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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA**

**FOURTH APPELLATE DISTRICT**

**DIVISION TWO**

In re J.M. et al., Persons Coming Under the  
Juvenile Court Law.

RIVERSIDE COUNTY DEPARTMENT  
OF PUBLIC SOCIAL SERVICES,

Plaintiff and Respondent,

v.

A.G.,

Defendant and Appellant.

E056663

(Super.Ct.No. RIJ114674)

OPINION

APPEAL from the Superior Court of Riverside County. Jacqueline C. Jackson,  
Judge. Affirmed.

William D. Caldwell, under appointment by the Court of Appeal, for Defendant  
and Appellant.

Pamela J. Walls, County Counsel, and Anna M. Deckert, Deputy County Counsel,  
for Plaintiff and Respondent.

## I

### INTRODUCTION

A.G. (mother) and E.M.'s (father) abuse of drugs led to the Riverside County Department of Public Social Services (DPSS) removing mother and father's boys from their care. Mother appeals orders denying her petition brought under Welfare and Institutions Code section 388<sup>1</sup> (section 388 petition), and terminating parental rights. Mother contends the trial court erred in denying her section 388 petition because the trial court did not take into consideration her efforts to rehabilitate by voluntarily attending drug treatment programs. Mother also argues the juvenile court erred in rejecting the beneficial parent relationship exception to terminating parental rights under section 366.26, subdivision (c)(1)(B)(i) (parent relationship exception).

We conclude the juvenile court did not err in denying mother's section 388 petition because there were not sufficient changed circumstances and granting the petition was not in the best interests of the boys. We also conclude the juvenile court did not err in rejecting the beneficial parent relationship exception. The judgment is affirmed.

## II

### FACTS AND PROCEDURAL BACKGROUND

Mother and father have a history with the juvenile dependency system. Mother received reunification services from June 20, 2007, to February 17, 2009, as to her son,

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<sup>1</sup> Unless otherwise noted, all statutory references are to the Welfare & Institutions Code.

T.G. (born in 2007), who was abused and neglected. T.G. tested positive for methamphetamines at birth. Mother admitted using methamphetamines while pregnant with T.G. T.G. was taken into protective custody in June 2007. After receiving over a year of reunification services, mother failed to reunify with T.G., resulting in termination of her parental rights to T.G. on September 23, 2009.

The instant matter arises from DPSS filing a juvenile dependency petition on September 28, 2009, adding B.G. (born in 2008) to an existing dependency proceeding involving T.G., who is not a party to this appeal. B.G. was taken into protective custody in October 2009, because of mother's continuing abuse of methamphetamine. She was arrested in July 2009 on drug related charges. B.G.'s father was unknown.

On December 14, 2009, DPSS filed a third amended petition adding J.M. to the petition. The petition alleged mother continued to abuse methamphetamine and tested positive for methamphetamine on October 13, 2009. J.M. was detained in November 2009, and placed with B.G. B.G. was 10 months old and J.M. was 10 days old.

B.G. and J.M. have different fathers. Father is J.M.'s biological father. He was not living with mother and J.M., and had failed to provide for J.M. Father abused controlled substances. He had tested positive on December 11, 2009, for methamphetamine. Father had received reunification services from March 1999 to July 2000, as to six of his other children, and had failed to reunify with them.

Mother entered an inpatient substance abuse treatment program in October 2009, and completed it in January 2010. She then enrolled in Family Preservation Court and tested negative for drug use. Mother maintained regular visitation with the boys. At the

jurisdiction hearing in March 2010, the juvenile court sustained the petition allegations and denied reunification services to mother and father under section 361.5, subdivision (b)(10) and (11).

Mother and father voluntarily participated in substance-abuse treatment, drug-testing, Family Preservation Court, counseling, and other services, resulting in mother reunifying with the boys in December 2010. The juvenile court terminated its jurisdiction over the boys on May 5, 2011.

### **Renewed Dependency Jurisdiction**

In September 2011, DPSS filed another juvenile dependency petition, alleging that mother and father once again were abusing drugs and failing to protect the boys. The boys were taken into protective custody in October 2011. They were placed back in the same foster home where they had previously been placed. Mother tested positive for methamphetamine and marijuana in October 2011, and failed to participate in three drug tests in November 2011. In November 2011, mother enrolled in a county substance abuse program. At the jurisdiction hearing in December 2011, the juvenile court sustained the allegations, denied reunification services under section 361.5, subdivision (b)(10), (11), and (13), and set a section 366.26 hearing.

