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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

In re EVAN A., a Person Coming Under  
the Juvenile Court Law.

D070332

IMPERIAL COUNTY DEPARTMENT  
OF SOCIAL SERVICES,

(Imperial County  
Super. Ct. No. JJP003383)

Plaintiff and Respondent,

v.

JESSIE A.,

Defendant and Appellant.

APPEAL from an order and judgment of the Superior Court of Imperial County,  
William D. Quan, Judge. Affirmed.

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

Katherine Turner, County Counsel, Haislip W. Hayes and Lisa Sanchez, Deputy  
County Counsel, for Plaintiff and Respondent.

Jessie A. appeals the juvenile court's order denying her petition for modification under Welfare and Institutions Code<sup>1</sup> section 388, in which she sought to modify a prior order bypassing family reunification services. She contends the court abused its discretion when it denied her petition because she had provided substantial evidence to establish a change of circumstances and granting her petition was in the best interest of her son, Evan A. Jessie further contends she was deprived of due process at the contested section 388 hearing when the court did not allow one of her witnesses to testify. Jessie also appeals the judgment terminating her parental rights, contending the court erred because the evidence showed Jessie had a beneficial parent-child relationship with Evan, pursuant to section 366.26, subdivision (c)(1)(B)(i), that outweighed any need for adoption.

We conclude the court did not err in denying Jessie's section 388 petition, in declining to hear one of Jessie's witnesses at the section 388 hearing, and in terminating Jessie's parental rights. Accordingly, we affirm the order denying Jessie's section 388 petition and the subsequent judgment.

## FACTUAL AND PROCEDURAL BACKGROUND

### *A. Removal and Detention*

In August 2015, when Evan was 18 months old, he was taken into protective custody after his caregiver contacted a social worker at the Imperial Department of Social Services (Department) and stated she could no longer care for Evan. The caregiver

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<sup>1</sup> All further statutory references are to the Welfare and Institutions Code.

further stated Jessie had appeared to be "high" when she left Evan and had a history of drug use. Shortly thereafter, a social worker interviewed Jessie, who admitted to using methamphetamine approximately four days earlier and having a seven-year history of substance abuse. Jessie described the longest period of time she had been able to remain sober as around 10 months. Jessie indicated she was currently homeless.

At the detention hearing in September 2015, the court sustained a section 300, subdivisions (b) and (g) petition against both parents and ordered Evan detained in foster care.<sup>2</sup> The court further ordered reunification services and supervised visitation for Jessie of two visits per week.

#### *B. Jurisdiction Hearing*

In November 2015 at the contested jurisdiction hearing, the court received the Department's detention jurisdiction report into evidence, overruled Jessie's objections as untimely filed, and heard the testimony of both of Evan's parents.<sup>3</sup> The Department had also submitted an addendum report, showing Jessie had recently tested positive for marijuana, methamphetamine and amphetamine. At the hearing, Jessie testified she had helped raise Evan, but had given her mother custody of him since he was one day old, until approximately six months prior, when he was left with a family friend to prevent social services from removing him from Jessie's mother's home. Jessie further testified

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<sup>2</sup> The petition alleged Jessie had failed to adequately supervise and care for Evan due to her chronic methamphetamine addiction pursuant to section 300, subdivision (b), and had left Evan without provision for support pursuant to section 300, subdivision (g).

<sup>3</sup> Because Evan's presumed father has not appealed, the facts relating to him and his testimony are not referenced herein other than to the extent they refer or relate to Jessie.

she had "pretty much" stopped using methamphetamine and was on the waiting list for a drug program. Jessie admitted she had previously completed an outpatient rehabilitation program when trying to retain custody of David Jr., Evan's older brother, but had abused drugs again after finishing the program.

The court found Evan's parents presented no evidence to indicate they had a plan for Evan's care. The court therefore concluded the allegations of the petition were true, determined that Evan was a person described under subdivisions (b) and (g) of section 300, and set the matter for a disposition hearing.

