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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

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

CONTRA COSTA COUNTY CHILDREN  
& FAMILY SERVICES BUREAU,

Plaintiff and Respondent,

v.

A.P., et. al.,

Defendants and Appellants.

A143014

(Contra Costa County  
Super. Ct. Nos. J11-00931, J11-00932)

T.P. (Mother) and A.P. (Father) appeal from orders terminating their parental rights to their children, Z.P. and A.P., and finding those children adoptable. The issues on appeal are: (1) whether the children were adoptable, and (2) whether the parents were precluded from effectively raising the beneficial parent-child exception to adoption as a result of not being allowed to visit with their children during the pendency and aftermath of an appeal that ultimately reversed an earlier order terminating parental rights. We conclude the record supports the juvenile court’s finding of adoptability. We also conclude the parents never tried to obtain visitation during or after the appeal and, moreover, have not shown any compelling reason termination would be detrimental such

that the juvenile court would have been compelled to grant the beneficial child-parent exception. Accordingly, we affirm.

### **FACTUAL BACKGROUND**

This is the third appeal in these children's cases. In resolving the first appeal, we gave the following background:

“The two children of Mother and Father, four-month-old A.P. and his two-year old-sister, Z.P. (the children) [now, as of the date of this decision, ages four and six], as well as their half brother D.G. [who is not involved in this appeal], were the subjects of dependency petitions under [Welfare and Institutions Code section 300, subdivisions (b) and (j), filed June 13, 2011. The petitions alleged Father had a substance abuse problem and had engaged in domestic violence against Mother. He was also alleged to have threatened five-year-old D.G. with a gun. The children were detained and placed in foster care. In October 2011, Mother and Father stipulated to the allegations of an amended petition.

“In November 2011, the juvenile court ordered reunification services for the parents and continued the children in foster care. In a report filed at the time, the Agency stated that Mother had joined a domestic violence support group and Father had entered a residential substance abuse treatment program. Since the children's detention, the parents had participated in weekly, one-hour supervised visits.

“In April 2012, nearly a year after the children's detention, they were returned to Mother's custody. Although working two jobs, Mother had been trying “diligently,” if not entirely successfully, to pursue reunification services. Since the November hearing, Father had maintained his sobriety, and he continued to participate in substance abuse programs. His weekly supervised visits with the children were reported to be ‘appropriate.’

“The Agency filed a supplemental petition in March 2013, seeking to have the children returned to foster care because Father had resumed his substance abuse in

December 2012. Mother claimed ignorance of Father's conduct, although he had been permitted to stay overnight in her home three to four days per week since October. The juvenile court granted the requested relief.

“In a dispositional report prepared in May 2013, the Agency stated that Mother's pride prevented her from providing information about other family members with whom the children might be placed; she was concerned her family would belittle her as a bad mother. Although she was attending therapy, the Agency was concerned she did ‘not understand the seriousness of the current family situation.’ It appeared that Father was continuing to abuse alcohol and marijuana. There was reason to believe Father's domestic violence had resumed during the time the children were living with Mother, and the Agency was concerned that Mother was reluctant to alienate Father because she lacked relationships with other adults. Given the parents' failure ‘to successfully address the issues which brought them in front of [the] Court initially,’ the Agency recommended termination of their reunification services. At the subsequent hearing, the juvenile court adopted the recommendation and scheduled a permanency planning hearing under [Welfare and Institutions Code] section 366.26, telling the parents, ‘I'm surprised at both of you. I think you can do better, and you have got time to show the court that you can. ¶¶ You can file a ‘change of circumstance’; I'll be looking for it.’

“In a report prepared for the permanency planning hearing, the Agency recommended termination of parental rights and a permanent plan of adoption. The Agency continued to be concerned that, although Mother loved the children, she was unwilling to acknowledge Father's domestic violence and substance abuse and did nothing to prevent them. As the Agency noted, she ‘does not put her children's well being a priority.’

