

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SIXTH APPELLATE DISTRICT

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

H037809
(Santa Clara County
Super. Ct. Nos. JD18812, JD18813)

SANTA CLARA COUNTY
DEPARTMENT OF FAMILY AND
CHILDREN'S SERVICES,

Plaintiff and Respondent,

v.

C.S., et al.,

Defendants and Appellants.

The parents of dependent children O.S. and D.S. ("the children"), mother M.G. and presumed father C.S. ("father"), appeal from the dependency order terminating their parental rights pursuant to Welfare and Institutions Code section 366.26.¹ The challenged order does not apply to the children's older half-siblings M.G. and A.G.²

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

² To avoid confusion, further references to M.G. are to the children's half-sibling and not to mother. This opinion does not recite all the dependency history for the half-siblings who are unrelated to father.

Mother principally argues that the parent-child relationship and the sibling relationship exceptions precluded the court from terminating her parental rights as to O.S. and D.S. Father also argues that the parent-child relationship exception was established. They both argue that legal guardianship would be the most appropriate choice. Each parent joins in the arguments of the other parent. (See Cal. Rules of Court, rule 8.200(a)(5).) They both assert that, if this court reverses the judgment as to one parent, it must reverse the judgment as to the other parent. (See *In re DeJohn B.* (2000) 84 Cal.App.4th 100, 110-111; Cal. Rules of Court, rule 5.725(a)(2).)

We find no error and affirm the juvenile court's order terminating parental rights.

I

Procedural History

On March 12, 2008, the Santa Clara County Department of Family and Children's Services ("Department" or DFCS) filed dependency petitions on behalf of O.S. and D.S. pursuant to section 300, subdivision (b) (failure to protect). The court found C.S. was the presumed father of O.S. and D.S.

The petitions were amended a number of times. The latest petitions, filed April 9, 2008, alleged jurisdiction under section 300, subdivision (j), (abuse of sibling) as well as under section 300, subdivision (b). They alleged the following. Mother has a history of methamphetamine use, she had signed a voluntary supervision agreement, and she was not participating in substance abuse treatment or parent education classes and not regularly drug testing as required by her case plan. On January 11, 2008, she had left the House on the Hill (HOH) program without completing it and against the advice of its staff and she had not accessed any further drug treatment. Father had admitted "using marijuana daily for chronic back pain, which negatively impacts his ability to care for the children." There was a history of domestic violence between the parents.

The following facts were also alleged. M.G. and A.G. had been exhibiting sexualized behavior in foster care. D.S. (11 months old), O.S. (two years old), A.G. (three years old) and M.G. (five years old) had been placed into protective custody. On March 12, 2008, mother admitted that she had left the four children in the care of their paternal uncle to smoke methamphetamine with her friends. On March 13, 2008, M.G. had reported that the uncle had touched his penis. On March 18, 2008, M.G. disclosed that the uncle had touched his "private parts" and, in addition, M.G. had seen the uncle touch A.G.'s "private parts."

At the time of the Jurisdiction Report, dated March 27, 2008, the children and their older half-siblings M.G. and A.G. were residing in foster homes. The report provided prior child welfare history. In October 2006, an anonymous referral alleged that there was drug activity in the home where mother was living with the two older children and crystal methamphetamine was being used. Another child, nine-month-old O.S., was allegedly living with her father. The emergency response social worker was not able to locate the family.

According to the report, a March 2007 referral alleged that mother, who was then pregnant with her fourth child, had used methamphetamine a few days before going to the hospital. In April 2007, mother signed an agreement for voluntary family maintenance. After D.S. was born, a referral by Kaiser Hospital alleged that mother had tested positive for methamphetamine twice in March 2007 and she had tested positive for alcohol once in April 2007.

The Jurisdiction Report indicated that in September 2007, the San Jose Police Department responded to a domestic violence call and placed mother's four children into protective custody due to general neglect, apparently based on their living conditions. An emergency response social worker also responded. Mother subsequently signed a voluntary placement agreement that allowed mother's children to be placed in foster care

while mother and father obtained safe and suitable housing. Both mother and father subsequently signed informal supervision agreements, which ended under their terms on March 28, 2008.

According to the Jurisdiction Report, in January 2008, the Santa Clara County Sheriff's Department requested the DFCS to respond to HOH, where mother had been residing with D.S. since December 21, 2007, because mother was leaving the program with D.S. against the advice of staff. Mother's counselor at HOH told the emergency response social worker who responded to the scene that she believed mother was leaving to use drugs.

The report further disclosed that, in late February 2008, the Department received a referral from the foster mother of O.S. and her two half-siblings that half-sibling M.G. was acting out sexually toward his siblings and their foster mother. Half-sibling M.G. had admitted touching A.G. and the foster mother.

An Addendum Report, dated April 9, 2008, provided additional information regarding the September 2007 incident and prior police responses to reported incidents at that residence. As to the September 2007 incident, mother, father, and the four children had been living in dirty conditions in a garage, which had an uncarpeted concrete floor, no bathroom, and only a small portable heater and a small portable refrigerator, and medications in the garage were within easy reach of the children. The four children were placed into protective custody. In addition, it was reported that father had admitted smoking marijuana every day to help him sleep and ease chronic back pain and provided a valid cannabis card.

