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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

In re J.M., a Person Coming Under the  
Juvenile Court Law.

SAN DIEGO COUNTY HEALTH AND  
HUMAN SERVICES AGENCY,

Plaintiff and Respondent,

v.

JENNIFER M.,

Defendant and Appellant.

D060571

(Super. Ct. No. J517310C)

APPEAL from orders of the Superior Court of San Diego County, Laura J.

Birkmeyer, Judge. Affirmed.

Jennifer M. appeals a juvenile court order summarily denying her Welfare and Institutions Code<sup>1</sup> section 388 petition for modification by which she sought further services and placement of her dependent son, J.M. Jennifer contends she was entitled to

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<sup>1</sup> Statutory references are to the Welfare and Institutions Code.

a hearing on her section 388 petition because she made a prima facie showing her circumstances had changed and it was in J.M.'s best interests to grant the petition. Jennifer also appeals an order terminating her parental rights to J.M., challenging the sufficiency of the evidence to support the court's finding the beneficial parent-child relationship exception to adoption did not apply to preclude terminating her parental rights. We affirm the orders.

### FACTUAL AND PROCEDURAL BACKGROUND

In April 2009, three-year-old J.M. became a dependent of the juvenile court under section 300, subdivision (b) and was removed from Jennifer's custody based on findings Jennifer left him with relatives who physically abused and neglected him, and the home in which he lived was unsafe, filthy and unsanitary.<sup>2</sup> The court placed J.M., who has severe speech and language delays and a diagnosis of autism, in foster care and ordered reunification services for Jennifer.

During the reunification period, Jennifer had a psychological evaluation, participated in domestic violence treatment and individual therapy, and completed a 21-week parenting skills course. She moved from a home she shared with five adults to a one-bedroom apartment. Jennifer progressed from supervised to unsupervised visits with J.M. J.M. was a client of the San Diego Regional Center and was receiving services for

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<sup>2</sup> J.M.'s older siblings also became dependents of the court, but they are not subjects of this appeal.

his disabilities. At the 12-month review hearing, the court found Jennifer had made substantive progress with her case plan, and continued services to the 18-month date.

According to a status review report prepared by the San Diego County Health and Human Services Agency (Agency), Jennifer had been terminated from therapy because she missed two appointments. Nevertheless, she needed additional therapy to improve her communication skills and address underlying issues that impacted her ability to safely parent and protect her children. Jennifer still lacked insight into the protective issues, did not understand the ongoing risks to her children or what their special needs were, and was not able to put the children's needs ahead of her own. Agency was greatly concerned about Jennifer's ability to properly parent J.M. and provide him with a stable home. Consequently, Agency recommended the court terminate Jennifer's reunification services.

The court granted Agency's request to have Jennifer's visits with J.M. revert to supervised. The court also ordered Agency to work with service providers who could assist Jennifer with additional parenting training for a child with autism.

At the 18-month hearing, the court found reasonable services had been offered or provided to Jennifer but she had not made substantive progress with her case plan. The court terminated services, continued J.M. as a dependent in out-of-home care and set a section 366.26 selection and implementation hearing.

Agency social worker Lisa Salisbury assessed J.M. as generally and specifically adoptable. Although J.M. had developmental delays, he was generally healthy and had made significant progress with motor skills and language. He had lived with his caregivers for the past two years and felt secure with them. J.M. saw the caregivers as his

parents, referred to them as mom and dad, and looked to them to meet his needs. The caregivers had learned to communicate with J.M. through sign language and the Picture Exchange Communication System (PECS). They were able to read his cues and anticipate his needs and they actively participated in his in-home services. The caregivers wanted to adopt J.M. and had an approved home study. If they were unable to adopt, there were two families in San Diego County and eight out-of-county families interested in adopting a child with J.M.'s characteristics.

