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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

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

SAN DIEGO COUNTY HEALTH AND
HUMAN SERVICES AGENCY,

Plaintiff and Respondent,

v.

FAITH J.,

Defendant and Appellant.

D068473

(Super. Ct. No. J518830)

APPEAL from an order of the Superior Court of San Diego County, Kimberlee A.

Lagotta, Judge. Affirmed.

Cristina Gabrielidis, under appointment by the Court of Appeal, for Defendant and Appellant.

Thomas E. Montgomery, County Counsel, John E. Philips, Chief Deputy County Counsel, and Dana C. Shoffner, Senior Deputy County Counsel, for Plaintiff and Respondent.

Defendant and respondent Faith J. (mother) appeals from the juvenile court's order terminating her parental rights as to her son, R.C. (minor), who, when he was born in October 2013, tested positive for marijuana and opiates. On appeal, mother contends (1) the juvenile court abused its discretion in denying her Welfare and Institutions Code¹ section 388 petition, and (2) there is no substantial evidence in the record supporting the court's finding that the beneficial parent-child relationship exception did not apply. Affirmed.

FACTUAL AND PROCEDURAL BACKGROUND

At birth, minor weighed five pounds one ounce. He had some early difficulties with breathing and needed a feeding tube. Minor also was given methadone for his withdrawal symptoms. Mother reported that she did not know she was pregnant until she was about six months along and that her first prenatal medical visit took place about a week before minor was born.

Mother admitted to a San Diego Health and Human Services Agency (Agency) social worker that she had a history of intravenous heroin use. Mother initially told the Agency social worker she had not used heroin for about six or seven months. Mother also claimed she had not used marijuana for about two months. After the Agency social

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

worker informed mother that minor was going to be tested for the presence of drugs, mother admitted using heroin about three or four weeks before minor was born.

However, hospital personnel observed mother had multiple bruises and marks on her arms, indicative of possible heroin use. Mother tested positive for marijuana, which she claimed was the result of secondhand smoke.

Mother admitted to a history of depression, anxiety, and self-harm (i.e., cutting her arms and legs). About one year before minor was born, mother was hospitalized after attempting suicide by overdosing on her own mother's muscle relaxers. Mother reported she was able to stop self-harm and drug addiction on her own, with the support of her family. However, the record shows mother on November 6, 2013 failed to drug test as she had promised, after an Agency social worker told mother that a drug test "was very important and that a no show would be considered a dirty test." A few days later, mother admitted to an Agency social worker that she had used heroine after minor was released from the hospital and that if she drug tested, she would test "positive."

On November 8, 2013, Agency filed a petition, as amended (petition), on behalf of minor. The petition alleged under section 300, subdivision (b) that there was a substantial risk minor would suffer serious physical harm or illness as a result of his parents' failure or inability to supervise and protect him adequately as a result of their substance abuse and their failure to "engage[] in services to address their drug use,"

despite each parent's recognition of the "need for intensive substance abuse treatment."²

That same day, Agency obtained a protective custody warrant to secure minor in protective custody before the detention hearing.

The court at the November 12, 2013 detention hearing found Agency made a prima facie showing on the petition and detained minor in out-of-home care. As relevant to this appeal, the court ordered that visitation between mother and minor would be supervised and liberal; that mother not breast feed minor "until medically authorized to do so"; and that Agency would provide voluntary services to mother. The court set the jurisdiction and disposition hearing for December 3, 2013.

About two weeks before the December 3 hearing, mother reported she wanted to reunify with minor. On questioning by an Agency social worker, mother admitted she needed to "be in a program, get counseling, get a job, be stable, stay busy, get a schedule, visit [minor], and stay positive," or risk losing minor. Mother further reported she would begin daily outpatient drug treatment.

When asked about her drug history, mother reported that she began smoking "weed" when she was about 14 or 15; that about two years ago, she "got more into alcohol and Ecstasy" and also began using heroin "every now and again"; and that she used heroin after minor was released from the hospital. The Agency social worker noticed mother then "had several bruises along her arm," which mother claimed to be

² The record shows Matthew C., minor's presumptive father (father), tested positive on October 28, 2013 for "Acetylmorphine, Amphetamine, codeine, methamphetamine, morphine, and marijuana metabolite." Father is not a party to this appeal.

