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

In re KENNETH W., a Person Coming  
Under the Juvenile Court Law.

FRESNO COUNTY DEPARTMENT OF  
SOCIAL SERVICES,

Plaintiff and Respondent,

v.

SUSANNE S.,

Defendant and Appellant.

F067683

(Super. Ct. No. 11CEJ300159-1)

**OPINION**

**THE COURT**\*

APPEAL from orders of the Superior Court of Fresno County. Mary Dolas,  
Commissioner.

Roni Keller, under appointment by the Court of Appeal, for Defendant and  
Appellant.

Kevin Briggs, County Counsel, and William G. Smith, Deputy County Counsel,  
for Plaintiff and Respondent.

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

Susanne S. (mother) appeals from an order terminating her parental rights (Welf. & Inst. Code, § 366.26)<sup>1</sup> to her son, Kenneth W. Mother contends she established that termination would be detrimental to Kenneth because of their beneficial parent-child relationship (§ 366.26, subd. (c)(1)(B)(i)). We disagree and will affirm.

### **FACTUAL AND PROCEDURAL BACKGROUND**

Mother and father were married and lived in Selma, but father travelled for his work. On July 5, 2011, police responded to reports of a noisy fight and a crying baby in a San Diego hotel room. When police arrived, they found mother, who was deemed the aggressor, father, who was injured and under the influence of cocaine and/or its metabolites, and one-year-old Kenneth, who was crying hysterically. Both mother and father were arrested and Kenneth was detained.

On July 8, 2011, a juvenile dependency petition was filed pursuant to section 300, subdivision (b), alleging that Kenneth had been exposed to violent confrontations between mother and father. Mother and father were granted separate, supervised visitation. Meanwhile, the paternal grandparents' home in Selma was assessed for suitability. On July 15, 2011, the paternal grandmother picked up Kenneth and took him to her home. On August 1, 2011, the juvenile court sustained the petition and ordered the matter transferred to Fresno County.

On October 11, 2011, mother and father were making moderate progress. They were having separate, unsupervised visits with Kenneth. Mother and father had not yet begun services to address their domestic violence. Father's drug tests were negative.

On November 28, 2011, the juvenile court granted extended, unsupervised visits. But on December 21, 2011, father tested positive for cocaine, and the juvenile court

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

ordered that his visits again be supervised. Unsupervised visits with father were reinstated on February 6, 2012.

The social worker's status report filed on April 16, 2012, stated that Kenneth was doing well with the paternal grandparents. Mother and father continued to live together. When Kenneth was on overnight visits with mother, father would stay at a relative's house. Kenneth was spending two days and one night per week with mother. Mother and father began limited joint visits with Kenneth on April 5, 2012. Father believed liberal joint visits would be detrimental to Kenneth because of mother's continued verbal aggression toward father. Mother and father actively participated in services and reported progress in solving their problems without violence, but they continued having marital problems. Father reported that he sometimes had to leave the home when he and mother could not resolve disagreements civilly. Father believed he was becoming a more assertive and responsible parent, but he had seen little change in mother's verbally and physically aggressive behavior. The social worker concluded mother and father were making progress and visiting consistently with Kenneth, and she recommended that reunification services be continued.

On May 11, 2012, the social worker recommended granting the paternal grandparents de facto parent status. They had expressed concerns regarding mother's verbally aggressive behavior toward them and father, sometimes in the presence of Kenneth. On May 14, 2012, the juvenile court granted them de facto parent status.

On June 8, 2012, father tested positive for cocaine, then failed to test five times and stopped attending his substance abuse treatment. The juvenile court ordered that father's visits again revert to supervised visits.

On September 6, 2012, the juvenile court held a contested 12-month status review hearing. The social worker recommended that mother receive six more months of services but that father's services be terminated. Father testified that he had been unable

to attend many of the required classes because he needed to work to pay for his mortgage and support mother and Kenneth, and he also provided transportation for mother's services. He had been overwhelmed by his many responsibilities. He was willing to leave his home to allow mother and Kenneth to reunify, but he intended to continue to support his family and reunify with them as soon as possible. After hearing father's testimony and the argument of counsel, the court found that mother and father had consistently and regularly visited with Kenneth, that mother had made significant progress, and that father had made moderate progress. The court believed father should be granted continued services if mother was going to receive services. The court ordered continued reunification services for both mother and father, and continued supervised visits for father.

