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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

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

RIVERSIDE COUNTY DEPARTMENT
OF PUBLIC SOCIAL SERVICES,

Plaintiff and Respondent,

v.

K.L.,

Defendant and Appellant.

E055086

(Super.Ct.No. RIJ117856)

OPINION

APPEAL from the Superior Court of Riverside County. Matthew C. Perantoni,
Temporary Judge. (Pursuant to Cal. Const., art. VI, § 21.) Affirmed.

Diana W. Prince, under appointment by the Court of Appeal, for Defendant and
Appellant.

Pamela J. Walls, County Counsel, and Anna M. Deckert, Deputy County Counsel,
for Plaintiff and Respondent.

Defendant and appellant K.L. (father) appeals from the trial court's order under Welfare and Institutions Code section 366.26¹ terminating his parental rights to his three children. Father contends the beneficial parental relationship exception to parental rights termination applies in this case and, therefore, the trial court erred in terminating his parental rights. We disagree. Therefore, we will affirm the judgment.

FACTUAL AND PROCEDURAL SUMMARY

The parties do not dispute the pertinent factual and procedural details. Therefore we take most of those details from the parties' briefs.

On April 2, 2009, Riverside County Department of Public Social Services (DPSS) filed a section 300 petition with respect to father's children, then two-year-old W. and one-year-old E., after the children's mother called paramedics because E. purportedly had a seizure. The paramedics responded but found no signs that E. had suffered a seizure or had stopped breathing as mother had reported. E. did have bite marks all over her body that mother's family members later explained had been inflicted by W. Mother's family reported that W.'s behavior was out of control. They also stated that mother is mentally ill and the children cannot safely be left in her care. DPSS removed the children from mother's care and placed them with a maternal aunt.

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

Father and mother had previously received voluntary services from DPSS after W., while in mother's care, climbed up on a counter, found a spray bottle of a laundry cleaning product, and got some of the cleaning product in his eyes. The voluntary services were not successful because father would not accept that he could not safely leave the children with mother, even briefly.

In the jurisdiction and disposition report, the social worker reported that father abused marijuana, and both parents engaged in acts of domestic violence, apparently in front of the children. W. had significant behavior issues that included hitting and biting. Nevertheless both W. and E. appeared to be adjusting to living with their maternal aunt. After finding jurisdiction and ordering services for father, the trial court also authorized unsupervised visits between father and the children.

Father was working and trying to comply with his reunification plan but apparently could not take care of the children on his own. Although father had been told not to allow mother to participate in his unsupervised visits with the children, father took the children to mother's home during one of his visits. When mother gave birth to L., the couple's third child, in March 2010, DPSS filed an amended petition to include L. in the dependency proceeding and placed L. with his siblings in the home of the maternal aunt.

In December 2010, DPSS placed W. and E. with father on a family maintenance plan. Among other things, father was advised not to allow mother to have unauthorized contact with the children. Father continued to have difficulty working and caring for the children on his own; he depended on family members for help. DPSS learned in March

2011, in the course of unannounced visits to father's home, that father and mother were effectively living together and that mother was taking care of the children while father was at work. Father also allowed his cousin, who had recently been released from prison, to live with him and the children. DPSS filed a section 387 supplemental petition to remove the children from father's custody and then detained all three children. At the hearing on that petition, DPSS recommended that the trial court admonish father not to allow mother in the home, but the court declined to follow that recommendation. Instead, the trial court terminated reunification services and set the section 366.26 selection and implementation hearing.

By the time of the section 366.26 hearing on October 24, 2011, L. was living with one maternal aunt, while W. and E. were living with another maternal aunt, both of whom were willing to adopt the children. At the hearing, father objected to adoption as the permanent plan and asked the trial court to consider guardianship because it would offer permanency to the children while also allowing him to retain his parental rights. Father also asked the trial court to continue the hearing so DPSS could complete the process that would enable the court to place all three children with his parents in Washington State.

The trial court declined the continuance request. Instead, the court found the children were adoptable and terminated parental rights. Father appeals from that order.

DISCUSSION

Under section 366.26, subdivision (c)(1), the juvenile court must terminate parental rights if the judge finds by clear and convincing evidence that a child is adoptable unless the court finds a compelling reason for determining that termination would be detrimental to the child under one or more of the exceptions set out in subdivision (c)(1)(B). At issue in this appeal is the exception set out in section 366.26, subdivision (c)(1)(B)(i), which allows the court to “forego adoption and refrain from terminating parental rights only if a parent has maintained regular visitation and contact with the child and the child would benefit from continuing the relationship. To trigger the application of the parental relationship exception, the parent must show the parent-child relationship is sufficiently strong that the child would suffer detriment from its termination. [Citation.] The benefit to the child from continuing such a relationship must also be such 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.” [Citations.] A child who is determined to be a dependent of the juvenile court should not be deprived of an adoptive parent when the natural parent has maintained a relationship that may benefit the child to some degree but does not meet the child’s need for a parent. [Citation.] Adoption, when possible, is the permanent plan preferred by the Legislature if it is likely the child will be adopted. [Citation.]” (*In re Aaliyah R.* (2006) 136 Cal.App.4th 437, 449-450.)

