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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

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

SAN DIEGO COUNTY HEALTH AND
HUMAN SERVICES AGENCY,

Plaintiff and Respondent,

v.

L.W.,

Defendant and Appellant.

D061782

(Super. Ct. No. EJ3307A-B)

APPEAL from orders of the Superior Court of San Diego County, Gary M. Bubis,
Judge. Affirmed.

L.W. appeals the termination of her parental rights to her sons, J.L.W. and J.A.W.
She contends the court erred in finding J.L.W. and J.A.W. were likely to be adopted and

the beneficial parent-child relationship exception did not apply. (See Welf. & Inst. Code,¹ § 366.26, subd. (c)(1)(B)(i).) We affirm.

FACTUAL AND PROCEDURAL HISTORY

On October 13, 2010, the San Diego County Health and Human Services Agency (the Agency) filed petitions on behalf of J.L.W. and J.A.W. under section 300, subdivision (b). J.L.W. was 23 months old and J.A.W. was two months old at the time. The petitions alleged there was substantial risk the boys would suffer serious physical harm or illness because of L.W.'s inability to supervise them adequately and provide regular care due to substance abuse and/or mental illness. Specifically, the petitions alleged the children had been exposed to violent confrontations in the family home between L.W. and her maternal grandfather. Additionally, L.W. suffered from depression and had failed to take her prescribed medication. Finally, L.W. used methamphetamine and marijuana to excess as evidenced by her positive drug test on September 30, 2010, and she had a long history of drug use dating back to the age of 15. L.W. was 24 years old when the petitions were filed.

Prior to the Agency filing the petitions, L.W. was taken to a hospital following an attempted suicide after she consumed about 19 muscle relaxant pills. Although L.W. was diagnosed with depression and suicidal ideation and given a prescription for Cymbalta, she did not fill her prescription in the following week. She signed a safety plan, but violated it when she removed her children from relative care.

¹ Statutory references are to the Welfare and Institutions Code unless otherwise specified.

L.W. named different men as alleged fathers of each of the boys. She claimed S.L. was the alleged father of J.A.W. The Agency believed it found S.L. in a California state prison, but it was later determined the man the Agency tracked down was not the correct S.L. L.W. named two men as alleged fathers of J.L.W. The Agency was unable to locate them with the information provided by L.W.

According to her maternal grandmother, L.W. started using drugs between the ages of 11 and 13, and by age 15, she was using marijuana, PCP, and methamphetamine. In junior high, L.W. began running away and stopped going to school. She became violent, kicked a hole in the wall, and was in and out of juvenile hall. Also, L.W. was diagnosed as suffering from a bipolar disorder and prescribed Zoloft. During her teenage years, L.W. spent time in a group home and a residential drug treatment program.

The Agency's jurisdiction report dated November 18, 2010, noted J.L.W. and J.A.W. were detained together in the home of a maternal cousin. It was uncertain how long the children could remain there because the cousin indicated she might have to return to Arizona due to a family emergency. The Agency continued to investigate other relative placement options. J.L.W. had turned two years old, was in good health, and was very affectionate toward his younger brother. J.A.W. was three months old and born with a heart condition necessitating surgery, which he received in January 2011. He was a very happy infant.

On February 28, 2011, the court sustained the petitions, finding the allegations true by clear and convincing evidence. It declared the boys dependents, removed

physical custody from L.W., and placed them in out-of-home care. The court ordered reunification services be provided.

The Agency's six-month review report dated August 30, 2011, recommended termination of reunification services. L.W. failed to participate in any reunification services ordered by the juvenile court, and she did not maintain regular contact with her children. She was arrested in July 2011 on charges of possession of a dangerous weapon, which ultimately resulted in her incarceration. When the social worker asked L.W. why she did not participate in services, L.W. answered, "I wanted to be with my boyfriend." L.W. indicated she had recently ended the relationship due to domestic violence and admitted having a drug abuse problem (she acknowledged daily methamphetamine use during the preceding six months).

J.L.W. had been placed with a nonrelative extended family member since December 23, 2010. J.A.W. had been residing with the maternal great grandmother since October 13, 2010. The social worker noted J.A.W. had been receiving regular medical follow-up after his successful heart surgery. He had some food allergies and was taking medication to aid with digestion. J.A.W. was one year old and developmentally on target, but some behavioral concerns had arisen. J.L.W. was a healthy two year old. He had recently begun to display some angry behaviors, such as hitting the caregiver's son and breaking a lamp. He also had problems with biting, pulling hair, and spitting, but these behaviors were resolving. The boys remained in separate placements but were able to see each other on a regular basis.

