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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

In re K.S. et al., a Person Coming Under
the Juvenile Court Law.

SAN DIEGO COUNTY HEALTH AND
HUMAN SERVICES AGENCY,

Plaintiff and Respondent,

v.

K.J. et al.,

Defendants and Appellants.

D066652

(Super. Ct. Nos. SJ12886A-B)

APPEALS from orders of the Superior Court of San Diego County, Randall
White, Judge. Affirmed.

Christina Gabrielidis, under appointment by the Court of Appeal, for Defendant
and Appellant K.J.

The Law Offices of Christopher R. Booth and Christopher R. Booth, under
appointment by the Court of Appeal, for Defendant and Appellant D.S.

Thomas E. Montgomery, County Counsel, John E. Philips, Chief Deputy County Counsel and Erica R. Cortez, Deputy County Counsel, for Plaintiff and Respondent.

K.J. (hereafter the mother), who is the mother of the two minors in this case—twins K.S. (the daughter) and K.S. (the son) (together the children)—and the children's presumptive father, D.S. (the father) (together the parents) appeal juvenile court orders terminating their parental rights to the children. The parents challenge the sufficiency of the evidence to support the court's finding that the beneficial parent-child relationship exception to termination of parental rights and adoption found in Welfare and Institutions Code¹ section 366.26, subdivision (c)(1)(B)(i) (hereafter § 366.26(c)(1)(B)(i)) is inapplicable.² We affirm the orders.

FACTUAL AND PROCEDURAL BACKGROUND

A. March 2013 petitions

The children were born in early January 2011. They were two years of age when they were taken into protective custody in late February 2013.

On March 4, 2013, the San Diego County Health and Human Services Agency (the Agency) filed petitions in the juvenile court on behalf of the children under former

¹ All further statutory references are to the Welfare and Institutions Code.

² The father did not submit a formal appellant's opening brief, but in a letter to this court he asserts that he joins in the mother's arguments and, if this court "reverses the juvenile court judgment terminating mother's parental rights, it must also reverse the judgment terminating [his] parental rights."

subdivision (b) of section 300 (hereafter section 300(b)),³ alleging there was a substantial risk the children would suffer serious physical harm or illness as a result of the failure or inability of the mother to adequately supervise or protect them. Specifically the petitions alleged that, on February 28 of that year, the mother was arrested and incarcerated on charges of willful cruelty to a child because she appeared to be under the influence of a controlled substance and unable to care for the children. The petitions further alleged that during the arrest, one of the children reached for a bottle in the mother's possession that tested presumptively positive for phencyclidine (PCP), and the daughter tested presumptively positive for PCP.

B. Detention Hearing

At the detention hearing held the next day, the court considered the petitions, the Agency's detention report, and the mother's form questionnaire and offer of proof.

The Agency's detention report summarized the events that led to the filing of the petitions. On February 28, 2013, police officers contacted the mother at a restaurant in Chula Vista after they received a report that a female with two small children was acting strangely. As they were speaking to the mother, they noticed she was behaving strangely, she was unsteady on her feet and appeared confused, and a strong chemical odor was emanating from her mouth. The officers evaluated her and determined she was under the influence. While the officers were evaluating the mother, one of the children reached for a small bottle that was on the ground. The bottle was wrapped in a balloon and had the

³ The court dismissed a second count alleged in the petitions under subdivision (g) of section 300.

same chemical smell that was emanating from the mother. The officers tested the contents of the bottle, which tested presumptively positive for PCP. The officers arrested the mother, took the children into protective custody, and transported the children to the Polinsky Children's Center (PCC).

Upon the children's admission to PCC the medical staff tested them for drugs. The son was presumptively negative, but the daughter was presumptively positive for PCP. An electrocardiogram was administered to the daughter after the nursing staff detected an irregular heartbeat and rhythm. Both of the children were wearing dirty clothes and had unkempt hair and dirty skin.