Mother and father visited the boys every week. The boys readjusted to living with their foster parents again but, following visits, threw tantrums, whined, exhibited aggressive behaviors and suffered nightmares. J.M. did not want his foster mother to leave him and told her he did not want her to get lost again.

## **Section 388 Petitions for Reunification Services**

In June 2012, mother and father filed section 388 petitions, requesting the juvenile court to change the order entered on December 1, 2011, denying reunification services under section 361.5, subdivision (b)(10) and (13), and setting a section 366.26 hearing.

Mother alleged changed circumstances, which included mother completing a substance abuse outpatient program, a parenting program, substance abuse testing, Narcotics Anonymous/Alcoholics Anonymous's (NA/AA) 12-step program, an aftercare program, and counseling. Mother further alleged that the section 388 petition for a changed order was in the boys' best interests because it would "strengthen the existing bond and the child/parent relationship." Mother and father continued visiting the boys once a week and the visits went well. Mother refrained from using drugs.

Father alleged in his petition that he had voluntarily completed substance abuse treatment, parenting, and anger management classes, and had also maintained employment and stable housing. Father further alleged that granting him services was in the boys' best interests because father had rehabilitated and could be a good parent.

## **Joint Section 388 Petition Hearing and Section 366.26 Hearing**

On June 28, 2012, mother and father testified at the joint hearing on their section 388 petitions and the section 366.26 hearing. Father testified he had completed a 45-day in-patient program, during which he participated in classes on anger management, parenting, domestic violence, relapse prevention, matrix, counseling, and other related classes. Father continues to participate in weekly 12-step meetings. Father tried to

maintain contact with the boys but sometimes was unavailable because of his work. Father believed both boys were bonded to him emotionally.

Mother testified that, after the court denied services on December 1, 2011, she voluntarily entered an out-patient substance abuse program that lasted 12 weeks. She attended group meetings twice a week, had three random drug tests which were all negative, met with a counselor, and attended 12-step meetings. Mother completed the program on March 28, 2012. On June 12, 2012, mother also completed a 12-week aftercare program, during which she maintained her sobriety. Mother last tested for drugs in May 2012. The last time she abused drugs was when she smoked marijuana in January 2012.

Mother testified she consistently maintained contact with the boys and did not miss any visitation with them. Initially mother visited the boys twice a week. During the last six months, visitation was reduced to once a week. Mother believed the boys were strongly bonded to her. They ran up to her, hugged and kissed her, and called her “mommy” or “mom.” At the end of visits, they resisted ending visits with mother and told her they wanted to go home with her. Mother said she has been employed for over two years and was living with father. Mother testified that throughout the last five years, she had participated in seven substance abuse programs. Mother acknowledged that in December 2011 and March 2012, she and father had engaged in domestic violence.

After considering the evidence and hearing argument, the juvenile court denied mother and father’s section 388 petitions. The court recognized that mother and father loved the boys deeply and had consistently visited them. The court concluded that,

nevertheless, mother and father had not demonstrated changed circumstances or that it was in the best interest of the boys to delay permanency and stability for the boys, and grant the section 388 petitions. The court noted that mother and father had been sober for only a relatively short period of time, and it was common to relapse, as they had done in the past. Their circumstances were changing but not changed. The court was also concerned about their domestic violence.

During the section 366.26 hearing, both parents requested the juvenile court to apply the beneficial parent relationship exception to terminating parental rights. The court found the exception did not apply and terminated parental rights.

### III

#### MOTHER'S SECTION 388 PETITION

Mother contends the trial court abused its discretion in denying her section 388 petition, filed in June 2012, requesting reunification services.

##### *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 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. Changed Circumstances*

Mother’s section 388 petition requested the December 1, 2011 order bypassing reunification services under section 361.5, subdivisions (b)(10), (b)(11) and (b)(13), be changed to an order granting her six months of reunification services. Section 361.5, subdivisions (b)(10) and (b)(11) allow the juvenile court to deny reunification services when the court has previously terminated reunification services or parental rights for other siblings or half siblings because of a failure to reunify with the sibling or half sibling, and when the parent has not subsequently made a reasonable effort to treat the problems that led to removal of the sibling or half sibling. Subdivision (b)(13) of section 361.5 provides that the court may deny reunification services when a parent “has a history of extensive, abusive, and chronic use of drugs or alcohol and has resisted prior court-ordered treatment for this problem during a three-year period immediately prior to

the filing of the petition that brought that child to the court's attention, or has failed or refused to comply with a program of drug or alcohol treatment described in the case plan required by Section 358.1 on at least two prior occasions, even though the programs identified were available and accessible.”

