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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION THREE

In re D.M., et al., Persons Coming Under
the Juvenile Court Law.

SOLANO COUNTY HEALTH AND
SOCIAL SERVICES DEPARTMENT,

Plaintiff and Respondent,

v.

K.S.,

Defendant and Appellant.

A144783

(Solano County
Super. Ct. Nos. J40600, J40601, J40997)

KS, mother of DM, ZS, and LS (the children), appeals from juvenile court orders (one as to each child), dated March 23, 2015, and filed March 26, 2015, which denied her Welfare and Institutions Code¹ section 388 petition and terminated her parental rights, thereby freeing the children for adoption.² Mother challenges the orders on various grounds, none of which warrants reversal. Accordingly, we affirm.

¹ All further unspecified statutory references are to the Welfare and Institutions Code.

² The juvenile court also terminated the parental rights of ZS's father and all unknown fathers of LS; no father has filed a notice of appeal. Shortly after the commencement of this dependency proceeding, DM's presumed father died.

FACTS

A. Background

Thirty-four-year old KS is the mother of DM (born 2008), ZS (born 2010) and LS (born 2011).³ Mother has had a chronic substance abuse problem for most of her life (started using marijuana and methamphetamine at age 13), which has periodically rendered her unable to provide appropriate care and supervision for her children, and impaired her ability to provide safe and stable housing for the children.

On March 16, 2011, when mother was pregnant with LS, the juvenile court declared two-year-old DM and nine-month-old ZS to be dependents of the court after sustaining a section 300 petition filed by the Solano County Health and Social Services Department (the agency). The children were placed in foster care and the agency was ordered to provide mother with family reunification services. Thereafter, on September 21, 2011, the juvenile court declared two month old LS to be a dependent of the court; the child remained in the custody of mother (who was then in a 90-day residential drug treatment program that allowed placement of the child with mother) and the agency was ordered to provide mother with family maintenance services. Mother participated in reunification services and DM and ZS were returned to mother's custody on February 14, 2012. Mother thereafter received family maintenance services for all three children through December 18, 2012.

B. Current Juvenile Dependency Proceeding

1. Jurisdictional and Dispositional Hearing

On November 7, 2013, the agency received a referral indicating that mother had been arrested for child endangerment and possession of a controlled substance. The reporting party alleged mother's home posed health and safety hazards to DM, ZS, and

³ KS is also the mother of three older children, DA, MS, and MS. DA, the oldest child, lives with the child's father and has not been the subject of any dependency proceeding concerning mother. Although initially detained and placed with DM, ZS, and LS, in 2013, MS (now 15) and MS (now 13) were ultimately placed with their respective paternal relatives with recommended permanent plans of legal guardianships. KS does not challenge any orders concerning MS and MS.

LS (then 5, 3, and 2 years of age). The agency social workers substantiated the report and placed the children in protective custody. The next day, on November 8, 2013, the agency filed a joint section 300 petition, later amended, alleging, in pertinent part, that the children were at substantial risk of neglect and serious physical harm or illness due to unsafe living conditions and mother's untreated substance abuse issues (§ 300, subd. (b)).

After a joint jurisdictional and dispositional hearing in February 2014, the juvenile court sustained the amended petition, declared the children dependents of the court, and offered mother reunification services including weekly visits with the children. The children were initially placed in the same foster care home and then moved to a new foster care home on June 27, 2014.

2. Six-Month Status Review

In the agency's status report for the six-month review hearing, filed with the juvenile court on August 18, 2014, the agency recommended termination of mother's reunification services and the scheduling of a 366.26 hearing to select permanent plans for the children. During the reporting period (the last six months) mother was essentially absent from the children's lives, with the exception of sporadic visits, and mother did not report the completion of any reunification services. In late May or early June 2014, mother moved to Florida despite the expressed concerns of the agency's social worker that she should remain in California, engage in services, and visit her children. Mother relocated to Florida with RF, her fiancé, and lived with RF's family. Mother reported that while she was in Florida, she made attempts to engage in reunification services and had obtained employment. Mother submitted to a drug test in Florida on June 17, 2014, and her test was negative. Nonetheless, the agency social worker reported that the prognosis for returning the children to mother if she were offered an additional six months of services was "very low" for the following reasons: (1) despite a multitude of services and support that had been offered to mother, her struggles with substance abuse and transience had persisted; (2) while in Florida mother had only recently begun a treatment plan that was significantly limited in scope and she had since left the program;

and (3) because of mother's move to Florida the agency could not assess her ongoing progress and the children's safety could not be assured.

The agency social worker also reported on the progress of the children. All three children had been participating in weekly play therapy, which focused on the children's trauma related to their removal and separation from mother. DM's therapy focused on that child's enuresis (a regressive behavior triggered by the trauma of removal) and on that child's defiance and tantrums, especially in relation to bathing and bedtime. The therapist had seen slow, but steady progress in DM's behaviors. On June 27, 2014, the children were moved to a new foster care home in another county. The children's new foster care family intended to adopt the children if mother failed to reunify with the children. The children had monthly visits with their two older half-siblings who had been placed with their respective paternal relatives. The siblings' visits were beneficial to all children and all of the children's caregivers were supportive of more frequent visits. Throughout the reporting period, the siblings had been consistent in expressing their need to remain connected and have visits as frequently as possible. The agency social worker reported "[t]he [children] are extremely close and feel it is exceptionally important to maintain their bond as strongly as possible."

