Filed 1/23/13 In re W.H. CA2/2

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

In re W. H., a Person Coming Under the Juvenile Court Law.	B242603 (Los Angeles County Super. Ct. No. CK78666)
LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. PAULA H., Defendant and Appellant.	

APPEAL from orders of the Superior Court of Los Angeles County. Marilyn Mordetzky, Juvenile Court Referee. Dismissed by opinion.

Paula H., in pro. per.; and Frank H. Free, under appointment by the Court of Appeal, for Defendant and Appellant.

No appearance for Plaintiff and Respondent.

This dependency case pertains to W. H. (minor). On appeal, Paula H. (mother) challenges (1) the order denying her petition pursuant to section 388 of the Welfare and Institutions Code[1] and (2) the order terminating her parental rights pursuant to section 366.26. After mother's court appointed counsel filed a no issues brief pursuant to *In re Phoenix H.* (2009) 47 Cal.4th 835 (*Phoenix H.*), mother filed a brief to identify appellate issues for our consideration. In addition, she filed an application to expand the appointment of appellate counsel to file a petition for writ of habeas corpus. She claims that she received ineffective assistance of counsel at the section 366.26 hearing when her attorney failed to argue that mother's parental rights should not be terminated due to the beneficial relationship exception.

The appeal is dismissed because mother failed to raise an arguable issue for reversal of the juvenile court's orders. In addition, we deny mother's application because she has not shown good cause to expand the appointment of counsel to file a petition for writ of habeas corpus.

Our analysis is set forth below.

FACTS

Mother's arrest; detention of the minor

On September 2, 2009, mother was arrested by a California Highway Patrol officer for driving while under the influence of methamphetamine. The minor, age two years old, was in mother's vehicle. Mother was arrested and incarcerated and the minor was placed in a foster home.

A few days later, mother went to a facility operated by the Department of Children and Family Services (Department) for a Team Decision Meeting and tried to remove the minor out of the building. She was stopped by a security guard and a social worker. At the time of the incident, mother was agitated, had dilated pupils and appeared to be under the influence of drugs. She eventually participated in the Team Decision Meeting but was generally uncooperative. During the meeting, she whispered comments to herself,

---

[1] All further statutory references are to the Welfare and Institutions Code unless otherwise indicated.

became agitated and tearful, and then would stand up and pace. The Department decided to take the minor into custody. Mother was referred to a drug testing facility but she did not show up.

The juvenile court ordered the minor detained. He was placed in confidential foster care.

The dependency petition

On September 11, 2009, the Department filed a petition on the minor's behalf pursuant section 300, subdivisions (b) and (g). The petition alleged mother uses methamphetamine, which places the minor at risk of physical harm. It was further alleged that Gary M. (father) has failed to provide the minor with the necessities of life and his whereabouts are unknown.

Mother's behavior

Mother threatened the foster mother over the phone. When asked about the incident by a social worker, mother initially denied the incident. Then she admitted that she tried to convince the foster mother to meet her at an undisclosed location so mother could "see her son." At some point, mother followed the foster mother home after a monitored visit at Penny Lane and drove by the foster home several times. Then she knocked on the door loudly and demanded to see the minor. She refused to leave until the foster mother said she had called the sheriff. As a result of these incidents, the minor had to be taken to a new foster home.

According to a social worker, mother said, "It's not kidnapping if it's your own child." After a visit at Penny Lane in late October 2009, mother picked up the minor, who was crying, and put him in her car and attempted to leave. Penny Lane staff had to persuade mother to release the minor. In November 2009, mother left Penny Lane after a monitored visit. Then she returned to the building and demanded to know why her son had not left. A Penny Lane supervisor said she would call the sheriff if mother did not leave. Mother began cursing at the supervisor and stated that at her next visit, she would take the minor "and no one will ever see them again." As a result of these incidents, Penny Lane staff refused to provide monitoring for any further visits. They said the risk

of abduction was too high and they could not provide security. Subsequently, mother's monitored visits took place at the Department's facilities.

Mother complained to a social worker that "it was not fair and that she was being falsely accused of trying to take her son. She stated that her son jumped into her car window when she was leaving."[2]

In December 2009, mother called the foster mother and offered her money to let her take the minor for the holidays. When the foster mother declined, mother said "it would be a lot of money." A month later, mother saw foster mother's car and followed it. At a red stoplight, mother got out of her car, walked up to the foster mother's car and asked to visit with the minor. The foster mother ignored mother and drove away when the light changed.