According to the report, the Agency had learned the mother had a criminal history for drug use dating back almost 10 years. During the mother's pregnancy with the children she was on probation and enrolled in the KIVA residential substance abuse treatment program. During an interview the mother admitted she had been drinking alcohol on the day the children were taken into protective custody. During that interview the mother's responses were sometimes incoherent or difficult to understand, and she would remain silent for long periods of time and stare or hide her face in her hands.

In the report the Agency also noted that in a previous child welfare investigation the mother had admitted her drugs of choice were marijuana and PCP. The children's maternal grandmother (the grandmother) stated she lived with the mother and the children in a motel room and believed the mother used PCP.

After considering the evidence, the court found the Agency had made a prima facie showing that the petition allegations were true and ordered the children detained at PCC.

C. Contested April 2013 Adjudication and Disposition Hearing

At the contested adjudication and disposition hearing held in April 2013, the court received in evidence the March 2013 detention report, the Agency's March 2013 jurisdiction and disposition report, three addendum reports, and the father's stipulated testimony.

The Agency's jurisdiction and disposition report recommended that the children be declared dependents of the court and that they remain in out-of-home care. The social worker who prepared the report noted that the mother was hospitalized in September 2012 after she was assaulted by the children's father. The father was arrested. The father admitted he was arrested twice in 2012 for driving under the influence, but he denied he had a drinking problem. He also denied he had committed acts of domestic violence against the mother.

The social worker also reported that the mother admitted she had used PCP since she was in her 20's and she had starting using PCP again six months before the interview for the report. The mother reported, however, that she did not think she needed help concerning her drug use and refused to meet with a substance abuse specialist.

According to the report, the children were placed together in a foster care home. The grandmother told the social worker she desperately wanted the children placed with her because she was very close to them and had been caring for them since they were

born. Regarding visitation, the report indicated the mother visited the children four times while they were at PCC and she had visited and called them daily following their placement in the foster home. The visits were positive and the children appeared to be happy to see her. The social worker also reported that the grandmother told her that the mother had suffered from debilitating depression since she was nine or 10 years old and her depression affected her ability to care for the children because she was often too depressed or "out of it" to provide daily care to the children.

The social worker also reported in the report that the mother admitted she had been treated for depression but she did not like the weight gain she experienced when she took medication, and she sleeps a lot and "shut[s] [herself] away from everything" when she experiences her depressive symptoms.

After considering the evidence, the court sustained the petitions, declared the children dependents of the court, ordered that they be placed in an approved home of a nonrelative extended family member, ordered reunification services for the parents, and set six-month and 12-month review hearings.

D. Contested December 2013 Six-Month Review Hearing

At the contested six-month review hearing held in late December 2013, which the parents and the grandmother attended, the court considered the Agency's jurisdiction and disposition report (discussed, *ante*), the Agency's six-month status review report, and two addendum reports also submitted by the Agency. Neither the mother, the father, nor counsel for the children presented any affirmative evidence.

The Agency's October 24, 2013, six-month status review report recommended that the court terminate reunification services for the parents and set a section 366.26 permanency hearing for the children. The social worker who prepared the report reported that the children were doing well in the care of their grandmother, they had bonded with her, and the grandmother indicated she wanted to adopt the children.

Regarding the mother, the report noted that throughout the six-month reporting period she had failed to maintain a stable home and had sporadic contact with the Agency. The mother was in the KIVA residential substance abuse treatment program from April 8 through April 16 and May 8 through May 19 of 2013. However, in June 2013 the mother failed to show up for a drug test. The mother thereafter had minimal to no contact with Agency until October 2013.

Regarding visitation, the report noted the mother's supervised visitation at the family visitation center was terminated after she failed to appear for three visits. On July 9, 2013, the social worker ended the parents' visits at the family home and required that future visits be at the Agency's Child Welfare Services office because a few days earlier on July 4, during a visit at the family home, the mother attempted to take the children from the grandmother and the police were called. However, the mother failed to visit the children after the July 4 incident.

