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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

In re K.H. et al., Persons Coming Under
the Juvenile Court Law.

SACRAMENTO COUNTY DEPARTMENT OF HEALTH
AND HUMAN SERVICES,

Plaintiff and Respondent,

v.

K.H.,

Defendant and Appellant.

C068521

(Super. Ct. Nos.
JD228311, JD228312)

Appellant, the father of K.H. and A.H. (the minors),
appeals from the juvenile court's orders terminating parental
rights. (Welf. & Inst. Code, §§ 366.26, 395; undesignated
statutory references that follow are to this code.) Appellant
contends the juvenile court erred by failing to find an
exception to adoption based on his beneficial relationship with

the minors. (§ 366.26, subd. (c)(1)(B)(i).) We disagree and affirm the juvenile court's orders.

FACTS AND PROCEEDINGS

Dependency petitions were filed by the Sacramento County Department of Health and Human Services (Department) in September 2008 regarding K.H. (age three) and A.H. (age four), which, as later amended, alleged that appellant engaged in acts of domestic violence against the minors' mother (mother) in their presence and that the parents' use of alcohol impaired their ability to care for the minors. The domestic violence by appellant was alleged to include pushing mother into a wall, twisting her arm, and hitting her in the ear, resulting in pain to her tailbone, toe, and arm.

The foster mother reported that the minors talked a lot about the domestic violence they had witnessed in the home. A.H. talked about the violence and "being afraid." During one visit, she told mother that the foster mother's boyfriend "doesn't call her a bitch," and she "coached the mother on how to be good so they can go home." K.H. was angry when he was first placed in the foster home, and he "would tell his foster parent and other adults [appellant] was going to get a shot gun and shoot them." He told the foster mother that appellant "pulled a gun out on" mother, and that "Mom knows how to behave." He talked about appellant "being mean and breaking his mother's arm and locking her out of the house when he [wa]s angry." K.H. worried about getting spanked for "wetting"

himself or his bed. In addition, the minors "often imitate[d] [appellant's] negative behaviors in their play." Nonetheless, they stated that they wanted to return home.

Prior to filing the petitions, the social worker reviewed police reports concerning domestic violence incidents by appellant in July, August, and September 2008, in addition to a report from March 2007 alleging that, during an argument, appellant "shoved a cooked hot pocket in [A.H.'s] face." Although mother later denied there had been any domestic violence since 2003, she immediately admitted she was lying to protect appellant and that there had been extensive domestic violence in the relationship. Appellant, who had five convictions for driving under the influence of alcohol and at least two for domestic violence, denied any intentional violence toward mother.

In November 2008, the amended petitions were sustained, and the juvenile court ordered reunification services for both parents.

The following month, law enforcement personnel responded to the home to address a domestic violence episode involving appellant, at which time he was arrested on a warrant. In February 2009, appellant had an "angry and explosive" exchange with the social worker, during which he again denied that the minors had been exposed to domestic violence and claimed it was mother's fault that he slapped her on one occasion because she had been "cheating on" him.

By May 2009, mother was living with the maternal grandfather, and they had moved in order to keep appellant from coming to the home. However, appellant followed mother from a 12-step meeting, came to and drove by the house and, according to mother, called her "50 times a day."

Meanwhile, A.H., who "worried a lot about her mother at the onset of therapy," no longer displayed symptoms of anxiety. K.H. had stopped making "inappropriate comments" and had "learned it is not okay to threaten or hurt other people." The minors reported they felt safe in their foster home. Yet the minors "appear[ed] to have a strong bond" with appellant, who reportedly "interact[ed] well" with them.

At the review hearing in May 2009, reunification services were continued.

That same month, when one of mother's service providers called to encourage her to enter residential treatment for her continued drinking, appellant was heard in the background yelling that his "fucking wife" was not going into a treatment program because she needed to take care of her father. When the service provider inquired who was speaking, appellant identified himself and stated, "I am going to fuck you up."

In July 2009, mother reported that she and appellant were back together.

In conversations with the social worker, appellant continued to deny he had ever assaulted mother or caused her to be fearful. He maintained the minors had not witnessed domestic

violence "because [t]here hasn't been any" and that they had been "brainwashed" into saying they were afraid of him.

Although slow to engage in their case plans, the parents had participated in the required services by the 12-month review hearing in February 2010. At the hearing, services were continued.

The minors began having extended visits with the parents, which went well, and they continued to exhibit a significant bond with the parents. Although appellant had an outburst at a therapy session in March 2010, the service providers otherwise felt he had made "good progress."

At a review hearing in May 2010, the juvenile court ordered the minors returned to the custody of the parents.

