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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

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

CONTRA COSTA COUNTY CHILDREN
AND FAMILY SERVICES BUREAU,

Plaintiff and Respondent,

v.

BARBARA C.,

Defendant and Appellant.

A146141

(Contra Costa County
Super. Ct. No. J13-00526)

Barbara C. (Mother), mother of 11-year-old Andrew C., appeals from the juvenile court’s orders terminating her parental rights and ordering adoption as the permanent plan, pursuant to Welfare and Institutions Code section 366.26.¹ Mother contends these orders must be reversed because (1) the court’s adoptability finding was not supported by substantial evidence; (2) the court improperly found that the beneficial parent-child relationship exception to adoption did not apply; and (3) the court violated Mother’s rights under title II of the Americans with Disabilities Act (ADA), section 504 of the Rehabilitation Act of 1973 (section 504), and California law at both the 18-month

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

hearing, at which the termination hearing was set, and the section 366.26 hearing because its findings were based on speculation about her mental health disability. In addition, Mother argues that, to the extent any of these contentions have been forfeited, she was denied effective assistance of counsel. We shall affirm the juvenile court's orders.²

FACTUAL AND PROCEDURAL BACKGROUND³

On May 1, 2013, the Contra Costa County Children and Family Services Bureau (Bureau) filed an original petition alleging that Andrew came within the provisions of section 300, subdivision (b), in that that he was at substantial risk of suffering serious harm as a result of Mother's mental illness and problem with alcohol use. In particular, the petition alleged that Mother had been placed in a psychiatric hospital for five days in March and 11 days in April, after experiencing auditory hallucinations. Then, in April, she "was acting strange, seeing witches in people, and driving erratically with the child in the car." While experiencing auditory hallucinations, she had "stopped her vehicle at an intersection, slammed a police officer's arm in the door, and struck him with her fist in his chest as he tried to take the keys out of the vehicle. The child was in the front passenger seat during the incident." Mother had also refused to take the medication prescribed by her psychiatrist to stabilize her mental health and was unwilling to stop drinking alcohol even though, when she drank alcohol, she had auditory hallucinations.

On May 2, 2013, the juvenile court ordered Andrew detained in the home of a relative. Subsequently, at the conclusion of the June 13, 2013 jurisdiction hearing, the

² In an accompanying petition for writ of habeas corpus (Case No. A148059), Mother raises additional claims of ineffective assistance of counsel, which are either identical to or related to those raised on appeal. In a separate order, we deny the habeas petition.

³ Many of the facts regarding events occurring before the section 366.26 hearing are taken from our prior nonpublished opinion in this matter, in which we denied Mother's petition for extraordinary writ, filed pursuant to California Rules of Court, rule 8.452 (rule 8.452). (*Barbara C. v. Superior Court* (June 25, 2015, A144926) [nonpub. opn.])

court sustained the allegations in the petition and took jurisdiction over Andrew, declaring him a dependent of the juvenile court.

In the disposition report dated July 9, 2013, and filed on August 20, the social worker reported that Mother suffered from bipolar disorder with “psychosis symptoms.” Since her most recent hospitalization, Mother had continued her medication regimen and followed all of her psychiatrist’s treatment recommendations. She understood “the need to be vigilant about administering her prescribed psychotropic medication and refraining from drinking alcohol.” She had been taking her medication daily, testing clean, attending weekly 12-step meetings, and meeting with her psychologist every two weeks. Mother was symptom free and capable of providing adequate care for Andrew. Andrew had enjoyed being with his great-aunt (aunt) and great-uncle (uncle), but was ready to return to Mother’s care. Because the Bureau believed there was a low risk to Andrew’s safety, it recommended that the court return him to Mother, with family maintenance services.

On August 20, 2013, the juvenile court adopted the recommendations of the Bureau and returned Andrew to his mother’s care, with family maintenance services.

On October 23, 2013, the Bureau again detained Andrew and filed a supplemental petition, pursuant to section 387, alleging that Mother had failed to comply with her case plan by not taking her medication and missing a drug test. On October 16, it was reported that she had been behaving in a disoriented, rambling and paranoid way. On October 17, she had arrived two hours late to pick Andrew up from school, displaying agitated behavior. Andrew also had four unexcused absences from school between October 15 and October 21. Finally, during an October 21 welfare check at the home, Andrew had reported being scared. He said that Mother was “ ‘acting strange again and not making sense,’ ” and that she had “ ‘grabbed my arm really hard for no reason when we were outside walking and would not let go when I said it hurt me.’ ”

On October 24, 2013, the juvenile court again ordered Andrew detained.

In a memorandum filed on November 14, 2013, the social worker related that, during the October 21 visit to the home, he had spoken with Andrew privately. Andrew

began to cry and said he did not want to leave his mother, but that she was “acting so ‘weird’ again.” When the social worker asked if he wanted to visit his aunt, he said “yes.” When the social worker went to speak to Mother, Mother refused to cooperate and the social worker said he would have to call the police. When he did so, Mother “immediately rushed up to the [social worker,] yelling at the top of her voice to get out of her home,” and postured “like she was ready to assault the [social worker].” Eventually, Andrew was taken to the home of his aunt. The social worker reported that it appeared that Mother “was at the beginning of another mental health break due to her poor self-management of her medication.” Andrew was happy to be residing with his aunt, had returned to school, and was hopeful that Mother could get the help she needed. The Bureau believed that Mother had failed her family maintenance program and requested that Andrew be removed and placed into the care of his paternal aunt.

Also on November 14, 2013, the juvenile court sustained the supplemental petition.

In the December 12, 2013 disposition report, the social worker reported that the Bureau had made repeated attempts to reach Mother by phone, email, and letter, but she had not responded to those attempts. She had not visited with Andrew since the most recent removal in October. Andrew had adjusted well to his placement, and the school had reported that his behavior had much improved since he had been in his aunt’s care.⁴ Andrew was happy living with his aunt and uncle, whom he had known his entire life. He had communicated to the social worker that he was open to having their home become permanent for him, and the aunt and uncle were willing to consider guardianship or adoption. The social worker related that they “have a substantive relationship with Andrew having known him his entire life.” Andrew had also lived with them for four months during the prior dependency and was happy in their care.

⁴ The social worker reported that Andrew suffered from ADHD (attention deficit hyperactivity disorder), and had delays in academic performance and socialization.

At the December 12, 2013 disposition hearing on the supplemental petition, the juvenile court terminated Mother's family maintenance services and set a review hearing for May 2014.

In the May 22, 2014 status review report, the social worker related that, after more than three months without contact, Mother had sent an email to the social worker on February 1, 2014, explaining that she had been in a house fire; asking about Andrew; and stating she wished to again begin receiving Andrew's monthly disability benefits, which the Social Security Administration had informed her would cease due to his being in foster care. Since then, Mother had been cooperative with the Bureau and had been diligent regarding her case plan responsibilities, including testing negative on all submitted tests, attending 12-step meetings, administering her medications, and regularly meeting with her psychiatrist and therapist. She had also had weekly phone visits and one in-person visit with Andrew.

Andrew was thriving in the home of his aunt and uncle, and was "aware of the situation with his mother and understands why he was removed." He had told the social worker that, "while he loves his mother, it is best if he remain[s] with his aunt." Since they had been in contact again, he had been asking about Mother more often and said he would like to continue to visit with her.

