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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

In re NATHAN P., et al., Persons Coming Under
the Juvenile Court Law.

STANISLAUS COUNTY COMMUNITY
SERVICES AGENCY,

Plaintiff and Respondent,

v.

TAMMY P.,

Defendant and Appellant.

F070181

(Super. Ct. No. 516423 516424)

OPINION

APPEAL from orders of the Superior Court of Stanislaus County. Ann Q.
Ameral, Judge.

Jack A. Love, under appointment by the Court of Appeal, for Defendant and
Appellant.

John P. Doering, County Counsel, and Carrie M. Stephens, Deputy County
Counsel, for Plaintiff and Respondent.

Tammy P. (mother) appeals the juvenile court's summary denial of her Welfare and Institutions Code section 388¹ petition without an evidentiary hearing and subsequent termination of parental rights over her then seven- and five-year-old sons, Nathan and Sebastian (collectively the boys). She contends the juvenile court abused its discretion in denying the section 388 petition, and erred in declining to apply the beneficial parent-child relationship exception. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

In February 2012, the boys' maternal grandmother, Karen, petitioned the San Joaquin probate court for guardianship over then four-year-old Nathan and two-year-old Sebastian. Mother had left the boys in Karen's care; Karen claimed the guardianship was necessary because mother had been reported to Child Protective Services (CPS) for child abuse, and was depressed and suicidal. Karen stated the boys' fathers were in Mexico.

After information came to the probate court's attention that the boys may come within the provisions of section 300, the probate court referred the matter to the San Joaquin County Human Services Agency (SJ Agency) for an investigation under Probate Code section 1513, subdivision (c), and asked the SJ Agency to inform the court of its investigation and any resulting action. In a subsequent letter to the probate court, the SJ Agency reported that both Karen and mother had extensive CPS histories, and that CPS intervened with Karen and her children, which resulted in the adoption of two of her children. Moreover, Karen had a criminal history that included a conviction for child cruelty. The SJ Agency recommended against the guardianship and filed a dependency petition on the boys' behalf.

The dependency petition alleged the boys came within the provisions of section 300, subdivisions (b) (failure to protect) and (g) (no provision for support) based on, among other things, Karen's CPS and criminal histories; mother's CPS referral history;

¹ Undesignated statutory references are to the Welfare and Institutions Code.

mother's inability to provide ongoing care for the boys and her leaving them without provision for support; and mother's mental health issues. The San Joaquin juvenile court adjudged the boys dependents and, in September 2012, transferred the case to Stanislaus County, where mother resided.

The Stanislaus County juvenile court (juvenile court) accepted the case and set the dispositional hearing for November 2012. The Stanislaus County Community Services Agency (Agency) placed the boys together in a foster home. In a report prepared for the dispositional hearing, the Agency stated that mother had a history of referrals dating back to 2008, which included reports of yelling at the boys, leaving them unattended, and smoking marijuana in their presence. While records showed mother had a history of mental health issues, mother was hesitant to discuss those issues in an interview. She admitted being depressed in the past, for which she had counseling, and she was previously "kept" in a hospital for about two weeks due to her depression.

The Agency recommended the juvenile court order a reunification plan for mother that required her to complete a clinical assessment and parenting program, participate in individual counseling and weekly visitation, and submit to random drug testing. The case plan further required mother to complete a substance abuse assessment and follow any recommended treatment if she tested positive for drugs.

In November 2012, the juvenile court approved the proposed reunification plan for mother and denied reunification services for the boys' fathers. Mother was given a minimum of one two-hour weekly visit with the boys, which the social worker had discretion to increase. The juvenile court set the six-month review hearing for the following month after determining the boys had been in foster care since July 1, 2012.

In December 2012, the juvenile court continued the review hearing to January 2013, to hear mother's *Marsden*² motion, which it subsequently denied.

² *People v. Marsden* (1970) 2 Cal.3d 118.

