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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
SIXTH APPELLATE DISTRICT

In re M.W., a Person Coming Under the  
Juvenile Court Law.

H040833  
(Santa Cruz County  
Super. Ct. No. DP002651)

SANTA CRUZ COUNTY HUMAN  
SERVICES DEPARTMENT,

Plaintiff and Respondent,

v.

A.W.,

Defendant and Appellant.

**I. INTRODUCTION**

In this juvenile dependency matter regarding M.W. (the child), the juvenile court terminated parental rights and selected adoption as the permanent plan pursuant to Welfare and Institutions Code section 366.26.<sup>1</sup>

On appeal, A.W. (the mother) contends the juvenile court abused its discretion by denying her section 388 petition, in which she sought to modify the court's prior order terminating her reunification services. The mother also contends the juvenile abused its

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

discretion by terminating her parental rights after determining that the beneficial parent-child relationship exception did not apply. We will affirm the judgment.

## **II. FACTUAL AND PROCEDURAL BACKGROUND**

### ***A. Section 300 Petition***

On June 12, 2012, the Santa Cruz County Human Services Department (the Department) filed a petition under section 300, subdivisions (b) [failure to protect] and (g) [no provision for support] alleging that the child, then seven years old, came within the jurisdiction of the juvenile court.

The petition alleged the child had suffered or was at a substantial risk of suffering serious physical harm. The petition detailed the mother's "untreated substance abuse issues" and her boyfriend's drug use and criminal history. The mother and her boyfriend had been arrested on June 8, 2012, after they were found in a vehicle with "a significant amount of controlled substances and drug paraphernalia." The boyfriend had been driving the mother's vehicle, and the mother knew that he had a suspended license. Both admitted they had used methamphetamine two days earlier.

The mother and the child had been residing with three known drug users who had drugs and weapons in the house. In a bedroom shared by the mother, the mother's boyfriend, and the child, police found Diazepam pills, a stun gun, a broken methamphetamine pipe, and a pornographic comic book.

The child had witnessed the mother's boyfriend striking the mother in the face, and the mother admitted that her boyfriend had been physically violent with her on three prior occasions.

The child's father, S.S., (the father) was residing in the state of Washington. He had a history of substance abuse. The father and the mother had been married when the child was born, but they were now divorced.

The child was taken into protective custody and temporarily placed with a neighbor/family friend.

***B. Detention Hearing***

At the detention hearing held on June 13, 2012, the juvenile court found that the Department had made a prima facie showing that the child came within section 300 and that continuing the child in the home of the parent was contrary to the child's welfare. The court ordered supervised visitation for the mother at least two times per week.

***C. Jurisdiction/Disposition Report***

The Department filed a jurisdiction/disposition report on July 24, 2012. The child was in a licensed foster home, where she was "thriving." The Department was assessing two potential relative placements and anticipated the child's placement would change soon.

The report discussed the mother's response to the allegations of the petition. The mother denied knowing that any drugs, weapons, or paraphernalia were in her house or car. She explained that the other people living at her house were tenants. She needed help paying the mortgage, and she did not believe the tenants endangered the child. She denied having a drug problem. She claimed a positive drug test on the day of her arrest was due to a prescription medication and possibly diet pills. She believed one of the sheriff's deputies was " 'out to get' her."

The father had visited the mother's house a month before her arrest, but he claimed he " 'did not see anything.' " Before that, the father had been gone for two years and "really did not know much about what [the mother] was doing." The father blamed the mother's boyfriend for "all of these issues." The father admitted he had used drugs such as heroin in the past, but he stated that he now only used "pharmaceutical drugs." He had previously sought substance abuse treatment, but he had relapsed. He was not currently in a program but claimed he was "motivated for residential treatment." He admitted he had used "pharmaceuticals" when he had visited the child. The Department was not considering the father for placement due to his "addiction issues."

The report also detailed the mother's boyfriend's criminal history. The boyfriend had been arrested for and/or convicted of vandalism, vehicle theft, driving under the influence of alcohol, receiving stolen property, possession of burglary tools, probation violations, tampering with a vehicle, possession of controlled substances without a prescription, possession of hypodermic needles, infliction of corporal injury on a spouse/cohabitant, and parole violations. A number of his arrests and parole violations occurred after he began a relationship with the mother, who admitted knowing about the boyfriend's criminal history.

In July of 2011, the child had witnessed a domestic violence incident, during which the boyfriend had placed his forearm around the mother's mouth, slamming her teeth into her front lip. The mother had refused a protective order but had signed a safety plan and sought counseling. Although the mother had agreed not to allow the child to have further contact with the boyfriend, the mother did not adhere to that agreement.

Staff at the child's school reported that the mother had helped in the kindergarten classroom until she became involved with her boyfriend. At that point, " 'everything went downhill and [the child] seemed more and more neglected.' " The child had "to learn to be a survivor," and she would tell "fantasy stories," lie, and steal. Her academic performance and personal hygiene had declined over the past two years.

Since the child's removal, the mother had realized she needed help and had begun to access services, including a parenting class and a substance abuse assessment. She had no car and no job, and she was facing foreclosure of the home she had owned for 12 years. She had been visiting with the child, who reportedly "loves her mother and is always happy to see her." The mother needed help in establishing an "adult/leadership role" with the child, who tended to control the visits.