Mother argues that following the December 1, 2011 order denying reunification services, her circumstances changed such that the bypass provision, section 361.5, no longer applied. She claims she had made a reasonable effort to overcome her chronic drug addiction by completing a substance abuse treatment program and after-care program. Mother asserts that, because section 361.5 no longer applied at the time of the section 388 hearing because of her changed circumstances, the court abused its discretion in denying her section 388 motion and denying her reunification services.

We conclude the juvenile court reasonably found that mother had not met her burden of demonstrating changed circumstances. The record shows that mother was making a concerted effort to change her circumstances by rehabilitating, as she had many times before. Unfortunately, mother had a history of participating in drug treatment programs and then relapsing. There was therefore the likelihood that she would do so again. Mother simply had not been drug free for a long enough period of time to establish that she had overcome her chronic drug addiction and had permanently rehabilitated. Mother admitted to using drugs in January 2011, which was less than six months before the section 388 hearing. Mother had only recently completed a substance abuse treatment program on March 28, 2012, and completed an after-care program on June 12, 2012, two weeks before the section 388 hearing. Under these circumstances,

and taking into account mother had relapsed on six previous occasions, the juvenile court reasonably concluded mother had not established her circumstances had actually changed.

*C. Best Interests of the Boys*

The court also reasonably found that it was not in the boys' best interests to grant mother's section 388 motion and order an additional six months of services, rather than terminating parental rights and proceeding with adoption. Although the evidence showed that the boys and mother had a strong bond, the evidence supported a finding that there was a high probability that mother would relapse, which would prevent mother from reuniting with the boys. Because the boys needed stability and permanency, and mother had had numerous opportunities to rehabilitate, the juvenile court reasonably concluded it was not in the boys' best interests to delay any longer placing the boys in a permanent home.

Even assuming, mother's circumstances were changing, "[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 . . . might be able to reunify at some future point, does not promote stability for the child or the child's best interests. [Citation.] "[C]hildhood does not wait for the parent to become adequate." [Citation.]" (*In re Mary G.* (2007) 151 Cal.App.4th 184, 206.)

Here, where mother had an extensive history of abusing drugs and relapsing, the court reasonably found it was not in the boys' best interests to grant mother's section 388 motion and allow an additional six months of reunification services. The boys had lived

with their prospective foster parents from November 2009 to December 2010 (13 months), and then were removed again from mother and father and placed with the same prospective foster parents in September 2011. The boys remained there up until the section 388 hearing in June 2012 (eight months). When the boys were removed in 2009, J.M. was a newborn and B.G. was not quite one year old. At the time of the section 388 hearing, they were two and a half and three and a half years old, and were bonded to their prospective adoptive parents, who wished to adopt them.

“‘When custody continues over a significant period, the child’s need for continuity and stability assumes an increasingly important role. That need will often dictate the conclusion that maintenance of the current arrangement would be in the best interests of that child.’ [Citations.]” (*In re Stephanie M.*, *supra*, 7 Cal.4th at p. 317.) The risk of harm from being removed from the boys’ prospective foster parents, returned to mother, and then mother relapsing again was too great. Granting mother’s section 388 petition would have resulted in an additional delay in providing the boys with a stable, permanent home, by allowing six months of reunification services. The court could reasonably conclude granting additional reunification services was not in the boys’ best interests. (*Stephanie M.*, at p. 317.)

#### IV

#### BENEFICIAL PARENT RELATIONSHIP EXCEPTION

The juvenile court found that B.G. and J.M. were adoptable and terminated parental rights, finding there was no detriment to the boys in doing so. Mother contends the juvenile court erred in rejecting the parent relationship exception to termination of

parental rights. Mother argues the order terminating parental rights must be reversed because the boys will suffer undue detriment if their visits and other contact with mother are terminated.

*A. Applicable Law*

At the section 366.26 hearing, the juvenile court's task is to select and implement a permanent plan for the dependent child. When there is no probability of reunification with a parent, adoption is the preferred permanent plan. (§ 366.26, subd. (b)(1); *In re Marina S.* (2005) 132 Cal.App.4th 158, 164.) If the juvenile court finds by clear and convincing evidence that a child is likely to be adopted, the juvenile court must terminate parental rights, unless one of several statutory exceptions applies. (§ 366.26, subd. (c)(1); *Marina S.*, at p. 164.)