The Bureau recommended that the court continue the dependency and order reunification services for Mother, to include attending therapy to help manage the symptoms of her psychotic disorder,⁵ complying with her psychiatrist's recommendations for medications, testing for alcohol use, and attending two to three 12-step meetings per week.

On May 23, 2014, the juvenile court ordered reunification services for Mother.

⁵ The social worker noted in her report that Mother had been diagnosed with psychotic disorder. Her therapist, Henry Foulds, and her psychiatrist, Dr. Levy, reported that she had shown no sign of psychosis since she had reengaged with services in early 2014.

In a December 2, 2014 status review report, the social worker related that Mother now had twice weekly phone calls and twice monthly supervised visits with Andrew. Mother had been working on her case plan since February, and had tested negative on all random tests, attended 12-step meetings as required, and met regularly with a psychiatrist and therapist. Mother also had apparently been hospitalized twice, in October 2013, and January 2014, while out of contact with the Bureau. A letter from her most recent psychiatrist, Dr. Bigman, reflected that Mother had not informed him of these involuntary hospitalizations. The Bureau also learned that Mother had set the previously reported house fire in a suicide attempt; Mother had said she “wanted to die because she wanted to be saved from going to hell.”

Andrew continued to thrive in the care of his aunt and other relatives, all of whom had a previous relationship with him and provided him with a safe and consistent environment. He was taking his ADHD medication and his school performance was improving; he presented as calmer and more focused. Andrew also understood the situation with Mother and consistently reported feeling safe in his relatives’ care, all of whom showed him a great deal of attention and love. He told the social worker that he wanted “to stay here and go with mom when she is ‘fully, fully better.’” A visit supervisor had told the social worker that Mother had always been appropriate with Andrew during visits. She also said, however, that Mother “wants to engage but doesn’t appear to know how,” and expressed concern about “what will happen if Andrew is returned to her care again.” Mother told the social worker that she sometimes talked to Andrew “about things she shouldn’t.” She also said that during a phone conversation on November 10, 2014, she was talking to him about having unsupervised visits and he responded that “he does not understand that they could be alone together; he told her he’s afraid she’ll go ‘cray-cray’ again.”

The Bureau recognized that Mother had “the ability to function while on her medication. However, if she does not take her medication, or drinks alcohol as she has done previously, the child is placed at severe risk. Andrew has endured a tremendous amount of distress and detriment while in [Mother’s] care during her psychotic breaks.”

The Bureau believed it would be dangerous for Andrew to be returned to Mother's care, "given her fragile mental state, her inability to sustain her mental health for a prolonged period of time, and what appears to be her failure to disclose to the physician monitoring her medication . . . her two most recent psychiatric hospitalizations." The Bureau therefore recommended that the court terminate Mother's reunification services and set a section 366.26 hearing.

In a February 10, 2015 update, The Bureau "acknowledge[d] that [Mother] appears to have maintained her stability for the past year, but the fact cannot be ignored that she had two significant psychotic episodes since Andrew's removal. These incidents caused extreme trauma to Andrew and the [Bureau] is very concerned about the impact that future instability could have on him."

The social worker also reported that Mother's counsel had raised a concern that the social worker had failed to communicate directly with Dr. Bigman, Mother's psychiatrist, before submitting the December 2, 2014 report, which stated that his October 29 letter reflected that Mother had not informed him of her two involuntary hospitalizations. In his letter, Dr. Bigman had stated that Mother "has been compliant with her medication treatment of Risperdal for her diagnosis of [p]sychotic disorder since Dr. Levy prescribed it for her in March of 2013. . . . She had been on a stable dosage of 2 mg daily for over a year, with no symptoms whatsoever up until our most recent appointment October 21, 2014" The social worker related that Dr. Bigman further stated in his letter that he would be retiring on November 1, 2014, three days after he wrote the letter. It was therefore not possible to communicate with him after the letter was received. In addition, given that Mother's two hospitalizations had occurred after Andrew's second removal from Mother's care on October 21, 2013, the social worker explained that Dr. Bigman's statement about Mother's lack of symptoms was not consistent with police reports and reports from the treatment facilities regarding Mother's medication compliance and involuntary hospitalizations in October 2013 and January 2014.

The social worker further related that the police report from January 5, 2014, before Mother's second hospitalization, stated that Mother "was standing in her driveway holding a beer bottle saying that she wanted to die. In that same report it is noted that [she] set a cardboard box on fire, left it on a wooden table in the living room and went outside. Her house was damaged by the fire and uninhabitable. ([Mother's] therapist and psychiatrist both often refer to the trauma that she suffered due to the house fire, but neither mentions that [her] intentional actions caused the fire.)"⁶

In a status review report filed on April 9, 2015, the social worker related that, although Mother had been compliant with her case plan for over a year, she had never acknowledged starting the fire at her home or her two psychiatric hospitalizations during the time she was out of contact with the Bureau. In a letter dated March 9, Mother's therapist, William Foulds, stated that Mother had been medication compliant since February 2014, and the error in Dr. Bigman's letter regarding medication compliance resulted from changes in psychiatrists due to retirements. Regarding knowledge of the house fire, Foulds wrote that Dr. Levy, Mother's original psychiatrist, had referred to it during his "first post-hospitalization visit" and that Foulds's first two posthospital visit notes from March 2014, directly addressed her responsibility for the fire. The social worker reported that Mother's current psychiatrist, Dr. Fazzolari, had not responded to a request for an explanation of his knowledge of the house fire.

Andrew said he "really loves it where he is living now," with the aunt, another great-aunt and the uncle, and that he " 'would like living with [Mother] when she gets better and when she quits smoking.' " By " 'gets better,' " he said he meant, " '[u]ntil she is ready to take care of me again and not burn my food, learn not to keep me up at

⁶ The social worker also noted that the case had been "transferred to a number of different social workers during a short period of time." The social worker for most of the dependency, Todd Lenz, informed Mother in September 2014, that he had accepted another position and that her case would be transferring to another social worker. In October, Lori Castillo spoke with Mother and advised her that she was the new social worker. Then, in November, Crystal Gabriel advised Mother that she was the new social worker and, since then, had been in contact with Mother on a monthly basis.

night and not let me watch videos on the computer all the time. She needs to tell me to go to bed.’ ” The social worker also reported that, at a January 10, 2015 hearing, the court had been informed of a phone call in which Mother had asked Andrew “why he was lying to her.” Mother’s twice-weekly phone calls with Andrew had been terminated after she offered Andrew a new PlayStation if he moved back to her home. Finally, Mother did not support Andrew’s current placement because she believed that, as three single, adult siblings, his caretakers had “certain lifestyles that are not conducive to raising a child.”

At the combined 12- and 18-month hearing, which took place on April 9, 2015, Todd Lenz, who was the social worker on the case from June 2013 until September 2014, testified that Mother had stayed in contact with him between February and September 2014, and had participated in her case plan during that period. In May 2014, Lenz had received a letter from Mother’s then-psychiatrist, in which he wrote that he would “strongly recommend” that Mother “be considered to regain custody of Andrew.”