The Department recommended that the mother be provided with reunification services. The mother's recommended case plan included a psychological evaluation, a domestic violence program, counseling, parenting education, family preservation

services, substance abuse testing, a drug and alcohol assessment, and supervised visitation.

***D. Jurisdiction/Disposition Hearing***

On July 24, 2012, the mother submitted the matter on the Department's report. The juvenile court ordered the matter continued as to the father. The Department subsequently submitted an updated disposition report concerning the father, in which it recommended he receive reunification services. In that report, the Department noted that the child was being placed with paternal relatives.

At a hearing on August 2, 2012, the father submitted on the Department's reports. At that hearing, the juvenile court sustained the petition and adopted the Department's recommendations, including reunification services for both parents.

***E. Six Month Review***

The Department filed its six month Status Review Report on February 26, 2013, in which it recommended the mother and the father continue to receive reunification services.

The child was "doing well" in her placement with paternal relatives, who were willing to provide the child with a permanent home through adoption or guardianship. The child had stated that she wanted to return home and talked about living "with both of her parents in a new home." In school, she was showing " 'outstanding progress.' "

The mother was visiting the child two times per week for an hour at a time, but she wanted to have more time with the child. During an observed visit, the mother did not take on the role of parent but rather allowed the child to order her around. The mother had not previously been told "that it was okay to tell her daughter no." The mother was also whispering to the child during the visits and had promised to buy the child a puppy.

The mother was resentful of the child's caregivers. She had yet to accept responsibility for her actions. She still had no job. However, she had been consistently participating in services. She had been seeing a counselor, who reported that the mother

was making “ ‘good progress.’ ” She had completed a psychological evaluation, which showed that the mother still needed supervised visitation. She had attended a support group and counseling sessions at the Walnut Avenue Women’s Center. She was in the process of finishing a parenting class. She had completed a drug and alcohol assessment, was participating in an outpatient substance abuse program, had a sponsor, and was using her support group. She had failed to show for numerous drug tests, but when she did take drug tests, the results were negative.

The mother provided written comments regarding the report. She did not agree with the Department’s recommendation not to return the child to her. The mother claimed to have a very clear understanding of how her own choices had affected the child, and of how she had “parentified” the child. She denied being resentful of the paternal relatives who were caring for the child. She admitted blaming others for some of her problems, but claimed she was now taking full responsibility for her actions. She understood the dynamics of domestic abuse and had a safety plan. She felt that the parenting classes she had been taking conflicted with the social worker’s views about proper parenting techniques, and she felt that it was appropriate to let the child “run the show during play time” since she had only two hours of visitation per week. She had missed drug tests because she had no home phone or means of transportation, since she lived in a rural area with limited bus service.

On March 19, 2013, following a settlement conference, the parents both agreed to submit the matter on the Department’s six month review report. The juvenile court continued the minor as a dependent of the court and ordered reunification services to continue to be provided to both parents.

***F. Twelve Month Review Report***

In its 12-month review report, filed on July 30, 2013, the Department recommended that reunification services be terminated and that a section 366.26 hearing be set.

On May 12, 2013, the father had been in the hospital, dying. The mother had been “ ‘ranting and raving’ ” at paternal family members in the hospital, and she had gone to the home where the child was living and cursed at one of the caregivers. The father had subsequently died.

The father’s health problems had begun with a seizure on March 27, 2013. Since that time, the mother had not been attending meetings or support groups and had not been drug testing on a regular basis. The mother had also refused to meet with the social worker. The mother had previously completed an outpatient substance abuse program, and she had recently checked in with the aftercare support group, but she had not been providing proof of her participation in NA/AA. The mother’s house had been foreclosed upon and it was unclear if she had obtained new housing or a job.

The child, who continued to reside with paternal relatives, had made comments about “ ‘going home’ ” with the mother. The child believed that the mother was going to buy her a cell phone and thought it was a good idea “so she can call her mother at any time.” The child thought the mother was “ ‘ready to get [her] back.’ ”

The mother had been visiting with the child two times per week for one hour at a time, and the visits remained supervised. During visits, the mother had spoken to the child about the court proceedings and about getting a new house for herself and the child. The mother was defensive when the social worker tried to give her feedback about parenting techniques.

On July 30, 2013, the 12-month review hearing was continued and the matter was set for a settlement conference. A settlement conference held on September 3, 2013 did not result in an agreement, so a contested hearing was set.

### ***G. Updated Report***

The Department filed an updated report on September 13, 2013, in which it continued to recommend termination of reunification services and the setting of a permanency planning hearing.

The mother had entered a residential substance abuse treatment program on August 8, 2013. She was attending a support group, participating in chemical dependency education classes, meeting with a counselor, participating in “seeking safety and domestic violence group,” attending NA/AA meetings, and submitting to drug tests, which were negative.

The mother had also agreed to try to meet therapeutic goals identified by a social worker at the Parents Center. However, she believed that the social worker from the Department was unsupportive, and the mother had refused to work with her. The mother had recently been accepted into Family Preservation Court.

The mother continued to tell the child that the child would be “ ‘going back home with [the mother],’ ” and thus the child had been talking to others about “going back home with mom.” The mother continued to be confrontational toward the child’s foster parents.

#### ***H. Twelve Month Review Hearing***

The 12-month review hearing was held on September 13, 2013.

At the beginning of the hearing, the child’s attorney stated, “[The child] would very much like to be able to reunify with her mother; however, I do not feel that that’s in [the child’s] best interest, and I would recommend to the Court to terminate reunification services . . . .”