1.

FORFEITURE

Father contends the beneficial parent relationship exception applies in this case. County counsel, in turn, contends father did not expressly object to termination of his parental rights under section 366.26, subdivision (c)(1)(B)(i) in the court below, and therefore he has forfeited the claim on appeal. Father, or more correctly father's attorney, did not cite the code section or use the precise statutory language in asking the trial court not to terminate father's parental rights. However, father's attorney did ask the trial court to order guardianship as the permanent plan so that father could continue to visit his children. We conclude that request is sufficient to preserve the issue for review on appeal.

2.

STANDARD OF REVIEW

Appellate courts do not agree on the standard of review applicable to a juvenile court's finding that the statutory exceptions to adoption do not apply. Some courts have applied the substantial evidence standard, i.e., whether, when viewed in the light most favorable to the judgment, substantial evidence supports the trial court's ruling. (See, e.g., *Autumn H.* (1994) 27 Cal.App.4th 567, 575 [trial court's finding that "no exceptional circumstance exists" to justify application of the exception is challenged under substantial evidence rule].) Others have applied the abuse of discretion standard. (E.g.,

In re Jasmine D. (2000) 78 Cal.App.4th 1339, 1351.) The two standards of review are not mutually exclusive.

When a statute authorizes discretionary action by the trial court based on the existence of specified circumstances, the trial court may only exercise that discretion if the evidence establishes the existence of the pertinent circumstances. In other words, there must be a factual basis for the trial court's exercise of discretion. (See *In re Jasmine D.*, *supra*, 78 Cal.App.4th at p. 1351.) Here, for example, before the trial court could consider whether to apply the exception set out in section 366.26, subdivision (c)(1)(B)(i), there must be evidence to show, first, that father maintained regular contact and visitation with the children and, next, that the children would benefit from continuing that relationship. We review the question of whether the evidence establishes the statutorily required circumstances under the substantial evidence standard. If substantial evidence establishes the required statutory circumstances, we then review the juvenile court's decision whether to rely on the exception under the abuse of discretion standard.

In *In re I.W.* (2009) 180 Cal.App.4th 1517, the court concluded because the burden is on the parent to show there are facts that support application of one of the exceptions that a ruling the exception does not apply is, in effect, a finding that the parent failed to carry his or her burden of proof rather than a question of the sufficiency of the evidence. (*Id.* at p. 1527.) "In the case where the trier of fact has expressly or implicitly concluded that the party with the burden of proof did not carry the burden and that party appeals, it is misleading to characterize the failure-of-proof issue as whether substantial

evidence supports the judgment. This follows because such a characterization is conceptually one that allows an attack on (1) the evidence supporting the party who had no burden of proof, and (2) the trier of fact's unassailable conclusion that the party with the burden did not prove one or more elements of the case [citations]. [¶] Thus, 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. [Citations.] Specifically, the question becomes whether the appellant's evidence was (1) 'uncontradicted and unimpeached' and (2) 'of such a character and weight as to leave no room for a judicial determination that it was insufficient to support a finding.' [Citation.]" (*Id.* at p. 1528.) In contrast, the substantial evidence test applies when the party that did not bear the burden of proof appeals a judgment in favor of the party that did bear the burden of proof and claims that party should not have prevailed at trial because the evidence was insufficient to prove the prevailing party's case. (*Ibid.*) We recognize that *In re I.W.*, *supra*, 180 Cal.App.4th 1517 correctly analyzes the standard of review issues that apply to an appellant's failure of proof in the trial court. Nevertheless, we are of the view that once the parent presents evidence to establish the existence of the statutory circumstances pertinent to an exception to parental rights termination, abuse of discretion is the appropriate standard under which to review a trial court's determination to not apply that statutory exception. (See *In re Jasmine D.*, *supra*, 78 Cal.App.4th 1339.) Section 366.26, subdivision (c)(1) requires the trial court to find a "compelling reason for determining that termination [of parental rights] would be

detrimental to the child” That is “a quintessentially discretionary determination.”

