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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

In re E.V., a Person Coming Under the
Juvenile Court Law.

H043113 & H043286
(Santa Clara County
Super. Ct. No. 114JD22755)

SANTA CLARA COUNTY
DEPARTMENT OF FAMILY AND
CHILDREN'S SERVICES,

Plaintiff and Respondent,

v.

A.D.,

Defendant and Appellant.

In this dependency proceeding brought pursuant to Welfare and Institutions Code section 300,¹ appellant A.D. (Mother) appeals the juvenile court's orders denying her section 388 petition to reinstate visitation, denying her request for an evidentiary hearing on her later-filed section 388 petition to reunify or reinstate reunification services, and terminating her parental rights. Four months after the dependent child, two-year-old E.V. (Child), was detained, the juvenile court granted a section 388 petition by respondent Santa Clara County Social Services Agency, Department of Family and Children's Services (Department) to suspend Mother's visitation after she behaved inappropriately

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

during visits, which detrimentally affected Child. Mother, who had substance abuse and mental health issues, later admitted that she attended visits with Child under the influence. After reunification services were terminated, Mother complied with portions of her case plan and had progressed sufficiently in her substance abuse and mental health treatment that the court allowed her one trial visit with Child. Although the visit itself went well, Child exhibited regressive behaviors after the visit, which led to the juvenile court's determination that reinstating visits would not be in Child's best interests. We will conclude that the court did not abuse its discretion when it denied Mother's section 388 petition to reinstate visits nor when it denied Mother's request for an evidentiary hearing on her section 388 petition to reunify or for reunification services. Since Mother's challenge to the juvenile court's order terminating her parental rights is based on alleged error in failing to reinstate visits, we will also conclude that the court did not err in making that order. We will therefore affirm the judgment.

I. FACTS & PROCEDURAL HISTORY

Child was born in February 2012. She is the daughter of Mother and D.T.S. (Father). Mother and Father never married. In 2012, Mother and Child lived with Mother's boyfriend (Boyfriend), who Mother had dated on and off for four years, both before and after Child was born.

A. Prior Referral for Child Protective Services

In June 2012, Mother and Boyfriend were in the process of separating. Mother went to their apartment to retrieve her belongings and took Child with her. Boyfriend told Mother to put the three-month-old down so he could "beat the shit out of [Mother]." He then pushed and punched Mother in the head, while she was holding Child. Mother reported the incident to police, which generated a referral to the Department, and she obtained a temporary restraining order against Boyfriend. Mother told a social worker

there were 10 prior incidents of domestic violence involving Boyfriend and said Boyfriend was gang-affiliated and she feared retaliation. The Department determined that the allegation of neglect due to domestic violence was unfounded and closed its file.

Also in June 2012, Mother was hospitalized on an involuntary psychiatric hold (Welf. & Inst. Code, § 5150) after she returned home and “went crazy” because she thought Child had been abducted. Mother was released after less than 72 hours. Thereafter, she received psychiatric services.

In July 2012, Father killed Boyfriend after Boyfriend hit Father in the head with a hammer. Father was convicted by plea of involuntary manslaughter. When the dependency petition was filed, Father was incarcerated in the state prison medical facility at Vacaville, where he receives treatment for severe headaches caused by the blow to his head.

Mother’s past criminal history included one felony and seven misdemeanor convictions between 2004 and 2009: two convictions for driving under the influence; three for drug offenses (possession of methamphetamine for sale, possession of laboratory equipment for manufacturing illegal drugs, and being under the influence of a controlled substance); one for fighting in public; one for receiving stolen property; and one for driving on a suspended license. Mother admitted having a clandestine methamphetamine lab in her home in 2007, “ ‘cooking’ ” two batches of methamphetamine, and selling methamphetamine. Mother successfully completed a deferred entry of judgment drug treatment program in 2009, at which time prosecution for a separate charge of being under the influence of a controlled substance was dismissed. When the dependency petition was filed, Mother was required to register as a narcotics offender. As we shall explain, Mother also committed new offenses while the dependency case was pending.

B. 2014 Referral for Child Welfare Services

Police received a report in August 2014 of an intoxicated woman sitting in a car outside a restaurant with a small child in the back seat. Witnesses told the officers the woman in the car—Mother’s mother (Maternal Grandmother)—consumed several alcoholic beverages at the restaurant, had allowed Child to run around outside the restaurant unattended, and then “passed out behind the wheel.” The officers smelled a strong odor of alcohol on Maternal Grandmother’s breath and noted that her speech was slurred and she seemed confused. Maternal Grandmother became violent and belligerent; she screamed profanities and it took 15 to 20 minutes to get her into a patrol car. Maternal Grandmother refused to identify Mother or Child and told the officers she did not care what they did with Child and to “ ‘take her to CPS.’ ” Maternal Grandmother was arrested for child endangerment and resisting arrest. The officers described Child as dirty and unkempt, with make-up smeared all over her face and body. Paramedics determined that Child was unharmed and cleaned her up. Since Maternal Grandmother refused to identify Mother or Child, the officers called the emergency response social worker, who took Child into protective custody.

Mother appeared at the Department’s office the following day. She was very agitated, was pacing, and said she would not leave until Child was released to her. Mother refused the social worker’s request to submit to a drug test and said she last used cocaine in 2012. Mother said Maternal Grandmother had not done anything wrong. Mother told the social worker she believed Child was safe in Maternal Grandmother’s care, she did not believe the social worker’s report from the night before, and she thought Maternal Grandmother was falsely arrested and a victim of police brutality. The social worker became concerned about Mother’s ability to protect Child. Father’s mother (Paternal Grandmother) contacted the social worker and asked that Child be placed with her, stating that she frequently took care of Child on weekends.