In its report for the six-month review hearing, the Agency advised the juvenile court that mother had scheduled initial appointments for services, including a substance abuse assessment on January 23, 2013. Mother maintained the boys should not have been removed and should be returned to her custody. Mother had visited the boys once in October, November and December, but missed at least four other visits. Mother appeared to lack parenting skills, had difficulty interacting and engaging the boys in play, and the boys did not appear distressed when separating from her. The boys were adjusting slowly to their foster family and home. A social worker observed that the boys appeared happy and comfortable in the home, and interacted well with their foster parents. The social worker believed mother could benefit from services and recommended she receive an additional six months of services.

At the January 2013 six-month review hearing, the juvenile court continued mother's reunification services and set a 12-month review hearing for June 2013. The juvenile court modified the case plan to provide that if mother completed a substance abuse assessment on January 23, 2013, she was required to follow all recommendations from that assessment. Mother did not appear at the hearing.

In April 2013, mother informed her social worker that she was approximately six weeks pregnant and expected to deliver in early December 2013.

In early June 2013, mother tested positive for opiates following a visit; the test also indicated recent prior use of marijuana. While mother did not appear to be surprised about the positive result for opiates, she immediately denied marijuana use. A few days later, mother called an Agency supervisor to complain about the drug test; she did not agree with the results, stated she did not use drugs and explained she was given Vicodin at the emergency room a few weeks before. Mother did not appear for the January 23, 2013 scheduled substance abuse assessment. Mother's social worker submitted a second referral for a substance abuse assessment, which was denied. Accordingly, the social worker told mother to attend Alcoholics/Narcotics Anonymous meetings for 21

consecutive days, after which the Agency would authorize another alcohol and drug assessment. Mother also was given the option of attending the Salvation Army Rehabilitation Program in San Francisco if she wanted to get into a program immediately.

In its report for the 12-month review hearing, the Agency reported mother was not compliant with any aspect of her case plan. Mother had not consistently visited the boys; she had missed at least 13 visits from November 2012 to May 2013. The social worker noted the boys, who were well mannered and very respectful to the social worker, appeared to have bonded with their caregivers. While during visits the boys appeared to be bonded with mother and enjoyed contact with her, the social worker received information from the “FFA social worker” that the boys were not asking about mother as much. The boys had completed mental health assessments; Sebastian met the medical necessity for mental health services and was receiving weekly counseling services. The boys appeared well grounded in their foster home and felt loved by the caregivers. The Agency recommended the juvenile court terminate mother’s reunification services and set a section 366.26 hearing to consider a permanent plan for the boys.

Mother requested a contested hearing, which the juvenile court set for early July 2013. Meanwhile the Agency, realizing there was confusion over mother’s referrals for a substance abuse assessment, authorized the assessment, which took place on July 1, 2013. Mother admitted she took Vicodin with an outdated prescription and codeine without a prescription five weeks before. She had no history of substance abuse treatment, but was willing to be treated. Mother also admitted she had mental health issues, but she was not taking her mental health medications due to her pregnancy, even though she was increasingly symptomatic. She said her doctor was exploring her medication options. As a result of the assessment, mother was referred to a treatment program to address both her substance abuse and mental health issues.

At the July 8, 2013 contested hearing, the boys’ attorney informed the juvenile court that the boys liked their visits with mother and wanted to go back home with her.

Mother testified she wanted more time to complete her case plan. Mother assured the court she would participate in services and “[e]ventually” find some way to complete them. She said she had completed a parenting class in San Joaquin County, even though the SJ agency did not tell her what class to attend. She had difficulty completing services and attending visits due to morning sickness she experienced during her pregnancy. Mother also testified she did not start her services earlier because she “was lagging.” According to mother, she played with the boys during visits; when the boys would first see her, they would run towards her and hug her. When visits ended, Nathan would become “very depressed and want[] to come home[,]” while Sebastian seemed normal. Mother testified she gave the boys to Karen because she was depressed and having negative thoughts, although she did not harm herself. She got help and was taking an antidepressant and Risperdal, but stopped taking the medications when she got pregnant.

The juvenile court continued the hearing, along with mother’s services, until September 2013, because it was not convinced mother was given the appropriate referrals by San Joaquin County, thereby delaying her progress in Stanislaus County. The juvenile court warned mother that if she did not make “remarkable progress” in the next two months, her services would be terminated, and advised her this was her “last opportunity.”

