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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

In re RAFAEL U. et al., Persons Coming
Under the Juvenile Court Law.

SAN DIEGO COUNTY HEALTH AND
HUMAN SERVICES AGENCY,

Plaintiff and Respondent,

v.

JENNIFER D. et al.,

Defendants and Appellants.

D067150

(Super. Ct. No. NJ14850A-B)

APPEALS from orders of the Superior Court of San Diego County, Michael J. Imhoff, Commissioner. Affirmed.

Patti L. Dikes, under appointment by the Court of Appeal, for Defendant and Appellant Jennifer D.

Elizabeth C. Alexander, under appointment by the Court of Appeal, for Defendant and Appellant Rafael U.

Thomas E. Montgomery, County Counsel, John E. Philips, Chief Deputy County Counsel, and Jennifer Stone, Deputy County Counsel, for Plaintiff and Respondent.

Jennifer D. and Rafael U., Sr., separately appeal an order under Welfare and Institutions Code section 366.26¹ selecting adoption as the permanent plan for their sons Rafael U., Jr., and Abel U. (collectively, the children) and terminating their parental rights.² Jennifer also appeals an order denying her petition under section 388 seeking either the return of the children to her custody or reinstatement of reunification services.³ Jennifer contends that (1) the court should have granted her section 388 petition because the evidence showed her circumstances had changed and it would be in the children's best interests to grant the petition; and (2) the court erred in finding that the beneficial parent-child relationship exception under section 366.26, subdivision (c)(1)(B)(i) did not apply to render termination of her parental rights detrimental to the children. The father joins in and adopts Jennifer's arguments and contends that if we reverse the termination of

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

² To avoid confusion, we refer to Rafael U., Jr., as "Rafael" and Rafael U., Sr., as "the father."

³ The father also filed a section 388 petition asking the court to vacate the section 366.26 hearing and provide him reunification services to the 18-month review date. The court denied the father's petition without an evidentiary hearing. Although in the introduction to his opening brief the father contends the court abused its discretion in denying him an evidentiary hearing, he does not present any argument on that issue. Consequently, we will not address it further. (*Oviedo v. Windsor Twelve Properties, LLC* (2012) 212 Cal.App.4th 97, 109, fn. 9 ["Issues as to which an appellant provides no argument or discussion are deemed waived and are properly disregarded."].)

Jennifer's parental rights, we must also reverse the termination of his parental rights. We affirm the appealed orders.

FACTUAL AND PROCEDURAL BACKGROUND

In September 2013, the San Diego County Health and Human Services Agency (the Agency) filed petitions on behalf of three-year-old Rafael and one-year-old Abel under section 300, subdivision (b), alleging that the children had suffered, or that there was a substantial risk they would suffer, serious physical harm or illness by the willful or negligent failure of Jennifer to provide them with adequate food, clothing, shelter or medical treatment.⁴ The petitions specifically alleged that the children's home "posed a health and safety hazard because it contained dirty dishes with rotting food, cockroaches, soiled diapers and trash on the floor, as well as [a] sharp knife and screwdrivers accessible to the child." The petitions further alleged that Jennifer had "a history of parental neglect and substance abuse and [Rafael] was dirty when taken into protective custody"

In a second count under section 300, subdivision (b), Rafael's petition alleged that Jennifer had left Rafael unattended and inadequately supervised, that Rafael was found

⁴ Effective June 20, 2014, subdivision (b) of section 300 was redesignated subdivision (b)(1). (Stats. 2014, ch. 29, § 64.) Subdivision (b)(1) provides, in relevant part, that a child comes within the jurisdiction of the juvenile court if "[t]he child has suffered, or there is a substantial risk that the child will suffer, serious physical harm or illness, as a result of the failure or inability of his or her parent . . . to adequately supervise or protect the child, . . . or by the willful or negligent failure of the parent . . . to provide the child with adequate food, clothing, shelter, or medical treatment, or by the inability of the parent . . . to provide regular care for the child due to the parent's . . . mental illness, developmental disability, or substance abuse."

walking around in the street without adult supervision for approximately two hours, and that Jennifer had a history of parental neglect and methamphetamine (meth) abuse. Abel's petition contained the same allegations in a count under section 300, subdivision (j) (abuse of a sibling).

The Agency removed the children from the home where Jennifer and the children were staying after police officers arrived at the home to conduct a welfare check of the children and found them running naked and unattended outside the home. The Agency's detention report stated that officers entered the home and found several people who had drug and criminal histories. The home was unsanitary and unsafe. The officers saw trash, soiled diapers, and several sharp screwdrivers on the floor of the bedroom that Jennifer and the children shared. The bedroom also contained dirty dishes, rotting food, and a sharp knife that was accessible to the children, "and there were cockroaches and bugs crawling all over the place." At floor level in a roommate's bedroom, there was a black bag that contained numerous hypodermic needles and other drug paraphernalia that was accessible to the children.

