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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

In re A.T. et al., Persons Coming Under the
Juvenile Court Law.

SAN BERNARDINO COUNTY
CHILDREN AND FAMILY SERVICES,

Plaintiff and Respondent,

v.

P.P. et al.,

Defendants and Appellants.

E055652

(Super.Ct.Nos. J230170 & J230171)

OPINION

APPEAL from the Superior Court of San Bernardino County. Gregory S. Tavill,
Judge. Affirmed.

Konrad S. Lee, under appointment by the Court of Appeal, for Defendant and
Appellant Father.

Donna P. Chirco, under appointment by the Court of Appeal, for Defendant and
Appellant Mother.

Jean-Rene Basle, County Counsel, and Dawn M. Messer, Deputy County Counsel,
for Plaintiff and Respondent.

I

INTRODUCTION

Mother and father (parents) separately appeal from an order terminating their parental rights to their three-year-old son, A.T. (born in 2009) and six-year-old daughter, M.T. (born in 2005). Parents contend the juvenile court erred in rejecting the beneficial relationship exception to adoption under Welfare and Institutions Code section 366.26, subdivision (c)(1)(B)(I).¹ Father also appeals an order denying his petition under section 388, seeking reinstatement of reunification services. He argues his circumstances have changed and it is in the children's best interests to grant his petition. We reject parents' contentions and affirm the judgment.

II

FACTS AND PROCEDURAL BACKGROUND

At the inception of the juvenile dependency proceedings, parents were living together but had never married. They had two biological children together, A.T. and M.T. During parents' relationship, father and another woman, R.M., had a child together, Rosalinda (born in 2007). Rosalinda lived with her mother, R.M., but visited father on weekends.

¹ Unless otherwise noted, all statutory references are to the Welfare and Institutions Code.

On Thanksgiving Day, November 26, 2009, father picked up Rosalinda from her mother's home at 7:00 a.m. At that time, Rosalinda was healthy, walking, talking, playing and had no problems. According to father, later that day, in the afternoon, M.T. told father, "Rosalinda is down." Father went to the bedroom and found Rosalinda on the floor, unresponsive. Father said he had last seen Rosalinda seven minutes before, and 45 minutes earlier had seen her running around and playing. At 1:30 p.m., father called 911. The paramedics transported Rosalinda to the hospital.

Rosalinda suffered multiple injuries, including a massive head injury, resulting in bleeding on the brain and left eye retinal damage. The forensic doctor reported that the injuries were due to blunt force trauma and were consistent with abusive head trauma. The injury was so severe that Rosalinda would have immediately been knocked unconscious. Rosalinda died two days later. The coroner deemed her death a homicide caused by "[t]raumatic brain injury."

Parents could not explain how Rosalinda was injured. Father gave inconsistent statements as to where he was when M.T. told him Rosalinda was on the floor. He initially said he was at his desk, and then said he was in the kitchen. Father also said mother was in their bedroom, changing A.T.'s diaper at the time. Mother told the police father was watching television with the children and she was taking a shower when she heard a bang or crack. Mother told father to check on the children and then saw father in the room with Rosalinda, who was unresponsive. About three months earlier, Rosalinda's mother, R.M., reported that Rosalinda had returned home from visiting father with bruises, which prompted her to file a police report. R.M. said she believed mother

hurt Rosalinda because, when R.M. was pregnant with Rosalinda, mother had threatened to harm R.M. and Rosalinda.

Detention Hearing

On November 27, 2009, A.T. and M.T. (the children) were placed in protective custody because of the high risk of physical harm. A.T. was nine months old and M.T. was four years old.² The San Bernardino County Children and Family Services (CFS) filed a juvenile dependency petition, alleging the children came within section 300, subdivisions (b) (failure to protect), (e) (severe physical abuse of a child under five), and (j) (abuse of a sibling). The petition alleged that parents failed to protect and supervise the children. Rosalinda allegedly had suffered severe physical harm inflicted nonaccidentally by father, and mother knew or should have known physical abuse was occurring, but failed to protect Rosalinda. The children were at risk of parents not protecting them. The petition further alleged that Rosalinda suffered the following injuries: “Vaginal tear and hemridging [*sic*], bruising and cuts on the lower inner lip, bruising on the upper outer left lips, bruising on the inner left ear lobe and canal, bruising the size of a quarter of the left lower back above the buttocks, point of impact on the back of the [head], bruising on the inner right ear, 2 inch long bruise on the left stomach, bleeding in the brain, and left eye retinal damage.”