The following day, mother’s social worker sent her a letter listing the services she needed to complete along with the names and telephone numbers of the individuals she needed to contact to initiate services. In late July 2013, mother began intensive outpatient treatment, but was discharged from the program in late August for excessive absences. According to mother’s counselor, while she attempted to participate in group sessions, she demonstrated limited cognitive abilities, and limited reading and writing skills. By September 2013, mother completed the parenting class, but had not begun individual parenting sessions. Mother completed her clinical assessment in September; the clinician recommended mother complete a psychological assessment and participate

in individual counseling. During this time, she tested negative for drugs and visited the boys weekly.

In its report for the continued 12-month review hearing, the Agency recommended the juvenile court terminate mother's reunification services and set a section 366.26 hearing. The Agency opined that mother had not "effectively engaged in her case plan and demonstrated that she is serious about having her children returned to her care."

At the September 19, 2013 continued contested 12-month review hearing, mother, the sole witness, testified she stopped participating in drug treatment because she did not like to hear about drugs and did not need to be there. She denied being a drug addict or using drugs recreationally. She said she was not willing to further participate in drug treatment. When questioned about her June 2013 positive result for an opiate, mother testified she was treated at the hospital for a bad yeast infection the day she was tested, and the doctor gave her Vicodin for pain but did not give her a prescription. Mother had started seeing the clinician who gave her the clinical assessment for individual counseling. Mother said she had a two-bedroom apartment where the boys could live, and she wanted the juvenile court to return them to her custody. She had great communication with the boys, who called her "Mommy," and they were bonded to her.

Following argument, the juvenile court found it would be detrimental to return the children to mother's custody, terminated her reunification services, and set a section 366.26 hearing for January 2014, which subsequently was vacated and reset for March 18, 2014.³ Mother's visits were reduced to once a month, supervised visits.

On March 7, 2014, the Agency filed a section 366.26 WIC report that recommended termination of parental rights so the boys could be freed for adoption. The

³ Mother sought an extraordinary writ from the juvenile court's order terminating reunification services and setting the section 366.26 hearing; she asked for continuation of reunification services and return of the boys to her custody. We denied her petition in an unpublished opinion, *T.P. v. Superior Court* (Nov. 27, 2013, F068050).

boys had been in a concurrent foster home since February 1, 2013; on January 31, 2014, they were moved to a new concurrent foster home after their first caregivers told the Agency they did not wish to adopt after all. The boys were doing well in their new home. While the foster parents were committed to providing the boys with a permanent home, due to the recent placement, they wanted a little more time to bond with the boys and integrate them into their home before an adoption was finalized. With extra time, the social worker believed it was extremely likely the boys would be adopted by their current foster parents. Due to the recent change in placement, an adoption assessment had not been completed.

Six-year-old Nathan was in the first grade; his teacher recommended he be retained in that grade because he was academically at the end of the kindergarten grade level. Nathan was doing fine socially, came to school ready and his classmates liked him. His attendance and behavior were good. The social worker had completed a “Katie A. eligibility assessment” and Nathan had been referred for a mental health assessment. Four-year-old Sebastian was enrolled in a head start program. He continued to receive counseling services; his treatment plan included learning and practicing coping, relaxation, and self-monitoring skills, as well as setting healthy boundaries. Mother had visited the boys monthly.

The Agency recommended the juvenile court find the boys were likely to be adopted, termination of parental rights would not be detrimental to the boys, and the permanent plan of adoption was appropriate, but no definite adoptive home had been located due to the recent placement change. The Agency recommended initiation of an adoption assessment and that a section 366.26 hearing be set for September 2014.

At the March 18, 2014 hearing, the juvenile court determined that one of the fathers had not been served and the Agency’s report was untimely. It continued the hearing to July 15, 2014.

On July 2, 2014, mother's trial counsel filed a section 388 requesting the juvenile court to vacate the order terminating reunification services and reinstate services. Mother's counsel asserted that mother's pregnancy had placed an undue burden on her while she was trying to participate in reunification services. Counsel explained that mother was no longer pregnant and she had completed her reunification services with the exception of the "child lab" and "Intensified Outpatient Program"; mother was confident she could complete those classes. Counsel asserted the requested order would be better for the boys because mother is their biological mother, and the boys were being shifted through the foster care system as evidenced by their change of placement, which was not stable or in their best interests.

