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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
SECOND APPELLATE DISTRICT  
DIVISION SIX

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

2d Juv. No. B277915  
(Super. Ct. No. J070433)  
(Ventura County)

VENTURA COUNTY HUMAN  
SERVICES AGENCY,

Plaintiff and Respondent,

v.

R.R.,

Defendant and Appellant.

R.R. (mother) appeals the juvenile court's orders denying her petition to reinstate family reunification services (Welf. & Inst. Code, § 388),<sup>1</sup> terminating parental rights to her daughter, M.J., and selecting adoption as the permanent plan.

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<sup>1</sup> All statutory references are to the Welfare & Institutions Code.

(§ 366.26.) Mother contends (1) the court abused its discretion by denying her section 388 petition without an evidentiary hearing and (2) the beneficial parent-child relationship exception precludes the child's adoption. (§ 366.26, subd. (c)(1)(B)(i).) We affirm.

#### FACTS AND PROCEDURAL BACKGROUND

In March 2015, Ventura County Human Services Agency (HSA) received a referral expressing concern about M.J.'s welfare. Mother had left M.J.'s then 13-year-old brother in the care of a friend for over two weeks, and the brother was concerned about his homeless mother and his then three-year-old sister, M.J.

While investigating the referral, a social worker and police found mother and M.J. in mother's boyfriend's father's home. They were staying in a room so cluttered with clothes and blankets the authorities had difficulty walking through it. Mother's boyfriend had a pipe "loaded with methamphetamine," and mother was arrested for being under the influence of a controlled substance. She later tested positive for methamphetamine, opiates, Oxycodone and marijuana. Mother, who has a history of drug-related arrests, was not in compliance with the terms of her probation.

Although M.J. was otherwise healthy, she was very small in height and weight, had not been immunized and had not seen a doctor since she was a few months old. HSA took her into protective custody and filed a petition alleging that mother failed to protect M.J. because of mother's drug abuse history, her arrest history and her unaddressed mental health issues. The juvenile court found the petition true, took jurisdiction over M.J. and

offered mother reunification services. M.J. was placed first in a foster home and then with her maternal grandparents.

The first six months of services went well. After serving a jail sentence for probation violations, mother enrolled in the Prototypes Detoxification Program in August 2015. Upon completion of that program, mother entered the Prototypes Residential Treatment Program. She regularly attended AA/NA meetings and was consistently testing negative for drugs and alcohol.

In October 2015, mother was terminated from the Prototypes Residential Treatment Program for failing to report another resident's possession of pain medication. Mother was arrested and jailed for violating her probation terms. She also missed multiple drug tests and failed one given by the Ventura County Probation Agency. Meanwhile, M.J.'s maternal uncle and aunt were approved for placement, and M.J. moved to Minnesota to live with them in January 2016. At the 12-month review hearing, the juvenile court terminated mother's reunification services and scheduled a section 366.26 hearing for August 8, 2016.

Mother subsequently filed a section 388 petition alleging changed circumstances and asking the juvenile court to reinstate reunification services. The court denied the petition without holding an evidentiary hearing, finding that "the request does not state new evidence or a change of circumstances," and that "the proposed change of order . . . does not promote the best interest of the child."

At the section 366.26 hearing, the juvenile court received evidence, including mother's and the social worker's testimony. It found that no exception to adoption existed and terminated mother's parental rights.<sup>2</sup> Mother appeals.

### DISCUSSION

Mother contends the juvenile court erred in summarily denying her section 388 petition and in failing to find the beneficial relationship exception existed to prevent termination of parental rights. We reject both contentions.

#### *Section 388 Petition*

Section 388 allows a parent, on the grounds of new evidence or change of circumstances, to petition the juvenile court to modify or change any order previously made. (§ 388, subd. (a)(1).) Appellate courts have consistently applied an abuse of discretion standard of review to a denial of a section 388 petition. (*In re A.S.* (2009) 180 Cal.App.4th 351, 358; *In re S.R.* (2009) 173 Cal.App.4th 864, 866; *In re Anthony W.* (2001) 87 Cal.App.4th 246, 250.)

The burden of proof is on the petitioner in a section 388 petition to prove by a preponderance of the evidence that the modification requested will promote the best interests of the child. (*In re L.S.* (2014) 230 Cal.App.4th 1183, 1193-1194.) A parent need only make a prima facie showing to trigger the right to proceed by way of a full evidentiary hearing. (*In re Marilyn H.* (1993) 5 Cal.4th 295, 310.)

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<sup>2</sup> The juvenile court offered mother a "goodbye" visit with M.J., but the prospective adoptive family intends to allow mother to continue having contact with M.J. as long as it "appears to be appropriate and safe."

Where, as here, a section 388 petition is brought after the section 366.26 hearing is scheduled, the focus is on the child's need for permanency and stability and there is a rebuttable presumption that out-of-home care is in the best interests of the child. (*In re Stephanie M.* (1994) 7 Cal.4th 295, 317.) A parent's interest in the care, custody, and companionship of the child is not paramount and a juvenile court addressing a section 388 petition must recognize and apply the shift in focus. (*Ibid.*)

In her petition, mother acknowledged that she was incarcerated in December 2015 and had relapsed into drug use. She stated she “finally received permission to re-enter the Prototypes program on July 18, 2016 after having been on the waiting list since January, 2016.” She represented she is “engaged in all of the required elements or phases” of the program and has “remained clean and sober while at Prototypes.” Her hope is to maintain her sobriety and to obtain further services to allow ultimate reunification with M.J.