Salisbury's assessment report described visits between Jennifer and J.M. When all three children were present, Jennifer had difficulty setting limits and allocating her time and attention among them. J.M. usually played independently. Jennifer sometimes left J.M. unattended, neglected to feed him when he tried to communicate he was hungry, and failed to change his wet diaper. She did not seem to understand autism or J.M.'s special needs. Jennifer did not properly supervise J.M. and she often did not play or otherwise interact with him. One time when Jennifer sat with J.M. to look at flash cards, he became irritated, moved the cards away and began to cry. J.M. separated easily from Jennifer at the end of visits. In Salisbury's opinion, J.M. did not view Jennifer as a parent, and they did not have a beneficial parent-child relationship. Instead, Jennifer was a "friendly visitor" to J.M.

Salisbury recommended the court terminate parental rights and order adoption as J.M.'s permanent plan. She noted J.M. needs consistent medical care and daily parenting from someone who can communicate with him and meet his special needs. He also needs consistent services and a stable home environment with caregivers who understand his

diagnoses and the services he requires. In Salisbury's opinion, adoption would provide J.M. with safety, a sense of belonging and permanence. Jennifer's love for him did not outweigh these benefits.

In July 2011, Jennifer filed a petition under section 388, asking the court to modify its prior orders terminating reunification services and setting a section 366.26 selection and implementation hearing. Jennifer sought to have the court reinstate reunification services and return J.M. to her custody, alleging it was in five-year-old J.M.'s "best interests to be raised by his birth mother if she is fit and able to do so." The court summarily denied the petition, finding Jennifer had not made a prima facie showing of changed circumstances or best interests.

At a contested selection and implementation hearing, Jennifer testified she recently began having two-hour visits with J.M. twice a week. J.M. called her "Ma-Ma." He was affectionate with her, and hugged and kissed her when she arrived at visits and when the visits ended. Jennifer knew J.M. was autistic and that he communicated best by using sign language, but she did not know sign language. She learned to use PECS and was told to communicate with J.M. this way. Jennifer fed J.M. at visits and knew when he was hungry because he said, "Eat. Eat."

J.M.'s caregiver testified J.M. had lived with her for almost three years. She had observed visits between J.M. and Jennifer, noting they were positive and beneficial to J.M. J.M. recognized Jennifer, was happy to see her and was affectionate with her. Although Jennifer did not fully understand how to communicate with J.M., the caregiver

believed Jennifer could learn how to do so. The caregiver testified J.M. called her "mom" and called her husband "dad."

After considering the evidence and arguments of counsel, the court found J.M. was likely to be adopted if parental rights were terminated. The court also found none of the exceptions to adoption applied to preclude terminating parental rights.

## DISCUSSION

### I

Jennifer contends the court erred by summarily denying her section 388 modification petition, by which she sought to have the court reinstate reunification services and return J.M. to her custody. Jennifer asserts she made a prima facie showing her circumstances had changed and it was in J.M.'s best interests to grant the petition.

### A

A party may petition the court under section 388 to change, modify or set aside a previous court order. The petitioning party has the burden of showing, by a preponderance of the evidence, that (1) there is a change of circumstances or new evidence, and (2) the proposed change is in the child's best interests. (§ 388; *In re Jasmon O.* (1994) 8 Cal.4th 398, 415.) The petition must be liberally construed in favor of its sufficiency. (Cal. Rules of Court, rule 5.570(a); *In re Marilyn H.* (1993) 5 Cal.4th 295, 309.) "The parent need only make a prima facie showing to trigger the right to proceed by way of a full hearing." (*In re Marilyn H., supra*, at p. 310.) " [I]f the petition presents any evidence that a hearing would promote the best interests of the child, the court will order the hearing.' [Citation.]" (*In re Jasmon O., supra*, at p. 415.) "However,

if the liberally construed allegations of the petition do not make a prima facie showing of changed circumstances and that the proposed change would promote the best interests of the child, the court need not order a hearing on the petition. [Citations.] The prima facie requirement is not met unless the facts alleged, if supported by evidence given credit at the hearing, would sustain a favorable decision on the petition." (*In re Zachary G.* (1999) 77 Cal.App.4th 799, 806.) In determining whether the petition makes the necessary showing, the court may consider the entire factual and procedural history of the case. (*In re Justice P.* (2004) 123 Cal.App.4th 181, 188-189.)