On October 12, 2012, mother was arrested for inflicting corporal injury on father. When police arrived, her speech was slow and slurred, and she repeatedly asked for her pain medication. As a result, her visits with Kenneth also reverted to supervised visits and she was ordered into substance abuse treatment.

On February 6, 2013, the juvenile court held a contested 18-month status review hearing. Father testified that he relapsed in October 2012, using cocaine, methamphetamine, and marijuana. He recognized he had an addiction problem. He had been sober for less than two weeks, but he was doing well in a new program and believed he would succeed. Mother, who failed to appear until late in the hearing, had had several encounters with law enforcement since that last status review hearing and had continued to show aggressive behavior. The court concluded the evidence established that return of Kenneth to either parent would create a substantial risk of detriment to Kenneth's safety, protection, physical and emotional well-being, and that his current placement was necessary and appropriate. The court terminated services for both mother and father.

A hearing was held on May 22, 2013. Both mother and father failed to appear for this hearing. Mother had been missing her visits as well. The juvenile court set the matter for a contested hearing.

On June 26, 2013, mother appeared at the settlement conference and the matter was confirmed for a contested hearing.

On July 3, 2013, a section 366.26 hearing was held. Mother was present, but father did not appear or contest the matter. Mother testified that she opposed adoption by the paternal grandparents because they could not provide the care Kenneth needed; they were too old. Mother said she had a close bond with Kenneth. He would say, "Hey, Mommy," then run to her and give her a hug and kiss. They would cuddle, draw pictures, read books, sing songs, pretend to cook, play blocks, and wrestle. But at the end of his recent visits, Kenneth's personality would change and he would hold onto mother. He would panic and ask to go home with her. He would say he wanted to go with her, not paternal grandmother. He showed sadness and fear of leaving mother. Mother said she believed it would harm Kenneth if her rights were terminated because he would feel rejected. She believed Kenneth would benefit from maintaining his relationship with her because she could teach him what love is supposed to look like and how people are supposed to treat each other when they care for each other. She could nurture and care for him and provide him the attention he needed because she was more active than paternal grandparents. She noted that she was able to direct his behavior until the end of the visits. She believed she would be able to discipline him consistently and appropriately since she had learned the tools to deal with emotional distress.

Mother explained that she was currently in an inpatient substance abuse program and had been sober since June 20, 2013. She placed herself in the facility on June 21, 2013, so she could heal emotionally and become the mother Kenneth needed. She said she did not think anyone else could take better care of him and love him more than she

because she was his mother and she would do whatever she could to fight for him and be the mother she should have been long ago.

On cross-examination, mother explained she had missed visits because paternal grandmother had repeatedly called the police to report seeing mother at the house, and the police arrested her. Paternal grandmother made those calls on the days mother was scheduled to visit. Mother also missed visits because she had difficulty finding transportation. Her memory of missed visits before her sober date, however, was blurry.

Teresa Hicks, a social worker aid, had supervised 10 to 15 of mother's visits with Kenneth. Teresa observed that the visits went well. Kenneth was happy to see mother and enjoyed himself throughout the visits. He would smile, giggle, and cuddle with mother. She played with him and was physically affectionate with him. He did not want to leave her. On cross-examination, Teresa explained that mother sometimes made it more difficult for Kenneth to say goodbye, even though she had been told the importance of easing that transition for him.

Mother's sister, maternal aunt, testified that Kenneth was excited to see mother at the visits. He would run to her and she would pick him up. He would laugh and kiss her. They would interact and play together. But at the end, he would cry and scream. Maternal aunt had witnessed about three visits in 2013.

Tumani Heights, the social worker assigned to Kenneth's case, testified that mother had not maintained regular visitation with Kenneth in recent months; her visitation was inconsistent. Mother was scheduled to visit twice a week for one hour, but she had missed 16 visits since February 2013. She had attended 21 visits in roughly the same period. Her missed visits had a detrimental effect on Kenneth. After the frequent contact he originally had with her, the diminishing contact caused him a lot of anxiety. When he did see her, he was overjoyed, but possibly fearful of when he might see her again. Her failures to appear were disappointments to Kenneth. Tumani believed

mother's missed visits had a negative impact on Kenneth's emotional well-being. Kenneth's therapist recommended that mother be required to check in one hour before visits to avoid Kenneth's disappointment when she failed to show. The therapist also recommended termination of mother's visitation.

