibly a danger to herself or to others through sudden impulsiveness and loss of judgment. Her responses suggest an evaluation of her use of alcohol." "While Ms. P[.] appears self-sufficient in many ways, the long-term prognosis for her interpersonal adjustment is doubtful. It should be emphasized that many patients with this pattern generated good initial impressions of their desires to cooperate with treatment and of their wishes to change. Outpatients with this pattern were seen as telling the therapist whatever they thought the therapist wanted to hear with a strong potential for an abrupt termination or disappearance when they did not get what they wanted from the therapist (note again the fundamental orientation towards manipulation and counter-manipulation)."

Dr. Collister concluded, however, that "[o]pinions and recommendations are deferred in this case to the court. While normally specific opinions relating to the issues of concern to the court, as set forth in the Order Appointing Expert form, are addressed systematically and provided to the court, in the present case I defer to the court for the court's consideration of those matters."

DCFS's report dated March 24, 2010, indicated that Mother was participating in individual therapy, parenting classes, and counseling for substance abuse and domestic violence. She had tested negative for drugs 17 times; she had missed three tests in October 2009, January 2010, and February 2010. She regularly visited with the children three times per week and visits went well.

Mother began weekly therapy sessions with psychologist Karen Schipani in April 2010. After five sessions, Schipani reported that Mother was highly motivated to do whatever was necessary to reconcile with her children. She read the material Schipani provided to her and completed homework assignments between sessions. Schipani, who had reviewed Dr. Collister's evaluation, noted that she had "barely scratched the surface in working" with Mother, but stated that "a decision by the court to permanently remove her children from her care and place them in adoption does appear to be pre-mature." She recommended Mother be allowed to continue receiving weekly therapy for six months before an adoption decision was made.

II. 12-Month Review Hearing

The 12-month review hearing for M.S. and the six-month review hearing for D.S., originally set for June 2010, was eventually held in October 2010. DCFS reported that Mother was participating in the required services, including therapy, drug and alcohol rehabilitation with random testing, and domestic violence education. Funding for Mother's counseling was discontinued in June 2010, but Mother continued participating in therapy with Schipani at her own expense. Mother completed a one-year residential treatment program that provided education in substance abuse, parenting, domestic violence, and women's issues. Mother was permitted to have unmonitored visits with the children four hours per week and she consistently attended the visits and acted appropriately, feeding the boys, diapering them, interacting with them by talking and playing games, and correcting unwanted behavior. In April 2010, Mother expressed concern that M.S.'s speech was delayed and DCFS referred the child for evaluation.

In July 2010, DCFS learned that Mother and Father had been involved in a physical altercation on June 1, 2010. Mother admitted she went to see Father at a hotel in order to discuss a court order, but when she arrived she saw he was using cocaine. She said she attempted to leave, but he chased her and tackled her to the ground. Police responded to the scene and found in Father's hotel room a manila envelope containing a court order, a cell phone charger, and a bra and underwear, all of which Mother admitted were hers. Mother declined to press charges against Father and did not report the incident to DCFS.

After DCFS learned of this incident, Mother's visits were returned to monitored in late July 2010. Also in late July 2010, the court ordered that visitation for Mother was to be offered three times per week, for three hours per visit. Mother consistently took full advantage of her visitation time, despite having to travel a long distance by bus and to coordinate visits with her work schedule.

The social worker reported that multiple difficulties were created by the G.'s with regard to visitation. Tania G. complained that M.S. had suffered regression or exhibited

behavioral problems after visits with Mother, and Tania did not allow Mother to see or accompany M.S. to the hospital when he had an asthma attack. The social worker stated that "[t]he caregiver's intentional behavior inflicted emotional distress and confusion on the child [M.S.] to sabotage the visit. Tania really wants to adopt the children and has deep and irreconcilable conflicts with mother and paternal grandmother."

The social worker reported that "the children were observed to be happy and bonded with mother and maternal grandmother," and that "[t]hey love each other and are bonded. Mother and sons have good communication. They played, talked, ate and laughed to each other." In October 2010, Mother stated she had had no contact with Father since the incident on June 1, 2010. Mother had moved to a domestic violence shelter on June 24, 2010.