Nothing in mother's section 388 petition provided prima facie evidence that her circumstances had changed and that she was capable of providing a stable, safe home environment for M.J. (*In re Stephanie M., supra*, 7 Cal.4th at p. 317.) While mother offered proof that she again was starting to rehabilitate, “[c]hildhood does not wait for the parent to become adequate.” [Citation.]” (*In re Baby Boy L.* (1994) 24 Cal.App.4th 596, 610.) Delaying permanency for M.J. to see if mother would ever be able to provide a sober, stable home was not in the best interests of M.J., and the juvenile court did not abuse its discretion in summarily denying mother's petition. (*In re L.S., supra*, 230 Cal.App.4th at pp. 1193-1194.)

### *Beneficial Relationship Exception*

“At a section 366.26 permanency planning hearing, the juvenile court determines a permanent plan of care for a dependent child, which may include adoption. [Citations.] ‘If the dependent child is adoptable, there is strong preference for adoption over the alternative permanency plans.’ [Citations.] In order to avoid termination of parental rights and adoption, a parent has the burden of proving, by a preponderance of the evidence, that one or more of the statutory exceptions to termination of parental rights set forth in section 366.26, subdivision (c)(1)(A) or (B) apply. [Citations.] The court, ‘in *exceptional circumstances*,’ may ‘choose an option other than the norm, which remains adoption.’ [Citation.] The parental benefit exception applies when there is a compelling reason that the termination of parental rights would be detrimental to the child. This exception can only be found when 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)(i).)” (*In re Anthony B.* (2015) 239 Cal.App.4th 389, 394-395.) “We apply the substantial evidence standard of review to the factual issue of the existence of a beneficial parental relationship, and the abuse of discretion standard to the determination of whether there is a compelling reason for finding that termination would be detrimental to the child. [Citations.]” (*Id.* at p. 395.)

Here, the trial court had difficulty finding that “there’s been consistent and regular contact” between mother and M.J. After mother was terminated from the Prototypes Residential Treatment Program in October 2015, visitation

virtually ceased. HSA had trouble contacting mother, and she apparently visited with M.J. only on Thanksgiving.

Mother was unable to visit during her incarceration in December 2015, and even after her release, she failed to visit M.J. After M.J. moved to Minnesota in January 2016, mother had Skype visits about twice per month, but those visits stopped when mother was incarcerated in April 2016. Between April 2016 and August 2016, mother just occasionally spoke with M.J. on the telephone. In sum, mother's visitation was irregular at best and M.J.'s attachment to mother was minimal. M.J.'s Minnesota social worker "reported that [M.J.] does not appear to miss her mother and rarely asks about her." Even mother described her relationship with M.J. as "so broken" now that M.J. is in Minnesota.

The juvenile court also did not abuse its discretion in finding that mother had failed to meet her burden of proving M.J. would benefit from continuing the relationship, i.e., that "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 re Autumn H.* (1994) 27 Cal.App.4th 567, 575.) In making this determination, "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." (*Ibid.*)

Mother's history of drug use supports the conclusion that the beneficial parental relationship exception to adoption did not apply. (See *In re Noah G.* (2016) 247 Cal.App.4th 1292, 1304 ["drug abuse is evidence continuing the parent-child relationship would not be *beneficial*"].) The juvenile court also properly considered M.J.'s young age and the fact that she had spent the last year and a half outside of mother's care. (*In re Angel B.* (2002) 97 Cal.App.4th 454, 468.) The court observed that M.J. "really deserves to have a permanent home. And the law requires us to -- to make that happen absent some exception, a compelling reason to show that the exception would apply. And I just -- I just don't have the evidence in this case to make that finding. Pleasant visits and calling [mother] 'Mom' right now are -- it's just not enough." **(RT 31.)**

Mother cites a few cases in support of her position that the beneficial parental relationship exception applied here. Suffice it to say that the cases are inapposite. Appellants are "essentially asking us to reweigh the evidence and to substitute [our] judgment for that of the trial court." (*In re Casey D.* (1999) 70 Cal.App.4th 38, 53.) The question is not whether the court could have found that the beneficial parental relationship exception to adoption applied, but rather whether it abused its discretion in finding otherwise. This simply is not the kind of "extraordinary case" in which "preservation of the parent's rights will prevail over the Legislature's preference for adoptive placement." (*In re Jasmine D.* (2000) 78 Cal.App.4th 1339, 1350.)



DISPOSITION

The orders denying mother's section 388 petition, terminating her parental rights and selecting adoption as the permanent plan are affirmed.

NOT TO BE PUBLISHED.

PERREN, J.

We concur:

GILBERT, P. J.

TANGEMAN, J.

Tari L. Cody, Judge  
Superior Court County of Ventura

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Emery El Habiby, under appointment by the Court  
of Appeal, for Defendant and Appellant.

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Respondent.