## B

Jennifer's modification petition alleged her circumstances had changed because she has a job and her own apartment; she has greatly increased efforts to ensure her children's well-being; she is able to appropriately share her attention with her three children; she has developed a safety plan and has childcare; she has started observing J.M.'s tutoring sessions; and she consistently speaks to J.M., who identifies her as "mom."

The record shows Jennifer was employed and had housing throughout the proceedings. Thus, these were not changed circumstances. Further, Jennifer's increased efforts to ensure J.M.'s well-being and participate in his education showed "changing" but not "changed" circumstances. For the past two years, Jennifer had attended school meetings, received information about J.M.'s developmental services, communicated with his caregivers about his progress and care, attended most of his appointments, and attended a meeting regarding his Individual Education Plan (IEP).

Although Jennifer had recently made more of an effort to share her attention among the three children, she had not been successful in doing so. During her most recent visits, Jennifer still struggled with giving J.M. her full attention while his older siblings were present. There were still occasions when Jennifer left J.M. alone or unsupervised, and when she missed cues that he was hungry. In other words, nothing had changed.

Jennifer's allegations of having a safety plan and child care are conclusory and unsupported by facts in the record. Because Jennifer did not include a declaration or other attachments to support the showing she would make at a hearing on her modification petition, her allegations are insufficient to warrant a hearing. (*In re Anthony W.* (2001) 87 Cal.App.4th 246, 250.)

Even though Jennifer now consistently speaks to J.M. and he refers to her as "mom," this was not a genuine change of circumstances because Jennifer admitted J.M. called her "Ma-Ma" for as long as she could remember. In any event, J.M. did not recognize Jennifer as his parent, and there was no evidence he was bonded to her. The allegations of the petition do not show Jennifer's circumstances had changed such that she could safely parent J.M., who has extensive needs and requires ongoing services.

## C

Even had Jennifer made a prima facie showing of changed circumstances, her petition did not show that reinstating services and placing J.M. with her was in his best interests. Jennifer had participated in more than 18 months of services, but she still did not know how to effectively communicate with J.M., properly supervise him or meet his

special needs. She neglected to feed J.M. when he tried to say he was hungry, and she failed to change his wet diaper. Although Jennifer argues J.M. deserves to be raised by his mother, "[t]he presumption favoring natural parents by itself does not satisfy the best interests prong of section 388." (*In re Justice P.*, *supra*, 123 Cal.App.4th at p. 192.)

There was no prima facie showing Jennifer was "fit and able" to have J.M. returned to her custody.

Moreover, J.M. had lived with his caregivers for nearly three years, and he looked to them to meet his daily needs. The caregivers were fully prepared to provide a permanent home for J.M. After reunification services are terminated, a parent's "interest in the care, custody and companionship of the child are no longer paramount. Rather, at this point, 'the focus shifts to the needs of the child for permanency and stability' [citation], and in fact, there is a rebuttable presumption that continued foster care is in the best interest of the child." (*In re Stephanie M.* (1994) 7 Cal.4th 295, 317; see also *In re C.J.W.* (2007) 157 Cal.App.4th 1075, 1081 [summary denial of section 388 petition was proper where there was no showing of how the children's best interests would be served by depriving them of a permanent stable home in exchange for an uncertain future].) The proper focus of this case was J.M.'s need for stability, continuity and permanency, regardless of Jennifer's interest in reunification. (*In re Stephanie M.*, *supra*, at pp. 317-318; *In re Brittany K.* (2005) 127 Cal.App.4th 1497, 1507.) Because the liberally construed allegations would not have sustained a favorable decision on the section 388 petition, Jennifer was not entitled to an evidentiary hearing. (*In re Zachary G.*, *supra*, 77 Cal.App.4th at p. 808; *In re Mary G.* (2007) 151 Cal.App.4th 184, 205-206.)