"scarring." When confronted by an admission to her drug counselor of her heroin use the day before the Agency interview, mother acknowledged that she "smoked" heroin the day before but that, in her view, "using" heroin meant intravenous heroin.

At the jurisdiction/disposition hearing, the court made a true finding on the petition, declared minor a dependent, and removed minor from mother's (and father's) custody. The court ordered that minor remain in the approved home of a relative; that Agency provide services to mother; and that mother participate in dependency drug court.

Mother entered an inpatient drug treatment program about a week after the jurisdiction/disposition hearing. Mother self-discharged from that program on December 28, 2013, after she admitted using methamphetamine earlier that same day. Mother failed to appear in drug court on January 14, January 21, January 28 and February 4, 2014 and, thus, was terminated from the program. In January 2014, mother overdosed on drugs.

In early February 2014, mother entered a year-long Christian-based drug treatment program called Phoenix Restoration Church (PRC) located in Phoenix, Arizona.³ Although mother received counseling for drugs and alcohol, domestic violence, and individual and group counseling, the PRC home supervisor, Marisela Canez, informed Agency that PRC did not use licensed counseling, but, instead, the counseling was done by either her or her husband, a pastor. In addition, Canez explained PRC did not drug

³ An Agency social worker spoke with a social worker in Arizona, who confirmed that PRC was recognized by the dependency court in Arizona as an approved substance abuse program.

test but that such testing could be arranged. Canez informed Agency that mother also was participating in parenting classes for one hour each week.

Mother submitted to two drug tests in March and April, 2014, both of which were negative. In late April 2014, mother submitted to an "on demand drug test," which also was negative. As a result of living in Phoenix, Arizona, mother's visits with minor were "limited," although an Agency social worker noted that mother had been making "reasonable" visitation efforts⁴ and that PRC had a home in El Centro where mother potentially could live and be closer to minor.

At the six-month review hearing on May 28, 2014, Agency recommended that mother (and father) receive further reunification services, noting that mother (but not father) had "made substantive progress with the provisions of the case plan" and that minor remain in his placement with relatives, where minor was thriving.

The court at the May 28 six-month review hearing granted mother's requests for a new order to drug court and additional reunification services. Pursuant to section 366.21, the court set the 12-month review hearing for December 1, 2014. Mother, however, failed to appear for all of her drug court hearings in June 2014 and, thus, was once again terminated from the program.

Following the May 28 hearing, mother and the social worker met with a substance abuse specialist, who recommended a long-term program called Casa de Milagros.

⁴ Mother visited minor on March 29, April 27, April 28, April 29 and April 30, 2014. Each visit lasted about four hours. Before moving to Arizona, mother visited minor about an hour one or two times per week.

Although mother attended (with father) the intake appointment at Casa de Milagros the following day, when a bed opened up a few days later, mother did not take it, explaining to the Agency social worker, " 'There's not a real reason that I couldn't make it that day.' " Mother denied relapsing.

When mother and an Agency social worker met on June 6, 2014, mother, in response to the request that she submit to an on-demand drug test, admitted she had relapsed on June 3, after drug court, and again on June 4, 2014. Mother tested positive on June 6 for amphetamine, methamphetamine and morphine.

Agency in its December 1, 2014 status report, in connection with the 12-month review hearing, recommended that reunification services be terminated for mother (and father) and that minor remain placed in the approved relatives' home. Agency noted that mother had been arrested on July 14, 2014 "by Immigrations/Customs Enforcement at the US/Mexican Border for possession of a controlled substance and transporting a controlled substance"; that after accepting a plea deal, mother was sentenced for transporting a controlled substance; that mother was serving her sentence at Las Colinas Detention and Reentry Facility (Las Colinas); and that her expected release date was April 15, 2015. On release, mother was slated to attend a nine-month program for substance abuse and spend another 18 months on probation.

