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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

In re B.S. et al., Persons Coming Under the
Juvenile Court Law.

MENDOCINO COUNTY DEPARTMENT
OF SOCIAL SERVICES,

Plaintiff and Respondent,

v.

K.L.,

Defendant and Appellant.

A145290

(Mendocino County
Super. Ct. Nos. SCUK-JVSQ-
12-16303, 12-16304, 12-16305,
12-16306)

I.

INTRODUCTION

Appellant K.L. (mother) appeals the juvenile court’s order denying her Welfare and Institutions Code section 388¹ petition and the termination of her parental rights to four of her children: B.S. (now age 10), N.S. (now age 9), Y.S. (now age 6), and D.S. (now age 5). After more than three years of family reunification and family maintenance, the juvenile court terminated parental rights and ordered a permanent plan of adoption with the children’s maternal aunt (aunt) and her wife (wife). Mother argues her due process rights were violated by the court’s exclusion of an audio recording, she had demonstrated changed circumstances, and the beneficial parent-child relationship

¹ All further statutory references are to the Welfare and Institutions Code unless otherwise identified.

exception applied. We reject mother’s arguments and affirm the orders denying her section 388 petition and terminating parental rights.

II.

FACTUAL AND PROCEDURAL BACKGROUND

In our prior nonpublished opinion from consolidated appeals A142794 and A143571 (*In re B.S.*, Sept. 30, 2015), we recited the underlying facts and procedural history:²

“Initial Referral

“Mother’s initial contact with the Mendocino County Health and Human Services Agency, Children and Family System of Care (the Agency) was in May 2011. Mother came to the Agency and requested her children be placed in foster care. At the time, she was a single mother with four children under age five. The whereabouts of the father were unknown. Mother was given welfare services and began participating in a voluntary family maintenance plan.

“The Agency filed a juvenile dependency petition in August 2011. It alleged mother had failed to provide adequate medical care and failed to provide adequate supervision pursuant to section 300, subdivision (b), and neglected B.S. and N.S under subdivision (j). Specifically, it alleged that D.S. was injured when mother allowed her four-year-old daughter to hold 10-month-old D.S. and she dropped him, causing a head injury. Mother had to be prompted by aunt to take the child to the hospital. In addition, 20-month old Y.S. had been allowed to ride in a ‘go cart’ pulled by an all-terrain vehicle driven by a nine-year-old child and had fallen out, sustaining injuries to her face, head, and body. The social worker had to encourage mother to take Y.S. to the emergency room.

² On our own motion, we take judicial notice of our prior opinion. (Evid. Code, §§ 451, subd. (a), 452, subd. (b)-(c), 459.)

“Initial Detention Hearing

“At a hearing held on August 18 and 19, 2011, Y.S. and D.S. were ordered detained and placed in the care of aunt. The two older children, B.S. and N.S., were returned to mother.

“First Amended Petition

“The Agency filed a first amended petition on September 15, 2011, adding two additional allegations pursuant to section 300, subdivision (b). The amended petition alleged that on a visit to the home, the social worker found five-year-old B.S. and four-year-old N.S. playing in front of the home unsupervised, and 22-month-old Y.S. walked out the front door naked and unsupervised into a driveway where cars were present. Mother was in the shower and did not return to supervise the children for 10 minutes. Mother was overwhelmed and stressed and had been verbally harsh with the children and exhibited inappropriate expectations for them. The amended petition removed the subdivision (j) allegations related to B.S. and N.S.

“First Jurisdiction Report and Hearing

“The Agency filed a jurisdiction report recommending the court establish jurisdiction over all four children, with the two younger children placed with aunt, and the two older children with mother. The court held a hearing on September 22, 2011, and sustained the section 300, subdivision (b) allegations of the amended petition.

“First Disposition Report and Hearing

“The Agency filed a disposition report on November 14, 2011, recommending the court establish dependency for the four children. It recommended Y.S. and D.S. remain with aunt, with reunification services and visitation by mother, and that B.S. and N.S. remain with mother and receive family maintenance services. The report noted mother requested that Y.S. and D.S. be placed with her, and the older children, B.S. and N.S., be placed with aunt. Mother stated she was prepared to care for her younger children, and it would be best for the two older children to be permanently placed with aunt.

“In an addendum to the disposition report filed on November 30, 2011, the social worker expressed concern that mother was not making progress in her therapy and had cancelled numerous appointments.

“The court held a hearing on December 12, 2011. The children’s counsel requested a psychological evaluation of mother to better tailor services for her, and the court ordered the evaluation. The court adopted the recommendations in the disposition report.

“Mother’s Psychological Evaluation

“The Agency filed a report on February 14, 2012, addressing the results of mother’s psychological evaluation and placement. The evaluation concluded mother needed parenting classes and help developing appropriate expectations for her children. Mother reported both bipolar and obsessive/compulsive disorder and was taking medication. Mother stated that B.S. wanted to live with aunt, and he ‘doesn’t want anything to do with his mother.’ She stated that she loved B.S., but ‘I don’t feel a bond with him or N[.S.]’ Mother stated N.S. also wanted to live with aunt. She stated that she loved N.S., ‘but I don’t have that actual bond with her either.’ Mother ‘feels because she was in an abusive relationship that she didn’t bond with either B[.S.] or N[.S.], but she does feel she has a bond with the babies.’ The evaluation concluded that mother had difficulty taking responsibility for herself and others and possessed limited coping skills. It recommended ‘multi-modal’ services including parenting classes, parental coaching, and therapy. It further suggested in-home coaching and parent/child interactive therapy to ‘develop a bond with her children.’

“The report recommended B.S. and N.S. remain with mother, and Y.S. and D.S. stay with aunt until mother could resolve some of the issues that brought the family to the Agency’s attention, and could show consistent attendance and participation in services.

“After reviewing the report and psychological evaluation, the court ordered mother to comply with the recommendations and updated case plan.