In the Agency's November 13, 2013 addendum report, the social worker reported that the parents twice had recently violated the restraining order against the father. In late October the parents were seen together walking away from court for at least one city block, and about three weeks later they arrived at court after driving together. The social

worker also reported that when she asked the mother whether she and the father continued to be a couple, the mother did not provide a clear answer and gave the impression she and the father were still in some kind of romantic relationship.

The evidence showed the mother had sporadically participated in dependency drug court since May 2013. The father failed to attend drug tests in July and October 2013, had minimally participated in a domestic violence offender group, and continued to deny he had a drinking problem.

In its November 21, 2013 addendum report, the Agency reported that the mother again failed to submit to a drug test in late October 2013.

After considering the evidence presented, the court ordered that the children continue as dependents of the court, found that the parents had been provided or offered reasonable services but had not made substantive progress with the provisions of the case plan, terminated the parents' reunification services, and set the matter for a section 366.26 selection and implementation hearing.

E. Contested August 2014 Section 366.26 Selection and Implementation Hearing

At the contested section 366.26 hearing held on August 6, 2014—which the Agency's counsel, the social worker, the parents and their counsel, the children's counsel, a maternal aunt, and the grandmother attended—the court considered the Agency's April 1, 2014 section 366.26 permanency planning assessment report, its addendum reports dated July 9 and August 6, 2014, and the social worker's curriculum vitae. The court also considered stipulated testimony submitted by the parents, who were present at the hearing. Counsel for the children did not present any affirmative evidence.

In the Agency's assessment report, the social worker recommended that the court terminate the parents' parental rights and order a permanent plan of adoption. The children, then three and a half years old, remained placed with their grandmother, with whom they had been living since April 2013. Both children were in good health and developmentally on target. The grandmother remained committed to adopting the children and was not interested in a legal guardianship. The social worker reported that the children called their grandmother "grandma," "mom" and "mommy," and the children looked to her to have their daily needs met. The children seemed happy when the grandmother picked them up from their visits with the parents, and as soon as they were told that "grandma" was there to pick them up, the children would look for her through the window.

The social worker opined that both of the children were likely to be adopted. She described them as adorable twin siblings who were healthy, attractive, young, and without significant developmental delays. If the grandmother were unable to adopt them, there were about 40 approved adoptive families interested in adopting children matching their characteristics.

The social worker also noted that the mother did not visit the children between July 2013 and March 2014. When the mother made some effort to visit the children again in March 2014, she continued to cancel visits and arrived late or left early. The mother seemed emotionally distant during her visits with the children. The children did not demonstrate distress before or after the visits with their mother.

The social worker also opined that the relationships that the mother and father had with the children did not rise to the level of a significant parental role. She also opined that those relationships did not outweigh the benefits of adoption. Neither counsel for the parents cross-examined the social worker.

The mother's stipulated testimony was that she loved her children very much and they loved her. She believed the children wanted to be with her and told her so when she would call them. The children called her "mom" and she was working to get into services so that she could be a good mother to them.

The father's stipulated testimony was that he loved his children and did not want the court to terminate his parental rights. He asserted his work schedule made it hard for him to visit the children and he would lose his job if he missed work to visit them. He chose to work so that he could provide financially for the children, and he disputed the grandmother's claim that he had not called the children.

After hearing the arguments of the parties' counsel, the court accepted the recommendations in the Agency's April 1, 2014 section 366.26 report, and found by clear and convincing evidence that it was likely the children would be adopted if parental rights were terminated, that none of the exceptions set forth in section 366.26, subdivision (c)(1)(B) applied, and that none of the circumstances listed in that subdivision which would make termination of parental rights detrimental to the children existed in this case. The court identified the grandmother as the prospective adoptive parent. The parents' timely appeals followed.