C. Juvenile Dependency Petitions, Initial Court Proceedings, and Reunification Plan

The Department filed a petition pursuant to section 300, subdivision (b) alleging there is a substantial risk Child will suffer serious physical harm or illness as a result of Mother's failure or inability to adequately protect or provide regular care for her. The petition contained the facts set forth above. It alleged Mother minimized the risk Child was exposed to when left in Maternal Grandmother's care. The Department recommended the social worker be given the discretion to release Child to an approved relative, Mother have supervised visits, and Mother be provided services.

At the initial hearing, the court appointed separate counsel for Mother and Child. The court found that continued detention was necessary because of a substantial danger to Child and directed the social worker to provide Mother with services, including parent orientation and education, a drug and alcohol assessment, drug testing, and mental health counseling. The court also ordered that Mother have supervised visits, a minimum of two visits per week for two hours each visit, and permitted visits by other family members. At the hearing, Mother indicated a willingness to drug test and the social worker arranged for random, weekly drug testing at Norchem. Child was placed in Paternal Grandmother's home and that transition went smoothly.

When Mother met with the social worker two weeks later, the social worker reminded Mother that she needed to call Norchem daily about drug testing. Mother said she would do whatever the Department asked of her to reunify with Child, but then refused to sign forms for the parenting class referral. Mother asked the social worker whether she could leave Child in Maternal Grandmother's care if the criminal charges against Maternal Grandmother were dropped; Mother said she was not concerned about Maternal Grandmother's drinking.

The Department filed an amended petition adding factual allegations to the grounds previously asserted. In a September 2 jurisdiction report, the social worker

recommended the disposition hearing be continued for two weeks to allow time to evaluate “the most appropriate dispositional plan and services for the family.” The social worker expressed concerns that Mother did not understand the risks to Child from Maternal Grandmother’s actions and questioned Mother’s judgment since she said she would allow Maternal Grandmother to care for Child again. At the hearing on September 2, the court appointed counsel for Father and continued the matter to September 23.

In the disposition report of September 23, the social worker recommended the court sustain the petition, provide family reunification services to Mother, and bypass services for Father since he was in prison. At that point, Mother had not yet drug tested, even though she had been directed to test four times. She had not completed the drug assessment and had missed four visits with Child. Mother had enrolled in a parenting class, but not the one recommended by the Department. Paternal Grandmother told the social worker she was willing to raise Child if Mother did not successfully reunify. At the hearing on September 23, the court set the matter for an early resolution conference on October 6.

On October 6, Mother arrived late for court in a stolen car, which she parked in a no parking zone in front of the courthouse. Mother’s driver’s license was also suspended. At the hearing, the court authorized prison visits between Father and Child and set the matter for a contested jurisdiction hearing on October 31. After the hearing, Mother was arrested for auto theft, possession of stolen property, and possession of burglary tools (Veh. Code, § 10851, subd. (a); Pen. Code §§ 496, subd. (d), 466).

In an October 31 addendum report, the social worker advised the court of Mother’s arrest, reported that Mother had missed two more visits with Child, and that Mother had been promising Child that they would be reunited soon, violating the court’s directive not to make such promises.

At the October 31 jurisdiction hearing, the court accepted Father's waiver of rights and reunification services, found the allegations of the amended petition true, declared Child a dependent of the court, ordered reunification services for Mother, and set the matter for a six-month review hearing in April 2015. The court ordered Mother to attend the Department's parent orientation class and parenting classes at Celebrating Families, complete a substance abuse assessment, submit to random drug testing, and obtain mental health counseling. The court also ordered continued placement with Paternal Grandmother, visitation with Mother at least twice a week, and counseling for Child.

The social worker filed a section 388 petition in December 2014 to change the court's visitation order based on Mother's "erratic and unstable behavior" during supervised visits and suggested no visitation until Mother obtains mental health treatment and her condition stabilizes. The social worker described three visits in which Mother behaved inappropriately and became highly agitated in front of Child. On November 21, Mother examined every part of Child's body for evidence of harm, recorded the "exam" on her phone, questioned Child repeatedly about her care, and threatened to spank Child if she played with boys. On November 24, Mother questioned Child repeatedly about a bump on her head, became overly emotional, claimed Child had suffered sexual abuse, and reported the alleged abuse to the police. The social worker supervising the visit said there was no evidence of sexual abuse. On December 1, Mother became upset when she noticed Child had pink eye—for which Child had received medical care. Mother raised her voice, criticized Paternal Grandmother in front of Child, called 911, attempted to leave the visitation center with Child, and refused to return Child to her caregiver. Paramedics and sheriff's deputies arrived and eventually diffused the situation. The social worker reported that Child was worried, confused, and upset by these incidents, and "shut down" when Mother had these outbursts. The court temporarily suspended visitation on December 12.

In January 2015, the Department reported that Mother was not actively participating in her case plan. Five months after Child was detained, Mother had not completed the substance abuse assessment and had not begun mental health counseling. She had missed 10 of 11 mandatory drug tests in November and December 2014, and had lied to the social worker about her compliance with drug testing. The one time she did test, she tested positive for alcohol. Mother began parenting classes on January 13, but left during the first class, stating it was too stressful because other participants brought their children and her child was not present.

The court granted the Department's request to suspend visitation and issued a temporary restraining order protecting Child and Paternal Grandmother from Mother. The court found that continuing visitation was detrimental to Child, there was no way to restructure the visits to prevent harm, and Mother lacked insight into how her behaviors negatively impacted Child.

The Department filed another section 388 petition in February 2015. The social worker reported that Mother had been dropped from the Celebrating Families parenting class because she missed three classes. The social worker asked the court to order Mother to complete a basic parenting class before returning to Celebrating Families, and undergo a psychological evaluation, with the goals of resuming visitation and reunification. The court granted the petition.