“Interview of Children

“The Agency filed a request for a hearing so that the children could be interviewed outside mother’s presence because the Agency had received an allegation of physical abuse. The court granted the request and issued an order. N.S. had stated mother’s boyfriend hit her on the thigh with a belt, leaving a large bruise. There were pictures documenting the injury. When N.S. was interviewed and asked who had injured her thigh, she said ‘mom.’ Mother stated she had not used a belt and did not physically punish the children. B.S. also stated that he was spanked with a belt. The incidents were investigated but were closed as inconclusive for physical abuse but substantiated for general neglect. The case plan was updated to instruct that mother and her boyfriend not use corporal punishment.

“Six-Month Status Review

“The Agency filed a six-month status review report on May 15, 2012. The report recommended another six months of family reunification services to allow mother to focus on her parenting skills and mental health. The report noted that the two youngest children ‘easily transfer between mom and [aunt].’ The two older children were more conflicted and had difficulty saying goodbye to aunt during visits. B.S. stated that he liked spending time with aunt because she did not spank him, and voiced a preference to live with aunt. For D.S. and Y.S. the report recommended continued placement with aunt with reunification services, and for B.S. and N.S. it recommended continued family maintenance and placement with mother.

“Section 387 Petition Detention Summary for B.S. and N.S. and Detention Hearing

“On June 12, 2012, the Agency filed a ‘Detention Summary in Support of 387 Supplemental Petition.’ It stated that Mendocino County sheriff’s deputies had served a search warrant on mother and her new husband’s home and found 860 marijuana plants. There was also marijuana bud in the bedroom that was easily accessible to children. N.S., Y.S., and D.S. were present during the raid and when mother was arrested. All four children were taken into protective custody and placed with aunt.

“A detention hearing on the supplemental section 387 petition alleging the marijuana grow was held on June 13, 2012. The court ordered all four children to remain with aunt.

“Six-Month Family Reunification Hearing for Y.S. and D.S.

“The court found ‘based on clear and convincing evidence that return of the children to the mother would create a substantial risk of detriment at this time.’ The court heard argument from counsel and admitted a letter written by mother into evidence outlining her concerns about aunt’s care of Y.S. and D.S. Mother had not made significant progress toward mitigating the causes requiring placement.

“Section 387 Jurisdiction Report and Hearing for B.S. and N.S.

“The Agency filed a section 387 jurisdiction report for B.S. and N.S. on July 2, 2012. The report alleged that the illegal marijuana grow in the home placed the children’s safety at risk. The report stated that the family maintenance plan had not been effective in rehabilitation and protection of the children.

“A contested jurisdiction hearing for B.S. and N.S was held on July 12, 2012. Mother objected to the section 387 petition and requested the court continue placement of the children with her. The court found by a preponderance of the evidence that the allegation was true. ‘This is . . . a case that came in because of concerns about the judgment of the parent in terms of her parenting and putting the children at risk. [¶] The marijuana grow in [mother’s] house shows a lack of judgment.’ The court further found that for a mother who already has children in family maintenance and reunification to engage in criminal activity ‘is evidence of a real lack of judgment.’

“Disposition Report and Hearings for B.S. and N.S.

“In its disposition report for B.S. and N.S., the Agency recommended B.S. and N.S. continue to be placed with aunt. The report noted mother had problems complying with her case plan and had sporadic attendance at her therapy sessions. The report stated: ‘[M]other indeed loves her children, but seems to have somewhat distorted perception of how to succeed in this case.’ She continued to have problems ‘following through on important steps she must take to reunify with her children’

“The court held a disposition hearing on the section 387 petition for B.S. and N.S. on August 2, 2012. Mother requested that the children be returned to her and that the case be transferred to her new county of residence as she had relocated to Stockton, California. The court concluded that it was not appropriate to return to the children to mother’s care and that transfer was not in the best interests of the children.

“In December 2012, the Agency filed a six-month status review report recommending the two older children be returned to mother. The report noted that mother had made ‘better progress’ on her case plan goals. The children stated a desire to return to their mother. The court adopted the recommendation and returned B.S. and N.S. to mother.

“Status Reports and Hearings for Y.S. and D.S.

“In the 18-month status review report, the Agency recommended Y.S. and D.S. be returned to mother. Mother had made progress in her case plan goals and had established a safe home for the children. The interaction between mother and the children was ‘very good’ and the children reported they were happy with mother. The court adopted the recommendation and returned the younger children to mother.

“Section 387 Supplemental Petition for All Four Children

“On December 4, 2013, the Agency filed a section 387 supplemental petition regarding all four children. It stated that mother had failed to provide a safe and stable home for the children. In a short period of time, mother had moved from Mendocino County to Stockton, Clear Lake, Redding and then Santa Rosa, California. Mother was not meeting the children’s ‘immediate needs for supervision, food, clothing, and/or medical or mental health care.’ When mother moved to Santa Rosa, she left all four children with aunt and they remained there for two months. The report recommended the children be detained and placed with aunt. At the hearing, the court ordered the children detained.

“On January 8, 2014, the Agency filed an amended juvenile dependency petition for all four children. It alleged that mother had contacted the social worker to state she

was unable to continue her court-ordered services. She requested that aunt be granted legal guardianship of the four children and that the children remain with aunt.

“The Agency filed a disposition report on January 14, 2014, recommending the court terminate reunification services and set a section 366.26 hearing. Mother had failed to follow through with court-ordered services and stated that she no longer wanted reunification services. The court held a disposition hearing on January 21, 2014. Mother did not object to the termination of services or her sister (aunt) retaining guardianship of the children. The court found the allegations in the petition to be true and terminated the family maintenance plan and reunification services. The court set a section 366.26 hearing.

“Section 366.26 Report, Section 388 Petition, and Combined Hearing

“The Agency filed a section 366.26 report on May 1, 2014. The report recommended aunt as the legal guardian for all four children.

“Prior to the section 366.26 hearing, aunt filed a section 388 petition. The petition requested the court change the permanent plan from guardianship to adoption, and further requested no visitation by mother. The petition alleged that mother made false allegations of physical abuse and had secretly recorded statements by the children. It attached a series of social media postings that included a statement posted by mother: ‘You will never adopt my kids you back stabbing worthless scum! Over my dead body . . . !!!!!’ (Original capitalization omitted.)