L.W. remained incarcerated at Las Colinas Detention Facility in September 2011 stemming from her illegal weapon possession. On September 30, she was accepted into the Kiva residential treatment program. She had positive visits with the boys on October 8 and October 12, 2011.

At the 12-month permanency hearing² on October 19, 2011, L.W. submitted a letter to the juvenile court asking for continued reunification services. In the letter, the mother described: (1) how she tried to end her life and (2) that she avoided her problems with illegal drug use. She emphasized that it was difficult to follow the correct path in life "when there has never been anyone to show you the way to go." L.W. also told the juvenile court that she wanted to change because she did not want to hurt her children anymore and wanted to make them more of a priority. She informed the juvenile court that she wanted to learn how to take care of her children and improve herself through therapy and counseling.

The court found there was not a substantial probability that either child would be returned to L.W. within the next six months. In addition, it found that a return of the boys to L.W.'s custody would be detrimental and the services provided had been reasonable. The court further found L.W. failed to participate regularly in the offered reunification services and failed to make substantive progress with the provisions of the case plan. It terminated court mandated reunification services and scheduled a hearing to select and implement a permanent plan.

² Apparently, the six-month review hearing merged with the 12-month permanency hearing.

A social worker prepared an assessment report dated February 16, 2012. She noted the boys remained in their separate placements, where they had been residing since late 2010. She described J.A.W. as an attractive 18-month-old boy. He had been diagnosed with mast cell disease and was monitored on a monthly basis at Rady Children's Hospital. He was required to undergo bone marrow biopsies every six months to monitor his condition. He also had congestive heart failure and underwent successful surgery. The social worker also observed that in a recent developmental screening, no concerns were noted regarding J.A.W.'s development or behavior.

The social worker also described J.L.W. J.L.W. was three years old and developmentally on target. Although the child's hitting behavior had decreased, it continued to be somewhat of an issue according to his caregiver.

The social worker personally observed several visits between L.W. and the boys, and noted that the relationship between L.W. and her children improved with the passage of time, but was not altogether positive. L.W. completed the Kiva program and by January 2012, transitioned into aftercare, which was three to four days a week.

Regarding adoptability, the social worker opined the boys were generally adoptable. She noted J.L.W. and J.A.W. were an attractive sibling group. The boys were good natured and developmentally on target. J.L.W. was in good physical health, but J.A.W. had medical issues. The number of homes available depended on the characterization of J.A.W.'s medical condition. If he was considered medically fragile, there were four approved adoptive families in San Diego County and 18 out of the county willing to adopt two boys like J.L.W. and J.A.W. If J.A.W. was considered as having a

controllable or correctable medical condition, there were 37 families in San Diego County disposed to adopting two children like J.L.W. and J.A.W.

The social worker opined it would not be detrimental to J.L.W. and J.A.W. to terminate parental rights. Although L.W. had visited consistently since September 30, 2011, her visitation prior to that date had been inconsistent. L.W.'s history of abandonment and failure to engage in services early on in the case prevented her from developing secure and solid parent-child relationships with the boys. In addition, during visits with her children, L.W. had exhibited a lack of concern for the boys' emotional well-being.

On February 16, 2012, the court held a section 366.26 hearing. L.W. was present, and the court set the case for trial. The court continued the matter on the contested hearing calendar.

Three weeks later, the Agency filed a section 387 petition on behalf of J.A.W. requesting a higher level of care. The Agency removed J.A.W. from the relative caregivers because they had allowed the mother to stay in their home, and the caregivers were ambivalent about their commitment to J.A.W. The Agency moved J.A.W. to a Foster Family Agency (FFA) home.³ The social worker arranged for weekly visits between the two brothers to continue. The court subsequently sustained the petition.

³ A FFA home is a specialized home where the caregivers have been trained in how to care for children with behavioral, medical, or emotional issues. The caregivers receive additional support from an FFA social worker.

The court held the contested section 366.26 hearing on March 26, 2012. L.W. was present with counsel. The court received into evidence the social worker's February 16, 2012 report, the section 387 detention report for J.A.W. dated March 9, 2012, and the social worker's curriculum vitae, but excluded as untimely a March 26, 2012 addendum report prepared by the social worker. Although the social worker was present at the hearing, none of the parties examined her.

After considering the evidence presented and hearing argument of counsel, the court found by clear and convincing evidence the boys were likely to be adopted and none of the statutory exceptions applied. It terminated parental rights and referred the matter to the Agency for adoptive placement.

The mother timely appealed.

DISCUSSION

L.W. raises two issues on appeal. First, she contends the juvenile court erred in terminating her parental rights because there was insufficient evidence to support its finding that J.L.W. and J.A.W. are adoptable. Second, she challenges the sufficiency of the evidence to support the court's finding the beneficial parent-child relationship exception did not apply to preclude terminating her parental rights. We reject both contentions.