## D

Jennifer asserts the court made erroneous findings at the 18-month hearing regarding the adequacy of services she received, and these findings "tainted" the court's order denying her section 388 modification petition. However, no previous appeal or writ petition was filed challenging these findings, and the time for doing so has long since passed. Ordinarily, "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." (*In re Meranda P.* (1997) 56 Cal.App.4th 1143, 1151.) Thus, any findings as to the adequacy of services are now final and not subject to our review in this appeal. (See *In re Daniel K.* (1998) 61 Cal.App.4th 661, 667.)

## II

Jennifer challenges the sufficiency of the evidence to support the court's findings the beneficial parent-child relationship exception did not apply to preclude terminating her parental rights. She asserts she regularly visited J.M., and the strong bond they shared outweighed the benefits of adoption for him.

## A

After reunification services are terminated, the focus of a dependency proceeding shifts from preserving the family to promoting the best interests of the child, including the child's interest in a stable, permanent placement that allows the caregiver to make a full emotional commitment to the child. (*In re Fernando M.* (2006) 138 Cal.App.4th 529, 534.) At the selection and implementation hearing, the court has three options:

(1) terminate parental rights and order adoption as the permanent plan; (2) appoint a legal guardian for the child; or (3) order the child placed in long-term foster care. (*Ibid.*)

"Adoption, where possible, is the permanent plan preferred by the Legislature." (*In re Autumn H.* (1994) 27 Cal.App.4th 567, 573.) If the court finds a child cannot be returned to his or her parent and is likely to be adopted if parental rights are terminated, it must select adoption as the permanent plan unless it finds a compelling reason for determining that termination of parental rights would be detrimental to the child under one or more of the enumerated statutory exceptions. (§ 366.26, subd. (c)(1)(A) & (B)(i)-(vi); *In re A.A.* (2008) 167 Cal.App.4th 1292, 1320.) "The parent has the burden of establishing the existence of any circumstance that constitutes an exception to termination of parental rights." (*In re T.S.* (2009) 175 Cal.App.4th 1031, 1039.) Because a selection and implementation hearing occurs "after the court has repeatedly found the parent unable to meet the child's needs, it is only in an extraordinary case that preservation of the parent's rights will prevail over the Legislature's preference for adoptive placement." (*In re Jasmine D.* (2000) 78 Cal.App.4th 1339, 1350.)

Section 366.26, subdivision (c)(1)(B)(i) provides an exception to the adoption preference if terminating parental rights would be detrimental to the child because "[t]he parents have maintained regular visitation and contact with the child and the child would benefit from continuing the relationship." We have interpreted the phrase "benefit from continuing the relationship" 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 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." (*In re Autumn H.*, *supra*, 27 Cal.App.4th at pp. 574-575; accord *In re Zachary G.*, *supra*, 77 Cal.App.4th at p. 811; *In re Jason J.* (2009) 175 Cal.App.4th 922, 936-937.)

To meet the burden of proof for this statutory exception, the parent must show more than frequent and loving contact, an emotional bond with the child or pleasant visits. (*In re Jason J.*, *supra*, 175 Cal.App.4th at pp. 936-937; *In re Derek W.* (1999) 73 Cal.App.4th 823, 827.) The parent must show he or she occupies a parental role in the child's life, resulting in a significant, positive emotional attachment from child to parent. (*In re Derek W.*, *supra*, at p. 827; *In re Elizabeth M.* (1997) 52 Cal.App.4th 318, 324.)

We review the court's finding regarding the applicability of a statutory exception to adoption for substantial evidence. (*In re Autumn H.*, *supra*, 27 Cal.App.4th at p. 576.) In this regard, we do not consider the credibility of witnesses, attempt to resolve conflicts in the evidence or weigh the evidence. Instead, we draw all reasonable inferences in support of the findings, view the record favorably to the juvenile court's order and affirm the order even if there is substantial evidence supporting a contrary finding. (*In re Baby Boy L.* (1994) 24 Cal.App.4th 596, 610.) On appeal, the parent has the burden of showing there is no evidence of a sufficiently substantial nature to support the court's finding or order. (*In re L.Y.L.* (2002) 101 Cal.App.4th 942, 947.)