² The juvenile dependency petition and detention report incorrectly state M.T. was born in December 2005, and was three years old at the time of detention. According to a copy of her birth certificate, M.T. was born in September 2005, and was four years old when first detained in November 2009.

On December 2, 2009, the juvenile court ordered the children removed from parents, and detained in foster care. On December 22, 2009, CFS filed an amended petition, adding that the children came within section 300, subdivision (f) (caused another child's death through abuse or neglect). The amended petition alleged the children were at risk of harm because Rosalinda died nonaccidentally, from unexplained blunt trauma, while in parents' care.

Jurisdiction/Disposition Hearing

CFS reported in its jurisdiction/disposition hearing report, filed on December 18, 2009, parents were visiting the children twice a week. According to the addendum reports filed in March, April and May 2010, the children were placed with their maternal grandparents in February 2010. Mother was attending counseling and visiting the children almost every day. Father had not participated in any reunification services offered him. He was referred to counseling but did not enroll or attend any counseling. The CFS reported that a family member had reported that on an unknown date father was seen shaking Rosalinda because he was frustrated with her. The social worker concluded Rosalinda died because father abused or neglected her and therefore he should not be offered reunification services.

At the contested jurisdiction hearing on May 4, 2010, the juvenile court sustained the amended petition, finding the children came within section 300, subdivisions (b) (failure to protect) and (j) (abuse of a sibling). At the contested dispositional hearing on May 10, 2010, the juvenile court ordered the children removed from parents' custody and

offered reunification services to mother, but not to father, under section 361.5, subdivision (b)(6) (inflicting physical injury to a sibling).

Six-Month Review Hearing

CFS reported in the six-month hearing report filed in November 2010, that on July 15, 2010, the children were removed from the maternal grandparents' home and placed with their paternal aunt (Aunt B.T.). It had become apparent maternal grandmother did not believe parents were responsible for Rosalinda's death. Additionally, maternal grandmother was allowing unsupervised parental contact, had failed to communicate with the social worker over a two-month period, and had inappropriately brought mother to M.T.'s individualized counseling session. When the therapist refused to allow mother into the session, mother had an outburst and maternal grandmother told the therapist M.T. would not talk in therapy. The therapist believed maternal grandmother was attempting to manipulate M.T. into not speaking freely during therapy. CFS further reported the Choctaw Nation of Oklahoma determined the children were eligible for membership but would not intervene in the dependency proceedings because the children were not currently enrolled members of the tribe.

The children were doing well in Aunt B.T.'s home and had bonded with her. Aunt B.T. was interested in adopting the children. Meanwhile parents continued living together, were both employed, and had not been charged with the death of Rosalinda, although a murder investigation was pending. M.T. had started kindergarten and parents assisted her daily with homework. M.T. attended weekly therapy. Her therapist believed M.T. did not witness anything traumatic involving parents. Mother had been attending

therapy since June 2010 and participated in parenting classes. The children were happy to see their parents. Mother visited the children almost daily. Father visited them four to five times a week. Mother continued to deny Rosalinda was mortally injured in her home. Mother told the social worker she believed Rosalinda died because R.M. neglected her.

The social worker recommended terminating reunification services because neither parent had made any progress in protecting the children from harm. There was no new evidence as to how Rosalinda was injured. The social worker concluded mother “has not shown that she can protect her children. This is evidenced by mother persistently stating she believes that Rosalinda [] died as a result of the child’s biological mother abusing or neglecting the toddler. This, despite the substantial evidence that [father’s] visiting child died as the result of an acute injury. In addition, mother continues to live with [father]. A preponderance of evidence shows that Rosalinda was injured, either intentionally or unintentionally, by an adult present in the apartment on Thanksgiving Day 2009. The undersigned therefore believes that mother could be in the denial stage of her grieving for the death of Rosalinda, in that the children’s father caused the child’s death. It is also possible that [mother] knows more about the circumstances of that day than she has revealed. Whichever circumstance most closely represents the truth, the children’s mother appears to be incapable of protecting [the children].”