At the October 6, 2014, six-month status review hearing, the parties entered into a stipulated resolution. Mother submitted on the agency's recommendation to terminate her reunification services for the children and to schedule a section 366.26 hearing to determine their permanent placement plans. The court also reduced mother's visits to telephone calls twice per month for a total of two hours per month. The agency was to arrange in-person visits if mother returned to California. Mother believed it was in the children's best interests to remain in their out-of-county foster care home where they were then residing so they could have contact with their two older half-siblings who were living in Solano County. Counsel for the children stated that sibling visits should be continued and noted that the children's two older half-siblings would seek a "post-adoption agreement" if adoption was determined to be the permanent plans for the three younger children.

3. Section 366.26 Agency Report and Section 388 Petition and Opposition

Before the section 366.26 hearing, originally scheduled for February 3, 2015, the agency submitted a report, filed on January 30, 2015, recommending termination of mother's parental rights and adoption as the children's permanent plans. The agency social worker reported that during December 2014, the children had been moved to a new foster care home in another county. The former foster care mother had sought removal because she was having difficulty handling DM's enuresis. The former foster care mother also was having difficulty in developing a close bond with DM as the foster care mother did not feel she would be able to meet the child's needs. The children were upset about the change of placement but they were getting used to their new foster care mother and her routines. The new foster care mother was working with DM regarding the child's enuresis.

The agency social worker reported that as of January 30, 2015, mother had one telephone call with the children and one in-person visit with the children on January 16, 2015. The children had last visited with their two older half-siblings in November 2014. There was no sibling visit in December 2014 because of the children's out-of-county placement. The agency social worker strongly recommended and was working toward insuring continued sibling visits.

As to the likelihood of adoption, the agency social worker reported the children were considered a sibling group for adoption assessment. They were considered generally adoptable because they were young, were able to develop an attachment to a caregiver, and the extent of any special needs was neither significant nor presented a barrier to adoption.⁴ When searching for a new prospective home, the agency social

⁴ The agency's report indicated that as of January 30, 2015: (1) DM is "a sweet little" child, developmentally on target; the child's teacher reported the child was doing well and there were no major issues; and the only ongoing concern was enuresis, which had been assessed not as a medical problem but caused by the fact that the child "had lot of trauma" and "might be regressing;" (2) ZS is "a very sweet" child, in good health, there were no developmental concerns; the child was doing well in day care and seemed to have adjusted well; (3) LS is "a very sweet" child, could be shy at times, no major

worker received numerous contacts from families expressing interest in adopting the children. The agency social worker also reported: “The current foster parent is interested in adopting the [children]. She is in the process of completing an adoption home study. [The] undersigned social worker will consider her interest for adoption when the completed adoption home study is received. At this time, the [agency] is not making a formal identification of an adoptive home. This does not present an impediment to the [agency’s] ability to identify an adoptive family for the [children] who is able to commit to adoption.” The agency social worker further reported that the children’s current foster care mother was dedicated to caring for the children and was open to maintaining sibling contact if the court ordered permanent plans of adoption.

On February 19, 2015, mother filed a JV-180 form petition under section 388 seeking to vacate the order scheduling the section 336.26 hearing for the children. Mother asserted that since the scheduling of section 336.26 hearing, the children had been moved from the prospective adoptive home that mother felt was in the best interests of the children to remain; and mother could now effectively parent the children as she had been in substance abuse treatment, tested negative for all substances, had attended counseling, and had established a home and residency in Florida. Mother was seeking the return of the children to her custody in Florida and believed that such a change in custody would be better for the children for the following reasons: mother “is now recovered,” and could now provide the children stability and a safe home; mother had “an extremely close bond” with the children and had “great reviews during her supervised visits regarding her parenting skills,” and DM was especially bonded with mother and had a very hard time being away from mother.

The agency opposed mother’s section 388 petition. The agency social worker assessed the situation in the following manner: “In the past, [mother] successfully reunited with all three of her children in 2012. About eleven (11) months later, the

developmental delays, previous reports noted the child had slight speech delay, but the child “is easy to understand;” and the child was attending day care program, doing well, and no issues had been reported.

children were removed again. Currently she has remained clean and sober for the last five (5) months and this social worker commends . . . her Nevertheless, five (5) months is not sufficient time to be clean and sober to ensure the stability needed to allow her three (3) children to return to her care. [Mother] would need more time to demonstrate under supervision . . . that she can maintain her sobriety and show evidence that she can get a job and obtain stable housing to support her children. In [mother's] account of the reasons for her prior relapse, she assigns blame on the [agency] for her relapse rather than recognizing her own responsibility for her sobriety and relapse prevention that is a component of treatment. [¶] . . . [¶] [Mother] has not currently had a period of sobriety that would support stability and the risk of relapse for her is still a factor. . . . The children are in need of stability and permanency that the mother is not in a position to provide at this time. The children are placed with a permanent family who is willing, able, and committed to move forward with a plan of adoption.”

The agency social worker also reported on two visits that mother had with the children – a January 16, 2015 visit supervised by the social worker, and a February 25, 2015 visit, supervised by the children's foster care mother. The first visit “went well.” The children were excited to see their mother, mother bought them lunch, played with them, and checked on their well-being and told them she loved them. There were also no problems during the second visit. However, the foster care mother reported that days after that visit, DM had more enuresis incidents and LS stated that she wanted to cut her hair off.

