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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

In re S.C. et al., Persons Coming Under the
Juvenile Court Law.

SAN DIEGO COUNTY HEALTH AND
HUMAN SERVICES AGENCY,

Plaintiff and Respondent,

v.

JAQUELINE S. et al.,

Defendants and Appellants.

D061798

(Super. Ct. No. EJ2199E-F)

APPEALS from a judgment of the Superior Court of San Diego County, David B. Oberholtzer, Judge. Affirmed.

Jaqueline S. and Timothy C., the parents of S.C. and L.C., appeal the judgment terminating their parental rights under Welfare and Institutions Code section 366.26.¹ Timothy contends that the juvenile court erred by not applying the beneficial parent-child

¹ Statutory references are to the Welfare and Institutions Code.

relationship exception to adoption (§ 366.26, subd. (c)(1)(B)(i)). Jaqueline does not claim independent error, but contends that if Timothy's appeal is successful, the termination of her parental rights must be reversed as well. We reject Timothy's contention and affirm the judgment.

FACTS

In March 2010, Timothy began caring for S.C., then three years old, and L.C., then three months old, in his home because of Jaqueline's drug abuse.

On June 12, as was his practice, he and S.C. met Jaqueline at a 7-Eleven store where Jaqueline would pick up S.C. for a visit. Timothy agreed to let Jaqueline borrow his car; he later stated that he was unaware that she was under the influence of drugs. While shopping with S.C. at a grocery store, Jaqueline left her purse inside the store bathroom. The purse, which was found by another shopper who gave it to store personnel, contained methamphetamine and drug paraphernalia. The store manager called the sheriff's department. When Jaqueline inquired whether the purse had been found, she was arrested and S.C. was taken into protective custody. Timothy was contacted and was told to report to the sheriff's station in Lemon Grove with L.C., who was taken into protective custody. The social worker criticized Timothy for using poor judgment by allowing Jaqueline to take S.C. and drive his car, because he knew that Jaqueline did not have a valid driver's license and that she had a drug problem.

The San Diego County Health and Human Services Agency (Agency) subsequently filed dependency petitions on behalf of S.C. and L.C., alleging that they

were at substantial risk because of their parents' substance abuse. (§ 300, subd. (b).) The petitions referenced Timothy's history of drug usage.

Almost immediately, Timothy began engaging in services. In July, he voluntarily started individual therapy and enrolled in the Incredible Families program. The program offers two-part sessions. During the first part of a session, the parent has a supervised visit with his or her children. The second part is a parenting education class. The program reported that Timothy was "very loving and nurturing [to the girls]." The program also noted that Timothy actively participated in the parenting class, was responsive to his children's needs and "genuinely enjoys spending time with his children."

On September 2, the court authorized unsupervised visits for Timothy. However, later that month, Agency asked the juvenile court to revert Timothy's visitation back to supervised status because he had allowed Jaqueline to participate in one of his unsupervised visits, in violation of an earlier order, and he had tested positive for marijuana. In October, the court granted Agency's request.

Also in October, the court sustained the dependency petitions, as amended, and followed Agency's recommendations that Timothy be offered family reunification

services and that Jaqueline not be offered services on the basis of section 361.5, subdivision (b)(10) and (11).²

In the ensuing months, Timothy's participation in services decreased. He began missing sessions at the Incredible Families program as well as therapy sessions. Timothy also had a positive drug test for methamphetamine in October and then failed to report for on demand drug testing for six months.

The Incredible Families program terminated Timothy for missing too many sessions. He restarted the program in February 2011, but in late March the program terminated him again for missing sessions. Timothy continued visiting his daughters at a visitation center, but his attendance was spotty, and in April, the center discontinued his visits. In June, Timothy resumed visits with the girls at an Agency office and was late for the first visit.

In January 2011, Timothy made an appointment with a new therapist to resume counseling, but he failed to show up for the first two sessions. Timothy attended the next three sessions, but told the therapist that he could not continue the therapy because he had employment and housing problems.

At the six-month review hearing, Agency recommended that Timothy's reunification services be terminated, noting that he "has failed to mitigate the primary

² Jaqueline has four other children. In 2002, she left the two older children with the paternal aunt because she was unable to care for them. The paternal aunt was later named guardian of these children. In 2003, Jaqueline's younger two children were taken into protective custody after drugs were found in the home. Jaqueline did not complete her reunification plan and her parental rights were terminated in 2004. The younger two children were eventually adopted by the same paternal aunt.

issues that brought the children to the Agency's attention." In April, the court granted the request by Timothy's counsel to refer Timothy to drug court. By July 5, the drug court reported that Timothy had 56 days of sobriety. Timothy also completed a parenting program through Home Start. At the contested six-month hearing on July 11, the court authorized six more months of services for Timothy.