### *C. Disposition Hearing*

In December 2015 the juvenile court held a contested disposition hearing. The court admitted various documents into evidence, including the disposition report and a letter from a treatment counselor indicating Jessie had completed initial detoxification in late November 2015. In the disposition report the Department recommended that the court not provide family reunification services to Evan's parents. The report showed that David Jr. had been removed from Jessie in 2011 and in 2013, and Jessie was unable to regain custody after the second removal, despite being provided with services. The report further established that Jessie remained homeless and had not started any of the Department's recommended services, and Evan could not be placed with Jessie's mother because she had an open case with the Department. In addition, the report recommended a CASA volunteer be appointed to serve as Evan's educational rights holder (Evan was receiving speech therapy and preschool enrichment) because Jessie's involvement with Evan's education was "infrequent" and "not reliable."

At the hearing, a social worker testified that Jessie had regularly visited Evan twice per week since his case was initiated and had only missed visitation while in detoxification and during the week prior to it. She further testified that Jessie's visits with Evan went well, Evan appeared happy, Jessie acted like a mother around him and he seemed to act like her son. In addition, the social worker testified that Jessie had been referred to a parenting class, but had not enrolled, and had left the residential detoxification program after a few days to seek medical attention and had not returned.

Following the hearing, the court sustained the allegations under section 300, subdivisions (b) and (g) by clear and convincing evidence. The court explained it had presided over the proceedings involving David Jr. and recalled that the Department had made every effort to accommodate Jessie's needs in providing the appropriate services, but "she did not properly partake of those services." The court determined that each parent's progress toward remedying the causes necessitating placement was minimal and declined to order reunification services for either parent, pursuant to section 361.5, subdivision (b)(10), (13).<sup>4</sup> The court ordered that Evan be maintained in foster care, set the section 366.26 permanent plan hearing, and ordered reasonable visitation for Evan's parents, sibling and maternal grandmother.

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<sup>4</sup> Under section 361.5, subdivision (b)(10) and (13), the court need not provide services if the parent previously failed to reunify with the child's sibling and has not subsequently made a reasonable effort to treat the problems that led to the sibling's removal (subd. (b)(10)) or if the parent "has a history of extensive, abusive, and chronic use of drugs or alcohol" and has resisted court-ordered treatment for the problem within the three years before the petition was filed, or has not complied with an available drug or alcohol treatment program in their case plan on at least two prior occasions (subd. (b)(13)).

*D. Jessie's Section 388 Petition for Modification*

In May 2016, only two days before the section 366.25 hearing, Jessie filed a section 388 petition seeking reinstatement of reunification services. She alleged as changed circumstances that she had completed a parenting class, was attending drug treatment classes and counseling, had been sober since January 23, 2016, and had visited Evan every week. She asserted it was in Evan's best interest for the court to order reunification services because such services "would help to strengthen the bond that exists between Jessie and her son." As exhibits to her petition, she attached a detailed report from Mi Familia regarding a parenting class she had taken and a letter and status report from a substance abuse counselor reflecting her progress.

*E. Combined Contested Hearing on Jessie's Section 388 Petition and Contested Section 366.26 Hearing*

At the May 2016 combined contested hearing, the court requested an offer of proof from Jessie's counsel regarding her section 388 petition and considered argument and evidence relating to the petition (over the objection of counsel for the Department and for Evan), prior to addressing the section 366.26 issues.

*1. Contested hearing on the section 388 petition*

At the onset of the hearing, the court accepted Jessie's section 388 petition and the Department's response into evidence. In its response, the Department expressed concern with the recent nature of Jessie's progress in overcoming her drug use, noting that Jessie had a history of demonstrating progress that did not last, resulting in the loss of parental rights to her older son. The Department indicated that Jessie's improvements in parenting

alone were insufficient to provide stability to Evan, as Jessie had not yet completed the drug program and had not secured appropriate housing. The court heard the introductory statement of Jessie's counsel, in which he emphasized Jessie's improved parenting skills and her enrollment and committed participation in an outpatient drug treatment program with counseling. The court then heard the testimony of Bonnie Walter, a substance abuse counselor. According to Walter, Jessie had been in the program since March 28, 2016 (approximately 44 days). Walter described the program as an outpatient clinic with no drug testing and testified Jessie had "shown substantial progress" and had abstained from drugs since January 23, 2016, based on Jessie's self-report and Walter's observations of Jessie during the program sessions. Walter further testified Jessie was at least four months away from completing the program, but there was no way to determine Jessie's exact completion date due to the individualized nature of the program. On cross-examination, Walter acknowledged that there was "a long road ahead" of Jessie and she could be prone to relapse.