The Agency had received two referrals in June 2013 regarding Jennifer's drug use and inability to care for the children. Jennifer did not have a stable home then and admitted to using meth, and she failed several times to drug test for the Agency. Rafael reportedly had gotten out of the home and was found wandering along the street three blocks away. A neighbor reported that between June 2013, when the neighbor moved to the area, and September 2013, when the children were removed from Jennifer, the neighbor had seen Rafael unattended about five times. He was always wearing a diaper

and no other clothes or shoes, and his feet, hands, and face were always dirty. The Agency was concerned that Jennifer was not meeting the children's need for supervision and other basic needs.

At the detention hearing, the court found that a prima facie showing had been made on the children's petitions and that continued care in Jennifer's home would be contrary to the children's welfare. The court removed the children from parental custody and ordered that the parents be provided reunification services and liberal, supervised visitation with the children.

The Agency's jurisdiction/disposition report stated that the children were detained with their paternal aunt. Agency social worker Jason Pasco interviewed Jennifer on September 27, 2013, at the home of her brother's girlfriend's parents, where Jennifer was temporarily staying. Before the children were taken into protective custody, Jennifer, the children, and Jennifer's boyfriend were all staying in a room that Jennifer rented in a house in Oceanside. Jennifer was aware that other residents of the house were using drugs. She told Pasco that she first used drugs when she was 16 years old and had used marijuana and meth. She had last used meth in June 2013 and was currently clean. However, she wanted to get into "rehab." When asked why, she said she just wanted to "get away from everything" and that she "need[ed] help." She told Pasco that she had no one to blame but herself for Rafael's being outside unattended.

A criminal protective order protecting Jennifer from the father was issued in March 2013 as a result of domestic violence in their relationship. Jennifer admitted there was mutual physical violence between her and the father. She had not participated in

anger management or domestic violence treatment. She and the father and the children had lived in the paternal grandparents' house for over two years. According to Jennifer, the paternal grandfather "kicked them out with the children because of all the fighting." The paternal grandmother told an Agency social worker that Jennifer and the father fought a lot while they were living in her home. She said that the grandfather obtained a restraining order against the father and kicked him out of the home, and Jennifer left two weeks later.

Pasco interviewed the father over the telephone because the father was incarcerated. The father said he had been arrested twice—once for domestic violence against Jennifer and later for possession of drugs. He explained that he was incarcerated because his drug charges were pending and he had refused to attend court hearings. He said he was on probation but denied being convicted of anything. He admitted there had been mutual arguing and domestic violence between him and Jennifer, but it had not occurred in front of the children and the children had never been hurt by it. The father had not completed any domestic violence classes although he was "supposed to," and he had not participated in anger management. He acknowledged that there was a protective order against him. He said the only drug he had ever used was marijuana, and he had not used it since he was 18.

At the jurisdiction and disposition hearing, the court sustained the petitions and made a true finding on each of the counts by clear and convincing evidence. The court declared the children to be dependents of the court and ordered them removed from parental custody and placed in the approved home of a relative. The court ordered the

Agency to provide the parents reunification services and ordered the parents to comply with those services. The court found that the parents had been advised that because the children were under three years of age or a member of a sibling group described in section 361.5, subdivision (a)(3) when they were removed from parental care, the court could limit the parents "to six months to participate regularly and make substantive progress in court-ordered treatment programs and to cooperate with or use department services provided by [the] Agency, or parental rights could be terminated and a permanent plan made for the children for adoption, legal guardianship, or another planned permanent living arrangement."

The Agency's status review report for the six-month review hearing stated that the father had not visited the children or participated in any reunification services. His current whereabouts were unknown. Jennifer's current contact information was unknown until April 24, 2014, when the social worker contacted her and discovered she was living with her brother and was pregnant with her current boyfriend. Jennifer had visited the children only seven times during the reporting period and was not participating in reunification services. She was unemployed, and her contact with the Agency had been limited and sporadic.

The children's caregiver reported that when Jennifer missed a visit with the children, Rafael responded by acting out. He was reluctant to go to the next visit and had to be convinced by being promised he could play with toys at the visit. Abel was less affected by Jennifer's missed visits. The visitation facility where the visits were to occur

cancelled Jennifer's visitation services in January 2014 after she missed a third visit without providing 24-hour notice.

Jennifer failed to show up for a drug treatment program that she was scheduled to begin on October 7, 2013. She reported that she attended that program for about a week and then transferred to another program in November 2013. In January 2014, Jennifer told a social worker that she had gone to Tijuana, Mexico, to stay with her father because she was homeless. Jennifer had not been engaged in substance abuse treatment since mid-January 2014, but she provided the Agency a negative drug screening on February 26, 2014, and had also tested clean on November 11, 2013.

The Agency reported that the children were thriving in the home of their relative caregivers, who were providing a loving and nurturing environment. The children felt at home and were adequately supervised there. They had lived most of their lives with the caregivers or with their paternal grandparents, who had shared care giving responsibilities in the past. The paternal grandmother still occasionally helped to care for the children in the caregivers' home.