However, appellant's domestic violence issues persisted. Unbeknownst to the social worker, five days before the minors were ordered returned to the parents, there had been three calls to the police about a domestic violence episode in the home. Three months later, during a home visit by the social worker, K.H. disclosed that appellant had been "mean" to mother and they "had to call the police." It appeared from the minors' behavior that they had been told not to report what was going on in the home. Mother denied there had been any physical abuse or that the police had been called. Shortly thereafter, the therapist reported that the minors' "behaviors and anxiety levels ha[d] increased."

In September 2010, the social worker met with K.H. at school, at which time he reported that appellant was hitting

mother and hid when the police came so he would not be taken to jail. According to K.H., appellant also "spank[ed] him on the butt with an open hand sometimes leaving bruises."

Supplemental petitions were filed, alleging in part that there had been further domestic violence in the home in the presence of the minors. Once the minors were placed in protective custody, they reported witnessing appellant "choking, hitting, kicking and pushing mother into the refrigerator," and they said appellant told them they would be removed again if they told the social worker. The minors also disclosed that appellant sometimes would direct K.H. to "beat" A.H. K.H. felt guilty about disclosing the domestic violence occurring in the home, and A.H. often "reminded him it was his fault that they were removed." However, K.H. eventually recognized that "telling the truth helped him to save his mother from getting hit." The minors were concerned that appellant was "hurting their mother," and they wanted to return home.

Mother confirmed that appellant had never stopped being abusive to her and that he had "choked, kicked, hit, thrown . . . and raped her." She showed the social worker bruises and scratches on her shoulder blades and stated she wore long-sleeved tops to hide her injuries from the minors. She said she would "no longer l[ie] and mak[e] excuses" for appellant.

Appellant was arrested, and mother was granted a temporary restraining order against him. Appellant reportedly made numerous telephone calls to mother while in custody and after being released, in violation of the restraining order. He also

tried to enter mother's home and had one of her phones turned off. Appellant later told the social worker that he had started drinking again and he knew he had "messed up." He acknowledged that he had wrongly blamed the Department in the past.

A.H. continued to be happy to see appellant at visits. K.H., on the other hand, was "often upset with [appellant,] and [would] not talk to him for extended periods of time in the visits." Moreover, the minors often yelled at and hit appellant. However, both of the minors continued to express a desire to return home.

The minors transitioned into a prospective adoptive home in October 2010, and they appeared to thrive in the placement. They referred to the foster parents as "mom and dad" and were very affectionate with the foster family. K.H., who had occasionally been aggressive with classmates, was "steadily improving." However, he struggled with feelings of guilt about liking the foster placement because of his loyalty to his parents. The minors' therapist felt the minors were "torn between two different lives" and "need[ed] some closure." The foster parents were committed to adopting them.

At a hearing in January 2011, the juvenile court sustained the allegations in the supplemental petitions, terminated reunification services, and set the matters for a hearing pursuant to section 366.26 to select and implement a permanent plan for the minors.

Appellant continued to attend visits, which had been reduced to one hour per month, and he was "appropriate" during the visits.

At the section 366.26 hearing, which occurred in June 2011, it was stipulated that, if the minors testified, they would state: (1) they missed their parents, paternal grandmother and pets "very much" and wanted to return to the parents' care if possible; (2) although they loved their foster family, they would feel bad if they were adopted because they would no longer see their "birth family"; and (3) their visits with appellant were "good" and they felt sad after visits because they missed him.

Appellant testified that, at visits, the minors would run to him and hug him when they first saw him, and they would tell him how much they missed him. They played, read books, and talked during visits. According to appellant, the minors appeared sad at the end of visits and usually cried.

Appellant's attorney urged the court to find an exception to adoption applied based on appellant's strong bond with the minors.

The juvenile court concluded that the minors "would benefit greatly from permanency" and that the harm from terminating parental rights would not be so great as to overcome the benefits to them of adoption. The court took into account appellant's "obvious great love" for the minors and that the minors said they would prefer to be with him, but concluded he had not established that the relationship outweighed the benefit

to the minors of being adopted. The court observed that the minors' relationship with appellant "could be stronger," that the minors' lives during the dependency proceedings had been "topsy-turvy," and that they had spent relatively little time with the parents. Accordingly, the court ordered a permanent plan of adoption and terminated parental rights.

DISCUSSION

Appellant maintains the juvenile court erred by failing to find an exception to termination of parental rights based on his beneficial relationship with the minors. We reach a contrary conclusion.

At a hearing under section 366.26, if the court finds by clear and convincing evidence that a child is likely to be adopted, the court must terminate parental rights and order the minor placed for adoption unless the court finds a "compelling reason for determining that termination would be detrimental" due to one of the statutorily enumerated exceptions. (§ 366.26, subd. (c) (1) (B).)

