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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

In re D.C., a Person Coming Under the  
Juvenile Court Law.

SONOMA COUNTY HUMAN  
SERVICES DEPARTMENT,

Plaintiff and Respondent,

v.

N.G.,

Defendant and Appellant.

A138972

(Sonoma County  
Super. Ct. No. 4010-DEP)

**I. INTRODUCTION**

In this juvenile dependency case, appellant N.G. (mother) was not offered reunification services after her son D.C. (minor) was removed from her custody, but was permitted to visit with him during the pendency of the proceedings. Shortly before minor’s permanency planning hearing, mother filed a petition to modify the juvenile court’s order by returning minor to her custody. At a combined hearing on mother’s petition and the selection of minor’s permanent placement, the juvenile court denied mother’s petition, selected adoption as minor’s permanent plan, and terminated mother’s parental rights.

On appeal, mother contends that the juvenile court abused its discretion in denying her petition to modify, resulting in a denial of due process. She also contends that the order terminating her parental rights should be reversed, because she maintained regular

visitation and contact with minor, and he has a beneficial relationship with her that outweighs the benefits of adoption. We reject these contentions, and affirm the juvenile court's order.

## **II. FACTUAL AND PROCEDURAL BACKGROUND**

This case has been before this court on a prior occasion. On March 13, 2013, we filed an unpublished opinion denying mother's petition for writ review of the juvenile court's order bypassing reunification services and setting a permanency planning hearing under Welfare and Institutions Code section 366.26.<sup>1</sup> (*In re D.C.* (Mar. 13, 2013, A137444).) The following statement of facts and procedural history, up through the filing of mother's writ petition, is largely taken from our prior opinion.

### **A. Events Prior to Filing of Writ Petition**

Mother was born in 1981. When she was a teenager, she became a dependent of the juvenile court due to abuse by her own mother (minor's grandmother). At the age of 17, mother ran away from the home where she was then residing. At the age of 18, mother had her first child, a daughter, by a man to whom mother was married until 2009. About two years later, mother gave birth to twin girls, fathered by the same man. When the twins were only two months old, their father physically assaulted one of them, causing severe injuries. As a result, all three children were declared dependents of the juvenile court, and mother was convicted of child cruelty. Neither mother nor the children's father received reunification services as to the twins, and they were ultimately adopted. Mother received reunification services as to the older girl, including partially completing a domestic violence program and attending Al-Anon meetings and parenting classes. However, the reunification was not successful, and the older girl was eventually adopted as well.

Meanwhile, mother became involved with another man who was so violent and aggressive that when mother gave birth to a fourth daughter in 2004, she immediately

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<sup>1</sup> All further statutory references are to the Welfare and Institutions Code unless otherwise noted.

relinquished the child for adoption in order to protect her. In April 2005, mother was arrested for possession of a controlled substance, and later went to a recovery program in lieu of going to jail. In December 2006, mother was ordered to register as a drug offender.<sup>2</sup>

Minor was born in the summer of 2009. At the time, mother was not sure which of two men, D.C. Sr. or B.B., was minor's father. D.C. Sr. was listed as the father on minor's birth certificate, and minor was given his surname. However, paternity testing later showed that B.B. was minor's biological father. D.C. Sr. appeared in the juvenile court proceedings, but ultimately waived reunification. B.B.'s whereabouts were never ascertained. Neither man was a party to the earlier writ proceeding, and neither man has been involved with minor or with the proceedings since then.

Before minor's first birthday, mother was referred to respondent Sonoma County Human Services Department (the Department) on two occasions due to her apparent neglect of minor. However, the Department did not initiate dependency proceedings on either occasion.

Between minor's first and second birthdays, mother was arrested repeatedly for drug-related offenses involving methamphetamine, probation violations, and loitering for the purpose of prostitution. In July 2011, shortly before minor's second birthday, mother was ordered by the court to participate in drug treatment. She declined residential treatment, and did not participate consistently in the outpatient program in which she enrolled. When minor was two, mother was referred to a parenting psychologist, who concluded that she was under the influence of drugs when she appeared for her intake appointment. Mother did not follow up with the treatment plan that the psychologist recommended.

In January 2012, as a result of mother's failure to comply with the drug treatment conditions of her probation, mother was ordered by the court to enter a residential drug

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<sup>2</sup> Mother denies having been ordered to register as a drug offender. The issue is not material to this appeal.

treatment program, Women's Recovery Services (WRS). She completed the residential program in April 2012, and then enrolled in an outpatient drug treatment program, but failed to complete it. Mother contended that she could not complete the outpatient program because of childcare issues; however, mother was offered subsidized childcare for minor, and apparently did not take full advantage of it.

In June 2012, a benefits worker concluded from mother's behavior that mother was using drugs, and mother agreed to obtain treatment, but did not do so. In late June or early July 2012, mother was referred to "detox" due to her methamphetamine use. Mother contends that she went, but she was unable to provide any verification. In August, mother was convicted of possession of drug paraphernalia, and placed on probation again. Minor's third birthday occurred shortly thereafter.

On August 28, 2012, the Department received a report that mother had tested positively for "substances" and had been asked to leave a treatment program in which she had been ordered to participate. The reporting party also suspected that mother was engaged in prostitution, and stated that mother "has no explanation as to where the minor is during these times."

On the following day, August 29, 2012, Amy Wyse, a social worker with the Department, went to a social services agency, Sonoma Works, where mother had an appointment later that day. Wyse met with Carlyne Sybelle, a worker at Sonoma Works who was familiar with mother. Sybelle expressed concern that mother had not been bringing minor to her meetings with Sybelle in recent months, and had told Sybelle that she was leaving him at friends' houses rather than at the day care facility in which mother was supposed to have enrolled minor. The Sonoma Works employee with whom mother was scheduled to meet, Diana Banthrall, also expressed concern about minor's wellbeing, because mother was homeless and thus unable to maintain a stable home environment for him.