The Agency's assessment was that both parents' lives were "marked with instability, issues of substance abuse, and a lack of parenting skills." The Agency concluded that despite being aware of the "mandated timelines in this case[,] the parents had "not cooperated with a plan of reunification with their children and it would be detrimental to return the children to either parent's care." Thus, the Agency recommended that the court terminate reunification services and set a section 366.26 hearing.

At the contested six-month review hearing on June 11, 2014, the parties stipulated that Jennifer would testify that she was referred to a substance abuse treatment program on May 12, 2014, and was deemed ineligible for inpatient treatment but was accepted into an outpatient program, which she began on May 27; she had been participating in the "Community Services for Families" program since June 6; and she had provided the social worker with signatures for 12-step meetings in the last few weeks. The court found by clear and convincing evidence that return of the children to parental custody would create a substantial risk of detriment to their physical and emotional well-being, and there was not a substantial probability that the children would be returned to the custody of a parent within the next six months. The court found the father had not made substantive progress with his case plan and Jennifer was "just starting to make progress with her case plan." The court terminated the parents' reunification services and set a section 366.26 hearing for October 9, 2014.

The Agency's report for the section 366.26 hearing was prepared by social worker Jaimi Martin and filed in September 2014. Martin reported that the children were placed with their paternal aunt and uncle and had been living with them since September 17, 2013. Jennifer had her first visit with the children on October 4, 2013, and was attentive and appropriate during the visit. Social worker Pasco called Jennifer three times between October 11 and 16 to arrange more visits. Jennifer returned his call on October 18 and scheduled a visit for that day, but she did not attend the visit.

Jennifer attended 16 one-hour visits with the children between October 25, 2013 and June 24, 2014. She arrived late to seven of those visits and early to two of them. She

did not visit during the month of February because she was living in Tijuana with her father and having financial difficulty. During her visits, she was attentive and affectionate toward the children and Rafael referred to her as "Jen[n]ifer mama." He greeted her at each visit and separated from her by spitting on her or refusing to hold her hand. Abel engaged less with her.

Martin was assigned to the case in July 2014 and attempted to call Jennifer on July 17. A man answered the phone and Martin heard Jennifer say, "Tell her I'm busy." The man told Martin that Jennifer was not available and would call her back later. On July 24, Martin sent Jennifer a letter to inform her that her visitation would be changing and she would need to contact Martin to arrange future visits. After several attempts, Martin contacted Jennifer on August 5, 2014, and scheduled a visit for August 12.

At the August 12 visit, the children hugged Jennifer and then climbed and played on a concrete wall while Jennifer rocked her three-week-old baby boy. Jennifer asked the children to come sit with her. Rafael returned to Jennifer for a few minutes and then went back to playing on the wall. Abel sat next to Jennifer but did not touch or look at her. When Jennifer offered the children a snack, Rafael said, "We can go now. Where is my mom?" Jennifer responded, "*I am your mother.*" Rafael did not respond. He later said to Jennifer several times, "You can go now." Rafael sometimes referred to Jennifer as "Yenifer" and sometimes as "mom." On his way home from the visit he asked Martin, "Will we be seeing my mom now?" When Martin asked whom he was referring to, Rafael said, "The one at home. Do you promise me that I will see that mom? I want to see that mom."

The children appeared to be more comfortable with Jennifer at the next visit on August 26, 2014. They sat beside her or on her lap, touched her, and initiated play with her. They spent most of the visit watching cartoons on her phone and became upset when she attempted to redirect their attention. They demanded to continue to watching cartoons and she acquiesced, stating she would not know how to handle an outburst. Rafael referred to Jennifer as "mom" and "Jaimi." Martin reminded Rafael that Jaimi was Martin's name, but Rafael continued to call Jennifer "Jaimi." When the children's caregiver aunt arrived, the children ran up to her and hugged her. They called the caregiver "mom" and asked her to take them with her. Martin told the children that she (Martin) would be taking them back to school. After the visit the children asked to see their "mom." When Martin asked which mother, one of the children yelled the caregiver's name.

Jennifer had visited the children every Tuesday for one hour since August 12, 2014. Martin reported that the children struggled with knowing what to call Jennifer. During a visit on September 16, 2014, Rafael referred to Jennifer variously as "teacher," "Jen[n]ifer," and "friend." Martin reported that the children had progressed from being cautious and keeping "their distances" from Jennifer to becoming more physical with her. At the end of each visit, Rafael continued to ask to be returned to his "mother," referring to his aunt caregiver. Neither Jennifer nor the father called the caregiver to ask about the boys' health and well-being.

Martin reported that although the children enjoyed watching cartoons, eating snacks, and playing with Jennifer, they had stated and shown that they want to be with

their relative caregivers. Martin specified adoption as the preferred plan for the children "due to it being the most stable plan and the children have a strong bond [with] their relative caregiver as demonstrated by their actions and statements." She concluded that "[a]ny potential relationship Rafael and Abel have with their parents [does] not outweigh the benefits of what they would have if they were adopted by their relative caregivers." The Agency recommended termination of parental rights.