Tumani explained that Kenneth had been in the paternal grandparents' care for two of his three years. Social workers had explained to mother the importance of her maintaining visitation and completing her services to reunify with Kenneth. Tumani believed Kenneth deserved permanence and stability, which mother could not provide. Tumani believed that the relationship between mother and Kenneth did not outweigh the benefit of his gaining a permanent home. Mother had not improved the physical aggressiveness and substance abuse that caused Kenneth to become a dependent.

County counsel argued that the parent-child beneficial relationship exception did not apply because mother had failed to maintain regular visitation and contact with Kenneth. Mother initially progressed to liberal visitation, but her choices resulted in the reduction of her visitation to supervised visits twice weekly for one hour. In recent months, mother had missed almost as many visits as she had attended. Mother's failures to show up caused Kenneth great anxiety. County counsel further argued that mother did not play a parental role, even though she and Kenneth loved each other and enjoyed their visits.

Mother's counsel argued that mother did maintain regular and consistent visitation, and that the obvious strong and loving bond between mother and Kenneth made this one of the exceptional cases where severing the relationship would not be beneficial to the child. Counsel argued for legal guardianship so mother and Kenneth could maintain their relationship.

The juvenile court took the matter under submission. At the next hearing, the court waited three hours for mother's arrival, then decided to proceed. The court found

clear and convincing evidence that Kenneth was likely to be adopted, and it concluded that adoption was the appropriate permanent plan. The court found that mother had maintained somewhat regular, although not necessarily consistent, contact with Kenneth. Her visits progressed to unsupervised and even overnight visits, then regressed to less frequent and shorter supervised visits. Neither parent had shown the ability to meet Kenneth's needs or provide for his stability, structure, and permanence. A large portion of Kenneth's short life had been spent with paternal grandparents. And although the contact between mother and Kenneth was enjoyable and pleasant, possibly even emotionally significant, mother had not been able to provide the relationship, care, stability, and protection that is indicative of a parent-child relationship. She had not shown anything resembling the consistent daily care and nurturing that defines a parental relationship. Mother had failed to show that the relationship promoted Kenneth's well-being to such a degree as to outweigh the well-being he would gain in a permanent home. Accordingly, the court found that mother had not met her burden to show that there was a significant beneficial relationship that promoted the well-being of Kenneth; nor had she provided sufficient evidence to show that terminating parental rights would be detrimental to Kenneth. The court concluded mother failed to establish the beneficial relationship exception.

### **DISCUSSION**

Mother contends the juvenile court erred by failing to apply the beneficial parent-child relationship exception to the termination of her parental rights. She argues that although she missed a number of visits, she attended 21 visits in the four months before the hearing, which should constitute regular visitation and contact. She says that she maintained extensive visitation with Kenneth throughout the proceedings. She contends the uncontested evidence established that she and Kenneth were very positively bonded and that Kenneth would benefit from continuing his relationship with her.

“By the time of a section 366.26 hearing, the parent’s interest in reunification is no longer an issue and the child’s interest in a stable and permanent placement is paramount. [Citations.]” (*In re Jasmine D.* (2000) 78 Cal.App.4th 1339, 1348 (*Jasmine D.*)) At a section 366.26 hearing, the juvenile court determines a permanent plan of care for a dependent child. (*In re Celine R.* (2003) 31 Cal.4th 45, 52-53.) Adoption is the permanent plan preferred by the Legislature. (*In re Autumn H.* (1994) 27 Cal.App.4th 567, 573 (*Autumn H.*)) “Because adoption is more secure and permanent than a legal guardianship or long-term foster care, adoption is the Legislature’s first choice for a permanent plan for a dependent minor child who has not been returned to the custody of his or her parents and who is found by the dependency court to be adoptable. [Citations.]” (*In re Scott B.* (2010) 188 Cal.App.4th 452, 469.) “Once the court determines the child is likely to be adopted, the burden shifts to the parent to show that termination of parental rights would be detrimental to the child under one of the exceptions listed in section 366.26, subdivision (c)(1).” (*In re S.B.* (2008) 164 Cal.App.4th 289, 297.) “Because a parent’s claim to such an exception is evaluated in light of the Legislature’s preference for adoption, it is only in exceptional circumstances that a court will choose a permanent plan other than adoption. [Citation.]” (*In re Scott B., supra*, at p. 469.) One such exception is the beneficial parent-child relationship exception in section 366.26, subdivision (c)(1)(B)(i), which involves a two-part test: (1) did the parent maintain regular visitation and contact with the child and (2) would the child benefit from continuing the relationship? “The benefit to the child from continuing such a relationship must ... 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.” [Citation.]” (*In re Aaliyah R.* (2006) 136 Cal.App.4th 437, 449.) “In other words, the 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. [¶] Interaction between natural parent and child will always confer some incidental benefit to the child.... The exception applies only where the court finds regular visits and contact have continued or developed a significant, positive, emotional attachment from child to parent.” (*Autumn H., supra*, 27 Cal.App.4th at p. 575.)