When mother arrived for her appointment with Banthrall, minor was with her, and Wyse observed an L-shaped mark near one of minor's eyes. During the meeting, mother admitted having taken drugs twice since leaving WRS in April 2012, but denied she was

addicted or engaged in prostitution, and refused to submit to drug testing or to enroll in outpatient treatment. Eventually, while speaking with Wyse and Banthrall, mother became so agitated that minor appeared frightened, asked Banthrall what was wrong with mother, and hid under a chair. Meanwhile, Wyse called another Department worker, had him bring the police, and obtained a warrant authorizing the Department to detain minor immediately. Wyse took minor to the doctor, where the little boy explained that the mark near his eye had been caused by a friend of his mother's hitting him with a plastic hanger. Minor was then placed in a temporary foster home.

On August 30, 2012, the Department filed the dependency petition from which these proceedings arise. The petition alleged that minor had suffered, or was at risk of suffering, serious physical harm due to mother's neglect and substance abuse (§ 300, subd. (b)), and that minor's half-siblings had been abused or neglected, and minor was at risk of abuse or neglect (§ 300, subd. (j)). On August 31, 2012, the day of the detention hearing, mother was tested for drugs, and the test was negative. Nonetheless, minor's detention was continued.

In early September, mother contacted WRS and asked to be placed on their waiting list for treatment, but later failed to follow up with the program. On September 17, 2012, the Department filed an amended petition alleging that mother's ability to care for minor was impaired by her substance abuse and failure to comply with treatment programs, as well as her homelessness and multiple arrests, and that mother had failed to prevent a friend from assaulting minor (§ 300, subd. (b)). The petition also elaborated on the original allegations with regard to the neglect and abuse of minor's older half-siblings (§ 300, subd. (j)). The juvenile court held a jurisdictional hearing on September 17, 2012, found jurisdiction, continued minor's foster care placement, and set a disposition hearing.

During September 2012, two of mother's drug tests indicated that she had provided a diluted sample, and she missed one test. In addition, mother appeared to a social worker to be under the influence when the worker met with mother immediately after one of mother's visits with minor. Mother again showed signs of being under the

influence during another visit with minor on September 25, 2012. The following day, she tested positive for methamphetamine. During another visit, mother insisted on braiding minor's hair for an hour and a half, ignoring his resistance.

On October 1, 2012, mother tried to start residential treatment at WRS, but was turned away and sent to detox because she was under the influence. Three days later, she completed the detox process and began the WRS residential program. On October 16, 2012, the WRS program manager reported that mother was not doing well in treatment, and was not complying with the program rules. On the same day, the Department social worker informed mother that the Department planned to recommend that reunification services be denied, whereupon mother became so irate and agitated that the meeting had to be terminated.

The Department's disposition report was filed on October 29, 2012. As mother had been informed, the Department recommended that no reunification services be provided. The disposition hearing was continued several times, and did not actually occur until December 18, 2012.

At the disposition hearing, the court received into evidence a letter from the WRS director indicating that mother's initial resistance to treatment had passed, and that the WRS staff had seen marked improvement in mother's compliance with the WRS program. The court also took judicial notice of portions of the file in the dependency proceeding relating to minor's oldest half-sister, in which mother was given reunification services, but ultimately lost her parental rights with regard to the minor.

The Department presented the testimony of a social worker, Vanessa Azevedo, as an expert witness regarding the assessment of risks to children and the provision or bypass of reunification services. Azevedo noted that during mother's efforts at reunification with minor's oldest half-sister, mother denied or minimized her problems and failed to comply fully with her case plan. In Azevedo's opinion, mother was still engaging in denial with regard to her criminal history and drug use in the current case. Historically, except for a brief period several years before minor was born, mother had

not demonstrated an ability to remain drug-free and avoid involvement in the criminal justice system when mother was not in a residential treatment program.

Azevedo acknowledged that mother had “begun to take steps in addressing her drug use,” but indicated that at least through October, mother still had “a considerable amount of denial around the severity of her use.” In the present case, mother had initially failed to comply with referrals to services, and had “continued to demonstrate hostile, aggressive behavior.” Azevedo noted that mother was neglectful of minor’s needs, at times leaving him in the care of people who were not safe and whom minor did not know (including grandmother, who abused mother as a child); had never yet taken minor to the dentist even though he was three years old; and by mother’s own admission, had been exposed only to men who were “bad to him and to his mother in front of him.” Mother tended to minimize the danger and negative effects of this behavior for minor. Azevedo was also concerned that mother was still involved in violent relationships, because Azevedo had observed bruises on mother’s arm that looked like they resulted from someone grabbing it hard, although mother denied this, and gave another explanation.

Azevedo also opined that minor exhibited some “attachment concerns” with respect to mother. For example, the first time Azevedo met minor, during one of mother’s visits with him, minor fled away from mother and hid behind a chair when Azevedo entered the room, whereas a child with a healthy attachment would normally go to their parent for comfort if frightened by a stranger. In addition, Azevedo had observed that minor did not react in the way a child normally would when mother exhibited abnormal behavior, and allowed near-strangers to remove him from mother’s presence without resisting. Azevedo indicated that this showed minor and mother had a dysfunctional relationship. Due to minor’s references to going to motels with mother for an hour, and hiding under furniture during that time, Azevedo was also concerned that mother had been exposing minor to her prostitution activities.

Azevedo acknowledged that mother had reentered the WRS residential treatment program on October 4, 2012, but described mother’s initial entry into the program as “forced and reluctant.” Based on a report from WRS’s director in mid-October, 2012,

Azevedo characterized mother's attitude as reflecting "a sense of entitlement" and "not taking responsibility." At that point, mother was doing poorly in the program, and was not following the rules even though she knew them. The WRS intake coordinator reported that mother told her the Department had taken minor away from her for no reason, and when the worker opined that there must have been a reason, mother responded by acknowledging that she had "a couple dirty tests." As of early November 2012, WRS staff reported that mother "was still having trouble following the rules there."

