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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

In re A.O. et al., Persons Coming Under the
Juvenile Court Law.

NAPA COUNTY HEALTH AND
HUMAN SERVICES AGENCY,

Plaintiff and Respondent,

v.

L.O. and E.M.,

Defendants and Appellants.

A140623

(Napa County
Super. Ct. No. 16963, 16964, 16965,
16966)

L.O. (Mother), mother of two-year-old A.O. (Baby Boy), three-year-old A.O.,¹ six-year-old C.O., and eight-year-old I.O., appeals from the juvenile court’s judgment terminating her parental rights to her children. E.M. (Father), father of the children, also appeals. Both parents challenge the judgment as to C.O. and I.O. only, and not as to Baby Boy and A.O.

Mother contends there was insufficient evidence to support the juvenile court’s findings that: (1) C.O. and I.O. were adoptable as a sibling group; and (2) the beneficial relationship exception to termination of parental rights did not apply to her relationship

¹Because the two younger children share the same initials, we will refer to the youngest child—who was one month old when the dependency petition was filed—as Baby Boy throughout this opinion.

with C.O. and I.O. Father joins in Mother's arguments and also separately contends: (1) the juvenile court erred in denying his petition for modification; and (2) there was insufficient evidence to support the juvenile court's finding that the beneficial relationship exception to termination parental rights did not apply to his relationship with C.O. and I.O. We reject all of the contentions and affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

The family came to the attention of the Napa County Child Welfare Services Department (the Department) on November 23, 2011, when the Department received a referral from a mandated reporter that then-one-month-old Baby Boy had been taken to the local hospital and then transferred by helicopter to Oakland Children's Hospital suffering from pneumonia, urinary tract infection, and dehydration. Baby Boy had been in Father's care when he was noted to be blue and nonresponsive. A skeletal survey revealed Baby Boy was suffering from two fractured ribs at different stages of healing. When hospital staff informed Mother of the injuries, Mother "asked how much this was going to cost and then asked if they were accusing her of breaking her son's back." The staff was concerned that Mother had visited Baby Boy only once for approximately 15 minutes during the entire week he was in the hospital.

The parents were interviewed at their home on November 29, 2011. They denied harming Baby Boy or any of their other children and said the injuries may have been caused by a car accident in which they were hit from behind, two days before Baby Boy was taken to the hospital. Mother denied that any of the children had any special needs or developmental delays, but it was noted that then-three-year-old C.O. was not verbal. It was also noted that then-one-year-old A.O. had spina bifida but that Mother did not understand how severe the condition was. A.O., C.O. and then-five-year-old I.O., were taken into protective custody on November 29, 2011, and a dependency petition on behalf of all four children was filed on December 1, 2011.

According to the detention report, there were prior domestic violence incidents involving the family. In August 2010, police officers responded to the parents' home after Mother called police to report that Father had kicked her out of their apartment and

was inside breaking things, and threatening to kill himself with a knife. The children were present during this incident. Father was also known to the police due to prior domestic violence referrals. Based upon prior Department referrals, the parents had been provided with various support services including Public Health Nurse home visitation, Medi-Cal, food stamps, cash aid, California Children's Services, Calistoga Resource Center, Family Preservation Services, and assistance with transportation issues. At an uncontested detention hearing on December 2, 2011, the juvenile court detained the children and ordered Mother to submit to random drug testing.

In a jurisdiction report dated January 11, 2012, the Department recommended that the juvenile court establish jurisdiction over all four children. According to the report, Father was the presumed father of C.O., A.O., and Baby Boy. Mother reported that another man whose whereabouts were unknown was I.O.'s biological father. Father, however, was present at I.O.'s birth and had raised him, and had expressed interest in being found the presumed father of I.O. Mother reported that she and Father were unemployed but that Father worked for the apartment landlord in exchange for the family being allowed to live there rent free. A forensic specialist opined that Baby Boy's injuries were not likely the result of accidental impact or a medical condition, but was caused "by being squeezed." Mother said the siblings were not allowed to hold Baby Boy and that they could not have accidentally harmed Baby Boy while playing or jumping on the bed. The report further stated that Mother had been educated by a social worker about A.O.'s spina bifida on November 18, 2010, including being told about the risks and consequences of the lack of treatment, but that Mother had failed to take A.O. to the hospital to be treated. A social worker noted she was "deeply concerned that the parents may not be understanding the severity of [A.O.'s] condition despite the education and outreach services that have been provided." The social worker observed that Mother always had a " 'flat affect' " and appeared to "lack . . . motivation."