When asked why he did not recommend that Andrew be returned to Mother, given that she was in compliance with her case plan, Lenz responded that she was cooperative and able to comply with what the Bureau was asking of her when she was on her medication. The concern was when she was off of her medication and, “because it was a second removal, the concern was we didn’t want to traumatize the child anymore. [¶] You know, she does well when the child is not in the home. It’s when the child is in the home that she struggles with her mental health.”⁷

Mother testified that her situation had changed since Andrew was removed from her care for the second time. She now understood what her problem was; she was

⁷ Three other social workers who also worked with Andrew and Mother for a short time testified at the hearing as well, including the current social worker, Crystal Gabriel, who testified that Mother’s visits with Andrew went well and were appropriate. During a visit she observed in February 2015, Andrew and Mother both “appeared happy.” Gabriel testified that the reports showed that Andrew seemed bonded to Mother, but the Bureau was concerned about returning him to her care because of the two removals while he was in her care and concern about future mental illness.

medication compliant; she was seeing her therapist every two weeks, and would continue to do so if Andrew came home. Mother had been compliant with her case plan for more than a year and believed that she was well now. In particular, she explained, “I had fixated on this person that was previously in my life” and had been “an influence” in her life 25 years previously. And she had “fixed that by actually meeting with him.”

At the conclusion of the hearing, the court commented on Mother’s inappropriate facial expressions in the courtroom, including “smiles” and “smirks,” during a discussion of Andrew’s fear of going home. The court then found that Mother had “no insight into her behavior. . . . [¶] I don’t think she’s a bit grateful for somebody taking care of this child while she herself was in total disarray. . . . I didn’t sense anything in that except hostility. [¶] And that bothers me so much, because I think her lack of insight into her behavior is part of whatever mental issues she has; lack of insight into the frightening behavior, lack of insight into what her behavior did to her son, this crazy stuff he witnessed, this crazy stuff he heard, this scary stuff he heard, the things that he had to do and see.

“I don’t think she has any insight into that. And, frankly, I haven’t sensed a sense of accountability for it, for this child. [¶] . . . [¶] I think there’s a lot of credibility issues with [Mother]. But sometimes I don’t know whether it’s something she just doesn’t choose to remember, whether she can’t remember, whether she dreams it up another way, or whether it’s intentional. I think some of it’s intentional. [¶]

“I do not find the child to be safe in [Mother’s] home, not for a second. And I’m sorry about it, but I think it’s a very big reality. . . . [¶] . . . [¶] . . . I think you wish him well but I don’t think you have any concept of his—he’s well now, not in your home, and that you have issues that are still evident to this court.

“I am very concerned about some of the testimony of what she did and did not tell the psychiatrist and what she chooses to share. But it all goes into the issue of credibility and the lack of insight into what . . . her issues are.

“So I’m going to follow the recommendations. I think they are very appropriate. I’m not giving family maintenance. It’s been 23 months. Enough is enough. [¶] I think

it's very important for this young boy not to have this being torn all the time. And I think this has been a terrible, terrible time for him. [¶] So I am setting a 366.26.”

On April 15, 2015, Mother filed a notice of intent to file writ petition and on June 25, 2015, we denied her petition for extraordinary writ, filed pursuant to rule 8.452, in which she sought review of the juvenile court's findings and orders terminating her reunification services and setting the section 366.26 hearing. (*Barbara C. v. Superior Court, supra*, A144926.)

In the section 366.26 report filed on August 21, 2015, the social worker reported that Andrew continued to take medication for ADHD, but was currently healthy. Andrew had no physical or cognitive delays, but did “present as immature for his age.” His ADHD appeared to affect his ability to read social cues, and he did not have any friends. He was held back in second grade due to struggles with meeting his educational benchmarks and individualized education program goals. He had now completed third grade and while he still had a hard time with abstract thinking, inference, and focusing, he was “significantly better than last year.” He still could not get along with other children, however. Andrew's speech therapist reported that he was doing better emotionally and that “ ‘He's practically a different kid!’ ”

His aunts reported that he was unable to think and plan in advance, could not read an analog clock, and was unable to sound things out. His aunt emphasized school by having structured time devoted to schoolwork. After school each day, she had Andrew complete his homework, review any subject matter with which he was struggling, and read for thirty minutes. Also, a mental health worker had assessed Andrew and had found that he did not seem to be experiencing any distress.

Andrew's aunt was now enthusiastic about adopting him, and hoped to provide him with stability and keep him involved with his extended family. The aunt had worked as a 911 dispatcher for the past 15 years, including the past 11 years as a supervisor. She reported that Mother was married to her brother and they became good friends. When Mother gained custody of Andrew, the aunt bought a home near Mother to help raise

him. She used to spend three days a week helping Mother with Andrew, but Mother's mental illness had interfered with their relationship.

At the request of Mother and the court, the Bureau had set up therapeutic visitation for Andrew and Mother. Following a visit on January 10, 2015, the therapist stated that Mother "was appropriate with Andrew, but does have some difficulty engaging with her child," and "could use some help with that." When asked if he wanted to continue with therapeutic visits, Andrew said that he would "rather be alone with his Mother." Twice monthly supervised visits were therefore resumed. On April 9, following the hearing at which the court set the section 366.26 hearing, visits were reduced to once a month. The visit supervisor had reported that Mother arrived early for all visits, brought Andrew's favorite snacks, and was loving and attentive. Andrew was also responsive to Mother.

The social worker reported that since February 2014, Mother had made efforts to comply with her case plan, and was able to function while on her medication. The social worker further reported, "if she does not take her medication, or drinks alcohol, as she has done previously, the child is placed at severe risk. Andrew has endured a tremendous amount of distress and detriment while in the Mother's care during her psychotic breaks. He is now stable and thriving in the care of his great aunt." The Bureau believed "that it would be dangerous for Andrew's health and safety to return him to his Mother's care, given her fragile mental state and her inability to sustain her mental health for a prolonged period of time." The Bureau therefore recommended that Mother's parental rights be terminated, with adoption by the aunt as the permanent plan. The Bureau was "hopeful that the Mother will remain stable so that Andrew can continue to visit and speak with her."

The section 366.26 hearing took place on July 16 and August 21, 2015. On July 16, Mother testified that she had last visited with Andrew the prior Monday. His reaction to her was "[t]he same as always. He loves me as much as ever." Before she left, he told her she was "the best mom ever." Andrew called her "mommy" during visits, and snuggled with her while they read books. No one had talked to Mother about whether she would be able to maintain contact with Andrew.

At that point in Mother's testimony, Andrew's attorney interrupted to inform the court that he had just realized that Andrew had recently turned 10, and he had not given Andrew notice of his right to be present at the hearing. All parties agreed to continue the hearing so that Andrew could receive proper notice.

At the continued hearing on August 21, 2015, neither Mother nor any other witnesses testified. The Bureau's counsel informed the court that Andrew had received notice of the hearing, but had told the social worker he did not want to be present. He also had informed the social worker that, "while [he] enjoys his visits with his mother, he does want to be adopted by his aunt, his current caregiver. And the current caregiver is open to having postadoption visitation." Andrew's attorney also said that he had confirmed the day before that Andrew did not want to be at the hearing, but that "[h]e does really want to be adopted. He does also want to see his mother. But she just can't be there for him all the time like she needs to be. And he knows that and he, in fact, has said that in the past, that she knows at times she's not well. He does want to see her."