At a hearing on October 9, 2014, the court set a contested section 366.26 hearing for December 11, 2014, and directed that any section "388 motions" were to be filed and served no later than November 6, 2014. The court set November 20, 2014, as the initial hearing date for section 388 motions. On November 20, the court granted Jennifer's request for a continuance of the time to file a section 388 motion and ordered that any section 388 motions were to be filed and served by December 4, 2014. The court set the initial hearing on the motions for December 11, "to coincide with the [section 366.26 hearing]."

In an addendum report filed on December 3, 2014, the Agency continued to recommend termination of parental rights. Jennifer's drug abuse treatment counselor told Martin that Jennifer had been in a three-step program since May 27, 2014, and had just started her first step. When asked if being on step one was appropriate given that Jennifer had been in the program for five months, the counselor stated, "No, we are a six[-]month program. We will also be giving her an extra month." All of Jennifer's drug test results had been negative since Jennifer started treatment. However, the counselor reported that she had to place Jennifer on three behavioral contracts and that Jennifer was

in jeopardy of being disqualified from the program because she had not submitted proof of attendance for group meetings and had left prior to a drug test. Jennifer was being asked to attend three meetings per week, but had poor attendance in August and had "missed some meetings last week." Jennifer told Martin that she was having difficulty attending her treatment program due to lack of money for transportation. On November 17, 2014, Jennifer's counselor reported that Jennifer continued to do well but continued to miss group meetings. The counselor stated, "It's so important to attend group while you have this support[.] [S]oon she won't and she needs to have this foundation and be able to maintain this routine after she leaves."

Jennifer continued to visit the children, and had attended every visit offered to her from August 12 to November 25, 2014. The visitation center where Jennifer began to visit the children in October reported that Jennifer and the children had positive visits together. Jennifer asked to attend any medical or dental visits the children may have. The children's caregiver reported that they currently had no appointments.

During a visit on November 25, 2014, while Jennifer was changing her infant son's diaper the visitation monitor asked if she would also change Abel's diaper. Jennifer asked, "He is not potty trained yet?" When she was informed that Abel was not potty trained, she changed his diaper. Jennifer interacted with all three boys during the visit. She and Rafael and Abel played with blocks and she praised their building efforts. Rafael and Abel requested that their "mom" look at what they made. Jennifer held Abel when he became upset and gave him kisses. At one point Abel fell and immediately looked up at the monitor and Martin. He rubbed his knee and looked like he was about to

cry. Martin and the monitor asked if he was okay, and he continued to look at them. Jennifer went to him and held him.

The caregiver reported that the father (her brother) had been released from jail a "few weeks ago" and was working full time. She said he was in classes and was doing everything he could to get his children back. When Martin asked her when the children last saw the father, she responded that she did not know. Martin had never spoken to the father and no visits between him and the children had been arranged.

The father filed a section 388 motion or petition on December 2, 2014, seeking reinstatement of reunification services. The father alleged that he was living with his parents, had stable employment, and was enrolled in a domestic violence program. He also alleged that he had obtained his driver's license and was seeking consistent visitation and phone calls with the children.

Jennifer filed a section 388 petition on December 9, 2014, seeking the return of the children to her custody or reinstatement of reunification services. As changed circumstances, she alleged that she was participating in outpatient treatment and that she had a sponsor and was attending meetings. She was doing so well that when she had her new baby in July, the Agency assessed her and the child and elected not to remove the child or offer her voluntary services. She was working, participating in treatment, and caring for her infant son without the assistance of the Agency. Jennifer attached the Agency's December 3, 2014, addendum report to her petition.

Jennifer also attached a letter to her section 388 petition in which she stated that she had turned her life around for the better and made meaningful changes. Losing her

children had opened her eyes and made her realize that she "wasn't okay." She stated that she had been attending parenting classes for two hours a week and was about to complete them. She had a reliable sponsor whom she talked to every week and was working with on completing her "steps," and she would be completing her substance abuse program that month. Jennifer had become "really close" to a church, and was attending bible study and church services twice a week. She wrote: "God and my children are my motivation. I have full custody of my new baby and believe to be a good mother to him. It was hard getting by with two children with no help. But now I have a support system and know that there's a way out without having to rely on negative things."

The pastor of Jennifer's church submitted a letter in which he stated: "Jennifer had made some mistakes in the past and due to those mistakes she finds herself struggling now in the present. In the midst of his [*sic*] trials she maintains a positive attitude towards life, she attributes her strength to Jesus Christ, she is receiving bible studies, and she is ready to be baptized. [¶] We can see how God has changed Jennifer's life, now she displays a high degree of integrity and responsibility; she is a special person, loving mother. [¶] On behalf of her church family and friends, we ask of you to be lenient with her, take [into] consideration the future of her and her family."

In a second addendum report filed on December 11, 2014, Martin stated that the children continued to be confused as to how to address Jennifer. Jennifer continued to be affectionate toward the children and they appeared to be feeling more comfortable with her and were following her directions. The caregiver reported that Jennifer called the children once a week but would "miss a week here and there." The caregiver said that the

children were "sorta glad about it, but I think they just like holding the phone. They get bored and then go play." The children did not ask for Jennifer between visits.