At a March 12, 2012 contested jurisdictional hearing, an Oakland Children's Hospital doctor testified that A.O.'s rib fractures were non-accidental and were caused by squeezing. One rib fracture occurred seven to 14 days before A.O.'s admittance to the

hospital, and another rib fracture occurred more than 14 days before. The social worker testified regarding the history of domestic violence between the parents, including incidents that occurred while Mother was pregnant, as well as Mother's report to a medical facility that Father had hit the children. Mother was issued a restraining order against Father on April 3, 2012.

The social worker further testified that when I.O. and C.O. were first placed outside the home, the foster parents reported that the children were unfamiliar with concepts of bed time and meal time and the idea of sleeping in a bed, and that C.O. had food issues including wanting more and more food after eating a full meal, getting up at night to get food from the kitchen, and eating so quickly that the foster parents were worried he would choke. I.O., who was five years old at the time, isolated himself at school, called the day care staff a "fucking bitch," and "lash[ed] out" when asked to do basic things like brush his teeth or clean up his toys for meal time. C.O. appeared to have difficulty with speech, and both C.O. and I.O. were behind academically. The parents had failed to follow up with A.O.'s medical treatment. Mother denied using substances but A.O.'s medical records showed that Mother tested positive for methamphetamines and amphetamines two weeks before she delivered A.O. Mother also refused to submit to drug testing in spite of the juvenile court's order to do so.

Mother testified that she did not hurt Baby Boy. Father testified that he did not know how Baby Boy was injured and that he had never intentionally squeezed him. He speculated that the injuries may have resulted from A.O. crawling over Baby Boy, a car accident, or from him accidentally squeezing Baby Boy too tightly as he reached to try to prevent A.O. from falling off a bed. Father also testified that there had been no domestic violence between him and Mother since 2010. The juvenile court took jurisdiction over the children.

According to a disposition report filed May 16, 2012, Mother told the social worker that she had a difficult childhood. Her mother (the maternal grandmother) drank and "part[ied]" all the time, including while pregnant with Mother, and then left Mother with the maternal grandmother's mother when Mother was only 17 days old. The

maternal grandmother physically abused Mother after they were reunited. As for the injuries to Baby Boy, Mother said she did not know what to say “other than that she will just keep him closer to her and keep closer eye on him because she still does not know who hurt him.” Mother said that if her relationship with Father “does not work out, she intends to raise her children by herself as it is against her religion to get a divorce or marry another man.”

The social worker also spoke to Father, who reported that his father regularly “beat up his mother” and also abused Father and his siblings. Father said he did not want to be like his own father and added, “But I have never hit my kids.” Father said he was angry that Mother had accused him of causing Baby Boy’s injury because he had not. When asked why he thinks he needs anger management classes, Father replied, “ ‘I thought I could control it myself, but I realize I can’t. I see that I’m falling into the same situation as my dad, in that I say I am going to change, but I’m not.’ ” Father reported that parenting classes were helping him.

The disposition report indicated the children were doing well in their foster homes. I.O. was a “generally healthy 5-year-old boy who loves toy trucks and cars.” He was up to date in his immunizations and was developmentally on target. He had made significant progress in his social skills and behaviors and had made many friends at school. C.O. was also “generally healthy.” He had a history of frequent ear infections and was scheduled for ear tube surgery. He had a “possible speech delay” but his speech was “expected to blossom as he receives and heals from his ear tube surgery, which will allow him to hear better.” I.O. and C.O. were living together in the same home with a foster family who was meeting their needs. They had adjusted well to the structure and routines of the home and had learned to listen and follow directions. They were seeing A.O. and Baby Boy—who lived together in a different foster home—twice a week for family visits.

The children initially visited both of their parents at the same time, one hour per visit, twice per week. After a restraining order was issued against Father protecting Mother in April 2012, the children began visiting each parent separately. Mother and

Father had been attending most of the visits and the children were happy to see them. The parents would bring a lot of food to the visits, and I.O. and C.O. would eat excessively and cry and throw tantrums, demanding more food. Despite constant intervention by the visitation supervisors, the parents continued to have difficulty setting boundaries for the children and the majority of the visits were spent with the children eating or crying over food. Eventually, the Department decided not to allow the parents to bring food to the visits. When I.O. had outbursts during the visits, the parents' redirections were often unsuccessful and required intervention by the visitation supervisors. The Department felt the family needed more intensive support through therapeutic visitation.