“The court held a combined hearing on the section 388 petition and section 366.26 report on August 13, 2014. Aunt’s counsel stated that mother had made allegations that aunt and her partner had physically abused the children, and had been attacking aunt on social media. Mother’s counsel stated that mother had recorded the children talking about physical abuse by aunt. Aunt’s counsel objected to the recording and the court sustained the objection. The court stated it could not ‘receive a recording that was made in violation of California law particularly of children who are represented by a lawyer who is unaware of this and did not consent to it.’ The court advised that mother should have contacted the Agency if she suspected abuse and allowed them to investigate.

Counsel for the Agency stated that they did an investigation and did not ‘find anything substantial after talking to the children.’

“The court advised the parties that the best course of action was to continue the section 366.26 hearing to allow the Agency to evaluate the options including adoption. Mother requested the court order a bonding study in light of the possible adoption. . . . [¶] . . . [¶]

“The court stated that it was considering the best interests of the children. ‘[A]t this juncture with the children having lived for most of the last four years with their current caretaker . . . I’m going to change my decision and, factually, I do not believe it would benefit the Court to have a Court appointed bonding expert. So I’m denying the mother’s request.’ The court scheduled a continued section 366.26 hearing for December 2014.

“On August 18, 2014, mother filed a notice of appeal.

“Motion for Reconsideration

“Mother filed a motion for reconsideration of the bonding assessment and admission of the audio recording of the children. Mother argued she needed a bonding study to present evidence that the children would benefit from a continuing relationship with her. Mother also requested the court reconsider exclusion of the audio recordings of the children. Mother’s counsel submitted a declaration that the social worker had told her that the girls reported they were spanked on the bottom and sometimes hit very lightly on the cheek by aunt and her partner.

“The court held a hearing on the motion and found there were no new facts or law and no change in circumstances. . . . [¶] . . . [¶]

“The court denied the mother’s request to use the audio recordings of the children based on the potential lack of veracity and the fact the children had a social worker, lawyer, and therapist that could act as witnesses for them. The court stated that introducing a recording from outside the courtroom ‘is just fraught with difficulty and the evidence would not be reliable.’

“Mother filed a second notice of appeal on November 10, 2014. The second appeal was consolidated with the first appeal by order of this court on December 15, 2014.”

Mother’s First Appeal

Mother appealed the juvenile court’s order denying her request for a bonding study and her subsequent motion for reconsideration. We affirmed the juvenile court’s denial of mother’s section 388 petition and we found mother had waived her argument regarding the court’s denial of her request to introduce a recording of the children.

Mother’s Allegations of Abuse by the Foster Parents

As evidence at the section 366.26 hearing, mother filed the “Delivered Services Logs” (DSLs), which contained the social service workers’ regularly kept notes. The DSLs contain several entries about the audio recording and allegations of abuse by aunt. On July 31, 2014, emergency response investigator Kort Pettersen was contacted by mother’s attorney, who forwarded him an audio file of a conversation between mother, B.S., N.S., and Y.S. The attorney requested the agency review the recording. Pettersen and social worker Paula Burns-Heron listened to the recording. Pettersen described it as “the children were being interviewed by their mother K.[L.], regarding possible physical abuse in the relative caregiver’s home (F.[O] AKA “Aunt [.]”), and many leading questions were posed to the children.” Mother asked the girls if they had been hit across the face and encouraged them to tell the social worker. Pettersen stated: “And when they did answer, the mother would often rephrase the same question and ask the child to answer repeatedly until (in an effort to appease her,) she got the answer she wanted, which appears to be that the children are and have been being physically abused in the current caregiver’s home[.]” Pettersen concluded: “After reviewing the audio file it became evident that the audio file was recorded in an attempt by the mother to support her assertions of abuse and an attempt to get her children back into her custody.”

Burns-Heron went to the foster home and interviewed the children and determined they were “safe.” Pettersen initiated a follow-up contact with aunt and wife. Aunt said

she and her wife had not hit any of the children in the face. She said that D.S. had been swatted on the “butt” two to three times.

On August 6, 2014, two social workers interviewed all four children, aunt, and wife again. B.S. stated that sometimes when he misbehaved, he got hit on the bottom. When B.S. was asked if he ever talked to anyone about it, he stated “yes, to [his] mom” and to social worker Burns-Heron, and said “Mom told us that [aunt and wife] hit us in the face.” When he was asked if that happened, he said “no.”

Y.S. stated that for punishment, they were sent to their room or got a time out. She said she had never been hit in the face. She said D.S. had been spanked on the bottom. Wife explained that she occasionally swatted D.S. on the “butt” when he persisted in doing things that might harm him. Aunt also admitted to swatting the children on the “butt” with a hand occasionally, but that this rarely happened anymore. The social worker concluded that the children “are safe and well cared for. The discipline appears to be appropriate.”

Mother’s Section 388 Motion

Mother filed a section 388 motion to reinstate reunification services or to have the children returned to her. Mother alleged changed circumstances including getting her high school diploma, new housing, and continued therapy. Continued reunification was beneficial to the children because they were “extremely bonded” to her. The Agency opposed the motion, arguing the children were stable and thriving in their current environment. The children have been cared for by aunt and she is well bonded with them. Mother appears to be making a belated attempt to show effort towards reunification since she has realized the children are likely to remain with aunt. The children’s therapist supports the children’s continued placement with aunt. The Agency noted problems with mother’s visitation, including missed visits and mother requesting the visit times be changed.

Adoption Assessment

The original “Adoption Assessment” was filed in November 2014. It recommended adoption be ordered for all four children by aunt and wife. B.S. expressed

affection for his foster parents and a desire to remain with them. Y.S. also stated she wanted to remain in her foster home. The report noted mother did not always attend visits with the children. The children have a “secure and stable parental relationship” with their foster parents.

An “Adoption Assessment Up[d]ate” was filed in April 2015. It continued to recommend adoption for all four children. It stated the children are thriving in their foster home and “the children have all expressed a desire to remain in this home and to be adopted there.”