D. Six-Month Review Hearing in April 2015

In a March 2015 status report for the six-month review hearing, the Department recommended the hearing be continued for 30 days to obtain a psychological evaluation of Mother. The social worker reported that Mother missed her January case status review meeting; failed to attend the parent orientation class twice; started the basic parenting class on March 21; had not undergone the substance abuse assessment; and failed to comply with drug testing 15 out of 15 times between January and April 2015. Maternal

Grandmother had been visiting Child two to three times a month; the visits were supervised by Paternal Grandmother and were going well. In violation of the restraining order, Mother showed up at the park where Maternal Grandmother was to visit Child on March 22. Mother told Paternal Grandmother the restraining order was fake, scooped up Child, and started walking toward the park gate, saying she had a television news crew waiting. Paternal Grandmother called the police, who persuaded Mother to return Child to Paternal Grandmother. On the way home, three-year-old Child cried and said she had to protect Mother. After the incident, Paternal Grandmother refused to supervise any more visits with Maternal Grandmother.

The social worker reported that Mother had tried to find a therapist. Between November 2014 and March 2015, Mother initiated services with four different providers. She was denied services by the first provider, “had a problem” with the second and third providers, and saw a “parenting coach” at the fourth provider, which did not have therapy openings. After four months and four providers, there was no evidence Mother had made any progress regarding her mental health status.

The court continued the six-month review hearing and at mother’s request set the case for a contested six-month review hearing on August 13, approximately one year after Child was detained.

E. Contested Six-Month Review Hearing in August 2015

The Department prepared two reports for the contested six-month review hearing in which the social worker opined that it would be detrimental to return Child to Mother. The social worker recommended visits with Mother continue to be suspended, the court terminate reunification services, and set the matter for a selection and implementation hearing pursuant to section 366.26 (.26 hearing).

The social worker reported that Mother was arrested in March 2015, and charged with possession of a controlled substance (methamphetamine), being under the influence

of a controlled substance, and possession of drug paraphernalia (Health & Saf. Code, §§ 11377, subd. (a), 11550, subd. (a), and 11364). Police stopped Mother for a traffic violation and, upon searching her, found a pipe containing a usable amount of methamphetamine in her pocket. Mother also admitted smoking three grams of methamphetamine the day before. The officers noted that Mother's driver's license had been suspended since May 2013. Criminal charges were filed.

Mother completed the psychological evaluation with licensed psychologist Robert Land in March 2015. Dr. Land reported that Mother—who last worked as a hair stylist—was living with Maternal Grandmother and had been unemployed since Child was detained. Mother described her substance abuse history, stating that she had used methamphetamine for six years, including bingeing at times; cocaine over a period of ten years; and that she started drinking again after Child was removed. Mother had participated in a 12-step program before. Dr. Land noted that the history of substance use Mother gave him was inconsistent with her criminal history and opined that she was a poor historian. Mother reported trouble sleeping, panic attacks upon seeing mothers with children, anxiety over the dependency proceedings, and depression with thoughts of suicide. Dr. Land noted that Mother had experienced trauma, “in choosing relationships that yielded domestic violence” and in the killing of Boyfriend. Dr. Land diagnosed generalized anxiety disorder, mild alcohol use disorder, and mild stimulant use disorder. He opined that Mother was using alcohol and controlled substances to cope with her high level of anxiety and having a hard time advocating for herself and Child. He recommended regular alcohol and drug testing to establish Mother's current use pattern, which was not clear; substance abuse treatment, including a 12-step program; regular individual psychotherapy, including therapy to understand domestic violence; and a psychiatric evaluation to determine whether Mother might benefit from medication.

Mother started the basic parenting classes in March, but was dropped from the class after she missed four classes. Mother complained to the social worker of difficulty finding a therapist. When the social worker offered to help her find a therapist, Mother said she would do it herself. Days later, the social worker found two therapists who agreed to see Mother on a weekly basis. Mother then overdosed on her brother's Risperdal² and ended up in the hospital for five days.

Mother completed the substance abuse assessment at the Department of Alcohol and Drug Services in April, after missing three appointments. Mother told the assessor she had completed a residential drug treatment program in 2011, she last used methamphetamine in July 2012, drank alcohol socially, and took one or two Norco a day as prescribed by her physician. She said she feels "overwhelmed by CPS requirements." The assessor recommended outpatient treatment at Family and Children's Services (FCS) and scheduled an intake appointment for Mother on May 5. Mother missed that appointment and did not reschedule. Mother had reported on a sex-trafficking website in early May that Child was being molested by a man in San José. The police and a local child abuse agency contacted Paternal Grandmother, who reported that Child was with her and had not been harmed.

On May 6, Mother was arrested on old warrants for drug charges and vehicle theft; she remained in custody until May 21. On May 29, Mother asked for another substance abuse assessment because she lied during the first assessment. Mother underwent the second assessment on June 1. At that time, she was out of jail, still unemployed, homeless, and living in her car. Mother admitted she was dishonest during the first assessment. Mother now told the assessor she used alcohol and methamphetamine

² Risperdal is an antipsychotic medication used to treat mental and mood disorders, including schizophrenia, bi-polar disorder and irritability associated with autism. (<http://www.webmd.com/drugs/2/drug-9846/risperdal-oral/details> [as of Sept. 26, 2016].)

“daily” from the time Child was removed until her arrest; she last used methamphetamine on May 6 and alcohol on May 23. Mother believed homelessness was a risk to her sobriety, was afraid of relapse, and requested a referral to a residential substance abuse treatment program. The assessor recommended residential treatment and encouraged Mother to follow her dependency case plan. The assessor told Mother she would have to call daily to get into a residential program.

Mother contacted the Christian Counseling Center (CCC) about mental health treatment on June 4, but did not do anything further to begin treatment there. The following day, Mother went to the social worker’s office and demanded help to move into residential drug treatment right away, saying “I have a drug problem!” The social worker told Mother to follow instructions she had previously received. Mother started drug testing that day. Norchem instructed Mother to test 10 times between June 5 and August 13; she missed one test, had one diluted test, and her other tests were negative.