On July 7, 2014, the juvenile court denied the petition without a hearing, finding that the request did not state new evidence or a change of circumstances, and the proposed change of order did not promote the boys' best interests. The juvenile court explained: "Mother's services were terminated on 09/19/13. No evidence has been provided to show any change of circumstances since termination of services. Children's interests in achieving permanency would not be promoted by the granting of the request."

In an addendum report filed on July 14, 2014, the Agency continued to recommend termination of parental rights and a permanent plan of adoption. The caregivers with whom the boys had been living since January 2014, Mr. and Mrs. C., were very committed to adopting them. The boys told the social worker they liked living with the C.'s and that they do lots of fun things together, but the social worker believed the boys could not understand what it meant to live with this family forever, as the concepts of time and permanence were too abstract.

The Agency's delivered service log described the boys' visits with mother. Generally, mother was appropriate with the boys, and the boys were happy to see and visit mother. At the end of the visit on November 5, 2013, the boys were crying and upset that they would not be able to see their mother anymore, but in later visits, the boys

had no problems when the visit ended. Mother visited once each month since October 2013, with the exception of her monthly visits in April, May and July 2014. Mother cancelled the April visit and the C.'s cancelled the May visit because Sebastian was sick. The July visit was cancelled because Karen said mother was in the hospital. The other visits took place on October 8, November 5, and December 3, 2013, and January 21, February 4, March 11, June 17, 2014

Sebastian's challenging behavior began to escalate in October 2013, when he was living in the first foster home; his therapist was addressing the behavior. When the boys moved to the second foster home in January 2014, they were happy to be there, excited about their shared bedroom, and interacted appropriately with the C.'s. During the social worker's home visit at the C.'s on February 19, 2014, Nathan asked the social worker if she was there to take him away. The social worker assured him she was not taking him anywhere and she was there just to talk to them. The boys were adjusting to the home, but had a lot of fears about the C.'s being gone. When Mr. C. dropped Nathan off at school, Nathan would wander the halls crying for Mrs. C., but would be fine once he got into class. Mrs. C. believed this was because the boys were uncertain about their placement and worried about having to leave.

By April 2014, Sebastian began exhibiting defiant behavior at the C.'s home. Mrs. C., however, was able to manage it and did not feel like it was unusual or excessive. Nathan responded well to redirecting, but would cry for his mother. Nathan told the social worker everything was good; he liked the house, his bed, and he felt safe there, as he was not afraid. In May 2014, Sebastian began having explosive temper tantrums at the C.'s home; when told no, he would throw himself on the floor and begin to scream, kick and throw things. He would also physically attack Nathan when they had a disagreement. It was clear to the social worker that Sebastian had significant problems responding to parental instructions, as well as lots of jumping up and down, and impulsivity. The C.'s asked for Sebastian to be re-evaluated for counseling services.

Nathan was “pretty compliant” with house rules and parental directions. He had been evaluated for counseling services, but the foster mother had not heard if or when counseling would begin.

In July 2014, the social worker met with the C.’s and the boys to discuss adoption, continuing counseling for the boys after the adoption, and the available resources. The boys liked living with the C.’s. Nathan told the social worker that if he stayed with the C.’s until he grew up, he could then live with mother in Mexico.

The contested section 366.26 hearing began on July 15, 2014, but was trailed to August 8 due to the juvenile court’s schedule. The juvenile court expressed its concern about Sebastian’s behavioral issues, and wanted to ensure that the Agency was addressing those issues immediately.