While incarcerated, mother reported she obtained her GED and participated in various classes and meetings, including NA meetings and Co-Dependency Anonymous. Mother also was able to have one-hour supervised visits with minor twice a month. An

Agency social worker reported that these visits between mother and minor were "appropriate" and that mother was affectionate toward minor and engaged him in play. Mother reported she could not return to PRC because she had been "kicked out" of the program for a rule violation following the May 28 hearing.

Agency noted that similar to the first six months of services, mother had been unable to show that she was able to succeed in services in order to reunify with minor. Although mother had been "clean and sober" while detained in Las Colinas, Agency questioned whether she could remain sober on release. Noting that minor needed stability and permanence in his life and that neither his mother nor his father was able to provide such, Agency recommended the court terminate reunification services for mother (and father) and set a section 366.26 hearing.

The court at the December 1, 2014, 12-month review hearing set a contested hearing for January 16, 2015 regarding the issue of continued services. After considering the reports of Agency and the testimony of mother, the court at the January 16 hearing found that return of minor to the custody of either mother or father would "create a substantial risk of detriment to said child's physical and emotional well being by a preponderance of evidence"; that mother had "made minimal progress with the provisions of the case plan"; that there was not a "substantial probability" minor would be returned to the physical custody of either mother or father within the next six months; and that court-ordered reunification services were terminated as to both parents.

Agency in its May 11, 2015 section 366.26 report recommended that the parental rights of mother and father be terminated and that minor be found to be adoptable. The May 11 report noted that minor was "happy and energetic" and "look[ed] to his caregiver to meet his mental and physical needs"; that minor had lived in a confidential relative placement since November 2013; that minor "initiate[d] and [was] reciprocal with affection with his caregiver," as he "hugs and kisses her with no prompts or cues"; and that between May and July 2014, mother had no visits with minor, and, when those visits resumed, they consisted of one-hour visits twice a month. The May 11 report noted mother was released from custody on April 15, 2015 and was on probation for nine months to be "served in an inpatient drug treatment program."

An Agency social worker supervised four visits between mother and minor at Las Colinas in March and April 2015. During the visits on March 10 and March 17, it was noted that minor pushed mother away when she attempted to kiss or hug him and that he was "stiff and hesitant" to interact with mother including in play. In addition, during the March 17 and April 4 visits, minor pointed at the door and attempted to leave the room several times. During the April 7 and April 14 visits, minor began to cry upon entering the room. Although mother attempted to console minor during the April 7 and April 14 visits, minor on both occasions cried for 25 minutes, and, as such, both visits ended about 35 minutes early.

When all the visits with mother ended, the Agency social worker reported minor did not cry or appear to be in distress. In fact, the opposite was true: During the visits

with mother, minor was in distress, and, when those visits ended, minor regained "energy" and his tearfulness ended when he saw his caregiver. According to the Agency social worker, minor had difficulty engaging in and being affectionate with mother during the visits, in contrast to his behavior when he was with his caregiver. The Agency social worker characterized the relationship between mother and minor as similar to that of child and "baby sitter" and expressed concern that minor looked to the social worker for comfort and not mother, despite the fact the social worker had only contacted minor on four occasions.

The Agency social worker found minor was adoptable given he was then 16 months old and had no "major medical, developmental or mental health issues," despite being exposed to illicit drugs in utero. The Agency social worker reported that minor's then current caregiver wanted to adopt him and that there were 61 other possible families with an approved adoptive home study that were a potential match to adopt minor.

Agency in its June 29, 2015 addendum report reiterated its recommendation that the parental rights of mother (and father) be terminated and that minor be found an adoptable child. The same Agency social worker who had supervised the March and April 2015 visits also supervised three additional visits with minor and mother that took place in May and June 2015, while mother was an inpatient at a drug treatment transition facility. The social worker reported minor cried during each visit when mother entered the room.

During the May 13 visit, the record shows minor pushed mother's face away when she attempted to kiss minor. Minor engaged in "independent play" for most of that visit. In the visit on June 3, minor pushed away mother's hand when she attempted to pick up minor. After being picked up by mother, minor began crying and then vomited as he continued to cry. After engaging in independent play for about 25 minutes, minor again began to cry and pointed to the door. When mother attempted to console minor, minor shook his head and began to throw toys at, and hit, mother.