I

ADOPTABILITY

"The issue of adoptability posed in a section 366.26 hearing 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, italics omitted.) While psychological, behavioral, medical and possible developmental problems may make it more difficult to find adoptive homes, they do not necessarily preclude an adoptability finding. (*In re Helen W.* (2007) 150 Cal.App.4th 71, 79; *In re Lukas B.* (2000) 79 Cal.App.4th 1145, 1154; *In re Jennilee T.* (1992) 3 Cal.App.4th 212, 224-225.) An adoptability finding requires "a low threshold: [T]he court must merely determine that it is 'likely' that the child will be adopted within a reasonable time." (*In re K.B.* (2009) 173 Cal.App.4th 1275, 1292; accord *In re Zeth S.* (2003) 31 Cal.4th 396, 406; *In re B.D.* (2008) 159 Cal.App.4th 1218, 1231.) The possibility a child may have future problems does not mean the child is not likely to be adopted. (*In re Jennilee T.*, *supra*, at pp. 223-225.)

The likelihood of adoptability may be satisfied by a showing the minor is generally adoptable, that is, independent of whether the minor is in a prospective adoptive home (§ 366.26, subd. (c)(1)), or has a prospective adoptive parent "waiting in the wings." (*In re Sarah M.*, *supra*, 22 Cal.App.4th at p. 1649; *In re A.A.* (2008) 167 Cal.App.4th 1292, 1313.)

We review a court's finding that a minor is adoptable for substantial evidence. (*In re Josue G.* (2003) 106 Cal.App.4th 725, 732; *In re Lukas B.*, *supra*, 79 Cal.App.4th 1145, 1154.) If, on the entire record, there is substantial evidence to support the findings of the juvenile court, we uphold those findings. We do not pass on the credibility of witnesses, attempt to resolve conflicts in the evidence or reweigh the evidence. Instead, we view the record favorably to the juvenile court's order and affirm the order even if

there is substantial evidence supporting a contrary finding. (*In re Casey D.* (1999) 70 Cal.App.4th 38, 52-53.) Although the Agency bore the burden of proof on this issue at the section 366.26 hearing (*In re Gregory A.* (2005) 126 Cal.App.4th 1554, 1557, 1559-1561), L.W. has the burden of showing there is no evidence of a sufficiently substantial nature to support the finding or order (*In re L.Y.L.* (2002) 101 Cal.App.4th 942, 947).

Here, L.W. argues that J.A.W. is not adoptable because he has serious medical problems and prospective adoptive parents have not been informed regarding his specific medical condition. She also insists J.L.W.'s behavioral issues prevent him from being adoptable. L.W.'s contentions, however, ignore the substantial evidence supporting the juvenile court's conclusion that both boys are generally adoptable.

A child is generally adoptable when his or her personal characteristics are sufficiently appealing to make it likely that an adoptive family will be located in a reasonable time, regardless of whether a prospective adoptive family has been found. (See *In re Sarah M.*, *supra*, 22 Cal.App.4th at p. 1649.) A child's relative youth, his or her good physical and emotional health, the minor's intellectual capacity and his or her ability to develop interpersonal relationships all indicate that the child is adoptable. (*In re Gregory A.*, *supra*, 126 Cal.App.4th 1554, 1562.)

The possibility that a child may have future problems does not preclude a finding that he or she is likely to be adopted. Even a minor exposed to substances in utero and suffering speech delays may be found generally adoptable. (*In re R.C.* (2008) 169 Cal.App.4th 486, 492.) Young children may be generally adoptable despite evidence of physical and developmental conditions, significant delays, and speech issues. These

conditions require time to determine the full severity of the issues the minor will face. The certainty of a child's future medical condition is not required before a court can find that the minor is generally adoptable. (See *In re Helen W.*, *supra*, 150 Cal.App.4th at p. 79.)

J.A.W. has serious health concerns. He was diagnosed with congestive heart failure, but underwent successful surgery in January 2011. J.A.W. also has mast cell disease, which requires monthly monitoring at Rady's Children Hospital. He undergoes marrow biopsies every six months. In addition, he has allergies to amoxicillin and certain food.

J.L.W. has exhibited some behavioral issues. When J.L.W. was first placed in a foster home, his foster mother stated that J.L.W. would pull hair as well as spit, bite, and hit others. The spitting and pulling hair later stopped, and the frequency of biting has decreased. However, his hitting of others, although not as prevalent, remains a problem.