DISCUSSION

Mother contends the order terminating her parental rights should be reversed because the court erred when it found the beneficial parent-child relationship exception to adoption set forth in section 366.26(c)(1)(B)(i) did not apply and refused to implement a plan of guardianship. In support of this contention she asserts there is insufficient evidence to support the court's determination that she did not meet her burden of showing she had a beneficial relationship with the children. Although the father has not submitted a formal appellant's opening brief, he asserts in a letter to this court that he joins the mother's arguments advocating guardianship and asserts that, if this court "reverses the juvenile court judgment terminating mother's parental rights, it must also reverse the judgment terminating [his] parental rights." In response the Agency argues the court properly concluded that the mother failed to establish the beneficial parent-child relationship exception to adoption applied. The children's counsel has submitted a letter brief joining the Agency's argument. We conclude substantial evidence supports the court's findings and orders.

A. Applicable Legal Principles

1. Beneficial parent-child relationship exception

When reunification services are terminated, the focus of a dependency proceeding shifts from preserving the family to promoting the best interest of the child, including the child's interest in a stable, permanent placement that allows the caregiver to make a full emotional commitment to the child. (*In re Fernando M.* (2006) 138 Cal.App.4th 529, 534.) At the section 366.26 selection and implementation hearing, the juvenile court has

three options: (1) Terminate parental rights and order adoption as the permanent plan, (2) appoint a legal guardian for the dependent child, or (3) order the child placed in long-term foster care. (*Ibid.*)

"Adoption . . . is the permanent plan preferred by the Legislature." (*In re Autumn H.* (1994) 27 Cal.App.4th 567, 573 (*Autumn H.*.) Thus, "[i]f the child is adoptable, there is a strong preference for adoption over alternative permanency plans." (*In re Michael G.* (2012) 203 Cal.App.4th 580, 588 (*Michael G.*.) All that is required to show a dependent child is adoptable is "clear and convincing evidence of the likelihood that adoption will be realized within a reasonable time." (*In re Zeth S.* (2003) 31 Cal.4th 396, 406; see § 366.26, subd. (c)(1).) The issue of adoptability focuses on the child and whether the child's age, physical condition and emotional health make it difficult to find a person willing to adopt that child. (*In re Zeth S.*, at p. 406; *Michael G.*, *supra*, at p. 589.)

At a section 366.26 hearing, once the juvenile court finds by clear and convincing evidence that the child is likely to be adopted within a reasonable time, the court is required to terminate parental rights and select adoption as the permanent plan unless the parent shows that termination of parental rights would be detrimental to the child under one of the exceptions listed in section 366.26, subdivisions (c)(1)(A) and (c)(1)(B). (*Michael G.*, *supra*, 203 Cal.App.4th at p. 589; *In re Erik P.* (2002) 104 Cal.App.4th 395, 401.)

The beneficial parent-child relationship exception found in section 366.26(c)(1)(B)(i) provides an exception to the adoption preference if the juvenile court finds a "compelling reason" for determining that termination of parental rights would be

"detrimental" to the child because "[t]he parents have maintained regular visitation and contact with the child and the child would *benefit from continuing the relationship.*" (§ 366.26(c)(1)(B)(i), italics added.) This court has interpreted the statutory phrase "benefit from continuing the relationship" to mean that the parent-child 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." (*Autumn H.*, *supra*, 27 Cal.App.4th at p. 575.) We explained in *Autumn H.* that, in determining whether the child would benefit from continuing the parent-child relationship for purposes of the beneficial parent-child relationship exception, the juvenile court "balances the strength and quality of the natural parent/child relationship in a tenuous placement against the security and the sense of belonging a new family would confer. 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.*, italics added; accord, *In re Jason J.* (2009) 175 Cal.App.4th 922, 936.)

