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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

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

ORANGE COUNTY SOCIAL SERVICES  
AGENCY,

Plaintiff and Respondent,

v.

M.S.,

Defendant and Appellant.

G047384

(Super. Ct. No. DP019578)

O P I N I O N

Appeal from orders of the Superior Court of Orange County, Dennis J. Keough, Judge. Affirmed.

Pamela Rae Tripp, under appointment by the Court of Appeal, for Defendant and Appellant.

Nicholas S. Chrisos, County Counsel, and Karen L. Christensen, Deputy County Counsel, for Plaintiff and Respondent.

No appearance for the Minor.

M.S. (mother) appeals from the court's orders denying her petition for modification (Welf. & Inst. Code, § 388; all further statutory references are to this code) and terminating her parental rights to her now almost five-year-old son, T.A. (the child). She contends the court abused its discretion in summarily denying the petition without a hearing and finding the benefit exception under section 366.26, subdivision (c)(1)(B)(i) inapplicable. Finding no error, we affirm.

## FACTS AND PROCEDURAL BACKGROUND

Due to mother's drug and alcohol problems, the child was declared a dependent in June 2010 when he was two years old. Mother initially received reunification services but in November "reverted back to her old behaviors of missing visits" without 24 hours' notice and in December was jailed for failing to pay her DUI fines and complete her program. Mother did not appear capable of completing her case plan or DUI program and seemed more concerned about her DUI than reunifying with the child. At the contested six-month review hearing, the court terminated reunification services at the recommendation of Orange County Social Services Agency (SSA) and set a section 366.26 permanency hearing. It thereafter summarily denied mother's section 388 petition and declared the paternal grandparents the child's legal guardians.

Mother petitioned this court for relief from the order denying her section 388 petition. In *In re T.A.* (Nov. 15, 2011, G045597) [nonpub. opn.], we affirmed the order denying the section 388 petition because although mother discussed at length her changed circumstances, she had not shown the requested change would be in the child's best interests. (*Id.* at pp. 1, 6, 8.) "[A]t the time of the hearing on the section 388 petition, the child had been in the paternal grandparents' care for 16 months. Although designated as the child's legal guardians, they intended to adopt him once they resolved the paternal grandfather's retirement circumstances. The child was doing well in their

care and had ‘an attachment with [them] that is not displayed with . . . mother.’ He does not ask for mother or mention her and has no problem ending visits.” (*Id.* at p. 7.)

In January 2012, SSA reported the paternal grandparents wanted to adopt the child, whose behavior had “greatly improved” after he was placed with them. He appeared “happy and healthy” in their care and had a “strong attachment” to them, notwithstanding being diagnosed with a mild case of “[r]eactive [a]ttachment [d]isorder.” Mother had been visiting the child regularly for two hours twice a week and was appropriate, but the child sometimes did not want to hold her hand, be carried, “touched . . . or have anything to do with her,” and occasionally spoke rudely to her. SSA believed the current plan of legal guardianship was no longer appropriate and proposed a section 366.26 hearing be scheduled. The court agreed and set the hearing.

In the report prepared for the permanency hearing, SSA recommended the child be found adoptable and mother’s parental rights be terminated. The child called the paternal grandparents “nana and papa” and interacted with them in a way that showed he was attached to them. Mother continued to visit regularly but the child began resisting and crying when picked up for visits, saying he did not “want to see mommy.” He was “distant and nonresponsive” to mother and seemed more interested in being with the paternal grandparents and his friends than visiting with mother.

The hearing was continued and SSA provided an addendum report noting that for the last month the child had been verbalizing his desire not to see mother and, although he did go to the visits, he hid behind the visitation monitor and stated he wanted “to go home to nana.” It was continued again after mother filed a section 388 petition in May 2012, requesting the child either be returned to her care, a 60-day trial return to begin immediately, or more reunification services.

Mother’s petition alleged changed circumstances and attached, among other things, documentation purportedly showing she had completed or was participating in various programs. She also submitted visitation notes from August 2011 to July 2012.

SSA reported mother had continued to regularly visit the child. At times, the child hugged mother, held her hand, called her “mama,” kissed and said he loved her, and was affectionate. Other times, the child said he preferred “nana’s milk” or wanted “to go with my nana,” and that he did not “like [or want] mama.” Additionally, after mother spanked the child in early July 2012 for running out to an ice cream truck, the child’s behavior regressed and he began hiding during therapy sessions, peeing on his bedroom floor, being more whiny, and throwing tantrums, which had stopped before the incident. When SSA met with the child at his current placement and asked how the visits with mother were going, the child ran and hid in his room and put his head in the corner.