A contested hearing was held on the dependency petitions. On April 10, 2008, the juvenile court found the allegations of the dependency petitions filed April 9, 2008 as amended were true and sustained the petitions.

The Disposition Report indicated that mother had been again admitted to HOH on April 17, 2008 and O.S. and D.S. had been placed in her care at HOH shortly thereafter. Mother had reported that methamphetamine was her drug of choice and she had last used it on April 15, 2008.

The juvenile court adjudged the children to be dependent children of the court. It ordered the children placed with their mother subject to the Department's supervision on the condition that the mother and children reside at HOH. The court also adjudged the children's two older half-siblings, M.G. and A.G., over whom it had also taken jurisdiction, to be dependent children and ordered them continued under the Department's care, custody and control for placement in a foster home.

On September 8, 2008, the Department filed subsequent petitions under section 342. They alleged dependency jurisdiction pursuant to section 300, subdivisions (b) and (j), and stated that father sexually molested M.G. and mother failed to protect M.G. from sexual abuse, remove him from the situation, report the abuse to the authorities, or seek therapy for him.

A Jurisdiction/Disposition Report, dated October 6, 2008, recommended that the section 342 petitions be sustained. It recommended that mother continue to receive family maintenance services for O.S. and D.S. and her case plan include a sexual abuse support group and that father continue to receive family reunification services and his case plan include sexual abuse treatment. It reported that the children were still placed with mother at HOH. Father had visited them regularly, behaved appropriately, engaged them in play, and was "very loving with his children." M.G. and A.G. were in separate foster homes.

A Status Review Report, dated November 19, 2008, for the sixth month review hearing recommended continued family maintenance services to mother and continued family reunification services to father with respect to O.S. and D.S. Following M.G.'s

disclosure that he had been molested by father, father's visits with O.S. and D.S. had been supervised. A.G.'s foster mother had then reported that A.G. said, "[C.] touched my private" and "My mom told me not to tell." M.G. and A.G. continued in separate foster placements.

An Addendum Report, dated January 27, 2009, for the jurisdictional/dispositional hearing indicated that M.G. and A.G. had been interviewed by an investigating detective. M.G. stated that father had touched his penis and A.G. disclosed that father had touched her vagina while his penis was exposed. The report indicated that a further section 342 petition would be filed on behalf of A.G. The matter was not being criminally prosecuted.

A Status Review Report, dated April 16, 2009, for the 12 month review indicated that mother had been discharged from HOH in October 2008 and moved with the children to a Therapeutic Housing Unit (THU). But mother had several compliance problems while at the THU and she had left abruptly in the night without notice in January 2009. She had moved with the children into her uncle's home. The report detailed the extent of parents' case plan compliance. Father had missed a number of visits with the children but the quality of those attended had been "excellent" and he was "loving, attentive and caring" with the children. The recommendation was for father to continue receiving family reunification services and mother to continue receiving family maintenance services with respect to O.S. and D.S. M.G. and A.G. had been living together in the same foster home since November 2008.

An Addendum Report, dated April 27, 2009, for the section 342 hearing indicated that mother had maintained O.S. and D.S. in her care. Father had repeatedly denied sexually abusing the children's half-siblings, he had missed four drug tests, and he had not complied with the social worker's recommendations for treatment. The report recommended that father continue to receive family reunification services and mother

continue to receive family maintenance services with respect to O.S. and D.S. M.G. and A.G. were still placed together.

On May 1, 2009, the juvenile court found the section 342 petition's allegations were true.

An Addendum Report, dated May 18, 2009, reported on the parents' progress and deficiencies with respect to their case plans.

In May 2009, the court accepted a written waiver of reunification services with regard to O.S. and D.S. from father and ordered mother to continue receiving family maintenance services with regard to the children. It nevertheless ordered father to complete a sexual abuse treatment program. Father was allowed weekly, supervised visits with O.S. and D.S. but contact with their half-siblings was prohibited.

A Status Review Report, dated September 10, 2009, for the 18 month review hearing stated that mother had relapsed on July 17, 2009 and voluntarily entered HOH on July 27, 2009. D.S. was living with mother; O.S. was in the care of mother's uncle. The plan was for O.S. to join mother when a bed for her became available. The report recommended that mother continue to receive family maintenance services as to O.S. and D.S. but family reunification services as to M.G. and A.G. be terminated. M.G. and A.G. were still placed together in the same foster home.

In January 2010, the Department filed supplemental petitions under section 387 on behalf of the children. On January 15, 2010, it filed first-amended petitions, which alleged the following facts. Mother had relapsed into substance abuse and admitted using marijuana on January 2, 2010 and methamphetamine on January 9, 2010. On January 11, 2010, she tested positive for methamphetamine. The children had been placed in protective custody. Mother was failing to participate in and fully comply with court-ordered programs and drug testing. The petitions recommended foster home placement.

The Jurisdiction/Disposition Report on the supplemental petitions, dated February 10, 2010, indicated that O.S. and D.S. had been placed in an emergency shelter home since January 13, 2010. The children's visits with the parents had "gone very well" and "[t]he children were happy to see their parents and enjoyed their company." The report discussed serious issues with regard to both parents. It acknowledged that the parents "love their children very much and are highly motivated to do services in order to reunify" but father had asserted he would not participate in services if his case plan included a sexual abuse treatment program. The report stated that the children were "very attached to their parents." The report recommended that both parents receive family reunification services with regard to the children.