The record shows minor also vomited as he cried during the third visit with mother, which took place on June 23. During this visit, mother requested the caregiver join them to help console minor. Minor also attempted to "hit or slap" mother when she attempted to hug, kiss or reach for him. The Agency social worker characterized the relationship between minor and mother as "minimal."

Mother filed a section 388 petition on June 29, 2015 (388 petition), before the contested section 366.26 hearing. Mother sought an order to return minor to her care at the inpatient drug treatment transition facility and "maintenance services for the *family*." (Italics added.) In support of the 388 petition, mother argued her circumstances had changed because she had been released from custody, had been accepted into and living in a residential treatment facility since May 4, 2015, and was "making progress in her treatment." Mother further argued it was in minor's best interests to grant the 388 petition as it would promote "permanency and preservation of the family."

In opposing the 388 petition, Agency in its July 7, 2015 addendum report noted that mother then was in the very early stage of drug treatment; that such treatment typically took about six to nine months to complete; that it was then unknown how mother would remain sober after she left a controlled environment; that mother would then be tasked with securing a stable home, ensuring an income to support herself and finding ways to maintain her sobriety; and that minor had lived apart from mother since birth. Agency further noted that minor had known his caregiver since birth; that the caregiver had consistently worked with Agency to ensure all of minor's needs were met; that, unlike mother, the caregiver and minor had a strong bond and had developed a "healthy" and loving relationship; and that the caregiver wanted to adopt minor.

The court at the outset of the contested section 366.26 hearing found there was sufficient prima facie evidence to warrant an evidentiary hearing on mother's section 388 petition. Counsel agreed the evidence proffered at the section 366.26 contested hearing would also be considered in connection with the 388 petition.

Mother testified she was at a "very low state" both when she was pregnant with minor and when she was unsuccessful in the "reunification phase of this case." Commendably, mother admitted she "needed to go to jail" in order for her to realize she wanted a different life for herself and minor. Mother also admitted minor was not "too comfortable" during their visits, which she noted was "completely valid, the way [minor] feels . . . because [she] ha[sn't] been there for him." Given time, however, mother testified their relationship "could get better."

Mother testified she did not use drugs while incarcerated at Las Colinas; that she had been sober for over 11 months; and that she participated in many classes and programs that were offered in that facility. Mother stated that in connection with her inpatient treatment, she sees a therapist once a week; that she "program[s] there from 8:30 in the morning to 3:00 p.m."; that the inpatient facility has a child-development center onsite that offers parenting skills; and that some women living in the facility and participating in the program have their children living with them. Mother stated if minor was to live with her in the facility, he would be placed in the "toddler" program. At the conclusion of the inpatient program, mother stated she could continue to live at the recovery center. However, mother also had the option of moving (with minor) to Washington to live with her own mother.

Mother admitted that she was offered reunification services for a little over a year; that she did not make the progress she should have during that period of time; and that her sobriety was "pretty much forced" on her, given that she was in jail for nine months. Mother also admitted that she was in the "beginning" of the treatment program; that she had never before successfully completed a substance abuse program; that she left her last treatment program after about three months; and that her current program was a requirement of the terms of her probation. Mother also admitted she has never been in a position to parent minor, including meeting his day-to-day needs.

At the conclusion of mother's testimony, the court received into evidence the reports of Agency, as summarized *ante*, and other documentary evidence, including the

attachments to the 388 petition. After hearing closing argument, the court denied mother's 388 petition, finding mother had not shown by a preponderance of the evidence that there has been a change in circumstance warranting a change in the court's order.

In denying the 388 petition, the court commended mother for her sobriety and her efforts to remain sober, but it also noted that mother was at the very beginning of the inpatient treatment program and that the focus at this point in the proceedings was not on reunification but rather the permanence and stability of minor. The court noted minor had "been waiting. He's been waiting since birth for mom to resolve the issues that brought [minor] before this court." The court found that before being in custody, mother had at least seven months to, but chose not to, engage in services. As such, the court found mother's circumstances were "not changed" as required by section 388, but rather were "hopefully changing."