After a continuance for additional documentation, the court summarily denied the section 388 petition, concluding mother had not demonstrated changed circumstances or that the requested change would be in the child’s best interest. At the subsequent contested section 366.26 hearing, mother testified she had consistently visited the child during the last year, missing only twice. She brought him toys and healthy food, read to him, took him to the bathroom, disciplined him, and allowed him to play with her cell phone. The child knew she was his mother and was bonded to her because he “recognize[s] [her] out of a crowd” and “a child has a sense of knowing who his parent is.” The visits were not always perfect but there were many good ones. Although the child was not always disappointed when visits ended, there were instances when he was. If mother was denied future visitation, the child, despite being too young to understand now, would in the future know she was gone and not forgive her.

Mother did not believe the paternal grandparents would allow her continued contact if her parental rights were terminated because shortly before Christmas they had closed the door in her face when she tried to talk to them about visitation and had hung up on her prior to that. They did not allow her to see the child on his fourth birthday, Thanksgiving or Christmas.

Regarding the incident before Christmas, the paternal grandfather testified he had asked her to leave because she was talking about visitation in front of the child and voices were raised. The child had a good visit with mother and when they returned, he told mother future contact was up to SSA. If parental rights were terminated, he believed it “would be best for” the child to allow contact with mother.

After the parties stipulated the child was adoptable, the court found mother had not sustained her burden of establishing the benefit exception to the termination of parental rights. Because the content of the visits were not so rich as to outweigh the child’s interests in permanency, the court terminated parental rights.

## DISCUSSION

### *1. Section 388 Petition*

Mother contends the court erred in summarily denying her section 388 petition because the documentation she provided, combined with SSA’s reports, sufficed under a prima facie standard to entitle her to a full evidentiary hearing. We disagree.

Under section 388, subdivision (a) “[a]ny parent . . . may, upon grounds of change of circumstance or new evidence, petition the court . . . to change, modify, or set aside any order of court previously made . . . .” The petition “must be liberally construed in favor of its sufficiency” (Cal. Rules of Court, rule 5.570(a)) and “[t]he parent need only make a prima facie showing to trigger the right to proceed by way of a full hearing” (*In re Marilyn H.* (1993) 5 Cal.4th 295, 310). “There are two parts to the prima facie showing: The parent must demonstrate (1) a genuine change of circumstances or new evidence, and that (2) revoking the previous order would be in the best interests of the children. [Citation.] If the liberally construed allegations of the petition do not show changed circumstances such that the child’s best interests will be promoted by the proposed change of order, the dependency court need not order a hearing. [Citation.] We

review the juvenile court's summary denial of a section 388 petition for abuse of discretion. [Citation.]" (*In re Anthony W.* (2001) 87 Cal.App.4th 246, 250.)

After reunification services have been terminated, dependency proceedings focus on providing a child with permanency and stability (*Kimberly H. v. Superior Court* (2000) 83 Cal.App.4th 67, 71-72), which "outweigh[s] any interest mother may have in reunification. [Citation.]" (*In re Anthony W., supra*, 87 Cal.App.4th at pp. 251-252.) A rebuttable presumption exists that a child's best interest is to remain in his or her existing placement. (*In re Stephanie M.* (1994) 7 Cal.4th 295, 317.) "To rebut that presumption, a parent must make some factual showing that the best interests of the child would be served by modification." (*In re Angel B.* (2002) 97 Cal.App.4th 454, 465.) Mother has not done that and thus it is unnecessary to address her primary argument she demonstrated changed circumstances sufficient to entitle her to an evidentiary hearing.