In February 2010, the court appointed a child advocate for O.S. and D.S.

On March 1, 2010, the court found the allegations of the January 15, 2010 supplemental petitions true. The court ordered the children to continue under the Department's care, custody and control in a foster home. It ordered services for the parents and supervised visitation for the children's parents and half-siblings.

In the child advocate's report to the court, filed April 9, 2010, she stated that "[t]he children are visiting weekly with their half siblings" and "[s]iblings visits should remain the same." According to the advocate, the children were "having regular supervised visits with the mother, father, and half siblings" and those visits were "good for the children" and "should continue." But she believed that "[i]t would not be beneficial for [the children] to be placed with their half siblings." She stated: "The children seem closely bonded to their mother. They are very excited to visit with her. [O.S.] does not bring up her half siblings on her own, but we did draw them in a picture of a house." As to the foster parents, she reported: "The foster parents seem loving and very understanding of the children. The children are well cared for and speak affectionately of their foster parents."

An Interim Review Report, dated April 15, 2010, stated that the children had "adjusted very well at the foster home and look to their foster parents for support and comfort." It also reported that the foster parents "love the children and are committed to adopting them if the parents are not able to reunify."

By order filed May 18, 2010, the court granted the social worker's request that the court remove the requirements of random drug testing and a domestic violence assessment from father's case plan.

An Interim Review Report, dated May 27, 2010, indicated that mother had relapsed into substance abuse, she had been discharged from the THU and the Blossoms Outpatient Program, and her overall functioning was deteriorating. Father, on the other hand, was continuing to make steady progress in his case plan but he continued to adamantly deny sexually abusing the children's half-siblings.

The child advocate's report, filed August 19, 2010, stated: "The children seem bonded with their biological mother and biological family. [O.S. and D.S.] know which days are visitation days and look forward to these days." The advocate continued to recommend that O.S. and D.S. not be placed with their half siblings and supervised visits with their parents and half-siblings, which appeared to be good for the children, continue. She reported that the foster parents seemed "loving and very understanding of the children" and the children were "well cared for" and spoke "affectionately of their foster parents."

A Status Review Report, dated August 26, 2010, reported that the children continued to reside at "the confidential FFA home," where they had been since January 13, 2010. They had not been placed with the older half-siblings because of the half-siblings' sexually inappropriate touching of O.S. and bullying of the children. Mother had failed to follow her case plan, she had relapsed into using methamphetamine in May 2010, and she had been terminated from all services due to noncompliance. The

social worker recommended family reunification services for mother be terminated. In contrast, father was making significant efforts and progress in his case plan. The social worker had observed that the children were "very attached" to father and their interaction was "mutually genuine, relaxed and affectionate." She recommended that family reunification services be continued for father and father's case plan require him to complete a sexual abuse treatment program and attend co-dependency meetings.

An Addendum Report, dated August 26, 2010, reported that, during an unsupervised visit between father and the children authorized by the social worker, father had allowed the mother to join the visit even though this was clearly forbidden. The requirement of supervision was reinstated for father's future visits with the children. The social worker raised her concerns regarding father's co-dependent relationship with mother and recommended that parents have separate visits with the children and father attend co-dependency meetings a minimum of twice a week.

Another Addendum Report, dated September 16, 2010, disclosed that mother had entered an inpatient treatment program but she had left after only a week. She was not participating in her case plan. The social worker again recommended termination of family reunification services to mother and continuation of services to father with respect to O.S. and D.S. She again recommended that father attend co-dependency meetings at least twice a week.

The court followed the social worker's recommendations in its September 16, 2010 orders, including termination of services to mother.

An Interim Review Report, dated November 10, 2010, reported that father "interacts with the children appropriately and affectionately." The previous recommendations concerning father were unchanged.

The child advocate's report, filed January 26, 2011, was substantially similar to the prior reports with respect to the children's bonding with mother and family,

recommendations regarding visitation, and the children's relationship with their foster parents. It added with respect to visitation that the children "adjust well upon returning to their foster home."

A Status Review Report, dated February 2, 2011, recommended that the court terminate family reunification services to father as well and set a section 366.26 hearing. Although father had completed most of his case plan, consistently visited the children, and developed a genuine and loving parent-child relationship, the social worker found that three risk factors outweighed those positive factors. First, father still lacked empathy and insight into the child sexual abuse. Father continued to defend his brother even though his brother had admitted molestation and to deny his own sexual wrongdoing. Second, father placed mother's interests over the children's interests and advocated for mother. Third, despite claiming he had not been in contact with mother, the social worker's observations indicated that claim was untrue and suggested that father was trying to hide a continuing, co-dependent relationship with mother. She indicated that father had not made sufficient progress to allow him to visit with the children without supervision and concluded the children would be at risk if returned to father.

An Addendum Report, dated June 13, 2011, indicated that father was no longer participating in his case plan but he was consistently visiting the children. It was the social worker's opinion that the children would very likely be exposed to mother's inconsistency and instability due to drug abuse and relapse if they were returned to father.

On June 13, 2011, the court terminated family reunification services to father and set a section 366.26 hearing.