One such exception is when "[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).) However, a parent is not entitled to have this exception applied "simply by demonstrating some benefit to the child from a continued relationship with the parent, or some detriment from termination of parental rights." (*In re Jasmine D.* (2000) 78 Cal.App.4th 1339, 1349 (*Jasmine D.*)). The benefit

to the child must 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. In other words, the 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.* (1994) 27 Cal.App.4th 567, 575 (*Autumn H.*)).

"The exception must be examined on a case-by-case basis, taking into account the many variables which affect a parent/child bond. The age of the child, the portion of the child's life spent in the parent's custody, the 'positive' or 'negative' effect of interaction between parent and child, and the child's particular needs are some of the variables which logically affect a parent/child bond." (*Autumn H., supra*, 27 Cal.App.4th at pp. 575-576.)

The parent has the burden of establishing an exception applies. (Cal. Rules of Court, rule 5.725(d)(4); *In re Zachary G.* (1999) 77 Cal.App.4th 799, 809 (*Zachary G.*); see *In re Cristella C.* (1992) 6 Cal.App.4th 1363, 1373.) "Because a section 366.26 hearing occurs only after the court has repeatedly found the parent unable to meet the child's needs, it is only in an extraordinary case that preservation of the

parent's rights will prevail over the Legislature's preference for adoptive placement." (*Jasmine D.*, *supra*, 78 Cal.App.4th at p. 1350.)

The parties disagree as to which standard of review applies on appeal following a juvenile court's determination regarding a statutory exception to adoption. Relying on *In re I.W.* (2009) 180 Cal.App.4th 1517, the Department maintains that, "where the issue on appeal turns on a failure of proof at trial, the question for a reviewing court becomes whether the evidence compels a finding in favor of the appellant as a matter of law." (*Id.* at p. 1528.) Appellant urges us to adopt the approach employed by the same appellate court in a more recent case, in which a combination of standards of review were applied-- substantial evidence as to the factual determination of whether there is a beneficial parent-child relationship and abuse of discretion as to whether such relationship outweighs the benefit of adoption. (*In re Bailey J.* (2010) 189 Cal.App.4th 1308, 1315.) We note that many courts have reviewed such findings for substantial evidence, with a few courts utilizing an abuse of discretion standard. (Compare, e.g., *In re Megan S.* (2002) 104 Cal.App.4th 247, 250-251; *In re L.Y.L.* (2002) 101 Cal.App.4th 942, 947; *Autumn H.*, *supra*, 27 Cal.App.4th at p. 576; *Zachary G.*, *supra*, 77 Cal.App.4th at p. 809; *In re Derek W.* (1999) 73 Cal.App.4th 823, 827 with *Jasmine D.*, *supra*, 78 Cal.App.4th at p. 1342 and *In re Aaliyah R.* (2006) 136 Cal.App.4th 437, 449.) However, as several courts have noted, and as appellant acknowledges, the practical differences between these standards

of review are not significant in the context of reviewing termination orders, as each standard accords broad deference to the trial court's judgment. (See, e.g., *Jasmine D.*, *supra*, 79 Cal.App.4th at p. 1351; *In re C.B.* (2010) 190 Cal.App.4th 102, 123; *In re Scott B.* (2010) 188 Cal.App.4th 452, 469.) Because our conclusion in the present matter would not change regardless of which of these standards of review we applied, and as addressing the issue here will not assist in resolving the split of authority, we simply acknowledge the varying views and turn to the merits.

To warrant ordering a permanent plan other than adoption, the juvenile court was required to find a compelling reason for determining that terminating parental rights would be detrimental to the minors. (§ 366.26, subd. (c)(1)(B)(i).) Ample evidence supports the court's conclusion that the minors' bond with appellant was not sufficiently compelling to derail adoption in favor of an alternative permanent plan.

Despite the bond the minors had with appellant and their avowed desire to be placed with him, it is debatable that the relationship was wholly positive or that it supported their emotional well-being. The minors had witnessed extensive domestic violence by appellant toward mother. In addition, they described episodes in which appellant directed K.H. to "beat" A.H. There were reports that appellant had spanked K.H., leaving bruises, and had "shoved" hot food in A.H.'s face. In foster care, the minors replicated in their play the behavior they had witnessed in the parents' home. A.H. expressed being

afraid when discussing the violence she had witnessed. Although the minors missed the parents and said they wanted to return to their care if possible, mixed in with these sentiments were feelings of guilt and protectiveness for mother. Both minors worried about her being in danger. They grappled with anxiety. K.H. felt guilty about disclosing the violence that had continued to occur in the parents' home. After the minors were removed a second time, they yelled at appellant and hit him during visits, and K.H. often would not speak to him. The juvenile court was entitled to consider all of this information when evaluating the nature of the minors' bond with appellant and was justified in concluding that the relationship "could be stronger."