Azevedo concluded that mother "was still struggling with giving herself into treatment wholeheartedly until, approximately, the middle of November [2012]." Even then, mother was still guarded about her children, and was "not opening up on many topics," such that the case worker felt that mother was not being honest or truthful about her life experiences, and was not taking responsibility for her current involvement with the Department. Mother's attitude during a meeting with Azevedo and the WRS case manager in mid-November 2012 was so aggressive and hostile that the meeting had to be terminated after 20 minutes. Mother also minimized her substance abuse problems, and denied being an addict even when she admitted to using drugs.

As of early December 2012, mother's case manager at WRS reported that mother was "more positive," "had been engaging more," and was "being supportive of other residents." However, mother was still being guarded, particularly when discussing her children.

Azevedo concluded that it would not be in minor's best interest to provide services to mother, because mother had been given many opportunities to better her life and minor's life before minor was removed from her custody, and had "blatantly refused" them. Azevedo acknowledged that mother had recently begun to participate in her residential treatment program. She discounted this, however, because mother had completed the same program in the recent past, yet had disregarded the attempts to help her that were offered to her after that, and was still continuing to minimize the severity of her drug use and its effect on minor. Azevedo also believed that mother might have mental health issues due to the abuse mother suffered as a child, the loss of her children,

her domestic violence relationships, and her codependency issues, but mother had not yet received the mental health therapy she appeared to need. Also, while mother's visits with minor had been positive since she reentered the WRS program, the visits that occurred before then had indicated that mother and minor did not have a healthy relationship.

Mother testified that her attitude had changed since she first entered WRS, and she was now trusted to support other women in the program. She admitted she was a methamphetamine addict, saying she had realized that about a year and a half earlier, and admitted that she had relapsed after completing the WRS program for the first time, having used drugs four times between May and her reentry into WRS. She averred, however, that things were different now, because she wanted to "stay clean." She had a sponsor, but that relationship had only been in place for a little over a month.

Mother acknowledged that she was ordered to go to a treatment program in the summer of 2011, and did not complete that program. Mother's explanation was that minor would become so upset after a few hours at daycare that she would have to leave the program to pick him up, and she had no other resources to care for him. She denied ever having been a prostitute, and contended that the police arrested her on that charge because they were looking for minor's father, who had an outstanding arrest warrant, and wanted to search her hotel room. She explained that minor developed the habit of hiding while in motel rooms as part of a game she played with him when they stayed in hotels, which they often did because she was homeless.

Mother denied that she would ever leave minor with someone who would hurt him, including her own mother, who had only babysat minor "maybe five times." She denied there was any domestic violence between her and her current boyfriend.

At the conclusion of the disposition hearing on December 19, 2012, the juvenile court found by clear and convincing evidence that: (1) minor's half-siblings were removed from mother's custody; she failed to reunify with them, and her parental rights over them were permanently severed; and she had not subsequently made a reasonable effort to treat the problems that led to their removal (§ 361.5, subs. (b)(10), (b)(11)); and (2) mother had a history of extensive, abusive, and chronic use of drugs and had resisted

court-ordered treatment for the problem during the three-year period immediately prior to the filing of the petition, or had failed or refused to comply with a program of drug treatment described in her case plan on at least two prior occasions, despite the availability and accessibility of these programs (§ 361.5, subd. (b)(13)). The court also declined to find clear and convincing evidence that reunification with mother would be in minor's best interest (§ 361.5, subd. (c)).

Based on these findings, the juvenile court adopted the Department's recommendation that no reunification services be provided (sometimes referred to as a "bypass" of services (see, e.g., *In re A.M.* (2013) 217 Cal.App.4th 1067, 1074)), and scheduled a permanency planning hearing under section 366.26 for April 25, 2013. Mother filed a timely notice of her intent to file a writ petition, and the petition itself was filed on January 24, 2013. (Cal. Rules of Court, rules 8.450(e), 8.452.)

### **B. Denial of Writ Petition**

As already noted, we filed our opinion denying mother's writ petition on March 13, 2003. (*In re D.C.*, *supra*, A137444 [nonpub.].) In that opinion, we upheld the trial court's conclusion that mother should be denied reunification services under section 361.5, subdivision (b)(13).<sup>3</sup> That statute permits a juvenile court in a dependency proceeding to deny reunification services to a parent or guardian who has "a history of extensive, abusive, and chronic use of drugs or alcohol and has resisted prior court-ordered treatment for this problem during a three-year period immediately prior to the filing of the petition that brought that child to the court's attention . . . ."

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<sup>3</sup> Section 361.5, subdivision (b)(13) provides: "(b) Reunification services need not be provided to a parent or guardian described in this subdivision when the court finds, by clear and convincing evidence, any of the following: [¶] . . . [¶] (13) That the parent or guardian of the child has a history of extensive, abusive, and chronic use of drugs or alcohol and has resisted prior court-ordered treatment for this problem during a three-year period immediately prior to the filing of the petition that brought that child to the court's attention, or has failed or refused to comply with a program of drug or alcohol treatment described in the case plan required by Section 358.1 on at least two prior occasions, even though the programs identified were available and accessible."

In her writ petition, mother acknowledged she met one requirement of that statute, in that she had resisted court-ordered treatment within the three years prior to the filing of the petition. (See *D.B. v. Superior Court* (2009) 171 Cal.App.4th 197, 203-204 [“a parent who has failed to participate in drug or alcohol treatment ordered directly by the court as a condition of probation in a criminal case may be denied services under section 361.5, subdivision (b)(13) if the other criteria of that provision are met”].) She contended, however, that substantial evidence did not support the juvenile court’s finding that she satisfied the other criterion for bypass under that subdivision, i.e., that she had a history of extensive, abusive, and chronic use of drugs. We concluded there was substantial evidence that mother had a problem with methamphetamine starting no later than mid-2010. Indeed, at the disposition hearing, mother’s counsel acknowledged that mother had a record of approximately, two and a half years of abusive and chronic use of methamphetamine. Between the summer of 2010 and the fall of 2012, mother was arrested for drug-related offenses several times, and repeatedly failed to comply with court-ordered drug abuse treatment. In addition, mother admittedly continued to use methamphetamine even after completing the WRS residential program for the first time in early 2012.