4. Combined Section 388 and Section 366.26 Hearings

On March 23, 2015, the juvenile court held a hearing on mother's section 388 petition, immediately followed by a hearing on the agency's request to terminate parental rights and determine permanent plans for the children pursuant to section 366.26.

a. Section 388 Hearing

Mother testified that she had a substance abuse history of “about 18-and-a-half years.” Her drugs of choice were methamphetamine and marijuana. During an earlier dependency, DM and ZS were removed from mother's care for about one year. Mother

completed a residential program for substance abuse treatment and participated in outpatient services. However, after the children were returned to mother's care in January 2012, she relapsed within three months in April 2012. Mother started using drugs again and dropped out of her outpatient treatment program.

During the current dependency proceeding the children were removed from her care in November 2013. Mother did not visit the children for "a pretty significant period of time" even though she was in California. In June 2014, mother moved to Florida. She returned to California in August 2014 and remained here until she moved back to Florida on October 25, 2014. While mother was in California between August and October, she relapsed. She used drugs "about every day," and failed to attend substance abuse meetings. When asked why she used drugs while in California, mother replied, "Because that's all I've ever known." She testified that Florida was a "different life," and she did not have the influences that she had in California. Mother stated she would never fully "recover" from her substance abuse problem as she would always be in recovery. On October 6, 2014, mother attended a court hearing regarding the children, and agreed to allow the children to be adopted by their foster care parents. She did so because the children had been placed with that couple during the earlier dependency proceeding and mother believed the couple would provide a good life for the children. Her children were happy and she had relapsed and was homeless.

Mother returned to Florida in October 2014 and "re-enrolled" in a substance abuse treatment program, where she was diagnosed as suffering from post-traumatic stress disorder (PTSD). She was prescribed antidepressants and antianxiety medication. She also was receiving counseling regarding her PTSD and attended additional outpatient substance abuse treatment. At the time of the March 2015 hearing, mother had been drug free for five months. She had not submitted to any drug testing in Florida. However, when she returned to California in January 2015, she tested negative for drugs.

Mother explained to the court why she was seeking custody of the children. In December 2014, mother learned that the children had been removed from their prospective adoptive home and placed in another home because DM was suffering from

enuresis and the prospective adoptive mother did not have a bond with that child. Mother returned to California in January 2015. At that time, the children had been moved to a new foster care home. Mother was requesting that the children be placed in her care because the children were asking her when she was going to get them back and she did not know how to respond to the children's questions.

Rebecca Mayer, mother of RF (mother's fiancé), also testified at the hearing. Mayer had known mother for several years. Mother and RF moved to Florida for a new start with the understanding that they would both seek help for their substance abuse problems. Mayer allowed mother and RF to live with her in a four-bedroom house. If the children were returned to mother, Mayer would permit them to live with her for a short time until mother had a place of her own. Mother had secured seasonal employment cleaning homes during the summer of 2014, but she was unemployed at the time of the March 2015 hearing.

Maurice Shaw, the social worker assigned to the case since November 2014, testified concerning the children's placements. During the earlier dependency proceeding, the children had been placed in the same foster care home for six months. During the current dependency proceeding, the children were placed in the same foster care home that they had been placed during the earlier dependency. However, in November 2014, the foster care mother reported that she did not feel a bond with DM. In December 2014, the foster care mother formally requested removal of the three children and the children were placed together in a new foster care home that same month.

Shaw testified that the children's current foster care home was a single-parent home. The foster care mother worked full-time and the children either attended school or were in day care. At the time of the March 2015 hearing the children had been in the new placement for three months. The foster care mother was very supportive, had found ways to work with DM regarding the child's enuresis, and for about 10 days, DM had no problems. DM's enuresis reoccurred after the child started visiting mother or had spoken on the telephone with mother. There was no medical reason for the child's enuresis and Shaw opined that the condition was caused by stress. Shaw had not asked mother if the

child had suffered from enuresis while in mother's care. He did not know if the child's problem was one that the child had been experiencing only when in foster care. On two occasions, ZS had been observed scratching and pulling hair when frustrated. The agency social worker had made referrals for that child to be assessed for possible therapy, but the child had not seen a therapist by the time of the March 2015 hearing.

Shaw had observed one visit between mother and the children. The children appeared excited because they were not expecting to see their mother. Mother engaged very well with the children. The children obviously recognized their mother and they seemed to have a relationship. An earlier visit in October 2014 was observed by another agency social worker. That worker reported that mother had a visit with the children and their two older half-siblings, and they all seemed very engaged.

On March 20, 2015, Shaw spoke with mother's substance abuse counselor in Florida. Mother was required to see the counselor once a week with the main focus on mother's PTSD. The substance abuse counselor had last seen mother on February 16, 2015. Mother then missed three sessions and risked discharge if she did not attend a session by April 1, 2015. The substance abuse counselor recommended that mother continue therapy sessions to address her PTSD and continue to attend AA/NA classes to help with her substance abuse recovery. Shaw had not been provided with mother's AA/NA attendance sheets, except for the attendance sheet submitted by mother at the March 2015 hearing. Shaw confirmed that mother's hair strand tests for drugs showed positive in October 2014 and negative in January 2015.