The child advocate's report, dated October 5, 2011, disclosed substantially the same information as her previous reports with regard to visitation but reflected that sibling visits had decreased to "bi-weekly." It recognized that the children seemed

"closely bonded with their mother and father" and continued to report the children's positive relationship with their foster parents.

The 366.26 WIC Report, dated October 5, 2011, and an Addendum Report, dated November 17, 2011, were filed on November 17, 2011. Following the contested section 366.26 hearing on November 17, 2011, the court terminated the parental rights of mother and father and ordered adoption as the permanent plan.

Mother and father each appeal from the order terminating parental rights.

II

Section 366.26 Hearing

At the section 366.26 hearing held on November 17, 2011, the juvenile court indicated that it had read and considered the "366.26 WIC Report," dated October 5, 2011, the Addendum Report, dated November 17, 2011, and the attachments to those reports.

The "366.26 WIC Report" stated that the children, then ages five and four, had been removed in January 2010 and they had resided in the same foster home since January 13, 2010. O.S. had started Kindergarten in fall 2011. Both children had adjusted to their foster home, they had grown attached to their foster parents, and they looked to their foster parents, who loved them very much, for guidance and comfort.

The report indicated that both parents had maintained contact with the children through supervised visits. Father's weekly, two-hour visits had gone well enough to allow an unsupervised visit on August 17, 2010, but father had allowed the mother, who father knew had an extended history of substance abuse and was an active drug user, to join the visit in violation of court order. Further visitation remained under supervision. During his subsequent visits, the father was "appropriate, affectionate and nurturing towards the children" and their interaction was "mutually genuine, relaxed and affectionate." But father was ineffective in disciplining the children.

The report stated that mother had visited the children, together with their older half-siblings, once a week for two hours until January 2011. Based on mother's problematic behavior in January 2011, the visits were decreased to twice a month beginning in February 2011. After mother subsequently had problems with the EMQ staff and refused to visit the children at the EMQ location, the location of the visits was changed. The case social worker began supervising mother's visits beginning in about May or June 2011. According to the report, the mother was, for the most part, appropriate and affectionate during the visits. The children were "happy to see mother and half-siblings" and had "a lot of fun during [the] visits."

According to the report, the children were clearly adoptable and their foster parents were the prospective adoptive parents. The foster parents recognized the strong familial relationship between the biological parents and the children and the foster parents were open to continued visits between the children and the biological parents or other family members if appropriate and in the children's best interest.

The social worker stated in her report that there would be "no detriment to the children in terminating parental rights." The children were as attached to their foster parents as they were to their biological parents and, although they looked forward to and enjoyed parental visits, the children were "not distressed or distraught when the visits did not occur due to [a] conflicted schedule or cancellation." When O.S. learned that her parents could not take care of her, she "quickly turned to the foster mother for security and comfort."

The social worker recommended the termination of both parents' parental rights and implementation of a permanent plan of adoption.

The Addendum Report, dated November 17, 2011, recounted the referral history, which involved multiple referrals, beginning in October 2006.

In March 2008, the children and their half-siblings were placed into protective custody because of the risk of sexual abuse, the parents' failure to protect, and parental substance abuse. M.G. reported that father's younger brother had sexually touched him and A.G. Their foster mother reported that M.G. had touched A.G.'s and O.S.'s "private areas" over their clothes on several occasions and that A.G. had inserted her big toe into O.S.'s vagina.

Mother entered HOH for the second time in April 2008, O.S. and D.S. were placed with her, mother received family maintenance services, and father received family reunification services. Both of the children's half-siblings reported that father had sexually molested them and a sexual abuse treatment program was added to his case plan.

The Addendum Report stated that in January 2011, O.S. and D.S. were removed from their mother's care and placed into protective custody because mother relapsed with methamphetamine and failed to comply with her case plan. Both parents were offered family reunification services as to the children. Mother's services were terminated on September 16, 2010. Father's services were terminated on June 13, 2011.

In the Addendum Report, the social worker acknowledged that the parents had consistently visited the children, the children had looked forward to the visits, and there was "genuine love and affection between the parents and children" but the social worker observed that both parents continue to struggle with many challenges. Mother continued to struggle with years of substance abuse and relapse and she had failed to address the issue of sexual abuse. Father had struggled with asserting boundaries with the mother and putting the children's best interest first and he continued to be in denial with regard to the child sexual molestation. According to the foster mother, although they were disappointed when their parents missed their visits, neither child looked sad or in distress and they got over their disappointment quickly.

At the section 366.26 hearing, the DFCS called social worker Shi-ning Liang to testify. The court admitted the social worker's curriculum vitae into evidence. It recognized her as an expert in permanent planning for dependent children.

Counsel for the parents, children and DFCS stipulated that the children were adoptable. The court found by clear and convincing evidence based upon the reports and the stipulation that each child was adoptable.

Liang testified that she had been supervising mother's visits since May 2011 and father's visits since the beginning. Each visit was two hours long; mother visited twice a month and father visited weekly. Based on her observations, she stated that the children love their mother, showed her genuine affection, enjoyed the visits and had a great time visiting with their mother, their siblings, and other family members or relatives.

Liang acknowledged that the children had been in mother's care with family maintenance services since the case began in 2008 until their removal in January 2010. Since being removed from her care, the children had been in foster care with their current foster parents. Until January 2011, mother visited with the children about once a week. In January 2011, mother's visits with the children were reduced to two hours twice per month. During the visits, the children were happy and enjoyed the time with their mother and siblings.