In our opinion denying mother’s writ petition, we also rejected mother’s alternative argument that the juvenile court erred in concluding that providing reunification services would not be in minor’s best interest. We concluded that mother’s belated recognition of her need to deal with her methamphetamine abuse was not sufficient to meet her burden to show by clear and convincing evidence that further efforts at reunification would be in minor’s best interest.

### **C. Subsequent Events and Proceedings**

In late January 2013, minor was placed in foster care in a potential adoptive home. On March 5, 2013, shortly before we issued our opinion denying mother’s writ petition, the Department served mother with a notice of hearing under section 366.26, setting minor’s permanency planning hearing for April 25, 2013. On April 12, 2013, the Department filed its report for the hearing (the April 2013 report), recommending that

mother's parental rights (as well as those of his biological and presumed fathers) be terminated so as to permit minor's current foster parents to adopt him, as they wished to do.

The April 2013 report stated that mother had continued to visit with minor regularly; visits occurred at WRS until mother completed her residential program in February 2013, and then at a social services agency office. Mother was generally on time and cooperative. Minor was able to transition from his foster parents to mother for visits without incident, and returned eagerly to his foster parents after visits. Minor was thriving in his current placement. He had made considerable progress toward overcoming some minor speech delays, had befriended his older foster sister and one of the family dogs, and, at age three and a half, was attending preschool and was starting to learn to count and say the alphabet.

A California State Department of Social Services adoption assessment was incorporated into the April 2013 report. Consistent with the Department's views as expressed in the April 2013 report, the assessment indicated that minor was healthy and developmentally on track. Based on observation of minor with his foster family, the assessment opined that minor was "clearly attached to his prospective adoptive parents as they are to him." Minor was too young to understand the concept of adoption, but the assessment noted that "he favors attention and comfort from his potential adoptive family and seeks comfort from them when distressed." The assessment noted that mother had been visiting with minor biweekly, and opined that although interaction between minor and mother "may have some incidental benefit, such benefit does not outweigh the benefit [minor] will gain through the permanence of adoption," and that "termination of parental rights would not be detrimental to [minor]."

The potential adoptive family had an approved home study, had been married for 15 years, and had already adopted a daughter, who appeared to be "proud to consider herself as [minor's] big sister." They were strongly committed to adopting minor, were demonstrating good parenting practices with him, and had a loving relationship with him. The adoptive parents were open to permitting minor to have contact with his birth family

if that was in his best interest. The assessment indicated that removing minor from the potential adoptive parents would be detrimental to his wellbeing, and that it would be in his best interest to terminate mother's parental rights and free him for adoption.

On April 22, 2013, mother filed a petition under section 388 seeking to modify the court's order by vacating the section 366.26 hearing, expanding visitation, and providing mother with reunification services. In support of her petition, mother asserted that she had completed the WRS residential program on February 4, 2013, and had attended weekly meetings since then, and continued to test clean. She provided a letter from the executive director of WRS attesting to her completion of the residential program, her participation in the aftercare program, and her consistently negative drug tests. Mother explained that her prior relapse had been the result of her failure to follow through with WRS's aftercare program after completing her residential treatment, and that this time, she was doing so. Mother was living in a women's shelter that provided a transitional sober living environment; attending weekly meetings and meetings with a sponsor; doing volunteer work; and looking for employment.

Mother's petition also averred that providing her with reunification services would be in minor's best interest. She noted that she had visited him whenever possible (currently every other week), provided him with food, reading, games, and affection. She had been minor's sole caregiver almost for his entire life<sup>4</sup> until the Department removed him from her custody, and she believed he had bonded with her. She averred that through her treatment, she had now gained the tools to avoid future relapses, and was prepared to provide minor with a healthy, safe home.

The juvenile court ordered a hearing on mother's petition. Mother later submitted a letter from her case worker at the women's shelter in support of the petition. The letter and the documents attached to it attested to mother's participation in the services offered by the shelter, her compliance with its rules, and her negative drug test results.

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<sup>4</sup> For about three months when minor was less than a year old, he spent half of each week with D.C. Sr., his presumed father. However, D.C. Sr. stopped visiting with minor when genetic testing revealed that D.C. Sr. was not minor's biological father.

Ultimately, the hearing on mother's petition and the section 366.26 hearing occurred simultaneously on June 3, 2013. At the hearing, mother was the sole witness. She testified that she had completed the WRS residential program and was participating in its aftercare program, which included a parent education program and a domestic violence group, as well as four sobriety meetings per week and a weekly meeting with her sponsor. She had recently moved into an apartment. She was working as a hotel housekeeper between three and six days a week, and testified that she had not used drugs since July 7, 2012, which was almost a year before the hearing.<sup>5</sup>

Mother's visits with minor had been reduced to once a month for an hour and a half, despite mother's requests for more frequent visits. During the visits, mother gave minor his lunch, read to him, and played games with him. Minor was affectionate with her, sitting in her lap and hugging and kissing her.

Mother acknowledged using drugs while she had custody of minor, starting with prescription pain medication due to a back injury, but contended she did not use methamphetamine around minor, she did not share housing with drug users, and minor was not "exposed to a drug lifestyle." On cross-examination, mother admitted using excess doses of pain medication, as well as methamphetamine, not only while minor was visiting with D.C. Sr., but also when minor was present, albeit asleep in a different part of the house. She acknowledged that when she used methamphetamine while minor was asleep in the house, she still would have been the person responsible for minor's care, but contended that she had never been so impaired that she could not take care of him.

Mother denied that minor had been exposed to domestic violence, explaining that her previous statement about having relationships with "mean motherfuckers" and "messed up people" referred to the abandonment of minor by his presumed and biological fathers, rather than to domestic violence. Mother admitted that she had left

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<sup>5</sup> This testimony is controverted by evidence in the record that mother tested positive for methamphetamine on September 26, 2012, and that when she arrived at WRS to enter the program on October 1, 2012, she had to be sent to detox because she was under the influence.

minor with her own mother on a few occasions, but averred that it had never been for more than three hours, and minor had never been alone with his grandmother. She also had left minor overnight with his godmother on one occasion when she was homeless.

