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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
FIFTH APPELLATE DISTRICT**

In re LEVI D., a Person Coming Under the  
Juvenile Court Law.

TULARE COUNTY HEALTH AND HUMAN  
SERVICES AGENCY,

Plaintiff and Respondent,

v.

AMANDA D.,

Defendant and Appellant.

F065148

(Super. Ct. No. JJV056920A)

**OPINION**

**THE COURT\***

APPEAL from a judgment of the Superior Court of Tulare County. Charlotte A. Wittig, Commissioner.

Merrill Lee Toole, under appointment by the Court of Appeal, for Defendant and Appellant.

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\* Before Levy, Acting P.J., Gomes, J. and Franson, J.

Kathleen Bales-Lange, County Counsel, John A. Rozum and Amy-Marie Costa, Deputy County Counsel, for Plaintiff and Respondent.

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Amanda D. (mother) appeals from an order terminating parental rights (Welf. & Inst. Code, § 366.26)<sup>1</sup> to her son, Levi D. She claims the juvenile court erred in failing to apply the sibling relationship exception to termination. (§ 366.26, subd. (c)(1)(B)(v).) On review, we disagree and affirm.

### **FACTUAL AND PROCEDURAL HISTORIES**

Dependency jurisdiction first was taken over then six-month-old Levi in August 2003, when mother was arrested for physically abusing him. Mother handled Levi in a “rough manner,” left him home alone for an hour while she went to a neighbor’s house, kept his bedroom in disarray, and she neglected Levi’s hygiene and failed to provide him with adequate medical care. Levi was removed from mother’s custody and she participated in reunification services. In December 2004, Levi successfully transitioned back to mother’s care and custody; dependency jurisdiction was terminated in July 2005. The juvenile court granted mother and Levi’s father, Gary R., joint legal custody, and gave mother sole physical custody.

The current dependency proceedings began in March 2009, when the Tulare County Health and Human Services Agency (Agency) filed a petition alleging then six-year-old Levi and his eight-month-old half-sister, Madison, came within the provisions of section 300, subdivisions (b) and (j). The juvenile court took dependency jurisdiction over the children after finding true allegations that mother’s boyfriend physically abused Levi and mother failed to protect Levi from the abuse. The children were placed together in a foster home and mother was offered reunification services. Mother gave birth to a third child, Allen P., in July 2009, who did not become a dependent. Levi had shown

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<sup>1</sup> Undesignated statutory references are to the Welfare and Institutions Code.

some aggressive tendencies while in foster care, including being physically aggressive with Madison. A social worker reported he was not very tolerant of his siblings. A Court Appointed Special Advocate (CASA) assigned to the case noted that when at one point Levi and Madison were in separate foster homes, Levi seemed indifferent when asked if he missed his sister.

Levi and Madison were returned to mother's custody in December 2009, with family maintenance services. Levi continued to show aggressive tendencies while in the home and would hit Madison, while Madison tried to copy Levi and followed him "like a shadow." Levi was in counseling and was to participate in conjoint therapy with mother. Mother, however, seemed reluctant to participate. The three children lived with mother in a trailer. Mother, however, became overwhelmed with all four of them living in a small space, so she allowed Levi to live with her sister. The social worker approved of the arrangement until mother could find a larger home. In April 2010, however, the aunt's home was found to be inappropriate and Levi moved back in with mother and his siblings.

Thereafter, mother reported having difficulty dealing with Levi's behavior. She was not compliant with taking Levi to therapy or with her own therapy. She believed Levi needed to be on psychotropic medication due to his behavior. Levi tried to burn her with a hot light bulb, and then tried to bite and hit her. Levi told a social worker he was not afraid of being with mother, but he did not want to live there. In September 2010, mother reported to a social worker that she was concerned for the other children's safety as Levi was hearing voices which told him to hurt her and she was unsure she could handle him. The CASA reported that Levi was a good big brother to his half-siblings "most of the time[,] and during one CASA visit, Levi played very well with them, especially Madison.