To meet his or her burden of establishing the applicability of the beneficial parent-child relationship exception, the parent must show more than frequent and loving contact, an emotional bond with the child, or pleasant visits. (*In re Derek W.* (1999) 73 Cal.App.4th 823, 827 (*Derek W.*)). "Interaction between natural parent and child will always confer some incidental benefit to the child." (*Autumn H.*, *supra*, 27 Cal.App.4th at p. 575.) The beneficial parent-child relationship exception "applies only where the court finds regular visits and contact have continued or developed a significant, positive,

emotional attachment from child to parent." (*Ibid.*) Thus, "[t]he parent must show he or she occupies a parental role in the child's life." (*In re C.F.* (2011) 193 Cal.App.4th 549, 555; *Derek W.*, at p. 827.)

Furthermore, "[a] biological parent who has failed to reunify with an adoptable child may not derail an adoption merely by showing the child would derive *some* benefit from continuing a relationship maintained during periods of visitation with the parent. [Citation.] A child who has been adjudged a dependent of the juvenile court should not be deprived of an adoptive parent when the natural parent has maintained a relationship that may be beneficial to *some* degree, but that does not meet the child's need for a parent." (*In re Angel B.* (2002) 97 Cal.App.4th 454, 466, second italics added; accord, *In re Marcelo B.* (2012) 209 Cal.App.4th 635, 643.)

2. *Standard of review*

On review of the sufficiency of the evidence to support a juvenile court's order terminating parental rights and freeing the parent's child for adoption, "we presume in favor of the order, considering the evidence in the light most favorable to the prevailing party, giving the prevailing party the benefit of every reasonable inference and resolving all conflicts in support of the order." (*Autumn H.*, *supra*, 27 Cal.App.4th at p. 576.) "We must affirm the juvenile court's rejection of any exception to termination of parental rights if the court's findings are supported by substantial evidence." (*Michael G.*, *supra*, 203 Cal.App.4th at p. 589, citing *Autumn H.*, *supra*, 27 Cal.App.4th at p. 576.)

"The appellate court does not reweigh the evidence, evaluate the credibility of witnesses or indulge in inferences contrary to the findings of the trial court. [Citations.]

The substantial evidence standard of review is generally considered the most difficult standard of review to meet, as it should be, because it is not the function of the reviewing court to determine the facts." (*Michael G., supra*, 203 Cal.App.4th at p. 589.)

B. *Analysis*

We begin our analysis by noting, as the Agency correctly points out, that the mother does not contest the court's findings that the children were adoptable. Significantly, the mother also concedes "the children's best interests were not served by living with [her]" because of her "substance abuse issues." As discussed, *ante*, once the juvenile court finds by clear and convincing evidence that the child is likely to be adopted within a reasonable time, as the court did here, the court is required to terminate parental rights and select adoption as the permanent plan unless the parent shows that termination of parental rights would be detrimental to the child under one of the exceptions listed in section 366.26, subdivisions (c)(1)(A) and (c)(1)(B). (*Michael G., supra*, 203 Cal.App.4th at p. 589.)

Here, the mother's principal contention is that the court erred "when it terminated [her] parental rights instead of ordering a plan of guardianship" because (she asserts) the evidence, when examined in the light most favorable to the judgment, "is insufficient to support the determination that [she] did not meet her burden of showing a beneficial relationship" within the meaning of the beneficial parent-child relationship exception to adoption set forth in section 366.26(c)(1)(B)(i). We reject this contention.

"Overcoming the statutory preference for adoption and avoiding the termination of parental rights requires the parent to show both that he or she has maintained regular

visitation with the child and that the child would benefit from continuing the relationship." (*In re Marcelo B.*, *supra*, 209 Cal.App.4th at p. 643, citing § 366.26(c)(1)(B)(i).)

We first conclude that substantial evidence supports the court's determination that the mother did not meet her burden of establishing the first prong of the beneficial parent-child relationship exception; that is, that she "maintained regular visitation and contact" with the children (§ 366.26(c)(1)(B)(i)). In *In re C.F.*, *supra*, 193 Cal.App.4th at page 554, this court explained that "[s]poradic visitation is insufficient to satisfy the first prong of the parent-child relationship exception to adoption."