The court also found it was not in minor's best interests to place minor with mother for the reasons already given and because minor saw his current caregiver, but not mother, as his parent. The court also found minor had some "very serious reactions" during visits with mother, and, for this separate reason, it would not be in his best interest to remove minor from his caregiver and place him with mother.

After denying the 388 petition, the court next turned to section 366.26. The court found by clear and convincing evidence that Agency presented sufficient evidence to support a finding minor would be adopted if parental rights were terminated and that minor was both "specifically and generally adoptable," inasmuch as minor's current

caregiver wanted to adopt him and there were 61 possible families in San Diego County with approved home studies that also would be willing to adopt a child with minor's characteristics.

The court also found by clear and convincing evidence that there were no exceptions to adoptability, including the beneficial parent-child relationship exception. The court found that regardless of whether mother had "regular and consistent visits" with minor, the evidence showed there was no "parent/child bond" between mother and minor such that termination of mother's parental rights would be detrimental to minor. The court instead found that the relationship between mother and minor was similar to that of a relationship between a child and babysitter or between a child and a family friend and that minor instead looked to the caregiver as his parent.

The court also found the relationship between mother and minor did not outweigh the benefits of adoption, inasmuch as it was "very clear" from the evidence that minor "easily" separated from mother after their visits and that minor was "emotionally and physically distraught during the visits" with mother. Finally, the court found by clear and convincing evidence that it was in minor's best interests to be adopted. The court thus terminated mother's (and father's) parental rights and ordered a permanent plan of adoption.

DISCUSSION

I

Section 388 Petition

A. *Guiding principles*

Section 388 permits any person having an interest in the child to petition for a hearing to change, modify, or set aside any court order previously made on grounds of change of circumstance or new evidence. (*In re Lesly G.* (2008) 162 Cal.App.4th 904, 912.) To prevail, the petitioner must demonstrate by a preponderance of the evidence that new or changed circumstances warrant a change in the prior order and that changing the order will serve the child's best interests. (*In re S.J.* (2008) 167 Cal.App.4th 953, 959; *In re Daijah T.* (2000) 83 Cal.App.4th 666, 672.)

After an evidentiary hearing, such as what occurred in the instant case, we review the denial of a petition under section 388 for abuse of discretion. (*In re S.R.* (2009) 173 Cal.App.4th 864, 870; *In re B.D.* (2008) 159 Cal.App.4th 1218, 1228.) "The appropriate test for abuse of discretion is whether the trial court exceeded the bounds of reason. When two or more inferences can reasonably be deduced from the facts, the reviewing court has no authority to substitute its decision for that of the trial court." (*In re Stephanie M.* (1994) 7 Cal.4th 295, 318–319; see *In re I.W.* (2009) 180 Cal.App.4th 1517, 1527.)

Moreover, the best interests of the child are of paramount consideration when a modification petition is brought—as it was here—*after* termination of reunification

services. (*In re Stephanie M.*, *supra*, 7 Cal.4th at p. 317.) In assessing the best interests of the child at this juncture, as the court here correctly noted, we look not to the *parent's* interests in reunification but rather to the needs of the *child* for permanence and stability. (*In re Marilyn H.* (1993) 5 Cal.4th 295, 309.)

Thus, a "petition which alleges merely changing circumstances and would mean delaying 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, does not promote stability for the child or the child's best interests." (*In re Casey D.* (1999) 70 Cal.App.4th 38, 47.) "[W]hen a child has been placed in foster care because of parental neglect or incapacity, after an extended period of foster care, it is within the court's discretion to decide that a child's interest in stability has come to outweigh the natural parent's interest in the care, custody and companionship of the child." (*In re Jasmon O.* (1994) 8 Cal.4th 398, 419.)

Indeed, the "escape mechanism" (*In re Kimberly F.* (1997) 56 Cal.App.4th 519, 528) provided by section 388 after reunification efforts have ceased is only available when a parent has "*complete[d] a reformation*" before parental rights have been terminated. (*Ibid.*, italics added.) This is because, if a parent's circumstances have not changed sufficiently to permit placement of the child with that parent, reopening reunification "does not promote stability for the child or the child's best interests" when the child is otherwise adoptable. (*In re Casey D.*, *supra*, 70 Cal.App.4th at p. 47.)