Andrew's attorney also stated that the current caregivers did not want to supervise visits and the Bureau's counsel explained that were "open to . . . postadoption visitation in a supervised visitation [*sic*]. They don't want to be the supervisors." Visits would be supervised by a licensed agency and would cost Mother \$50 for a one hour visit. The court stated that it thought the visits were in Andrew's best interest, and Andrew's attorney responded, "He wants them. He enjoys them when she's well and she's there and he [wants] to see her. He just doesn't want to be living with her." Andrew and the caregiver had told Andrew's counsel that visits had been going well, and the court responded that it believed Andrew "has been made to feel a lot of guilt about this" Andrew's counsel agreed.

Mother's counsel stated that she was concerned that if Andrew did not have ongoing contact with Mother, "it could be very detrimental to him. . . . [¶] This has been his mom for ten years. He is at a very critical age where he needs as many adults supporting and loving him as possible. I still feel that legal guardianship is in this child's best interest. [¶] I think adoption and the possibility that he would lose all contact with

my client would be a horrible, horrible thing to happen to this child. And so I'm asking the court to find that the most appropriate plan is legal guardianship with his current caregivers."

The court then stated: "There's a lot of concerns I have in this case. I've been on it since the very beginning. We all know the very significant mental behavior of the Mother. And I've never felt that she really understood the effect it had on the child. I had found her not credible several times. She is not angry and smirking anymore in court, which is a change, doesn't seem to be angry and hostile all the time.

"But the thing I'm concerned about is that she was so very vindictive to the caregiver. And I am concerned about what effect that would have in the future on the child. I don't doubt that she loves the child. I don't doubt that for a second. But I don't think she can control herself. I don't think she tells the truth. And maybe [] she tells the truth as she sees the truth at the time. Maybe it's not intentional. I don't know. [¶] But I have a lot of concerns about [counsel] asking me to make orders on visitation because of the vindictiveness that this Mother has towards the caregiver. [¶] The caregiver obviously doesn't want to supervise the visits. And given what Mother has talked about with the caregiver and what's happened in the past and the history, I can understand. She doesn't get along with the caretaker. That's very apparent.

"But I really have to focus on the very best interests of the child. [¶] I'm going to terminate parental rights today. I think that's definitely in the best interest of the child. I think it would be detrimental to return the child to the parent's custody.

The court went on to say that when visits were supervised at the Bureau, Mother was unable to say negative things about the aunt, but there was a concern that she would say those things to Andrew during future visits. The court stated that, given how well he was doing—"he's just blossoming and confident"—it had concerns about ordering visits and, if it did, "they would be very infrequent."

Counsel for Andrew said that he understood the court's concerns, but that Andrew's "stated interest is that he wants the visits. His best interest very likely could be that he shouldn't have them," but, whenever counsel saw Andrew, he was "happy seeing

Mother, doesn't even want a therapist involved. [¶] It's hard for me to separate his best interest from his stated interest when he's been so explicit about what he wants." The court responded, "frankly, I think [Mother] has worked very hard to make this minor feel very guilty, very guilty for preferring to stay with the aunt. I think that has been a driving force in her." The court continued, "if you recall in the beginning, he felt so guilty for preferring to be with the aunt when he knew how much [Mother] loved him. [¶] . . . [¶]—and cared about him. And I know she does. I do know that. I mean that's not ever been a doubt. It's just what she's able to control."

The court found by clear and convincing evidence that Andrew was likely to be adopted, that termination of parental rights was in his best interest, and that it would be detrimental to return him to Mother's custody. The court then terminated Mother's parental rights.

With respect to visitation, the court stated: "I am not going to order visits, but I'm not going to forbid them. I think that is something that the adoptive mother and [Mother] have to work out in the best interest of the child. And if [Mother] continues to be so angry and vindictive and blaming of the adoptive mother, that's never going to be a very good situation, because this child looks to the aunt as his caregiver for life. [¶] . . . [¶] So I just think they're going to have to work this out. I think the caregiver is willing to do that, because she knows that Andrew loves his Mother, scared of her, scared of what he's seen her do. [¶] And I think he's scared because he knows she doesn't realize it, which is even more scary, because it's unpredictable. Because she's been unpredictable in this court. I mean she can't help herself." The court concluded that visitation would "be at the discretion of the caretaker. I think this caretaker loves Andrew dearly. I think she's shown it in every way possible and that they will do what's best for the boy."

On September 1, 2015, Mother filed a notice of appeal from the order terminating her parental rights.

DISCUSSION

Mother's arguments on appeal include challenges to the trial court's findings made both at the section 366.26 hearing when it terminated her parental rights, as well as those

made at the earlier 18-month review hearing, when it terminated her reunification services and set the section 366.26 hearing.

I. Waiver

Before addressing the merits of Mother’s arguments, we must determine which of them are cognizable on appeal from the order terminating her parental rights. As noted, Mother raises a number of issues regarding purported errors that took place before or at the time of the 18-month review hearing, when the juvenile court terminated her reunification services and set the section 366.26 hearing. These include the contentions that her case plan was not based on an individualized assessment of her mental health disability, that the Bureau failed to establish a safety plan that would allow Mother to safely regain custody of Andrew, and that the court based its decision at the 18-month hearing to terminate reunification services on bias and speculation, all in violation of federal and state law intended to protect parents with mental illness from discrimination.

However, “[v]arious provisions of the statutory scheme strictly control the timing and manner of appeal or writ review of the critical findings and orders that can culminate in an order terminating parental rights, their primary goal being to expedite finality and thereby achieve permanency for the child.” (*In re Zeth S.* (2003) 31 Cal.4th 396, 405-406 (*Zeth S.*)) In light of this goal, any orders not appealed in a timely manner are subject to the waiver rule. (*In re Meranda P.* (1997) 56 Cal.App.4th 1143, 1151 (*Meranda P.*) [identifying principle “that an appellate court in a dependency proceeding may not inquire into the merits of a prior final appealable order on an appeal from a later appealable order” as the “ ‘waiver rule’ ”].)

“The waiver rule as applied in dependency cases flows from section 395, under which the dispositional order is an appealable judgment, and all subsequent orders are directly appealable without limitation except for post 1994 orders setting a .26 hearing, which are subject to writ review ([rule 8.452]) and related limitations (§ 366.26, subd.

(*I*).^[8] A consequence of section 395 is that an unappealed disposition or postdisposition order is final and binding and may not be attacked on an appeal from a later appealable order. [Citations.] In other words, ‘A challenge to the most recent order entered in a dependency matter may not challenge prior orders for which the statutory time for filing an appeal has passed.’ [Citation.] The rule serves vital policy considerations of promoting finality and reasonable expedition, in a carefully balanced legislative scheme, and preventing late-stage ‘sabotage of the process’ through a parent’s attacks on earlier orders.’ [Citation.]” (*In re Jesse W.* (2001) 93 Cal.App.4th 349, 355, citing *In re Janee J.* (1999) 74 Cal.App.4th 198, 206-207 (*Janee J.*) & *Meranda P.*, *supra*, 56 Cal.App.4th at p. 1150.)