The Department submitted the matter on the 12-month review report and the updated report.

The mother submitted a letter from her inpatient treatment program, a Positive Parenting Program certificate, NA/AA attendance slips, parent education forms, an email from the mother to the child’s teacher, and a card that the child wrote to the mother.

The mother also testified at the 12-month review hearing. She was still participating in the inpatient substance abuse treatment program and anticipated she would be there for another month and a half. She would then look for housing and

employment. The mother was attending counseling through the Parent Center and at her inpatient treatment center. In addition, she was seeing a grief counselor regarding the death of the father. She was working on setting boundaries, eliminating resentment and blame, taking responsibility, and developing safe coping skills. The mother had learned positive discipline from her parenting classes. She used those skills during her visits with the child. She talked to the child about school, and she communicated with the teacher and principal. The mother stated she was willing to work with the foster parents.

In closing comments, the Department asserted that the child could not safely be returned to the mother at that time, since the mother was in residential treatment and did not have housing. Even if she had housing, the Department would not recommend returning the child to the mother because the mother had not made sufficient progress in counseling and other aspects of her case plan. The Department noted that the mother had not drug tested until she began the inpatient treatment program, which was only “after the 12 months was up.” The Department pointed out that the mother had refused to participate in interviews with the social worker. The Department argued that the mother’s loss of her home and the death of the father were not sufficient excuses for the mother’s failure to make progress and that it was unlikely the child would be returned even if services were extended.

The child’s attorney reiterated that the child wanted to return to the mother. The child’s attorney found it significant that the mother had not started inpatient drug treatment until after receiving the Department’s 12-month review report, which had recommended termination of reunification services. The child’s attorney also felt it was significant that the mother had not moved past supervised visits. The child’s attorney felt it was unhealthy for the mother to be telling the child she would be returned to the mother “[w]hen in reality, there’s not a substantial probability that [the child] would return home to her mother,” even if the court extended services. The child’s attorney believed it

would give the child closure and the ability to “start moving forward” if reunification services were terminated.

The mother requested the juvenile court extend reunification services an additional three months, to December of 2013.

The juvenile court reviewed the circumstances of the case and found that mother’s progress had been incremental, rather than substantial, and that she had inconsistently participated in the case plan. The court found it significant that the mother did not enter residential treatment until after the Department recommended terminating reunification services. The court also found it significant that the mother had not made efforts to save her home from foreclosure nor progressed in domestic violence education. The court found that returning the child to the mother would create a substantial risk of detriment to the child’s safety, protection, and physical and emotional well-being, and it found no substantial probability of return if services were extended another three months or “even a full six months.” The court therefore terminated reunification services and set the matter for a section 366.26 hearing on January 28, 2014.

***I. Mother’s Section 388 Petition***

Following the 12-month review hearing held on September 13, 2013, the mother regularly attended family preservation court review hearings, at which she provided proof of her sobriety and participation in meetings and programs. On December 4, 2013, the mother reported having a full-time job and participating in counseling. The team comments from January 15, 2014 state: “[The mother] is a ‘Rock Star’, she is attending every meeting and has perfect attendance.”

On January 23, 2014, about four months after reunification services were terminated at the 12-month review hearing, the mother filed a section 388 petition, asking the court to set aside the section 366.26 hearing and order that family reunification services be resumed.

In her section 388 petition, the mother asserted that she had “ameliorated the circumstances that brought [the child] before the Dependency Court.” The mother stated that she had completed her inpatient program and remained sober. She had completed 16 sessions of the Celebrating Families Program. She was regularly attending and participating in an outpatient treatment program, an aftercare program, NA/AA meetings, and counseling. She was in Phase II of Family Preservation Court. She was employed through a staffing agency, and she had housing. She continued to visit with the child. The mother provided documentation of her participation in and completion of the various programs.

***J. Section 366.26 Report***

The Department filed a section 366.26 report dated January 28, 2014. The Department recommended that the mother’s parental rights be terminated and that the juvenile court select adoption as the permanent plan.

The Department asserted that the mother “continues to be unable to provide for [the child’s] care.” The mother’s visitation with the child had been “tapered down to once per month.” The mother continued to have difficulty setting limits during the visits. She had missed a visit in December of 2013, later stating that she “was unaware of the visit because she left her cell phone in a friend’s car for a few days.” The mother had been offered a visit in January of 2014, but the Department had not heard back from her. The caregivers reported that the mother had not called the child in 17 days.

The child had expressed “confusion and loss around not reunifying with her mother.” However, the child was “assimilating to her prospective adoptive family and beginning to claim them as her own and vice versa.”

***K. Combined Hearing***

On January 28, 2014, the date set for the section 366.26 hearing, the juvenile court set a settlement conference for February 11, 2014. No agreement was reached at the settlement conference.

On March 24, 2014, the juvenile court held a hearing on the mother's section 388 petition and then held the section 366.26 hearing.

The child's attorney submitted two letters to the court. The first letter was from one of the child's caregivers. The caregiver described how the child had been thriving on the routine provided in the home. She opined that "[i]f reunification is reinstated, this child will be back to being unsure of what is going to happen and with that comes anxiety and fear that obstructs her ability to just be a kid."