Mother explained that she believed it would be best for minor to reunify with her, because she loved him and knew him better than anyone else, including his foster parents. She had been responsible about ensuring he received medical and dental care while he was in her custody. She believed minor viewed her as his mother, not just as a relative or friend.

When asked on cross-examination what her understanding was about why minor was removed from her care, mother explained that while she was attending an outpatient treatment program, she had experienced difficulty obtaining day care for minor. Then, when she brought minor with her to a welfare appointment, and found that a social worker from the Department had been called to attend the appointment, she became very upset, so she yelled and screamed, and that was why minor was removed, even though she tested clean at the time. She characterized the other reasons given by the Department for minor's removal as having been added after the fact, and criticized the Department for removing minor just because she yelled in his presence, although she admitted she should not have done so.

At the conclusion of mother's testimony, after hearing argument from counsel, the juvenile court denied mother's petition. The court found that while mother had changed, the changes were not "such that the original order denying her services should never have been granted." The court also found that there was insufficient evidence that it would be in minor's best interest to grant the relief mother was requesting.

In the section 366.26 portion of the hearing, the Department submitted on the April 2013 report. Mother's counsel offered mother's testimony on the petition as her evidence in support of her contention that it would be in minor's best interest not to terminate her parental rights, and argued the evidence showed that minor was strongly bonded to mother and looked to her for affection, parenting, and discipline. The Department responded that although minor's visits with mother were friendly and

uneventful, he did not show any evidence of having problems separating from her, or that he looked to her as his psychological parent. Minor's counsel argued that although mother had been minor's caretaker until he was removed from her custody, she had been neglectful of him during that time, and had subjected him to experiences inappropriate for a small child, including her own behavior of screaming and shouting.

The court acknowledged that mother had demonstrated her love for minor, but noted she had made unfortunate choices in her life that were hazardous for minor. Thus, the court found that although there would be some benefit to maintaining mother's parent-child relationship with minor, that benefit was outweighed by the benefit of stability, continuity, and a permanent plan. Accordingly, the court adopted the Department's recommendation of adoption as minor's permanent plan, and terminated the parental rights of mother and of minor's presumed and biological fathers. Mother filed a timely notice of appeal.

### **III. DISCUSSION**

#### **A. Denial of Petition to Modify Order**

Under section 388, a parent may petition to modify a previously issued court order in a dependency proceeding on the basis of changed circumstances or new evidence. However, "[n]ot every change in circumstance can justify modification of a prior order. The change in circumstances must relate to the purpose of the order and be such that the modification of the prior order is appropriate. [Citation.]" (*In re S.R.* (2009) 173 Cal.App.4th 864, 870, citing *In re Daijah T.* (2000) 83 Cal.App.4th 666, 674 [changes in parental circumstances that make reunification desirable may justify modification of an order terminating services].) "In evaluating whether the petitioner has met his or her burden to show changed circumstances, the trial court should consider: (1) the seriousness of the problem which led to the dependency, and the reason for any continuation of that problem; (2) the strength of relative bonds between the dependent children to both parent and caretakers; and (3) the degree to which the problem may be easily removed or ameliorated, and the degree to which it actually has been. [Citation.]" (*In re A.A.* (2012) 203 Cal.App.4th 597, 612.) The parent must also demonstrate that the

requested modification would be in the best interests of the dependent child. The party seeking the modification bears the burden to prove both of those requirements by a preponderance of the evidence. (Cal. Rules of Court, rule 5.570(h)(1); see also *In re B.D.* (2008) 159 Cal.App.4th 1218, 1228; *In re Michael B.* (1992) 8 Cal.App.4th 1698, 1703.)

In the present case, mother's burden to show that the requested modification would be in minor's best interest was heightened by the fact that she did not qualify for reunification services. The identification in section 361.5, subdivision (b), of a set of "comparatively extreme situations" in which a juvenile court may bypass reunification services " 'reflect[s] the Legislature's desire to provide services to parents only where those services will facilitate the return of children to parental custody.' [Citations.]" (*In re A.M., supra*, 217 Cal.App.4th at p. 1074.) "When the court determines a bypass provision applies, the general rule favoring reunification is replaced with a legislative presumption that reunification services would be an unwise use of governmental resources. [Citation.]" (*In re S.B.* (2013) 222 Cal.App.4th 612, 622.) Moreover, section 361.5, subdivision (c) provides that "[t]he court *shall not* order reunification for a parent . . . described in [section 361.5, subdivision (b)(13)] unless the court finds, *by clear and convincing evidence*, that reunification is in the best interest of the child." (Italics added.) This provision applies not only to the initial denial of reunification services, but also when a parent who has been denied reunification applies to modify that order under section 388. (See *In re A.M., supra*, 217 Cal.App.4th at pp. 1075-1076.)

As mother acknowledges, we review a juvenile court's order granting or denying a section 388 petition for abuse of discretion. (*In re A.A., supra*, 203 Cal.App.4th at p. 612 [a section 388 petition "is addressed to the sound discretion of the juvenile court, and its decision will not be overturned on appeal in the absence of a clear abuse of discretion"]; *In re A.S.* (2009) 180 Cal.App.4th 351, 358; *In re Michael B., supra*, 8 Cal.App.4th at p. 1704.) We may not substitute our own judgment for that of the juvenile court; reversal is warranted only when the juvenile court "exceeded the limits of legal discretion by making an arbitrary, capricious or patently absurd determination. [Citation.]" (*In re A.S., supra*, 180 Cal.App.4th at p. 358.) "The denial of a section 388 motion rarely merits

reversal as an abuse of discretion. [Citation.]” (*In re Amber M.* (2002) 103 Cal.App.4th 681, 685-686.)