Combined Section 388 and Section 366.26 Hearings

The court held a combined hearing on mother’s section 388 petition and the section 366.26 motion over several days. Mother’s counsel renewed the request to admit the audio recording as evidence. Counsel argued that the DSLs which were admitted into evidence described the audio recording, so they “opened the door” requiring admission.

The court stated that mother violated the visitation agreement by recording the children on her cell phone. “The children are too young to give any kind of knowing consent to being recorded.” Mother had a plan to question the children. The incident had been investigated and there were several other sources of information that were “far less prejudicial” to get the information before the court.

B.S. and N.S.’s therapist, Hallie Davrill, testified about the bond between the children and their foster parents, aunt and wife. N.S. has posttraumatic stress disorder (PTSD), anxiety, and refused to talk at school. B.S. also suffers from PTSD, depression, and attention deficit hyperactivity disorder (ADHD). Davrill also conducted family therapy with aunt and wife focusing on positive parenting and responding to the children’s trauma. Davrill had been in the home with the foster parents and the children at least 30 times. She had no concerns about abuse in the home. She observed the foster parents as having a “positive nurturing” environment. Davrill was not aware of allegations of spanking in the home.

Social worker Robert Distefano testified that the visits between mother and the children are “good” and that mother provides an activity and food. The children show

mother affection and she is affectionate with them. Veronica Hernandez, a social worker assistant, supervised more than 30 visits in this case. She also testified that mother provides food and activities for the children, the children hug mother, and she hugs them. The children always seemed happy to return to aunt and wife. She twice heard the children say they did not want to go home with mother.

The children's assigned social worker, Paula Burns-Heron, testified the visits between mother and children are "amiable." When mother made an allegation of abuse by aunt, Burns-Heron interviewed the children. N.S. told her that she sometimes gets a spanking on the bottom or a time out. B.S. said he gets a five-minute time out or a "swat on the butt." Her determination was there was no danger to the children. She explained that a "swat on the butt with a hand is not an abuse situation." Wife admitted that she had swatted the children on the "butt." Burns-Heron counseled aunt and wife to change their behavior so no spanking would occur in the future. She stated her belief that the children should not be returned to mother "[b]ecause the children are in a stable environment that they've been in for a very long time. They're doing well." Reunification services would create continued instability. She stated, however, that she felt it was important for the children to have continued contact with mother. Burns-Heron stated she believed adoption was the best plan for the children because adoptive parents have a "better ability to regulate the children's lives . . . and [to] be able to make definite decisions about . . . what's best for them."

Emergency response investigator Kort Pettersen testified about his investigation of allegations of abuse by aunt and wife. He testified that he listened to the audio file but did not testify about the content of the file. He stated only that after listening to the audio recording from mother, he interviewed the children. N.S. said D.S. "gets swatted on the butt once in awhile," and she and B.S. get time outs. Y.S. stated that she had never seen D.S. get hit in the face. Pettersen expressed concerns about coercion by mother. In a prior interview with N.S., she stated she was going to talk to him because mother bought her a big drink and gave her a dollar.

Mother testified that since her reunification services were terminated, she has sought services on her own including parenting classes and therapy. She is remarried with six-month-old twins. Her husband is acquiring citizenship and is employed. She will be starting a job at a winery. She described her relationship with B.S. as “okay.” When asked if it would be detrimental to B.S. if he is not allowed to see her, she stated “I’m sure it would have some effect” but he does not talk about his feelings. She testified N.S. is very loving and more open to talking with her. N.S. expressed a desire to come home with her. Mother believed N.S. would go into a downward spiral if N.S. could no longer see her.

Mother described Y.S. as being affectionate and wanting to sit on her lap. Y.S. tells her she loves her and misses her. Mother believes it would be detrimental to Y.S. if her parental rights were terminated because Y.S. is sad when their visits end and wants to come home with her. D.S. hugs and kisses her and wants to go home with her.

Aunt testified they never had any intention of keeping the children from mother but they had concerns about her behavior. Mother made references to the audio recording and allegations of abuse by aunt on Facebook. She allowed the children to have contact with their father against a court order. She said that from November 2013 to April 2014 before the supervised visitation began, mother missed several visits. It was disappointing to the children, so aunt and wife stopped telling them about visits in advance. From August 2014 to June 2015, mother missed eight visits with the children.

Aunt testified that she requested adoption over guardianship because she had been there to “pick up the pieces so many times” and the children need “permanent stability.” Aunt stated all the children love their mother and have an attachment to her.

The court heard argument from all parties regarding both the section 388 motion and the section 366.26 permanent plan. The Agency argued that “somewhere along the lines we have lost track of the best interest of the children, and now it’s evolved into this sibling argument.” The two foster parents and mother all love these four children and the children love all three people.

The Agency argued that mother has not demonstrated substantial change in support of her section 388 petition. The fact she had completed courses and obtained services is not enough. Mother has had the children taken away twice and even if there is a change, it is not in the best interests of the children to return to her care. The children are doing well with the foster parents and have shown improvements in behavior. The evidence the children have been swatted on the bottom does not constitute abuse; they were isolated incidents that were investigated. For the section 366.26 motion, the children want to stay with their foster parents.

The children's counsel argued that she was glad mother was attending classes, but it was not in the best interests of the children to remove them from the only stable home they have ever known. For the section 366.26 motion, she argued the children need the stability provided by adoption. Mother was never able to provide them with stability; the children were moved multiple times to different homes, schools and therapists. "[J]ust love is not enough to drop [the children] out of an adoption. It needs to be a bond that is so significant that breaking it would be detrimental to the child."

Mother's counsel argued she had taken classes, obtained her high school diploma, gotten stable housing and continued therapy. The testimony demonstrated the positive relationship between mother and the children. It was in the best interest of the children to continue reunification with mother because there had been corporal punishment in the foster home in violation of the foster care agreement.

For purposes of the section 366.26 motion, counsel argued that guardianship was preferable to adoption. The children have a significant relationship with mother and it would be detrimental to them to terminate that relationship. N.S. would "spiral downhill" if she is not allowed to see mother. Y.S. and D.S. give her hugs and kisses and call her mommy. An adoption does not require visitation and it would be left to the foster parents to allow it.