On May 17, 2012, both parents submitted to the disposition and reunification case plan as to A.O., C.O. and I.O., which included reunification services to both parents. The Department recommended no reunification services for the parents as to Baby Boy. After a contested hearing on disposition as to Baby Boy, the juvenile court ordered reunification services to Mother and bypassed services for Father.

At a three-month review hearing, the social worker testified that Mother was complying with her case plan and had been regularly visiting the children. There were concerns that Mother was unable to control all of the children, in spite of having a therapeutic visitation coach working with her. Father was also visiting regularly with the children and the visits were going well.

In a six-month status review report dated October 31, 2012, the Department recommended terminating reunification services to the parents and setting a permanency hearing under Welfare and Institutions Code section 366.26² (366.26 hearing). According to the report, all of the children had adjusted well to their foster placements. I.O. was doing generally well but often cried, had tantrums, and had difficulty coping with change. C.O. was frequently seen smiling and loved interacting with new people. He called people inappropriate names but was compliant at school and in his home and

²All further statutory references are to the Welfare and Institutions Code.

had not demonstrated physically aggressive behavior. According to the report, visits were “chaotic” at the beginning of the reporting period. I.O. frequently cried and did not follow Mother’s directions. C.O. often isolated himself during the visits and did not play with Mother. Mother struggled with setting and maintaining limits with the children, and with identifying safety concerns in order to keep all of the children safe.

Mother’s therapist reported that Mother had missed three weeks of appointments due to reported illness. Mother maintained that she did not believe Father had harmed Baby Boy. She said she did not want to have a restraining order against Father, stating, “I have no reason to keep my husband out of the home, he never harmed the children in my presence.” Mother had not been using the counseling sessions to address her domestic violence issues, as she continued to deny she was actually a victim of domestic violence.

Father had participated in anger management classes and the program had recommended that he attend additional sessions. According to his therapist, Father showed remorse for his actions towards Mother. Father had also completed a parenting class and was visiting the children regularly. He wished to reunite with Mother and raise the children together. He noted that it would be difficult for him to raise the children on his own, without Mother.

At a six month review hearing, the social worker testified that Mother was receiving various services but had not yet secured safe and stable housing due to ongoing domestic violence by Father and an assault by her brother. Mother had yet to demonstrate knowledge of age appropriate development, had failed to apply skills learned in parenting classes, and had not fully participated in counseling. According to Mother’s therapist, Mother was not properly treating her depression, which sometimes resulted in Mother being unable to get out of bed. She was not participating in domestic violence programs and had not yet transitioned from intensive therapeutic visitation services to monitored, supervised or unsupervised visitation. Father had been attending his visitation regularly but had not transitioned from intensive therapeutic visitation to monitored or

supervised visitation. He had failed to secure suitable housing, and Mother had reported that Father had broken down the door and threatened her life.

On December 18, 2012, after a contested hearing, the juvenile court found that reasonable services had been provided to the parents in all areas, except that there had been a delay in starting therapeutic services. The court found Mother had made minimal progress in her case plan, and that Father had made substantial progress in his case plan. The court continued reunification services for both parents.

In a twelve-month status review report, the Department recommended terminating reunification services to the parents and scheduling a 366.26 hearing. I.O.'s emotional stability had improved and he was using words to express his feelings. I.O. said he "kinda would like to live with his mother and then kinda not." When asked why he would not want to live with Mother, he responded that Father "pulled a knife and was threatening to stab himself. He stated that he tried to stop his father by pulling on his leg but his father kept throwing objects at his mother. He said that it was really scary" I.O. said he did not wish to live with Father because he is "mean." He said that Father often spoke in a mean way to him and Mother, and kicked him in the mouth, causing his lip to bleed. He said he enjoyed visiting with his parents but believed Father was nice "only because [the visit] is at CPS [Child Protective Services]."

C.O. was well behaved in his foster home with minimal incidents. He continued to call people inappropriate names and had made statements indicating he wanted to harm others in his class. C.O. was being assessed for mental health services and had not qualified for speech services. C.O. said he did not want to live with Mother because "she was not very nice to him" when they lived together. When asked how he felt about living with Father, C.O. said he would never want to live with him because Father was "mean" to him and pushed him down when they lived together. He said he enjoyed visiting his parents but did not want to live with them.