On August 6, 2014, mother’s trial counsel filed a second section 388 petition requesting the juvenile court to reinstate reunification services. Mother’s counsel asserted that since the 12-month review hearing, (1) mother was attempting to re-enroll in the required reunification courses, specifically “child lab” and “Intensified Outpatient Program[,]” which was all she needed to complete; (2) mother, who lived alone in her own apartment and had beds, clothing, toys and “facilities” to care for the boys, was confident she could complete the classes; and (3) Sebastian was “manifesting emotional disturbances.” Counsel further asserted the requested order would be better for the boys because: reunification would be with the biological mother; the boys were being “shifted” through the foster care system, as shown by their move from one foster family to another, which was neither stable nor in their best interests; Sebastian, who was manifesting emotional disturbances, often stated he wanted to be with mother and asked “When am I coming home?”; and termination of visitation would be detrimental to the boys. Attached to the petition was a September 1, 2013 rental agreement showing that mother was renting an apartment on a month-to-month basis; mother signed the rental agreement on August 14, 2013 and the landlord signed on August 19, 2013.

Mother's counsel also filed his declaration, in which he sought an ex parte order changing the September 19, 2013 order terminating mother's reunification services to an order reinstating services or, in the alternative, shortened time for a hearing on the section 388 petition. Counsel asked that the petition be heard before the August 8, 2014 section 366.26 hearing; asserted that the boys were not likely to be adopted as Sebastian was difficult to place due to his emotional problems, and there was no identified or available prospective adoptive parent; and requested the juvenile court grant mother's request and issue an order reinstating her services.

On August 7, 2014, the juvenile court denied the petition without a hearing, finding that the request did not state new evidence or change of circumstances, and the proposed change of order did not promote the boys' best interests. The juvenile court explained: "The[re] is no evidence of changed circumstances since termination of mother's services on 9/19/13." The juvenile court also denied mother's ex parte request shortening time for the hearing on her petition.

At the August 8, 2014 section 366.26 hearing, county counsel made an offer of proof that the supervising social worker, Patricia Tout, would testify that mother missed a visit with the boys in July and that Sebastian continued to receive regular counseling services, which offer the parties and the juvenile court accepted. Mother called Tout as a witness. Tout had not done a bonding assessment for mother and the boys. The boys were four- and two-years-old when they were detained in May 2012 and, based on reports Tout had read, had lived primarily with mother before their detention. Tout agreed that after the boys' removal, mother had maintained regular visitation, and the reports were that the visits went well and were positive. The boys seemed happy to arrive at the visits, but also were fine when they left. The current care providers intended to adopt the boys.

Mother also testified on her own behalf. The boys were taken from her on May 1, 2012. She had maintained regular visitation with them since then. Mother described the

visits as follows: “Me and my kids play together. I keep them entertained. We play cards or whatever is there, what the CPS put in there, and toys. And I like to draw and stuff like that.” The boys were very happy during visits, and told mother they were tired “of being in here[,]” and they did not like it “where they’re at.” Mother described the visits as positive and that she was bonded with the boys, as shown by them hugging her when she arrives for visits and telling her they miss her. The boys have said they want to come home. Before the boys were detained, mother was in a three-month program. During that time, the boys lived with Karen and visited mother once a month. Prior to being in the program, the boys lived with mother.

Mother thought the boys needed her in their lives because she is their mother and she really loves them. Mother thought it was not right to terminate her parental rights and it would be bad for the boys, as it would be hard on them and they would feel hurt because they would think she does not want them. When asked who in her view was closest to the boys, mother answered, “My mom,” but also said she was close to them and they follow her everywhere. Mother felt that CPS was keeping her boys away from her just to hurt her more and make her suffer. Mother thought the boys would continue to act out because they want to come home. She believed it would be good for the boys to continue to have a relationship with her.

County counsel asked the juvenile court to terminate parental rights because the boys are adoptable, their caregivers were willing to adopt them, and mother had not met her burden of proving an exception to termination of parental rights. County counsel pointed out that while mother had maintained regular and positive visits, the boys had been out of her care for over two years and mother acted as more of a friendly visitor than a parent during visits. Mother’s counsel argued the evidence showed a substantial, positive emotional attachment between mother and the boys, and it would be detrimental to the boys to terminate mother’s parental rights.

The juvenile court found that the boys were very likely to be adopted and mother failed to meet her burden of proving that termination of parental rights would be detrimental to the boys. The juvenile court explained that even if there were some detriment, it was required to weigh that against the benefit the boys would receive in having a permanent home. The juvenile court found the boys desperately needed to know they belonged with someone and seemed to be really attached to the foster parents, and on that basis, found termination of parental rights would not be detrimental to the boys. Accordingly, the juvenile court ordered adoption as the permanent plan and terminated parental rights.