As to father, Liang testified that he had been very consistent in visiting the children and he had been nurturing during the majority of his supervised visits. In her opinion, father loves and cares for the children and, in general, appropriately interacts with them. He plays with them and reads books to them. The children had a good relationship with father, looked forward to his visits, and enjoyed his attention. Liang stated that the children did not seem sad at the end of their visits with father. But she acknowledged that O.S. had said that she wanted to live with father at some point.

Liang distinguished the relationship of the children with their mother from their relationship with their foster parents. She indicated that, while they have fun with their mother, the children "look up to their foster parents for support, for guidance, [and] for reassurance." She testified: "The foster parents are the parental figures to them. When they are sad they look to the foster parents for support and comfort." She stated that the children "seek closeness and affection with the foster parents." Over the past two years, the children had not shown signs of detriment when they did not see their parents.

She acknowledged that the children wanted to return home, but explained that it was very common for all children at this stage and it was "their magical thinking" to believe they could return home. She testified that mother "continues to struggle with substance abuse and lack of insight into the child molestation" and father "continues to struggle with the codependent relationship with mother and [is] not able to understand the significance of child sexual abuse." It was Liang's determination that the children would not suffer emotionally, physically, or mentally if the parental rights are terminated.

Liang testified that in most cases children have love and affection for their parents but are bonded to their caregivers who provide them daily support and meet their fundamental needs. In her opinion, the children were bonded to only their foster parents. She did not believe that having a good time with a parent equals bonding. She indicated that the children's relationships with their parents were not "bonding" relationships because a "true bond" is a strong relationship that involves providing daily support and meeting their needs.

Liang acknowledged, however, that O.S burst into tears and said she wanted to go home with mommy when told on September 11, 2011 that she would not be returning to her mother's care. When the social worker told D.S., he had a similar but less extreme reaction. O.S. had also said, four to six times during various visits supervised by Liang, that she wanted to return home.

After the September 11, 2011 conversation, O.S. started making peace with the idea that she was going to live in the foster home. Liang conceded, however, that on October 4, 2011, O.S.'s wish that she could live with her mother, father, D.S. and her half-siblings had been written in a book. After the September 11, 2011 conversation with D.S., D.S. told his foster mother that he was going to live with her and his foster father. Even prior to that conversation, D.S. wanted the foster parents to call him "son" and he called the foster mother "mom."

Liang reported that the children saw their older half-siblings twice per month. She acknowledged that the children enjoyed those visits. She agreed that it was beneficial for the children to continue to have a relationship with those half-siblings.

Liang reported that the foster parents had initially told her that they did not want the children to be completely cut off from the biological parents and consequently they wanted to be the children's guardians but, after further discussions, they had ultimately decided they wanted to adopt them. Liang indicated that the children's foster parents were committed to allowing visits with their half-siblings and, if appropriate, with the parents. Liang had confidence that the foster parents would fulfill that commitment. Liang acknowledged that A.G.'s placement was changing and she could not guarantee that her future caregivers would support her relationships with O.S. and D.S.

Liang reported that the children had lived with their half-siblings for a very short period, perhaps three or four months in 2007. In her opinion, the children would not suffer harm if they were deprived of a relationship with their half-siblings as a result of adoption. She made clear that her recommendation for adoption would not change even if the foster parents were unwilling to facilitate visits with the parents because "permanency is more important than the children visiting their parents on a regular basis."

Liang described the benefits of adoption: "Adoption gives the children a sense of belongingness, a sense of permanency, and a sense of security. It gives them a sense that they are wanted, that they are loved, that someone wants them and loves them enough to be responsible for them." She contrasted adoption with long-term foster care and long-term guardianship, which terminate and do not provide a lifelong connection. A legal guardianship ends when a child turns 18 years of age and foster parents can terminate long-term foster care at any time by a seven-day notice.

III

Discussion

A. Statutory Preference for Adoption and Termination of Parental Rights

" 'Once reunification services are ordered terminated, the focus shifts to the needs of the child for permanency and stability.' (*In re Marilyn H.* [(1993) 5 Cal.4th 295,] 309) 'A section 366.26 hearing . . . is a hearing specifically designed to select and implement a permanent plan for the child.' (*Id.* at p. 304) It is designed to protect children's 'compelling rights . . . to have a placement that is stable, permanent, and that allows the caretaker to make a full emotional commitment to the child.' (*Id.* at p. 306)" (*In re Celine R.* (2003) 31 Cal.4th 45, 52-53.)

At the section 366.26 stage of dependency proceedings, the "Legislature has made adoption the preferred choice. (Welf. & Inst.Code, § 366.26, subds. (b), (c).)" (*In re Celine R., supra*, 31 Cal.4th at p. 49, fn. omitted.) Section 366.26, subdivision (c), provides in pertinent part: "If the court determines, based on the assessment provided as ordered under [applicable statute], and any other relevant evidence, by a clear and convincing standard, that it is likely the child will be adopted, the court *shall* terminate parental rights and order the child placed for adoption." (Italics added.)