At the six-month review hearing on January 3, 2011, mother and her therapist, Carolyn Williams, testified. Williams testified that mother denied injuring Rosalinda and did not believe father posed a risk to the children. Mother denied any responsibility for

Rosalinda's death. She also did not believe father was responsible and continued to deny that Rosalinda was even injured in her home. According to Williams, mother indicated she felt disappointed and betrayed when father had a child with R.M., and did not like R.M. Mother told Williams she loved Rosalinda and had a good relationship with her.

Mother testified at the six-month hearing that she believed father was a risk to the children. When asked why she believed this, mother said, "Because apparently if I don't think that, you guys aren't going to give me my children back. Mother then stated she did not believe father was a risk to the children. Mother acknowledged she was still living with father but did not intend to continue living with him. She claimed she was still living with him solely for financial reasons.

After hearing testimony and arguments, the juvenile court ordered mother's reunification services terminated and set the section 366.26 hearing.

Section 366.26 Hearing Report

CFS reported in its section 366.26 hearing report filed in April 2011, that the children had lived with Aunt B.T. since July 15, 2010, and had bonded with her. Aunt B.T. had known the children since birth. The children looked to Aunt B.T. as their parental figure. A.T. called her "mom" and M.T. called her Auntie B. Aunt B.T. reported in January 2011 that parents were visiting the children less often, specifically one to two times a week. Aunt B.T. supervised the visits. Visits were appropriate, although sometimes father would play with the children for only a few minutes and then watch television. Mother would visit with the children for five to ten minutes and then take a nap. In April 2011, the social worker explained to mother that when she visited,

parents needed to interact with the children throughout their visits. The social worker recommended terminating parental rights and concluded the children would not suffer harm from doing so.

Father's Section 388 Petition

On May 19, 2011, father filed a section 388 petition, seeking reinstatement of his reunification services, terminated on May 10, 2010. Father alleged the following changed circumstances: Father had completed a parenting program and had attended 16 individual counseling sessions. Father noted he had continued to visit the children regularly and believed the children were closely bonded to parents.

On June 2, 2011, CFS filed a response to father's section 388 petition, stating that father did not participate in reunification services originally offered. It was not until after the court ordered services terminated in May 2010 that he completed an in-home parenting program and attended counseling. The social worker believed the parenting program and counseling did not address or resolve the issues related to physical abuse of Rosalinda. The social worker also noted that father claimed he visited the children four to five times a week, but the section 366.26 report showed recorded visits of approximately two times a week, and during the visits, father interacted with the children for only about five minutes, and then watched television.

The social worker concluded that, because father knew or should have known how Rosalinda was seriously injured, he continued to pose a substantial danger to the children's physical health, safety, and physical and emotional well-being. "The force used to cause the acute injuries leading to the death of 22-month old Rosalinda []

indicates an unpredictable violent nature that would place the children . . . in danger if returned to the care of [parents].” CFS concluded there was no change of circumstances and recommended the court deny father’s section 388 petition.

Mother’s Section 388 Petition

On June 2, 2011, mother filed a section 388 petition, seeking reinstatement of reunification services, terminated on January 3, 2011. Mother alleged the following changed circumstances: Mother had made substantial progress in her therapy and had continued to visit the children regularly to maintain her parent-child bond with the children. In mother’s supporting declaration, she stated that she and father separated the weekend after the hearing on January 3, 2011. She no longer saw him, other than when their visits with the children overlapped. She maintained daily contact with the children. She continued counseling, even after services were terminated. Mother continued to work at In-N-Out Burger and was also training to become a pharmacist technician. Mother noted she first read the autopsy report regarding Rosalinda’s death on January 3, 2011. The juvenile court scheduled the hearings on parents’ section 388 petitions on the same day as the section 366.26 hearing.