Based on the physical altercation on June 1, 2010, between Mother and Father and on Dr. Collister's evaluation of Mother, the social worker opined that returning the children to Mother would place them at risk of harm. The social worker stated that counseling had not benefited Mother regardless of the progress reported by her counselors, and that she had only given the impression she was in compliance with court orders. DCFS recommended termination of family reunification services.

The court held a contested 12-month review hearing in October 2010. Although the court found Mother was in compliance with her case plan, it found that Mother was just beginning the process and had more work to do. The court terminated family reunification services and set a section 366.26 permanency planning hearing for February 2011.

Shortly thereafter, Tania G. reported that she observed M.S. masturbating in the bathtub to the point of ejaculating, and that he told her that Mother told him to do that. Mother explained that she was concerned that his uncircumcised penis was not being cleaned properly, causing him discomfort, so she taught him how to retract the foreskin and clean himself in the bathtub and after urinating. DCFS had M.S. examined by a physician, who found no evidence of abuse, and indicated that a child of his young age

was not physically capable of ejaculating. The allegation was determined to be inconclusive.

In November 2010, DCFS requested that Mother's visits be reduced because the children were spending too much time in the car and were exhausted by the visitation schedule. The court modified the visits to twice weekly. Thereafter the visits took place at a fast food restaurant near the G.'s home in Temecula and were monitored by DCFS. Mother continued to consistently attend every visit, although she lived in Whittier, one and one-half hours away.

III. Mother's Section 388 Petition

In January 2011, Mother filed a section 388 petition requesting reinstatement of family reunification services and unmonitored visitation. Mother indicated she had obtained a restraining order against Father and had completed two domestic violence programs and substance abuse counseling. She participated in individual counseling and continued to drug test with negative results. Mother submitted numerous letters of recommendation and support from family, friends, and her therapist and program counselors. The court found that Mother's showing was sufficient to warrant holding a hearing on the section 388 petition, and set a hearing date in February 2011 to coincide with the section 366.26 hearing.

In February 2011, the court continued the section 366.26 hearing and the section 388 hearing for contest. The court ordered that Evidence Code section 730 evaluations be performed of Mother, M.S., and the G.'s.

IV. The Section 730 Evaluations

Dr. Michael Ward evaluated Mother, M.S., and the G.'s. Dr. Ward observed that it was obvious there was a good and close relationship and bond between M.S. and the G.'s. The visit he observed between Mother and M.S. went very well. As soon as Mother entered the office, M.S. smiled; she picked him up and hugged and kissed him, which he gladly accepted. He sat in her lap as she read him a book and asked him to

point things out as they read. Mother engaged M.S. with educational games, which he thoroughly enjoyed, and they were affectionate and at ease with one another. He observed "it is very clear that [M.S.] and his mother have a good and close relationship and bond. All the interactions I observed were very natural, positive and appropriate." He indicated that there was no reliable way to quantify and evaluate which bond was stronger, that with Mother or that with the G.'s. M.S. initially said Mother was his aunt, but then told Dr. Ward he had two moms and one dad.

Dr. Ward stated that it was common when performing evaluations in dependency cases for an offending parent to present in a defensive fashion. Here, however, he noted "a somewhat surprising and fairly dramatic difference in this regard" between Mother and the G.'s. Mother was "much less defensive than the average 'offending' parent seen for the Court." In contrast, the G.'s both had "extremely high scores" indicating defensiveness, "even higher than our typically very defensive parents." People with such scores are often "naively defensive," with "a marked tendency to either be very unaware and/or non-insightful, or they simply deny and/or downplay any problems or difficulties." Tania's scores further indicated a "marked tendency or need to see herself and be seen by others in an extremely positive or favorable light." The scores indicated "a possible significant lack of insight and awareness, especially for the aunt." Such people are often "rather rigid and inflexible, which may relate to some of the problems in the case, in terms of visits, etc., and especially in light of the mother's complaints about the aunt in those regards, as opposed to the uncle." Dr. Ward stated the G.'s "may now be a little too unwilling to even consider giving the mother another chance." "[W]hile the aunt and uncle have clearly stepped up to the plate and done a great job, they may not be the best people to try and work out something when we get into more complicated, emotionally involved situations."