## B

Here, the record shows Jennifer regularly visited J.M. She did not, however, meet her burden of showing she had a beneficial parent-child relationship with him so as to overcome the legislative preference for adoption.

Although Jennifer and J.M. were affectionate with each other and their interaction during supervised visits was generally positive, the relationship they shared was not parental in nature. Jennifer did not consistently give J.M. her full attention when his older siblings were present. She sometimes left J.M. alone or unsupervised, missed cues that he was hungry, and neglected to change his wet diaper. J.M. viewed Jennifer not as a parent, but as a "friendly visitor." (See *In re Sylvia R.* (1997) 55 Cal.App.4th 559, 563 [mother's relationship with children was more of a peer than parent].) He separated easily from Jennifer after visits and there was no evidence her absence from his daily life affected him adversely. J.M. did not have a "significant, positive, emotional attachment" to Jennifer such that terminating parental rights would result in great harm to him. (*In re Jason J.*, *supra*, 175 Cal.App.4th at p. 936; *In re Autumn H.*, *supra*, 27 Cal.App.4th at p. 575.) "A biological parent who has failed to reunify with an adoptable child may not derail an adoption merely by showing the child would derive *some* benefit from continuing a relationship maintained during periods of visitation with the parent." (*In re Angel B.* (2002) 97 Cal.App.4th 454, 466.)

Further, at the time of the selection and implementation hearing, five-year-old J.M. had been out of Jennifer's custody for almost three years. J.M. is thriving in the home of his caregivers who are committed to adopting him, and who have been meeting

his medical, developmental and emotional needs on a daily basis. The court was entitled to accept the social worker's opinion that the benefits of adoption for J.M. outweighed the benefits of maintaining a relationship with Jennifer. (*In re Justice P.*, *supra*, 123 Cal.App.4th at p. 191 [child's interest in stable and permanent home is paramount once a parent's interest in reunification is no longer at issue].) We cannot reweigh the evidence or substitute our judgment for that of the juvenile court. (*In re Casey D.* (1999) 70 Cal.App.4th 38, 53.)<sup>3</sup>

Despite Jennifer's preference for guardianship for J.M., the Legislature has decreed that a permanent plan other than adoption "is not in the best interests of children who cannot be returned to their parents. These children can be afforded the best possible opportunity to get on with the task of growing up by placing them in the most permanent and secure alternative that can be afforded them." (*In re Beatrice M.* (1994) 29 Cal.App.4th 1411, 1419; see also *Jones T. v. Superior Court* (1989) 215 Cal.App.3d 240, 251 [unlike adoption, guardianship is not "irrevocable and thus falls short of the secure and permanent placement intended by the Legislature"].) J.M., whose unique needs could not be met by Jennifer, deserves to have his custody status promptly resolved and his placement made permanent and secure. Substantial evidence supports the court's

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<sup>3</sup> Jennifer's reliance on *In re S.B.* (2008) 164 Cal.App.4th 289, 298-300, is misplaced. We are compelled to reiterate "*S.B.* is confined to its extraordinary facts." (*In re C.F.* (2011) 193 Cal.App.4th 549, 558.) In *S.B.*, the evidence showed that despite the child's strong, positive, significant relationship with her caregiver, she would be "greatly harmed" by the loss of the equally significant, positive relationship she shared with her father. (*In re S.B.*, *supra*, at pp. 300-301.) Here, in contrast, Jennifer made no such showing.

finding the beneficial parent-child relationship exception did not apply to preclude terminating parental rights.

DISPOSITION

The orders are affirmed.

NARES, J.

WE CONCUR:

HUFFMAN, Acting P.J.

McINTYRE, J.