The second letter was from the child's therapist. She agreed the child was showing improved behavior since living with the caregivers and that it was "helpful" for the child to know that she was going to keep living with them. The therapist acknowledged she had "never had any observations of [the child] with her Mother, nor . . . observed and or interacted with [the child] after any visits with her Mother," but she expressed "concerns for how [the child] may be emotionally impacted if her Mother were to again be offered family reunification services," since it would affect the child's feelings of belonging and security.

The mother testified at the hearing. She described her continuing participation in substance abuse treatment, including the aftercare program and NA/AA meetings. She had been sober for almost eight months, since July 26, 2013. The mother also testified about her participation in domestic violence groups, individual counseling, grief counseling, and a grief support group. She testified that she was still employed and that she had stable housing.

The mother testified that during visits, she played games with the child and asked the child about school. At each visit, they would hug, kiss, and say they loved and missed each other. The mother was complying with the advisements of the social worker and the court not to discuss the case with the child.

The mother felt that she and the child had "a strong bond." The mother felt she had changed her life and could now offer the child "structure and emotional and financial

stability.” In light of the child’s loss of her father 10 months earlier, the mother felt it would “devastate” the child to also lose her mother.

The child’s attorney provided an offer of proof as to what the child would say: “[The child] would say that she loves her mother and had hoped to reunify with her.” The child’s attorney also read into the record a letter from the child’s former kindergarten teacher, who had continued to help the child in school and who had spent time with the child and her present caregivers. The teacher praised the caregivers for providing the child “with the kind of environment [he had] always wished for her,” and he described the child’s social and academic improvements since she began living with the caregivers.

The mother testified in rebuttal that she was happy that the child was doing well and that she believed she could provide the same stable home for the child. She was willing to cooperate with the child’s caregivers if reunification services were reinstated.

The juvenile court denied the mother’s section 388 petition, finding that although there had been a change of circumstances, changing the prior order was not in the child’s best interests. The court acknowledged that the mother “had perhaps the most remarkable recovery in all areas” that the court had witnessed. However, the court noted, it could not “turn back the clock,” and it was required to “look at what’s best for [the child].” Since reunification services had been terminated, the child had made “dramatic strides,” and thus it was not in the child’s best interests to “turn back the clock to reunification.”

At the section 366.26 hearing, the maternal grandmother testified on behalf of the mother. She described a loving relationship between the mother and the child. The mother’s attorney asked the court to also consider the evidence presented in support of the section 388 petition. She submitted a letter from the maternal aunt, which noted that there was “some sadness” in the child. The mother also submitted visitation logs from recent visits with the child and minute orders from Family Preservation Court hearings.

The child's attorney asked the juvenile court to find that the child was adoptable and that the mother did not have a beneficial relationship with the child. The child's attorney was in agreement with the Department's recommendation that the juvenile court terminate the mother's parental rights.

The Department noted that in order to meet the statutory exception for a beneficial parent-child relationship, the mother had to show that she had maintained consistent and regular visitation, and that the child would benefit from continuing the relationship. The Department conceded that the first requirement was met, but argued that the "second prong" was not. The Department argued that the child was "particularly vulnerable to any continued change and drama in her life" and had a "heightened need for stability."

The mother asked the juvenile court to find the "parental beneficial exception" and not to terminate her parental rights. She argued that in determining the child's best interests, the juvenile court should consider the stability she had attained. She urged the juvenile court to order a legal guardianship rather than adoption.

At the end of the March 24, 2014 hearing, the juvenile court terminated parental rights and selected adoption as the child's permanent plan. It found "the child's well-being is best provided in the home where she has been" and that the relationship between the mother and the child did not "outweigh the well-being of permanent placement with the adoptive parents." The court ordered the Department to facilitate a "closure visit" and expressed a hope that the prospective adoptive family and the mother could work out a visitation agreement.

### **III. DISCUSSION**

In her initial briefing, the mother argued that the trial court abused its discretion by (1) denying her section 388 petition, in which she requested that the juvenile court reinstate reunification services, and (2) terminating her rights at the section 366.26 hearing, at which she argued that the beneficial parent/child relationship exception

applied. In response to our request for supplemental briefing, the mother argues that a bonding study should have been requested and ordered.

We begin our analysis with a review of the relevant legal framework for permanency planning and modification of court orders.

**A. Legal Framework for Permanency Planning**

“The objective of the dependency scheme is to protect abused or neglected children and those at substantial risk thereof and to provide permanent, stable homes if those children cannot be returned home within a prescribed period of time. [Citations.]” (*In re Marilyn H.* (1993) 5 Cal.4th 295, 307 (*Marilyn H.*)) “When the child is removed from the home, the court first attempts, for a specified period of time, to reunify the family. [Citation.]” (*In re Celine R.* (2003) 31 Cal.4th 45, 52 (*Celine R.*)) Where reunification efforts have failed, “ ‘the court must terminate reunification efforts and set the matter for a hearing pursuant to section 366.26 for the selection and implementation of a permanent plan. [Citation.]’ ” (*Ibid.*)

“ ‘A section 366.26 hearing . . . is a hearing specifically designed to select and implement a permanent plan for the child.’ [Citation.] It is designed to protect children’s ‘compelling rights . . . to have a placement that is stable, permanent, and that allows the caretaker to make a full emotional commitment to the child.’ [Citation.]” (*Celine R., supra*, 31 Cal.4th at pp. 52-53.) “The court has four choices at the permanency planning hearing. In order of preference the choices are: (1) terminate parental rights and order that the child be placed for adoption . . . ; (2) identify adoption as the permanent placement goal and require efforts to locate an appropriate adoptive family; (3) appoint a legal guardian; or (4) order long-term foster care. (§ 366.26, subd. (b).) Whenever the court finds ‘that it is likely the child will be adopted, the court shall terminate parental rights and order the child placed for adoption.’ (§ 366.26, subd. (c)(1).)” (*Celine R., supra*, at p. 53.)