At an October 2010 review hearing, the juvenile court ordered Levi immediately detained and a section 387 supplemental petition filed. Levi was placed in a foster home,

while Madison remained with mother, who also had custody of Allen, on family maintenance. The juvenile court subsequently found true allegations in the section 387 petition that Levi's prior placement was ineffective to protect him due to mother's inability to meet his needs, as he was exhibiting defiant, out-of-control and violent behaviors, including threatening to kill mother and the other children in the home, yet she failed to attend conjoint therapy with Levi or follow treatment recommendations. The juvenile court removed Levi from mother's custody, terminated her services, denied Levi's father reunification services and set a section 366.26 hearing. The juvenile court ordered two hour weekly supervised visits with mother, with sibling visitation to occur at the same time.

An October 2010 adoptions assessment found Levi was not adoptable at that time, as his mental health status was unclear, and instead recommended a permanent planned living arrangement with a goal of legal guardianship. A great uncle who lived in Texas was being assessed for placement after expressing an interest in him, but he was unable to commit to adoption as he had no relationship with Levi. The assessment reported that Levi was part of a sibling set. His relationship with his siblings was "[a]n ok" one, and while the siblings were raised together, shared common experiences and had "[s]omewhat close" bonds with each other, the assessor did not believe he should remain placed with them.

The section 366.26 hearing was held in March 2011. While Levi told a social worker in February 2011 that he wanted to continue visiting mother and was worried about his siblings, he told the care provider he did not care if he visited mother anymore and would rather stay in his foster home than visit her. During visits, mother did not interact with Levi and told him to care for his younger siblings. Mother ended some visits 40 minutes to an hour early. Levi did not seem to care if the visit was cut short and told mother he would rather be at the foster home watching television. Mother cancelled five visits. The missed and shortened visits did not appear to bother Levi.

The great uncle's placement assessment had been started but not completed. He and the great aunt were interested in providing Levi with permanency by becoming legal guardians, and would even consider adoption. In March 2011, Levi began speaking with his great aunt and uncle by telephone. A second adoptions assessment was completed in March 2011, which found Levi not adoptable because his current care providers were not committed to adoption and he appeared to have acute psychological issues. This assessment stated that Levi was not part of a sibling set, as Madison was in family maintenance with mother and there was a younger sibling who was a non-dependent.

At the March 2011 section 366.26 hearing, the juvenile court identified adoption as the permanent placement goal without termination of parental rights, and ordered the County Adoptions Agency to make efforts to locate an appropriate adoptive family. The juvenile court set another section 366.26 hearing for August 2011, and ordered another assessment. The juvenile court reduced mother's visits with Levi, with sibling visitation to occur at the same time.

By August 2011, the assessment of Levi's great aunt and uncle still had not been completed. The quality of Levi's visits with mother and his siblings, which usually took place at a park, had not changed. While Levi played with his siblings, mother did not engage in activities with the children and tended to direct Levi to get the other children or bring her items for them. The CASA reported that while the children meet with each other and play and run, Levi would end up being the caretaker of the other children and then go off to play on something by himself. At the August 2011 section 366.26 hearing, the juvenile court ordered a permanent plan of long term foster care for Levi with a specific goal of placing him with his relatives once the assessment was completed.

In December 2011, Levi was placed with his great aunt and uncle in Texas. When the social worker who escorted Levi to Texas asked him if he was going to miss his mother, brother and sister, Levi just shrugged his shoulders. Before Levi moved to Texas, mother's visits with Levi continued. While she sat and spoke with him as he

played with toys, she did not sit on the floor and play with him. After his move, Levi told his great aunt and uncle that he did not want to talk with mother on the phone. They agreed, however, to weekly telephone calls. The great aunt and uncle wanted to adopt Levi, who wanted to be adopted by them. A third adoption assessment was completed in January 2012, which found Levi adoptable. The assessment reported that Levi was part of a sibling set, but Levi did not need to be placed with his siblings, and although they were raised together, had significant common experiences and had existing close and strong bonds, the nature of Levi's relationship with his siblings was "[p]ositive, but more of a protector with them."