On the other hand, Mother's score indicating a lack of defensiveness "is actually a very positive sign or factor, since it suggests that the person is at least willing to acknowledge some faults and problems." Mother acknowledged that she had lied and

manipulated people in the past and that she had made a mistake by failing to follow through with her programs and stay away from Father from the outset.

Mother's scores indicated "she is probably a fairly outgoing, sociable individual," but suggested "some possible feelings of alienation." Most significantly, her scores indicated she would "most likely have some definite anti-social attitudes, characteristics, and/or behaviors[, with] some underlying anger and hostility, and . . . problems with frustration tolerance and impulse control. Many of these people do have conflicts with society and authority and may have a history of legal problems [and] [p]ast or current substance abuse." Mother's marked lack of defensiveness indicated that "she basically pleads 'guilty' to the diagnosis, based on her past, although she emphasized that she wants to and is changing her life around." Her scores in this regard would always remain elevated because "a lot of the items related to those types of scales are based on past behavior." However, Dr. Ward acknowledged that the apparent change in Mother could perhaps be "her biggest and best con and manipulation yet." Yet, "there do seem to be multiple data sources that suggest she really is trying to change and actually has made some definite positive changes in her attitude and behavior."

Dr. Ward opined that there was nothing to indicate Mother had any significant potential to be physically abusive with the children. There was also no significant potential for her to be "overtly emotionally abusive." However, the fact she exposed the children to domestic violence amounted to emotional abuse. She stated to him that the relationship was definitely over, and "to the extent that she has really learned about the dynamics and effects of domestic violence on the people involved, including children, it would seem that this is no longer a major issue or concern."

Dr. Ward disagreed with Dr. Collister's previous conclusions about Mother. Dr. Ward noted that the latter's use of computer-generated interpretative reports tended to "'overpathologize'" people, because such reports would lead one to erroneously think that all of the statements made therein definitively applied to the individual being evaluated when that is not the case. Such reports could be misleading or somewhat inappropriately alarming. Dr. Ward acknowledged that Mother's scores with

Dr. Collister were "rather negative" and "a definite cause for concern," and agreed "[s]he needed and deserved a negative report." He continued: "However, some of the statements are overly negative and/or alarmist and do not appear to have an adequate database." Dr. Ward saw no evidence to suggest that Mother was a "'borderline psychotic character,'" or suffered from "'alienated predator syndrome.'" He felt that "the net effect [was] that the system has also viewed her more negatively than she deserves, especially when there are some data to suggest she has and is making positive changes in her life and attitude." Comparing her current scores with the previous ones, Dr. Ward opined that "she is perhaps somewhat less impulsive and more thoughtful at this point, and that she is also feeling less alienated."

Mother acknowledged that the G.'s were taking good care of the children and that they were bonded. However, she said Tania did not like her and did not want to see her. Dr. Ward noted that he observed a "disturbing and disappointing thing" when Mother visited with M.S.: there was no interaction at all between Mother and the G.'s; they might not have even looked at each other when they all met in his outer office. "Fortunately, and possibly partially to the credit of all of these adults, [M.S.] seems to have no clue of the obvious strain between all the people he loves and who love him. However, that could change, especially as he gets older, and depending on what transpires here." Noting the legal preference for adoption, Dr. Ward noted that "it has been my definite experience over many years, that in some case situations, and especially when a parent has a good relationship with the children and 'finally' appears to be making significant progress, that adoption among relatives may not be the best permanent plan, particularly when there is a strain in the relationships between these relatives." He expressed doubt that the G.'s, especially Tania, were "truly open to 'open' adoption, which is the only thing that would make any sense here, given that these children clearly also have a close and bonded relationship to their mother and [maternal grandmother]. In short, given the unfortunate strain between the mother and the aunt, and whatever the reasons for that strain, the children are probably going to lose no matter what happens here."