“When the juvenile court finds that the child is adoptable, it must terminate parental rights unless it finds one of four specified circumstances in which termination would be detrimental (§ 366.26, subd. (c)(1)(A)-(D)).” (*In re Brittany C.* (1999) 76 Cal.App.4th 847, 852.) Our Supreme Court has instructed that “[t]he specified statutory circumstances—actually, *exceptions* to the general rule that the court must choose adoption where possible—‘must be considered in view of the legislative preference for adoption when reunification efforts have failed.’ [Citation.]” (*Celine R., supra*, 31 Cal.4th at p. 53.)

One of the exceptions to the preference for adoption is the beneficial parent/child relationship exception set forth in section 366.26, subdivision (c)(1)(B)(i). “Under section 366.26, subdivision (c)(1)(B)(i), parental rights cannot be terminated where the juvenile court ‘finds a compelling reason for determining that termination would be detrimental to the child’ because ‘[t]he parents have maintained regular visitation and contact with the child and the child would benefit from continuing the relationship.’ ” (*In re C.B.* (2010) 190 Cal.App.4th 102, 123-124 (*C.B.*.)

A parent who claims that the beneficial parent/child relationship exception applies, and that therefore parental rights should not be terminated, has the burden of proof. (*C.B., supra*, 190 Cal.App.4th at p. 122.) To meet this burden, “ ‘the parent must show more than frequent and loving contact, an emotional bond with the child, or pleasant visits—the parent must show that he or she occupies a parental role in the life of the child. [Citation.]’ ” (*Id.* at p. 126.) As this court has explained, “ ‘[i]nteraction between natural parent and child will always confer some incidental benefit to the child. The significant attachment from child to parent results from the adult’s attention to the child’s needs for physical care, nourishment, comfort, affection and stimulation. [Citation.]’ ” (*In re Bailey J.* (2010) 189 Cal.App.4th 1308, 1315 (*Bailey J.*.) “ ‘The exception applies only where the court finds regular visits and contact have continued or developed a significant, positive, emotional attachment from child to parent.’ [Citation.]” (*Ibid.*)

In addition, “ [t]he exception must be examined on a case-by-case basis, taking into account the many variables which affect a parent/child bond. The 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 are some of the variables which logically affect a parent/child bond.’ [Citation.]” (*C.B., supra*, 190 Cal.App.4th at p. 124.)

The statutory requirement that “ ‘the child would benefit from continuing the [parent/child] relationship’ means that ‘the 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.’ [Citation.] The juvenile 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.’ [Citation.] ‘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.]” (*C.B., supra*, 190 Cal.App.4th at p. 124.)

### ***B. Modification of Court Orders***

“Any parent or other person having an interest in a child who is a dependent child of the juvenile court . . . may, upon grounds of change of circumstance or new evidence, petition the court in the same action in which the child was found to be a dependent child of the juvenile court . . . for a hearing to change, modify, or set aside any order of court previously made or to terminate the jurisdiction of the court. . . .” (§ 388, subd. (a)(1).)

The procedure provided by section 388 “accommodate[s] the possibility that circumstances may change after the reunification period that may justify a change in a prior reunification order.” (*Marilyn H., supra*, 5 Cal.4th at p. 309.) Section 388 provides an “ ‘escape mechanism’ ” that allows the court to consider new information before a hearing on termination of parental rights. (*Ibid.*)

When a section 388 petition is brought after the termination of reunification services, “the predominant task of the court [is] to determine the child’s best interest. . . .” (*In re Stephanie M.* (1994) 7 Cal.4th 295, 320 (*Stephanie M.*)) “After the termination of reunification services, the parents’ interest in the care, custody and companionship of the child are no longer paramount. Rather, at this point ‘the focus shifts to the needs of the child for permanency and stability’ [citation], and in fact, there is a rebuttable presumption that continued foster care is in the best interest of the child. [Citation.] A court hearing a motion for change of placement 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.” (*Id.* at p. 317.)

***C. Denial of Section 388 Petition***

We first consider the mother’s claim that the trial court abused its discretion by denying her section 388 petition, which was filed after the juvenile court terminated her reunification services. In her section 388 petition, the mother requested the juvenile court order the resumption of reunification services.

The standard of review for an order denying a section 388 petition is abuse of discretion. (*In re Jasmon O.* (1994) 8 Cal.4th 398, 415.) Thus, the juvenile court’s decision will not be disturbed unless the lower court “ ‘has exceeded the limits of legal discretion by making an arbitrary, capricious, or patently absurd determination [citations].’ ” [Citations.]” (*Stephanie M., supra*, 7 Cal.4th at p. 318.) “ ‘When two or more inferences can reasonably be deduced from the facts, the reviewing court has no authority to substitute its decision for that of the trial court.[.]’ [Citations.]” (*Id.* at pp. 318-319.)

In ruling on the mother’s section 388 petition below, the juvenile court found that although the mother had shown a change of circumstances, changing the prior order was not in the child’s best interests. On appeal, the mother contends the juvenile court should have found that it *was* in the child’s best interests to reinstate reunification services.