B. *Analysis*

Here, there is ample evidence in the record to show the court properly exercised its discretion when it found mother was "hopefully changing" but had not yet changed, and when it found the proposed change in the court order—ordering minor to be placed with mother in her inpatient drug treatment facility and ordering "family maintenance services for the family"—was not in minor's best interests.⁵ (§ 388, subd. (a).)

Indeed, the record shows that at the time of her 388 petition: mother had been enrolled in an inpatient drug treatment program for about two months; mother was then in the beginning stages of said program; the inpatient part of the program lasted about six to nine months, depending on the person; mother had yet to complete successfully a drug treatment program, despite being enrolled in previous programs; mother's sobriety was "forced" on her, inasmuch as the record shows she was continually relapsing (and not being truthful with Agency social workers regarding such relapses) until she was incarcerated at Las Colinas for nine months and then was required to participate in the inpatient drug treatment program as a condition of her probation; and, before her

⁵ On appeal, mother for the first time suggests that, in connection with the petition, the juvenile court alternatively could have reinstated mother's reunification services and expanded visitation. We conclude mother forfeited this issue by failing to raise it in the 388 petition and/or at the hearing on that petition. (See *In re Dakota H.* (2005) 132 Cal.App.4th 212, 221-222 [noting "[f]orfeiture, also referred to as 'waiver,' applies in juvenile dependency litigation and is intended to prevent a party from standing by silently until the conclusion of the proceedings"].) In any event, based on the record in this case, we independently conclude mother was not entitled to such alternative relief, inasmuch as the focus of the proceedings was no longer reunification but rather minor's need for permanence and stability. (See *In re Marilyn H.*, *supra*, 5 Cal.4th at p. 309.)

incarceration for transportation of a controlled substance (i.e., methamphetamine), mother had a history of illicit drug use dating back to when she was about 14 or 15 years old, including most recently using heroin intravenously. While this court, like the juvenile court, commends mother on the steps she has taken to become and remain sober, under our standard of review the record shows the juvenile court's finding mother's circumstances were changing, but not yet changed, was based on ample evidence and was neither arbitrary nor capricious nor patently absurd. (See *In re Stephanie M.*, *supra*, 7 Cal.4th at p. 318.)

Moreover, even *if* we conclude the court abused its discretion when it found mother's circumstances were changing and not changed for purposes of section 388, we nonetheless would affirm the court's denial of her 388 petition because we also conclude mother failed to show that the relief requested in her 388 petition—placement of minor with her and initiation of family maintenance services—would be in his best interest. (See *In re Stephanie M.*, *supra*, 7 Cal.4th at p. 317 [noting the best interests of a child are of paramount consideration when a modification petition is brought *after* termination of reunification services].)

In addition to the evidence summarized *ante*, the record shows that at the time of the combined sections 388/366.26 hearing: minor had spent his entire life (i.e., about 18 months) in out-of-home care; there was a strong bond between minor and his caregiver, a paternal cousin; minor looked to the caregiver as his parent; the caregiver met all of minor's needs and expressed an interest in adopting minor in order to provide him with

stability, consistency, safety and a permanent home; and minor was thriving under the care of his caregiver.

In contrast, the record shows that: mother had never taken care of minor, bathed him, fed him or taken him to doctor's appointments; minor had never lived with mother; the relationship between minor and mother was minimal, and more like the relationship one would expect between a child and babysitter; minor strongly resisted visits with mother, including shortly before the combined hearing; and, during all of the visits in 2015, minor cried, resisted any sort of affection from mother, and easily separated when the visits ended (sometimes early, because of his behavior).

Based on this evidence, which is substantial, we thus conclude the court properly exercised its discretion when it found mother failed to satisfy her burden to show it was not in minor's best interests to continue living with his caregiver, who occupied the role of parent and who provided him consistency and permanency, and it was in his best interest to be placed with mother in family maintenance services. (See *In re Stephanie M.*, *supra*, 7 Cal.4th at p. 317; *In re Angel B.* (2002) 97 Cal.App.4th 454, 464.)