Shaw opined that the children were "very stable" and it would not be in the children's best interests to be moved to Florida to live with their mother at that time. He explained that mother had previously been given custody of the children and within 11 months mother was actively using drugs and the children were again removed from her care. During the current dependency proceeding, mother had only been "clean and sober" for five months, and that was not enough time to show that the children should be returned to her custody. Additionally, the children had just been removed from one foster care home and were getting adjusted to a new foster care home. On February 27, 2015,

Shaw visited the children. DM and ZS said they wanted to continue living with their current foster care parent.⁵ LS was not sure about going back to mother.

On rebuttal, mother testified that her most recent visit with the children and their two older half-siblings took place in February 2015. During this visit, DM asked when mother was going to get them back. At the end of the visit DM acted upset and did not want to leave. ZS was upset and also asked when mother was going to get them back and to make sure that mother called them. Mother claimed that when she was around the children, the children did not really pay attention to the foster care mother. Mother had one telephone call with the children and she had no Skype visits with the children. While DM was living with mother the child did not have enuresis.

The juvenile court denied mother's section 388 petition for custody of the children and termination of the dependency proceedings. In so ruling, the court explained: "[Mother] has made some progress here in the last five or six months. She certainly has some very strong support from her, possibly, future mother-in-law and her family. The things that she has been doing are certainly things that are for her benefit. . . . And that she really needs to do for herself and for her children. And she's to be commended for all of those things and encouraged to continue to do so." Nonetheless, the court had problems with mother's request to have the children returned to her immediate custody. Specifically, the court stated: "With regard to the change of circumstances, well, certainly their foster care placement changed. Well, that's certainly a change of circumstance. Is it a change of circumstance that would support immediately sending the children to be with her? I have to wonder, and the reason I have to wonder is that . . . her request . . . is filed on February 19th, four days before a .26 hearing was set to be heard. And here we are. And . . . I have to wonder about that change of circumstance because if

⁵ In the agency's written opposition to mother's section 388 petition, Shaw stated: "[DM] and [ZS] also indicated to this social worker that they want to stay living with current foster parent *and* with their mother." (Italics added.) At the hearing on the section 388 petition, Shaw testified that he had made a typographical error, and the sentence should have read that the two children had indicated "they want to stay living with current foster parent and *not* with their mother." (Italics added.)

it was that big of a deal, why the [petition] wasn't filed much sooner than it was. [¶] . . . I think there are changes of circumstance, that [mother] is now addressing many of the issues that . . . brought her here and her children to this court. But the problem is that the amount of time that has passed. . . . [W]e're at a .26 hearing . . . where we're going to set a plan for these children to find some permanency and stability. The amount of time that has passed is not in the best . . . interests of these children. They need stability. [¶] . . . [T]he testimony I heard here today is that she's been clean and sober for five months. I don't think that's true. All I know from a verified test is that . . . she was clean and sober as of January. I have no idea of what has taken place since then because I have no . . . test results. . . . I want her to go to these AA and NA meetings, but when they didn't begin until three days after the .26 hearing was set to be heard, I have to wonder why I'm not finding AA and NA meetings for months before this, particularly while she was supposed to be attending them on a daily basis for some extended period of time. [¶] I think she's making a real effort. . . . But this is hard work, and I recognize that. . . . And, again, I want to commend her on this. But at this point with an 18-year drug history [and] a prior failed dependency case, . . . to now uproot the[se children] and move them to Florida immediately, I can't imagine that that's in their best interest at this point."

b. Section 366.26 Hearing

Following the denial of mother's section 388 petition, the juvenile court conducted a section 366.26 hearing to determine the children's permanent placements. The parties stipulated that the testimony and evidence presented at the section 388 hearing would be considered by the court at the section 366.26 hearing. Shaw was recalled as a witness. He had prepared the agency's January 30, 2015 report for the section 366.26 hearing. Shaw testified that as of a week before the March 2015 hearing, the foster care mother remained willing and able to adopt the children. He did not see any barriers to the foster care mother's completion of the adoption within a reasonable time. Even if the foster care mother was not able to adopt the children, Shaw believed the children were still adoptable. The children were young and had no major behavioral issues, and when Shaw had been looking for a new foster care home for the children, there were a few families

who were interested in the children despite DM's enuresis. Acknowledging that the children had positive interactions with mother, Shaw believed mother's residence in Florida made contact difficult. The agency had been unsuccessful in arranging Skype visits, but starting in March 2015, the agency had arranged telephone calls between mother and the children. Shaw was asked to assess whether mother's relationship with the children outweighed the benefits of adoption. He testified that mother had not been a parent to the children in a very long time, and, the children were currently in a stable foster care home with a foster care parent willing to adopt them. Shaw was also asked to assess whether the siblings' relationship outweighed the benefits of adoption. He agreed the children loved their two older half- siblings. But he opined that the children should be in a stable adoptive home and the current foster care mother had stated she was willing to keep in contact with the two older half-siblings.

At the conclusion of the section 366.26 hearing, the juvenile court made the following findings and rulings. The court explained that "[t]he first question that I have to answer is [whether there is] clear and convincing evidence that these children are adoptable. . . . [¶] The only evidence that I have is that . . . one prospective adopting party backed out. On the other hand, I have Mr. Shaw testifying that . . . he's got several folks who are interested in adopting these children knowing full well the problems that [DM] is having with . . . enuresis. . . ."