The mother relies primarily on *In re Kimberly F.* (1997) 56 Cal.App.4th 519 (*Kimberly F.*), where the court discussed the meaning of the best interest standard in the context of a section 388 petition filed after reunification services were terminated. In *Kimberly F.*, the court rejected the notion that a child's best interest could be determined by comparing the household and upbringing offered by the natural parent or parents with that of the caretakers. (*Id.* at pp. 526-530.)

The *Kimberly F.* court set forth a list of factors to be considered in determining the merits of a section 388 petition: (1) the seriousness of the problem leading to dependency and the reason that problem was not overcome by the final review; (2) the strength of relative bonds between the dependent children to both parent and caretakers and the length of time a child has been in the dependency system in relationship to the parental bond; and (3) the degree to which the problem may be easily removed or ameliorated, and the degree to which it actually has been. (*Id.* at pp. 530-532.)

The mother contends each of the three *Kimberly F.* factors supported reinstating reunification services, although she acknowledges that the list of factors was "not meant to be exhaustive." (*Kimberly F.*, *supra*, 56 Cal.App.4th at p. 532.) The mother also acknowledges that at least one other Court of Appeal has "decline[d] to apply the *Kimberly F.* factors," finding that "they do not take into account the Supreme Court's analysis in *Stephanie M.*, applicable after reunification efforts have been terminated." (See *In re J.C.* (2014) 226 Cal.App.4th 503, 527 (*J.C.*.) According to the *J.C.* court, "a parent's petition for either an order returning custody or reopening reunification efforts must establish how such a change will advance the child's need for permanency and stability." (*Ibid.*)

Regarding the *Kimberly F.* factors, the mother first asserts that her "substance abuse was not a long-term intractable problem which was likely to recur." The mother notes that she had no history of substance abuse before becoming involved with the boyfriend, that she had completed substance abuse programs, and that there was no

evidence she had relapsed during the dependency proceedings. She further notes that her failure to continuously participate in substance abuse treatment was due to her ex-husband's illness and death, the loss of her home, and her lack of transportation.

We acknowledge that while drug use is often an “intractable” problem (*Kimberly F., supra*, 56 Cal.App.4th at p. 532), the mother apparently did overcome that problem by the time of the combined section 388 and section 366.26 hearing. But unfortunately, the mother did not complete all of the rehabilitation efforts required by her case plan until after the 12-month review period. Moreover, the trial court could reasonably conclude, based on the mother's difficulty in complying with her case plan through some particularly difficult life events, that the child's need for permanency and stability would not be promoted by a resumption of reunification services, since the mother might find herself faced with similar challenges in the future. Thus, this factor did not necessarily weigh in favor of a finding that the child's best interests would be promoted by granting the mother's section 388 petition.

The mother next contends she had an “ ‘indisputably strong bond’ ” with the child, noting she had raised the child for seven years. The mother also points out that she had visited the child throughout the dependency proceedings, and that during the visits, “they always enjoyed each other's company and expressed affection for each other.” Further, she notes, the child wanted to reunify with the mother.

We acknowledge that the child had a strong bond with the mother and had expressed the desire to reunify. However, by the time of the section 388 hearing, the child was also developing a strong bond with her prospective adoptive family: she was “beginning to claim them as her own and vice versa.” “[T]he disruption of an existing psychological bond between dependent children and their *caretakers* is an extremely important factor bearing on any section 388 motion. [Citation.]” (*Kimberly F., supra*, 56 Cal.App.4th at p. 531.) Thus, the juvenile court could reasonably find that this factor

weighed in favor of finding that the child's need for permanency and stability would not be promoted by a resumption of reunification services.

Regarding the third *Kimberly F.* factor—the degree to which the original problem has been ameliorated, the mother points to the juvenile court's finding that the mother had made “perhaps the most remarkable recovery in all areas” that the court had witnessed. The mother also notes that she was referred to as a “Rock Star” by the Family Preservation Court team, and she references her regular participation and success in counseling, substance abuse treatment, and parenting classes.

We acknowledge that the mother made remarkable progress in her case plan by the time of the combined section 388 and section 366.26 hearing. However, the record also contains evidence suggesting that the mother had not yet effectively addressed some of the problems that were important in terms of providing the child with permanency and stability. For instance, the mother had communication issues that affected her visitation with the child following the termination of reunification services. She had missed a visit with the child, she had not responded to the Department's offer of another visit, and she had gone 17 days without calling the child. Based on this evidence, the trial court could reasonably conclude that the mother still needed improvement in areas of life directly affecting her parenting ability and her ability to provide the child with permanency and stability. Thus, this factor did not clearly weigh in favor of granting the section 388 petition.

As noted above, we may reverse the juvenile court's decision only if we find that the juvenile court “ ‘ “exceeded the limits of legal discretion by making an arbitrary, capricious, or patently absurd determination [citations].” ’ [Citations.]” (*Stephanie M., supra*, 7 Cal.4th at p. 318.) We may not substitute our decision for that of the juvenile court. (*Id.* at pp. 318-319.) On this record, although the mother showed a change of circumstances and made great progress in her case plan, we conclude that the juvenile

court did not make an arbitrary, capricious, or patently absurd determination in finding that changing its prior order was not in the child's best interests.