(*In re Jasmine D.*, *supra*, at p. 1351.) Stated otherwise, review of a juvenile court determination that the exception does or does not apply “involves primarily factual matters and a judgment whether the ruling rests on a reasonable basis

[Accordingly,] [b]road deference must be shown to the trial judge. The reviewing court should interfere only “if we find that under all the evidence, viewed most favorably in support of the trial court’s action, no judge could reasonably have made the order that he did.” [Citations.]’ [Citation.]” (*In re Robert L.* (1993) 21 Cal.App.4th 1057, 1067.)

3.

ANALYSIS

It is undisputed that father maintained regular visits and contact with all three children.² Moreover, the two older children were connected to father not only as a result of his regular contact, but also, and perhaps more importantly, because they had lived with him before and during the dependency process.³ L., on the other hand, was born

² DPSS claims that father’s supervised visits with the children were sporadic after the court detained them in March 2011 and set the section 366.26 hearing. In the pertinent DPSS report, dated June 30, 2011, the social worker stated that father’s visits had been “sporadic” because father “will go an entire month without visiting and then show up two weekends in a row.” The report presumably covered only the three months between the hearing in March and the end of June (the date of the report). More significantly, the social worker’s statement is conclusory and incomplete. The social worker should have reported the facts, i.e., the number of times father visited with the children during the period in question.

³ W. lived with father until he was two years six months old, and E. lived with father until she was 18 months old. Both children lived with father for six months (from
[footnote continued on next page]

during the dependency process, and was about 18 months old at the time of the selection and implementation hearing in October 2011.⁴ The issue before us therefore is whether father presented evidence to show the second statutory requirement under the beneficial parental relationship exception, namely, that the benefit to W. and E. from maintaining their relationship with father outweighed the benefit they would receive from the permanency of adoption.

On the issue of benefit to the children, father cites the length of time the children have lived with him, as well as the evidence that W.'s behavior problems improved while he was in father's care. The social worker noted the improvement, and father's use of the skills he acquired in parenting classes, during a home visit that occurred shortly before DPSS removed the children from father in March. Father also points out that after W. was removed from his care, W.'s ability to control his anger deteriorated to the point that "he grabbed two baby geese and drowned them in their small pool. He has also done this with his sister's dolls stating, 'I'm gonna kill you.'"

The above noted evidence cuts both ways. DPSS viewed the deterioration in W.'s behavior as an indication that father had a negative influence on the children. However, in arguing that the juvenile court correctly terminated father's parental rights, DPSS cites

[footnote continued from previous page]

September 2010 until their removal in March 2011). W. was four years old and E. was three years old when DPSS removed them father's care in March 2011.

⁴ Father acknowledges that L. was too young to have been affected by removal from father's care.

facts that support removal of the children from father's custody, i.e., his apparent inability to care for the children while also working. No one disputes that father is unable to care for the children on his own or that he fails to appreciate the risk of harm mother poses to the children and, therefore, he should not have custody and care of the children. Those facts, however, are not necessarily relevant to the issue of whether the children would benefit from continuing their relationship with father. Father apparently tried his best to care for the children and in doing so maintained a parental relationship with them.

Because his attorney did not expressly raise the issue in the trial court, father's attorney did not cite evidence to support application of the beneficial parental relationship exception. Therefore, we cannot say that the evidence presented in the trial court compels a finding that the children would benefit from continuing their relationship with father. In arguing otherwise, father cites *In re S.B.* (2008) 164 Cal.App.4th 289, in which Division One of this court held that the trial court erred in finding the beneficial parental relationship exception did not apply. (*Id.* at p. 301.) But in that case, the father presented evidence at a contested hearing to show that the exception applied. That evidence included the testimony of the case social worker, and of the psychologist who had prepared a bonding study. The social worker acknowledged there would be some detriment to the child resulting from termination of the father's parental rights. The psychologist in turn testified that the bond between the father and child was fairly strong to moderate. The psychologist also described the loving behavior the child exhibited toward her father during the bonding study interview. (*In re S.B.*, *supra*, at p. 295.)

We may reasonably assume that there is “some measure of benefit” in continued contact between a parent and child who have a positive bond and that the child will suffer some negative effects from severance of that bond, but that is not sufficient to establish that the child would be greatly harmed by termination of parental rights. (*In re Jason J.* (2009) 175 Cal.App.4th 922, 937.) In short, father did not meet his burden of establishing an exception to termination of parental rights. (*In re Daisy D.* (2006) 144 Cal.App.4th 287, 291.) Therefore, we cannot say the juvenile court abused its discretion in this case. (*In re Jasmine D., supra*, 78 Cal.App.4th at pp. 1350-1351.)

DISPOSITION

The judgment is affirmed.

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MCKINSTER
J.

We concur:

HOLLENHORST
Acting P.J.
MILLER
J.