“Five days before the scheduled hearing, Mother filed a petition for modification under [Welfare and Institutions Code] section 388. The petition stated that in the three months since the dispositional hearing, Mother had organized a ‘support system’

consisting of family members and friends from church and was ‘no longer in a relationship’ with Father. Mother requested that visitation be expanded or the children returned to her care.” (*In re A.P.* (Apr. 30, 2014, A139885) [nonpub. opn.], fn. omitted.)

In September 2013, the juvenile court denied the Welfare and Institutions Code section 388 petition,<sup>1</sup> ordered termination of parental rights, and selected adoption as the permanent plan.

In the first appeal, we reversed the juvenile court’s denial of Mother’s section 388 petition and its subsequent termination of parental rights as to both Mother and Father. In her petition, Mother had made a prima facie showing of changed circumstances, claiming she had cut ties with Father and established a family support network. The juvenile court, however, erroneously concluded the petition was untimely and denied it without reaching its merits. (*In re A.P.*, *supra*, A139885.)

Following remand, at a hearing at which a permanency planning hearing was scheduled, the juvenile court again denied Mother’s section 388 petition, this time on the merits. Mother appealed this denial. However, given the timing of the denial, Mother needed to challenge it by writ. Since she did not do so, she was foreclosed from subsequent appellate review of that ruling, and her appeal was therefore dismissed. (*Contra Costa County Children & Family Services Bureau v. T.P.* (Dec. 29, 2014, A142427) [app. disp.].)

In the meantime, the permanency hearing occurred on September 9, 2014. The Agency recommended termination. The children submitted on the Agency’s recommendation. Mother and Father, however, opposed termination. Father, in particular, raised the issue that one of the reasons the Agency recommended termination was the parents’ lack of visits over the past year, which father blamed on the delay

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

related to the first appeal. After hearing argument, the juvenile court terminated both parents' rights, finding the children would suffer detriment if returned to their parents and noting the children's need for a stable home far outweighed the benefits of contact with their parents. It also found both children, Z.P. and A.P., adoptable.

In making its ruling, the juvenile court had the Agency's section 366.26 report.

It reported on the children's well being. Six-year-old Z.P. had no serious medical conditions and was "developmentally on target." Though working through some inappropriate expressions of anger and frustration, those were being worked on in weekly therapy sessions with a therapist who viewed Z.P. as "doing great." Z.P. was "happy" in her placement and had "bonded with the prospective adoptive parents." A.P., then age three, also had no major medical problems (though he had and recovered from a bout of impetigo) and was also "developmentally on target." He had been acting out somewhat at his new school and was about to start some play therapy, but "[o]verall" was "adjusting to attending the head start program." He was reported as "happy and content" in his current placement, having "built a strong relationship with his foster parents," identifying them as his parents. Both children, the Agency concluded, were "adoptable children who do not display significant behavioral issues."

Evaluating the prospective adoptive parents, the Agency noted the children had been placed with those parents for over a year, had adjusted extremely well, and were developing, each day, a stronger bond. The Agency cited the children's affection for the prospective adoptive parents and that the placement was loving, stable, and nurturing.

In contrast, the Agency noted the children essentially had no current parent-child relationship with Mother and Father. After the children were removed from Mother at the March 2013 hearing on the Agency's supplemental petition, Mother had weekly supervised visitation with Z.P. and A.P., which was reduced to twice monthly visits in June 2013. After the juvenile court initially terminated parental rights in September 2013, before the first appeal, neither parent had further visitation.

Despite the successful visits, reported the Agency, “the issues that caused the children’s removal . . . remain unaddressed and/or minimized: substance abuse and domestic violence.” A Facebook posting from Father included a picture of Mother smiling at the San Francisco Pride parade featuring the caption, “ ‘My love enjoying herself at pride parade in SF,’ ” and another post, dated June 29, 2014 (the date of the San Francisco parade) stating, “ ‘Fun day with the woman I love at the parade in SF.’ ” The premise of Mother’s rejected section 388 petition was, as noted, that she had changed and was no longer associating with Father. The Agency again noted the lack of visitation with the parents in the past year.