According to the report, both parents continued to receive therapeutic visitation services. Mother canceled a visit on January 3, 2013, stating she was ill, but when a social worker made an unannounced visit to her home that day, Mother was moving

furniture out of her apartment with a male friend. When asked why she told the Department she was sick, Mother insisted she was ill, and that she had no choice but to move her things that day because she owed over \$2,500 to the landlord and had been evicted. The social worker also spoke to Father, who asked for assistance with repairing his relationship with Mother. The social worker explained to Father that the focus was on the children and not on his relationship with Mother. When asked whether he was still seeing Mother, Father admitted to having had unauthorized contact but also laughed and said, “ ‘not any more.’ ” Father was still participating in anger management and domestic violence classes but the Department continued to be concerned about Father’s history of violence towards both Mother and their children.

At a twelve-month review hearing, the social worker testified that she was unable to determine Mother’s progress in a domestic violence program because Mother had withdrawn her consent for the program to release information to the Department. Mother continued to be medically unstable and had not secured a stable home, and there were reports of ongoing domestic violence. Mother was still unable to describe what spina bifida was and was unaware that C.O. had hearing loss. Father had not secured safe and stable housing for the children and there were ongoing allegations of domestic violence between him and Mother in spite of the restraining order. The therapeutic visitation coach testified that he would not recommend reducing the amount of supervision provided at visitation for either parent. On February 11, 2013, after a two day contested hearing, the juvenile court found that reasonable services had been provided and that the progress made by both parents was moderate. The court scheduled an 18-month review hearing and continued reunification services.

In 18-month status review report filed May 3, 2013, the Department recommended terminating reunification services to the parents and scheduling a 366.26 hearing. Father was on informal probation after violating a restraining order in October 2012, and an arraignment hearing was scheduled to take place on May 31, 2013, after he again violated the restraining order on January 27, 2013. I.O. and C.O. were doing well in their foster home, with minimal incidents. Mother told the children that they were going to come

home with her, even though she had not yet moved beyond therapeutic visitation, “which is the highest level of supervision.” She did not appear to understand why the children could not visit her unsupervised. Father said that two of his roommates may be moving out and that he hoped he would be able to rent their rooms for his children. As of April 25, 2013, he still did not have any update as to when, if ever, his roommates were leaving. Father was visiting the children regularly and continued to participate in classes but had failed to maintain regular communication with the Department.

At the 18-month review hearing, there was testimony that Mother had missed six visitations, was still in therapeutic visitation, was unable to demonstrate the knowledge of age-appropriate development and nonphysical discipline techniques, failed to sign release of information related to the domestic violence program, failed to meet with the social worker monthly, failed to comply with her medical and psychological treatment plan, and failed to address the issues that brought her to the Department’s attention or demonstrate and apply the knowledge she learned through therapy. Mother had failed to maintain a safe and stable home, and had moved in with her brother who was paroled to the home and who had assaulted her in October and then again in February. The therapeutic visitation coach testified that Mother should not move to unsupervised visitation and that therapeutic visitation should end for Mother because she was not making progress.

Father had moved from therapeutic visits to monitored visits, but was not ready to move to unsupervised visitation. Father had not yet obtained safe and stable housing for the children. Father continued to violate the restraining order and had reportedly impregnated Mother. On June 18, 2013, after a contested hearing, the juvenile court found that reasonable services had been provided, terminated reunification services to the parents, and scheduled a 366.26 hearing.

On October 3, 2013, before the contested 366.26 hearing, Father filed a petition for modification of prior orders as to A.O., C.O., and I.O. He asserted, “Father has educated himself on Spina Bifida. Father’s home is now suitable for placement of the children. Father lives with his brother . . . and two cousins . . . Father’s brother is moving out soon. Father’s cousins have no criminal records[,] . . . know the children and had

significant past contact with them.” He asked that the children be placed with him on a family maintenance plan. At a hearing on the petition, Father called several witnesses to the stand in an effort to show that he had sufficient support that would enable him to raise his children. A friend from bible study classes testified he would be available to take A.O. to her medical appointments if given sufficient notice. The witness also testified that he would cease helping Father if he failed to see positive changes in Father, or if Father did not live his life “according to the Bible principles.” Father testified that he lived with three adult male cousins in a three bedroom home, and that the three children could live in his bedroom. The juvenile court denied Father’s request.