The juvenile court next addressed whether any exception to the termination of parental rights applied in this case. The court specifically noted the parties had asked the court to consider two exceptions to termination: the beneficial parent-child relationship and the sibling relationship.

As to the beneficial parent-child relationship exception, the juvenile court found: "[There are] two requirements [to be met]. One, that the parent has exercised regular visitation and contact. . . . I recognize that [mother], in an effort to get herself clean and sober . . . has chosen a path that she believes is beneficial to her, and it appears that it is beneficial to her. Certainly the support that she has received has been a great benefit to her. [¶] . . . [T]rying to get herself into a position where she could effectively parent these

children. The problem is, just from a practical standpoint, that those efforts have also had the unintended consequence of . . . her not being able to actually exercise . . . regular visitation and contact. [¶] . . . And, I can't see how I can find that . . . under these circumstances . . . she has exercised regular visitation and contact. And even if I could, the second prong of this exception is . . . that the benefit to the child of maintaining the parent-child relationship outweighs the benefit of adoption. [¶] And, I recognize and agree that interaction between the mother and her children . . . clearly . . . has a benefit to these children. . . . I would have to weigh that against the benefit that is provided by the stability that the adoption would bring. This exception does require that she be occupying a parental role, not just a friendly visitor. And the problem is since she doesn't have regular visitation and contact, . . . she's not occupying a parental role So as a result I find that the . . . beneficial [parent-child] relationship exception does not apply.”

The juvenile court also found that the sibling relationship exception did not apply in this case. The court explained: “First . . . these young [children] have been apart from each other for quite sometime. It sounds like there is great amount of effort to make sure [that] they maintain regular and frequent contact with each other. But if the question is, that maintaining a family relationship with [the child's] other [siblings] is outweighed by . . . [the child] finding a stable . . . home, I can't make that finding.”

The juvenile court concluded its ruling by noting that it had read, considered, and received into evidence the agency's report prepared for the section 366.26 hearing, it had considered the wishes of the children consistent with their ages, and all of its findings were made in light of what was in the best interests of the children.

Mother's timely appeals ensued.

DISCUSSION

I. Denial of Mother's Section 388 Petition

Section 388 provides, in pertinent part, that: “Any parent or other person having an interest in a child who is a dependent child of the juvenile court . . . may, upon grounds of change of circumstance or new evidence, petition the court in the same action

in which the child was found to be a dependent child of the juvenile court . . . for a hearing to change, modify, or set aside any order of court previously made or to terminate the jurisdiction of the court.” “At a hearing on a motion for change of placement, the burden of proof is on the moving party to show by a preponderance of the evidence that there is new evidence or that there are changed circumstances that make a change of placement in the best interests of the child. (§ 388; *In re Audrey D.* (1979) 100 Cal.App.3d 34, 45 [160 Cal.Rptr. 802]; Cal. Rules of Court, rule [5.570(b)(1)].)” (*In re Stephanie M.* (1994) 7 Cal.4th 295, 317 (*Stephanie M.*)). However, when a section 388 request comes late in the proceeding following the termination of reunification services, like in this case, “the parent[’s] interest in the care, custody and companionship of the child are no longer paramount. Rather, at this point ‘the focus shifts to the needs of the child for permanency and stability.’” (*In re Marilyn H.*, [(1993)] 5 Cal.4th 295, 309 [(*Marilyn H.*)]), and in fact, there is a rebuttable presumption that continued foster care is in the best interests of the child. (*Id.*, at p. 302.)” (*Stephanie M.*, *supra*, at p. 317.) Thus, the juvenile court here appropriately recognized that by the time mother had filed her section 388 petition the focus had shifted from reunification to the children’s best interests. (*Stephanie M.*, *supra*, at p. 317.)

The determination of where the children’s best interests lay “was committed to the sound discretion of the juvenile court.” (*Stephanie M.*, *supra*, 7 Cal.4th at p. 318.) “It is not enough for a parent to show *just* a genuine change of circumstances under the statute. The parent must show that the undoing of the prior order would be in the best interests of the child.” (*In re Kimberly F.* (1997) 56 Cal.App.4th 519, 529.) “A petition which alleges merely changing circumstances and would mean delaying the selection of a permanent home for the child to see if a parent, who has repeatedly failed to reunify with the child, might be able to reunify at some future point, 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 (*Casey D.*)). The juvenile court’s “ruling should not be disturbed on appeal unless an abuse of discretion is clearly established. [Citations.] . . . And [our Supreme Court has]

... warned: ‘... When two or more inferences can reasonably be deduced from the facts, the reviewing court has no authority to substitute its decision for that of the [juvenile] court.’ [Citations.]” (*Stephanie M.*, *supra*, 7 Cal.4th at pp. 318-319.)