"If it is likely the child will be adopted, the court must choose that option—and as a result terminate the natural parents' parental rights—unless it 'finds a compelling reason

for determining that termination would be detrimental to the child due to one or more' of specified circumstances. (§ 366.26, subd. (c)(1).)" (*In re Celine R.*, *supra*, 31 Cal.4th at p. 49.) "The specified statutory circumstances—actually, *exceptions* to the general rule that the court must choose adoption where possible—'must be considered in view of the legislative preference for adoption when reunification efforts have failed.' (*In re Jasmine D.*, *supra*, 78 Cal.App.4th at p. 1348.) At this stage of the dependency proceedings, 'it becomes inimical to the interests of the minor to heavily burden efforts to place the child in a permanent alternative home.' (*Cynthia D. v. Superior Court*, *supra*, 5 Cal.4th at p. 256.) The statutory exceptions merely permit the court, *in exceptional circumstances* (*In re Jasmine D.*, *supra*, at pp. 1348–1349), to choose an option other than the norm, which remains adoption." (*Id.* at p. 53.)

"After the parent has failed to reunify and the court has found the child likely to be adopted, it is the parent's burden to show exceptional circumstances exist. [Citation.]" (*In re Autumn H.* (1994) 27 Cal.App.4th 567, 574; see Evid. Code, §§ 110, 115, 190, 550.)

B. Parent-Child Relationship Exception

1. Nature of Exception

If the court find a child is likely to be adopted, an exception to termination of parental rights exists if "[t]he court finds a compelling reason for determining that termination 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, subd. (c)(1)(B)(i).)

To establish this parent-child relationship exception, a parent must show that "regular visits and contact have continued or developed a significant, positive, emotional attachment from child to parent." (*In re Autumn H.*, *supra*, 27 Cal.App.4th at p. 575.) But evidence of a beneficial relationship is not enough to establish the exception because

"[i]nteraction between natural parent and child will always confer some incidental benefit to the child." (*Ibid.*) A parent must additionally prove 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." (*Ibid.*) "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." (*Ibid.*) This evidentiary hurdle is high. (See *In re Casey D.* (1999) 70 Cal.App.4th 38, 51.)

The court must "state its reasons in writing or on the record" only if it finds the parent-child relationship exception applies. (§ 366.26, subd. (c)(1)(D).)

Where uncontroverted evidence shows or a court finds based upon substantial evidence that a parent maintained regular visitation and contact with a dependent child and enjoyed a significant, positive relationship with the child, appellate review of a determination that the parent-child exception does not apply is governed by the abuse of discretion standard. (See *In re C.B.* (2010) 190 Cal.App.4th 102, 123; *In re Bailey J.* (2010) 189 Cal.App.4th 1308, 1314-1315.) "The appropriate test for abuse of discretion is whether the trial court exceeded the bounds of reason. When two or more inferences can reasonably be deduced from the facts, the reviewing court has no authority to substitute its decision for that of the trial court." [Citations.]" (*In re Stephanie M.* (1994) 7 Cal.4th 295, 318-319.)

2. *Mother's Relationship with the Children*

Mother argues that she has maintained regular contact with the children, the children have a substantial, positive emotional attachment to her, and the children would

benefit from continuing their relationship with her. She asserts that, based upon the nature of her relationship with the children, termination of her parental rights is detrimental to the children.

The existence of love and affection between a parent and a dependent child does not preclude termination of parental rights. Even where the evidence shows a significant, positive, emotional attachment between a parent and a child, the parent still has the burden at the section 366.26 stage to prove that the parent's relationship with the child "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." (*In re Autumn H.*, *supra*, 27 Cal.App.4th at p. 575.)

Mother has not shown that the juvenile court abused its discretion by not applying the parent-child relationship exception as to her. Given the children's relatively young ages, the amount of time they had spent out of mother's care, the children's positive adjustment to foster care, the social worker's opinion that termination of parental rights would not be detrimental to the children, the lack of any evidence that O.S. or D.S. had any particular needs that only mother could meet, and the lack of any expert evidence that termination of parental rights would be detrimental to either child, the juvenile court could reasonably conclude that the overall benefits of adoption were greater than the benefits of continuing mother's parental relationship with the children and there was not "a compelling reason for determining that termination would be detrimental" to the children. (§ 366.26, subd. (c)(1)(B).)

Mother complains that "the social worker's conclusion that the children's affection for their parents could not rise to the level of a bond . . . was colored by her misperception that there never could be a bond between a parent and child who was being cared for by someone else on a daily basis." She fails to show the social worker's opinion resulted in trial error. The juvenile court made clear that it rejected the notion that a

parent and child could not bond if the child did not reside with the parent or the parent was not the child's primary caregiver. It then stated: "The Court does believe that children can have the strong emotional bond and relationship and connection to parents that the law envisions for the beneficial [parent-child] relationship exception even if they are not for long periods of time in the care of their parents. The Court has seen, and has read and considered cases and case law where children do in fact exhibit the type of great harm that the law describes if parental rights are terminated. This is not such a case."