Dr. Ward stated if the children remained with the G.'s there was no risk of abuse or neglect, but "they might lose any or truly meaningful contact with their mother [and maternal grandmother]. If they are eventually placed back with their mother, . . . there is some risk of possible future abuse or neglect. But at least they would be with their mother [and maternal grandmother], and hopefully this possible risk will continue to be progressively reduced as she continues her necessary work in progress. I believe she understands fully the stakes at hand and is able and willing to respond accordingly." "I see no cogent reason at this point in time as to why this mother cannot have a greatly and quickly progressively accelerated schedule of unmonitored visits, both in terms of frequency and duration." To be cautious, the maternal grandmother could initially monitor visits, but if all went well that provision could soon be dropped. She would need to be prohibited from taking the children to see Father and be subjected to random, unannounced checks. But if all went well, "that would then seem to set the stage for possible reunification."

V. The Combined Section 366.26/Section 388 Hearing

The DCFS report dated April 13, 2011, indicated Mother was in full compliance with the therapy, education, drug testing, and visitation requirements of her case plan. Her therapist reported she had demonstrated growth and maturity. She was committed to staying sober, relying on her strong support group, and attending college so she could provide for her children. She was employed and living in a facility that would accept children. Mother visited consistently with the children, often in the company of the maternal grandmother. DCFS stated that both children, and especially M.S., were very bonded with Mother and did not want to go home at the end of the visits. Mother fed the children good food she prepared at home, talked and played with them, and corrected their unwanted behavior. She checked D.S. for fever when he was ill and asked about the children's doctor visits and medications.

After Dr. Ward submitted his evaluation, DCFS reported that the decision had been reached to allow Mother to have unmonitored visits. Mother had a six-hour

unmonitored visit that went very well. The children were reported to be bonded and attached to both Mother and the maternal grandmother. DCFS recommended that the court permit twice weekly, unmonitored visits with Mother. However, Tania G. was opposed to unmonitored visits. She claimed Mother was having contact with Father and said Father's cousin would verify that fact. When asked by the social worker, the cousin said he did not know Mother. Tania said she wished to adopt the children. She was not interested in legal guardianship because she did not want to be bothered by Mother or Father in the next 18 years.

The combined section 366.26 and section 388 hearing took place beginning in June 2011 and concluded in July 2011. Mother testified that she had not spoken to or communicated with Father and she did not plan on resuming a relationship with him because her children deserved better. The transitional home where she lived required her to stay away from Father, observe a curfew, and attend 12-step and house meetings. Paul G. testified he observed Mother talking on her cell phone during a hearing in February 2011 and he believed he heard Father's voice on the other end of the line. Mother denied talking to Father on the phone during that hearing.

Father testified, somewhat incoherently, that he still saw Mother, that she wanted to reconcile with him, and that she was drinking and using drugs. Mother denied these claims. She testified that she last saw Father in June 2010, other than at a later court hearing, and last spoke with him by telephone in October 2010.

Mother's counsel first argued that the section 388 petition should be granted because Mother had clearly demonstrated a change in circumstances in that she was in full compliance with the case plan and Dr. Ward had indicated it was in the children's best interests to continue to have extensive contact with her. Counsel for DCFS argued that the court should grant the section 388 petition for the limited purpose of allowing two-hour unmonitored visits. The court asked if that position was inconsistent with DCFS's recommendation that parental rights should be terminated, and counsel acknowledged the inconsistency. Addressing the section 366.26 issues, counsel for DCFS argued that the children were thriving in the home of their loving caregivers.

There was no issue with Mother's compliance with her programs, but counsel did question whether Mother had in fact terminated her relationship with Father.

Mother's counsel argued that Mother undoubtedly met the exception stated in section 366.26, subdivision (c)(1)(B)(i). However, the court stated that it doubted that Mother occupied a parental role with the children. The court instead likened the children's attachment to what one might see with a favorite babysitter. Mother played learning games with M.S., but that did not suffice to show she is capable of being a parent. The court acknowledged that Mother was almost like a new person compared to how she was at the outset of the case. However, the court remained concerned about Mother's history of attachment to Father, notwithstanding the fact the court did not find Father's testimony to be particularly credible. The court said it was having trouble finding a significant benefit to the children of continuing the relationship with Mother. In response, Mother's counsel argued that Mother had taken full advantage of the limited opportunities made available to her to spend time with the children and parent them. As to the detriment to the children of terminating Mother's parental rights, counsel pointed to Dr. Ward's assessment that an open adoption was the only thing that would make any sense here because the children have a close and bonded relationship to Mother. But given that the G.'s were not willing to allow Mother to have significant or meaningful contact with the children, Dr. Ward recommended attempting reunification with Mother. The court indicated it was taking into consideration Dr. Ward's report but it was not disregarding Dr. Collister's report as well as other evidence.