On August 5, Timothy was admitted to the CRASH (Community Resources And Self Help) program, an inpatient drug rehabilitation program. On September 1, Timothy was terminated from the program, and on September 19, Timothy was terminated from drug court for poor compliance.

Timothy failed to show for six scheduled visits with the children, and the children refused to attend one visit. S.C. remarked that she was "sad" when "[m]y dad did not show up." The social worker reported that the children were happy to spend time with their father and that he was affectionate and loving toward them.

On September 23, Timothy was arrested on theft-related charges.

At the 12-month review hearing on November 10, the court terminated reunification services for Timothy and set a section 366.26 hearing.

Agency assessed S.C. and L.C. as likely to be adopted if parental rights were terminated. The girls were healthy and the foster mother, who had an approved home study, wanted to adopt them. If the foster mother was unable to adopt them, there were 33 approved families in San Diego County who were willing to adopt a child similar to S.C. and 59 approved families in the county who were willing to adopt a child similar to

L.C. Moreover, there were 21 approved families in the county who were willing to adopt both girls.

Timothy remained incarcerated and had not received any visits with his daughters since September.

The section 366.26 hearing was held on April 17, 2012. The parties stipulated to the following testimony by Timothy: "I want to thank the court for the chance to rectify the situation with my daughters. I love them very much, have never stopped loving them, and will always love them. I feel that there is a very strong bond between me and my daughters, and I believe that they want that bond to continue. Therefore, I would ask the court to please not terminate my parental rights and allow me to show the court that I am ready to be a proper father to my daughters. I also would like to thank the current caregivers . . . for taking care of my daughters and I would respectfully ask them that if the court does decide to terminate my parental rights, that they might allow me to play a role, no matter how small, in [S.C.'s and L.C.]'s lives as they grow up. And I will work doubly hard to earn that chance to be part of their lives. Thank you."

The court found that S.C. and L.C. were likely to be adopted and that none of the statutory exceptions to adoption applied. The court terminated parental rights and referred the children to Agency for adoptive placement.

DISCUSSION

Timothy contends that the juvenile court erred by not applying the beneficial parent-child relationship exception to adoption (§ 366.26, subd. (c)(1)(B)(i)). The contention is without merit.

Adoption is the permanent plan that is preferred by the Legislature. (*In re Derek W.* (1999) 73 Cal.App.4th 823, 826.) At the selection and implementation hearing, the juvenile court must terminate parental rights if the court finds that the child is likely to be adopted within a reasonable time, unless one of the statutory exceptions applies. (§ 366.26, subd. (c)(1).) 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." The exception applies only if both prongs are met. The parent bears the burden to establish by a preponderance of the evidence that an exception to the statutory preference for adoption applies. (*In re Lorenzo C.* (1997) 54 Cal.App.4th 1330, 1343-1345.)

Our standard of review is the substantial evidence test. (*In re Autumn H.* (1994) 27 Cal.App.4th 567, 576.) We determine if there is substantial evidence, contradicted or uncontradicted, to support the conclusions of the juvenile court, resolving all conflicts favorably to the prevailing party, and drawing all legitimate inferences to uphold the lower court's ruling. (*In re Brison C.* (2000) 81 Cal.App.4th 1373, 1378-1379.)

The record contains substantial evidence that neither prong of section 366.26, subdivision (c)(1)(B)(i) was met.

Although Timothy had frequent and consistent contact with S.C. and L.C. at the beginning of the case when he initially enrolled in the Incredible Families program, by the end of 2010, Timothy's visitation had become inconsistent. The Incredible Families program terminated Timothy because he had missed too many visits. When he restarted with Incredible Families in February 2011, his attendance did not improve significantly

and the program terminated him again in March. Timothy's attendance was not much better at the visitation center, and as result, in April, he lost the privilege to have visits with his daughters there as well. In June, Timothy resumed visits with S.C. and L.C. at an Agency office. In August, Timothy enrolled in a residential drug program and, in September, he was arrested. Timothy had no visits with the girls after his arrest.