Mother and Father each appealed from the permanency hearing orders.

## **DISCUSSION**

### ***Mother’s Appeal***

At a section 366.26 permanency hearing, the juvenile court selects and implements a permanent plan for the dependent child. The purpose is to protect the child’s “compelling rights” to a stable, permanent placement founded upon a strong emotional commitment from a caretaker. (*In re D.M.* (2012) 205 Cal.App.4th 283, 289.) “ ‘At a permanency plan hearing, the court may order one of three alternatives: adoption, guardianship or long-term foster care. [Citation.] If the dependent child is adoptable, there is a strong preference for adoption over the alternative permanency plans.’ [Citation.] ‘Once the court determines the child is likely to be adopted, the burden shifts to the parent to show that termination of parental rights would be detrimental to the child under one of the exceptions listed in section 366.26, subdivision (c)(1). [Citations.] Section 366.26, subdivision (c)(1)(B)(i), provides an exception to termination of parental rights when “[t]he parents have maintained regular visitation and contact with the child and the child would benefit from continuing the relationship.” ’ ” (*In re G.B.* (2014) 227 Cal.App.4th 1147, 1165.) When, as here, reunification services have ceased, “the

focus of the proceedings changes from family reunification to the child's interest in permanence and stability.” (*Id.* at p. 1163.)

### ***Adoptability***

“The issue of adoptability ‘focuses on the *minor*, e.g., whether the minor’s age, physical condition, and emotional state make it difficult to find a person willing to adopt the minor.’ (*In re Sarah M.* (1994) 22 Cal.App.4th 1642, 1649 . . . .) And ‘[u]sually, the 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.’ (*Id.* at pp. 1649–1650.) In some cases, a minor ‘who ordinarily might be considered unadoptable due to age, poor physical health, physical disability, or emotional instability is nonetheless likely to be adopted because a prospective adoptive family has been identified as willing to adopt the child.’ (*Id.* at p. 1650.) And when a child is deemed adoptable ‘only because a particular caretaker is willing to adopt, the analysis shifts from evaluating the characteristics of the child to whether there is any legal impediment to the prospective adoptive parent’s adoption and whether he or she is able to meet the needs of the child.’ (*In re Helen W.* (2007) 150 Cal.App.4th 71, 80 . . . .)” (*In re Jose C.* (2010) 188 Cal.App.4th 147, 158 (*Jose C.*)). We review a juvenile court’s finding of adoptability for substantial evidence, such that the “ ‘appellant has the burden of showing there is no evidence of a sufficiently substantial nature to support the finding or order.’ ” (*Ibid.*)

Here, the record is replete with evidence supporting the finding Z.P. and A.P. were adoptable. First, the Agency’s report, which included input from medical doctors and therapists, painted a picture of two healthy children who were in the midst of addressing some relatively minor emotional issues, but doing well overall. There was no evidence either child had emotional, physical, or any other conditions rising to a level that would make them unadoptable. Mother claims the Agency’s report regarding the children was

based on stale information, but she does not offer what a new report would say. More problematically, she forfeited the issue at the permanency hearing when she did not raise it or request a continuance to gather additional information. (*In re A.B.* (2014) 225 Cal.App.4th 1358, 1366.) And even if there were evidence of some emotional difficulties, both children had been living with prospective adoptive parents who had provided a stable and loving home for over a year and who wanted to adopt. This alone permits a finding of adoptability. (*Jose C.*, *supra*, 188 Cal.App.4th at pp. 159–160.)

### ***Parent-Child Relationship Exception***

As noted, section 366.26, subdivision (c)(1)(B)(i), provides an exception to termination of parental rights when there is a “compelling reason” 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.”

Mother contends she was deprived of visitation for the pendency of her first appeal, from the September 2013 orders, and during the several months following remand before the juvenile court conducted the permanency hearing in September 2014. (MOB 14-15.) She argues the lack of visitation was not her fault and should not have been held against her when the court selected adoption for Z.P. and A.P. and terminated her parental rights.