In February 2012, the juvenile court identified the permanent plan goal as adoption and set a section 366.26 hearing, which was ultimately held on June 1, 2012. Pending the section 366.26 hearing, the juvenile court ordered supervised visits with mother to occur twice per month for one hour if she were to travel to Texas or Levi travel to Tulare County; otherwise, she was allowed to speak with Levi over the telephone once per week. Sibling visitation was to occur at the same time.

In a report prepared for the section 366.26 hearing, the social worker stated that mother had telephone visits with Levi. It appeared to the great aunt and uncle, however, that occasionally Levi did not want to talk to her but did not know how to stop the conversation, and he regressed every time he talked to mother. Levi had telephone contact with his sister and brother; according to the great aunt, he was very happy to be able to talk to them and appeared to have relaxed knowing they were no longer with mother. The great aunt and uncle remained committed to adoption; Levi had become a part of their family, they had grown to love him and they wanted him as their son. The Agency recommended termination of parental rights and a permanent plan of adoption. It further recommended termination of all court-ordered visits, with sibling telephone contact to continue at the discretion of the prospective adoptive parents and the social worker.

A clinical psychologist in Texas assessed Levi in April 2012. She diagnosed him with ADHD, predominantly hyperactive-impulsive type, based on ratings by his great aunt, his academic records and her own observations. Levi's "projective personality measures" suggested he was experiencing significant feelings of helplessness or loss of control to the point suggestive of post-traumatic stress disorder. He admitted he "often worr[ied] about . . . my family." Levi appeared to be a socially isolated or alienated youngster who preferred to retreat to a fantasy world of his own making rather than interact with real people, but no deep-seated oppositional or defiant tendencies were noted. The psychologist "strongly recommended" that Levi be adopted by his great aunt and uncle, who seemed able to provide a safe and wholesome home environment for him.

At the section 366.26 hearing, the court took judicial notice of the entire case file, as well as the reports prepared for the hearing. Mother testified that before Levi moved to Texas, she, Madison and Allen had weekly visitation with Levi. During visits, the kids played and she talked to Levi about "general stuff," such as school and whether he was making friends. Levi played constantly with Madison and Allen. Since Levi moved to Texas, she had weekly telephone contact with him. Levi's siblings, four-year-old Madison and nearly three-year-old Allen, who were no longer in mother's care and were living with her sister, were present during these telephone calls. Some of the calls used a webcam, where Levi could see mother and his siblings.

Mother's attorney asked the juvenile court not to terminate mother's parental rights based on the exceptions to adoption for a beneficial parent/child and sibling relationships. The juvenile court, however, found that mother had not met her burden of establishing that the parent/child relationship exception applied, as permanence for Levi outweighed the extent or nature of the parent/child relationship, or that the sibling relationship exception applied. The juvenile court found by clear and convincing evidence that Levi was likely to be adopted and terminated parental rights.

## **DISCUSSION**

Mother contends there was no substantial evidence to support the juvenile court's rejection of her argument that termination would substantially interfere with Levi's relationship with his siblings. According to her, the evidence showed Levi had a strong bond with his siblings, with whom he had lived most of their lives, and continuing contact was within the best interests of all the siblings. Citing to the fact that a home study had not yet been completed for Levi's great aunt and uncle, Levi's "plethora of special needs," and the great aunt and uncle's own physical problems, she asserts Levi needed ongoing contact with his siblings to calm him and provide him with family support.

Section 366.26, subdivision (c)(1)(B) acknowledges parental rights termination may be detrimental to a dependent child under specifically designated circumstances. In particular, section 366.26, subdivision (c)(1)(B)(v) permits a finding of a detriment in situations where termination would cause a substantial interference with the sibling relationship.