Following Walter's testimony, Jessie's counsel asked to present a witness from Mi Familia. The court inquired whether the witness would provide any testimony beyond that contained in the report attached to Jessie's section 388 petition and counsel stated the testimony would "pretty much" follow the report. The court then asked if there was any particular portion of the report that needed to be cleaned up and Jessie's counsel did not indicate that there was. The court declined to hear the witness, noting it had read the report.

After hearing closing argument from Jessie's counsel, the court explained Jessie had been denied reunification services due to her long-term substance abuse issues, and it had heard testimony to determine whether she would be able to complete the treatment program and potentially reunify with Evan. The court concluded that although the evidence showed Jessie was making "a great step forward," due to the short amount of time she had been in the treatment program it viewed her progress as "changing, not changed" circumstances. The court therefore denied Jessie's section 388 petition.

*2. Contested section 366.26 hearing*

For the section 366.26 portion of the hearing, the court accepted the Department's section 366.26 report into evidence. The report indicated, among other things, that Evan was bonding with his prospective adoptive parents (with whom he did not yet reside) and that he cried upon separating from them after visitation. In contrast, Evan had no problems separating from Jessie after visits with her and, although Jessie provided Evan with adequate attention during her visits, she was sometimes distracted, either communicating with her mother during the visits or making calls to service providers during the visitation period. The report further stated Evan's adoption would likely be finalized by November 2016. In addition, the report indicated Jessie's parental rights to David Jr. had been terminated in January 2016.

Following arguments of counsel, the court found there was clear and convincing evidence that Evan was adoptable. The court then considered whether Jessie had established by a preponderance of the evidence that the parental bond exception should

apply, and concluded that the evidence of her weekly or twice a week visits with Evan was insufficient to establish the parental bond exception.

The court therefore terminated parental rights and referred Evan to the Department for adoption.

Jessie timely appealed.

## DISCUSSION

### I. *THE COURT PROPERLY DENIED JESSIE'S SECTION 388 PETITION*

In her section 388 petition, Jessie argued the evidence showed a substantial change of circumstances, as she had completed a parenting class, was successfully participating in a drug treatment program, and had had weekly visits with Evan since the detention hearing. Jessie further asserted it was in Evan's best interest to maintain a relationship with her. We conclude the court acted within its lawful discretion in denying Jessie's section 388 petition.

#### A. *Applicable Legal Principles*

##### 1. *Section 388*

Under section 388, a parent may petition the court to modify a dependency order on the grounds of change of circumstance or new evidence. (§ 388, subd. (a)(1).)

"The petitioner has the burden of showing by a preponderance of the evidence (1) that there is new evidence or a change of circumstances and (2) that the proposed modification would be in the best interests of the child." (*In re Mickel O.* (2011) 197 Cal.App.4th 586, 615 (*Mickel O.*), italics omitted.) To satisfy the first prong, the petitioner must show changed, not changing, circumstances, which must be significant

enough to require modification of the prior order. (*Ibid.*) Granting such a petition on a showing of merely changing circumstances "does not promote stability for the child or the child's best interests." (*In re Casey D.* (1999) 70 Cal.App.4th 38, 47 (*Casey D.*))

When addiction is a primary factor in a child's removal from parental custody, the parent's recent sobriety is generally interpreted as reflecting "'changing,' not changed, circumstances" for the purposes of a section 388 petition. (*In re Ernesto R.* (2014) 230 Cal.App.4th 219, 223 [mother's completion of a drug treatment program was not a substantial change of circumstances in light of her chronic substance abuse problem, history of drug relapses, and the early stage of her recovery].)

