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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

In re R.W. et al., Persons Coming Under  
the Juvenile Court Law.

LAKE COUNTY DEPARTMENT OF  
SOCIAL SERVICES,

Plaintiff and Respondent,

v.

D.W.,

Defendant and Appellant.

A145126

(Lake County Super. Ct.  
Nos. JV320367A, JV320367B)

In this dependency proceeding involving siblings R.W., a boy born in June 2011, and K.W., a girl born in October 2013, the juvenile court terminated the parental rights of the children's mother, R.D., and their father, D.W., and selected adoption as the permanent plan for the children. On appeal, D.W. contends (1) there was not clear and convincing evidence the children were adoptable, and (2) the court should have applied the beneficial parental relationship exception to termination of parental rights set forth in Welfare and Institutions Code section 366.26, subdivision (c)(1)(B)(i).<sup>1</sup> We affirm.

<sup>1</sup> All statutory references are to the Welfare and Institutions Code unless otherwise stated. R.D., the mother, did not appeal the court's order terminating parental rights, and she is not a party to this appeal.

## I. BACKGROUND

### A. The Initiation of Dependency Proceedings as to R.W.

On April 16, 2013, the Lake County Department of Social Services (the Department) filed a juvenile dependency petition on behalf of R.W. The petition alleged the parents had a history of failing to comply with agreements to accept vital services and interventions from the Department that would have ensured the safety of R.W. When R.W. was born in June 2011, he tested positive for methamphetamines and barbiturates. In November 2012, the family was found to be homeless and sleeping under a tarp on a property where there was a burned down foundation of a home. In each of these instances, the Department put in place a risk reduction plan and offered services to the parents, but the parents did not follow through or engage with services. In January 2013, the Department received reports that the parents were engaging in domestic violence, were using methamphetamines, and had been asked to leave a friend's residence where they had been staying. The parents refused to cooperate or participate in the Department's investigation.

On April 12, 2013, R.W. was taken into protective custody after the family was found to be living in an uninhabitable condition. R.W. and his parents were living in a makeshift tent under a tarp on the deck of a burned down home (apparently the same place the family had been staying in November 2012). The family had no running water, no electricity and no bathroom facilities. The family also had no source of heat in weather that included rain, wind, frost and overnight low temperatures of 30-40 degrees. The April 16, 2013 petition alleged the parents did not have adequate food for R.W.; he had not received routine medical care and was behind on his immunizations; the parents had a history of homelessness and had negligently failed to provide stable, safe and adequate housing for R.W.; and the parents had a history of substance abuse that rendered them incapable of providing care or supervision for R.W. (See § 300, subd. (b).)

On April 17, 2013, the juvenile court ordered R.W. detained. He was placed in foster care.

In its May 2013 report for the jurisdictional hearing, the Department noted it had received multiple child welfare referrals alleging neglect of R.D.'s older children, as well as referrals alleging neglect of R.W. A friend of the parents who in the past had allowed them to stay with him reported the parents were alcoholics and drank daily to excess. Both parents tested positive for alcohol ingestion on April 17, 23 and 30, 2013. The parents remained homeless and stayed with different friends. The parents declined to participate in services offered by the Department. R.D. told a social worker she was afraid to leave D.W. and described domestic violence between them. At the jurisdictional hearing in June 2013, the court sustained the dependency petition.

In its July 2013 disposition report, the Department stated it had interviewed both parents. In her interview, R.D. denied using drugs. She did not admit to having a problem with alcohol. D.W. "provided no insight into his abuse of alcohol." He stated he drank a beer or two a week but did not abuse alcohol. He refused to discuss the need for treatment services and stated the judge only had a problem with his homelessness. The parents regularly attended visits with R.W. and expressed a strong love for him during visits. At the disposition hearing on July 11, 2013, the court adjudged R.W. a dependent, ordered supervised visitation, and ordered that reunification services, including counseling, substance abuse treatment and parenting classes, be provided to R.D. and D.W.