In September 2011, CFS filed a response to both section 388 petitions, stating that the children continued to reside with Aunt B.T. Mother continued to deny that Rosalinda was mortally injured at parents’ apartment and claimed Rosalinda died because of neglect by R.M. During a recent conversation with the social worker on September 13, 2011, mother stated that she sometimes thought father might have hurt Rosalinda. Father never showed signs of child abuse and therefore she did not initially think of it. Mother also

concluded, after she did her own research and read the autopsy report, that it was possible R.M. injured Rosalinda before father picked her up on Thanksgiving Day. Mother told the social worker she was no longer with father. The social worker concluded that mother had not demonstrated any progress in her ability to protect the children. Because mother had consistently denied the possibility father killed Rosalinda, there remained a substantial risk of harm to the children if they were returned to either parent. The social worker recommended termination of parental rights and adoption.

In September 2011, the Choctaw Tribe notified the juvenile court that the children and mother were now enrolled members of the Choctaw Tribe. The juvenile court granted the Choctaw Tribe's motion to intervene, and continued the section 388 and section 366.26 hearings to allow the Choctaw Tribe to review the case.

CFS filed an addendum report on February 3, 2012, stating that mother was visiting the children three to four times a week at Aunt B.T.'s home. Father's visits with the children were held at the CFS office because of a past conflict between father and Aunt B.T. Father complained that paternal grandfather was living at Aunt B.T.'s home. Aunt B.T. said paternal grandfather was not living there, although he did briefly visit. In January 2012, paternal grandfather was deported. The social worker concluded there was little evidence that paternal grandfather lived at Aunt B.T.'s home.

The Choctaw Tribe filed an affidavit with the juvenile court in February 2012, stating the tribe was in agreement with CFS "in finding it is difficult to believe that neither father nor the children's mother were aware that the child was injured so severely that she died. The force used to cause the acute injuries leading to the death of 22-month

old Rosalinda [] indicates an unpredictable violent nature that would place the children . . . in danger if returned [to] the care of [father or mother].” The Choctaw social worker further concluded that, “As a qualified expert, I believe that from our cultural perspective, that the parents have failed to demonstrate that they are fit to parent their children[.] [T]herefore their rights could possibly be terminated.” The Indian tribe social worker also concluded continued custody with parents would result in serious emotional or physical harm to the children; reunification services were unsuccessful; and it would be appropriate to terminate parental rights and free the children for adoption with their paternal aunt.

Combined Hearing on the Section 388 Petitions and Section 366.26 Hearing

On February 8, 2012, the juvenile court conducted a combined hearing on parents’ section 388 petitions and the section 366.26 hearing. The following testimony was presented during the combined hearing.

Social Worker Altmire’s Testimony

CFS social worker, Craig Altmire, testified that mother did not visit every day. She visited the children three or four times a week, and visited for six to eight hours per visit. During that time, mother was not primarily responsible for caring for the children. Aunt B.T. was, and mother helped. The two or three visits Altmire observed, were appropriate. Father also visited consistently, about once a week, depending on his work schedule. The children appeared excited to see him. The children also appeared very bonded to mother. Parents initially provided Aunt B.T. with financial support for the children.

Altmire did not have anything negative to say about mother's relationship with the children, other than that he was concerned mother would not protect the children.

Altmire concluded that, although the children were very close and attached to mother, it would not be detrimental to the children to terminate their relationship with her because Aunt B.T. was willing to allow continued visitation and the children were very bonded to Aunt B.T. Altmire acknowledged it could be somewhat detrimental if the children were not permitted to have regular contact with mother. They had become less bonded to mother because they had not lived with her for the past two years.

Visits with parents had always been supervised. There had not been any overnight visits. Altmire did not believe the children's emotional attachment with mother was so substantial and positive that the children would be greatly harmed if deprived of it. Altmire believed Aunt B.T. would provide a safe and stable home for the children. Altmire did not believe this as to mother, "because of [the] protection issue." Altmire concluded mother's relationship with the children did not outweigh the benefit of adoption. Neither parent had disclosed how Rosalinda died while in their home. Mother never acknowledged any responsibility for the death.