For example, an appellate court concluded the juvenile court did not err in denying a mother's section 388 petition when the mother had an extensive history of drug abuse, had only been drug-free for five months, had not completed the requirements of her drug treatment program, and had a history of entering programs when required to and then relapsing, particularly in light of the young age of the child (16 months), who would be unable to protect herself in the event of a relapse. (*Casey D.*, *supra*, 70 Cal.App.4th at pp. 48–49 & see *In re Kimberly F.* (1997) 56 Cal.App.4th 519, 531, fn. 9 (*Kimberly F.*) ["It is the nature of addiction that one must be 'clean' for a much longer period than 120 days to show real reform."]; *In re Clifton B.* (2000) 81 Cal.App.4th 415, 423–424 (*Clifton B.*) [seven months of sobriety insufficient when father had a history of drug use including periodic short-term sobriety followed by relapse].)

Likewise, we previously concluded a mother did not establish changed circumstances to support her section 388 petition when she had a long history of drug

abuse, had lost custody of her other children as a result and had only been sober and in drug treatment for less than four months. (*In re Mary G.* (2007) 151 Cal.App.4th 184, 206 (*Mary G.*) ["Given the severity of [mother's] drug problem the court could reasonably find her sobriety between March and the date of the hearing, June 20, was not particularly compelling."].)

In contrast, an appellate court concluded a mother had established changed circumstances when she "had completed several parenting classes and had maintained her sobriety for over a year." (*In re J.C.* (2014) 226 Cal.App.4th 503, 523 (*J.C.*))

## 2. *Standard of review*

The determination on a section 388 petition is "committed to the sound discretion of the juvenile court, and the trial court's ruling should not be disturbed on appeal unless an abuse of discretion is clearly established." (*In re Stephanie M.* (1994) 7 Cal.4th 295, 318.) Consequently, the reviewing court will not disturb a trial court's " "decision unless the trial court has exceeded the limits of legal discretion by making an arbitrary, capricious, or patently absurd determination," " " or put another way, the trial court has exceeded the bounds of reason. (*Ibid.*) In addition, if two or more inferences can reasonably be deduced from the facts, we have no authority to substitute our decision for that of the trial court. (*Ibid.*) "It is rare that the denial of a section 388 motion merits reversal as an abuse of discretion . . . ." (*Kimberly F., supra*, 56 Cal.App.4th at p. 522.)

## B. *Analysis*

Here, the evidence supports the court's finding that Jessie's circumstances were changing but had not changed, within the meaning of section 388, and the court did not

abuse its discretion in denying Jessie's section 388 petition. As the court observed, Jessie's drug abuse was her most significant impediment in regaining custody of Evan.

At the time of the hearing, Jessie had a several-year history of drug use, had only been enrolled in a drug recovery program for 44 days, was at least four months away from completing the program, and had a history of relapsing after achieving temporary sobriety, which had resulted in the termination of her parental rights to David Jr. Jessie had also initially entered an inpatient treatment program following Evan's removal, but had stayed only a few days. In addition, the outpatient program Jessie later entered did not conduct drug testing, therefore the evidence of Jessie's sobriety was limited to her own self-reports and the drug counselor's observations during the few hours per week she met with Jesse. Even based on Jessie's self-report, she had only been sober for less than four months at the time of the hearing.

Jessie also identified her completion of a parenting class and increased parenting skills as changed circumstances. However, Jessie had previously completed a parenting class, and shown increases in her parenting skills, in her efforts to regain custody of David Jr., but was unable to maintain her sobriety. Although the court acknowledged Jessie's progress, it viewed the short duration of her efforts to maintain sobriety as an indication of changing, rather than changed, circumstances.