The children's counsel expressed concern about allowing unmonitored visits. Although Mother appeared on paper to have come a long way, counsel was uncertain given the history of the case. He stated that in an ideal world the children would benefit from a continued relationship with Mother and that it is clear the children have a close relationship with Mother. Counsel continued: "It's unfortunate that the two families don't get along better and under the circumstances I would hate for anything to jeopardize the children[']s placement." Counsel for DCFS then argued that the real detriment to the children in this case would be removing the children from the G.'s care.

The court echoed that it was very fortunate the children have a loving, supportive home and that it would hate to risk that or undermine their placement. On the other hand, Mother had made significant changes in her life. The court said: "I wish this were a situation that things could be worked out that the children could continue to have a relationship with the mother in addition to living in a home that I know provides stability and that these children need and that they have never had before they lived with these caregivers, that would be the ideal situation as minor's counsel has indicated." But the court was concerned about Mother's impulsivity, and did not see that the relationship resulting from Mother's visits outweighed the children's tremendous need for stability. However, the court was "not inclined to terminate parental rights" where the prospective adoptive parents might make Mother unable to have any kind of relationship with the children at all. The court wanted to know clearly what the G.'s position was on the subject before making a ruling, and called a recess for that purpose.

When the hearing resumed, the children's counsel informed the court that the G.'s were willing to monitor visits for Mother and Father, if Father was not under the influence, but they were not willing to allow unmonitored visits. They were willing to provide photographs of the children to the parents. Counsel reiterated that "[i]n an ideal world, I would like to see guardianship but given the relationship between the mother and the [G.'s], I don't want to put the placement in jeopardy is what I am saying."

The court concluded that in order to serve the best interests of the children, and because it did not have enough confidence in Mother's stability, it would deny the section 388 petition. The court stated, "I think the worst thing that could happen is that [which] would jeopardize the children[']s placement." The court described Mother's relationship with the children as fun and enjoyable, but not sufficiently significant that it would work to the children's detriment if it were severed. The court terminated parental rights and ordered that adoption would be the permanent plan for the children.

This appeal from the ensuing order denying the section 388 petition and terminating parental rights followed.

DISCUSSION

I. 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 Edward R.* (1993) 12 Cal.App.4th 116, 122; *In re Heather B.* (1992) 9 Cal.App.4th 535, 546.) In order for the court to select and implement adoption as the permanent plan, it must find, by clear and convincing evidence, the minor will likely be adopted if parental rights are terminated. (§ 366.26, subd. (c)(1).)" (*In re Tabatha G.* (1996) 45 Cal.App.4th 1159, 1164.)

"Adoption must be selected as the permanent plan for an adoptable child and parental rights terminated unless the court finds 'a compelling reason for determining that termination would be detrimental to the child due to one or more of the following circumstances: [¶] (i) The parents have maintained regular visitation and contact with the child and the child would benefit from continuing the relationship. . . .' (§ 366.26, subd. (c)(1)(B).) '[T]he burden is on the party seeking to establish the existence of one of the section 366.26, subdivision (c)(1) exceptions to produce that evidence.' (*In re Megan S.* (2002) 104 Cal.App.4th 247, 252.)" (*In re Bailey J.* (2010) 189 Cal.App.4th 1308, 1314 (*Bailey J.*).)