**B. The Initiation of Dependency Proceedings as to K.W.**

In October 2013, R.W.'s sister, K.W., was born. On November 13, 2013, the Department filed a dependency petition on behalf of K.W. The petition alleged: K.W. was prenatally exposed to alcohol; R.D. had "test[ed] positive for alcohol repeatedly throughout her pregnancy"; and the parents had failed to provide safe and stable housing for K.W. (See § 300, subd. (b).) In connection with K.W.'s prenatal exposure to alcohol, the petition alleged D.W. reasonably should have known of R.D.'s ongoing alcohol use and failed to protect K.W. The petition also alleged that, in light of the parents' neglect of R.W., there was a substantial risk K.W. would be abused or neglected. (See § 300, subd. (j).) The Department initially did not seek detention of K.W., because R.D. agreed

to go straight from the hospital birthing center to a residential substance abuse treatment program and live there with K.W. D.W. was resistant to R.D.'s going to the inpatient treatment program and stated she did not need it, but R.D. agreed to go anyway.

On December 9, 2013, the court, in response to an application by the Department, ordered that K.W. be taken into protective custody. According to the Department's application, R.D. had left the residential treatment program prematurely, despite warnings from the Department that, if she did so, the Department would seek to detain K.W. D.W. supported R.D.'s decision to leave the program. In addition, both parents were out of compliance with their case plans in R.W.'s proceeding. D.W. had demonstrated only "minimal" compliance with his Alcohol and Other Drug Services plan and with counseling. R.D. had failed to engage in counseling and had made little progress in addressing her substance abuse problem, testing positive for alcohol on numerous occasions. The parents had failed to maintain adequate housing.

After K.W. was taken into protective custody, the Department filed a second amended petition as to K.W. on December 16, 2013, adding allegations about R.D.'s departure from the treatment program. The court ordered K.W. detained. K.W. was placed in a foster home with her brother, R.W. At the jurisdictional hearing on February 10, 2014, the court found true the allegations in the second amended petition as to K.W. At the disposition hearing on March 10, 2014, the court adjudged K.W. a dependent, ordered supervised visitation, and ordered that reunification services be provided to both parents.

### **C. The Review Hearings and the Termination of Reunification Services**

In connection with the six-month review in R.W.'s proceeding, the Department initially recommended that the court terminate reunification services to both parents and set a section 366.26 permanency hearing. The parties subsequently agreed that services would be continued for both parents. On March 21, 2014, the court found the parents had made minimal progress in complying with their case plans, and ordered the continuation of services. The court set a 12-month review hearing for R.W. for May 27, 2014, and a six-month review hearing for K.W. for September 15, 2014.

In its May 2014 report for the 12-month review hearing for R.W., the Department recommended termination of reunification services as to both parents. The report stated the parents began renting a living space in December 2013. Because of the parents' history of homelessness, the Department requested proof of income and rental receipts from the parents. D.W. repeatedly objected to providing such documentation. He later provided a handwritten rental receipt and a note in his own handwriting as proof of income, in part from some computer repairs. The Department offered various services to D.W., and he participated in a psychological evaluation, as well as substance abuse treatment, individual therapy, couples counseling and parenting classes. The Department concluded (based in part on the report from the psychologist who evaluated D.W.) that, despite the above services, D.W. had "failed to make substantive progress in understanding, resolving, or even acknowledging the issues that led to [R.W.'s] detention." D.W. minimized the problems he had with substance abuse and homelessness, took little responsibility for his own behavior, denied any domestic violence toward R.D., and maintained his children never should have been removed from his care. At supervised visits, the parents were affectionate with R.W. and often played and interacted appropriately with him. But the parents did not consistently use their time well during visits, and they engaged in some unproductive behaviors, including bringing up concerns about the dependency case, arguing with the visitation supervisor about her feedback, accusing the foster mother of improper care of R.W., and focusing excessively on concerns about the children's health.