We agree. On her section 388 petition, Jessie bore the burden of changed circumstances, significant enough to require modification of the court's prior order. (*Mickel O.*, *supra*, 197 Cal.App.4th at p. 615.) Although no former addict can ever guarantee permanent sobriety, a continued period of sobriety may provide an indication

of changed circumstances. (See *J.C.*, *supra*, 226 Cal.App.4th at p. 523.) In contrast, a few months of sobriety, coupled with a history of relapse, reflects only changing, and not changed, circumstances. (See *Casey D.*, *supra*, 70 Cal.App.4th at pp. 48-49; *Clifton B.*, *supra*, 81 Cal.App.4th at pp. 423-424; *Mary G.*, *supra*, 151 Cal.App.4th at p. 206.)

Here, Jessie was less than four months sober, was several months away from completing her drug treatment program, had a seven-year history of drug abuse, including a history of relapse, and had been unable to maintain sobriety in order to regain custody of Evan's older brother. In addition, although Jessie was able to show improved parenting skills, her ability to parent while sober was not a primary factor in Evan's removal. Rather, his removal stemmed from Jessie's lack of stability and inability to care for Evan due to her methamphetamine use, and there is no indication that her improved parenting skills represent a significant change in these circumstances.

We conclude under these facts the court acted within its legal discretion in denying Jessie's petition because the evidence shows, at best, that her circumstances were merely changing, not changed.<sup>5</sup>

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<sup>5</sup> In light of our conclusion, we need not, and do not, address Jessie's claim the court erred in finding she had failed to show that reinstatement of reunification services would be in Evan's best interest.

## II. *THE COURT DID NOT ABUSE ITS DISCRETION IN LIMITING WITNESS TESTIMONY*

Jessie contends on appeal the court abused its discretion and denied Jessie her right to due process by not hearing testimony of one of Jessie's witnesses during the contested hearing on Jessie's section 388 petition. We disagree.

### A. *Applicable Legal Principles*

#### 1. *Due Process for a Section 388 hearing*

Rule 5.570(h) of the California Rules of Court governs the conduct of hearings on section 388 petitions.<sup>6</sup> (*In re E.S.* (2011) 196 Cal.App.4th 1329, 1339 (*E.S.*)). Pursuant to rule 5.570(h)(2), a section 388 petition hearing must be conducted in the same manner as a dispositional hearing if "[¶] (A) The request is for termination of court-ordered reunification services; or [¶] (B) There is a due process right to confront and cross-examine witnesses." (Rule 5.570(h)(2).) If neither provision applies, "proof may be by declaration and other documentary evidence, or by testimony, or both, at the discretion of the court." (*Ibid.*)

In conducting a section 388 hearing (388 hearing), the court must balance a parent's interest in regaining custody of the child "against the government's interest in serving the best interests of the [child] by resolving dependency matters expeditiously and allowing the juvenile court wide latitude to control dependency proceedings." (*In re Matthew P.* (1999) 71 Cal.App.4th 841, 851 (*Matthew P.*)). " 'A meaningful hearing requires an opportunity to examine evidence and cross-examine witnesses.' " (*Ibid.*) In

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<sup>6</sup> All further references to rules are to the California Rules of Court.

*Matthew P.*, we concluded the juvenile court abused its discretion in limiting the 388 hearing to declarations when its denial of the de facto parents' motion was based entirely on the content of disputed social services reports and the parents were given no opportunity to cross-examine the social workers or to testify to supplement their own declarations, which addressed only one of three reports. (*Ibid.*) Under such circumstances, we concluded the de facto parents were "denied an opportunity to be heard." (*Ibid.*)

Likewise, the Court of Appeal in *In re Clifton V.* (2001) 93 Cal.App.4th 1400, 1405 (*Clifton V.*) determined the juvenile court abused its discretion in refusing to hear testimony at a 388 hearing when "[t]here was a clear credibility contest between mother and the paternal grandmother, which the juvenile court resolved adversely to mother based solely on the parties' written submissions and argument of counsel." (*Ibid.*) The court concluded the mother was denied due process under those circumstances and should have been allowed to testify and permitted to cross-examine the grandmother and the social worker whose report the court relied on. (*Ibid.*)

However, the petitioning party is not necessarily entitled to a full evidentiary hearing. (*E.S., supra*, 196 Cal.App.4th at p. 1340.) "It is well recognized that due process is a flexible concept which depends upon the circumstances and a balancing of various facts." (*Ibid.*) For example, "[t]he due process right to present evidence is limited to relevant evidence of significant probative value to the issue before the court." (*In re Jeanette V.* (1998) 68 Cal.App.4th 811, 817 (*Jeanette V.*)).) Consequently, witness testimony may not always be required. (See *In re C.J.W.* (2007) 157 Cal.App.4th 1075,

1080–1081 [the juvenile court did not violate due process when it conducted a 388 hearing in which it received written evidence and heard substantial argument from counsel but did not allow testimony from the parents].)