Mother also attacks the termination of her parental rights on the ground that the social worker and juvenile court improperly considered the children's relationship to their foster parents in assessing the parent-child relationship exception. Ordinarily, courts do not examine the suitability of the prospective adoptive parents in deciding whether to terminate parental rights where it is likely the child will be adopted. (See *In re Michael G.* (2012) 203 Cal.App.4th 580, 589; *In re Scott M.* (1993) 13 Cal.App.4th 839, 844.) Here, there was no dispute that the children were adoptable. In deciding the applicability of the parent-child exception to termination of parental rights, however, the court may properly consider a child's particular needs. (*In re Angel B.* (2002) 97 Cal.App.4th 454, 467; *In re Autumn H.*, *supra*, 27 Cal.App.4th at pp. 575-576.) Evidence that someone other than the parent, such as a foster parent, is able to meet the child's needs is relevant in assessing whether the parent-child exception has been established. (Cf. *In re Jason J.* (2009) 175 Cal.App.4th 922, 938 [no evidence child had any needs that only biological father could satisfy]; *In re Helen W.* (2007) 150 Cal.App.4th 71, 81 [nothing in the record indicated that children had any needs that could be met only by the mother]; *In re Zachary G.* (1999) 77 Cal.App.4th 799, 811 [juvenile court properly rejected parent-child exception where evidence showed child relied on the grandparents, who were his caregivers, to meet his needs, looked to them when he was hungry, tired or in need of affection or attention, and was not upset when mother's visit ended].) The court's remark

that the evidence showed that "the children look to their foster parent caregivers for the vast majority if not all of their needs" did not establish that the court improperly considered the children's relationship to their foster parents.

Citing two cases, mother further asserts that the foster parents' willingness to permit post adoption contact is an improper factor in evaluating the parent-child relationship exception. In the first cited case, *In re S.B.* (2008) 164 Cal.App.4th 289, the juvenile court "recognized that [the child] would benefit from continuing her relationship with [the father] and based its decision to terminate parental rights in part on the grandparents' willingness to allow [the father] to continue to visit [the child]." (*Id.* at p. 300.) The appellate court stated: "We do not believe a parent should be deprived of a legal relationship with his or her child on the basis of an unenforceable promise of future visitation by the child's prospective adoptive parents." (*Ibid.*) This court reached a similar conclusion in *In re C.B.*, *supra*, 190 Cal.App.4th 102, the second case cited by mother, where we found that the juvenile court had "injected an improper factor into the weighing process, namely, the prospective adoptive parents' willingness to allow the children to have continued contact with mother." (*Id.* at p. 128.) We stated: "It is important to remember that once the legal parent-child relationship is permanently severed by termination of parental rights, a substantial, positive emotional attachment between a child and a parent has no legal protection even if depriving the child of that attachment by disallowing contact would greatly harm the child." (*Ibid.*, fn. omitted.)

Mother has not affirmatively shown by reference to the record that the juvenile court improperly relied on the foster parents' willingness to allow post-adoption contact with parents in deciding that the parent-child relationship exception did not apply. Absent contrary evidence in the record, we presume the juvenile court correctly followed the law. (See Evid. Code, § 664 ["It is presumed that official duty has been regularly performed"]; *Ross v. Superior Court* (1977) 19 Cal.3d 899, 913.)

Mother maintains that the children would have stability and permanency with the foster parents through guardianship and "[a] guardianship was the more sensible plan for permanency in this case given the age of the foster parents." She also argued that the foster parents were not opposed to guardianship. By statute, termination of parental rights and selection of adoption is the first choice at the section 366.26 hearing. (See § 366.26, subd. (b)(1).) The foster parents' willingness to go along with a guardianship plan or their suitability as prospective adoptive parents given their ages were not relevant considerations at the section 366.26 hearing. (See *In re T.S.* (2003) 113 Cal.App.4th 1323, 1329 [although "the age of prospective adoptive parents may be relevant to their 'suitability' to adopt," their suitability is not before the court at a section 366.26 hearing]; but cf. *In re Carl R.* (2005) 128 Cal.App.4th 1051, 1062 [assessment of adoptability included consideration of the prospective adoptive parents in the unique situation where a disabled child required total care for life and he was deemed adoptable only because a particular family was willing to adopt him].) Where a juvenile court finds by clear and convincing evidence that it is likely the child will be adopted and no exception to termination of parental rights has been established, the juvenile court has no discretion to make a permanent plan of guardianship instead of adoption. (See § 366.26, subds. (c)(1)-(c)(3).)

3. *Father's Relationship with the Children*

Father maintains that undisputed evidence established that he regularly visited the children and occupied a parental role. He argues that "[w]hen the parent has met the burden of showing that he or she has maintained regular visitation and contact and that the relationship is beneficial to the child, the court errs in not applying the [parent-child relationship] exception." Without any citation to the record, he also asserts that the benefits to O.S. and D.S. of continuing his parent-child relationship outweigh the benefits of adoption.