Mother's testimony

Mother testified she initially visited the children every day at maternal grandmother's home, from around 7:00 a.m. to 4:00 p.m. When she started school in January 2011, her visits decreased. She saw the children three times a week, from 7:00 a.m. to 4:00 p.m. In July 2011, after mother finished school, she visited the children at Aunt B.T.'s home, five times a week, from 8:00 a.m. to 4:30 p.m. Mother believed she

had an outstanding relationship with the children. M.T. always wanted mother to hold her, and A.T. did not leave her side. Mother believed the children were closer to her than to Aunt B.T. They called her “Mommy” and their aunt, “Auntie B.” Mother believed terminating her relationship with the children would be detrimental. She acknowledged that she had been telling M.T. that she was “fighting for her to come home,” which was inappropriate.

Mother provided Aunt B.T. with about \$200 a month in child support, because Aunt B.T. asked her to. Father was also sending money to Aunt B.T. According to mother, about nine months before the hearing, she terminated her six-year relationship with father. She currently saw him a couple times a week, when their visitation with the children overlapped.

Mother acknowledged she had previously testified in court that she did not know how Rosalinda was injured and said she still did not know. Mother denied having any idea as to how Rosalinda sustained head injuries, bruises to her scalp, ears, body, and mouth, and an acute tear to her vulva.

Father’s Testimony

Father testified that he consistently visited the children. His visits were moved from Aunt B.T.’s home to the CFS office because he and his father and sister, Aunt B.T., were having a conflict during the fall of 2011. Before visitation moved to the CFS office, father visited the children about an hour every other day, depending on his work hours. Father believed he was bonded to his children. The children would run up to him and M.T. always wanted to be with him. Separation at the end of visits was difficult. The

children screamed and cried when he left. Father believed they would suffer emotionally if parental rights were terminated. Although father was denied reunification services, he took a parenting course and participated in counseling.

Father testified that he did not kill Rosalinda. He acknowledged he and mother were the only adults in their apartment the day of Rosalinda's death, and A.T. and M.T. were the only children in the apartment. Father did not know how she died or who killed her. The court interjected: "You both can't claim ignorance and expect me to believe it. It's not believable. We need an explanation for who killed the child and how it happened." Father replied that he did not know how Rosalinda died but he had "a clue." Father then explained that Rosalinda's mother, R.M., lived with many family members and friends. R.M.'s oldest daughter was molested and abused in her home. The incident was reported to the police. Father said he believed Rosalinda was abused while in R.M.'s care, although he acknowledged he was aware the autopsy report and medical reports stated Rosalinda sustained blunt force trauma while in parents' home. Father said the paramedics told him there was nothing in his home that could have caused Rosalinda's injuries. Father did not know how to explain her injuries because she was not injured in his home and he did not do it. Before he found Rosalinda unconscious, she had been running around his home and playing normally with M.T.

Father denied having a temper. The social worker reported a couple times that she had to call law enforcement during father's visitations because of his temper. Father explained it was not because of his temper. He and his father were not getting along and the social worker asked father to leave, but the children were clinging to him. Father

claimed the social worker had a grudge against him. Father denied threatening to kick the social worker's "ass" when she would not allow him to take his child to a movie unsupervised. Father also denied having a confrontation with his brother.

After hearing argument, the juvenile court denied parents' section 388 petitions, finding there had been no change of circumstances and that granting the petitions was not in the children's best interests. The court found that "the children would still be at risk of harm by the parents if returned to the parents."

As to the section 366.26 hearing, the juvenile court found that mother had established a "substantial, positive, and emotional" attachment to the children, but father had not. Parents had not shown that they could meet the children's needs in protecting them from future abuse. The court concluded the beneficial relationship exception did not apply. The court found parents' testimony not believable. Parents continued to refuse to say how Rosalinda was killed. The court acknowledged that parents' refusal to disclose this alone was not determinative of the beneficial relationship exception. But evidence that parents knew how Rosalinda was killed, and parents' lack of disclosure of who killed Rosalinda and how it occurred, supported a finding parents were not protective of the children. The court ordered parental rights terminated, with the children referred for adoption.