### 3. *Standard of review*

We review the juvenile court's conduct of a 388 hearing for abuse of discretion. (See *Clifton V.*, *supra*, 93 Cal.App.4th at p. 1405.) However, a finding of abuse of discretion does not end our due process inquiry. We then consider whether the error was harmless beyond a reasonable doubt. (*In re Vanessa M.* (2006) 138 Cal.App.4th 1121, 1132.

### B. *Analysis*

In the present case, although the record is unclear regarding whether the court found that Jessie's section 388 petition established the required prima facie showing, it held a contested 388 hearing and heard testimony regarding Jessie's progress in overcoming her drug use. However, Jessie contends the court erred by not allowing an additional witness to testify about her progress in parenting classes. Jessie asserts witness testimony regarding the parenting classes was necessary to show her "perspective," and relevant to Jessie's mental changes regarding her approach to life and her substance abuse.

Under the governing rule, a court may exercise its discretion not to hear witness testimony on a section 388 petition if the petition does not request termination of court-ordered reunification services or violate a party's right to confront and cross-examine witnesses. (Rule 5.570(h)(2).) The first circumstance clearly does not apply to Jessie's

petition to overturn the court's bypass of reunification services. The second circumstance, the due process right to present a witness, has been interpreted as arising "where there is a contested hearing involving an issue of credibility." (*Clifton V.*, *supra*, 93 Cal.App.4th at p. 1405, citing *Matthew P.*, *supra*, 71 Cal.App.4th 841.)

For example, in *Clifton V.*, as described *ante*, the juvenile court abused its discretion when it was required to make a credibility determination regarding conflicting information presented by a mother and the paternal grandmother, but refused to let the mother testify or allow her to cross-examine the grandmother. (*Clifton V.*, *supra*, 93 Cal.App.4th at p. 1405.) Likewise, in *Matthew P.*, the parents were denied due process when the court's decision was based on contested social services reports and the parents were not allowed to cross-examine the social worker or to testify. (*Matthew P.*, *supra*, 71 Cal.App.4th at p. 851.) The circumstances of *Clifton V.* and *Matthew P.* are easily distinguishable from this case.

Here, the juvenile court declined to hear testimony of one witness, on the issue of Jessie's progress in parenting classes. The Department did not dispute Jessie's improvement in parenting skills from 2013, when she had completed a prior parenting class, and 2016, following completion of a second parenting class. However, the Department was not convinced that Jessie's enhanced parenting abilities would be sufficient to provide stability for Evan, when her progress in drug treatment was very recent, she had not yet completed the treatment program and she had been unable to establish an appropriate living situation.

Unlike the circumstances of *Clifton V.* and *Matthew P.*, Jessie has not identified any issue of credibility for which due process would require testimony. In considering whether to hear testimony, the court specifically asked Jessie's counsel if there was additional information the parenting witness could provide that was not in the report, or whether there was anything in the report that required clarification. Only when Jessie's counsel's was unable to identify information satisfying either criteria, did the court decide to proceed without further testimony. Jessie has failed to demonstrate that the parenting witness' testimony would have added any pertinent information to the issue of Jessie's changed circumstances or, put another way, that it was "relevant evidence of significant probative value to the issue before the court." (*Jeanette V.*, *supra*, 68 Cal.App.4th at p. 817.) We therefore conclude the hearing on Jessie's section 388 petition comported with due process.