Aunt's counsel argued that mother should not be provided additional reunification services. There has been a long history of services and the children were repeatedly moved to different counties. Over the whole course of the case since 2011, mother has

never provided stability. Mother's alleged stable housing is new and she has moved twice in the last six months. The children have experienced trauma and have behavioral issues from their time in mother's care. The children have improved markedly in the past two years while in aunt's care.

The allegations of abuse made by mother have led to investigations that are stressful for the children. There was no foundation for mother's claim that the children had been hit in the face. B.S. stated that mother told him that the foster parents hit him in the face, but it had not happened. Mother attempted to record the children saying there was abuse and also posted negative statements about aunt on Facebook. The children have a bond with mother, but it is not such a significant bond that it should prevent adoption.

The court stated that there was "some mixed evidence about the children's relationship with mother and whether they would benefit from continuing to visit her." The court could not mandate the adoptive parents (aunt and wife) to allow visitation with mother.

On the section 388 petition, the court found mother was doing services on her own and had established "some stability" in her housing, but "the changes are not of such significance" that they warrant additional reunification services or a change in placement. It would not be beneficial to the children who have undergone a multi-year history of instability while mother was receiving services. "[I]t would not benefit the children to perpetuate that instability to give mother yet another chance to reunify."

On the section 366.26 motion, the court stated it has struggled with the best plan for the children. The foster parents have provided a loving, stable home. The children are bonded to them. Their behavior has improved "by leaps and bounds" in therapy and in school. The therapist visited the home 30 times and never had any concerns about the children's safety or well-being. The court found there were instances of corporal punishment, but it was not abuse and did not cause lasting physical or emotional injuries. The foster parents have been honest about what happened and endeavored to change their disciplinary practices.

The court then addressed whether mother had met her burden to show an exception to the termination of parental rights. There was evidence the children have a bond with mother, but there is also evidence that “mother still acts in ways that are not in the children’s best interest.” When mother heard about incidences of the children being swatted on the “butt,” she acted properly in reporting it to the social worker, but she also posted it on Facebook and “shov[ed] a tape recorder with leading questions under the children’s mouths trying to get them to say things,” which was confusing and potentially destabilizing to them. It seemed mother’s actions were more about trying to show her sister was in the wrong than about her concerns for the children.

The court expressed its concern that if it ordered legal guardianship, mother would continue with this sort of behavior, which could destabilize the children. The court stated: “[W]ith some hesitation and with knowledge there does appear to be some bond between the mother and the children, I will adopt the Agency’s recommendation.” The court found by clear and convincing evidence that all four children were adoptable. The court stated: “This is a close case. It’s not a water-tight case for any side, and it’s a difficult judgment call the court had to make on conflicting evidence.” The court ordered visitation to continue pending appeal.

III.

DISCUSSION

A. The Juvenile Court Did Not Violate Mother’s Rights by Excluding an Audio Recording of the Children

Mother argues that the juvenile court violated her constitutional right to due process by excluding the audio recording she made of her children. She was prejudiced because the court relied on the Agency’s conclusions about the recording in terminating her parental rights.

Mother has raised the issue of the audio recording numerous times. She first requested the court admit the audio recording at the scheduled section 366.26 hearing on August 13, 2014. The court stated it could not “receive a recording that was made in

violation of California law particularly of children who are represented by a lawyer who is unaware of this and did not consent to it.” The court denied the request.

Mother filed a motion for reconsideration in September 2014. The court held a hearing on the reconsideration motion and again denied her request to admit the audio recording of the children based on the potential lack of veracity and the fact the children have a social worker, lawyer, and therapist that can act as witnesses for them. Introducing a recording from outside the courtroom is “fraught with difficulty” and the evidence is not reliable.

In her first appeal before this court, mother asserted that she was appealing the court’s denial of her motion for reconsideration and the court’s denial of her request to introduce the audio recordings of the children. We concluded both arguments were waived for failing to provide any legal argument or citation to authority. (*In re B.S.*, *supra*, at p. 14.)

Mother then raised the issue again at the consolidated hearing on her section 388 petition and the section 366.26 motion. Counsel argued a new basis for admission of the audio recording: the county had “opened the door” to have the evidence admitted because it was discussed in the DSLs.

The court stated that mother had violated the visitation agreement by recording the children on her cell phone. “The children are too young to give any kind of knowing consent to being recorded.” It appeared mother had a plan to question the children. The incident had been investigated and there were several other sources of information that were “far less prejudicial” to get the information before the court. The court stated that it ruled on the evidence at the reconsideration hearing and it was making the same ruling that it was not admissible.

In this appeal, mother raises two interrelated arguments. She asserts both that the court erred in excluding the audio recording and this error denied her the right to present a complete defense at the hearing. We turn first to the admissibility of the recording.

Welfare and Institutions Code section 706 provides the court shall receive in evidence the social study of the children and such other relevant and material evidence as

may be offered. “We shall conclude the provisions of Evidence Code section 352 (allowing the court to limit relevant evidence if it is cumulative, time wasting, or likely to confuse the issues) are necessarily implied in Welfare and Institutions Code section 706.” (*In re Romeo C.* (1995) 33 Cal.App.4th 1838, 1843, fn. omitted.) “Trial courts are afforded discretion to work within existing guidelines to determine the admissibility of evidence. (See *Wagner v. Benson* (1980) 101 Cal.App.3d 27, 36) The reviewing court will not disturb their findings absent an “ ‘ ‘ ‘arbitrary, capricious, or patently absurd determination.” ’ ’ ’ [Citation].)” (*In re Nada R.* (2001) 89 Cal.App.4th 1166, 1176.)

The juvenile court found the evidence inadmissible on several grounds. First, the children were too young to knowingly consent to be recorded and that neither the foster parents nor their counsel consented to the recording. Second, the foundation for the recording indicated that it was not reliable. Third, the incident had been investigated and there were several other sources of information that were “far less prejudicial” before the court.