Mother began a one-year residential drug treatment program at Victory Outreach Women’s Home (Victory Outreach) on June 6. That program was not approved by the Department of Alcohol and Drug Services. On June 15, Mother sent a letter to Paternal Grandmother, apologizing for her behavior and thanking her for caring for Child. Mother stated: “I was very much stuck in my addiction and was in denial about everything.” Mother left Victory Outreach on June 30, less than one month after starting, to resolve a problem with a bail bond. That day, she entered a plea in the drug case, which resulted in probation with a drug treatment program under Proposition 36.

Mother started attending weekly parenting classes on June 16. Mother spoke with the social worker on July 1 and asked if she could resume visits with Child, saying she was doing everything she was supposed to do. The social worker told Mother she was not receiving the mental health counseling ordered by the court and gave her the contact information for CCC again. At that point, Mother had not completed the parent

orientation class and had left her drug treatment program. Mother requested a third substance abuse assessment.

Mother completed the parent orientation class on July 6 and the third substance abuse assessment on July 7. This time, the assessor referred Mother for intensive outpatient drug treatment at Perinatal Substance Abuse Program (PSAP) with the intake appointment scheduled for July 27. Mother kept that appointment and obtained a physical at PSAP's request.

Mother began mental health treatment with a therapist on July 16. The therapist opined that Mother needed long-term mental health treatment. The social worker told Mother she needed weekly therapy. Mother said she had scheduled a psychiatric evaluation and asked when visitation could be reinstated. The social worker told her she needed to participate consistently to stabilize her mental health issues before visitation could resume. Mother agreed to contact Momentum and CCC to see if they could offer weekly therapy.

In an August 13 report, the social worker expressed concerns about Mother's tendency to minimize her addiction and about her lack of progress with both substance abuse and mental health treatment. The social worker opined that even if Mother participated in substance abuse treatment for six months, it would not insure her sobriety; that it would be detrimental to return Child to Mother; that it is unlikely Child will be returned to Mother before the 18-month review hearing; and recommend the court terminate reunification services.

Mother and the social worker testified at the continued six-month hearing on August 13. Mother admitted she had substance abuse and mental health issues. She started drinking again after Boyfriend died in 2012. She used methamphetamine a few times between 2011 and August 2014, but started using regularly after Child was removed. Mother did not engage in services until late May because she was using

alcohol and methamphetamine daily. She testified she went to visits with Child and to court proceedings under the influence. Mother has not used drugs since she was arrested on May 6 and has used alcohol only once since then, on May 23. Mother was attending 12-step meetings twice a week and had a sponsor. She started working 12 hours a week in early July and had just began studying criminal justice at a local college. She was using tools she learned in rehabilitation in 2011 to maintain her sobriety.

The juvenile court found by clear and convincing evidence that Mother failed to participate regularly and had not made substantive progress in the case plan, terminated reunification services, and set a .26 hearing for December. The court noted that Mother was starting to participate nine to 10 months after the disposition hearing, but found she had not demonstrated sufficient stability to receive even supervised visits and denied Mother's requests to lift the no visitation order and the restraining order. The court also found no substantial probability Child may be returned to Mother within six months. The court set the matter for further review on September 28 for an update on Mother's progress as it relates to visitation. Mother filed a notice of intent to file a writ petition challenging the order setting the .26 hearing, but did not pursue the writ petition in our court.

F. Mother's Section 388 Petitions to Modify the Court's Orders

On September 24, 2015, Mother filed two section 388 petitions to change the juvenile court's orders, asking the court to remove the finding of detriment, reinstate visits, and modify the restraining order. A few days later, Mother filed an amended petition with documentary support attached.

In an interim review report, the social worker reported that after the Department suspended services, Mother began receiving substance abuse treatment at FCS and was participating in random drug testing twice a month, both through her Proposition 36 program. Mother's tests were negative on August 24 and September 2. Mother had

obtained mental health treatment on July 17 and August 27, and had a third appointment set for September 30. Mother completed a psychiatric evaluation on September 2, and the psychiatrist prescribed Zoloft. The social worker reported that Child had been denied mental health services because there were no mental health concerns. In mid-September, Paternal Grandmother told the social worker Child was almost fully potty trained, was less fearful when leaving Paternal Grandmother, but had “more accidents in her pants” and woke up crying at night after visits with Maternal Grandmother. The social worker recommended the court find continued detriment and maintain the suspension of visits due to a lack of consistent participation and progress in Mother’s mental health treatment. The social worker opined that given Mother’s long term drug use, she will require long term substance abuse treatment; that it was too early to assess Mother’s progress in her mental health treatment to determine whether she is emotionally stable enough to resume visitation; and that visits should be suspended until Mother engages in mental health treatment for at least six months.

At the review hearing on September 28, the court indicated it was not able to find continuing detriment based on the most recent reports and asked for the parties’ views on supervised visitation. Mother’s counsel advised the court that Mother had been charged in a new criminal matter with brandishing a weapon (Pen. Code, § 417, a misdemeanor) based on conduct in January 2015. He also reported that Mother was seeing a therapist, taking her medication, and still working. He asked the court to reinstate weekly visits and to set the matter for a contested hearing. Child’s counsel was concerned that many months had passed since the last visits, those visits were very traumatic for Child, and Child still was not in therapy. The social worker said she was willing to consider a trial visit and there were other options for getting Child therapy services. The juvenile court set the matter for a contested hearing on November 18 and found that Mother had stabilized enough for one supervised visit prior to that date. The court ordered the social

worker to obtain counseling for Child to prepare for the visit and that the visit be supervised by the assigned social worker.

Before the November 18 hearing, the social worker reported that the visit took place on October 28 and went very well. Mother brought breakfast, toys, and snacks for Child. Mother behaved appropriately throughout the visit. Mother and Child did a puzzle, ate, sang, danced, juggled balls, and played games; they smiled and laughed throughout the visit and said they loved each other. The visit ended without incident and Child was eager to see Paternal Grandmother.