Jennifer's substance abuse counselor reported that Jennifer's drug test results continued to be negative and that Jennifer was doing well "overall," but "could be participating more in groups." The counselor reported that Jennifer was requested to attend three meetings outside the program and that doing so was an ongoing struggle for Jennifer. Martin stated that "six months of sobriety does not prove that [Jennifer's] behaviors are fully changed."

The caregivers reported that they wanted to adopt the children. They said that "[a]s long as [the children's] parents are doing what they need to do, and are being respectful with us and the boys, they (the parents) can always be a part of the kids' [lives]." Martin concluded that "[a]doption for [the children] . . . outweigh[s] any potential relationship they may have with their biological parents[,] especially when considering the relationship and attachment they have with their current caregivers."⁵ The Agency continued to recommend termination of parental rights.

Contested section 366.26 hearing and hearing on section 388 petitions

At the contested hearing on December 11, 2014, the court denied the father's section 388 petition on the ground he had not carried his burden of showing it would be in the children's best interests to, in the court's words, "delay permanency and set a

⁵ Presumably through inadvertence, Martin stated the opposite of what she meant, writing that "[a]doption for [the children] *does not* outweigh any potential relationship they may have with their biological parents" (Italics added.)

review date and offer reunification services." The court granted Jennifer an evidentiary hearing on her section 388 petition and received into evidence Jennifer's petition; a letter from her drug abuse treatment counselor; the letter from her pastor; an October 2014 letter from a parent educator stating that Jennifer was enrolled in a court-approved parenting course; Jennifer's letter to the court; the Agency's report for the section 366.26 hearing filed in September 2014 and addendum reports filed on December 3 and December 11, 2014; and Martin's curriculum vitae.

After hearing testimony from Jennifer and argument from counsel, the court denied Jennifer's section 388 petition based on its findings that Jennifer had not carried her burden of showing a sufficient change of circumstances to warrant granting the petition, and that it would not be in the children's best interests to return them to Jennifer's custody and extend reunification services.⁶ The court then immediately proceeded to the section 366.26 hearing and received into evidence the same Agency reports it had received in the hearing on Jennifer's section 388 petition. The parties stipulated that the court could also consider the other evidence received in the section 388 hearing. After hearing testimony from the father and argument from counsel on the section 366.26 issues, the court found by clear and convincing evidence that the children were likely to be adopted and that none of the circumstances specified in section 366.26, subdivision (c)(1)(B) that would make termination of parental rights detrimental to them

⁶ The court orally stated its finding "that even if it were determined that there was change in circumstance established, that it would . . . not be in the best interests of the children at this time to grant relief of return of custody to [Jennifer], or to extend the reunification periods."

existed. The court terminated parental rights and referred the children to the Agency for adoptive placement.

DISCUSSION

I. *Section 388 Petition*

Jennifer contends the court should have granted her section 388 petition because she met her burden of showing that her circumstances had changed and returning the children to her would be in their best interests. Section 388 provides that, "[a]ny parent or other person having an interest in a child who is a dependent child of the juvenile court . . . may, upon grounds of change of circumstance or new evidence, petition the court in the same action in which the child was found to be a dependent child of the juvenile court . . . for a hearing to change, modify, or set aside any order of court previously made or to terminate the jurisdiction of the court."

In ruling on a section 388 petition, the court must consider whether the requested relief is in the child's best interests. (*In re Jasmon O.* (1994) 8 Cal.4th 398, 415.) We review the juvenile court's determination for an abuse of discretion and will not disturb that determination " ' 'unless the trial court has exceeded the limits of legal discretion by making an arbitrary, capricious, or patently absurd determination [citations]." ' ' (*In re Stephanie M.* (1994) 7 Cal.4th 295, 318.)

In deciding whether a denial of a section 388 petition was an abuse of discretion, we bear in mind that after the termination of reunification services, a parent's "interest in the care, custody and companionship of the child [is] 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 interests of the child." (*In re Stephanie M.*, *supra*, 7 Cal.4th at p. 317.) Accordingly, "[t]he court need not continue to consider the issue of reunification at the section 366.26 hearing. The burden thereafter is on the parent to prove changed circumstances pursuant to section 388 to revive the reunification issue." (*In re Marilyn H.* (1993) 5 Cal.4th 295, 309.)