This included the recording having been reviewed by two social workers who then conducted an investigation of the allegations made by the children. The social workers interviewed each of the children as well as the foster parents. They found that the children had been “swatted on the butt” by the foster parents, but concluded that there was no abuse occurring in the home. The court could reasonably conclude that the interviews with the children were more reliable than the potentially self-serving recording made by mother. Mother could not demonstrate the audio recording was reliable so the court could properly exclude it on that basis. (See *In re Jordan R.* (2012) 205 Cal.App.4th 111, 133.) Further, the court found the recording was made without the knowledge and consent of the children’s attorney or foster parents and in violation of mother’s visitation agreement. For all these reasons, the court found the recording was not relevant evidence.

Mother contends that Evidence Code section 356, the rule of completeness, required the juvenile court to admit the entire recording. Because the Agency “opened

the door” when the social worker described part of the recording in the service logs, mother had the right to admit the full recording.

Evidence Code section 356 provides: “Where part of an act, declaration, conversation, or writing is given in evidence by one party, the whole on the same subject may be inquired into by an adverse party; when a letter is read, the answer may be given; and when a detached act, declaration, conversation, or writing is given in evidence, any other act, declaration, conversation, or writing which is necessary to make it understood may also be given in evidence.” The purpose of section 356 is “to prevent a party from using select aspects of a conversation, act, declaration, or writing to create a misleading impression on the subject presented to the jury. [Citation.]” (*People v. Guerra* (2006) 37 Cal.4th 1067, 1121-1122, overruled on other grounds in *People v. Rundle* (2008) 43 Cal.4th 76, 151.) But where the party is the proponent of the evidence, she is not an “adverse party” and not entitled to introduce the whole writing. (*Id.* at p. 1122.)

Mother, not the Agency, introduced the DSLs into evidence and relied upon them at the hearing, and thus the rule of completeness does not apply. Additionally, mother’s argument that selected excerpts from the recording were introduced via the DSLs is inaccurate. No excerpts were introduced. The social workers referenced the recording in their service logs as part of their investigation of mother’s allegations. This did not “open[] the door” to admission of the recording itself because the Agency investigated the accusations and the recording was not determinative of their findings. This is not a circumstance where part of the recording was played at the hearing. The court found the entire recording to be inadmissible.³

³ Mother raises several additional arguments in her brief based on speculation about the court’s decision to exclude the evidence. Mother argues to the extent the court relied on California Rules of Professional Conduct, rule 2-100, it was error. She also contends if the court relied on Penal Code section 632, this was not a proper basis to exclude the recording. We need not consider these hypothetical grounds on appeal. There is no mention in the record of rule 2-100 or Penal Code section 632, and they did not form the basis for the court’s decision.

We turn, then, to mother's assertion that the court's ruling that the recording was not admissible prevented her from being able to present a complete defense and violated her due process rights.

Due process during a dependency hearing generally requires that parents be given the right to present evidence, to cross-examine adversarial witnesses, and for counsel to be provided the opportunity to argue the merits of an issue. (*In re Lesly G.* (2008) 162 Cal.App.4th 904, 914–915.) “The due process right to present evidence is limited to relevant evidence of significant probative value to the issue before the court. [Citations.]” (*In re Jeanette V.* (1998) 68 Cal.App.4th 811, 817.)

Mother's counsel had the opportunity, and did, cross-examine the social workers as well as aunt at the hearing. Mother introduced evidence, including the DSLs that detailed the allegations of abuse from her recording of the children. Mother had the opportunity to cross-examine the social workers about their review of the recording and its content. Mother testified and also had the opportunity to discuss why she made the recording although she elected not to do so. Mother's entire due process argument, then, hinges on the fact the court excluded the recording itself from evidence.

The court's rulings on the section 388 petition and section 366.26 motion were not based on the *content* of the recording. The court referenced the fact mother recorded the children as it demonstrated her lack of judgment. The recording was a violation of the visitation agreement and was done without the children's consent or consent of their counsel or guardians. The description and conclusions were contained in the DSLs that were introduced into evidence *by mother*, not the Agency. At the hearing, the Agency relied on its investigation of the allegations not upon the content of the recording.

Mother was not precluded from presenting her case. The recording was cumulative of other evidence before the court and the court was within its discretion to exclude it as unreliable and irrelevant.

Mother's due process rights were not violated, but even if they were, she cannot demonstrate prejudice. “Courts of Appeal have found that a constitutional due process violation in the dependency context requires application of the harmless beyond a

reasonable doubt standard, since the error is of federal constitutional dimension. [Citations.]” (*In re Vanessa M.* (2006) 138 Cal.App.4th 1121, 1132.)

Mother argues she was prejudiced because the court “relied heavily” on the Agency’s conclusions about the recording in deciding to terminate her parental rights. This is not an accurate portrayal of how the recording was considered at the hearing. Again, mother is confusing the content of the recording with the fact the recording was made. Mother argues that the court’s finding that the audio recording was “more about . . . mother trying to show her sister to be in the wrong than about the children” was improper without having listened to the recording. But the fact mother made the recording, regardless of its content, was relevant to the court’s conclusion that mother “still acts in ways that are not in the children’s best interest.”

The cases relied on by mother involve instances where juvenile courts have denied parents their right to confront and cross-examine witnesses. (See *In re Stacy T.* (1997) 52 Cal.App.4th 1415, 1426 [multiple due process violations]; *In re Dolly D.* (1995) 41 Cal.App.4th 440, 446 [deprivation of right to confront and cross-examine witnesses].) Mother was given a full opportunity to confront and cross-examine witnesses and she testified at the hearing. In view of the other evidence supporting jurisdiction including the thorough investigation by the social workers, the numerous reports in the record, the testimony of the children’s therapist, several social workers, aunt, and mother at the hearing, we conclude that even if it was error to exclude the recording, it was harmless beyond a reasonable doubt to do so.

B. *The Court Properly Denied Mother’s Section 388 Petition*

“Under section 388, a parent may petition to change or set aside a prior order ‘upon grounds of change of circumstance or new evidence.’ (§ 388, subd. (a)(1); see Cal. Rules of Court, rule 5.570(a).) The juvenile court shall order a hearing where ‘it appears that the best interests of the child . . . may be promoted’ by the new order. (§ 388, subd. (d).) Thus, the parent must sufficiently allege *both* a change in circumstances or new evidence *and* the promotion of the child’s best interests. [Citation.]” (*In re G.B.* (2014) 227 Cal.App.4th 1147, 1157, fn. omitted, original italics (*G.B.*).