In *Meranda P.*, *supra*, 56 Cal.App.4th at pages 1150-1151, the mother raised a number of issues on appeal from the termination of parental rights related to her lack of legal representation during the early stages of the dependency proceedings and her appointed counsel’s purported incompetence during the later stages, including his failure at the 18-month review hearing to question the sufficiency of the reunification services she had received. The mother argued that all of “ ‘these deprivations and failures tainted the entire termination process’ and render[ed] her claims about the absence and inadequacy of counsel cognizable on her appeal from the termination order.” (*Id.* at p. 1151.) The appellate court declined to carve out an exception to the waiver rule even though the issues the mother raised on appeal involved “the important constitutional and statutory rights to counsel and to the effective assistance of counsel.” (*Ibid.*) This was because, as important as the issues were, “[e]nforcing the waiver rule against the mother’s representational claims [did] not infringe her due process rights.” (*Ibid.*)

⁸ Section 366.26, subdivision (*I*)(1), provides that an order setting a section 366.26 hearing is not appealable at any time unless the parent timely filed a writ petition, the petition “substantively addressed the specific issues to be challenged and supported that challenge by an adequate record,” (*id.*, subd. (*I*)(1)(B) and the petition was summarily denied or otherwise not decided on the merits. (§ 366.26, subd. (*I*)(1); see § 366.26, subd. (*I*)(2).)

In *Janee J.*, *supra*, 74 Cal.App.4th at pages 207-208, a panel of this Division rejected a parent’s contention that the waiver rule, as applied in *Meranda P.*, would never allow review of trial counsel’s past performance, no matter how deficient, thereby “stripping away” due process protection for a parent. We concluded that “the crux of *Meranda P.*” is that “the waiver rule will be enforced unless due process forbids it.” (*Janee J.*, at p. 208.) We declined to attempt to catalog all of the circumstances that might allow relaxation of the waiver rule but found that two prior cases—*Meranda P.* and *In re Cathina W.* (1998) 68 Cal.App.4th 716 (*Cathina W.*)—implied certain guidelines. “First, there must be some defect that fundamentally undermined the statutory scheme so that the parent would have been kept from availing himself or herself of the protections afforded by the scheme as a whole. Lack of notice of rule [8.452] rights was one such example in *Cathina W.* Second, to fall outside the waiver rule, defects must go beyond mere errors that might have been held reversible had they been properly and timely reviewed. To allow an exception for mere ‘reversible error’ of that sort would abrogate the review scheme (§§ 366.26, subd. (l), 395) and turn the question of waiver into a review on the merits. *Meranda P.* recognized that error unfavorable to a parent’s interest during the course of dependency may well prove irremediable [citation], yet applied the waiver rule anyway. Finally, it follows that resort to claims of ineffective assistance as an avenue down which to parade ordinary claims of reversible error is also not enough and that it is never enough, alone, to argue that counsel rendered ineffective assistance by not raising potentially reversible error on [8.452] writ review of a setting order.” (*Janee J.*, at pp. 208-209.)⁹

⁹ Some of the few errors deemed sufficiently fundamental to evade the waiver rule include the erroneous failure to appoint a guardian ad litem (*In re M.F.* (2008) 161 Cal.App.4th 673, 682); the improper appointment of a guardian ad litem (*In re Jessica G.* (2001) 93 Cal.App.4th 1180, 1190); counsel’s erroneous concession of jurisdiction, which is an “entirely legal, and quite fundamental” error (*In re S.D.* (2002) 99 Cal.App.4th 1068, 1080); and the failure to advise a parent of the writ requirement for challenging an order setting a section 366.26 hearing (*In re Cathina W.*, *supra*, 68 Cal.App.4th at p. 722).

In the present case, Mother was represented by counsel throughout these proceedings, was aware of the services ordered, and filed a writ petition in a timely manner challenging the setting of the section 366.26 hearing, which we decided on the merits. She is now attempting to raise issues that either were already decided or could have been decided had she raised them in her writ petition. (See *In re Merrick V.* (2004) 122 Cal.App.4th 235, 247 [“All court orders, regardless of their nature, made at a hearing in which a section 366.26 permanency planning hearing is set must be challenged by a petition for extraordinary writ”]; see also § 366.26, subd. (I); rule 8.452.) None of these issues, which involve the alleged failure to provide reasonable reunification services and related claims, as well as the claim that counsel was ineffective for failing to raise them in a timely manner, involves a “defect of fundamental proportions” that prevented Mother from pursuing these claims earlier. (*Janee J.*, *supra*, 74 Cal.App.4th at pp. 209, 212.) That the claims may implicate “issues of important constitutional and statutory rights,” including the effective assistance of counsel, is not sufficient to overcome the waiver rule. (*Meranda P.*, *supra*, 56 Cal.App.4th at p. 1151; accord, *Janee J.*, at pp. 206-207, 209.) Accordingly, only those contentions directly related to the court’s decision to terminate parental rights are presently reviewable.¹⁰

¹⁰ The Bureau does not address the question of waiver in its briefing. Instead, it argues that Mother is barred by the doctrine of law of the case from raising ineffective assistance of counsel claims related to the 18-month review hearing following our denial of her writ petition. “Under the law of the case doctrine, when an appellate court ‘states in its opinion a principle or rule of law necessary to the decision, that principle or rule becomes the law of the case and must be adhered to throughout [the case’s] subsequent progress, both in the lower court and upon subsequent appeal’ ” (*People v. Barragan* (2004) 32 Cal.4th 236, 246.) “As its name suggests, the doctrine applies only to an appellate court’s decision on a question of law; it does not apply to questions of fact. [Citation.]” (*Ibid.*) Nevertheless, it does apply to an appellate court’s determination of evidence’s legal sufficiency. (*Ibid.*)

In denying Mother’s writ petition, we held that substantial evidence supported the juvenile court’s finding that return of Andrew to her custody would create a substantial risk of detriment to Andrew’s physical or emotional well-being. (See § 366.22, subd. (a).) Although our opinion did not address all of the untimely issues Mother now

II. Termination of Mother's Parental Rights

In this appeal from the termination of Mother's parental rights, the only issues that are presently reviewable are whether the juvenile court properly found that (1) Andrew was adoptable, and (2) the beneficial parent-child relationship exception to adoption did not apply. (See *Zeth S.*, *supra*, 31 Cal.4th at pp. 411, 412, fn. 9 [“ ‘It is not the purpose of the section 366.26 hearing to show parental inadequacy, which had to have been previously established,’ ” but only to determine the type of permanent home].)

A. Adoptability

Mother contends the court's adoptability finding for Andrew, a child with special needs, was not supported by substantial evidence.

“Once reunification services are ordered terminated, the focus shifts to the needs of dependent children for permanency and stability. [Citation.]” (*In re A.A.* (2009) 167 Cal.App.4th 1292, 1320.) “At a hearing under section 366.26, the court must select and implement a permanent plan for a dependent child. Where there is no probability of reunification with a parent, adoption is the preferred plan. [Citation.]” (*In re K.P.* (2012) 203 Cal.App.4th 614, 620 (*K.P.*).

The juvenile court may terminate parental rights only if it determines by clear and convincing evidence that it is likely the child will be adopted. (§ 366.26, subd. (c)(1).) “Although a finding of adoptability must be supported by clear and convincing evidence, it is nevertheless a low threshold: The court must merely determine that it is ‘likely’ that the child will be adopted within a reasonable time. [Citations.]” (*In re K.B.* (2009) 173 Cal.App.4th 1275, 1292 (*K.B.*)). On appeal, we review the court's adoptability finding “only to determine whether there is evidence, contested or uncontested, from which a reasonable court could reach that conclusion. It is irrelevant that there may be evidence which would support a contrary conclusion. [Citation.]” (*Ibid.*)

attempts to raise, a finding of law of the case is an alternative basis for refusing to permit Mother to relitigate in this appeal the sufficiency of the evidence issue that was in fact decided in the prior opinion. (See *People v. Barragan*, *supra*, 32 Cal.4th at p. 246.)