"Although the kind of parent/child relationship which must exist in order to trigger the application of section 366.26, [former] subdivision (c)(1)(A) [now (c)(1)(B)(i)] is not defined in the statute, it must be sufficiently strong that the child would suffer detriment from its termination." (*In re Beatrice M.* (1994) 29 Cal.App.4th 1411, 1418; accord *In re Melvin A.* (2000) 82 Cal.App.4th 1243, 1253.) "'In the context of the dependency scheme prescribed by the Legislature, we interpret the "benefit from continuing the [parent/child] relationship" exception to mean the relationship 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 other words, 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. 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 Autumn H.* [(1994)] 27 Cal.App.4th 567, 575.)" (*In re Beatrice M., supra,* 29 Cal.App.4th at p. 1418; accord *In re Jamie R.* (2001) 90 Cal.App.4th 766, 773.) The exception referred to in section 366.26, subdivision (c)(1)(B)(i) "'applies only where the court finds regular visits and contact have continued or developed a significant, positive, emotional attachment from child to parent.' (*In re Autumn H., supra,* 27 Cal.App.4th at p. 575.)" (*In re Beatrice M., supra,* 29 Cal.App.4th at p. 1419.) In evaluating the parent-child relationship, the court may consider the age of the child, the portion of the child's life spent in the parent's custody, the positive and negative interaction between the parent and the child, and the child's particular needs. (*In re Jerome D.* (2000) 84 Cal.App.4th 1200, 1206; *In re Autumn H., supra,* 27 Cal.App.4th at p. 576.)

We recognize that "[t]here is some dispute about the precise standard of review that applies to an appellate challenge to a juvenile court ruling rejecting a claim that one of the adoption exceptions applies. In *In re Jasmine D.* (2000) 78 Cal.App.4th 1339 (*Jasmine*), Division Three of the First District Court of Appeal acknowledged that most courts had applied the substantial evidence standard of review to this determination. (*Jasmine,* at p. 1351.) However, the court concluded that the abuse of discretion standard of review was 'a better fit' because the juvenile court was obligated to make 'a quintessentially discretionary determination.' (*Jasmine,* at p. 1351; but see *Pack v. Kings County Human Services Agency* (2001) 89 Cal.App.4th 821, 839-840 [disagreeing with *Jasmine's* standard of review choice but not in the context of a challenge to a ruling on an exception to adoption].)" (*Bailey J., supra,* 189 Cal.App.4th at p. 1314.) Other courts have used a hybrid combination of the substantial evidence and abuse of discretion standards (see *id.* at pp. 1314-1315); or a modified substantial evidence test (see *In re I.W.* (2009) 180 Cal.App.4th 1517, 1528 ["where the issue on appeal turns on a failure of proof at trial, the question for a reviewing court becomes whether the evidence compels a

finding in favor of the appellant as a matter of law"].) The conventional view relies upon the substantial evidence test. (See *In re Autumn H., supra*, 27 Cal.App.4th at p. 576 ["On review of the sufficiency of the evidence, we presume in favor of the order, considering the evidence in the light most favorable to the prevailing party, giving the prevailing party the benefit of every reasonable inference and resolving all conflicts in support of the order"].) In any event, our conclusion in this case would be the same under any of these standards.

Particularly in this case, we concur with the formulation of the standard of review stated in *Bailey J.*, that "both standards of review come into play in evaluating a challenge to a juvenile court's determination as to whether the parental . . . relationship exception to adoption applies in a particular case. Since the proponent of the exception bears the burden of producing evidence of the existence of a beneficial parental . . . relationship, which is a factual issue, the substantial evidence standard of review is the appropriate one to apply to this component of the juvenile court's determination. Thus, as th[e] court noted in *In re I.W.*[, *supra*,] 180 Cal.App.4th 1517, a challenge to a juvenile court's finding that there is no beneficial relationship amounts to a contention that the 'undisputed facts lead to only one conclusion.' (*In re I.W.*, at p. 1529.) Unless the undisputed facts established the existence of a beneficial parental . . . relationship, a substantial evidence challenge to this component of the juvenile court's determination cannot succeed.