We review a juvenile court's denial of a section 388 petition for abuse of discretion. (*In re Jasmon O.* (1994) 8 Cal.4th 398, 415.) We "may not disturb the decision of the trial court unless that court has exceeded the limits of judicial discretion by making an arbitrary, capricious, or patently absurd determination. [Citation.]" (*In re E.S.* (2011) 196 Cal.App.4th 1329, 1335.) "The juvenile court may modify an order if a parent shows, by a preponderance of the evidence, changed circumstance or new evidence and that modification would promote the child's best interests. [Citations.]" (*In re Amber M.* (2002) 103 Cal.App.4th 681, 685.)

Mother argues she introduced significant evidence of changed circumstances and that the continuation of reunification services would be in the children's best interest. Mother completed eight parenting classes, obtained her high school diploma, enrolled in junior college, and continued to attend therapy. She remarried and her husband is employed. She obtained seasonal work at a winery. Mother argues that the court's conclusion that continued reunification was not in the children's best interest was in error because she has a positive, beneficial relationship with the children.

Social worker Burns-Heron testified that reunification services would create continued instability for the children. Mother had previously been provided with more than two years of services and voluntarily terminated them in 2014.

Mother's continued efforts to improve her parenting skills and obtain an education are admirable, but despite the recent changes in mother's housing and potential employment, she had not demonstrated any long-term stability. She had moved twice in the six months prior to the hearing, which was her pattern throughout the case. Her proffered employment was seasonal work only. Mother has twin infants at home and did not demonstrate how she would be able to care for six children under age 10 while attending junior college and working.

The juvenile court found the changes were not so significant to warrant additional services or a change in placement. "[I]t would [not] benefit the children to perpetuate that instability to give . . . mother yet another chance to reunify."

Even if mother could demonstrate changed circumstances, “there was no showing whatsoever of how the best interests of these young children would be served by depriving them of a permanent, stable home in exchange for an uncertain future. [Citations.]” (*In re C.J.W.* (2007) 157 Cal.App.4th 1075, 1081.) The evidence at the hearing demonstrated that it was in the children’s best interest to remain with their foster parents. “[O]n the eve of the section 366.26 permanency planning hearing . . . the children’s interest in stability was the court’s foremost concern and outweighed any interest in reunification. [Citation.]” (*In re Edward H.* (1996) 43 Cal.App.4th 584, 594.) Accordingly, the juvenile court did not abuse its discretion in denying mother’s section 388 petition.

C. *The Court Did Not Err in Terminating Mother’s Parental Rights*⁴

Mother argues the beneficial relationship exception applies and the court should not have terminated her parental rights.

This court has held that we review a juvenile court’s order on the beneficial relationship exception for substantial evidence. (*G.B.*, *supra*, 227 Cal.App.4th at pp. 1165-1166.)⁵ “After reunification efforts have terminated, the focus shifts from

⁴ Inexplicably, the Agency fails to address this issue in its brief. However, contrary to mother’s suggestion, a respondent does not concede an issue in an appellant’s opening brief by failing to address it. (*People v. Hill* (1992) 3 Cal.4th 959, 995, fn. 3, overruled on other grounds in *Price v. Superior Court* (2001) 25 Cal.4th 1046 [“A failure to respond to an opponent’s argument may be unwise as a tactical matter,” but such failure does not concede the argument].)

⁵ Mother recognizes a division among the Courts of Appeal about the appropriate standard of review for the beneficial relationship exception. Division Three of this court has applied the abuse of discretion standard. (*In re Jasmine D.* (2000) 78 Cal.App.4th 1339, 1351 (*Jasmine D.*) [holding the “practical differences between the two standards of review are not significant”].) The Fourth and Sixth Districts have held that both standards apply: the substantial evidence standard applies to the factual issue of whether a beneficial relationship exists and the abuse of discretion standard applies to the court’s discretionary determination whether there is a compelling reason weighing against adoption. (*In re J.C.* (2014) 226 Cal.App.4th 503, 530; *In re Bailey J.* (2010) 189 Cal.App.4th 1308, 1314-1315.) We apply the substantial evidence standard but recognize the result would be the same under either standard.

family reunification toward promoting the best interests of the child. A child has a fundamental interest in belonging to a family unit, which includes a ‘placement that is stable, permanent, and that allows the caretaker to make a full emotional commitment to the child. [Citation.]’ [Citation.] At the selection and implementation stage, the court has three alternatives: adoption, guardianship or long-term foster care. [Citation.] In selecting a permanent plan for an adoptable child, there is a strong preference for adoption over nonpermanent forms of placement. [Citation.]” (*In re Zachary G.* (1999) 77 Cal.App.4th 799, 808–809.) If a child is found adoptable at the section 366.26 hearing, the juvenile court must terminate parental rights and place the child for adoption unless termination would be detrimental to the child. “ ‘Once the court determines the child is likely to be adopted, the burden shifts to the parent to show that termination of parental rights would be detrimental to the child under one of the exceptions listed in section 366.26, subdivision (c)(1). [Citations.] Section 366.26, subdivision (c)(1)(B)(i), provides an exception to termination of parental rights when “[t]he parents have maintained regular visitation and contact with the child and the child would benefit from continuing the relationship.” ’ [Citations.]” (*G.B., supra*, 227 Cal.App.4th at p. 1165, quoting *In re S.B.* (2008) 164 Cal.App.4th 296, 297 (*S.B.*.)

Mother contends she consistently visited the children over the course of this case. The evidence in the record is mixed. Mother missed visits without notice. The Agency’s report filed in January 2015 documented four recently missed visits in September and October 2014. It does appear, however, that mother maintained ongoing visitation with the children, and neither at the hearing nor on appeal does the Agency contest this issue. We, therefore, turn to the benefit to the children to maintaining their relationship with mother.