***D. Section 366.26 Hearing***

The mother next contends the juvenile court abused its discretion by terminating her parental rights at the section 366.26 hearing. The mother claims the court should have found that the preference for adoption was overcome by the parent/child relationship exception set forth in section 366.26, subdivision (c)(1)(B)(i). In her supplemental brief, the mother argues that either the Department or her trial counsel should have requested that the juvenile court order a bonding study and that a bonding study would have provided information relevant to the question of whether terminating parental rights would have a detrimental impact on the child.

As noted above, in order to establish the parent/child relationship exception, the juvenile court must find 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)) and that the beneficial relationship is “a compelling reason for determining that termination would be detrimental to the child” (§ 366.26, subd. (c)(1)(B)).

This court has determined that there is a two-part standard of review for the juvenile court's ruling regarding the application of the parent/child relationship exception provided by section 366.26, subdivision (c)(1)(B)(i). (*Bailey J., supra*, 189 Cal.App.4th at pp. 1314-1315.) First, “[s]ince the proponent of the exception bears the burden of producing evidence of the existence of a beneficial parental . . . relationship, which is a factual issue, the substantial evidence standard of review is the appropriate one to apply to this component of the juvenile court's determination. Thus, . . . a challenge to a juvenile court's finding that there is no beneficial relationship amounts to a contention that the ‘undisputed facts lead to only one conclusion.’ [Citation.] Unless the undisputed facts established the existence of a beneficial parental . . . relationship, a substantial

evidence challenge to this component of the juvenile court’s determination cannot succeed.” (*Id.* at p. 1314.)

“The same is not true as to the other component of these adoption exceptions. The other component of . . . the parental relationship exception . . . is the requirement that the juvenile court find that the existence of that relationship constitutes a ‘*compelling reason* for determining that termination would be detrimental.’ (§ 366.26, subd. (c)(1)(B), italics added.) A juvenile court finding that the relationship is a ‘compelling reason’ for finding detriment to the child is *based* on the facts but is not primarily a factual issue. It is, instead, a ‘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. [Citation.] Because this component of the juvenile court’s decision is discretionary, the abuse of discretion standard of review applies.” (*Bailey J., supra*, 189 Cal.App.4th at p. 1315; accord, *C.B., supra*, 190 Cal.App.4th at p. 123.)

The Department does not challenge the mother’s claim that she had “maintained regular visitation and contact with the child and the child would benefit from continuing the relationship”—the first component of the parent/child exception. (See § 366.26, subd. (c)(1)(B)(i).) The Department contends, however, that here, the juvenile court reasonably determined that the parent/child relationship was not “a compelling reason for determining that termination would be detrimental to the child.” (See *id.*, subd. (c)(1)(B).)

The mother contends this case is similar to *In re S.B.* (2008) 164 Cal.App.4th 289 (*S.B.*). In *S.B.*, the father contested the termination of his parental rights following the removal of the child due to both parents’ substance abuse. During the reunification period, the father had visited the child three times per week, and the child became upset when her visits with the father ended. (*Id.* at p. 294.) The child stated that she wanted to live with the father, and the child told the father that she loved him and missed him. (*Id.*

at p. 295.) During visits, the father had “ ‘demonstrate[d] empathy and the ability to put himself in his daughter’s place to recognize her needs.’ ” (*Id.* at p. 294.) A bonding study had been conducted, and the doctor concluded that “there was a potential for harm to S.B. were she to lose the parent-child relationship.” (*Id.* at p. 296.) The appellate court held that under the circumstances, the juvenile court had erred by finding that the beneficial parent/child relationship exception did not apply. “The record shows S.B. loved her father, wanted their relationship to continue and derived some measure of benefit from his visits. Based on this record, the only reasonable inference is that S.B. would be greatly harmed by the loss of her significant, positive relationship with [her father]. [Citation.]” (*Id.* at pp. 300-301.)

“The *S.B.* case has been criticized by other appellate courts for its suggestion the exception applies if the child merely ‘derived some measure of benefit’ from the parental relationship. (*S.B.*, *supra*, 164 Cal.App.4th at p. 301.) The same appellate court that authored the *S.B.* case cautioned in *In re Jason J.* (2009) 175 Cal.App.4th 922, 937: ‘The *S.B.* opinion must be viewed in light of its particular facts. It does not, of course, stand for the proposition that a termination order is subject to reversal whenever there is “some measure of benefit” in continued contact between parent and child.’ More recently, the same court emphasized in *In re C.F.* (2011) 193 Cal.App.4th 549, 558-559 that the *S.B.* case must be ‘confined to its extraordinary facts. [The *S.B.* case] does not support the proposition a parent may establish the parent-child beneficial relationship exception by merely showing the child derives some measure of benefit from maintaining parental contact.’ ” (*J.C.*, *supra*, 226 Cal.App.4th at p. 530.)

In this case, unlike *S.B.*, there was no bonding study and no expert testifying that there was a potential for detriment to the child from the loss of her relationship with her mother. Here, the record contained evidence, in the Department’s section 366.26 report, that the child was “assimilating to her prospective adoptive family and beginning to claim them as her own and vice versa.” The record also contained evidence that the child could

be emotionally impacted if she were to lose the stability offered by her adoptive home. In contrast to *S.B.*, here the experts—the social worker and the therapist—did not provide evidence to support a finding that the child would be harmed by the loss of her relationship with her mother.

In sum, while we commend the mother’s efforts and progress, we cannot say that the juvenile court made an arbitrary, capricious, or patently absurd determination in finding that the relationship between the mother and the child did not “outweigh the well-being of permanent placement with the adoptive parents.” We therefore find no abuse of discretion in the trial court’s finding that the parent/child exception did not apply.