DISCUSSION

Summary Denial of the Section 388 Petition

Mother first challenges the summary denial of her second section 388 petition filed on August 6, 2014. In her view, she made a prima facie showing of changed circumstances, as “new evidence showed the [boys] were not stable due to their desire to return to their mother.” This new evidence includes Nathan’s statement to the social worker that he wanted to stay in the foster home, but would live with mother when he grew up; that the foster parents were trying to get Nathan into counseling; and that Sebastian was receiving counseling for defiant behavior in his foster home. Mother asserts this evidence is a prima facie showing that holding a hearing on the petition would have promoted the boys’ best interests, particularly in light of what she claims is the boys’ strong bond with her and Sebastian’s “explosive” behavior that was affecting Nathan. As discussed below, we disagree with mother and conclude the juvenile court did not abuse its discretion when it denied her petition.

A parent may petition the juvenile court to vacate or modify a previous order on grounds of change of circumstance or new evidence. (§ 388, subd. (a).) The parent, however, must also show that the proposed change would promote the best interests of

the child. (§ 388, subd. (d); Cal. Rules of Court, rule 5.570;⁴ *In re Stephanie M.* (1994) 7 Cal.4th 295, 317 (*Stephanie M.*).

A court shall liberally construe such a petition in favor of its sufficiency. (*In re Marilyn H.* (1993) 5 Cal.4th 295, 309 (*Marilyn H.*)). Nonetheless, section 388 contemplates that a petitioner makes a prima facie showing of both elements to trigger an evidentiary hearing on the petition. (*In re Zachary G.* (1999) 77 Cal.App.4th 799, 806 (*Zachary G.*); see also *Marilyn H.*, at p. 310.) For instance, if a parent makes a prima facie showing of changed circumstances or new evidence sufficient to satisfy the first prong under section 388, a court may deny a section 388 petition without an evidentiary hearing if the parent does not make a prima facie showing that the relief sought would promote the child's best interests. (*In re Justice P.* (2004) 123 Cal.App.4th 181, 189.)

A prima facie showing refers to those facts that will sustain a favorable decision if the evidence submitted in support of the petitioner's allegations is credited. (*In re Edward H.* (1996) 43 Cal.App.4th 584, 593 (*Edward H.*)). Consequently, section 388 petitions with general, conclusory allegations do not suffice. Otherwise, the decision to grant a hearing on a section 388 petition would be nothing more than a pointless formality. (*Edward H.*, *supra*, at p. 593.) To obtain a hearing, successful petitions include declarations, certificates or other attachments, which demonstrate the showing the petitioner will make. (*In re Anthony W.* (2001) 87 Cal.App.4th 246, 250-251.)

The petition executed by mother's counsel failed to make a prima facie showing of either changed circumstances or the boys' best interests. With respect to changed circumstances, mother failed to show any change since the September 9, 2013, 12-month

⁴ California Rules of Court, rule 5.570(d) provides: "The court may deny the petition ex parte if ... the petition filed [under section 388] fails to state a change of circumstance or new evidence that may require a change of order or termination of jurisdiction, or fails to show that the requested modification would promote the best interest of the child"

review hearing at which her reunification services were terminated. The allegations in the petition that mother had an apartment that would accommodate the boys and that she was attempting to sign up for classes, which she was confident she could complete, are not changed circumstances at all. This is because she had the apartment at the time of the 12-month review hearing and she had not signed up for or begun the classes.

The final changed circumstance alleged in the petition is that Sebastian was “manifesting emotional disturbances.” Sebastian’s behavior, however, does not factor into the juvenile court’s decision on whether to continue mother’s reunification services. Instead, to continue mother’s services, the juvenile court was required to find a substantial probability that the boys would be returned to her physical custody and maintained safely in her home by the 18-month review hearing. (§ 366.21, subd. (g)(1).) To make this finding, the juvenile court had to consider whether mother (1) consistently visited the boys, (2) made significant progress in resolving the problems that led to their removal, and (3) demonstrated the capacity and ability to complete the case plan’s objectives and provide for the boys’ safety, protection, and physical and emotional well-being. (*Ibid.*) Since the boys’ mental and emotional states are not part of the decision on whether to continue reunification services, that Sebastian began to manifest emotional disturbances after the 12-month review hearing or, as mother asserts on appeal, that the boys were unstable due to their desire to return to her, is not information that would change the juvenile court’s mind on whether to continue mother’s services. Consequently, their mental states do not constitute changed circumstances for purposes of a section 388 petition to reinstate mother’s services.