In considering the merits of section 388 petitions on the ground of changed circumstances, courts distinguish between *changed* circumstances and merely *changing* circumstances. (*In re Casey D.* (1999) 70 Cal.App.4th 38, 47, 49.) Granting such petition results in delay of "the selection of a permanent home for a child to see if a parent, who has repeatedly failed to reunify with the child, might be able to reunify at some future point" (*Id.* at p. 47.) To grant such a petition on a showing of merely changing circumstances "does not promote stability for the child or the child's best interests. [Citation.] " "[C]hildhood does not wait for the parent to become adequate." " (*Ibid.*)

Although we review the court's decision on a section 388 petition for abuse of discretion, the practical differences between this standard of review and the substantial evidence standard are not significant. (*In re Jasmine D.* (2000) 78 Cal.App.4th 1339, 1351.) " [E]valuating the factual basis for an exercise of discretion is similar to analyzing the sufficiency of the evidence for the ruling. . . . Broad deference must be shown to the trial judge. The reviewing court should interfere only " 'if [it] find[s] that under all the evidence, viewed most favorably in support of the trial court's action, no

judge could reasonably have made the order that he did.' . . ." ' " (*Ibid.*) In other words, there is no abuse of discretion when the factual findings underlying the court's exercise of discretion are supported by substantial evidence. (See *People v. Cluff* (2001) 87 Cal.App.4th 991, 998 ["A trial court abuses its discretion when the factual findings critical to its decision find no support in the evidence."]; *Johns v. City of Los Angeles* (1978) 78 Cal.App.3d 983, 990 [abuse of discretion to order a new trial based on juror misconduct if no substantial evidence supports a finding of bias]; *West v. Lind* (1960) 186 Cal.App.2d 563, 566 [discretion to order preliminary injunction upheld if factual determinations are supported by substantial evidence]; *In re John F.* (1994) 27 Cal.App.4th 1365, 1375-1376 [petitioner's burden on section 388 petition is to show by a preponderance of the evidence that modification of the order promotes the child's best interests].)

The court's denial of Jennifer's section 388 petition was not an abuse of discretion because substantial evidence supports the court's findings that Jennifer's circumstances had not sufficiently changed and that the return of the children to her custody was not in the children's best interests. In its oral ruling, the juvenile court addressed Jennifer's progress in her drug abuse treatment program as follows: "[Jennifer], as much as she is trying, is still struggling. While her program manager does have laudator[y] comments about [Jennifer], there's also a degree of frustration. And it all centers around [Jennifer]'s compliance with the program rules and their requirements because it's only a six-month program. [Jennifer] was placed on three behavior contracts during the course of that treatment episode. [¶] And I think that's sort of a misnomer. It wasn't because of her

acting out or conduct, it was primarily because she wasn't doing her 12-step meetings, didn't turn them in on time, and I believe, because she missed one . . . drug testing session. [¶] But nonetheless, I think it shows that [Jennifer]'s still struggling, particularly, given the fact that [she]'s just recently completed step two at the very end of her program."

The court commended Jennifer for the effort she had put into her drug treatment program and the progress she had made. However, the court noted that "given [Jennifer]'s long-standing history with chemical dependency" and "the frustrations that are evident with the program manager and [Jennifer]'s compliance," it was difficult to determine whether her progress constituted "a substantial change in circumstance." The court concluded that in "the context of this case, that while [Jennifer] is participating in her [drug abuse] program and she is making progress in that program, it's not the type of substantive progress that would constitute change in circumstance given the nature and history of her addiction."

The court essentially found that Jennifer's circumstances were changing but had not changed. The evidence the court referenced sufficiently supports that finding. Martin's first addendum report noted that Jennifer had been in a six-month, three-step program for over five months (since May 27, 2014) and had just started her first step. Jennifer's counselor in the program told Martin that Jennifer had not made appropriate progress and would be given an extra month to complete the program. As the court noted, the counselor also reported that she had to place Jennifer on three behavioral contracts and that Jennifer was in jeopardy of being disqualified from the program

because she had not submitted proof of attendance for group meetings and had left prior to a drug test. The counselor later reported that Jennifer continued to miss group meetings, which the counselor believed were important to build the "foundation" Jennifer would need to "be able to maintain this routine after she leaves [the program]." Given Jennifer's history of drug abuse and her drug treatment counselor's concerns about her compliance and progress with her treatment program, the court could reasonably view Jennifer's sobriety as a work in progress that showed changing, but not changed, circumstances.

The court also reasonably found that it was not in the children's best interests to remove them from their current placement and return them to Jennifer or to reinstate Jennifer's reunification services and delay the section 366.26 hearing. The children were ages one and three when they were removed from Jennifer's custody and Jennifer's visitation with them was minimal during the first six months of the dependency case. By the time Jennifer began to visit consistently, the children had strongly bonded and developed a sense of security with their caregivers. The children had lived most of their lives with the caregivers or with their paternal grandparents, who still occasionally helped to care for the children in the caregivers' home. The children felt at home with their caregivers and were adequately supervised there. At the hearing on her section 388 petition, Jennifer testified that she was currently renting a room in a house that was not large enough for her, her new baby, and Rafael and Abel.

When Jennifer visited the children, they did not appear to regard her as a parent figure, as reflected by Rafael's confusion over what to call her. Rafael variously called

Jennifer "teacher," "Jen[n]ifer," "friend," and "Jaimi," and he asked on the way home from a visit with Jennifer to see his "mom." When asked which mom that he wanted to see, he said, "The one at home. Do you promise me that I will see that mom? I want to see that mom." When Abel fell and appeared to be about to cry, he looked up at Martin and the visitation monitor and not Jennifer.