Even to the extent the minors' bond with appellant could be termed positive, the juvenile court was required to weigh the significance of this relationship against the benefit the minors would gain in a permanent adoptive home. By the time of the section 366.26 hearing, the minors had been out of appellant's care for almost three years (nearly half of their young lives), with one brief, tumultuous interruption. They "appear[ed] to be thriving in their [adoptive] placement" and were affectionate with the adoptive family, although K.H. struggled with feelings of guilt about liking his placement. In the words of the minors' therapist, they were "torn between two different lives" and needed "closure." Any permanent plan short of adoption promised to prolong the anxiety and conflicted feelings they had.

Appellant claims the juvenile court "erroneously focused on how much time the [minors] had spent with the parents relative to the foster parents, rather than the nature and quality of their relationship, and how significant it was to the [minors]." But, as already discussed, the amount of a child's life spent in parental custody is a relevant consideration when evaluating a parent/child bond. Moreover, the court's comment on the strength of the minors' bonds with appellant reflects it considered the nature and quality of the relationship when weighing the benefits and detriment to them of adoption.

Appellant analogizes the circumstances here to those in *In re Scott B.*, *supra*, 188 Cal.App.4th 452, in which the appellate court reversed an order terminating parental rights because it found that the beneficial parental relationship exception to adoption applied. However, unlike the 11-year-old child in that case, the minors, here, had not spent most of their lives in appellant's care. (*Id.* at p. 471.) The current matter also diverges from *Scott B.* in that none of the professionals involved with the minors opined that they would suffer detriment if their relationship with appellant were severed. (*Ibid.*) Finally, in *Scott B.*, the appellate court relied on substantial evidence in the record that the child's emotional instability would "not enable him to endure" the termination of visits with his mother. (*Ibid.*) There is no similar evidence in the record in the present matter.

Appellant's reliance on *In re S.B.* (2008) 164 Cal.App.4th 289 is similarly misplaced. In that case, a bonding expert

testified there was a potential for the six-year-old child to be harmed if the relationship with her father were severed, and the juvenile court found that the child shared "an emotionally significant relationship" with her father. (*Id.* at p. 296.) Nonetheless, the court declined to find an exception to adoption because the relationship was not "parental." (*Ibid.*) The appellate court concluded it was error to decline to find the exception because "the only reasonable inference is that [the child] would be greatly harmed by the loss of her significant, positive relationship with [her father]." (*Id.* at p. 301.) Here, there was no such testimony from a bonding expert, and the juvenile court made a finding supported by the evidence that the minors' relationship with appellant "could be stronger."

Appellant also cites *In re Amber M.* (2002) 103 Cal.App.4th 681, in which the appellate court concluded it was error to decline to apply the beneficial parental relationship exception with regard to three children who had been out of their mother's care for more than two years. However, in *Amber M.*, the children's therapists, the family's court-appointed special advocate, and a psychologist who conducted a bonding study all concluded that severing the parental bond could be detrimental to the children. (*Id.* at pp. 689-690.) No such evidence was presented here.

Appellant contends the minors could have achieved stability and permanence with a permanent plan other than adoption. But a guardianship--the preferred permanent plan when adoption is not

possible--"is 'not irrevocable and thus falls short of the secure and permanent placement intended by the Legislature.'" (*In re Teneka W.* (1995) 37 Cal.App.4th 721, 728.) Thus, we disagree with appellant that guardianship would provide the minors the same degree of closure as adoption. Appellant's reliance on *In re Brandon C.* (1999) 71 Cal.App.4th 1530 in this regard is misplaced. In that case, the appellate court *affirmed* a finding that the beneficial parental relationship exception applied. Here, on the other hand, the issue is whether the evidence supports a finding that the exception to adoption did not apply. Whether the evidence also could have supported a contrary conclusion is immaterial.

In sum, in light of the minors' young age at removal, the length of time they had been out of the parents' care, the trauma they were exposed to while in their care, and the evidence suggesting they would be able to bond with their prospective adoptive family, the juvenile court was warranted in concluding that the advantages of adoption outweighed any benefit to the minors of maintaining a relationship with appellant.

DISPOSITION

The juvenile court's orders are affirmed.

_____ HULL _____, Acting P. J.

We concur:

_____ BUTZ _____, J.

_____ MAURO _____, J.