Jurisdictional/dispositional hearing

On January 8, 2010, the juvenile court sustained the September 11, 2009 petition as to count b-1 as amended by interlineations and as to count b-3. It removed the minor from mother's custody. The Department was ordered to provide reunification services to mother and the minor. Mother was ordered to participate in drug rehabilitation with random drug testing and obtain a sponsor, and she was also ordered to participate in parent education and grief counseling. The juvenile court awarded mother a minimum of three hours visitation. The Department had the discretion to liberalize.

Return of the minor to mother's care

Mother enrolled at a treatment center.

Initially, mother had monitored visits with the minor. Starting February 16, 2010, the Department granted mother unmonitored visits at her treatment facility. Her counselor reported that mother had tested clean and was making tremendous progress in treatment.

---

[2] At the time, as we have already indicated, the minor was only two years old. Mother's statement lacked credibility.

At the subsequent review hearing, the juvenile court granted mother unmonitored visitation. Mother had unmonitored weekend visits. The visits went well and the minor's foster mother reported no concerns.

Mother completed her treatment program on June 9, 2010, and started her after care program about a week later. When the minor's foster family went on vacation on June 18, 2010, the Department allowed the minor to return to mother's home until the next hearing. At the six-month review hearing, the juvenile court placed the minor in mother's care.

Six weeks later, mother relapsed.

The supplemental petition; detention

Pursuant to section 387, the Department filed a supplemental petition alleging that mother had been discharged from her substance abuse rehabilitation program because she had resumed the use of drugs, and further that mother's continuing use of drugs placed the minor at risk of harm.

The juvenile court ordered the minor detained.

The report of October 4, 2010

The Department reported that the minor had a strong attachment to mother. However, the Department also reported mother had not submitted to a drug test in August or September 2010. She refused to discuss her substance abuse issues. Instead, she focused her attention on perceived injustices of the Department and the harm it caused the minor by placing him in foster care.

Due to mother's threats to abduct the minor, the Department scheduled seven monitored visits at the Department's facilities during the month of September 2010. Mother appeared on time for two visits and late for three visits. One visit was canceled because mother did not attend, and another did not occur because the Department could not locate mother to confirm the visit.

Jurisdictional/dispositional hearing

Mother waived her right to a trial on the section 387 petition. The juvenile court sustained the petition and ordered the minor's removal. The Department was ordered to

provide reunification services, and mother was ordered to attend parent education, drug rehabilitation with random drug testing, individual counseling and to attend Narcotics Anonymous and obtain a sponsor.

The report of January 3, 2011; the last minute information for court

Before the next review hearing, the Department filed a report indicating that mother was not drug testing on a consistent basis, and she refused to enroll in her previous treatment center. At the time of the report, mother had not started a parent education program. Though mother told the social worker that she was going to Narcotics Anonymous meetings, she did not disclose whether she had obtained a sponsor. Mother's visits with the minor were regular, but she had a history of arriving late. On some occasions she arrived so late that the visits were canceled. The Department reported that when mother did have visits, she was appropriate, loving and creative with her time.

As a supplement to its report, the Department informed the juvenile court that mother checked into a residential recovery facility on January 10, 2011, but she then checked herself out three days later.[3] The foster father complained to the Department that three days in a row in mid-January, mother called by phone dozens of times. He requested that mother comply with the phone call schedule, which was 6:00 p.m. to 7:00 p.m. on weekdays but not weekends. Upon visiting the social worker's office, mother was very intense and hyper. The next day, when the social worker spoke to mother by phone, her speech was very rapid. Both occasions, the social perceived that mother was under the influence of an amphetamine substance of some kind. A few days later, the foster father complained that mother harassed him by repeatedly calling over the weekend.

---

[3] Subsequently, the Department corrected the record to state that mother went to the treatment facility for only one day rather than three days, and also that she did not stay overnight.

The review hearing of January 24, 2011

The juvenile court signed an order making the minor's foster parents his educational representatives. Additionally, the juvenile court instructed the social worker and mother's counsel to inform her that if she did not comply with the phone schedule, her phone contact might by terminated.

The change of location for visits

In March 2011, at mother's request, the Department agreed to change the location of her visits to A Change of Faces.

The report of April 4, 2011; the addendum report

In advance of the next review hearing, the Department reported that mother refused to submit to random drug testing and was not in a drug treatment program. During the reporting period, mother was granted monitored visitation for three hours a week. Her visitation, however, was sporadic. She often did not show up. Other times, she was 20-45 minutes late despite being aware that there was only a 15 minute grace period. In the prior six months, she had missed an average of three to four of the possible eight or nine visits per month. The minor became very distressed when mother did not appear for a visit.