Martin reported that any potential relationship the children may have with Jennifer or the father did not outweigh the benefit of adoption. In finding that granting Jennifer's section 388 petition would not be in the children's best interests, the court expressed the view that although Jennifer was doing well with the children in visitation and they were "beginning to warm up to her" and "recognize or remember who she is," Jennifer had "not established that she[had] attained a parenting role for the children that would warrant return of custody at this time." The court also expressed concern that adding then four-year-old Rafael and two-year-old Abel to Jennifer's care "would actually overload her right now. That it would overwhelm her. And she does simply not have the living arrangement that would be conducive to having the children returned."

Regarding Jennifer's request to reinstate reunification services, the court stated that "[g]iven the age of the children, it would not be . . . in their best interests[] to delay permanency for a period of three months, or slightly longer, and again reinstate reunification. In the court's judgment, [Jennifer] would need far longer than this next three months . . . to progress to the point where her own stability would be conducive to having the children returned." The evidence of the children's strong parental bond with their caregivers, the lack of a parent-child relationship with Jennifer, and Jennifer's lack

of a living arrangement that could accommodate her and three children sufficiently supports the court's finding that it was not in the children's best interests to return them to Jennifer's custody or to reinstate reunification services for Jennifer and delay a permanency hearing. The court did not abuse its discretion in denying the mother's section 388 petition.

II. *Termination of Parental Rights*

Jennifer contends the court erred in finding that the beneficial parent-child relationship exception of section 366.26, subdivision (c)(1)(B)(i) did not apply to preclude the termination of her parental rights. " 'At a permanency plan hearing, the court may order one of three alternatives: adoption, guardianship or long-term foster care. [Citation.] If the dependent child is adoptable, there is a strong preference for adoption over the alternative permanency plans.' [Citation.] 'Once the court determines the child is likely to be adopted, the burden shifts to the parent to show that termination of parental rights would be detrimental to the child under one of the exceptions listed in section 366.26, subdivision (c)(1). [Citations.] Section 366.26, subdivision (c)(1)(B)(i), provides an exception to termination of parental rights when "[t]he parents have maintained regular visitation and contact with the child and the child would benefit from continuing the relationship." ' " (*In re G.B.* (2014) 227 Cal.App.4th 1147, 1165.)

This court has interpreted "the 'benefit from continuing the [parent-child] relationship' exception to mean the relationship 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." (*In re Autumn H.* (1994) 27 Cal.App.4th 567, 575.)

"A parent asserting the parental benefit exception has the burden of establishing that exception by a preponderance of the evidence. [Citation.] It is not enough to show that the parent and child have a friendly and loving relationship. [Citation.] "Interaction between [a] natural parent and child will always confer some incidental benefit to the child" [Citation.] For the exception to apply, 'a *parental* relationship is necessary[.]' [Citation.] "While friendships are important, a child needs at least one parent. Where a biological parent . . . is incapable of functioning in that role, the child should be given every opportunity to bond with an individual who will assume the role of a parent." ' " (*In re J.C.* (2014) 226 Cal.App.4th 503, 529.)

The beneficial parent-child relationship exception must be determined on a case-by-case basis, taking into account the factors that affect the relationship between parent and child, including the child's age, the portion of the child's life spent in the parent's custody, and the child's particular needs. (*In re C.B.* (2010) 190 Cal.App.4th 102, 124.) The court's finding on the issue is reviewed under the substantial evidence rule. (*In re Autumn H., supra*, 27 Cal.App.4th at p. 576.) Under that rule "we must accept the evidence most favorable to the order as true and discard the unfavorable evidence as not

having sufficient verity to be accepted by the trier of fact." (*In re Casey D.*, *supra*, 70 Cal.App.4th at p. 53.)⁷

We conclude that Jennifer did not meet her burden of establishing that the beneficial relationship exception to termination of parental rights applies. The beneficial relationship exception requires the parent to have "maintained *regular visitation and contact with the child . . .*" (§ 366.26, subd. (c)(1)(B)(i), italics added.) In the eight-month period between October 25, 2013 and June 24, 2014, Jennifer attended 16 one-hour visits with the children, with a two-month gap of no visitation between January 17 and March 20, 2014. After a visit on June 24, Jennifer did not visit the children until August 12, 2014. The infrequency of Jennifer's visitation during the first 11 months of the dependency case obviously impeded her ability to establish a parent-child relationship with the children, especially given the children's very young ages when they were taken into protective custody. Although Jennifer visited the children more consistently after

⁷ The parties disagree on the proper standard of review regarding the beneficial relationship exception. The Court of Appeal in *In re J.C.* applied the substantial evidence standard of review to the factual issue of whether there was a beneficial parental relationship with the child, and the abuse of discretion standard to the determination of whether there is a compelling reason for finding that termination of parental rights would be detrimental to the child. (*In re J.C.*, *supra*, 226 Cal.App.4th at pp. 530-531.) The Agency argues that this "hybrid" standard of review is more appropriate than the substantial evidence standard. Jennifer argues that we should limit our review to the determination of whether there is substantial evidence in the record to support the court's findings, and that the hybrid standard used in *In re J.C.* is an incorrect application of section 366.26, subdivision (c)(1)(B)(i) because it requires a parent to prove a third element in addition to regular visitation and a beneficial relationship, the third element being a compelling reason to find termination would be detrimental. We need not take a position on this issue because the juvenile court in the present case did not find a beneficial parental relationship and therefore did not weigh whether such relationship was a compelling reason to choose a permanent plan other than adoption.