In denying mother’s section 388 petition, the juvenile court commended mother, as do we, for her efforts to address her long-standing problem with substance abuse. However, mother did not undertake those efforts in time for the children to significantly benefit. Given mother’s extensive 18-year history of drug abuse, the juvenile court reasonably found that mother’s few months of sobriety “against [her] previous failings,” did not show sufficiently changed circumstances requiring a change in the children’s placements. (*In re Brian R.* (1991) 2 Cal.App.4th 904, 918.) The juvenile court was additionally obliged to “evaluate the likelihood that [mother] would be able to maintain a stable, sober and noncriminal lifestyle for the remainder of [the children’s] childhood[s].” (*Ibid.*) In challenging the order denying the section 388 petition, mother asks us to consider isolated portions of the documentary and testimonial evidence presented at the section 388 hearing. However, our limited power of review requires us to “accept the evidence most favorable to the order as true and discard the unfavorable evidence as not having sufficient verity to be accepted by the trier of fact.” (*Casey D.*, *supra*, 70 Cal.App.4th at p. 53.) Mother’s attempts to reargue the evidence are insufficient to justify setting aside the juvenile court’s denial of the section 388 petition. Mother presented no independent evidence – by way of reports, letters, or testimony of current service providers, therapists or other professionals – showing that she was ready to assume custody of the children on a full-time basis or that a change in custody would be in the children’s best interests. We see nothing in the record or the cases cited by mother from which we can conclude that in this case the juvenile court was required, as a matter of law, to grant her the relief she requested under section 388. Accordingly, we must uphold the denial of mother’s section 388 petition.

II. Termination of Mother’s Parental Rights

In challenging the orders terminating her parental rights to the children, mother presents several contentions, none of which requires reversal.

A. Substantial Evidence Supports Juvenile Court’s Adoptability Findings

We review the juvenile court’s adoptability findings to determine whether the record contains substantial evidence from which a reasonable trier of fact could conclude, by clear and convincing evidence, that the children were likely to be adopted. (*In re Lukas B.* (2000) 79 Cal.App.4th 1145, 1154.) “[O]n 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.]” (*Sheila S. v. Superior Court* (2000) 84 Cal.App.4th 872, 881.)

“For the juvenile court to find a child adoptable, it is not necessary that an adoptive family be readily available . . . ‘[or] that the [child] already be in a potential adoptive home or that there be a proposed adoptive parent “waiting in the wings.” [Citations.]’ (*In re Sarah M.* (1994) 22 Cal.App.4th 1642, 1649 [28 Cal.Rptr.2d 82].)” (*In re I.I.* (2008) 168 Cal.App.4th 857, 870 (*I.I.*)). Instead, 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.” (*In re Erik P.* (2002) 104 Cal.App.4th 395, 400 (*Erik P.*)).

Mother argues the children could not be found generally adoptable because of their ages, behaviors, emotional characteristics, their close relationship with mother and their two older half-siblings, the children were a sibling set, and the agency had not named the children’s foster care parent as a prospective adoptive mother. However, before finding that the children were generally adoptable, the juvenile court considered evidence concerning each of factors enumerated by mother. Mother’s reliance on isolated portions of the documentary and testimonial evidence at the section 388 and 366.26 hearings is not persuasive. We see no deficiencies in the evidence that are “sufficiently egregious” as to “impair the basis for the court’s decision to terminate parental rights” after finding that the children were likely to be adopted within a reasonable time. (*In re Crystal J.* (1993) 12 Cal.App.4th 407, 413.) By her arguments,

mother merely asks us to reweigh the evidence, which we cannot do. (*Stephanie M.*, *supra*, 7 Cal.4th at pp. 318-319.)⁶

B. Juvenile Court Did Not Abuse Its Discretion in Finding that Exceptions to Termination of Parental Rights Did Not Apply

“When the [juvenile] court has not returned an adoptable child to the parent’s custody and has terminated reunification services, adoption becomes the presumptive permanent plan and parental rights should ordinarily be terminated at the section 366.26 hearing. . . . 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.” (*In re Jasmine D.* (2000) 78 Cal.App.4th 1339, 1350 (*Jasmine D.*).

Section 366.26, subdivision (c)(1), provides for a number of exceptions to termination of parental rights. The beneficial parental-child exception applies when “the parents have maintained regular visitation and contact with the child and the child would benefit from continuing the relationship.” (§ 366.26, subd. (c)(1)(B)(i).) The sibling exception applies when “[t]here would be substantial interference with a child’s sibling relationship, taking into consideration the nature and extent of the relationship, including, but not limited to, whether the child was raised with a sibling in the same home, whether the child shared significant common experiences or has existing close and strong bonds

⁶ We reject mother’s argument that juvenile court should have ordered a short delay of the proceedings that may have resolved certain issues. The juvenile court’s choice was not between placing the children with mother or placing them for adoption. Mother’s section 388 petition seeking custody had already been denied, and properly so. The choice was between continuing the children in temporary foster care or terminating parental rights thereby freeing the children to be adopted. The juvenile court did not err in deciding that adoption was in the best interests of the children. Nor do we see merit in mother’s argument that the children were at risk of becoming legal orphans if not adopted. Under the current statutory scheme, if a child has not been adopted after three years following the termination of parental rights, the child may petition the juvenile court to reinstate parental rights. (§ 366.26, subd. (i)(3).) (See *I.I.*, *supra*, 168 Cal.App.4th at p. 871.)

with a sibling, and whether ongoing contact is in the child’s best interest, including the child’s long-term emotional interest, as compared to the benefit of legal permanence through adoption.” (§ 366.26, subd. (c)(1)(B)(v).)