III

FATHER'S SECTION 388 PETITION³

Father contends the trial court abused its discretion in denying his section 388 petition, seeking to set aside the disposition order, denying father reunification services. Father argues his circumstances changed and granting his petition was in the children's best interests.

During the disposition hearing on May 10, 2010, the juvenile court denied father reunification services because he had not made use of reunification services offered and continued to deny any responsibility for Rosalinda's death. After father was denied services, he completed a parenting course and attended 16 counseling sessions on his own. These were essentially the only changes alleged in his section 388 petition filed on June 2, 2011. On February 8 and 9, 2012, the juvenile court heard and denied father's section 388 petition, finding there were no changed circumstances because parents continued to deny any responsibility for Rosalinda's death and would not disclose how it happened. The court also concluded it was not in the children's best interests to set aside the orders terminating reunification services because there remained the risk that the parents would not protect the children from harm.

A. Applicable law

“A juvenile court order may be changed, modified or set aside under section 388 if the petitioner establishes by a preponderance of the evidence that (1) new or changed

³ Mother does not challenge on appeal denial of her section 388 petition.

circumstances exist, and (2) the proposed change would promote the best interest of the child. [Citation.] The parent bears the burden to show both “a legitimate change of circumstances” and that undoing the prior order would be in the best interest of the child. [Citation.] The petition is addressed to the sound discretion of the juvenile court, and its decision will not be overturned on appeal in the absence of a clear abuse of discretion. [Citation.]” (*In re S.J.* (2008) 167 Cal.App.4th 953, 959-960 [Fourth Dist., Div. Two].)

In evaluating whether parents have met their burden to show changed circumstances, the trial court should consider: (1) the seriousness of the problem which led to the dependency, and the reason for any continuation of that problem; (2) the strength of relative bonds between the dependent children to both parent and caretakers; and (3) the degree to which the problem may be easily removed or ameliorated, and the degree to which it actually has been. (*In re Kimberly F.* (1997) 56 Cal.App.4th 519, 532.) These factors become less significant once reunification services have been terminated, as in the instant case. This is because, “[a]fter the termination of reunification services, . . . ‘the focus shifts to the needs of the child for permanency and stability’ [citation], . . .” (*In re Stephanie M.* (1994) 7 Cal.4th 295, 317.)

B. Discussion

Father did not meet his burden of establishing changed circumstances. The problem that led to the dependency of the children was not resolved. (*In re Edward H.* (1996) 43 Cal.App.4th 584, 592.) The parents took no responsibility whatsoever for the death of the children’s sibling, which occurred while the deceased child was solely in the parents’ care. They completely denied that it occurred in their home, when the autopsy

report and other evidence conclusively established Rosalinda died in their home, while in parents' care. There were no other adults present. The only others in the home were A.T., who was nine months old, and M.T., who was four years old. The evidence established M.T. could not have possibly caused Rosalinda's catastrophic injuries. That left parents, and they continued to act as if nothing happened in their home, when it was irrefutable that something horrific happened to Rosalinda while in their care, and they must have known about it.

Under such circumstances, the juvenile court did not abuse its discretion in denying father's section 388 petition. Without parents' disclosure of how Rosalinda was injured, there remained the danger parents would not protect the children from harm. While father did eventually complete a parenting course and attend counseling on his own, there was no evidence there was any change in the circumstances that led to the dependency proceedings. Because there remained a veil of uncertainty as to how Rosalinda was killed and who killed her while in parents' sole care, the juvenile court reasonably found it was not in the children's best interests to reinstate father's reunification services and delay adoption.