The social worker reported that Child was receiving services from therapist Erika Hulse. Child saw Hulse twice before the visit and three times after the visit. Two days before the visit, Hulse “ ‘saw a lot of confusion and high emotions’ ” in Child when discussing the visit. Paternal Grandmother reported that Child had no reaction when told she would be visiting Mother. Hulse saw Child two days after the visit and did not observe any changes. But in their sessions on November 6 and 13, Child was less willing to talk, exhibited extreme anxiety separating from Paternal Grandmother, cried, could not verbalize, hid her face, and acted like she had never met Hulse before. Hulse reported a regression in social competence and a heightened fear response. Given the timing, Hulse told the social worker she could not opine with certainty whether these changes were due to the visit.

Child’s preschool teacher told the social worker Child had regressive behaviors at school shortly after the visit. Child, who was potty-trained and had consistently used the bathroom since April 2015, started wetting herself and purposefully urinated on the floor. Child had difficulty sleeping at naptime, was aggressive and irritable with other children, was harder to comfort, and had separation anxiety. Paternal Grandmother reported that Child started having really bad “meltdowns” after the visit; Child had become clingy and said she wanted to call Paternal Grandmother “Mommy”; she had numerous potty

accidents before and after the visit. Child had not talked about the visit or asked Paternal Grandmother about another visit. The social worker opined that the visit had a negative effect on Child, that additional visits would cause further detriment, and recommended the court suspend further visits.

The review hearing was not completed on November 18 and the court continued it to November 23. On November 19, Mother filed another section 388 petition, asking the court to permit her to reunify with Child, or alternatively, to reinstate family reunification services. The court set that petition for hearing on December 7, the date of the .26 hearing.

Both Mother and the social worker testified on November 23. Mother said she had seen her therapist monthly since July, but was transferring her care so that she can receive weekly treatment. She had been taking her medication, getting more sleep, and managing her stress. She was attending weekly group substance abuse treatment through FCS, going to Narcotics Anonymous meetings three times a week, had a sponsor, and had not relapsed. She was still working, had increased her hours to 30 hours per week, and had moved into an apartment with her brother. She had pleaded guilty to the brandishing charge and received probation with electronic monitoring for six months.

The social worker repeated the information and opinions in her report. She also opined that the October visit triggered traumatic memories for Child of the December 2014 visit when paramedics were called. According to the social worker, there was no evidence Paternal Grandmother did anything to undermine the October 28 visit. Even though Hulse cannot say whether the changes in Child's demeanor were due to the recent visit, the social worker believed they were, based on the totality of the reports from Hulse, the preschool, and Paternal Grandmother. The social worker disagreed with Mother's theory that Child's regressive behaviors occurred because Child wanted to see Mother again.

The juvenile court found that although Mother had demonstrated a change in circumstances, she had not shown it would be in Child's best interests to reinstate visits. The court concluded that although Mother was doing everything right, Child was not emotionally ready for contact with Mother. The court denied the petitions to reinstate visits and lift the restraining order. The court acknowledged the "tremendous progress" Mother had made and encouraged her to continue her recovery efforts.

G. Selection and Implementation Hearings in December 2015 and February 2016

In its report for the .26 hearing, the Department recommended the court terminate both Mother's and Father's parental rights, with a permanent plan of adoption by Paternal Grandmother. The social worker described Child as healthy, charming, loving, and highly adoptable. She reported that Child and Paternal Grandmother were strongly bonded and Child feels comfortable and safe in Paternal Grandmother's care. The social worker opined that Mother had only begun to address the issues that brought Child into foster care.

At the hearing on December 7, the Department, Father's counsel, and Child's counsel asked the court to deny Mother's section 388 petition to reunify or reinstate reunification services, arguing that Mother had not made a prima facie showing that required an evidentiary hearing or that either request was in Child's best interest. Mother's counsel argued that Mother had a right to an evidentiary hearing on her section 388 petition. He told the court that he would cross-examine Hulse and have a social worker from his office testify that in the context of the dependency system it is in the child's best interest to reunify with a parent.

The court denied Mother's request for an evidentiary hearing on her section 388 petition and summarily denied the petition, reasoning the Mother had not made a prima facie showing that it would be in [C]hild's best interests to reunify or to extend family reunification services. The court noted that on November 23 it had found that it would

not be in Child's best interests to "even have visits" with Mother due primarily to the trauma Child has suffered and the impact the October 28 visit had on her emotional wellbeing. The court continued the .26 hearing to January 7 to allow time for Father's counsel to discuss the social worker's report with Father.

On January 7, the court set a contested .26 hearing for February 11. In an addendum report, the social worker stated that Child was attending weekly therapy with Hulse, had completed 14 sessions since mid-October 2015, and had been approved for 40 visits. Hulse told the social worker Child does not spontaneously talk about Mother and only mentions her if asked. The social worker reported that Child had not asked about or talked about Mother with the social worker or Paternal Grandmother, showing a lack of bond with Mother, and that Child had only seen Mother twice in a year. In contrast, Child was strongly bonded with Paternal Grandmother.

The only evidence presented at the contested .26 hearing was the social worker's reports. Mother argued against the social worker's recommendation, asserting that Child was not adoptable based on some negative behaviors at preschool, that there was a beneficial bond between Mother and Child based on the October 28 visit, and that Mother had not been given a fair opportunity to establish a bond.

The court found by clear and convincing evidence that Child was adoptable. The court also found that Mother had not met her burden of showing this case fit within the beneficial relationship exception to adoption.

II. DISCUSSION

In case No. H043113, Mother appeals the November 23, 2015 order denying her section 388 petitions to reinstate visitation and lift the restraining order, and the December 7, 2015 order summarily denying her section 388 petition to reunify or reinstate reunification services. In case No. H043286, Mother appeals the February 11, 2016 order terminating her parental rights.