In the present case, Mother acknowledges that she did not object in the juvenile court on the ground that the adoption assessment was inadequate and, for that reason, may not challenge the adequacy of the adoption assessment on appeal. (See *In re Erik P.* (2002) 104 Cal.App.4th 395, 399.) She does claim, however, that certain inadequacies in the adoption assessment help to demonstrate the lack of substantial evidence supporting the court's finding of adoptability, an issue that is not forfeited by failing to raise it in the juvenile court. (See *ibid.*) Even assuming, as Mother argues, that Andrew is a special needs child and that the only potential placement is with his aunt, we find that substantial evidence supports the court's finding that Andrew is likely to be adopted by his aunt. (See *K.B., supra*, 173 Cal.App.4th at pp. 1292-1293 ["It is well established that if a child has special needs which render the child not generally adoptable, a finding of adoptability can nevertheless be upheld if a prospective adoptive family has been identified as willing to adopt the child and the evidence supports the conclusion that it is reasonably likely that the child will in fact be adopted within a reasonable time"]; accord, *In re Gregory A.* (2005) 126 Cal.App.4th 1554, 1562.)

For example, the record reflects that Andrew's aunt had known him all of his life. When Mother gained custody of Andrew, the aunt had bought a home nearby to help raise him and had spent three days a week helping Mother with him. Andrew had lived with the aunt for four months during the prior dependency and for some 20 months during the current dependency. The aunt had expressed her willingness to have her home become permanent for Andrew at an early stage in the proceedings, and she and the other relatives living in the home had "all been cleared by the [Bureau]," as of the time of the six-month review.

In the 12-month review report, the social worker described Andrew's placement: "Andrew is residing with two great aunts and [a] great uncle in Concord, CA. He has his own room and play area. The home is a single story four bedroom home. [His aunt], who is the primary caregiver, works as a dispatcher for [the] San Francisco County Sheriff. The great uncle does not work and is at home to greet Andrew from school. The great aunt's sister resides in the home too. She is also home during the day to help care

for Andrew. Andrew has reported consistently that he feels safe in their care and enjoys being able to spend time with his family every day. The home provides Andrew with a safe and consistent environment. He receives plenty of attention and is shown lots of love by his aunts and uncle.”

The Bureau’s report for the section 366.26 hearing stated that the aunt was “enthusiastic about adopting” Andrew and that she “hopes to provide him with stability and keep him involved with his extended family,” including his cousins in Tracy. During a conversation about adoption with the social worker, the only concern the aunt had regarding the process was about “getting assistance with college.” She also stated that she and her siblings did not want to be responsible for supervising Andrew’s visits with Mother, and the social worker planned to provide the aunt with a list of local agencies authorized to supervise visits. The social worker and her supervisor were able to answer all of the aunt’s questions during this meeting.

In the section 366.26 report, the social worker also described the aunt’s personal and career history, as well as the ways in which she emphasized school and supported Andrew in his studies. In addition, the report contained an evaluation of Andrew’s medical, developmental, educational, mental, and emotional status. Finally, at the time of the section 366.26 hearing, Andrew told the social worker and his counsel that while he enjoyed his visits with Mother, he wanted to be adopted by his aunt.

Mother claims there was no evidence presented regarding whether the aunt had a criminal or child abuse history and that, therefore, the court could not determine if there was a legal impediment to adoption. (See *In re Valerie W.* (2008) 162 Cal.App.4th 1, 15 [when child is deemed adoptable based solely on a particular family’s willingness to adopt, juvenile court must determine whether there is a legal impediment to adoption].) Although the court did not specifically state that no legal impediment existed, in light of the evidence and the court’s findings, such a determination is implicit in the court’s orders. Moreover, contrary to Mother’s assertion, the social worker *had* reported that all adults in the aunt’s home had been cleared by the Bureau early in the process, and

Andrew had remained in the home for nearly two years without incident. Mother has not identified any potential impediments to adoption.

This evidence in the record is sufficient to support the juvenile court's finding that Andrew is likely to be adopted by his aunt within a reasonable time. (See *K.B.*, *supra*, 173 Cal.App.4th at pp. 1292-1293.)

In light of this evidence, which strongly supports the court's adoptability finding, Mother's argument that counsel was ineffective for not objecting to the Bureau's technical noncompliance with subdivision (i) of section 366.21, which lists the information that is to be included in an adoptability assessment, fails due to lack of prejudice. (See *Strickland v. Washington* (1984) 466 U.S. 668, 694, 697 (*Strickland*); *Meranda P.*, *supra*, 56 Cal.App.4th at pp. 1153-1154.) Mother's other ineffective assistance claims applicable to the adoptability issue, involving, inter alia, counsel's failure to present any documentary or testimonial evidence or to cross-examine the social workers, likewise fail due to lack of prejudice. (See *ibid.*) In addition, Mother's argument that counsel was ineffective for failing to set the matter for trial is misplaced, given that the section 366.26 hearing proceeded as a contest, with Mother testifying and all counsel presenting argument to the court before it ruled.

B. Beneficial Parent-Child Relationship Exception

Mother contends the court improperly found that the beneficial parent-child relationship exception to adoption did not apply.

When the court finds that the child is likely to be adopted if parental rights are terminated, it must select adoption as the permanent plan unless it finds by clear and convincing evidence, pursuant to one of the statutorily-specified exceptions, "compelling reason[s] for determining that termination would be detrimental to the child." (§ 366.26, subd. (c)(1)(B).) The parent has the burden of proving detriment under any of these exceptions. (*In re C.F.* (2011) 193 Cal.App.4th 549, 553 (*C.F.*.)

At issue here is the beneficial-parent child relationship exception, which applies if the juvenile court finds by clear and convincing evidence that "[t]he parents have

maintained regular visitation and contact with the child and the child would benefit from continuing the relationship.” (§ 366.26, subd. (c)(1)(B)(i).)

Appellate courts have differed on the correct standard of review for determining the applicability of a statutory exception to termination of parental rights. (Compare, e.g. *In re Autumn H.* (1994) 27 Cal.App.4th 567, 576 (*Autumn H.*) [applying substantial evidence standard]; *In re Jasmine D.* (2000) 78 Cal.App.4th 1339, 1351 (*Jasmine D.*) [applying abuse of discretion standard]; *K.P.*, *supra*, 203 Cal.App.4th at pp. 621-622 [applying substantial evidence standard of review to whether beneficial parent-child relationship exists and applying abuse of discretion standard to whether that relationship provides a compelling reason to apply exception].) Although the “practical differences” among these various standards of review “are not significant” (*Jasmine D.*, at p. 1351), we believe that use of the hybrid standard of review, which incorporates both the substantial evidence and the abuse of discretion standards, is appropriate when reviewing juvenile court determinations regarding the statutory exceptions to adoption. (See *In re J.C.* (2014) 226 Cal.App.4th 503, 530-531; *K.P.*, at pp. 621-622; *In re Bailey J.* (2010) 189 Cal.App.4th 1308, 1314-1315.)