To start with, Mother offers no evidence she ever attempted to get visitation pending or after the first appeal. The Agency pointed this out in its respondent’s brief and neither parent disputed the assertion—in fact, neither parent even filed a reply brief. Mother, meanwhile, was not as helpless as she claims. Had she wished to pursue visitation, she could have sought it in the juvenile court or, if rejected there, in this court. “The juvenile court has the discretion to stay the provisions of a judgment or order awarding, changing, or affecting custody of a minor child ‘pending review on appeal or for any other period or periods that it may deem appropriate’ (Code Civ. Proc., § 917.7), and the party seeking review . . . should first request a stay in the lower court.” (*In re*

*M.M.* (2007) 154 Cal.App.4th 897, 916.) “If the juvenile court should deny the stay request, the aggrieved party may then petition this court for a writ of supersedeas pending appeal.” (*Ibid.*; see also Welf. & Inst. Code, § 395 [further authorizing stays]; *In re Anna S.* (2010) 180 Cal.App.4th 1489, 1499; *In re Melvin A.* (2000) 82 Cal.App.4th 1243, 1248–1249; *In re Christy L.* (1986) 187 Cal.App.3d 753, 758.) Mother could have made significant efforts toward securing visitation but did not.

Moreover, in the end, to invoke the beneficial parent-child relationship exception, it is not enough to show regular visitation and a good relationship. The question is does “ ‘the relationship promote[] the well-being of the child to such a degree as to outweigh the well-being the child would gain in a permanent home with new, adoptive parents.’ [Citation.] The juvenile court ‘balances the strength and quality of the natural parent/child relationship in a tenuous placement against the security and the sense of belonging a new family would confer.’ [Citation.] ‘If severing the natural parent/child relationship would deprive the child of a substantial, positive emotional attachment such that the child would be greatly harmed, the preference for adoption is overcome and the natural parent’s rights are not terminated.’ [Citation.]” (*In re C.B.* (2010) 190 Cal.App.4th 102, 124.)

Even assuming a good relationship between Mother and children, the record showed Z.P. and A.P. likely to be adopted into a stable and loving home where they already felt accepted and happy. There was no evidence of a compelling reason that termination of the relationship would be detrimental. None was argued to the juvenile court at the permanency hearing, and none has been argued here on appeal. The record also suggested the parents were still struggling to overcome the problems that led the juvenile court to take jurisdiction in the first place. Under these circumstances, we cannot say the trial court abused its discretion in weighing the evidence before it and denying the exception. (See *In re G.B.*, *supra*, 227 Cal.App.4th at p. 1166 [“Mother’s visits with her children were always supervised, mother was only at the beginning stages

of working on the effects of domestic violence in her life, and there was still instability and dysfunction surrounding her relationship with father. By contrast, the children were in a secure placement and were bonded with their current and prospective caregivers.”]; *In re Marcelo B.* (2012) 209 Cal.App.4th 635, 644 [“The parents demonstrated . . . a warm and affectionate relationship with their son” but “they continue to abuse alcohol and each other” and so “have not demonstrated an ability to provide Marcelo, over the long term, with a stable, safe and loving home environment. Accordingly, the juvenile court properly found there was no beneficial parental relationship sufficient to overcome the statutory preference for adoption.”]; *In re Bailey J.* (2010) 189 Cal.App.4th 1308, 1315 [noting the discretionary nature of decision that a parent-child relationship is “compelling” enough to outweigh the benefits of a permanent placement].)

***Father’s Appeal***

Father adopted Mother’s brief and requested we reverse the order terminating his parental rights if we reversed the order terminating Mother’s parental rights. As we shall affirm the order as to Mother, we shall likewise affirm as to Father.

**DISPOSITION**

The section 366.26 orders of the juvenile court are affirmed.

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Banke, J.

We concur:

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Margulies, Acting P. J.

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Dondero, J.