We reject appellant’s argument that we should review the juvenile court’s rulings under a substantial evidence test. Although other “courts . . . have routinely applied the substantial evidence test,” this court has concluded “the abuse of discretion standard is in order. The juvenile court is determining which kind of custody is appropriate for the child. Such a decision is typically reviewable for abuse of discretion. [Citations.]” (*Jasmine D.*, *supra*, 78 Cal.App.4th at p. 1351.) “ ‘[E]valuating the factual basis for an exercise of discretion is similar to analyzing the sufficiency of the evidence for the ruling. Broad deference must be shown to the trial judge. The reviewing court should interfere only “ ‘if [it] find[s] that under all the evidence, viewed most favorably in support of the trial court’s action, no judge could reasonably have made the order that he did.’ . . . ” ’ [Citations.] However, the abuse of discretion standard is not only traditional for custody determinations, but it also seems a better fit in cases like this one, especially since the statute now requires the juvenile court to find a ‘compelling reason for determining that termination would be detrimental to the child.’ (§ 366.26, subd. (c)(1).) That is a quintessentially discretionary determination. The juvenile court’s opportunity to observe the witnesses and generally get ‘the feel of the case’ warrants a high degree of appellate court deference. [Citation.]” (*Jasmine D.*, *supra*, 78 Cal.App.4th at p. 1351.)

Here, we conclude the juvenile court did not abuse its discretion in finding that the beneficial parent-child relationship exception did not apply. “We recognize that interaction between parent and child will always confer some incidental benefit to the child. [Citation.] [But,] [t]o meet the burden of proof, the parent must show more than frequent and loving contact, an emotional bond with the child, or pleasant visits. [Citation.] The parent must demonstrate more than incidental benefit to the child. In order to overcome the statutory preference for adoption, the parent must prove he or she occupies a parental role in the child’s life, resulting in a significant, positive emotional

attachment of the child to the parent. [Citation.]” (*In re Dakota H.* (2005) 132 Cal.App.4th 212, 229 (*Dakota H.*).

As mother concedes, before the juvenile court may apply the beneficial parent-child relationship exception to termination, the parent must demonstrate regular visitation and contact with the children. Mother acknowledges in effect that she failed to meet her burden. She specifically admits “there had been significant periods of time” during which she did not visit or contact the children from the time they were detained in November 2013 until the March 2015 hearing. She argues the juvenile court should have excused her failure to regularly visit and contact the children because it was due “primarily” to insufficient finances caused by her move to Florida, and she was supposed to have regular Skype telephone calls beginning in October 2014 but that never occurred because the foster care parents had not complied with the court order. However, the juvenile court was well aware of mother’s reasons for failing to maintain regular visits and contact the children. It ultimately determined that those reasons were not sufficient to relieve mother of her responsibility to regularly visit and contact the children. Because mother failed to meet her burden of showing regular visitation and contact with the children, the juvenile court could not find that mother had retained a parental role in the lives of the children. We need not and do not further address mother’s arguments to the contrary. “[A] *parental* relationship is necessary for the exception to apply, not merely a friendly or familiar one. [Citations.] ‘While friendships are important, a child needs at least one parent. Where a biological parent . . . is incapable of functioning in that role, the child should be given every opportunity to bond with an individual who will assume the role of a parent.’ [Citation.] Thus, a child should not be deprived of an adoptive parent when the natural parent has maintained a relationship that may be beneficial to some degree but does not meet the child’s need for a parent. It would make no sense to forego adoption in order to preserve parental rights in the absence of a real parental relationship.” (*Jasmine D., supra*, 78 Cal.App.4th at p. 1350.) “This is not the extraordinary case where an adoption should have been foreclosed by the exception provided in section 366.26, subdivision (c)(1)(B)(i).” (*Jasmine D., supra*, at p. 1352.)

We also conclude that the juvenile court did not abuse its discretion in finding that the sibling relationship exception to termination did not apply.⁷ Because the dependency proceedings initially concerned five siblings, the juvenile court was well aware of the children’s relationships with their two older half-siblings. In mid-2014 the two older half-siblings began living apart from DM, ZS, and LS, and continued to do so at the time of the March 2015 hearing. While acknowledging that the siblings were close and desired further contact, the juvenile court reasonably found the record did not support a finding that maintaining the sibling relationship was “imperative for the emotional well-being” of DM, ZS, and LS, “now and in the future,” so as to outweigh the benefits of an adoptive placement for those children. (*Erik P.*, *supra*, 104 Cal.App.4th at p. 404.) “Unlike adoption, other permanency options are not equivalent to the security of a permanent home. [Citation.] Even guardianship is ‘not irrevocable and thus falls short of the secure and permanent placement intended by the Legislature.’ [Citation.]” (*Dakota H.*, *supra*, 132 Cal. App. 4th at p. 231.) The juvenile court acted within its discretion when it determined that the preference for adoption was not overcome by the children’s relationship with their two older half-siblings.

C. Juvenile Court’s Consideration of Children’s Wishes

Mother also argues that reversal of the termination orders is required because the juvenile court did not adequately consider the wishes of DM, ZS, and LS, as required by section 366.26, subdivision (h)(1). We see no basis to reverse on this ground.