Furthermore, even if Jessie had been denied due process, she cannot show the court's decision not to hear the parenting witness' testimony was anything other than harmless error. Jessie has presented no evidence that the witness would have provided any relevant information beyond that which the court had already considered in reviewing the parenting report. Even assuming a live witness could make a stronger case than a written report for Jessie's enthusiastic participation in the parenting classes and her enhanced parenting skills, such evidence would not have overcome the court's concern regarding Jessie's long history of substance abuse, her prior participation in programs followed by relapse and the short term of her recent sobriety. In light of these

circumstances, we cannot conclude the court's decision not to hear testimony of the parenting witness was harmful under any standard for prejudice.

### III. *THE COURT PROPERLY TERMINATED JESSIE'S PARENTAL RIGHTS*

Jessie contends the court erred in terminating her parental rights because she presented evidence that the beneficial relationship exception applied and the court therefore should have ordered a "lesser permanent plan" for Evan. We conclude substantial evidence supports the juvenile court's findings and it acted within its discretion in terminating Jessie's parental rights.

#### A. *Applicable Legal Principles*

##### 1. *Beneficial parent-child relationship exception*

At a section 366.26 hearing, the juvenile court establishes a permanent plan of care for a dependent child, which may include adoption, guardianship or long-term foster care. (*In re S.B.* (2008) 164 Cal.App.4th 289, 296-297; § 366.26, subs. (a), (b).) However, termination of parental rights and placement for adoption is the most preferred outcome. (§ 366.26, subd. (b)(1).) Therefore, following the hearing, "[i]f the court determines . . . by a clear and convincing standard, that it is likely the child will be adopted, the court shall terminate parental rights and order the child placed for adoption" unless a statutory exception to termination for adoption is applicable. (§ 366.26, subd. (c)(1).) The parent bears the burden of proving that one or more of the statutory exceptions applies by a preponderance of the evidence. (*In re Anthony B.* (2015) 239 Cal.App.4th 389, 395 (*Anthony B.*))

The statutory exception at issue here is the "beneficial relationship exception." The beneficial relationship exception applies when the juvenile court finds "a compelling reason for determining that termination would be detrimental to the child" due to the circumstance that "[t]he parents have maintained regular visitation and contact with the child and the child would benefit from continuing the relationship." (§ 366.26, subd. (c)(1)(B)(i).) Although a parent does not need to have day-to-day contact with the child for the beneficial relationship exception to apply (*Casey D.*, *supra*, 70 Cal.App.4th at p. 51), the parent-child relationship must play such a significant and compelling role in the child's life "that the benefit of preserving it outweighs the stability and benefits of adoption" (*Anthony B.*, *supra*, 239 Cal.App.4th at p. 396).

Therefore, it is not sufficient for a parent to merely establish that the parent and child have a friendly and loving relationship, as a natural parent's interaction with his or her child " "will always confer some incidental benefit to the child." " " (*J.C.*, *supra*, 226 Cal.App.4th at p. 529.) Rather, in determining whether to apply the exception, the court must "balance[] 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 (*Autumn H.*))

Among the variables to be considered in evaluating the benefits of a parental relationship are the age of the child, the amount of time spent in the parent's care,

whether the interactions are positive or negative, and whether the child has particular needs that the parent can best satisfy. (*In re Angel B.* (2002) 97 Cal.App.4th 454, 467-468 (*Angel B.*))

## 2. *Standard of review*

"We apply the substantial evidence standard of review to the factual issue of the existence of a beneficial parental relationship, and the abuse of discretion standard to the determination of whether there is a compelling reason for finding that termination would be detrimental to the child." (*Anthony B.*, *supra*, 239 Cal.App.4th at p. 395.) We do not reweigh the evidence, evaluate the credibility of witnesses or resolve evidentiary conflicts. (*Autumn H.*, *supra*, 27 Cal.App.4th at p. 576.) Moreover, "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." (*Ibid.*)