As indicated above, proof of a positive, beneficial relationship is not enough; there must be affirmative evidence that a child will suffer harm if parental rights are terminated or, stated another way, the benefits of continuing the parent-child relationship outweigh the benefits of permanency through adoption. In this case, there was no bonding study and no testimony from a mental health expert, social worker, or court-appointed special advocate (CASA) that termination of parental rights would be detrimental to either of the children. (Cf *In re Scott B.* (2010) 188 Cal.App.4th 452, 470-471 [trial court erred in terminating parental rights because the parent-child relationship exception applied where autistic son had special needs, he had just turned 11 years old and he had spent nearly his entire life living with his mother, he continued to be emotionally unstable and repeatedly insisted that he preferred to live with his mother, and his CASA repeatedly stated in her reports that the mother-son relationship was very close and its disruption would be detrimental to the son]; *In re S.B.*, *supra*, 164 Cal.App.4th at pp. 295-296, 301 [trial court erred in terminating parental rights because parent-child relationship exception applied where a Dr. Kelin, who had conducted a bonding study of father and daughter, testified that "there was a potential for harm to [the daughter] were she to lose the parent-child relationship" because their bond was "fairly strong"]; *In re Amber M.* (2002) 103 Cal.App.4th 681, 689-691 [trial court erred in terminating parental rights because parent-child relationship exception applied where a psychologist, who had conducted a bonding study of mother and daughter, "concluded that they shared 'a primary attachment' and a 'primary maternal relationship' and that '[i]t could be detrimental' to sever that relationship"].) Here, the case social worker, who was recognized as an expert in permanent planning for dependent children, testified that termination of parental rights would not be detrimental to the children. The court could reasonably conclude that parent-child exception as to father had not been established.

Although father now argues that there is no evidence the security and stability of the children's placement would be jeopardized by retention of parental rights and the unique facts of this case "make legal guardianship a more appropriate permanent plan for the children," that is not the standard for selecting guardianship instead of adoption as the permanent plan under the parent-child relationship exception to termination of parental rights.

B. Sibling Relationship Exception

Under section 366.26, another exception to the termination of parental rights applies where "[t]he court finds a compelling reason for determining that termination would be detrimental to the child" because "[t]here would be substantial interference with a child's sibling relationship, taking into consideration the nature and extent of the relationship, including, but not limited to, whether the child was raised with a sibling in the same home, whether the child shared significant common experiences or has existing close and strong bonds with a sibling, and whether ongoing contact is in the child's best interest, including the child's long-term emotional interest, as compared to the benefit of legal permanence through adoption." (§ 366.26, subd. (c)(1)(B)(v).)

"Reflecting the Legislature's preference for adoption when possible, the 'sibling relationship exception contains strong language creating a heavy burden for the party opposing adoption. It only applies when the juvenile court determines that there is a "compelling reason" for concluding that the termination of parental rights would be "detrimental" to the child due to "substantial interference" with a sibling relationship.' (*In re Daniel H.*, *supra*, 99 Cal.App.4th at p. 813, quoting § 366.26, subd. (c)(1).) Indeed, even if adoption would interfere with a strong sibling relationship, the court must nevertheless weigh the benefit to the child of continuing the sibling relationship against the benefit the child would receive by gaining a permanent home through adoption. (*In*

re L.Y.L. (2002) 101 Cal.App.4th 942, 952–953.)" (*In re Celine R.*, *supra*, 31 Cal.4th 45, 61.)

The substantial evidence standard of review applies to a juvenile court's factual finding whether a beneficial sibling relationship exists while the abuse of discretion standard of review applies to its determination whether the existence of a beneficial sibling relationship constitutes a compelling reason for determining that termination of parental rights would be detrimental to the child. (*In re Bailey J.*, *supra*, 189 Cal.App.4th 1308, 1314-1315.)

Mother now complains that "the social worker's report and addendum for the section 366.26 hearing did not address the nature of the sibling bond." She asserts that "[a]n order terminating parental rights must be reversed where the assessment report is inadequate."

An assessment report prepared for a section 366.26 hearing, which must be reviewed by the juvenile court (§ 366.26, subd. (b)), must include a "review of the amount of and nature of any contact between the child and his or her parents and other members of his or her extended family since the time of placement." (See §§ 366.21, subd. (i)(1)(B), 366.22, subd. (c)(1)(B).) "Extended family" for purposes of this subparagraph includes a child's siblings. (*Ibid.*) The report and addendum satisfied this element, indicating that the children have regularly visited with their mother and older half-siblings on a supervised basis. The report stated: "The children are happy to see mother and half-siblings. They enjoy each other's company and have a lot of fun during visits."

The evidentiary burden was on mother, who raised the sibling relationship exception to termination of parental rights, to show the exception applied. (*In re Megan S.* (2002) 104 Cal.App.4th 247, 252.) It was up to her to present additional evidence regarding the nature, strength, and extent of the children's bond with their half-siblings

and the benefit of continuing those relationships "as compared to the benefit of legal permanence through adoption" (§ 366.26, subd. (c)(1)(B)(v)).

Mother argues that the court erred in finding that the exception had not been proven. The record discloses that the children have not lived with their older half-siblings for most of their lives. O.S. was two years old and D.S. was almost one year old when they were placed with mother in April 2008 and have not lived with their half-siblings since then. While there was evidence that the children had regular supervised contact with their half-siblings and enjoyed visiting with them, mother did not present any evidence, such as expert testimony, to show that the benefit to the children of continuing the sibling relationships with their half-siblings outweighed "the benefit of legal permanence through adoption." (§ 366.26, subd. (c)(1)(B)(v).) The court did not abuse its discretion by implicitly finding that mother had not proved that the sibling relationship exception to termination of parental rights applied in this case.

DISPOSITION

The November 17, 2011 order terminating parental rights of mother and father and selecting adoption as the permanent plan is affirmed.

ELIA, J.

WE CONCUR:

RUSHING, P. J.

GROVER, J.*

* Judge of the Monterey County Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.