Section 366.26, subdivision (h), states, in pertinent part: “(1) At all proceedings under this section, the court shall consider the wishes of the child and shall act in the best interests of the child.” This court has interpreted subdivision (h)(1) of section 366.26 to “require the juvenile court to receive direct evidence of the children’s wishes regarding

⁷ Because the juvenile court heard argument on the matter and ruled on the issue, we shall consider mother’s arguments challenging the ruling that the sibling exception to termination of parental rights did not apply. (See *In re Melvin A* (2000) 82 Cal.App.4th 1243, 1250 [“we will consider the merits of appellant’s claim if only to forestall any claim of ineffective assistance of counsel for failing to argue the issue” in the juvenile court].)

termination and adoption at the permanency planning hearing. This evidence may take the form of direct formal testimony in court; informal direct communication with the court in chambers, on or off the record; reports prepared for the hearing; letters; telephone calls to the court; or electronic recordings. Although a child's presence in court is not required, an out-of-court statement, as in a report or other form, must reflect the fact that the child is aware that the proceeding involves the termination of parental rights." (*In re Diana G.* (1992) 10 Cal.App.4th 1468, 1480.) Concededly, there is no direct evidence in the record that the children were specifically questioned about their preferences regarding termination of parental rights and adoption. Nonetheless, "[t]he purpose of the statutory injunction that the court 'consider the wishes of the child' simply requires the court to consider what the child's preferences are [W]e should not carelessly impose upon them decisions which are heavy burdens even for those given the ultimate responsibility to decide. To ask children with whom they prefer to live or to ascertain what they wish through other evidence is one thing. To ask those children to choose whether they ever see their natural parent again or to give voice to approving that termination is a significantly different prospect." (*In re Leo M.* (1993) 19 Cal.App.4th 1583, 1592-1593.) The record demonstrates that, based on the agency's reports and the testimony of both mother and the agency's social worker, the juvenile court was well aware of the children's feelings regarding their mother and two older half-siblings and their living arrangements. Even if the children had expressed wishes to return to mother's custody or to stay in contact with their two older half-siblings, such preferences, as a matter of law, would not have required the juvenile court to accede to those wishes. (See *In re Kristen B.* (2008) 163 Cal.App.4th 1535, 1541 ["the Legislature has expressly provided that the best interests of the minor, not his or her wishes, determine the outcome of the case"].)

D. Purported Conflict of Interest of Counsel for DM, ZS and LS

Mother also argues that the termination orders should be reversed because counsel for DM, ZS, and LS, had a conflict of interest. Mother asserts that counsel may not have had a conflict of interest while DM, ZS, and LS, were placed together with their two

older half-siblings and reunification was the plan. However, she argues that counsel “developed an actual conflict of interest” when the agency recommended permanent plans of adoption for DM, ZS, and LS, while investigating legal guardianships for the two older half-siblings. Nonetheless, as mother concedes, even if counsel should have withdrawn and the juvenile court should have appointed new counsel, we may not set aside the termination orders due to that purported error unless we “find a reasonable probability” that the outcome would have been different. (*In re Celine R.* (2003) 31 Cal.4th 45, 59-60 (*Celine R.*)) Regarding any constitutional due process violation, mother also must “show there was a ‘determinative difference’ in the outcome of the proceeding by reason of the [conduct of] counsel, such that the proceeding was rendered fundamentally unfair to the parent.” (*In re Meranda P.* (1997) 56 Cal.App.4th 1143, 1153.) As we now discuss, we find mother has failed to meet her burden of demonstrating prejudicial error.

During the section 388 and section 366.26 hearings, the juvenile court was made aware of mother’s relationship with the children, the children’s relationship with their two older half-siblings, mother’s attempts to complete the necessary services to reunite with the children during the current dependency proceeding, the reasons for her failure to do so, why she was then seeking immediate custody of the children, and why the children would benefit if her parental rights were not terminated at that time. There is no reasonable possibility that had DM, ZS, and LS, been represented by separate counsel, any other matters favorable to the preservation of mother’s parental rights, or otherwise reflecting on the best interests of the children, would have been brought to the juvenile court’s attention.

As to severance of the children’s relationship with their two older half-siblings, “the sibling relationship exception permits the court to consider only possible detriment to [DM, ZS, and LS, not their two older half-siblings]. Reflecting the Legislature’s preference for adoption when possible, the ‘sibling relationship exception contains strong language creating a heavy burden for the party opposing adoption. It only applies when the juvenile court determines that there is a “compelling reason” for concluding that the

termination of parental rights would be “detrimental” to the child due to “substantial interference” with a sibling relationship.’ [Citation.] Indeed, even if adoption would interfere with a strong sibling relationship, the court must nevertheless weigh the benefit to the child of continuing the sibling relationship against the benefit the child would receive by gaining a permanent home through adoption. [Citation.]” (*Celine R., supra*, 31 Cal.4th at p. 61.) By the time of the March 2015 hearing, DM, ZS, and LS, had been living separately from their two older half-siblings for nine months and one year respectively. Even if the permanent plans for DM, ZS, and LS, were not adoption, there was no showing those children would ever live with their two older half-siblings. “Under the[se] circumstances the [juvenile court] reasonably discounted the importance of the sibling relationship [to DM, ZS and LS], even if it was important to the [children’s two older half-siblings], and, as does the Legislature generally, [the court] valued more” the ability of DM, ZS, and LS, “ ‘to belong to a family.’ [Citation.]” (*Celine R., supra*, at p. 61.)

Accordingly, we see nothing in the record that persuades us that if DM, ZS, and LS, had been represented by separate counsel, the juvenile court would have reached a result more favorable to mother, or that the result reached was fundamentally unfair to mother.

DISPOSITION

The juvenile court orders, dated March 23, 2015, and filed March 26, 2015, are affirmed.

Jenkins, J.

We concur:

McGuinness, P. J.

Pollak, J.

In re D.M. et al., A144783