Jessie argues that cases (such as *Anthony B.*) applying a "composite" standard of review, which incorporates both the substantial evidence and abuse of discretion standards, are "wrongly decided" because they require a parent to establish a third non-statutory element, the existence of a compelling reason not to terminate parental rights. We disagree. As described above, the "compelling reason" language is included in section 366.26 to describe the nature of permissible exceptions. (§ 366.26, subd. (c)(1)(B).) Furthermore, characterizing the beneficial relationship exception as requiring a "compelling reason for finding that termination would be detrimental to the child," is merely a concise way of referring to the well-established balancing analysis a trial court

must apply to determine whether the parent child relationship is of sufficient benefit to overcome the presumption favoring adoption.<sup>7</sup> (See *Autumn H.*, *supra*, 27 Cal.App.4th at p. 575.) In any case, the practical differences between the substantial evidence and abuse of discretion standards of review as applied in this context are not significant. (*In re Jasmine D.* (2000) 78 Cal.App.4th 1339, 1351.)

### B. Analysis

Jessie does not contest the juvenile court's finding that Evan was likely to be adopted. Instead, she contends she established that the beneficial relationship exception applies and it would not be in Evan's best interest to terminate her parental rights. In considering the beneficial relationship exception, the court noted the frequency and consistency of Jessie's visits with Evan, but determined it had not been provided with sufficient evidence to conclude that the parental bond exception applied. To establish applicability of the beneficial relationship exception, Jessie was required to demonstrate, in addition to her regular visitation with Evan, that he would benefit more from a continuing relationship with her than from the stability and permanency of adoption. (*Anthony B.*, *supra*, 239 Cal.App.4th at p. 396.)

Jessie contends Evan has "a beneficial relationship with [her] that promote[s] his well-being to such a degree as to outweigh the benefits of adoption and warrant a plan of guardianship." Jessie notes she was involved with Evan "nearly all of his life," he was happy during her visits, had no issues when separating from Jessie and did not suffer any

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<sup>7</sup> Jessie acknowledges the applicability of the *Autumn H.* balancing test for assessing whether the beneficial relationship exception applies.

negative consequences before or after visitation with her. In addition, Jessie acted like a parent during the visits, was attentive to Evan and changed his diapers and Evan "seemed to be her son." Evan's presumed father testified that Jessie loved her children and was "a great mother."

Although Jessie appears to love Evan and has a relationship with him, substantial evidence supports the juvenile court's finding that her relationship with Evan was not a beneficial relationship within the meaning of the statutory exception to adoption. We begin with analysis of the various factors described in *Angel B.* (*Angel B.*, supra, 97 Cal.App.4th at pp. 467-468 [(1) the age of the child; (2) the amount of time spent in the parent's care; (3) whether the interactions are positive or negative; and (4) whether the child has particular needs that the parents can best satisfy].) First, Evan was only 18 months old when he was taken into protective custody. (See *id.* at p. 467 [two-year old child was "very young, too young to understand the concept of a biological parent"].) Second, Evan had spent the majority of his young life in the custody of either his maternal grandmother or a family friend, with Jessie visiting when her drug problems would allow. Third, although Evan was generally happy during Jessie's visits, she acted motherly toward him and he seemed to act like her son, Evan was described as a very friendly child who would come to almost anyone who approached him in a friendly manner. In addition, Jessie would sometimes use her two-hour visitation time with Evan for other purposes, such as talking to her mother and making calls to service providers. Evan did not express sadness when separating from Jessie. However, Evan had already begun forming bonds with his prospective adoptive parents, causing him to cry upon

separation from them following visits. Fourth, Evan requires speech therapy, and Jessie's involvement with Evan's education had been characterized as "infrequent" and "not reliable."

In summary, the evidence did not establish that Evan was so attached to Jessie he would be greatly harmed by termination of her parental rights. (*Autumn H., supra*, 27 Cal.App.4th at p. 575.) We conclude substantial evidence supports the juvenile court's determination that Jessie did not demonstrate the existence of a beneficial parental relationship. We further conclude the court did not abuse its discretion when it determined that Evan's need for a stable and permanent home outweighed any benefit Evan might receive from continuing his relationship with Jessie.

#### DISPOSITION

The order and judgment are affirmed.

NARES, Acting P. J.

WE CONCUR:

HALLER, J.

AARON, J.