In the meantime, the minor remained in his foster care placement. He was attending pre-school and demonstrated significant progress in his peer and social interaction, and in his speech and language.

The Department recommended that the juvenile court terminate reunification services.

Prior to the hearing, the Department filed an addendum. It reported that mother had been arrested for possession of an illegal substance on two occasions since the section 387 petition was sustained.

The review hearing of May 25, 2011

The juvenile court found that mother was not in compliance with the case plan and terminated reunification services. The matter was continued for a permanent placement hearing pursuant to section 366.26.

Ensuing reports

For the permanency hearing, the Department reported that the minor's paternal grandmother in Arizona had been identified as the prospective adoptive parent. The social worker was preparing documents to submit to Arizona under the Interstate Compact for the Placement of Children (ICPC). In a subsequent report, the Department noted that when the social worker picked the minor up to visit mother, he asked the social worker for reassurance that he would be returned to the home of his foster parents. The foster parents reported that following the minor's visits with mother, he would take his pillow and blanket into the foster parents' bedroom during the night and they would find him sleeping on the floor in the morning. The social worker asked the minor why he sleeps in the foster parents' room. He said that he gets scared and he feels safe in their bedroom.

Regarding visitation, the Department reported that a monitor at A Change of Faces permitted mother to speak in a derogatory fashion about the foster parents, which caused him distress. When the visits were over, he went to his foster mother in tears and said mother was mean to the foster mother. At one point, mother told the minor he would be living with her at her house. As a result, the minor expressed anxiety and confusion to the social worker.

In a section 366.26 report, the Department reported that the paternal grandmother had stayed in California for two weeks and had visited the minor during mother's visits. The visits reportedly went well. The paternal grandmother indicated that she was interested in adopting the minor.

On November 22, 2011, the Department filed a last minute information for the court that indicated the following. Dena K., a social worker from Penny Lane, expressed concern that mother and her boyfriend might try to abduct the minor from A Change of

Faces. In the past, staff at Penny Lane had barely talked mother out of taking the minor from their parking lot. Prior to Halloween, mother kept telling the minor to remember her costume. On Halloween, the foster parents saw a man parked in a car on their street. He watched as people came and went from the foster parents' house. The car had the same sticker mother has on her vehicle. The sticker depicts the cartoon character Calvin urinating on the words "Penny Lane."

The Department's supplemental section 366.26 report indicated that paternal grandmother had not been approved through the ICPC. New prospective adoptive parents, Mr. and Mrs. P., were identified. They were committed to providing the minor permanency by adoption.

In a subsequent report, the Department informed the juvenile court that in October 2010, mother was arrested for possession of a controlled substance in violation of Health and Safety Code section 11350, subdivision (a). She was convicted. In March 2011, mother was placed on formal probation for three years under the terms of Proposition 36. A few months later, a bench warrant issued for her arrest due to her failure to appear in court. In July 2011, mother admitted to violating the terms of her Proposition 36 probation and the trial court found that she was not amenable to treatment. She was placed on probation for three years and ordered to serve 21 days in county jail. In 2012, mother was incarcerated on three occasions, including a stint in county jail from April 21, 2012, to May 11, 2012. During the reporting period, mother's visits with the minor were sporadic. Sometimes she missed visits because of her incarceration, but other times she missed the visits without explanation.

The foster parents reported that on February 14, 2012,and May 14, 2012, their home was being watched by a man and woman in a parked car. They believed it was mother and her boyfriend.

While placed with Mr. and Mrs. P, the minor was referred for a psychological evaluation after demonstrating disturbing behavior. On several occasions, he smeared his feces on walls and bathroom fixtures. When he was angry, he would tear up his room and break his toys.

Mother's phone call

Mother called the social worker on May 14, 2012, and asked to have the minor returned to her custody. The social worker explained that the Department was concerned about his safety and that she needed to be clean and sober. When reminded that the case came to the attention of the Department when mother was driving under the influence of drugs with the minor in the car, mother argued that being under the influence of drugs while driving was not dangerous to the minor.

Mother's section 388 petition

At the hearing on May 22, 2012, mother's counsel said, "[T]oday mother has given me a [section] 388 [petition] which I've given to all attorneys in the court with the attachments, and so I'd ask the court [to] consider that, if not today, sometime in the near future. Basically it's a request for either unmonitored visits or visits to be back at [A] Change of Faces."