Under section 366.26, subdivision (c)(1)(B)(i), the parent relationship exception may apply when a parent has “maintained regular visitation and contact with the child and the child would benefit from continuing the relationship.” (§ 366.26, subd. (c)(1)(B)(i); see *In re Derek W.* (1999) 73 Cal.App.4th 823, 826 [“parent has the burden to show that the statutory exception applies”].) The “benefit” prong of the exception requires the parent to prove his or her relationship with the child “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.* (1994) 27 Cal.App.4th 567, 575 [“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”].) No matter how loving and frequent the contact, and

notwithstanding the existence of an “emotional bond” with the child, “the parents must show that they occupy ‘a parental role’ in the child’s life.” (*In re Andrea R.* (1999) 75 Cal.App.4th 1093, 1108; *In re Beatrice M.* (1994) 29 Cal.App.4th 1411, 1418-1419.) The relationship that gives rise to this exception to the statutory preference for adoption “characteristically aris[es] from day-to-day interaction, companionship and shared experiences. Day-to-day contact is not necessarily required, although it is typical in a parent-child relationship.” (*In re Casey D.* (1999) 70 Cal.App.4th 38, 51.)

Moreover, “[b]ecause a section 366.26 hearing occurs only after the court has repeatedly found the parent unable to meet the child’s needs, it is only in an extraordinary case that preservation of the parent’s rights will prevail over the Legislature’s preference for adoptive placement.” (*In re Jasmine D.* (2000) 78 Cal.App.4th 1339, 1350; see also *In re K.P.* (2012) 203 Cal.App.4th 614, 621.) The juvenile court may consider the relationship between a parent and a child in the context of a dependency setting, but the overriding concern is whether the benefit gained by continuing the relationship between the biological parent and the child outweighs the benefit conferred by adoption. (*In re Lukas B.* (2000) 79 Cal.App.4th 1145, 1155-1156; *In re Autumn H.*, *supra*, 27 Cal.App.4th at p. 575.)

### *B. Standard of Review*

California courts have disagreed as to the applicable standard of review for an appellate challenge to a juvenile court ruling rejecting a claim that an adoption exception applies. Most courts have applied the substantial evidence standard of review. We agree with the view expressed in the recent decision, *In re K.P.*, *supra*, 203 Cal.App.4th at

pages 621-622, “that the review of an adoption exception incorporates both the substantial evidence and the abuse of discretion standards of review. . . . [W]hether an adoption exception applies involves two component determinations: a factual and a discretionary one. The first determination—most commonly whether a beneficial parental or sibling relationship exists . . . is, because of its factual nature, properly reviewed for substantial evidence. [Citation.] The second determination in the exception analysis is whether the existence of that relationship or other specified statutory circumstance constitutes ‘a compelling reason for determining that termination would be detrimental to the child.’ [Citations.] This “quintessentially” discretionary decision, which calls for the juvenile court to determine the *importance* of the relationship in terms of the detrimental impact that its severance can be expected to have on the child and to weigh that against the benefit to the child of adoption,’ is appropriately reviewed under the deferential abuse of discretion standard. [Citation.]” (*In re K.P.*, *supra*, 203 Cal.App.4th at pp. 621-622, quoting *In re Bailey J.* (2010) 189 Cal.App.4th 1308, 1314-1315.) We likewise apply the composite standard of review here.

### *C. Discussion*

Mother regularly visited the boys and maintained a strong, loving relationship with them. Mother argues that terminating parental rights would deprive the boys of a substantial, positive emotional attachment such that they would be greatly harmed. Mother argues she had a parental relationship with the boys. B.G. was in her care and mother had a parental relationship with him, from the time he was born until September 2009 (nine months). Both B.G. and J.M. were also in her care from September 2011 to

June 2012 (eight months). Mother argues the boys loved her deeply and showed affection for her by calling her “Mom” or “Mommy,” and resisting ending visits. Mother further asserts that the boys’ strong, positive relationship with their prospective adoptive parents does not negate the harm they would suffer from the court terminating mother’s relationship with them.

Despite the strong, loving relationship mother held with the boys, we cannot say the trial court erred in finding that mother’s relationship would promote the boys’ well-being to such a degree as to outweigh the well-being the boys would gain by being adopted by their foster parents. (*In re Melvin A.* (2000) 82 Cal.App.4th 1243, 1253.) As noted in *In re Melvin A.*, the kind of parent/child relationship that must exist in order to trigger the beneficial parent relationship exception is not defined in any statute. The court in *Melvin A.* explained that the relationship “‘must be sufficiently strong that the child would suffer detriment from its termination.’ [Citation.]” (*Ibid.*) Continuing the parent/child relationship must promote “‘the well-being of the child to such a degree as to outweigh the well-being the child would gain in a permanent home with new, adoptive parents. In other words, the court balances the strength and quality of the natural parent/child relationship in a tenuous placement against the security and the sense of belonging a new family would confer. If severing the natural parent/child relationship would deprive the child of a substantial, positive emotional attachment such that the child would be greatly harmed, the preference for adoption is overcome and the natural parent’s rights are not terminated.’ [Citation.]’ [Citations.]” (*Melvin A.*, at pp. 1253-1254.)