In a section 366.26 hearing report, the Department stated that I.O. was a generally healthy boy who appeared to be developmentally on target. He was starting to have emotional breakdowns and temper tantrums at school again and was struggling academically. A therapist was working with I.O. on controlling his mood and using words to express himself. C.O. was a generally healthy boy who was developmentally on target. He had a speech delay but his hearing had improved after receiving ear tube surgery, and it was determined he did not need speech therapy. He was thriving and doing well at preschool. Prospective adoptive parents had been identified for I.O. and C.O. I.O. said it was “cool” that he was going to have a new family, but later said he wished to go home to his parents. When asked what kind of mommy and daddy he wanted, he said he did not want a daddy because “daddy used to throw stuff at mommy and caused the police to come and when the police came they drew their guns.” He then said he wanted a family with which he could grow up. C.O. said he was aware that he would be going to a new family and said he wished to go to “a nice family.” According to the report, the Adoption Unit had determined that both I.O. and C.O. were adoptable.

An adoption assessment report for I.O. and a second adoption assessment report for C.O. set forth in detail the reasons the children were adoptable. The report for I.O. stated, among other things, that I.O. was developmentally on target but struggled academically because he had not attended preschool. His therapist reported that his behavior and ability to express himself was improving. I.O. would need a patient family

willing to work through his emotional and school challenges, but his age and absence of significant medical ailments made him a good candidate for adoption. The report for C.O. stated, among other things, that C.O. was a generally healthy boy who had some medical issues that had been addressed. C.O. struggled to regulate emotions and use acceptable language and would need a patient family willing to work through his emotional and school challenges. The report further stated that C.O.'s age and absence of significant medical ailments and development challenges made him a good candidate for adoption. In addition to their current placement, there were six approved home studies of families interested in adopting them as a sibling set. According to the Court Appointed Special Advocate, I.O. and C.O. were endearing, playful and sensitive boys who appeared to be healthy and who enjoyed playing games and having books read to them.

At the 366.26 hearing, the adoptions social worker testified there were six compatible adoptive home studies for C.O. and I.O., and that the children had been placed in a prospective adoptive home two weeks before the hearing. He testified that the children were generally adoptable, and that in the event the current placement was not successful, there were six other prospective adoptive homes ready for placement.

Father's counsel stated that Father could not make a case for the beneficial relationship exception to adoption. Mother admitted she was irresponsible in failing to provide proper medical treatment to the younger children. Counsel for the children joined the Department's request to terminate parental rights and place the children for adoption. After a contested hearing, the juvenile court found by clear and convincing evidence that all of the children were adoptable. The juvenile court found the children generally adoptable because there were multiple families willing to adopt. The court further found there was no evidence of a beneficial relationship exception because, while the children enjoyed their visits and sometimes cried at the end of visits, they had bonds with other people as well. At the time of the hearing, C.O. was fine with the idea of meeting a potential new family, and I.O. was excited about it. The court terminated Mother and Father's parental rights to the children.

DISCUSSION

I. Adoptability

The juvenile court may terminate parental rights only if it determines by clear and convincing evidence the child is likely to be adopted. (§ 366.26, subd. (c)(1).) The statute requires clear and convincing evidence of the likelihood that adoption will be realized within a reasonable time. (*In re Zeth S.* (2003) 31 Cal.4th 396, 406.) In determining adoptability, the focus is on whether a child's age, physical condition and emotional state will create difficulty in locating a family willing to adopt. (*In re David H.* (1995) 33 Cal.App.4th 368, 378.) "[T]he fact that a prospective adoptive parent has expressed interest in adopting the minor is evidence that the minor's age, physical condition, mental state, and other matters relating to the child are not likely to dissuade individuals from adopting the minor. In other words, a prospective adoptive parent's willingness to adopt generally indicates the minor is likely to be adopted within a reasonable time either by the prospective adoptive parent *or by some other family.*" (*In re Sarah M.* (1994) 22 Cal.App.4th 1642, 1649–1650.)