In her petition, mother claimed that the juvenile court had entered a restrictive visitation order on an unspecified date. Mother identified the following change in circumstances: "There is no risk of abduction evident by attached statement made by Virginia Arcos [(Arcos)]. 'A Change of Faces' is an approved facility for monitored visitation which provides much more positive environment." Arcos was the executive director of A Change of Faces. She wrote a letter stating in part that A Change of Faces had no fear that mother would abduct the minor. With respect to the order being requested, mother stated: "Visits to be allowed at A Change of Faces or unmonitored visitation over the d[i]scretion of [the Department]." To demonstrate that the requested order would be in the minor's best interests, mother averred: "The [Department] has minimum time and space to allow joyful quality time. Communication is limited between [the Department] and mother and [their] statements addressed to the court are full of slander."

The juvenile court denied the petition on the grounds that the "request [did] not state new evidence or a change of circumstances" and the "proposed change of order . . . does not promote the best interests of the child."

The report of June 25, 2012; the last minute information for court

According to the Department, the minor remained in confidential foster care placement. He was affectionate with his caregivers and foster siblings.

Regarding mother, the Department reported that a monitor at A Change of Faces was concerned about security for visits. On the day of a scheduled visit, mother called from outside the facility to say that she did not want the minor to see her "like this." She was shaking as though experiencing withdrawals. Then she hovered around the facility acting unusual. In November 2011, her visits were changed from A Change of Faces back to the Department because of her reported flagrant disregard for the rules of monitored visitation. Mother objected and, at her request, the Department made a referral to Grace Resources for monitored visits. Grace Resources interviewed her and observed strange behavior. Also, the man who accompanied mother to the interview was observed walking around the parking lot with a flashlight. Grace Resources declined to monitor the visits. Then, on December 15, 2011, after a visit was terminated early due to mother's behavior, mother met with a social worker, motioned to the guard in the lobby, and stated: "Do you really think that security . . . could stop me if I really wanted to take [the minor]?'" A court issued an order restraining mother and her boyfriend from going to the current foster parents' home or stalking the minor.

In a last minute information for court memo, the Department informed the juvenile court of the following. The minor reported to the foster mother that mother told him to hurt his two foster siblings, and that mother put a hole in his favorite toy, a Harry Potter owl, and took out two hearts. The foster mother looked at the toy and discovered that there was a large hole in the heart area. The monitor at the visit stated that mother had been whispering to the minor. Also, he saw mother with the owl and heard a ripping sound. He watched her take out the hearts.

When mother visited with the minor the next time, she discussed the dependency case. The monitor instructed mother to stop. Mother argued with the monitor and the visit was terminated.

The section 366.26 hearing

Mother did not appear for the contested section 366.26 hearing, and her attorney asked for a continuance. The request was denied.

Mother's attorney did not offer evidence. Instead, he made the following statement: "I don't have the mother here to tell me what she wants me to say, but I'm very sure, after what we've been through, this case has been long term, that she doesn't want her parental rights terminated. [¶] So I would just say that although she has missed visits off and on, I think the visits have been fairly regular. I don't think they've been perfect, but I think they have been regular, and I know that all the reports basically come back saying that when she does visit, the visits are excellent. [¶] And there was some kind of information for the court today. It has some negative information in it, but even a month ago the [section 366.26] report said visits were excellent. [¶] So I would just suggest that the [minor] would benefit from continuing contact with mother and that would outweigh the permanency of adoption and ask the court not to terminate mother's parental rights today."

In rejoinder, the Department's counsel stated, "I would like to make a comment with regards to mother's visitation. While mother does have a somewhat consistent visitation, I don't believe it's in the [minor's] best interests or the [minor] would continue to benefit from the mother's parental rights not being terminated." The juvenile court indicated that "[b]enefit is not the exception to be applied." The Department's counsel said, "Okay. The mother is often inappropriate with the minor. Says inappropriate things during the visits. [The minor] deserves a permanency in adoption with his current caretakers. I don't believe it's in the [minor's] best interest[s] to continue mother's parental rights." The minor's counsel agreed with the Department and said, "The mother does visit with [the minor], but her behavior is questionable. And her ability to . . . achieve and maintain sobriety is also questionable. [The minor] is still young. He has been in the system quite a few years. I think it would be in his best interest[s] for the court to terminate parental rights so he can be adopted."

After hearing argument, the juvenile court ruled. It stated the issue was whether the minor "could be substantially harmed if the relationship with his mother was to be severed. Although the visits have been appropriate when they do occur, that is not enough for the exception to apply." The juvenile court concluded that "no exception to the adoption applies in this case" and terminated the parental rights of mother and father.