Here, the boys had suffered harm from mother rehabilitating, with the boys returned to her, and then mother relapsed, with the boys once again removed from her. This occurred when the boys were quite young and there was evidence that they suffered from the separation and readjustment of returning to their foster parents. They also suffered emotional turmoil from visitation with mother and father. The instability in mother and father's relationship with the boys likely would continue because of their history of drug abuse and relapsing.

Mother cites *In re S.B.* (2008) 164 Cal.App.4th 289, for the proposition that the trial court erred in rejecting the parent relationship exception, since mother had a strong relationship with the boys and had consistently visited them. In *In re S.B.*, the court reversed the juvenile court's ruling rejecting the parent relationship exception as to the father, and terminating parental rights. (*Id.* at p. 292.) The *S.B.* court concluded that the father met his burden of establishing the exception by showing that he maintained consistent contact and visitation with S.B. and was in full compliance with his case plan. The father was S.B.'s primary caretaker for three years, since S.B.'s birth, until she was removed from his care because he and S.B.'s mother were arrested on drug-related charges. (*Id.* at pp. 293, 298.) The father consistently visited S.B. three times a week and S.B. wanted to leave with father at the end of the visits. (*Id.* at p. 294.)

In reversing the trial court, the court in *S.B.* stated that the parent relationship exception did not require a finding that the child has a primary attachment to the parent. The court explained that "[t]he exception may apply if the child has a 'substantial, positive emotional attachment' to the parent. [Citation.] We do not believe it is

reasonable to require the parent of a child removed from parental custody to prove the child has a ‘primary attachment’ to the parent, or to show the parent and the child have maintained day-to-day contact. If that were the standard, the rule would swallow the exception. [Citation.]” (*In re S.B.*, *supra*, 164 Cal.App.4th at p. 299.)

The instant case is distinguishable from *S.B.* The boys were younger than *S.B.* when they were initially removed from mother’s care and *B.G.* lived with her for only nine months. Also, *S.B.*’s father had completely complied with his case plan and fully rehabilitated at the time of the section 366.26 hearing. Unlike mother in the instant case, *S.B.*’s father did not have an extensive juvenile dependency history or history of receiving services and repeatedly relapsing on drugs. In addition, in *S.B.*, an evaluator conducted a bonding study and testified that *S.B.*’s father’s relationship with *S.B.* vacillated between parental and peer-like. The evaluator further concluded that, because *S.B.*’s father’s relationship with *S.B.* was fairly strong, there was a potential for harm to *S.B.* were *S.B.* to lose the parent-child relationship. (*In re S.B.*, *supra*, 164 Cal.App.4th pp. 295-296.)

Here, there was no bonding study or related expert testimony. Also, unlike in *S.B.*, *J.M.* was removed from mother’s care shortly after his birth and lived with his foster family for the first 13 months of his life. *B.G.* was nine months old when he was removed from mother’s care in the instant proceedings. Although the boys were returned to mother, they resided with her for only 10 months, and then were once again removed from mother’s custody and care. This, no doubt disrupted the boys’ relationship with mother and created emotional turmoil for them when they subsequently visited her. At

the time of the section 366.26 hearing, J.M. and B.G. were two and a half and three and a half years old, respectively. They had lived with their foster family for a total of about 22 months. Unlike in *S.B.*, the boys spent a substantial portion of their young lives in foster care, and their relationship with mother was disrupted by her drug abuse relapse and the juvenile court's removal of the boys a second time.

Under such circumstances, we conclude the court did not abuse its discretion in rejecting the parental relationship exception, even though mother consistently visited the boys. It was reasonable for the court to find that mother's continued relationship with the boys did not promote the well-being of the boys to such a degree as to outweigh the well-being the boys would gain in a permanent home with new, adoptive parents, particularly when it was likely mother would relapse once again.

V

#### DISPOSITION

The judgment is affirmed.

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CODRINGTON

J.

We concur:

KING

Acting P. J.

MILLER

J.