II

Section 366.26 and the Beneficial Parent-Child Relationship Exception

Mother contends there is insufficient evidence to support the court's finding that she did not meet her burden of showing a beneficial relationship with minor for purposes of the beneficial parent-child relationship exception to adoption. (See § 366.26, subd. (c)(1)(B)(i).)

As noted, when reunification services are terminated, such as in the instant case, the focus of a dependency proceeding shifts from preserving the family to promoting the best interest 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 section 366.26 hearing, the court has three options: (1) terminate parental rights and order adoption as the permanent plan, (2) appoint a legal guardian for the dependent child, or (3) order the child placed in long-term foster care. (*Ibid.*)

However, "[a]doption . . . is the permanent plan preferred by the Legislature." (*In re Autumn H.* (1994) 27 Cal.App.4th 567, 573.) Thus, "[i]f the child is adoptable, there is a strong preference for adoption over alternative permanency plans." (*In re Michael G.* (2012) 203 Cal.App.4th 580, 588.) All that is required to show a dependent child is adoptable is "clear and convincing evidence of the likelihood that adoption will be realized within a reasonable time." (*In re Zeth S.* (2003) 31 Cal.4th 396, 406; see § 366.26, subd. (c)(1).)

Here, as noted *ante*, the court at the section 366.26 hearing found by clear and convincing evidence that minor was likely to be adopted, which finding mother does not challenge on appeal. In any event, the record contains ample evidence supporting the finding that minor was both "specifically and generally adoptable," inasmuch as minor's current caregiver wanted to adopt him and there were 61 possible families in San Diego

County with approved home studies that also were willing to adopt a child with minor's characteristics.

Once the court found by clear and convincing evidence that minor was likely to be adopted within a reasonable time, it was required to terminate the parental rights of the parents and select adoption as the permanent plan unless mother showed that termination of her parental rights would be detrimental to minor, including, as she contends here, under the beneficial parent-child relationship exception set forth in section 366.26, subdivision (c)(1)(B)(i). (See *In re Michael G.*, *supra*, 203 Cal.App.4th at p. 589; *In re Erik P.* (2002) 104 Cal.App.4th 395, 401.)

Section 366.26, subdivision (c)(1)(B)(i) provides an exception to the adoption preference if the court finds a "compelling reason" for determining that termination of parental rights would be "detrimental" to the child because the "parents have maintained regular visitation and contact with the child and the child would benefit from continuing the relationship." The statutory phrase "benefit from continuing the relationship" has been interpreted to mean that the parent-child 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 re Autumn H.*, *supra*, 27 Cal.App.4th at p. 575.)

In determining whether the child would benefit from continuing the parent-child relationship for purposes of this exception, 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.*, *supra*, 27 Cal.App.4th at p. 575; accord, *In re Jason J.* (2009) 175 Cal.App.4th 922, 936.)

To meet the burden of establishing the applicability of the beneficial parent-child relationship exception, a parent must show more than frequent and loving contact, an emotional bond with the child, or pleasant visits. (*In re Derek W.* (1999) 73 Cal.App.4th 823, 827.) "Interaction between natural parent and child will always confer some incidental benefit to the child." (*In re Autumn H.*, *supra*, 27 Cal.App.4th at p. 575.)

Rather, the "parent must show he or she occupies a parental role in the child's life." (*In re C.F.* (2011) 193 Cal.App.4th 549, 555; see *In re Derek W.*, at p. 827.)

Thus, 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.

[Citation.] A child who has been adjudged a dependent of the juvenile court should not be deprived of an adoptive parent when the natural parent has maintained a relationship that may be beneficial to some degree, but that does not meet the child's need for a parent." (*In re Angel B.*, *supra*, 97 Cal.App.4th at p. 466, italics omitted; accord, *In re Marcelo B.* (2012) 209 Cal.App.4th 635, 643.)