August 12, 2014, her visitation remained supervised and was limited to 1 two-hour visit per week at the time of the section 366.26 hearing.

Even assuming Jennifer satisfied the requirement of regular visitation and contact with the children,⁸ we conclude the juvenile court reasonably found that the beneficial parent-child relationship exception to termination of parental rights did not apply. Martin reported that Rafael continually appeared to be confused about how to address Jennifer, referring to her variously as "Jen[n]ifer," "Jaimi" (Martin's first name), "mom," and "teacher." Abel engaged with Jennifer less than Rafael did, and looked to the social worker and visitation monitor rather than Jennifer when he fell and hurt his knee. At the end of visits Rafael consistently asked to be returned to his "mom" or "mother," referring to the paternal aunt caregiver. When Jennifer offered him a snack at one visit, Rafael said, "We can go now. Where is my mom?" After Jennifer told him she was his mother, he said to her several times, "You can go now." The caregiver reported that the children did not ask for Jennifer between visits.

Martin further reported that although the children enjoyed watching cartoons, eating snacks, and playing with Jennifer, they had stated and shown that they want to be with their relative caregivers. Noting that Rafael was three years old and Abel was one year old when they were taken into protective care, Martin stated: "Today they consider their relative caregivers as 'mom' and 'dad.' [The children have] spent most of their lives

⁸ The court in its oral ruling stated: "[F]or the last four months, [Jennifer] has been consistent and regular in her contact and visits with the children. Prior to that, the visits were inconsistent."

living without their biological parents. They saw their mother once a week for less than an hour due to her lateness, and at times [Jennifer] failed to show for visits months at a time. Currently [Jennifer] is visiting more, however, the children have bonded to their relative caregivers and what potential parental relationship existed with [Jennifer] has faded." Martin concluded that any potential relationship the children might have with their parents did not outweigh the benefits of adoption by their relative caregivers.

The court was entitled to find Martin's opinion credible and to give great weight to her assessment. (*In re Casey D.*, *supra*, 70 Cal.App.4th at p. 53.) Based on Martin's reports regarding Jennifer's visitation with the children, the court could reasonably conclude that although the relationship between Jennifer and the children was positive and affectionate, it was not a parent-child relationship.

Further, as noted, the parent has the burden of proving that termination of parental rights would be detrimental to the child. (*In re Melvin A.* (2000) 82 Cal.App.4th 1243, 1252; *In re G.B.*, *supra*, 227 Cal.App.4th at p. 1165.) To overcome the preference for adoption and preclude termination of parental rights at a permanency planning hearing, the evidence must support a finding that "severing the natural parent[-]child relationship would deprive the child of a substantial, positive emotional attachment such that *the child would be greatly harmed . . .*" (*In re Autumn H.*, *supra*, 27 Cal.App.4th at p. 575, italics added.)

Even assuming Jennifer had a parental relationship with the children that provided some benefit to the children, the court could reasonably find, based on the evidence discussed above, that severing the relationship would not cause the children to be greatly

harm. The evidence showed that the children were secure and thriving in the care of their relative caregivers, whom they had known their entire lives. Martin reported that "[i]n addition to ensuring that [the children's] academic needs are met the caregivers have enriched their lives with extra-curricular activities such as sports." The children expressed eagerness to return to the caregivers' home after their visits with Jennifer and had come to know them as "mom" and "dad." In contrast, the children had spent most of their lives out of the care and custody of Jennifer and the father, and had not progressed from being cautious and keeping "their distances" from Jennifer to become more physical with her until the four-month period before the section 366.26 hearing. In its oral ruling the court noted that "[n]either of the two boys express any separation anxiety at the conclusion of visits, nor do they inquire of their mother in between visits."

The evidence in the record amply supports a finding that termination of Jennifer's parental rights would not cause the children to be greatly harmed, even if Jennifer occupied a parental role in their lives. Accordingly, substantial evidence supports the court's finding that there was not a parent-child relationship between Jennifer and the children that outweighed the benefits of adoption or, in the court's words, that "whatever benefit may have been conferred upon . . . the children by the contact each has had with . . . the parents is greatly outweighed by their need for stability in placement, which can only be achieved through adoptive placement." Jennifer has not shown that the court erred in terminating parental rights.

DISPOSITION

The orders denying the parents' section 388 petitions are affirmed. The orders selecting adoption as the permanent plan for the children and terminating parental rights are affirmed.

O'ROURKE, J.

WE CONCUR:

HUFFMAN, Acting P. J.

McDONALD, J.