In addition to failing to meet the first prong of section 366.26, subdivision (c)(1)(B)(i) pertaining to visitation, Timothy also failed to satisfy the second prong of the statute—namely, showing that S.C. and L.C. would benefit from continuing their relationship with him. That showing requires more than frequent and loving contact, an emotional bond with the child, pleasant visits or incidental benefit to the child. (*In re Derek W.*, *supra*, 73 Cal.App.4th at p. 827.) To overcome the statutory preference for adoption, a parent must prove that he or she occupies a parental role in the child's life, resulting in a significant, positive emotional attachment of the child to the parent. (*Ibid.*; *In re Elizabeth M.* (1997) 52 Cal.App.4th 318, 324.)

In *In re Autumn H.*, *supra*, 27 Cal.App.4th at page 575, this court explained that to come within the beneficial parent-child relationship exception to adoption, a parent must show that the "relationship 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." (Italics added.) The court must balance "the strength and quality of the . . . 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." (*Ibid.*) The court's balancing test must be performed on a case-by-case basis, taking into account variables, including "[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 pp. 576, 575.) We subsequently affirmed this balancing test, explaining that the standard "reflects the legislative intent that adoption should be ordered unless *exceptional circumstances* exist" (*In re Casey D.* (1999) 70 Cal.App.4th 38, 51, italics added.)

The court's finding that Timothy had not demonstrated that S.C. and L.C. would benefit from continuing their relationship with him is supported by substantial evidence. Timothy had to do more than show an emotional bond with his daughters or that his visits with them were pleasant. (*In re Andrea R.* (1999) 75 Cal.App.4th 1093, 1108.) Timothy had to show that he occupied a parental role in S.C.'s and L.C.'s lives. (*Ibid.*; see also *In re Teneka W.* (1995) 37 Cal.App.4th 721, 728.) Timothy did not make that showing.

We acknowledge that Timothy's initial reunification efforts were significant. Timothy voluntarily started services in July—before the jurisdiction and disposition hearings took place—and he received high marks from his service providers. The Incredible Families program personnel who watched him interact with S.C. and L.C. were impressed with, among other things, how nurturing Timothy was toward his daughters and how responsive he was to their needs. Further, at the beginning of September, the court granted Timothy unsupervised visitation. However, the

unsupervised visitation was short-lived; the court revoked it the following month after Timothy tested positive for marijuana and improperly allowed Jaqueline to visit the girls during one of his unsupervised visits. Timothy's visitation remained supervised for the remainder of the case and his visits stopped altogether in September 2011 after he was arrested. Parents who have not advanced beyond supervised visitation have a difficult time establishing the beneficial parent-child relationship exception. (*In re Casey D.*, *supra*, 70 Cal.App.4th at p. 51.)

By the time of the section 366.26 hearing in April 2012, S.C. and L.C. had been living with their caregivers for 21 months and were bonded to them. Moreover, the girls had blossomed under the stability that the caregivers provided. The girls were well behaved and appeared to be happy and well adjusted in the caregivers' home. The primary caregiver had been proactive with the two girls, noticing that S.C. became upset when Jaqueline or Timothy missed visits and seeking therapy for her. When asked by the social worker where she wanted to live in the whole world, S.C. replied that she wanted to live with the caregiver and L.C.

At the selection and implementation hearing, the juvenile court's foremost concern is the child's interest in stability and permanency. (*In re Beatrice M.* (1994) 29 Cal.App.4th 1411, 1418.) "The purpose of section 366.26 is to select a permanent plan for a child who cannot return home because reunification efforts have failed." (*Ibid.*) In the 12 months allotted to Timothy for reunification, he did not overcome the problems that had led to S.C. and L.C.'s dependency. Further, Timothy did not demonstrate over the course of the dependency that he could assume a parental role, and the once strong

bond between him and the girls had largely dissipated. Timothy did not establish that severing what remained of this bond in favor of "the security and the sense of belonging" that an adoptive family would provide would harm the girls in any way. (*In re Autumn H.*, *supra*, 27 Cal.App.4th at p. 575.) Simply put, the benefits of the relationship between Timothy and the girls did not "outweigh the well-being the [girls] would gain in a permanent home with new, adoptive parents." (*Ibid.*) Dependent children should not be made to wait indefinitely for their father to become an adequate parent. (*In re Marilyn H.* (1993) 5 Cal.4th 295, 310.)

DISPOSITION

The judgment terminating parental rights is affirmed.

AARON, J.

WE CONCUR:

HALLER, Acting P. J.

IRION, J.