Even assuming mother showed changed circumstances, however, she did not establish that reopening reunification services would be in the boys’ best interests. The parent bears the burden of showing in a section 388 petition both a change of circumstances and that the proposed change is in the child’s best interests. A petition only alleging changing circumstances, which would lead to a delay in the selection of a

permanent home, to see if a parent could eventually reunify with a child at some future point, does not promote stability for the child or the child's best interests. (*In re Casey D.* (1999) 70 Cal.App.4th 38, 47.)

To understand the element of best interests in the context of a section 388 petition brought, as in this case, on the eve of the section 366.26 hearing, we look to our Supreme Court's decision in *Stephanie M.* At this point in the proceedings, a parent's interest in the care, custody, and companionship of his or her children is no longer paramount. Rather, once reunification efforts end, the focus shifts to the children's needs for permanency and stability; there is in fact a rebuttable presumption that continued out-of-home care is in the best interests of the child. (*Stephanie M.*, *supra*, 7 Cal.4th at p. 317.) A court conducting a modification hearing at this stage of the proceedings must recognize this shift of focus in determining the ultimate question before it, that is, the best interest of the child. (*Ibid.*)

Mother did not show it would be in the boys' best interests for the juvenile court to order continued services for her. That option would have delayed permanency and stability for the boys, who had not been in mother's care for over two years. Mother failed to visit the boys consistently during the first of those years, and although she visited more regularly during the second year, her visits were only monthly. Notably, in advocating her position, mother ignores the boys' need for permanence and stability. Neither the juvenile court nor this court, however, may do so.

In sum, mother failed to make a prima facie showing in her petition of changed circumstances, and that continuing services would be in the boys' best interests.

The Beneficial Parental Relationship Exception to Adoption

Mother contends the juvenile erred when it declined to apply the statutory exception to adoption of section 366.26, subdivision (c)(1)(B)(i), known as the beneficial parental relationship exception. She asserts she met her burden of proving both that she had regular visitation and contact with the boys, and the boys would benefit from

continuing their relationship with her, such that it would be detrimental to the boys to terminate her parental rights.

There is a split of authority concerning the standard of review in this context. (See *In re Bailey J.* (2010) 189 Cal.App.4th 1308, 1314–1315 (*Bailey J.*) and *In re K.P.* (2012) 203 Cal.App.4th 614, 621–622 [hybrid combination of substantial evidence and abuse of discretion standards; applying substantial evidence test to determination of the existence of a beneficial parental or sibling relationship and the abuse of discretion test to issue of whether that relationship constitutes a compelling reason for determining that termination would be detrimental to the child]; *In re Autumn H.* (1994) 27 Cal.App.4th 567, 576 (*Autumn H.*) [substantial evidence test—“On review of the sufficiency of the evidence, we presume in favor of the order, considering the evidence in the light most favorable to the prevailing party, giving the prevailing party the benefit of every reasonable inference and resolving all conflicts in support of the order”]; *In re Jasmine D.* (2000) 78 Cal.App.4th 1339, 1351 (*Jasmine D.*) [abuse of discretion test].) Mother asserts the substantial evidence standard of review applies to our review of the beneficial parental relationship exception, while the Agency asserts review is for abuse of discretion.