More specifically, it is not an abuse of discretion to deny a section 388 petition that “alleges merely changing circumstances and would mean delaying the selection of a permanent home for a child to see if a parent . . . might be able to reunify at some future point,” because granting such a petition “does not promote stability for the child or the child’s best interests. [Citation.] ‘ “[C]hildhood does not wait for the parent to become adequate.” ’ [Citation.]” (*In re Casey D.* (1999) 70 Cal.App.4th 38, 47.) Where, as here, a section 388 petition is filed “on the eve of the section 366.26 permanency planning hearing[,] the child[]’s interest in stability [is] the court’s foremost concern and outweigh[s] any interest in reunification. [Citation.]” (*In re Edward H.* (1996) 43 Cal.App.4th 584, 594.)

Here, mother argues that the juvenile court abused its discretion by denying her section 388 petition on a legally improper ground, i.e., that mother had failed to establish that the original bypass order was erroneous. We agree with the Department that mother’s argument misconstrues the juvenile court’s rationale. As we understand the court’s remarks, the issue was whether the changes in circumstances that mother had attempted to prove were sufficiently related to the reasons for the bypass order, and were of sufficient magnitude, to entitle mother to a second chance at reunification. This correctly identifies the inquiry a juvenile court should undertake when deciding a section 388 petition that seeks to modify a bypass order. Accordingly, the juvenile court in the present case did not err in focusing on that issue.

In arguing that the denial of her section 388 petition was an abuse of discretion, mother also relies on *In re Kimberly F.* (1997) 56 Cal.App.4th 519 (*Kimberly F.*). *Kimberly F.* is readily distinguishable, however. It involved a single mother with four children who permitted her home to become filthy and unsanitary because she was overwhelmed by the needs of her oldest child, a teenager who had a life-threatening illness. As a result, her two youngest children were removed from her care. The mother ultimately managed to remedy the conditions in the home that had led to the younger

children's removal, but this did not occur until after the termination of reunification services. Accordingly, the mother filed a petition under section 388 shortly before the permanency planning hearing, but the juvenile court denied it.

On the mother's appeal, the court concluded that although "[i]t is rare that the denial of a section 388 motion merits reversal as an abuse of discretion, . . . this is such a case." (*Kimberly F.*, *supra*, 56 Cal.App.4th at p. 522.) In so holding, the court stressed that a court considering a section 388 petition "must consider the seriousness of the reason for the dependency in the first place. Not all reasons for initial dependency jurisdiction are equal from the point of view of a child's interests." (*Id.* at p. 530.) In *Kimberly F.*, the original reason for the children's removal from their mother's home—its unsanitary condition—was the *least* serious of the circumstances that can justify intervention by the dependency system, and one of the most easily remedied. (See *id.* at pp. 522, 532.) The *Kimberly F.* court expressly distinguished cases such as the one now before us, in which at least one of the underlying reasons for removal is drug addiction or substance abuse.

Additionally, the mother in *Kimberly F.* had had "a substantial amount of unmonitored visitation during the period of dependency," and there was an "undisputedly strong bond" between the children and their mother—"a bond which [was] strong enough . . . to vitiate the children's desire to be adopted by their caretakers." (*Kimberly F.*, *supra*, 56 Cal.App.4th at p. 532.) The children were also strongly bonded to their two older brothers, who had remained in the mother's care. (*Ibid.*) For all of those reasons, the court concluded that the denial of the mother's section 388 petition was an abuse of discretion.

None of the factors on which the court relied in *Kimberly F.* is present in this case. Substance abuse is a far more serious and intractable problem than a dirty house, and requires a correspondingly more extensive showing of *lasting* remediation before the parent can convincingly contend that the conditions justifying removal have been permanently eliminated. The *Kimberly F.* court expressly recognized this distinction. (See *Kimberly F.*, *supra*, 56 Cal.App.4th at p. 531, fn. 9.) In the present case, by the time

of the June 2013 hearing, mother had only a four-month track record of maintaining her sobriety *outside* the context of a residential treatment program. Moreover, less than a year earlier, mother had relapsed only a few months after completing a prior course of residential treatment at the same program. Mother produced evidence that she had made substantial progress in her substance abuse recovery since then, and that after her more recent release from residential treatment, she had participated fully in a comprehensive aftercare program. Nonetheless, given mother's lengthy history of substance abuse and failed attempts at treatment, the juvenile court did not abuse its discretion in finding that mother's showing as to changed circumstances was not adequate to require that the court reverse its earlier order bypassing reunification.

Mother also relies on *In re Eileen A.* (2000) 84 Cal.App.4th 1248 (*Eileen A.*), disapproved on other grounds by *In re Zeth S.* (2003) 31 Cal.4th 396. In *Eileen A.*, the dependency proceedings involved a toddler who had been severely physically abused by her father. The mother was denied reunification services, *against* the recommendation of the social worker, due to her failure to appreciate the severity of the child's injuries. Despite the denial of services, the mother attended parenting classes, went to Al-Anon, saw a counselor regularly, visited with the child as much as she was permitted, and went to all of the child's medical appointments. Meanwhile, the father was sent to prison for felony child abuse, and the mother made clear that she wanted to divorce him, although she could not afford the cost of hiring counsel for that purpose.

Despite these changed circumstances, the mother's trial counsel failed to file a section 388 petition prior to the section 366.26 hearing, thus rendering it almost inevitable that the mother's parental rights would be terminated. (See *Eileen A.*, *supra*, 84 Cal.App.4th at pp. 1255-1256.) On appeal from the order terminating her parental rights, the mother argued that her trial counsel had rendered ineffective assistance by failing to file a section 388 petition. The appellate court agreed, concluding that "[t]here simply could be no satisfactory explanation for [the mother's] trial counsel's failure to file a request for a section 388 modification under the circumstances of this case." (*Id.* at p. 1255.) Addressing the issue of remedy, the court opined that the mother needed to

make only a prima facie showing of prejudice from her counsel’s failure to file the motion, that is, that she only needed to show a reasonable probability that she would have obtained a more favorable result in the absence of her counsel’s error. (*Id.* at pp. 1259-1260.) The court concluded that the mother had made such a showing. (*Id.* at pp. 1260-1262.)