Mother contends her "section 388 petition was tailored to meet the best interests of the child" by asking alternatively the child "be returned to her, . . . additional time for services be allowed, or that the court modify the visitation order to include overnight visits," which gave "the court a wide latitude in fashioning a modification which would be in the child's best interests." But she herself acknowledges it would not be in the "child's best interest to be returned to [her] abruptly after living with his grandparents for so long." And she offers no reason why it would be in the child's best interest for her to receive additional services or overnight visits. Mother does argue "she was continuing to get closer and closer to [the child] through her regular visits. They had a very affectionate relationship. He called her mommy or mama and thus was clear on who his mother was. She was not just a friendly visitor, she was mommy." This, however, shows only that mother may have had a bond with the child. It does not demonstrate "a delay in permanency" by reopening reunification services or granting overnight visits was in the best interests of the child, whom the paternal grandparents had cared for over half of his life and planned to adopt. (*In re A.S.* (2009) 180 Cal.App.4th

351, 358 [section 388 petition properly denied where no reason provided why continuing dependency proceedings and delaying permanency would benefit the children]; *In re Edward H.* (1996) 43 Cal.App.4th 584, 594 [concluding allowing a parent “additional six months of reunification to see if [she] would and could” do what was necessary to regain custody “would not have promoted stability for the children and thus would not have promoted their best interests”].) Because the liberally construed allegations do not sustain a favorable decision on the section 388 petition, mother was not entitled to an evidentiary hearing and no due process violation occurred. (*In re Zachary G.* (1999) 77 Cal.App.4th 799, 806.)

## 2. *Benefit Exception*

Once the court determines under section 366.26 a child is likely to be adopted, it “shall terminate parental rights” (§ 366.26, subd. (c)(1)) and order the child placed for adoption unless it “finds a compelling reason for determining that termination would be detrimental to the child” because of one of the statutory exceptions. (§ 366.26, subd. (c)(1)(B).) One exception is where a “parent[] ha[s] 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 parent has the burden of proving the exception applies. (*In re Derek W.* (1999) 73 Cal.App.4th 823, 826.)

A split of authority exists on whether an abuse of discretion or substantial evidence standard of review applies to a decision rejecting one of the adoption exceptions. (*In re Bailey J.* (2010) 189 Cal.App.4th 1308, 1314 and cases cited therein.) *Bailey J.* considered both standards and adopted an analysis we find persuasive. Because whether a parent has shown a beneficial relationship is a question of fact, we review this for substantial evidence (*ibid.*), considering it in the light most favorable to the decision (*In re Autumn H.* (1994) 27 Cal.App.4th 567, 576). Regarding whether the parent-child relationship is a “compelling reason for determining that termination would be

detrimental” (§ 366.26, subd. (c)(1)(B)), the court exercises its discretion and we thus use an abuse of discretion standard (*In re Bailey J.*, *supra*, 189 Cal.App.4th at p. 1315). Here, even assuming the existence of a beneficial relationship, mother has not shown the court abused its discretion in concluding the relationship did not outweigh the benefits adoption would bring.

To prove that the beneficial parental relationship exception applies, it is not enough to show “some benefit to the child from a continued relationship with the parent, or some detriment from termination of parental rights.” (*In re Jasmine D.* (2000) 78 Cal.App.4th 1339, 1349.) The parent must show that the parental relationship “promotes the well-being of the child to such a degree as to outweigh the well-being the child would gain in a permanent home with new, adoptive parents. In 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.” (*In re Autumn H.*, *supra*, 27 Cal.App.4th at p. 575.) “When the benefits from a stable and permanent home provided by adoption outweigh the benefits from a continued parent/child relationship, the court should order adoption.” (*In re Jasmine D.*, *supra*, 78 Cal.App.4th at p. 1350.) Factors courts consider in determining the applicability of the parental relationship exception include “[t]he age of the child, the portion of the child’s life spent in the parent’s custody, the “positive” or “negative” effect of interaction between parent and child, and the child’s particular needs . . . .’ [Citation.]” (*In re Jerome D.* (2000) 84 Cal.App.4th 1200, 1206.)

Here, the child was four and a half years old at the time of the permanency hearing and had spent less than half of his life in mother’s custody. Mother’s interaction with the child never progressed beyond a few hours a week of monitored visitation. (*In re Jeremy S.* (2001) 89 Cal.App.4th 514, 523, disapproved of on another ground in *In re Zeth S.* (2003) 31 Cal.4th 396, 414 [showing required for benefit exception ““difficult to make . . . where . . . parents have . . . [not] advanced beyond supervised visitation””].)