Furthermore, by the time the court heard father's section 388 petition, the children had been in protective custody for over two years. For over two years the children had been living in the safe and stable home of their aunt, and were closely bonded to her. At the time of the hearing on father's section 388 petition, the focus was on the permanency and stability of the children, and the presumption was against disrupting the stability of the children's placement. (*In re Angel B.* (2002) 97 Cal.App.4th 454, 464; *In re*

Stephanie M., supra, 7 Cal.4th at p. 317.) Although parents maintained a close relationship with their children by visiting them often and consistently, visitation remained supervised because of the serious and egregious injuries Rosalinda sustained in parents' care, and because of parents' refusal to take any responsibility for her death or disclose how it happened. We cannot say that it was in the best interests of the children to set aside the disposition order denying father reunification services, which would have delayed terminating parental rights and impeded adoption proceedings.

Father argues that it was uncertain how Rosalinda died and it was unclear that father was responsible for her death. But the evidence in the record is clear that Rosalinda's lethal injuries occurred while she was within his and mother's sole care and it was highly probable they were responsible for her death and knew how it happened. According to the autopsy report, the injuries were so severe, Rosalinda was instantaneously knocked unconscious. This indicates she did not sustain the injuries before arriving at his home. There was undisputed evidence that Rosalinda was conscious and in good health when father picked her up from R.M.'s home in the morning. In addition, father told the social worker that 45 minutes before finding Rosalinda unconscious, he had seen her running and playing. Father denied hearing anything, such as a bang from Rosalinda falling or any other noise. Mother, however, reported she had heard a bang or "wood cracking," possibly from the toddler bed breaking.

According to the forensic doctor who examined Rosalinda, her injuries were "consistent with a high force trauma causing the injury, and falling from a two story

home's roof on concrete floor would be consistent with the injuries observed.” The injuries were not consistent with falling in her room, which had carpet. According to the paramedics, there was nothing in parents' apartment that could have led to Rosalinda sustaining such injuries accidentally and without parents knowing they were occurring. If Rosalinda's injuries occurred inside parents' apartment, parents would have heard the impact and, in all probability, either mother or father caused Rosalinda's injuries. Mother and father have not provided any evidence to the contrary, other than self-serving statements that they were not responsible for Rosalinda's injuries and she was not injured while within their care. These circumstances lead to the well-founded concern that the children were at risk of harm if left unsupervised with parents.

Furthermore, as father acknowledges in his appellate opening brief, “mother could have been the perpetrator of R.T.'s death as R.T. was the product of an illicit affair [father] had with another women [R.M.] during his relationship with mother. . . . Mother certainly [had] a reason to hate the child, R.T., as representative of her partner's infidelity and another woman's intrusion into her life.” While this motive is speculative, the facts are not. The injuries occurred while Rosalinda was in the care of both parents, and it is highly unlikely that they did not both know when and how Rosalinda was injured or who injured her. Yet they both feign a total lack of responsibility and knowledge of the incident, which is not believable. Under such circumstances, the juvenile court did not abuse its discretion in denying father's section 388 petition. Circumstances were not sufficiently changed and it was not in the children's best interests to set aside the order denying father reunification services.

IV

THE BENEFICIAL RELATIONSHIP EXCEPTION

Mother and father contend the juvenile court erred in rejecting the beneficial relationship exception to adoption (§ 366.26, subd.(c)(1)(B)(i)). This exception is often raised but rarely applies. (*In re Eileen A.* (2000) 84 Cal.App.4th 1248, 1255, fn. 5, disapproved on other grounds in *In re Zeth S.* (2003) 31 Cal.4th 396, 413.) While it can have merit in an appropriate case (e.g., *In re S.B.* (2008) 164 Cal.App.4th 289, 296-301), this is not such a case.

A. Applicable Law

Generally, at a section 366.26 hearing, if the juvenile court finds that the child is adoptable, it must terminate parental rights. (§ 366.26, subds. (b)(1) & (c)(1).) This rule, however, is subject to a number of statutory exceptions (§ 366.26, subds. (c)(1)(A) & (c)(1)(B)(i)-(vi)), including the beneficial relationship exception, which applies when “termination would be detrimental to the child” because “[t]he parents have maintained regular visitation and contact with the child and the child would benefit from continuing the relationship.” (§ 366.26, subd. (c)(1)(B)(i).)