*Eileen A.*, *supra*, 84 Cal.App.4th 1248 is distinguishable from the present case on several grounds. First, the appellate court in that case was not considering whether the juvenile court abused its discretion in denying a section 388 petition; rather, it was considering whether the mother had shown a reasonable probability that such a petition, if filed, would have been granted. Second, the grounds for the child’s removal from the mother’s custody stemmed not from any affirmative misconduct on the mother’s part, but rather from her “omission and ignorance.” In this regard, the court expressly distinguished cases involving parental drug abuse. (*Id.* at p. 1261.) Third, in *Eileen A.*, unlike the present case, the minor’s appellate counsel and the social worker both favored granting reunification services to the mother.<sup>6</sup> Finally, in *Eileen A.*, the minor’s current caretakers were *not* prepared to adopt her, so that the minor would have faced a change of placement whether or not reunification was granted. (*Id.* at pp. 1261-1262.) For all of these reasons, nothing in *Eileen A.* persuades us that the juvenile court’s order in the present case should be reversed.

Finally, in her reply brief, mother cites a recent case, *In re G.L.* (2014) 222 Cal.App.4th 1153, which she contends has “closely analogous circumstances.” That case, however, involved an appeal by the dependent child from the juvenile court’s order *granting* reunification services to the mother. It is true that there are many factual similarities between the two cases. We note, however, that in *In re G.L.*, the social worker’s reports indicated that the bond between the mother and the child appeared to *strengthen* over the course of their visits (*id.* at pp. 1165-1166), whereas in the present

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<sup>6</sup> In the present case, the Department’s counsel and minor’s trial counsel both argued *against* mother’s section 388 petition, and minor has not filed a brief on appeal.

case, there is no equivalent evidence. In any event, given the abuse of discretion standard of review, a case in which an order granting reunification services was affirmed on appeal carries little weight in our consideration of an appeal from an order denying such services.

For all of the foregoing reasons, we affirm the juvenile court's order denying mother's section 388 petition. In so doing, we do not intend to slight mother's commendable efforts to overcome the issues that led to the minor's removal, nor the fact that these efforts were undertaken voluntarily and without the support of Department-sponsored reunification services. We merely hold that the juvenile court did not abuse its discretion in concluding, given mother's overall history, that the results of her efforts did not constitute a sufficient change of circumstances to outweigh minor's need for stability and permanency.

### **B. Denial of Due Process**

Mother contends that the erroneous denial of her section 388 petition resulted in the violation of her due process rights. Inasmuch as we have concluded that the denial of mother's section 388 petition was not erroneous, we need not address this argument.

### **C. Termination of Parental Rights**

At a section 366.26 hearing, when reunification services have been bypassed or terminated and adoption is likely,<sup>7</sup> parental rights must be terminated unless the objecting parent satisfies the burden of proving the applicability of one of the exceptions listed in section 366.26, subdivision (c). (*In re S.B.* (2008) 164 Cal.App.4th 289, 297, holding limited on another ground by *In re C.F.* (2011) 193 Cal.App.4th 549, 557-559.) One of those exceptions, sometimes referred to as the beneficial relationship exception, is that parental rights are not to be terminated when "[t]he 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).) Mother argued in the juvenile court, and

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<sup>7</sup> Mother expressly concedes that minor is adoptable.

reiterates on appeal, that her parental rights should not have been terminated because the statutory beneficial relationship exception applies.

The Department concedes that mother maintained regular contact with minor through supervised visitation during the course of the dependency proceedings. Thus, the issue we are called upon to decide here is whether the juvenile court erred in finding that mother did not meet the burden of proof needed to establish the second prong of the beneficial relationship exception, i.e., that minor would benefit from continuing his relationship with mother. In order to meet this burden, mother must demonstrate that her “relationship [with minor] promotes [his] well-being . . . to such a degree as to outweigh the well-being [minor] would gain in a permanent home with new, adoptive parents.” (*In re Autumn H.* (1994) 27 Cal.App.4th 567, 575, disagreed with on another ground by *In re Jasmine D.* (2000) 78 Cal.App.4th 1339 (*Jasmine D.*)) In other words, the burden is on mother to show that her parent-child relationship with minor is such that “severing the natural parent-child relationship would deprive the child of a *substantial*, positive emotional attachment such that the child would be *greatly* harmed. [Citations.]” (*In re Angel B.* (2002) 97 Cal.App.4th 454, 466, original italics; see also *In re Brittany C.* (1999) 76 Cal.App.4th 847, 853-854.)

Implicit in the requirements for applicability of the beneficial relationship exception is that “a *parental* relationship is necessary for the exception to apply, not merely a friendly or familiar one. [Citations.]” (*Jasmine D.*, *supra*, 78 Cal.App.4th at p. 1350, original italics.) That is, the parent must show more than frequent and loving contact, an emotional bond with the child, or pleasant visits. (*In re Derek W.* (1999) 73 Cal.App.4th 823, 827.) The parent must show he or she occupies a “parental role” in the child’s life (*ibid.*), resulting in “ ‘a significant, positive, emotional attachment from child to parent.’ [Citation.]” (*In re Elizabeth M.* (1997) 52 Cal.App.4th 318, 324.) “Because a section 366.26 hearing occurs only after the court has repeatedly found the parent unable to meet the child’s needs, it is only in an extraordinary case that preservation of the parent’s rights will prevail over the Legislature’s preference for adoptive placement.” (*Jasmine D.*, *supra*, 78 Cal.App.4th at p. 1350.)

There is some dispute in the case law regarding the correct standard of review on appeal from an order rejecting the applicability of the beneficial relationship exception to the termination of parental rights. “Most courts have applied the substantial evidence standard of review to this determination [citations], although at least one court has concluded that it is properly reviewed for an abuse of discretion [citation].” (*In re K.P.* (2012) 203 Cal.App.4th 614, 621.) The Sixth District has adopted a hybrid standard, under which the determination whether a parental relationship exists is reviewed under the substantial evidence test, whereas the abuse of discretion standard applies to the determination whether that relationship is sufficiently important that the detriment from its termination would outweigh the benefit of adoption. (*In re Bailey J.* (2010) 189 Cal.App.4th 1308, 1314-1315; accord, *In re K.P.*, *supra*, 203 Cal.App.4th at pp. 621-622.)