Mother acknowledges this but argues she and the child “had established a loving and bonded relationship” over the last two years and that the “visitation notes . . . revealed increasing displays of love and affection between them over time.” But although mother did have some positive visits, the child began resisting the visits four months before the section 366.26 hearing, crying and stating he did not ““want to see mommy.”” He also interacted less with mother, did not hold her hand when walking to the car, and stated he did not ““like [or want] mama.”” Moreover, one visit in which mother had spanked the child had the negative effect of causing the child’s behavior to regress, exemplified by his hiding during therapy sessions, peeing on his bedroom floor, being more whiny, and throwing tantrums—all of which had previously stopped before the incident. When SSA subsequently met with the child at his current placement and asked how the visits with mother were going, the child ran and hid in his room and put his head in the corner.

By contrast, the child appeared “happy and healthy” in the care of the paternal grandparents, who wanted to adopt him, met all of his needs, and provided him “with a safe, stable nurturing home.” He had a “strong attachment” to them, notwithstanding his diagnosis of mild reactive attachment disorder and referred to them as “nana and papa.” And during visits with mother, the child indicated preferences for ““nana’s milk”” or that he wanted ““to go with my nana.”” Under these facts, the court did not abuse its discretion in concluding the contents of the visits were not “so rich” as to outweigh the child’s “interests in permanency.”

Mother notes courts have recognized the beneficial parental exception does not require proof the child has a “primary attachment” to the parent or that the parent maintained day-to-day contact with the child. But the court did not rely on the absence of primary attachment or day-to-day contact. Moreover, the three cases mother cites all recognize the exception nevertheless requires the beneficial nature of the relationship be of such degree “that terminating parental rights would be detrimental to the child and

outweighs the child’s need for a stable and permanent home that would come with adoption.” (*In re Casey D.* (1999) 70 Cal.App.4th 38, 51; see also *In re S.B.* (2008) 164 Cal.App.4th 289, 301; *In re Brandon C.* (1999) 71 Cal.App.4th 1530, 1534, 1538.) The evidence in this case does not rise to that level. The exception does not allow a parent who “failed to reunify with an adoptable child . . . [to] derail an adoption merely by showing the child would derive *some* benefit from continuing a relationship maintained during periods of visitation with the parent. [Citation.]” (*In re Angel B.* (2002) 97 Cal.App.4th 454, 466.)

Mother asserts she believed “it would be detrimental to [the child], over time, if the parental-child relationship were permanently severed.” (Italics omitted.) But that is mere speculation and does not show the court abused its discretion in concluding the benefits of adoption outweighed mother’s bond with the child.

Mother maintains “[t]here was no real need to change the permanent plan of guardianship” since the child’s “needs were being well met by the grandparents and [he] was enjoying fully the benefits of his relationship with . . . mother.” But she acknowledges she “had been unable to regain custody” and may “never [b]e able to do so.” In such cases, “[t]he Legislature has decreed . . . guardianship is not in the best interests of children who cannot be returned to their parents. These children can be afforded the best possible opportunity to get on with the task of growing up by placing them in the most permanent and secure alternative that can be afforded them.” (*In re Beatrice M.* (1994) 29 Cal.App.4th 1411, 1419; see also *Jones T. v. Superior Court* (1989) 215 Cal.App.3d 240, 251 [unlike adoption, guardianship is “not irrevocable and thus falls short of the secure and permanent placement intended by the Legislature”].) The child, who could not be returned to mother, deserved to have his custody status promptly resolved and his placement made permanent and secure.

In her reply brief, mother cites and analogizes this case to *In re Scott B.* (2010) 188 Cal.App.4th 452 for the first time. The court there found compelling reason

to reverse an order terminating parental rights where mother had consistent weekly visits, and a court-appointed special advocate found disrupting the close mother-daughter relationship would be detrimental to a nine-year-old developmentally disabled and emotionally vulnerable child who repeatedly insisted on living with her mother. (*Id.* at p. 471.) Here, in contrast, there was no testimony from a psychological expert or other disinterested person suggesting termination of parental rights would be detrimental. The child’s behavior had “greatly improved” after being placed with the paternal grandparents and he had no emotional fragility, “significant medical or developmental concerns.” He also did not want to visit or see mother at times, much less insist on living with her. Nor was there evidence the child was adversely affected by the paternal grandparents’ purported refusal to allow visits or that he would suffer detriment from any future interruption in visitation. The compelling reasons in *Scott B.* do not exist in this case and we will not disturb a court’s finding the parental benefit exception inapplicable on the particular facts presented, where, as here, no abuse of discretion has been shown.

#### DISPOSITION

The orders are affirmed.

RYLAARSDAM, J.

WE CONCUR:

O’LEARY, P. J.

FYBEL, J.