The 12-month review hearing for R.W. was continued and ultimately merged with the 18-month review hearing; the court combined that hearing with the six-month review hearing for K.W. In connection with those hearings, the Department submitted an addendum report for R.W. on September 15, 2014, and a status report for K.W. on September 19, 2014. In both reports, the Department recommended that the court terminate reunification services to the parents and set a section 366.26 permanency hearing. The Department reported that, in June 2014, the parents were asked to leave the home where they had been staying. They had "unstable and inconsistent housing and/or

no housing.” The parents no longer lived together. On August 2, 2014, sheriff’s deputies responded to a report of domestic violence by D.W. against R.D. in a park. R.D. told the deputies that D.W. came up to her in the park, yelled at her about a jacket she was wearing, and then grabbed her by the neck and choked her. D.W. then threw R.D. to the ground and hit her. In a separate incident on August 31, 2014, D.W. was arrested for public intoxication. D.W. continued to visit with the children. On November 10, 2014, the court terminated reunification services and set a section 366.26 permanency hearing for February 25, 2015.<sup>2</sup>

#### **D. The Termination of Parental Rights**

In its report for the section 366.26 hearing, the Department recommended that the court terminate parental rights and select a permanent plan of adoption for R.W. and K.W. The Department’s report and an attached adoption assessment concluded the children were likely to be adopted if parental rights were terminated. The children were young and had “no significant health issues.” R.W. and K.W. had been placed with prospective adoptive parents who had an approved home study and were committed to adopting them. The adoption assessment noted that, for the most part, the children’s birth parents, R.D. and D.W., had participated regularly in supervised visits with the children. Positive interactions had been noted in these visits, but the “caretaking capacity of the parents was never determined to be such that the visits could become unsupervised.” In the past two months, mother R.D. had missed several visits; father D.W. had continued to attend regularly. The adoption specialist concluded: “The birth parents appear to occupy the role of familiar and friendly visitor to the children. However, the benefits that the children would derive from maintaining the relationship with their birth parents do not outweigh the benefits that they would derive from adoption with capable, nurturing adoptive parents.”

At the section 366.26 hearing (which concluded on May 4, 2015), the court admitted into evidence several visitation reports submitted by D.W., as well as the

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<sup>2</sup> D.W. filed a notice of intent to file a writ petition challenging the court’s order (No. A143656), but he did not file a writ petition.

Department's section 366.26 report and the September 19, 2014 status review report. After hearing argument, the court found it was likely that R.W. and K.W. would be adopted, terminated parental rights, and selected adoption as the permanent plan for R.W. and K.W.

## II. DISCUSSION

Where reunification services have failed and a hearing pursuant to section 366.26 is held, the court must determine whether the child is likely to be adopted; if so, with limited exceptions, the court must terminate parental rights and order the child placed for adoption. (§ 366.26, subd. (c)(1).) D.W. contends there was not sufficient evidence supporting the juvenile court's finding that R.W. and K.W. are likely to be adopted. He also argues the court erred in not applying the beneficial parental relationship exception to termination of parental rights set forth in section 366.26, subdivision (c)(1)(B)(i). We reject both claims of error.

### A. Adoptability

“Once reunification services are ordered terminated, the focus shifts to the needs of the child for permanency and stability.” (*In re Marilyn H.* (1993) 5 Cal.4th 295, 309.) To select adoption as a child's permanency plan at a section 366.26 hearing, the juvenile court must find by clear and convincing evidence that it is likely the child will be adopted within a reasonable time. (§ 366.26, subd. (c)(1); *In re Zeth S.* (2003) 31 Cal.4th 396, 406.) The fact that the child is not yet placed with a family prepared to adopt the child “shall not constitute a basis for the court to conclude that it is not likely the child will be adopted.” (§ 366.26, subd. (c)(1); see *In re B.D.* (2008) 159 Cal.App.4th 1218, 1231.) The adoptability inquiry “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. [Citations.] Hence, it is not necessary that the minor already be in a potential adoptive home or that there be a proposed adoptive parent ‘waiting in the wings.’ ” (*In re Sarah M.* (1994) 22 Cal.App.4th 1642, 1649 (*Sarah M.*)) “Usually, 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. 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.*" (*Id.* at pp. 1649–1650.)