"The same is not true as to the other component of these adoption exceptions. The other component of . . . the parental relationship exception . . . is the requirement that the juvenile court find that the existence of that relationship constitutes a '*compelling reason* for determining that termination would be detrimental.' (§ 366.26, subd. (c)(1)(B), italics added.) A juvenile court finding that the relationship is a 'compelling reason' for finding detriment to the child is *based* on the facts but is not primarily a factual issue. It is, instead, a 'quintessentially' discretionary decision, which calls for the juvenile court to determine the *importance* of the relationship in terms of the detrimental impact that its severance can be expected to have on the child and to weigh that against the benefit to the

child of adoption. (*In re L. Y. L.* (2002) 101 Cal.App.4th 942, 951.) Because this component of the juvenile court's decision is discretionary, the abuse of discretion standard of review applies." (*Bailey J.*, *supra*,189 Cal.App.4th at pp. 1314-1315.)

We first consider whether Mother met her burden of proving in juvenile court that she has a beneficial parental relationship with her children. Stated conversely, we consider whether there was substantial evidence that Mother did *not* occupy a beneficial parental role in the children's lives. The court recognized that at times there was a substantial, positive emotional attachment, i.e., a beneficial relationship, which ideally would be continued by allowing Mother to have meaningful contact with the boys. However, the court concluded in the end that it was not a *parental* relationship, but rather was merely "fun" and "enjoyable" and not sufficiently significant that it would work to the children's detriment if it were severed.

Unless the undisputed facts lead to only one conclusion, that Mother established the existence of a beneficial parental relationship, a substantial evidence challenge to this component of the juvenile court's determination cannot succeed. (*Bailey J.*, *supra*,189 Cal.App.4th at pp. 1314-1315, citing *In re I.W.*, *supra*, 180 Cal.App.4th at p. 1529.) Although it does not end our inquiry, we conclude that this is one of the rare cases in which a parent conclusively established the existence of such a relationship. (Cf. *In re S.B.* (2008) 164 Cal.App.4th 289, 298.)

It is clear that Mother loves M.S. and D.S. and has established a caring, bonded relationship with them despite the fact that they were removed from her custody when M.S. was about two years old and D.S. was a newborn. The parties agree that Mother maintained regular, consistent, and appropriate visits with the children. The social worker, the children's counsel, and the Evidence Code section 730 evaluator all agreed that Mother shared an important, loving bond with the boys, particularly M.S., and that continuing the relationship would be the ideal outcome for the boys.[3] At the same time DCFS was recommending termination of parental rights, it was advocating for Mother to

---

[3] Dr. Ward did not evaluate D.S. and was not provided the opportunity to observe D.S. and Mother together.

have extensive, unmonitored visits with the children. Mother undoubtedly occupies a special role in their lives, far beyond that of a favorite babysitter or an enjoyable playmate. She has been nurturing during visits, providing affection, food, guidance, and discipline. She has advocated for the children's needs in a parental fashion, such as when she requested that M.S. be evaluated for speech delay, and arguably when she instructed M.S. in matters of personal hygiene. In short, we conclude that there was insufficient evidence for the court to conclude that Mother did not occupy a beneficial parental relationship with the children.

However, we cannot find that the juvenile court abused its discretion by concluding that the benefit to the children of maintaining their relationship with Mother did not outweigh the benefit to the children of having a safe, stable, permanent home. In exercising its discretion, the court found that the existence of that relationship did not constitute a compelling reason for determining that termination would be detrimental. In so doing, the juvenile court was required to determine the detrimental impact that severance of the parental relationship could be expected to have on the children and to weigh that against the benefit to the children of adoption. (*Bailey J., supra*, 189 Cal.App.4th at pp. 1314-1315, citing *In re L. Y. L., supra*, 101 Cal.App.4th at p. 951.) "[A] finding of *no* detriment is not a prerequisite to the termination of parental rights." (*Jasmine D., supra*, 78 Cal.App.4th at p. 1347; italics added.) Rather, if the court finds that the children would suffer some detriment from severance of the relationship but would not be greatly harmed (as the court implicitly found here), and further concludes that the benefits that adoption would confer outweigh that detriment and the record supports that conclusion, the court does not abuse its discretion in ordering parental rights terminated. (See *In re Autumn H., supra*, 27 Cal.App.4th at p. 575.)