We review the juvenile court's finding of adoptability for substantial evidence, viewing the evidence in the light most favorable to the judgment, drawing every reasonable inference and resolving all conflicts in the evidence in favor of the juvenile court's findings. (*In re Josue G.* (2003) 106 Cal.App.4th 725, 732.) An appellant challenging an adoptability finding bears the burden of showing the evidence is insufficient to support the juvenile court's findings. (*In re Geoffrey G.* (1979) 98 Cal.App.3d 412, 420.) We do not pass on the credibility of witnesses, attempt to resolve conflicts in the evidence, or weigh the evidence. (See *In re B.D.* (2008) 159 Cal.App.4th 1218, 1232.)

Here, the adoptions assessment reports for I.O. and C.O., as well as the testimony of the adoptions social worker, provided ample support for the juvenile court's finding that the children were adoptable. Although I.O. and C.O. both demonstrated behavioral and academic issues, they were noted to be improving in their current placement, and all of their medical needs had been met. At the time of the 366.26 hearing, they were living

in a prospective adoptive home that was ready to accept the children as a sibling set. In addition, there were six more approved home studies of families interested in adopting them as a sibling set. The Court Appointed Special Advocate stated that I.O. and C.O. were endearing, playful and sensitive boys who appeared to be healthy and who enjoyed playing games and having books read to them. Their ages and absence of medical ailments and development challenges made them good candidates for adoption.

Mother asserts there was insufficient evidence that I.O. and C.O. were adoptable “as a *sibling group*,” but as noted, the prospective adoptive family was ready to accept the children as a sibling group, and there were six additional families that had been approved and were willing to do so as well. Mother questions whether the “current caretakers were committed to adopting [I.O. and C.O.]” because the social worker admitted the prospective adoptive parents had not been fully advised of “the brothers’ issues.” To be considered adoptable, however, a child need not be in a prospective adoptive home and there need not be a prospective adoptive parent “‘waiting in the wings.’” (*In re Sarah M.*, *supra*, 22 Cal.App.4th at p. 1649.) Mother also points out that an adoptive home study had not yet been done at the time of the hearing. There is no requirement, however, that an adoptive home study be completed before a court can terminate parental rights. (*In re Marina S.* (2005) 132 Cal.App.4th 158, 166.) There was substantial evidence to support the juvenile court’s finding.³

2. Beneficial Relationship Exception

“Adoption, where possible, is the permanent plan preferred by the Legislature.” (*In re Autumn H.* (1994) 27 Cal.App.4th 567, 573.) After a minor is found to be adoptable, “the court must order adoption and its necessary consequence, termination of parental rights, unless one of the specified circumstances provides a compelling reason for finding that termination of parental rights would be detrimental to the child. The 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

³We hereby deny the Department’s motion to augment the record with post-judgment documents relating to the issue of adoptability.

preference for adoption when reunification efforts have failed.’ [Citation.] At this stage of the dependency proceedings, ‘it becomes inimical to the interests of the minor to heavily burden efforts to place the child in a permanent alternative home.’ [Citation.] The statutory exceptions merely permit the court, in exceptional circumstances [citation], to choose an option other than the norm, which remains adoption.” (*In re Celine R.* (2003) 31 Cal.4th 45, 53.) One statutory exception to the general legislative preference for adoption occurs when “[t]he 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.” (§ 366.26, subd. (c)(1)(B)(i).) This exception is known as the beneficial relationship exception.

To determine whether the beneficial relationship exception applies, 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. 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.” (*In re Autumn H.*, *supra*, 27 Cal.App.4th at p. 575.) The beneficial relationship exception is “difficult to make in the situation, such as the one here, where” the parents have not “advanced beyond supervised visitation.” (*In re Casey D.* (1999) 70 Cal.App.4th 38, 51.) This exception “may be the most unsuccessfully litigated issue in the history of law. . . . [I]t is almost always a loser.” (*In re Eileen A.* (2000) 84 Cal.App.4th 1248, 1255, fn. 5, disapproved on other grounds in *In re Zeth S.*, *supra*, 31 Cal.4th at pp. 413–414.)