Despite these concerns, the record contains substantial evidence of the boys' respective appealing characteristics. The social worker described J.A.W. as an "active and thriving little boy." She noted there were no concerns regarding his development. The social worker stated that J.L.W. was developing "on target . . . and has a lot of positive energy and likes to climb and play."

The social worker also described J.L.W. and J.A.W. as "emotionally healthy little boys." She noted, "Both are good natured and present as developing on target." She believed them to be "an attractive brother sibling group who . . . are adoptable." She stated if J.A.W. was considered as having a "controllable/correctable medical issue,"

there were 37 families in San Diego County approved to adopt a child matching J.A.W.'s characteristics. If J.A.W. was considered "medically fragile," then there were four families in San Diego County and 18 out of the county approved to adopt. In finding these numbers of prospective families, the social worker assumed both boys would be adopted by the same family.

Accordingly, construing the record in the light most favorable to the judgment, we conclude substantial evidence supports the adoptability finding. (*In re Josue G.*, *supra*, 106 Cal.App.4th 725, 732; *In re J.I.* (2003) 108 Cal.App.4th 903, 911.)

II

THE BENEFICIAL PARENT-CHILD EXCEPTION

Section 366.26, subdivision (c)(1) allows termination of parental rights upon clear and convincing evidence of adoptability. An exception exists if "[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).) A beneficial relationship is one that "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 re Autumn H.* (1994) 27 Cal.App.4th 567, 575.) 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.) L.W. has the burden to prove the facts supporting applicability of this exception to adoption. (*In re Scott B.* (2010) 188 Cal.App.4th 452, 469.) Examining the evidence in the light most favorable to the orders,

we conclude that L.W. failed to meet her burden of showing a beneficial relationship. (*In re Autumn H.*, *supra*, at p. 576; *In re Cristella C.* (1992) 6 Cal.App.4th 1363, 1372-1373.)

The record shows that L.W. has not maintained regular visitation with her children. She had visited consistently since September 30, 2011, but her visitation prior to that date had been inconsistent. She had failed to maintain regular visitation because of her drug use, criminal activity, and desire to spend time with her boyfriend.

Further, even if we were to determine her consistent visitation since September 30, 2011 was sufficient to satisfy the first prong of section 366.26, subdivision (c)(1)(B)(i), L.W. falls far short of carrying her burden on the second prong. L.W. lost custody of her children when J.L.W. was two years old and J.A.W. was only two months old. L.W. was offered a reunification plan, but she ignored the offered services and did nothing during the six months the plan was offered. As the social worker noted, she exhibited disregard and a lack of interest in the well-being of her children and clearly placed her needs before those of J.L.W. and J.A.W. Her drug addiction made her frequently absent early in her children's life, which as the social worker commented, "did not allow for the development of a secure and solid child/parent relationship."

In her opening brief, L.W. glosses over these facts and focuses on her more recent interaction with her children. The record does show that she has enjoyed some positive interaction with her boys and both J.L.W. and J.A.W. are becoming more comfortable with her and appear to enjoy her company. That said, sufficient evidence supports the court's finding that L.W.'s relationship with her children does not promote the well-being of the children to such a degree as to outweigh the well-being the children would gain in

a permanent home with new, adoptive parents. (See *In re Autumn H.*, *supra*, 27 Cal.App.4th at p. 575.)

For example, at the beginning of L.W.'s visits, J.L.W. was traumatized. He was afraid of his mother and did not want his foster mother to leave.

L.W. also exhibited a lack of regard for the boys' emotional health after her relationship with the boys started to improve. On one occasion while visiting J.L.W. and J.A.W., she became upset when the social worker explained why the boys' case was in the adoption unit at the Agency. She would not listen to the social worker's explanation and yelled at her, becoming more agitated until the social worker ended the conversation. During this same visit, L.W. asked why the boys could not remain in the homes they currently were in until she could get them back. When the social worker explained that they were looking to place the boys in the same home, L.W. again became angry and lashed out at the maternal grandmother. After the maternal grandmother apologized to L.W., the social worker informed the maternal grandmother that she need not apologize and L.W. was not the victim. L.W. then called J.L.W. to her and told him he was a victim. The social worker told L.W. not to involve J.L.W. in the conversation, but L.W. continued to discuss the issue with J.L.W. Referring to J.L.W. as smart, she questioned him, "You're a victim aren't you?"

In conclusion, we agree with the juvenile court that L.W. did not carry her burden in proving the beneficial parent-child exception applied. Although her efforts toward sobriety and creating a more positive relationship with her children are to be commended, L.W.'s undertakings are too little, too late.

DISPOSITION

The orders are affirmed.

HUFFMAN, Acting P. J.

WE CONCUR:

McDONALD, J.

O'ROURKE, J.