When the juvenile court's adoptability finding is challenged on appeal, we determine "whether the record contains substantial evidence from which the court could find clear and convincing evidence that the child was likely to be adopted within a reasonable time." (*In re B.D., supra*, 159 Cal.App.4th at p. 1232.) We draw all reasonable inferences supporting the juvenile court's adoptability finding and resolve any evidentiary conflicts in favor of the court's order. (*In re Autumn H.* (1994) 27 Cal.App.4th 567, 576 (*Autumn H.*)) We reject D.W.'s challenge to the court's adoptability finding, both because he waived the contention and because it fails on the merits.

#### **1. Waiver**

In her argument at the section 366.26 hearing, D.W.'s counsel stated: "As the Court knows, the question at a [section 366.26] hearing is whether or not the child or children here are adoptable. *And they are.* And based on that, the Court is to terminate parental rights unless there's a compelling reason that the Court finds in one of the exceptions." (Italics added.) D.W.'s counsel then argued the court should find the beneficial parental relationship exception applicable, and should select guardianship, rather than adoption, as the permanent plan. The court and county counsel understood that D.W.'s counsel had conceded the children were adoptable. After D.W.'s counsel made the above remarks and began arguing the beneficial relationship exception, the juvenile court stated: "Let me stop you for a moment. So, in essence, you're arguing that, yes, the children are adoptable and the Court must choose adoption unless the beneficial relationship exception applies? If that's established—that exception is established, then you choose guardianship?" D.W.'s counsel responded: "That would be the only other option, yes." After D.W.'s counsel finished her argument (and after counsel for R.D. and counsel for the children argued), county counsel stated "the real

question is, in our view, is whether they're adoptable. And that's conceded as well as true."

On appeal, the Department contends D.W. forfeited his argument that there is no substantial evidence to support a finding of adoptability as to R.W. and K.W., because he did not make such an argument in the juvenile court. An appellate claim based on a lack of substantial evidence to support an adoptability finding is not forfeited by a mere failure to make the argument in the juvenile court. "Generally, points not urged in the trial court cannot be raised on appeal. [Citation.] The contention that a judgment is not supported by substantial evidence, however, is an obvious exception.'" (*People v. Butler* (2003) 31 Cal.4th 1119, 1126.) Accordingly, "while a parent may waive the objection that an adoption assessment does not comply with the requirements provided in section 366.21, subdivision (i), a claim that there was insufficient evidence of the child's adoptability at a contested hearing is not waived by failure to argue the issue in the juvenile court." (*In re Brian P.* (2002) 99 Cal.App.4th 616, 623.) But the circumstances as to D.W.'s appellate argument about adoptability are distinguishable from a mere failure to assert the claim in the trial court. Here, D.W.'s counsel *expressly conceded* that R.W. and K.W. were adoptable.

Under the doctrine of judicial estoppel, a party may be precluded " " "from changing its position over the course of judicial proceedings when such positional changes have an adverse impact on the judicial process." ' ' ' (*International Engine Parts, Inc. v. Feddersen & Co.* (1998) 64 Cal.App.4th 345, 350.) " " "Judicial estoppel is 'intended to protect against a litigant playing "fast and loose with the courts." ' ' ' ' ' (*Jackson v. County of Los Angeles* (1997) 60 Cal.App.4th 171, 181.) The principles of invited error also prevent a party from taking litigation action that "induces the commission of an error[; the party] is estopped from asserting it as grounds for reversal." (*Redevelopment Agency v. City of Berkeley* (1978) 80 Cal.App.3d 158, 166.) Because D.W.'s counsel expressly conceded on the record that R.W. and K.W. were adoptable, D.W. has waived any appellate claim to the contrary.