As pointed out in *Jasmine D.*, *supra*, 78 Cal.App.4th at page 1351, “[t]he practical differences between the [various] standards of review are not significant” in reviewing a juvenile court’s conclusion that the beneficial relationship exception does not apply. In any event, we need not resolve this issue in the present case, because regardless of the standard of review we apply, we find insufficient reasons to overturn the juvenile court’s decision.

Mother argues that her showing was sufficient because she produced evidence that minor was excited to see her, and was sad when their visits ended. However, this statement is supported only by a citation to the description in the record of mother’s visits with minor in September and October 2012, and the report of the foster parents that minor cried on two occasions. As to the September and October 2012 visits, however, the evidence was equivocal as to the strength of minor’s bond with mother. For example, while minor appeared to be excited to see mother at the visit on September 25, 2012, he did not hug or kiss her, and although he “got teary eyed” when the visit ended, he quickly recovered, and smiled when he saw his foster mother. The foster parents’ reports that minor cried after his visits on two occasions did not attribute his distress to his separation from mother. Rather, on one occasion minor cried because a container of yogurt got

spilled, and on the other, the foster mother attributed his distress to his uncertainty about whether he was really going back to his foster home.

More importantly, mother cites no evidence establishing that minor continued to have a strong parental bond with her at the time of the section 366.26 hearing, after having been in the custody of his foster parents for four months. On the contrary, as already noted, at the end of one visit with mother, minor was agitated and upset until the foster mother was able to reassure him that he was being taken back to his “Daddy” at the foster parents’ home. The Department reported that when mother visited minor on March 28, 2013, minor smiled when mother entered the room, but did not interrupt his play to greet her, and was eager to return to his foster parents at the end of the visit. Similarly, the adoptions assessment opined that minor was “clearly attached to his prospective adoptive parents.” These facts constitute substantial evidence to support the juvenile court’s finding that as of the date of the section 366.26 hearing, minor’s bond with mother was not strong enough to warrant a finding that terminating her parental rights would be detrimental to him.

In arguing to the contrary, mother relies on *In re S.B.*, *supra*, 164 Cal.App.4th 289, but the facts here are sharply distinguishable. In *In re S.B.*, a social worker and a bonding study expert both opined that terminating the father’s parental rights would be detrimental to the minor. The minor was unhappy when her visits with father ended; missed him when they were not together; and told him she wished she lived with him. (*Id.* at p. 298.) That record “fully support[ed] the conclusion [that father had] continued the significant parent-child relationship despite the lack of day-to-day contact with [his daughter] after she was removed from his care. [Citation.]” (*Id.* at p. 299, italics omitted.)

The record in the present case is not comparable. Here, there was no expert testimony supporting a finding of detriment to minor from terminating mother’s parental rights. Moreover, mother points to no evidence that minor requested longer or more frequent visits with her, or exhibited significant stress or behavioral problems as a result of having to separate from her at the conclusion of their visits. (Cf. *In re Zachary G.*

(1999) 77 Cal.App.4th 799, 811 [even though mother maintained regular contact with minor and had a positive relationship with him, beneficial relationship exception did not apply where minor relied entirely on other caregivers to meet his physical and emotional needs, and did not appear to be upset when visits with mother ended].)

For similar reasons, one of the other cases on which mother relies, *In re Amber M.*, *supra*, 103 Cal.App.4th 681, is also distinguishable. In that case, a psychologist who conducted a bonding study of the mother and the oldest child, who was seven years old, concluded that they had a primary attachment and a primary maternal relationship, which it would be detrimental to the child to sever. (*Id.* at p. 689.) The oldest child's therapist also believed it was important to continue her relationship with the mother. (*Ibid.*) There was also evidence of a strong attachment to mother on the part of the two younger children. (*Id.* at pp. 689-690.) The presence of this "common theme running through the evidence" that there was "a beneficial parental relationship that clearly outweigh[ed] the benefit of adoption" prompted the appellate court to rule that the beneficial relationship exception applied, and to reverse the juvenile court's order terminating mother's parental rights. (*Id.* at p. 690.) No comparable evidence was introduced in the present case.

Mother also relies on *In re Scott B.* (2012) 188 Cal.App.4th 452. In that case, the child was not removed from mother's custody until he was almost nine years old, and was 11 by the time of his final section 366.26 hearing. (*In re Scott B.*, *supra*, at pp. 455-456, 471.) After his initial removal, the child repeatedly expressed a desire to return to living with his mother. (*Id.* at pp. 456-457, 460.) The child's advocate, the social worker, and the foster mother all believed it was very important to permit the child to maintain contact with his mother. (*Id.* at pp. 461-462, 464-465.) The child repeatedly made it clear that he did not want his foster mother to adopt him, even though he loved her, and threatened to run away from his foster home if he were adopted. (*Id.* at pp. 462, 464, 466.) The appellate court noted that it was "clear from the record that [the child's] emotional make up will not enable him to endure interruption of his long-standing frequent visits with [his] [m]other", yet it was not clear that the foster mother would fully honor the child's needs in that regard. (*Id.* at pp. 471-473.) Accordingly, the court

reversed the order terminating the mother’s parental rights, and held that legal guardianship with the foster mother, rather than adoption, would be in the child’s best interests. (*Id.* at pp. 472-473.) Obviously, the circumstances of the present case are vastly different.

The bottom line is that the beneficial relationship exception “does not permit a parent who has failed to reunify with an adoptable child to derail an adoption merely by showing that the child would derive some benefit from continuing a relationship maintained during periods of visitation with the parent.” (*Jasmine D.*, *supra*, 78 Cal.App.4th at p. 1348.) Regardless of the applicable standard of review, we find nothing in the record that would justify overturning the juvenile court’s order terminating mother’s parental rights.

**IV. DISPOSITION**

The juvenile court’s orders of June 3, 2013, denying mother’s section 388 petition, terminating her parental rights, and selecting adoption as minor’s permanent plan are affirmed.

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RUVOLO, P. J.

We concur:

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REARDON, J.

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RIVERA, J.