***E. Bonding Study***

We requested supplemental briefing regarding whether a bonding study should have been requested and ordered in this case, as in *S.B.*

In attempting to establish the beneficial parent/child exception to the preference for adoption, “the parties or the court may require a bonding study to illuminate the intricacies of the parent-child bond so that the question of detriment to the child may be fully explored.” (*In re S.R.* (2009) 173 Cal.App.4th 864, 869 (*S.R.*)) “The juvenile court’s discretion to order a bonding study arises from Evidence Code section 730,” which allows the court to appoint an expert when “that the expertise is, or may be, required to resolve issues in the case.” (*Ibid.*)

Thus, a bonding study can help a parent obtain evidence of the existence and nature of a relationship between the child and the parent to help show that termination of parental rights is precluded by the parent/child exception of section 366.26, subdivision (c)(1)(A). (*In re Tabatha G.* (1996) 45 Cal.App.4th 1159, 1168.) However, “[t]here is no requirement in statutory or case law that a court must secure a bonding study as a condition precedent to a termination order.” (*In re Lorenzo C.* (1997) 54 Cal.App.4th 1330, 1339, 1341 (*Lorenzo C.*) [bonding study was not likely to be useful where “the child was only two years old at the time of the section 366.26 hearing and had

had no contact with his father during the preceding five months”].) Moreover, “[b]onding studies after the termination of reunification services would frequently require delays in permanency planning.” (*In re Richard C.* (1998) 68 Cal.App.4th 1191, 1197 (*Richard C.*)) Nevertheless, “it is not beyond the juvenile court’s discretion to order a bonding study late in the process under compelling circumstances.” (*Ibid.*) A bonding study can be especially helpful to a parent facing potential termination of parental rights, as it can provide an expert’s support for a parent’s assertion that the parent/child relationship exception should apply. (See, e.g., *In re Amber M.* (2002) 103 Cal.App.4th 681, 689 (*Amber M.*) [bonding study showed that it could be detrimental to sever the parent/child relationship]; *In re David D.* (1994) 28 Cal.App.4th 941, 947 [bonding assessment showed that the children had positive attachments to the mother and that it would be detrimental if they were to have no contact with her].)

Acknowledging that it was incumbent upon her trial counsel to request the juvenile court order a bonding study (see *Lorenzo C.*, *supra*, 54 Cal.App.4th at p. 1338), the mother contends that her trial counsel’s failure to make such a request constitutes ineffective assistance.

California law expressly provides that indigent parents whose children are the subject of dependency proceedings and may be placed out of the home have the right to appointed counsel (§ 317, subd. (b); rule 5.534(h)(1)(B)), and, if represented by counsel, they have the right to competent counsel. (§ 317.5, subd. (a).) This statutory right to counsel “must include the right to seek review of claims of incompetence of counsel.” (*In re Kristin H.* (1996) 46 Cal.App.4th 1635, 1662 (*Kristin H.*)) A parent challenging a court order based on ineffective assistance of counsel must meet a two-part test: the parent must show that “counsel failed to act in a manner to be expected of reasonably competent attorneys practicing in the field of juvenile dependency law” and must also “establish that the claimed error was prejudicial.” (*Id.* at pp. 1667-1668.) The test for

prejudice is whether it is “ ‘reasonably probable’ ” that a more favorable result would have occurred in the absence of counsels alleged failings. (*Id.* at p. 1668.)

At the combined section 388 and section 366.26 hearing, it was undisputed that the child, who was then nine years old, wanted to return to her mother and that the mother and child had a strong bond. However, it was necessary for the mother to show that the parent/child bond outweighed the benefits of adoption, and thus to show that severing the bond would be detrimental to the child. A bonding study may or may not have provided an expert’s support for the mother’s testimony that it would harm the child to permanently sever their relationship (see, e.g., *Amber M.*, *supra*, 103 Cal.App.4th at p. 689) and “illuminate[d] the intricacies of the parent-child bond so that the question of detriment to the child [could] be fully explored” (*S.R.*, *supra*, 173 Cal.App.4th at p. 869).

However, even if the mother’s trial counsel had requested a bonding study in advance of the combined section 388 and section 366.26 hearing, having carefully reviewed this record, we cannot say it is reasonably probable that the trial court would have granted that request, particularly in light of the possibility that ordering a bonding study would have caused a delay in permanency planning. (See *Richard C.*, *supra*, 68 Cal.App.4th at p. 1197.) The trial court could also have reasonably determined that the record contained sufficient evidence regarding the “intricacies of the parent-child bond” (*S.R.*, *supra*, 173 Cal.App.4th at p. 869) such that a bonding study was unnecessary. Moreover, on the record before us, we cannot conclude that it is reasonably probable that if a bonding study had been ordered, it would have led to a more favorable result for the mother at the combined section 388 and section 366.26 hearing. (See *Kristin H.*, *supra*, 46 Cal.App.4th at p. 1668.) Thus, the mother has not shown that her trial counsel was ineffective for failing to request a bonding study.

#### **IV. DISPOSITION**

The orders denying the Welfare and Institutions Code section 388 petition and terminating parental rights are affirmed.

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BAMATTRE-MANOUKIAN, ACTING P.J.

WE CONCUR:

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MIHARA, J.

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GROVER, J.