A. Applicable Legal Principles

Section 300 et seq. provides “a comprehensive statutory scheme establishing procedures for the juvenile court to follow when and after a child is removed from the home for the child’s welfare. [Citations.]” (*In re Celine R.* (2003) 31 Cal.4th 45, 52.) As the Supreme Court has explained: “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.] Although a parent’s interest in the care, custody and companionship of a child is a liberty interest that may not be interfered with in the absence of a compelling state interest, the welfare of a child is a compelling state interest that a state has not only a right, but a duty, to protect. [Citations.] The Legislature has declared that California has an interest in providing stable, permanent homes for children who have been removed from parental custody and for whom reunification efforts with their parents have been unsuccessful. [Citations.] This interest is a compelling one. [Citation.]” (*In re Marilyn H.* (1993) 5 Cal.4th 295, 307 (*Marilyn H.*))

After a child has been adjudged a dependent of the juvenile court, the exclusive procedure for establishing the permanent plan for the child is the selection and implementation hearing as provided under section 366.26. The essential purpose of the .26 hearing is for the court “to provide stable, permanent homes for these children.” (§ 366.26, subd. (b); see *In re Jose V.* (1996) 50 Cal.App.4th 1792, 1797.) There are six statutory choices for the permanency plan; the preferred choice is adoption, coupled with an order terminating parental rights. (§ 366.26, subd. (b); see also *In re Celine R.*, *supra*, 31 Cal.4th at p. 53.) The court selects this option if it “determines ... by a clear and convincing standard, that it is likely the child will be adopted.” (§ 366.26, subd. (c)(1).) Thus, at the .26 hearing, “in order to terminate parental rights, the court need only make two findings: (1) that there is clear and convincing evidence that the minor will be

adopted; and (2) that there has been a previous determination that reunification services shall be terminated.” (*Cynthia D. v. Superior Court* (1993) 5 Cal.4th 242, 249–250.)

During the reunification process and beyond, parents and other interested persons may petition under section 388 to modify any of the juvenile court’s orders. Section 388 requires a showing of a “change of circumstance or new evidence” and that the modification would be in the “best interests” of the child. (§ 388, subs. (a)(1), (d); *In re Kimberly F.* (1997) 56 Cal.App.4th 519, 526 (*Kimberly F.*); see also Cal. Rules of Court, rule 5.570(d).)

The California Supreme Court explained the nature and role of section 388 in *Marilyn H.* “Essentially, *Marilyn H.* teaches us that section 388 *really is* an ‘escape mechanism’ when parents complete a reformation in the short, final period after the termination of reunification services but before the actual termination of parental rights. [Citation.] As such, section 388 is vital to the *constitutionality* of our dependency scheme as a whole, and the termination statute, section 366.26, in particular. [Citation.]” (*Kimberly F., supra*, 56 Cal.App.4th at p. 528, original italics, citing *Marilyn H., supra*, 5 Cal.4th at p. 309.)

If the court determines from the petition “that the best interests of the child ... may be promoted by the proposed change of order,” it shall schedule a hearing on the matter. (§ 388, subd. (d).) A section 388 petition is to be liberally construed in favor of its sufficiency. (*In re Jasmon O.* (1994) 8 Cal.4th 398, 415; see also rule, 5.570(a).)

The moving party has the burden of proof at any hearing on a section 388 petition to show by a preponderance of the evidence both that there are changed circumstances or new evidence and that a change in the court’s prior order would be in the best interests of the child. (*In re Stephanie M.* (1994) 7 Cal.4th 295, 317 (*Stephanie M.*)). The parent’s burden of showing that changed circumstances are sufficient such that the child’s interests would be promoted by modifying a prior order “is a difficult [one] to meet in

many cases, and particularly so when ... reunification services have been terminated or never ordered. After the termination of reunification services, a parent's interest in the care, custody and companionship of the child is no longer paramount. [Citation.] Rather, at this point, the focus shifts to the needs of the child for permanency and stability. [Citation.]” (*In re Angel B.* (2002) 97 Cal.App.4th 454, 464.)

The determination whether to change an order by granting a section 388 petition “is ‘committed to the sound discretion of the juvenile court, and [its] ruling should not be disturbed on appeal unless an abuse of discretion is clearly established.’ [Citation.] An abuse of discretion occurs when the juvenile court has exceeded the bounds of reason by making an arbitrary, capricious or patently absurd determination. [Citation.]” (*In re Marcelo B.* (2012) 209 Cal.App.4th 635, 642, quoting and citing *Stephanie M., supra*, 7 Cal.4th at p. 318.) This abuse of discretion standard also applies where the court denies a section 388 petition without an evidentiary hearing. (*In re G B.* (2014) 227 Cal.App.4th 1147, 1158.)

B. The juvenile court did not abuse its discretion when it denied Mother's section 388 petitions to reinstate visitation and lift the restraining order.

Mother argues there is no substantial evidence to support the trial court's order denying her section 388 petition to reinstate visitation and that the “proffered evidence to support a change in circumstance was substantial.” She argues that her prior drug problem was being addressed, her mental health condition was being successfully treated, and the trial visit on October 28 could not have gone better. That Mother had met her burden of demonstrating the changed circumstances required to support her section 388 petition to reinstate visits was not in dispute. In their closing arguments, the Department, Father's counsel, and Child's counsel all agreed that Mother had met her burden of demonstrating changed circumstances. And in ruling on the petition, the juvenile court found that Mother had met her burden of establishing a change in circumstance.

The disputed issue in this case is whether Mother had met her burden of proving that reinstating visitation was in Child's best interests. (*Kimberly F., supra*, 56 Cal.App.4th at p. 526.) The Department, Father's counsel, and Child's counsel all argued that Mother had not met her burden of proving the best interests prong of the test, and the juvenile court agreed.