These appeals followed. Subsequently, after appointed counsel filed a no issues brief, mother filed an application to expand appointment of counsel to file a petition for writ of habeas corpus.

DISCUSSION

I. The Appeal.

The California Supreme Court instructs that "appointed counsel for a parent in an appeal from an order of the juvenile court affecting parental rights who finds no arguable issues need not and should not file a motion to withdraw, but should (1) inform the court he or she has found no arguable issues to be pursued on appeal, (2) file a brief setting out the applicable facts and the law, and (3) provide a copy of the brief to the parent." (*Phoenix H.*, *supra*, 47 Cal.4th at p. 843.) The Court of Appeal does not have to allow the parent to file an appellate brief unless there is a showing of good cause that an arguable issue exists. (*Id*. at p. 844.) If the parent does not make the requisite showing, the appeal can be dismissed. (*Id*. at p. 846.)

Pursuant to *Phoenix H.*, we have reviewed the brief filed by mother and conclude that she has not demonstrated the existence of an arguable issue. We address each of mother's contentions below.

A. Ineffective assistance of counsel.

Mother contends that she received ineffective assistance of counsel. She further contends that her ineffective assistance of counsel claim is reviewable on appeal because there can be no satisfactory answer for her attorney's tactics. (*In re Darlice C.* (2003) 105 Cal.App.4th 459, 463 (*Darlice C.*).) "We address a claim of ineffective assistance of counsel in the dependency context by applying a two-part test. In the first step, we examine whether trial counsel acted in a manner expected of a reasonably competent

attorney acting as a diligent advocate. If the answer is no, we move to the second step in which we examine whether, had counsel rendered competent service, the outcome of the proceeding would have been more favorable to the client. [Citation.]" (*In re Ana C.* (2012) 204 Cal.App.4th 1317, 1329–1330.)

Though unclear, mother seems to suggest that the first time she received ineffective assistance of counsel was at the January 8, 2010, jurisdictional/dispositional hearing. She complains that her attorney did not give her a copy of an amended section 300 petition and did not file an opposition. The record discloses that the original petition was amended by interlineations. Some words were crossed out of count b-1. Also, the underlined words in the following sentence were added to count b-1: "On 09/02/2009, while the mother was transporting the [minor] in a car, she was arrested for Driving Under the Influence of Drugs [and] Child Endangerment." The timing of the interlineations is not apparent from the face of the appellate record, so it is not clear that mother's attorney could have given her a copy prior to the hearing. What is clear is that the interlineations did not change the import of count b-1, which was that minor was at risk of harm due to mother's dependency on illegal substances. Moreover, attorneys in dependency proceedings do not file oppositions to section 300 petitions. In any event, these issues are beyond our jurisdiction to consider because mother did not appeal from the orders of January 8, 2010.

In mother's view, her attorney provided ineffective assistance when he did not challenge the juvenile court's January 8, 2010, jurisdictional and dispositional orders by way of motion to reconsider, writ petition or section 388 petition. Because those orders were not appealed, it is unclear whether we have the power to review her claim that her attorney should have challenged those orders. In any event, mother does not explain what her attorney was supposed to argue and why the suggested tactics would have obtained a better result. We easily conclude that the record does not show, on its face, that counsel failed as an advocate.

Next, mother asserts that there is no reason why her attorney did not participate in the section 388 petition she filed in 2011. But he did. The record indicates that mother

gave her section 388 petition to her attorney and then her attorney gave it to the juvenile court and the other parties. Also, mother's attorney urged the juvenile court to consider the petition. Subsequently, the juvenile court denied the section 388 petition without an evidentiary hearing on the grounds that the petition did not make a prima facie showing regarding (1) new evidence or changed circumstances and (2) that a change in an existing order would promote the best interests of the minor. In doing so, the juvenile court exercised its discretion. (*In re Marcelo B.* (2012) 209 Cal.App.4th 635, 642 ["[u]nless the moving party makes a prima facie showing of both elements, the petition may [be] denied without an evidentiary hearing"].) Mother does not contend that she made a prima facie case and that, therefore, the juvenile court abused its discretion. More importantly, she does not explain what more her attorney could have done, i.e., that if he had drafted the section 388 petition himself, he would have identified successful arguments. On this record, we cannot conclude that her attorney was incompetent per se. Additionally, we note that due to mother's ongoing drug use, her attempt and threats to kidnap the minor, her disturbing behavior at A Change of Faces and at the Department's facilities, and A Change of Faces' refusal to monitor any more visits at its facility because of mother's noncompliance with rules, we perceive no grounds upon which the juvenile court would have ordered the Department to provide mother with unmonitored visits or with visits at A Change of Faces.