At the time parental rights were terminated, M.S. was only four years old and had spent half of his life in the home of the G.'s , with whom he also was undisputedly strongly bonded. D.S. was not yet two years old and had spent virtually his entire life in the care of the G.'s, with whom he also was undisputedly strongly bonded. Mother visited consistently, but only for several hours each week and almost always in a

monitored setting because of concerns that Mother continued to have contact with Father. It is to Mother's credit that she was able to maintain a substantial bond with M.S. and to form an apparently meaningful bond with D.S. under those circumstances. However, the extent of those bonds—while important and meaningful to the children, and the loss of which would likely cause some detriment—could rationally be found to compare unfavorably to the benefit the boys would experience from being adopted by the G.'s and becoming permanent members of that loving, stable family at the tender ages of two and four. That is precisely what the court concluded, and we find it did not abuse its discretion in doing so.

Mother argues that the juvenile court erred by basing its decision to terminate parental rights on the unenforceable promise by the G.'s to permit continuing visitation. At least one court has found such reliance to be erroneous. (*In re S.B.*, *supra*, 164 Cal.App.4th at p. 300 ["We do not believe a parent should be deprived of a legal relationship with his or her child on the basis of an unenforceable promise of future visitation by the child's prospective adoptive parents."].) Here, however, we find there was no such reliance on the part of the juvenile court. The G.'s half-hearted response when pressed on the issue, that they would allow monitored visits and provide pictures of the children, but would not agree to unmonitored visitation, did not have the effect of reassuring the court that Mother would continue to have contact. Tania G. was quoted in the DCFS report as saying that she was not interested in legal guardianship because she did not want to be bothered by Mother in the next 18 years. After the G.'s responded to the court's inquiry, the children's counsel reiterated that "[i]n an ideal world, I would like to see guardianship but given the relationship between the mother and the [G.'s], I don't want to put the placement in jeopardy." Thus, he clearly interpreted the unenthusiastic response from the G.'s as no promise at all. The court made no statement to the effect that in light of the purported promise of continuing contact, it was making the decision to terminate parental rights. We find no error in this regard.

II. The Section 388 Petition

"The juvenile court may modify an order if a parent shows, by a preponderance of the evidence, changed circumstance or new evidence and that modification would promote the child's best interests. (§ 388; *In re Michael B.* (1992) 8 Cal.App.4th 1698, 1703.) This is determined by the seriousness of the problem leading to the dependency and the reason for its continuation; the strength of the parent-child and child-caretaker bonds and the time the child has been in the system; and the nature of the change of circumstance, the ease by which it could be achieved, and the reason it did not occur sooner. (*In re Kimberly F.* (1997) 56 Cal.App.4th 519, 530-532.) After termination of services, the focus shifts from the parent's custodial interest to the child's need for permanency and stability. (*In re Stephanie M.* (1994) 7 Cal.4th 295, 317.) 'Whether a previously made order should be modified rests within the dependency court's discretion, and its determination will not be disturbed on appeal unless an abuse of discretion is clearly established.' (*In re Michael B.*, *supra*, 8 Cal.App.4th at p. 1704.) The denial of a section 388 motion rarely merits reversal as an abuse of discretion. (*In re Kimberly F.*, *supra*, 56 Cal.App.4th at p. 522.)" (*In re Amber M.* (2002) 103 Cal.App.4th 681, 685-686.)

In response to Mother's section 388 petition, the court found that Mother had demonstrated a change of circumstance in that she had made substantial progress in meeting the treatment goals set for her by the court. Indeed, the court remarked that Mother was almost like a new person. Nonetheless, the court remained concerned about Mother's history of attachment to Father and the prospect that she could continue to seek contact with him, thus jeopardizing the safety and well-being of the children if she was permitted to have unmonitored visits. As such, the court concluded it was not in the children's best interests to modify the previous order to allow for unmonitored visitation and reinstatement of family reunification services, which would necessarily delay the permanency that adoption would provide. As discussed above in relation to the court's decision to terminate parental rights, we find no abuse of discretion in the court finding

that it was in the children's best interests to instead be freed to pursue adoption by the G.'s.

DISPOSITION

The order denying Mother's section 388 petition for modification and terminating parental rights to M.S. and D.S. is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

SUZUKAWA, J.

We concur:

EPSTEIN, P. J.

WILLHITE, J.