In the present case, the Bureau does not dispute that Mother satisfied the first prong of section 366.26, subdivision (c)(1)(B)(i), in that she maintained consistent and positive visitation with Andrew. With respect to the second prong of section 366.26, subdivision (c)(1)(B)(i), the Bureau *does* dispute that a continued relationship with Mother benefits Andrew to such a degree that termination of parental rights would be detrimental to him.¹¹

¹¹ The Bureau does not assert, and we do not find, that this issue is forfeited due to counsel’s failure to raise the parent-child beneficial relationship exception at the permanency planning hearing. At that hearing, Mother’s counsel argued that termination of Mother’s parental rights “could be very detrimental” to Andrew, given that Mother had “been his mom for ten years. He is at a very critical age where he needs as many adults supporting and loving him as possible. I still feel that legal guardianship is in this child’s best interest.” Counsel further argued that “adoption and the possibility that he would lose all contact with my client would be a horrible, horrible thing to happen to this child.

In *C.F., supra*, 193 Cal.App.4th 549, the appellate court “interpreted the phrase ‘benefit from continuing the relationship’ in section 366.26, subdivision (c)(1)(B)(i) to refer to a ‘parent-child’ relationship that ‘promotes the well-being of the child to such a degree as to outweigh the well-being the child would gain in a permanent home with new, adoptive parents. In other words, the court balances the strength and quality of the natural parent-child relationship in a tenuous placement against the security and the sense of belonging a new family would confer. If severing the natural parent-child relationship would deprive the child of a substantial, positive emotional attachment such that the child would be greatly harmed, the preference for adoption is overcome and the natural parent’s rights are not terminated.’ [Citation.]

“A parent must show more than frequent and loving contact or pleasant visits. [Citations.] ‘Interaction between natural parent and child will always confer some incidental benefit to the child. . . .’ [Citation.] The parent must show he or she occupies a parental role in the child’s life, resulting in a significant, positive emotional attachment between child and parent. [Citations.] Further, to establish the section 366.2, subdivision (c)(1)(B)(i) exception the parent must show the child would suffer detriment if his or her relationship with the parent were terminated. [Citation.]” (*C.F., supra*, 193 Cal.App.4th at p. 555, quoting *Autumn H., supra*, 27 Cal.App.4th at p. 575, fn. omitted.)

“Because a section 366.26 hearing occurs only after the court has repeatedly found the parent unable to meet the child’s needs, it is only in an extraordinary case that preservation of the parent’s rights will prevail over the Legislature’s preference for adoptive placement.” (*Jasmine D., supra*, 78 Cal.App.4th at p. 1350.) “Application of this exception is decided on [a] case-by-case basis and a court takes into account such factors as the minor’s age, the portion of the minor’s life spent in the parent’s custody, whether interaction between parent and child is positive or negative, and the child’s

And so I’m asking the court to find that the most appropriate plan is legal guardianship with his current caregivers.” Although counsel did not explicitly refer to subdivision (c)(1)(B)(i) of section 366.26, she made it sufficiently clear that she believed the exception was applicable to alert the juvenile court to the issue and preserve it for appeal.

particular needs.” (*In re Scott B.* (2010) 188 Cal.App.4th 452, 471 (*Scott B.*), citing *Autumn H.*, *supra*, 27 Cal.App.4th at pp. 575-576.)

Here, Mother argues that she does occupy a parental role in Andrew’s life. She adopted him when he was an infant. He was almost eight years old when he was detained and was 10 at the time of the section 366.26 hearing. Andrew thus had lived with Mother for most of his life. (See *Scott B.*, *supra*, 188 Cal.App.4th at p. 471.) As the court found, Mother plainly loves Andrew and, overall, the evidence showed that their supervised visits went well. They enjoyed their time together and Andrew appeared bonded with Mother, which is not surprising given the nearly eight years of his life that he spent in her care. There was also evidence, however, that both the therapeutic visitation therapist and a visit supervisor had observed that Mother “does have some difficulty engaging with” Andrew, as well as that the biweekly telephone calls between Mother and Andrew had to be terminated due to Mother’s inappropriate comments. (See *ibid.*)

Even assuming the evidence was sufficient to demonstrate that Mother occupies a parental role in Andrew’s life, we nonetheless conclude the juvenile court did not abuse its discretion when it implicitly found, in light of all of the relevant factors, including Andrew’s particular needs (see *Scott B.*, *supra*, 188 Cal.App.4th at p. 471), that the benefit of maintaining that relationship did not outweigh the well-being he would gain from the stability and permanency of adoption by his aunt. (See *K.P.*, *supra*, 203 Cal.App.4th at pp. 621-622.) As the court found, Andrew plainly was traumatized by Mother’s behavior during the periods before her psychotic disorder was brought under control. Although her therapist indicated that she had been in remission for some time, Andrew remained anxious about her ability to safely care for him long-term, as demonstrated by comments he made over the course of the dependency. His belief that Mother could not meet his needs is further reflected in statements to the social worker and his attorney shortly before parental rights were terminated: that he wanted to see

Mother but did not want to live with her, and that he wished to be adopted by his aunt.¹² As the court stated, “Andrew loves his Mother” but is “scared of her, scared of what he’s seen her do. [¶] And I think he’s scared because he knows she doesn’t realize it, which is even more scary, because it’s unpredictable. . . .”

In addition, the evidence shows that Andrew was happy living with his aunt. He wanted to be adopted by her and she was committed to adopting him. He had known her nearly all of his life and had lived with her and her siblings for almost two years over the course of the two dependencies. The aunt had provided him with a stable, loving home, in which he was supported in a variety of ways. Andrew’s behavior had improved while in her care, as had many of his school-related issues. A short time before the section 366.26 hearing, Andrew’s speech therapist had reported that he was doing better emotionally and was “ ‘practically a different kid,’ ” and a mental health worker who assessed him did not believe he was experiencing any distress.

In sum, in light of the evidence showing the ways in which the aunt, not Mother, was able to meet Andrew’s particular needs and occupied the primary parental role, the court did not abuse its discretion in finding that the level of detriment to Andrew from

¹² Mother argues that Andrew’s stated desire to continue visiting her shows that he did not truly understand that adoption by the aunt would mean that Mother’s parental rights would be terminated and that his contact with her might end. However, for a court to consider a child’s wishes, as is required by section 366.26, subdivision (h), it is not necessary for the court to ask how the child feels about ending the parental relationship. As the appellate court explained in *In re Leo M.* (1993) 19 Cal.App.4th 1583: “[I]n honoring [minors’] human dignity we must be mindful that we 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. We must have regard for the possible and readily conceivable anguish that such confrontational choices could create in a short lifetime already filled with trauma. . . . Therefore, we conclude that in considering the child’s expression of preferences it is not required that the child specifically understand the proceeding is in the nature of a termination of parental rights.” (*Id.* at p. 1593; accord, *In re Amanda D.* (1997) 55 Cal.App.4th 813, 820.)

terminating Mother's parental rights was not such that he "would be greatly harmed," when balanced against the benefit of adoption by the aunt. (*C.F.*, *supra*, 193 Cal.App.4th at p. 555; *Scott B.*, *supra*, 188 Cal.App.4th at p. 471; see *J.C.*, *supra*, 226 Cal.App.4th at pp. 530-531; compare *In re Amber S.* (2002) 103 Cal.App.4th 681, 689-690 [where (1) bonding study showed that children shared primary attachment with Mother, (2) CASA disagreed with Agency's adoption recommendation due to bond and love between mother and children, and (3) mother had done "virtually all that was asked of her to regain custody," court improperly terminated her parental rights].) We do not discount the love between Mother and Andrew, or Andrew's desire to continue visiting with Mother. Nevertheless, in light of the evidence presented and the legislative preference for adoption as the permanent plan, the juvenile court appropriately determined that this was simply not the kind of "extraordinary case" in which "preservation of the parent's rights will prevail over the Legislature's preference for adoptive placement." (*Jasmine D.*, *supra*, 78 Cal.App.4th at p. 1350.)