As a corollary, mother suggests that her attorney should have filed a separate section 388 petition. Again, she does not indicate what the substance of such a petition should have been. Consequently, it is impossible to conclude that her attorney did not live up to his professional responsibilities. From her brief, it appears that mother believes that an attorney representing a parent in a dependency proceeding should file a section 388 petition as a matter of course. That is not true. An attorney should only file papers that he or she believes to have merit. In this case, because of mother's continuing drug use, sporadic visits and erratic behavior, we cannot conceive of any grounds upon which the juvenile court would have altered its visitation order or decided to grant additional reunification services.

Moving on to the section 366.26 hearing, mother argues that there is no satisfactory explanation for her attorney's failure to file a trial brief, trial exhibits and a motion in limine. We disagree. Typically, no one files a trial brief for a section 366.26 hearing. With respect to exhibits, a juvenile court normally only considers the Department's reports and attachments to those reports. Oftentimes, the attachments contain evidence favorable to the parent such as letters from friends, therapists, counselors and others. While motions in limine are common in civil and criminal trials, they are not common in dependency cases. Thus, the actions of mother's attorney appear to fall within the norm.

Mother contends that her attorney should have (1) objected to the statement by the social worker who said the minor asked for assurances he would be returned to his foster parents' home and (2) cross-examined the social worker as to that statement. But this is not a case in which it can be said that there are no satisfactory explanation for her attorney's tactics. At the contested section 366.26 hearing—which was conducted in mother's absence because she failed to appear—mother's attorney indicated that he did not know what mother wanted to do. However, he proceeded to argue that parental rights should not be terminated due to the beneficial relationship exception. In his argument, he focused on the relationship between mother and the minor, and he mentioned how well their visits went. It is conceivable that mother's attorney did not object to or otherwise challenge the social worker's statement because he did not want to dwell on a statement that undercut his argument. Or perhaps he realized, based on his experience, that challenging the statement was pointless. Simply put, the record does not demonstrate irrefutable incompetence. Beyond that, we cannot ignore that the juvenile court ruled that the beneficial relationship exception was not applicable. We fail to see any potential prejudice to mother.

Last, mother avers that her attorney should have given her the opportunity to file a section 388 petition immediately after the June 25, 2012, section 366.26 hearing. There is a flaw in this argument. Once a section 366.26 hearing is held, a parent can no longer file a section 388 petition. (*In re Marilyn H.* (1993) 5 Cal.4th 295, 309 ["A petition

pursuant to section 388 may be used to raise [an] issue in the trial court prior to the section 366.26 hearing"].) Thus, it cannot be said that mother's attorney acted in an incompetent manner.

B. The termination of parental rights.

Mother argues that her parental rights should not have been terminated because the minor was not adoptable and because the juvenile court should have applied the beneficial relationship exception.

At a section 366.26 hearing, the juvenile court must find adoptability by clear and convincing evidence. (*In re I.W.* (2009) 180 Cal.App.4th 1517, 1525 (*I.W.*).) But "[t]he 'clear and convincing' standard specified in section 366.26, subdivision (c)(1)[] is for the edification and guidance of the trial court and not a standard of appellate review. [Citations.]" (*I.W., supra,* at p. 1525.) "Thus, on appeal from a judgment required to be based upon clear and convincing evidence, the clear and convincing test disappears and 'the usual rule of conflicting evidence is applied, giving full effect to the respondent's evidence, however slight, and disregarding the appellant's evidence, however strong.' [Citation.]" (*Id*. at p. 1526.) In other words, if a finding of adoptability is supported by substantial evidence, then an appellate court cannot second guess the finding. (*Ibid*.)

The courts are split regarding the standard of review of a finding regarding the existence of an exception to the termination of parental rights. Some courts apply the substantial evidence test (*In re C.F.* (2011) 193 Cal.App.4th 549, 553) and other courts apply review for an abuse of discretions (*In re Jasmine D.* (2000) 78 Cal.App.4th 1339, 1351.) Both standards are deferential.

Mother's task is to demonstrate an arguable issue regarding adoptability or the exception. She has failed to do so.