Here, substantial evidence establishes that the mother's visitation with the children was sporadic after she lost custody of them. The children were taken into protective custody in late February 2013 when the mother was arrested. The children, who were then two years old, were declared dependants of the juvenile court in late April that year. The Agency's October 2013 six-month status review report shows the mother's supervised visitation with the children at the family visitation center was terminated after she failed to appear for at least three visits. That report also shows that on July 9, 2013, the social worker ended the parents' visits at the family home and required that future visits be at the Agency's Child Welfare Services office because a few days earlier on July 4, during a visit at the family home, the mother attempted to take the children from the grandmother and the police were called. Asserting that "[t]he mother and the father have failed to consistently visit the children," the social worker stated in her report that "the mother has not been in the home and has not seen the children since the [July 4, 2013]

incident." In the Agency's April 1, 2014 section 366.26 permanency planning assessment report, the social worker similarly reported that the mother did not visit the children between July 2013 and March 2014. The report also shows that, although the mother made some effort to visit the children again in March 2014 shortly before the contested section 366.26 hearing, she continued to cancel visits and arrived late or left early.

The mother asserts she met her burden of establishing the first prong of the section 366.26(c)(1)(B)(i) beneficial parent-child relationship exception because she "had consistent visitation for the first four months of dependency, and [she] thereafter maintained consistent phone contact." However, as the foregoing substantial evidence shows the mother's visitation with the children was sporadic between the time they were taken into protective custody and the court's termination of parental rights, we conclude the mother has failed to meet her burden of showing the first prong of the beneficial parent-child relationship exception is satisfied. (*In re C.F.*, *supra*, 193 Cal.App.4th at p. 553 ["Sporadic visitation is insufficient to satisfy the first prong of the parent-child relationship exception to adoption."].)

We also conclude that substantial evidence supports the court's determination that the mother did not meet her burden of establishing the second prong of the beneficial parent-child relationship exception; that is, that the children "would benefit from continuing the relationship" with their mother (§ 366.26(c)(1)(B)(i)). As already discussed, this court has interpreted the statutory phrase "benefit from continuing the relationship" to mean that the parent-child 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." (*Autumn H.*, *supra*, 27 Cal.App.4th at p. 575.) We also explained in *Autumn H.* that the beneficial parent-child relationship exception "applies only where the court finds regular visits and contact have continued or developed a *significant, positive, emotional attachment* from child to parent." (*Ibid.*, italics added.) Citing *Autumn H.*, we have also explained that "[t]he parent must show he or she occupies a parental role in the child's life, resulting in significant, positive, emotional attachment between child and parent." (*In re C.F.*, *supra*, 193 Cal.App.4th at p. 555.)

Here, although the mother showed she loves and cares about the children and demonstrated some parenting skills during supervised visitation with them, this was not enough to show she "occupie[d] a parental role in the child[ren]'s li[ves]." (*In re C.F.*, *supra*, 193 Cal.App.4th at p. 555.) The mother essentially disregards substantial evidence showing that, although the children experienced positive supervised visits with her, in the professional opinion of the social worker who prepared the Agency's section 366.26 permanency planning assessment report the relationships the mother and father had with the children did not rise to the level of a significant parental role. The social worker also opined that those relationships did not outweigh the benefits of adoption. As already discussed, the statutory preference for adoption cannot be overcome unless the children would be greatly harmed by the termination of parental rights. (*Autumn H.*, *supra*, 27 Cal.App.4th at p. 575; accord, *In re Jason J.*, *supra*, 175 Cal.App.4th at p. 936.) Here, there is no evidence they would be greatly harmed by the termination of parental rights.

For all of the foregoing reasons, we conclude substantial evidence supports the court's finding that the beneficial parent-child relationship exception to termination of parental rights and adoption found in section 366.26(c)(1)(B)(i) did not apply.

Accordingly, we affirm the orders terminating the parents' parental rights to the children.

DISPOSITION

The orders are affirmed.

NARES, Acting P. J.

WE CONCUR:

McDONALD, J.

McINTYRE, J.