Here, the juvenile court did not err in determining that the beneficial relationship exception did not apply to either parent. (*In re K.P.* (2012) 203 Cal.App.4th 614, 621–

622.)⁴ I.O. and C.O. came to dependency with a variety of problems, but Mother failed to recognize that either child had any delays, or that C.O. was hearing impaired and required surgery on his ears. She made minimal progress in her case plan and there was little evidence that she occupied a parental role in the children's lives. She visited the children regularly but did not move beyond therapeutic services, which was the highest level of supervision the Department provided. The children were generally happy to see Mother, but as the juvenile court noted, there was evidence the children were capable of forming bonds with other adults and were happy to see their foster parents as well. At the time of the 366.26 hearing, C.O. was fine with the idea of meeting a potential new family, and I.O. was excited about it.

As to Father, he stated at the 366.26 hearing that he was not raising the beneficial relationship exception because the facts did not support it. He later admitted that any evidence on the beneficial relationship exception was fruitless. He has therefore forfeited the claim. (E.g., *Steve J. v. Superior Court* (1995) 35 Cal.App.4th 798 [agency waived issue of services by failing to dispute it at the juvenile court]; *In re Urayna L.* (1999) 75 Cal.App.4th 883 [failure to raise grandparent relation waived if not brought up at the hearing].) In any event, his contention fails on the merits because he cannot demonstrate he occupied a parental role in I.O. or C.O.'s lives. After over one year of intensive therapeutic visitation, Father eventually transitioned to supervised or monitored visitation, but progressed no further. He had not yet obtained safe and stable housing for the children and continued to violate the restraining order against him and had even reportedly impregnated Mother. While there was evidence the children enjoyed their visits with Father, they also stated at various times that he was "mean," recounted past

⁴"For years California courts have diverged in their view about the applicable standard of review for an appellate challenge to a juvenile court ruling rejecting a claim that an adoption exception applies. Most courts have applied the substantial evidence standard of review to this determination" and at least one court "concluded that it is properly reviewed for an abuse of discretion." (*In re K.P.*, *supra*, 203 Cal.App.4th at p. 621.) We conclude that in this case, there was no error even under the less deferential abuse of discretion standard.

incidents of violence, and said they did not want to live with him. Neither parent has shown the juvenile court erred in determining that the beneficial relationship exception did not apply.

3. Section 388 Petition

Father contends the juvenile court abused its discretion by denying his section 388 petition. We disagree.

Under section 388, a parent may request that the court change, modify, or set aside a previously made court order. The burden of proving the requested modification is on the parent. (*In re Stephanie M.* (1994) 7 Cal.4th 295, 317.) The parent must show both that: (1) there is a change of circumstances or new evidence; and (2) the proposed change is in the child's best interests. (§ 388, subds. (a) & (c); *In re Daijah T.* (2000) 83 Cal.App.4th 666, 672.) The parent must show changed, rather than merely changing, circumstances. (*In re Casey D., supra*, 70 Cal.App.4th at p. 49.) "It is not enough for the parent to show *just* a genuine change of circumstances under the statute. The parent must show that the undoing of the prior order would be in the best interests of the child." (*In re Kimberly F.* (1997) 56 Cal.App.4th 519, 529.) Factors appropriate in the juvenile court's consideration of a section 388 petition include: "(1) [T]he 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." (*Id.* at p. 532.) In addition, it is settled that when a parent files a section 388 petition on the eve of the section 366.26 hearing, the children's interest in stability should be the court's foremost concern and will outweigh any interest in reunification. (*In re Edward H.* (1996) 43 Cal.App.4th 584, 594.)

A petition under section 388 "is addressed to the sound discretion of the juvenile court and its decision will not be disturbed on appeal in the absence of a clear abuse of discretion." (*In re Hector A.* (2005) 125 Cal.App.4th 783, 798.) Where a trial court has discretionary power to decide an issue, a reviewing court will not disturb that decision

unless the trial court has exceeded the limits of legal discretion by making an arbitrary, capricious, or patently absurd determination. (*In re Raymundo B.* (1988) 203 Cal.App.3d 1447, 1456.)

Here, Father alleged in his petition for modification that his brother was moving out of the home and that there would be enough space for the children to move in with him. Testimony revealed, however, that the brother was simply in the process of moving, but had not yet moved, and that the lease was in the brother's name. The remaining occupants planned to enter into a new lease, but had not yet done so. In light of the fact that there was very little evidence to show that Father's planned living arrangement was appropriate for the children, or that returning the children to him with continued services served their best interests, the juvenile court did not abuse its discretion in denying the petition.

DISPOSITION

The judgment is affirmed.

McGuiness, P.J.

We concur:

Pollak, J.

Jenkins, J.