"In making the determination of adoptability, the juvenile court 'must focus on the child, and whether the child's age, physical condition, and emotional state may make it difficult to find an adoptive family.' [Citation.] 'A child's young age, good physical and emotional health, intellectual growth and ability to develop interpersonal relationships are all attributes indicating adoptability.' [Citation.] 'If the child is considered generally

adoptable, we do not examine the suitability of the prospective adoptive home. [Citation.] However, where the child is deemed adoptable based solely on the fact that a particular family is willing to adopt him or her, the trial court must determine whether there is a legal impediment to adoption.' [Citation.] [¶] 'A prospective adoptive parent's … interest in adopting is evidence that the child's age, physical condition, mental state, and other matters relating to the child are not likely to discourage others from adopting the child.' [Citation.]" (*I.W.*, *supra*, 180 Cal.App.4th at p. 1526.)

Here, there is evidence that Mr. and Mrs. P. were committed to adopting the minor. Mother has not indicated that there is a legal impediment to adoption. Moreover, there was substantial evidence of general adoptability. While the minor exhibited some disturbing behaviors, he was only five years old and the evidence demonstrated that he fit in well with his foster family.

In her appellate brief, mother cites section 366.26, subdivision (c)(1)(A) as the beneficial relationship exception. It therefore appears that she has confused subdivision (c)(1)(A) with subdivision (c)(1)(B)(i), which provides that parental rights will not be terminated if the juvenile court finds a compelling reason for determining that termination would be detrimental to a child because the parent has regular visitation and contact and the child would benefit from continuing the relationship. Presumably, mother's argument is based on that subdivision.

Mother had the burden establishing the beneficial relationship exception. (*In re Fernando M.* (2006) 138 Cal.App.4th 529, 534.) Her brief, however, does not raise an arguable issue as to whether that burden was met. The beneficial relationship exception applies if a parent 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).) As explained in *In re Mary G.* (2007) 151 Cal.App.4th 184, 207: "A parent must show more than frequent and loving contact or pleasant visits. [Citation.] 'Interaction between natural parent and child will always confer some incidental benefit to the child. . . . The parent must show he or she occupies a parental role in the child's life, resulting in a significant, positive, emotional attachment between child and parent. [Citation.]" After

the section 387 petition was sustained, mother's visits were sporadic and always monitored. Toward the end, mother damaged the minor's toy owl and told him to hurt his two foster siblings. We easily conclude that mother did not occupy a parental role in the minor's life. Moreover, mother failed to demonstrate the type of parent-child relationship that triggers the exception because it "'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. . . .' [Citation.]" (*In re Brandon C.* (1999) 71 Cal.App.4th 1530, 1534.) Because of her ongoing substance abuse, mother missed visits and was often incarcerated. Her drug use has clearly impaired her ability to be a good parent. As late as a month before the section 366.26 hearing, mother argued to a social worker that driving under the influence of an illegal substance with the minor in the car was not dangerous. When she missed visits, the minor was upset. He wanted assurances that he would not have to stay with mother. In contrast, the evidence showed that he was bonded to his foster family. In our view, the juvenile court's ruling on the beneficial relationship exception would be upheld whether we applied a substantial evidence or an abuse of discretion standard of review.

II. The Application to Expand Appointment of Counsel to File a Petition for Writ of Habeas Corpus.

A. <u>The law.</u>

"'In general, the proper way to raise a claim of ineffective assistance of counsel is by writ of habeas corpus, not appeal. [Citations.]'" (*Darlice C.*, *supra*, 105 Cal.App.4th at p. 463.) "Usually, . . . '[t]he establishment of ineffective assistance of counsel most commonly requires a presentation which goes beyond the record of the trial. . . . Action taken or not taken by counsel at a trial is typically motivated by considerations not reflected in the record. . . . Evidence of the reasons for counsel's tactics, and evidence of the standard of legal practice in the community as to a specific tactic, can be presented by declarations or other evidence filed with the writ petition. [Citation.]' [Citation.]" (*Ibid.*)

Some cases hold that when a juvenile court orders the termination of parental rights, a parent has the right to raise ineffective assistance of counsel through a petition

for writ of habeas corpus. (*In Darlice C., supra,* 105 Cal.App.4th at p. 463; *In re O.S.* (2002) 102 Cal.App.4th 1402, 1406, fn. 2; *In re Carrie M.* (2001) 90 Cal.App.4th 530, 533–534 [it is appropriate "to raise the issue of ineffective assistance of counsel by petition for writ of habeas corpus filed concurrently with an appeal from a final order"].) Other cases state that section 366.26, subdivision (i)(l)[4] bars any type of collateral review of a juvenile court's order terminating parental rights. (*In re Meranda P.* (1997) 56 Cal.App.4th 1143, 1161–1163 ["[t]his statutory language forbids alteration or revocation of an order terminating parental rights except by means of a direct appeal from the order"]; *In re Heather B.* (2002) 98 Cal.App.4th 11, 15; *In re Jessica K.* (2000) 79 Cal.App.4th 1313, 1316.) For purposes of ruling on mother's application, we agree with the analysis in *Darlice C.*

B. The merits of the application.

Family Code section 7895 requires an appellate court to appoint counsel for an indigent parent who appeals "from a judgment freeing a child who is a dependent child of the juvenile court from parental custody and control." Mother does not suggest that there is a similar right for a parent who files a habeas petition, and we could not find one in our independent research. However, in general, an appellate court has discretion "to appoint appellate counsel for a parent when parental rights are at stake." (*In re Bryce C.* (1995) 12 Cal.4th 226, 234 (*Bryce C.*).)