## **2. Substantial Evidence Supports the Court's Adoptability Finding**

Even if we were to overlook D.W.'s express waiver of his challenge to the adoptability finding, we would nonetheless reject his argument. Substantial evidence supports the juvenile court's finding that R.W. and K.W. were likely to be adopted. The children are young and healthy. When the court made its adoptability finding in May 2015, R.W. was three years old (one month from his fourth birthday) and K.W. was one and one-half years old. Although R.W. tested positive for methamphetamines and barbiturates at birth and K.W. was prenatally exposed to alcohol, neither child had any significant health problems. The adoption assessment stated that both children had had regular well-child check-ups, and no significant health issues had been noted. R.W. had "screenings for neurology, dental, hearing and vision," and all were within normal limits.

Both children had some developmental issues, but the evidence supports a conclusion that these issues were not significant enough to pose an impediment to adoption. For R.W., developmental testing suggested some delays in the area of communication and social-emotional development, and he received weekly speech therapy until he was three years old. After an informal assessment in January 2015, a speech/language pathologist concluded that R.W. was not significantly behind in his expressive speech development, and that placement in a home with other children would likely be the fastest way to improve his articulation and vocabulary. For K.W., developmental screenings suggested her gross motor development should be monitored. The February 2015 adoption assessment states that K.W. "crawls and pulls to stand, and is just starting to take steps with support." K.W. is interested in exploring her environment and likes to engage in physical play. K.W. enjoys playing by herself, singing and manipulating toys; she also enjoys interacting with her brother and her caretakers. The court reasonably could conclude the children's developmental issues were not severe and would not pose an impediment to adoption.

Finally, as noted, R.W. and K.W. were placed with prospective adoptive parents who had an approved home study and were committed to adopting them. While such a placement is not a prerequisite to a finding of adoptability (*Sarah M., supra*,

22 Cal.App.4th at p. 1649), the prospective adoptive parents' interest in adopting the children is evidence that their age, physical condition, mental state, and other characteristics are not likely to dissuade individuals from adopting them, and that the children are likely to be adopted within a reasonable time either by the prospective adoptive parents or by another family (*id.* at pp. 1649-1650).

On appeal, D.W. does not argue that any characteristic of R.W. or K.W. would make it difficult to place them for adoption. And he acknowledges that a prospective adoptive parent's interest in adopting a child generally indicates the child is likely to be adopted within a reasonable time by the prospective adoptive parent or by another family. D.W. maintains, however, that the children's placement with the prospective adoptive parents could still fail, because that placement (which began in February 2015) was still relatively new when the court made its adoptability finding in May 2015, and because the children have a close bond with D.W. But the mere possibility that an adoption by the current prospective adoptive parents will not be completed does not persuade us that there is a lack of substantial evidence supporting the court's finding that the children are adoptable. And while the relationship between D.W. and the children is relevant in determining the applicability of the beneficial relationship exception to termination of parental rights (the second step of the analysis under section 366.26), D.W. has not shown that that relationship undercuts the court's conclusion that the children themselves are adoptable (the first step of the section 366.26 analysis). As discussed, the children's youth and good health and the prospective adoptive parents' interest in adopting them provide ample support for the court's finding that they are likely to be adopted, either by the prospective adoptive parents or by another family.

**B. The Beneficial Parent-Child Relationship Exception**

Under section 366.26, subdivision (c)(1), the denial of reunification services "shall constitute a sufficient basis for termination of parental rights" unless "(B) [t]he court finds a compelling reason for determining that termination would be detrimental to the child due to one or more of the following circumstances: [¶] (i) The parents have maintained regular visitation and contact with the child and the child would benefit from

continuing the relationship. . . .” The parents have the burden of proving the applicability of the beneficial relationship exception. (*Autumn H.*, *supra*, 27 Cal.App.4th at p. 574.)