On review of the sufficiency of the evidence to support a court's order terminating parental rights and freeing the parent's child for adoption, "we presume in favor of the order, considering the evidence in the light most favorable to the prevailing party, giving the prevailing party the benefit of every reasonable inference and resolving all conflicts in support of the order." (*In re Autumn H.*, *supra*, 27 Cal.App.4th at p. 576.) "We must affirm the juvenile court's rejection of any exception to termination of parental rights if the court's findings are supported by substantial evidence." (*In re Michael G.*, *supra*, 203 Cal.App.4th at p. 589.)⁶

"The appellate court does not reweigh the evidence, evaluate the credibility of witnesses or indulge in inferences contrary to the findings of the trial court. [Citations.] The substantial evidence standard of review is generally considered the most difficult standard of review to meet, as it should be, because it is not the function of the reviewing court to determine the facts." (*In re Michael G.*, *supra*, 203 Cal.App.4th at p. 589.)

In the instant case, we conclude mother has failed to show there was no substantial evidence in the record supporting the finding that the beneficial parent-child exception did not apply in this case. Indeed, as mother admitted during testimony in the contested

⁶ Agency urges us to adopt a hybrid standard of review, applying both the substantial evidence and abuse of discretion standards, as some courts have done. (See, e.g., *In re J.C.* (2014) 226 Cal.App.4th 503; *In re Bailey J.* (2010) 189 Cal.App.4th 1308.) As we have noted, however, there is little practical difference between the two standards. (See *In re Jasmine D.* (2000) 78 Cal.App.4th 1339, 1351 [recognizing the "practical differences between the two standards of review are not significant"].) In any event, we need not decide whether to apply the hybrid standard here because we note that the result would be the same regardless of whether we apply a hybrid or a substantial evidence standard in this case.

section 366.26 hearing, at no time since minor's birth in October 2013 has mother occupied a "parental role" in minor's life. (See *In re Andrea R.* (1999) 75 Cal.App.4th 1093, 1108–1109.) To the contrary, the record shows the relationship between mother and minor was "minimal," and was similar to that between a babysitter and a child.

Indeed, the record shows minor cried, pushed mother away, resisted her affection, and sought to terminate the visits (i.e., by pointing to the door and attempting to open the door) during four visits with mother at Las Colinas in March and April 2015. Two of those visits ended about 35 minutes early because minor would not stop crying and could not be consoled by mother. The record further shows when all such visits ended, minor was not in distress when he left mother.

The record further shows minor cried and pushed mother away when they visited in May and June 2015, while mother was living in the inpatient drug treatment facility. In two of those visits, minor became so upset he also vomited while crying. During these visits, minor also engaged in "independent play" and pushed mother away when she attempted to pick him up. Mother herself recognized minor was not comfortable during their visits, which commendably she found understandable because "she hadn't been there for him."

The record also shows that mother was in the early stage of drug treatment for heroin use among other drugs at the time of the section 366.26 contested hearing; that mother had struggled with alcohol and drug use since she was about 14 or 15 years old; that mother had yet to complete successfully a drug treatment program, despite enrolling

in such program(s) in the past; that she continued to use, and test positive for, drugs at the same time she was offered reunification services; that after receiving more than a year of reunification services, they were terminated in January 2015 after mother was arrested and incarcerated in July 2014 for transportation of a controlled substance (i.e., methamphetamine); and that sobriety was "forced" on mother as a result of her arrest and incarceration and as a result of the conditions of probation.

In contrast, the record shows at the time of the section 366.26 hearing minor had lived with, and been under the care of, his caregiver since birth; that minor looked to the caregiver as a parental figure; that the caregiver took care of minor's daily needs; that minor and the caregiver had developed a strong bond; and that minor was thriving in his placement with the caregiver, who also wanted to adopt minor.

Thus, when balancing 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" (*In re Autumn H.*, *supra*, 27 Cal.App.4th at p. 575), we conclude the record amply supports the court's finding that the beneficial parent-child exception did not apply in this case. (See *In re Clifton B.* (2000) 81 Cal.App.4th 415, 424 [noting the parental relationship must be more than " 'frequent and loving contact' " for the exception to adoption to apply].)

DISPOSITION

The order denying the section 388 petition and terminating the parental rights of mother is affirmed.

BENKE, Acting P. J.

WE CONCUR:

O'ROURKE, J.

IRION, J.