Importantly, “a *parental* relationship is necessary for the exception to apply, not merely a friendly or familiar one. [Citations.] ‘While friendships are important, a child needs at least one parent. Where a biological parent ... is incapable of functioning in that role, the child should be given every opportunity to bond with an individual who will assume the role of a parent.’ [Citation.] Thus, a child should not be deprived of an adoptive parent when the natural parent has maintained a relationship that may be beneficial to some degree but does not meet the child's need for a parent. It would make no sense to forgo adoption in order to preserve parental rights in the absence of a real parental relationship.” (*Jasmine D., supra*, 78 Cal.App.4th at p. 1350.)

“To sum up, when the court has not returned an adoptable child to the parent's custody and has terminated reunification services, adoption becomes the presumptive permanent plan and parental rights should ordinarily be terminated at the section 366.26 hearing. The parent has the burden of proving that termination would be detrimental to the child under section 366.26, subdivision (c)(1)(A). [Citations.] The juvenile court may reject the parent's claim simply by finding that the relationship maintained during visitation does not benefit the child significantly enough to outweigh the strong preference for adoption.” (*Jasmine D., supra*, 78 Cal.App.4th at p. 1350.) “The exception must be examined on a case-by-case basis, taking into account the many

variables which affect a parent/child bond. The 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 are some of the variables which logically affect a parent/child bond." (*Autumn H.*, *supra*, 27 Cal.App.4th at pp. 575-576.) "Because a section 366.26 hearing occurs only after the court has repeatedly found the parent unable to meet the child's needs, it is only in an extraordinary case that preservation of the parent's rights will prevail over the Legislature's preference for adoptive placement." (*Jasmine D.*, *supra*, at p. 1350.)

We review the juvenile court's decision on this issue for abuse of discretion. (*Jasmine D.*, *supra*, 78 Cal.App.4th at p. 1351.)

In this case, mother's visitation was, as the juvenile court put it, somewhat regular. She had missed almost as many visits as she had attended during the last four months. She was not taking advantage of her opportunities to be with Kenneth. Her failures to appear caused him great anxiety, yet she promoted the desperate anguish he felt when they parted. Mother established that Kenneth was affectionate and enjoyed his visits with her, but she did not establish that she fulfilled a parental role or that severing the parent-child relationship would deprive Kenneth of a substantial, positive emotional attachment. Kenneth was removed from mother when he was only one year old and had been out of mother's care for the majority of his life. And the mere fact that mother provided a relationship that may have benefitted Kenneth to some degree is "simply not enough to outweigh the sense of security and belonging an adoptive home would provide." (*In re Helen W.* (2007) 150 Cal.App.4th 71, 81.) Mother failed to resolve her problems with aggression and domestic violence that led to Kenneth's dependency, and she was battling an apparently worsening substance abuse problem. Although the court gave her extra time to resolve these issues, she had taken only very recent steps to demonstrate a minimal effort. She was not meeting Kenneth's need for a parent. Even in light of the

warm affection mother and Kenneth shared, we cannot say the juvenile court abused its discretion by deciding that “[t]he benefit of a stable, permanent adoptive home for [Kenneth] clearly outweighed the benefit of a continued relationship with [mother] ....” (*Jasmine D, supra*, 78 Cal.App.4th at pp. 1351-1352.) “This is not the extraordinary case where an adoption should have been foreclosed by [this] exception ....” (*Id.* at p. 1352.) We agree with the conclusions of the juvenile court.

**DISPOSITION**

The juvenile court’s orders terminating mother’s parental rights are affirmed.