We also reject Mother's ineffective assistance of counsel claims on this issue. Counsel's failure to call Mother to testify again after her testimony was interrupted on the first day of the hearing was plainly not prejudicial, where Mother had already testified about the close relationship and positive visits she had with Andrew and the record included evidence regarding the positive nature of their visits and Andrew's desire to maintain contact with Mother. (See *Strickland*, *supra*, 466 U.S. at pp. 694, 697; *Meranda P.*, *supra*, 56 Cal.App.4th at pp. 1153-1154.) We do not believe that the presentation of additional testimony or other evidence could have so negated the evidence already discussed, *ante*, that the court would have concluded that the benefit to Andrew from relationship with Mother outweighed the benefit he would gain from adoption by the aunt.

III. Disability Discrimination

Mother contends the juvenile court's termination of her parental rights was tainted by discrimination against her based on speculation about her mental health disability, in violation of the ADA and section 504, which she asserts are applicable in California

dependency cases, notwithstanding California case law to the contrary. (See *In re Diamond H.* (2000) 82 Cal.App.4th 1127, 1139, disapproved on another ground in *Renee J. v. Superior Court* (2001) 26 Cal.4th 735, 748, fn. 6 [parent may have separate cause of action under ADA based on a social service agency’s action or inaction, but “the ADA does not apply directly to juvenile dependency proceedings and cannot be used as a defense in them”]; see also *In re Anthony P.* (2000) 84 Cal.App.4th 1112, 1116 [same]; cf. *In re M.S.* (2009) 174 Cal.App.4th 1241, 1253 [finding reasoning of *In re Diamond H.* “equally applicable where a minor found to be a person within meaning of section 602 attempt[s] to assert an ADA violation as grounds to set aside an otherwise valid dispositional order”].) She also observes that California law prohibits the disability discrimination she allegedly suffered here. (See, e.g., *Patricia W. v. Superior Court* (2016) 244 Cal.App.4th 397, 422 (*Patricia W.*), quoting *In re Jamie M.* (1982) 134, Cal.App.3d 530, 540 [“ ‘Harm to the child cannot be presumed from the mere fact of mental illness of the parent’ ”].)

Mother focuses primarily on alleged violations that occurred before and during the 18-month review hearing, which are subject to the waiver rule, as previously explained. (See pt. I., *ante.*) She also argues, however, that at the time of the section 366.26 hearing, “the court failed to conduct an individualized assessment of Mother’s circumstances, to determine if Andrew could return home. Instead the court based its decisions to terminate . . . parental rights on bias and speculation, in violation of state and federal law.” Because this issue was not raised at the time of the section 366.26 hearing, we must determine whether counsel was ineffective for failing to do bring it to the attention of the juvenile court. (See *Strickland, supra*, 466 U.S. at pp. 688, 694.)

First, as discussed in part I. of this opinion, “ “[t]he decisions made at the review hearing regarding reunification are not subject to relitigation at the termination hearing. This hearing determines only the type of permanent home.” ’ [Citation.]” (*Zeth S., supra*, 31 Cal.4th at p. 411; accord, *In re Charmice G.* (1998) 66 Cal.App.4th 659, 670.) Thus, the court could not be faulted for failing to fully assess Mother’s circumstances to determine if Andrew could return home, since the sole question before it was whether

adoption should be the permanent plan, and counsel was not incompetent for failing to raise the issue. (See *Zeth S.*, at p. 411; see also *Strickland, supra*, 466 U.S. at p. 688.)¹³

Second, we do not agree with Mother that the court's determinations at the section 366.26 hearing were based on speculation and bias. At that hearing, where the question was the type of permanent home Andrew would have (see *Zeth S., supra*, 31 Cal.4th at p. 411), the court's finding that the benefit of adoption by the aunt outweighed the benefit of a continued parental relationship with Mother was based on current evidence and the court's observations of Mother, including a determination regarding her credibility. (See *In re Heather A.* (1996) 52 Cal.App.4th 183, 193 [issues of fact and credibility are province of trial court].) The evidence showed that Andrew was profoundly traumatized by Mother's past behavior. He had expressed ongoing concern about that experience and about her ability to care for him, ultimately expressing the desire to be adopted by his aunt.¹⁴ The court also expressed concern about Mother's lack of insight and failure to be truthful. In addition, the court stated, in the context of a discussion with Andrew's counsel about whether visitation would be in Andrew's best interest, that Mother was vindictive toward the aunt and that Andrew, from the beginning of the case, had felt guilt about preferring to remain with the aunt.

The court's findings were reasonable, based on the evidence and its own observations. Because the court's decision to terminate parental rights was not improperly based on speculation and bias (compare *Patricia W., supra*, 244 Cal.App.4th

¹³ It is true that the Bureau had repeatedly emphasized the possibility of relapse and the attendant risks to Andrew were he to be returned to Mother's care, which arguably were not based on Mother's current circumstances. However, as discussed, questions regarding whether reunification services were reasonable and whether the Bureau's recommendations were based on speculation are not before us, in this appeal from the termination of Mother's parental rights. (See pt. I., *ante*.)

¹⁴ For example, in the December 2014 status review report, the social worker reported that Mother had related that during a phone call with Andrew in November—over a year after his second removal—she mentioned the possibility of having unsupervised visits, to which he responded that he did not understand that they could be alone together, given his fear that she could “go ‘cray cray’ again.”

at p. 422), counsel was not ineffective for failing to raise the issue of disability discrimination at the section 366.26 hearing. (See *Strickland, supra*, 466 U.S. at pp. 688, 694.)¹⁵

DISPOSITION

The juvenile court's orders are affirmed.

¹⁵ In light of this conclusion, and given the protections against mental health discrimination already afforded under California law (see, e.g., *Patricia W., supra*, 244 Cal.App.4th 397), we do not reach the question whether the ADA and section 504 are directly applicable to dependency proceedings. We therefore deny Mother's request for judicial notice of a recent federal technical assistance bulletin—"Protecting the Rights of Parents and Prospective Parents with Disabilities: Technical Assistance for State and Local Child Welfare Agencies and Courts under Title II of the Americans with Disabilities Act and Section 504 of the Rehabilitation Act," August 10, 2015, United States Department of Health and Human Services and United States Department of Justice—as unnecessary to our resolution of the issues raised in this appeal.

Kline, P.J.

We concur:

Richman, J.

Stewart, J.

In re Andrew C. (A146141)