On appeal, Mother merely reargues the evidence presented at the November 23, 2015 hearing. She describes the positive aspects of the trial visit, relies on Hulse's statement that she could not opine with certainty that the visit caused Child's behavioral changes, and attacks the social worker's qualifications and opinions. Mother also reasserts her theory, unsupported by any evidence, that Child's behavior changed after the visit because Child was not allowed to have further visits with Mother. Mother made all these arguments to the juvenile court. Under the abuse of discretion standard of review that applies to this case, it is not our role to reweigh the evidence and decide the section 388 petition anew.

Mother also complains of an alleged three-month delay in ruling on her section 388 petition to reinstate visits, suggesting that the order was not made until January 2016. It is not clear how this alleged delay relates to the issues before us. Regardless, there was no delay in ruling on the petition. Mother filed her petitions to reinstate visitation and lift the restraining order on September 24, and the court set them for hearing at the September 28 review hearing. On September 28, the court ordered a trial visit and set a contested hearing on the petitions for November 18, a date Mother agreed to. The visit took place on October 28. The contested hearing commenced on November 18 and was continued to November 23 to complete the presentation of evidence. The court ruled on the petition on November 23. There simply was no delay.

Mother does not argue that the juvenile court erred when it found that reinstating visits was not in Child's best interests. "Best interests" is a complex idea. (*Kimberly F.*,

supra, 56 Cal.App.4th at pp. 530–531.) In determining whether the proposed modification is in the child’s best interests, the court considers a number of factors, including: “(1) the seriousness of the problem which led to the dependency, and the reason for any continuation of that problem; (2) the strength of relative bonds between the dependent children to *both* parent and caretakers; and (3) the degree to which the problem may be easily removed or ameliorated, and the degree to which it actually has been. While this list is not meant to be exhaustive, it does provide a reasoned and principled basis on which to evaluate a section 388 motion.” (*Id.* at p. 532.) A review of these factors supports the juvenile court’s order here.

Mother’s substance abuse and mental health problems that led to the dependency and the termination of visitation cannot be easily removed or ameliorated. “Like alcoholism [citation] chronic drug abuse presents a lifelong challenge and may put children of such drug abusers in danger.” (*In re Ernesto R.* (2014) 230 Cal.App.4th 219, 225; *Kimberly F.*, at p. 531, fn. 9 [“It is the nature of addiction that one must be ‘clean’ for a much longer period than 120 days to show real reform”].) Mother admitted that she went to court appearances and visits under the influence. Although Mother made great strides in her rehabilitation efforts after she was incarcerated in May 2015, her sobriety was still relatively new when the court ruled on her petitions in November 2015. Mother had also failed attempts at drug rehabilitation in 2009 and 2011, relapsing in 2102 and thereafter. Mother had barely begun her mental health treatment; she was seeing her therapist only once a month, testified that the monthly treatment she was receiving was not enough, and was in the process of changing therapists. Indeed, the juvenile court found that while Mother had made considerable progress, she had not alleviated the problems that brought Child before the court.

More importantly, there was substantial evidence that the trial visit on October 28 was detrimental to Child and that Child was not ready for visits with Mother. Child’s

therapist, preschool teacher, and Paternal Grandmother all reported changes in Child's behavior after the visit: Child was less willing to talk to her therapist, exhibited extreme separation anxiety, cried, could not verbalize, had potty accidents, had difficulty sleeping, had become aggressive and irritable with other children, was harder to comfort, started having "meltdowns," and had become clingy and increasingly emotional. The social worker opined, based on information she had gathered from Paternal Grandmother, Hulse, and Child's teacher, that the regressive changes in Child's behavior were due to the trial visit and that further visits would not be in Child's best interests. She also opined that Child had attachment issues.

The evidence of the strength of the relative bonds between Child and Mother and Child and her caretaker also supports the court's order. Child had been living with Paternal Grandmother for approximately 15 months when the court ruled on the section 388 petitions. Child was strongly bonded to Paternal Grandmother and felt comfortable and safe with her. Paternal Grandmother reported that Child had no reaction when told she would be visiting Mother in October 2015. Before the visit, Child's therapist observed confusion and high emotions in Child when they discussed the visit. At the end of the visit, Child was eager to see Paternal Grandmother. She did not cry or lament having to leave Mother. After the visit, Child did not talk to Paternal Grandmother about the visit or ask to visit Mother again. Instead, she started asking Paternal Grandmother if she could call *her* "Mommy." While Child remembered Mother and displayed affection toward her at the visit on October 28, Child had spent only a few hours with Mother during supervised visits in the year before that visit. And when visits were afforded to Mother under her case plan, Mother missed 10 visits and was late to two. Moreover, Mother's last three supervised visits with Child in late 2014 did not go well, with Mother refusing to surrender Child and calling emergency personnel. Mother admitted she went to visits under the influence and that likely explains her erratic

behavior in late 2014. In addition, the last time Child had seen Mother before the October 2015 visit was in March 2015 when Mother violated the restraining order and tried to kidnap Child from the park. The relative strength of Child's bond with Paternal Grandmother as compared to her bond with Mother supports the juvenile court's order.

On this record, the court reasonably found that it was not in Child's best interests to reinstate visits. We therefore conclude the court did not abuse its discretion when it denied Mother's petitions to reinstate visitation and lift the restraining order.

C. The juvenile court did not abuse its discretion when it denied Mother's section 388 petition to reunify or reinstate reunification services without an evidentiary hearing.

After the contested hearing on Mother's petition to reinstate visits had begun, but before the second day of that hearing, Mother filed a section 388 petition to reunify, or alternatively to reinstate reunification services. The court scheduled that petition for a hearing on December 7, the same day as the .26 hearing.