In *Bryce C.*, the question was whether the Court of Appeal should appoint counsel upon request for a parent who was a respondent. The court explained that "constitutional considerations may mandate the appointment of counsel at least on a case-by-case basis." (*Bryce C., supra,* 12 Cal.4th at p. 234.) "Normally an appellate court should appoint

---

[4] Section 366.26, subdivision (i)(1) provides: "Any order of the court permanently terminating parental rights under this section shall be conclusive and binding upon the child, upon the parent or parents and upon all other persons who have been served with citation by publication or otherwise as provided in this chapter. After making the order, the juvenile court shall have no power to set aside, change, or modify it, except as provided in paragraph (2), but nothing in this section shall be construed to limit the right to appeal the order."

counsel for the respondent whenever the issues are complex or it contemplates reversing the judgment. . . . We need not decide now, in a vacuum, whether an appellate court may *ever* deny counsel to a respondent parent and then reverse the judgment. But counsel should, at least, be appointed whenever the appellate court contemplates rendering a decision . . . that itself terminates parental rights. [¶] . . . [¶] Some appellate courts might find it more efficient, on balance, to exercise their discretion by granting counsel to all responding parents in termination cases, rather than on a case-by-case basis. We do not require or prohibit either practice. That is up to the courts themselves in the management of their dockets. We merely hold that appellate courts are not required to appoint counsel for all responding parents, but may, and sometimes must, appoint counsel in specific cases." (*Id*. at pp. 234–235.)

Though *Bryce C.* arises in the context of an appeal rather than a potential petition for writ of habeas corpus, we find it instructive. Moreover, we conclude that in this context, *Bryce C.* and *Phoenix H.* must be read together.

Phoenix H. establishes that when appointed counsel files a no issues brief, the Court of Appeal need not allow a parent to file an appellate brief absent a showing of good cause. The policy is based on the "state's interest in expediting juvenile proceedings in order to promptly achieve a permanent placement for the child." (*Phoenix H.*, *supra*, 47 Cal.4th at p. 843.) In our view, the same policy applies when considering a parent's application to expand appointment counsel to file a petition for writ of habeas corpus when the parent challenges the termination of parental rights based on ineffective assistance of counsel after appointed counsel has already filed a no issues brief in a related appeal. A child's permanent placement should not be delayed unless a parent makes a prima facie case for habeas relief. Any other rule would permit a parent to cause unnecessary delay even though he or she has not complied with the case plan and has no legitimate chance of prevailing.

We turn to mother's application to determine whether she has established good cause for the relief she requests.

According to mother, she "has before this court in her appeal an argument that trial counsel failed to competently represent her at the section 366.26 hearing because counsel failed to argue the [beneficial relationship] exception to adoption. . . . [Citation.] Without the habeas petition, this court will not have before it information about trial counsel's 'trial strategy' . . . , or lack thereof as it turns out, in that trial counsel failed to advise [mother] of the [beneficial relationship] exception to adoptability; failed to advocate its application at the section 366.26 hearings . . . ; and further because counsel represented [mother] at [the] section 366.26 hearing without having any contact with [mother], without making any attempt to locate her and without knowing her position and issues to argue on her behalf."

In our view, mother has not demonstrated good cause. Her attorney did, in fact, argue the beneficial relationship exception. To better make a case, he needed mother's testimony. Mother, however, did not attend the hearing and the juvenile court denied her attorney's request for a continuance. Even if mother had appeared and testified, it is extremely doubtful that the result would have been different. On the record, the juvenile court ruled that the exception did not apply. Thus, at the end of the day, mother's drug addiction, failure to comply with the case plan and distressing words and actions undermined reunification. Though she would like to, she cannot lay blame for her loss of parental rights at the feet of counsel.

DISPOSITION

The appeal is dismissed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.
ASHMANN-GERST

We concur:

_____, Acting P. J.
DOI TODD

_____, J.
CHAVEZ