If termination would substantially interfere with the sibling relationship, section 366.26, subdivision (c)(1)(B)(v) lists numerous factors the juvenile court should consider in determining whether the circumstances of any given case warrant the application of the exception. First, a juvenile court must consider the nature and extent of the relationship, including, but not limited to, factors such as 1) whether the child was raised with a sibling in the same home, 2) whether the child shared significant common experiences, or 3) whether the child has existing close and strong bonds with a sibling. If the relationship exhibits some or all of these factors, the juvenile court must then go on to balance any benefit, emotional or otherwise, the child would obtain from ongoing contact with the sibling against the benefit of legal permanence the child would obtain through adoption. (§ 366.26, subd. (c)(1)(B)(v); see *In re L.Y.L.* (2002) 101 Cal.App.4th 942, 949.)

This statutory exception merely permits a court, in *exceptional circumstances*, to exercise its discretion and choose an option other than the norm, which remains adoption.

(*In re Celine R.* (2003) 31 Cal.4th 45, 53.) Once the court determines a child is likely to be adopted, the burden shifts to the parent to show that termination of parental rights would be detrimental under one of the statutory exceptions. (*In re Zachary G.* (1999) 77 Cal.App.4th 799, 809 (*Zachary G.*.)

We are aware of the split of authority concerning the standard of review in this context. (See *In re Bailey J.* (2010) 189 Cal.App.4th 1308, 1314–1315 and *In re K.P.* (2012) 203 Cal.App.4th 614, 621–622 [hybrid combination of substantial evidence and abuse of discretion standards; applying substantial evidence test to determination of the existence of a beneficial sibling relationship and the abuse of discretion test to issue of whether that relationship constitutes a compelling reason for determining that termination would be detrimental to the child]; *In re Autumn H.* (1994) 27 Cal.App.4th 567, 576 [substantial evidence test—“On review of the sufficiency of the evidence, 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”]; *In re Jasmine D.* (2000) 78 Cal.App.4th 1339, 1351 [abuse of discretion test].) Mother argues the substantial evidence standard of review applies, while the Agency asserts review is for abuse of discretion. Our conclusion in this case would be the same under any of these standards.

Levi may have had a bond with his siblings, shared a home with them, and had common experiences with them. To establish the sibling relationship exception, however, mother must establish severing the sibling relationship would cause Levi detriment. (*In re Megan S.* (2002) 104 Cal.App.4th 247, 251 (*Megan S.*.) Here, there is no evidence that Levi would suffer detriment if his relationships with Madison and Allen were severed. Levi’s relationship with them was more of a parent than a brother. Levi, who was five years older than Madison and six years older than Allen, acted as his siblings’ caretaker during visits and would then play by himself. Although mother testified that the three siblings played constantly during visits, the juvenile court was free

to discount this testimony as self-serving and deserving of little weight. Levi was indifferent when visits were cancelled or cut short. After moving to Texas, he developed a positive relationship with his great aunt and uncle, was bonding with them, and wanted to be adopted by them.

Even if Levi would suffer detriment if separated from his siblings, the court may still terminate parental rights if it determines he would benefit more from adoption than by maintaining his sibling relationships. (*Megan S., supra*, 104 Cal.App.4th at p. 252.) Levi's therapist in California stated in reports prepared in January and July 2011, that, for his long term mental and emotional health, it was essential for Levi to be in a stable home environment with nurturing guardians who could provide consistent limits and boundaries. The clinical psychologist in Texas strongly recommended that Levi be adopted by his great aunt and uncle, who seemed to be able to provide a safe and wholesome environment for him. Levi's relatives were willing to adopt him and he wanted to be adopted by them. Given Levi's relationship with his siblings, which was more of a parent/child relationship than that of siblings, and Levi's need for stability and permanence, we cannot conclude that the juvenile court erred in determining that Levi would gain more through adoption than by maintaining his sibling relationships.

#### **DISPOSITION**

The order terminating parental rights is affirmed.