To demonstrate a beneficial relationship, the parent must “ ‘prove [that] his or her relationship with the child “promotes the well-being of the child to such a degree as to outweigh the well-being the child would gain in a permanent home with new, adoptive parents.” [Citations.] No matter how loving and frequent the contact, and notwithstanding the existence of an “emotional bond” with the child, “the parents must

show that they occupy ‘a parental role’ in the child’s life.” ’ [Citations.]” (*G.B.*, *supra*, 227 Cal.App.4th at p. 1165, quoting *In re K.P.* (2012) 203 Cal.App.4th 614, 621 (*K.P.*.)

The exception is applied on a case-by-case basis considering several factors such as the child’s age, the portion of the child’s life spent in the parent’s custody, the positive or negative effect of interaction between parent and child, and the child’s particular needs. (*In re Autumn H.* (1994) 27 Cal.App.4th 567, 575–576.)

Mother analogizes her case to *S.B.*⁶ The father in *S.B.* was the primary caregiver for his daughter for three years, consistently visited her several times per week throughout the dependency proceedings, and complied with “ ‘every aspect’ of his case plan,” including maintaining his sobriety and seeking therapy. (*S.B.*, *supra*, 164 Cal.App.4th at p. 298.) The daughter was upset when the visits ended, she told father “I love you,” and expressed her desire to live with him. (*Id.* at pp. 294-295, 298.) The court reversed the termination of parental rights, finding substantial evidence for the beneficial relationship exception because of the significant parent-child bond. (*Id.* at p. 298.)

There is evidence here similar to *S.B.* of a parent-child bond. The children hug mother, tell her they love her, and seem to enjoy their visits. However, a “parent must show more than frequent and loving contact or pleasant visits. [Citation.]” (*C.F.*, *supra*, 193 Cal.App.4th at p. 555.) In *C.F.*, the parent presented evidence that the children enjoyed their visits, had an emotional connection with her, and wanted to continue seeing her. (*Id.* at pp. 555-556.) She presented testimony that the children were “happy and excited” to see her at their visits and would run to her and hug her. (*Id.* at p. 556.) The court concluded that there was no evidence the mother occupied a parental role in the children’s lives or that they would suffer actual detriment if her parental rights were terminated. (*Id.* at p. 557.) The children enjoyed visiting with their mother but looked to

⁶ *S.B.* has been the subject of considerable criticism and limited to its unique facts. (*In re C.F.* (2011) 193 Cal.App.4th 549 (*C.F.*.) *S.B.* must be “confined to its extraordinary facts. [*S.B.*] does not support the proposition a parent may establish the parent-child beneficial relationship exception by merely showing the child derives some measure of benefit from maintaining parental contact.” (*Id.* at pp. 558–559.)

their aunt and grandmother to fulfill their emotional and physical needs. (*Ibid.*) The fact the children derive some benefit from the relationship is not enough to outweigh the benefits of permanency for the child. (*Id.* at pp. 558-559.)

The same is true here. Mother has only sporadically filled a parental role in her children's lives, and for the past two years they have looked to their foster parents for all their needs. Mother did not comply with her case plan and requested reunification be terminated in January 2014. Her visitation was not always consistent. More recently, her visitation has been more regular, but it is supervised and limited to one hour per week. Mother has not been the children's primary caregiver for more than two years. The two younger children have only been in her care for less than 12 months out of the last four years. Y.S. and D.S. began living with aunt in August 2011 when they were babies. They lived with aunt until February 2013, when returned to mother for less than a year. They then returned to aunt's care in December 2013 and have remained there ever since. B.S. and N.S. were in mother's care until June 2012 and went to live with aunt for 6 months, were returned to mother for another 10 months, and then have lived with aunt since December 2013. All four children have spent much of their young lives in aunt's custody. (See *In re Marcelo B.* (2012) 209 Cal.App.4th 635, 644 [finding against the beneficial-relationship exception where the child had lived "nearly half of his life" with his aunt and her husband, who have been involved with him since his birth and who have provided him with " 'a loving, safe and nurturing home environment' "].)

Mother provides a detailed description in her opening brief of her visits with the children and her relationship with them. There is no question that mother loves her children and the children love mother. There remains a bond. The issues the juvenile court struggled with were whether this bond was so substantial that it would be detrimental to the children to terminate parental rights, and whether the need for permanency and stability outweighed the continued maintenance of the parent-child relationship.

The juvenile court described this as a "close case." While social worker Burns-Herron testified that the children should not be returned to mother, she recognized it was

important for the children to have continued contact with mother. However, mother has not always acted in the children's best interest. The foster parents have provided a stable, loving home for the children. The children had improved by "leaps and bounds" both in therapy and in school. The children are bonded to their foster parents. In the Adoption Assessments, the social worker concluded that all four children wanted to remain in their foster home.

Recognizing this was a "difficult judgment call" the court had to make on conflicting evidence, the court concluded the termination of parental rights was in the children's best interest and adopted the Agency's recommendation. " '[B]ecause 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.' [Citation.]" (*K.P.*, *supra*, 203 Cal.App.4th at p. 621.) There is evidence that mother visited the children and no question there is a bond, but the evidence falls short of establishing that the parent-child relationship outweighs the benefit to the children of a permanent adoptive home with their foster parents where they have lived for the past two years and for many months before that. (See *G.B.*, *supra*, 227 Cal.App.4th at p. 1166.) The children have benefited from a stable home, showing improvement in their behavior. They are doing well in school, engaged in sports and other activities, and have structure in their lives. "When the benefits from a stable and permanent home provided by adoption outweigh the benefits from a continued parent/child relationship, the court should order adoption. [Citation.]" (*Jasmine D.*, *supra*, 78 Cal.App.4th at p. 1350.)

In conclusion, mother's due process rights were not violated in the manner in which the dependency court conducted the contested hearings. The findings made by the juvenile court were supported by substantial evidence, and we find no error warranting reversal of its denial of mother's section 388 petition or the order terminating mother's parental rights.

IV.
DISPOSITION

The court's orders denying mother's section 388 petition and terminating parental rights are affirmed.

RUVOLO, P. J.

We concur:

REARDON, J.

RIVERA, J.

A145290, *In re B.S.*