A parent seeking modification of a court order pursuant to section 388 must "make a prima facie showing to trigger the right to proceed by way of a full hearing. [Citation.]" (*In re Marilyn H.*, *supra*, 5 Cal.4th at p. 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.]" (*In re Anthony W.* (2001) 87 Cal.App.4th 246, 250; see also Cal. Rules of Court, rule 5.570(d).) In determining whether a section 388 petition makes the necessary prima facie showing, the juvenile court may consider the entire factual and procedural history of the case. (*In re Justice P.* (2004) 123 Cal.App.4th 181, 188–189.)

In her petition to reunify, Mother argued that for "the sake of judicial economy and intertwined issues," her section 388 petitions should be heard at the same time. She

argued: “Seeing as how visitation is a crucial component of any reunification case plan, ... a hearing on both at the same time is appropriate.” Mother said she was not opposed to continuing the November 23 hearing to consolidate the issues presented by the two petitions, but asked that she receive therapeutic visits with Child in the meantime. Mother did not attach any evidentiary exhibits to her petition to reunify, and she repeated her arguments about the positive October visit, about the therapist’s inability to opine about causation, and attacking the social worker’s opinion.

At the hearing on the section 388 petition to reunify, Mother requested a full evidentiary hearing and made an offer of proof that she would cross-examine Hulse and have a social worker from her attorney’s office testify as an expert on best interests and risk assessment. The juvenile court denied the request for an evidentiary hearing and denied the petition summarily on the ground that Mother had not made a prime facie showing that it would be in Child’s best interests to return Child to Mother or to extend family reunification services. The court relied on its previous ruling that “it would not be in [C]hild’s best interest[s] to even have visits” with Mother.

Mother contends the documentation she attached to her petition to reunify was sufficient to meet her burden to prove changed circumstances under the prima facie standard. But as we have noted, she did not attach any documents to her section 388 petition to reunify and relied on the same arguments she made in her earlier section 388 petition to reinstate visits. Even if Mother made a prima facie showing of changed circumstances, the court’s ruling was based on her failure to make a prima facie showing on the “best interests” prong, and as we shall explain, the record supports that finding.

Mother argues that her petition to reunify was tailored to meet the best interests of Child, since it asked not only for the return of Child, but included an alternative request to reinstate family reunification services. Mother then argues that the full 18 months for

reunification had not yet run and focuses on her efforts to comply with the case plan after she got out of jail.

Just two weeks before the hearing on Mother's section 388 petition to reunify, the juvenile court had held a full evidentiary hearing on the question of whether Mother's visitation could safely resume. At the conclusion of that hearing, the court found that further visits with Mother would not be in Child's best interests. If Child could not safely spend an hour with Mother in a supervised setting on November 23, it logically follows that she could not be returned to Mother's care on December 7, especially since Mother had not submitted any evidence that anything had changed between those two dates. Moreover, as even Mother noted, the issues of visitation and reunification are intertwined, and "visitation is a crucial component of any reunification case plan." Without visitation, reunification efforts would almost certainly fail, especially since the 18-month period to complete reunification services was to run two months after the hearing on the section 388 petition to reunify. Given the facts and procedural history, in particular the court's November 23 ruling, we conclude the court did not abuse its discretion when it denied Mother's request for an evidentiary hearing on her section 388 petition to reunify.

D. The juvenile court did not err when it terminated Mother's parental rights.

Mother attacks the court's order after the .26 hearing by asserting that the juvenile court committed reversible error when it granted the Department's section 388 petition to terminate visitation. Apparently, this contention refers to the court's December 12, 2014 order temporarily suspending visitation and its January 21, 2015 order suspending visitation after a contested hearing on the Department's petition. But the text of Mother's argument does not develop this point further. Although Mother's argument heading refers to the granting of the *Department's* section 388 petition to suspend visits, the text of the argument refers to the evidence presented on *Mother's* section 388 petition to

reinstate visits.³ Mother argues the court's errors were cumulative and resulted in a miscarriage of justice. She also asserts the court violated her constitutional right to maintain a parental relationship with Child. We note that Mother does not challenge any of the court's findings at the .26 hearing.

We have already found that the court did not abuse its discretion when it denied Mother's section 388 petition to reinstate visitation. Since Mother's challenge to the court's ruling on the .26 petition is derivative of her argument on the section 388 petition to reinstate visitation, her challenge to the order on the .26 hearing necessarily fails.

III. DISPOSITION

The judgment is affirmed.

³ To the extent Mother intends to challenge the court's December 2014 and January 2015 orders granting the *Department's* section 388 petition to suspend visitation, those orders are not appealable. To preserve her right to appeal those orders, Mother was required to file a writ petition challenging the court's August 13, 2015 order setting the .26 hearing and raise the granting of the Department's petition to suspend visitation as a specific substantive issue in the writ proceeding. (§ 366.26, subd. (1); *Anthony D. v. Superior Court* (1998) 63 Cal.App.4th 149, 153, 156–158.) Although Mother filed a notice of intention to file a writ petition and arranged for the preparation of the appellate record, she did not pursue the writ proceeding further and never filed a petition.

Mother does not otherwise expressly challenge the court's December 2014 or January 2015 orders or develop the point further. When the appellant asserts a point but fails to support it with reasoned argument or citation to authority, as Mother has done here, this court may treat the point as waived and pass it without further consideration. (*People v. Stanley* (1995) 10 Cal.4th 764, 793; *Stoll v. Shuff* (1994) 22 Cal.App.4th 22, 25, fn. 1 [alleged error never discussed in body of opening brief not “a serious effort to raise the issue on appeal” and thus waived].)

Grover, J.

WE CONCUR:

Rushing, P.J.

Walsh, J.*

H043113; H043286

*In re E.V., a Person Coming Under the Juvenile Court Law; Santa Clara County
Department of Family and Children's Services v A.D.*

*Judge of the Santa Clara County Superior Court assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.