“When applying the beneficial parent-child relationship exception, the court balances the strength and quality of the parent-child relationship in a tenuous placement against the security and sense of belonging that a stable family would confer on the child. If severing the existing parental relationship would deprive the child of ‘a substantial, positive emotional attachment such that the child would be greatly harmed, the preference for adoption is overcome and the natural parent’s rights are not terminated.’

[Citation.]” (*In re B.D.* (2008) 159 Cal.App.4th 1218, 1234-1235.) “The factors to be considered when looking for whether a relationship is important and beneficial are: (1) the age of the child, (2) the portion of the child’s life spent in the parent’s custody, (3) the positive or negative effect of interaction between the parent and the child,[] and (4) the child’s particular needs. [Citation.] While the exact nature of the kind of parent/child relationship which must exist to trigger the application of the statutory exception to terminating parental rights is not defined in the statute, the relationship must be such that the child would suffer detriment from its termination. [Citation.]” (*In re Angel B., supra*, 97 Cal.App.4th at p. 467.)

“[F]or the exception to apply, the emotional attachment between the child and parent must be that of parent and child rather than one of being a friendly visitor or friendly nonparent relative, such as an aunt.’ [Citation.]” (*In re Jason J.* (2009) 175 Cal.App.4th 922, 938.) “A biological parent who has failed to reunify with an adoptable child may not derail 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.’ [Citations.]” (*Id.* at p. 937.)

“We must affirm a trial court’s rejection of these exceptions if the ruling is supported by substantial evidence. [Citation.]” (*In re Zachary G.* (1999) 77 Cal.App.4th 799, 809.) “We . . . review[] the evidence most favorably to the prevailing party and

indulg[e] in all legitimate and reasonable inferences to uphold the court’s ruling. [Citation.]” (*In re B.D.*, *supra*, 159 Cal. App.4th at p. 1235.) Because parents had the burden of proof, we must affirm unless there was “indisputable evidence [in parents’ favor] no reasonable trier of fact could have rejected” (*In re Sheila B.* (1993) 19 Cal.App.4th 187, 200.)

B. Discussion

Parents argue they have a significant parent-child bond with the children, they love their children, the children view them as their parents, they visited the children frequently and consistently, and their relationship could not be easily overlooked upon adoption of the children. Even though parents maintained a close relationship with the children, we conclude parents have not established that the benefits from continuation of their relationship with the children outweigh the benefit to the children of being placed in a safe, stable, permanent adoptive home. In considering the four factors commonly determinative of whether a relationship is important and beneficial, we conclude the detriment suffered by the children from its termination does not outweigh the security and sense of belonging that a stable family would confer on the children. (*In re Angel B.*, *supra*, 97 Cal.App.4th at p. 467.) The children were relatively young when removed from parents. A.T. was only nine months old and M.T. was four years old. A.T. spent the majority of his life living with Aunt B.T. and M.T. spent about a quarter of her life living with her.

While parents’ interaction with the children may have had a positive effect on the children, maintaining the relationship required continued supervised visitation. Parents

never had unsupervised visits or overnight visits because of the concern parents would not protect the children from serious physical harm. The children's sibling suffered lethal injuries while in parents' exclusive care and parents continued to deny any responsibility for her death or knowledge of how she died. There was also evidence that on one occasion, after Rosalinda returned from visiting father, R.M. noticed Rosalinda had sustained bruises, which prompted R.M. to file a police report. In addition, a family member reported seeing father shaking Rosalinda when he was frustrated with her.

The juvenile court reasonably rejected the beneficial relationship because of the continued risk of harm to the children if placed in parents' unsupervised care. The risk remained that parents would not protect the children if they were left in parents' care unsupervised. Furthermore, the record demonstrates that Aunt B.T. has been willing to allow parents supervised visitation of the children, and would likely continue to allow it after adopting the children. We thus affirm the juvenile court's rejection of the beneficial relationship exception. (*In re Zachary G.*, *supra*, 77 Cal.App.4th at p. 809.)

V

DISPOSITION

The judgment is affirmed as to both mother and father.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

CODRINGTON
J.

We concur:

McKINSTER
Acting P. J.

MILLER
J.