Our conclusion in this case would be the same under any of these standards because the practical differences between the standards are “not significant,” as they all give deference to the juvenile court’s judgment. (See *Jasmine D.*, *supra*, 78 Cal.App.4th at p. 1351.) “[E]valuating the factual basis for an exercise of discretion is similar to analyzing the sufficiency of the evidence for the ruling. . . . Broad deference must be shown to the trial judge. The reviewing court should interfere only “if [it] find[s] that under all the evidence, viewed most favorably in support of the trial court’s action, no judge could reasonably have made the order that he [or she] did.’ . . .”” (*Id.* at p. 1351.) Moreover, a substantial evidence challenge to the juvenile court’s failure to find a beneficial parental or sibling relationship cannot succeed unless the undisputed facts establish the existence of those relationships, since such a challenge amounts to a

contention that the “undisputed facts lead to only one conclusion.” (*In re I.W.* (2009) 180 Cal.App.4th 1517, 1529; *Bailey J., supra*, 189 Cal.App.4th at p. 1314.)

Once the court determines a child is likely to be adopted, the burden shifts to the parent to show that termination of parental rights would be detrimental under one of the statutory exceptions. (*Zachary G., supra*, 77 Cal.App.4th at p. 809.) To avoid termination of parental rights under the parent-child relationship exception, the juvenile court must find “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).)

The Court of Appeal in *Autumn H.* defined a beneficial parent/child relationship as one that “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.” (*Autumn H., supra*, 27 Cal.App.4th at p. 575.) “[T]he 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.” (*Ibid.*)

A parent must show more than frequent and loving contact or pleasant visits for the exception to apply. (*In re C.F.* (2011) 193 Cal.App.4th 549, 555 (*C.F.*); *In re C.B.* (2010) 190 Cal.App.4th 102, 126; *I.W., supra*, 180 Cal.App.4th at p. 1527.) “The parent must show he or she occupies a parental role in the child’s life, resulting in a significant, positive, emotional attachment between child and parent. [Citations.] Further, to establish the section 366.26, subdivision (c)(1)(B)(i) exception the parent must show the child would suffer detriment if his or her relationship with the parent were terminated.” (*C.F., supra*, at p. 555.)

In this case, the juvenile court found that while mother had a loving relationship with the boys, she did not meet her burden of proving that adoption was not in the boys' best interests. In so finding, the juvenile court noted the following: mother and the boys loved each other, but the boys had been out of mother's home for over two years; while Sebastian was having behavioral issues, the boys seemed bonded and attached to the foster parents; mother's testimony that there would be detriment was insufficient to satisfy her burden of showing detriment; and the boys desperately needed to know they belonged with someone and were attached to their foster parents. Accordingly, the juvenile court found mother's relationship with the boys did not promote their wellbeing to such a degree that it outweighed the wellbeing they would gain in a permanent adoptive home with new adoptive parents.

Mother asserts the juvenile court erred in so finding, citing to evidence that (1) a month before the section 366.26 hearing, Nathan said he wanted to live with mother; (2) after reunification services were terminated, Sebastian began having escalating negative behaviors; (3) two months later, the boys were sad and crying at the end of a visit because they were upset about not seeing mother anymore; and (4) as the section 366.26 hearing approached, Sebastian began having explosive temper tantrums. She also points to the social worker's testimony that visits were positive, and her own testimony that the boys were very happy at visits, hugged her, told her they missed her and wanted to go home with her, and she believed the boys would continue to act out negatively because they wanted to go home. Mother asserts this evidence shows more than that the boys were enjoying visits that provided some measure of benefit; instead, it shows that they were attached and bonded to mother.

Mother, however, ignores the other evidence that supports the juvenile court's decision. Mother only visited the boys once a month. In all but one of those visits, i.e. the November 2013 visit at which the boys became upset, the boys had no problem separating from mother. Mother does not point to any evidence in the record

demonstrating that the boys had a consistent and positive relationship with her similar to a parent-child relationship. Nor was there testimony or other evidence demonstrating a potential for harm if the boys were to lose their relationship with mother. Moreover, the boys were very young; without termination of parental rights, they faced the prospect of tenuous placements for the bulk of their childhoods, which runs counter to their protected interests in permanence and stability.

On this record, we cannot say that no judge reasonably could have made the decision made here, or that the undisputed facts lead to only one conclusion.

DISPOSITION

The orders denying the section 388 petition filed on August 6, 2014, and terminating parental rights are affirmed.

GOMES, J.

WE CONCUR:

CORNELL, Acting P.J.

PEÑA, J.