The *Autumn H.* court recognized that “[i]nteraction between natural parent and child will always confer some incidental benefit to the child.” (*Autumn H.*, *supra*, 27 Cal.App.4th at p. 575.) “To meet the burden of proof, the parent must show more than frequent and loving contact, an emotional bond with the child, or pleasant visits.” (*In re Dakota H.* (2005) 132 Cal.App.4th 212, 229.) The beneficial relationship exception applies only when the relationship with the natural parent “promotes the well-being of the child to such a degree as to outweigh the well-being the child would gain in a permanent home with new, adoptive parents. In other words, the court balances the strength and quality of the natural parent/child relationship in a tenuous placement against the security and sense of belonging a new family would confer.” (*Autumn H.*, *supra*, 27 Cal.App.4th at p. 575.) Only 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 [is] the preference for adoption . . . overcome [so that] the natural parent’s rights are not terminated.” (*Ibid.*) The existence of this relationship is determined by “[t]he age of the child, the portion of the child’s life spent in the parent’s custody, the ‘positive’ or ‘negative’ effect of interaction between parent and child, and the child’s particular needs[.]” (*Id.* at p. 576.)

In *In re G.B.* (2014) 227 Cal.App.4th 1147, we reviewed the juvenile court’s order on the beneficial relationship exception for substantial evidence, while noting that some courts have applied different standards of review. (*Id.* at p. 1166 & fn. 7; see *Autumn H.*, *supra*, 27 Cal.App.4th at pp. 575–577 [substantial evidence standard applies to finding on the applicability of beneficial relationship exception]; *In re Jasmine D.* (2000) 78 Cal.App.4th 1339, 1351 (*Jasmine D.*) [applying abuse of discretion standard but recognizing difference in standards not significant]; *In re Bailey J.* (2010) 189 Cal.App.4th 1308, 1314–1315 [applying combination of both standards].) We agree with *Jasmine D.* that the practical differences between the two standards in evaluating the beneficial relationship exception are not significant. (*Jasmine D.*, *supra*, 78 Cal.App.4th

at p. 1351.) On the record before us, we would affirm the court's finding under either standard. (See *In re G.B.*, *supra*, 227 Cal.App.4th at p. 1166, fn. 7.)

The record supports the juvenile court's determination that the beneficial relationship exception did not apply. At the time of the section 366.26 hearing, R.W. was almost four years old, and K.W. was one and one-half years old. R.W. had lived away from D.W. and R.D. for more than half his life, since April 2013; K.W. had lived away from her parents since December 2013, when she was less than two months old.

We acknowledge there was evidence, highlighted by D.W. on appeal, that D.W. visited R.W. and K.W. regularly during the dependency and behaved appropriately and affectionately (including playing with the children, bringing nutritious food, helping R.W. use the bathroom and changing K.W.'s diaper), and the children interacted positively with him. (Cf. *In re L.Y.L.* (2002) 101 Cal.App.4th 942, 947 [appellate court will affirm juvenile court's order if supported by substantial evidence, even if other evidence supports contrary conclusion].) But this evidence did not establish that D.W.'s relationship with R.W. and K.W. promoted their well-being to such an extent that it outweighed the well-being the children would gain in a permanent home with adoptive parents. (See *In re K.P.* (2012) 203 Cal.App.4th 614, 621.) D.W. did not progress to unsupervised visits. He engaged in unproductive behaviors during some visits. As late as August 2014, more than a year after the removal of R.W. and after D.W. had received extensive services, D.W. continued to engage in some of the behaviors that led to the dependency and to instability in the family's life, including alcohol abuse and domestic violence against R.D. (See *In re G.B.*, *supra*, 227 Cal.App.4th at p. 1166.) By contrast, the prospective adoptive parents were committed to adopting R.W. and K.W. and giving them a permanent home. The record supports the juvenile court's conclusion that the relationship between the children and D.W. did not constitute a compelling reason to determine that termination of parental rights would be detrimental to the children. (§ 366.26, subd. (c)(1)(B)(i).)

### **III. DISPOSITION**

The order terminating parental rights is affirmed.

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Streeter, J.

We concur:

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Ruvolo, P.J.

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Rivera, J.

A145126/*In re R.W.*