

NOT TO BE PUBLISHED IN OFFICIAL REPORTS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 This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.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 S.S. et al., Persons Coming Under the
Juvenile Court Law.

H040947
(Santa Clara County
Super. Ct. Nos. JD20865, JD20866,
JD20867, JD20868)

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

Plaintiff and Respondent,

v.

S.S.,

Defendant and Appellant.

Father S.S. appeals the juvenile court's decision that terminated his parental rights over four of his children and selected a permanent plan of adoption for those children.¹ (Welf. & Inst. Code, § 366.26.) Father contends that the juvenile court erred because: (1) father's regular visitation of, and beneficial relationship with, his children provided a compelling reason against terminating his parental rights; and (2) the juvenile court failed to ensure that the children's relative caregivers were advised that legal guardianship was an alternative to adoption. For the reasons stated here, we will affirm.

¹ Both father and his eldest son have the initials S.S. In this opinion, we refer to father as "father" and his eldest son as "S.S."

I. JUVENILE COURT PROCEEDINGS

Plaintiff Santa Clara County Department of Family and Children's Services (Department) filed juvenile dependency petitions under section 300, subdivision (b) regarding four children of father and mother Y.V. in October 2011. The four children were eight-year-old son S.S., six-year-old son E.S., five-year-old daughter H.S., and three-month-old son N.S. The petitions, which contained identical factual summaries, alleged that the parents were unable to provide regular care for their children due to the parents' substance abuse. Mother and N.S. tested positive for methamphetamines when N.S. was born in June 2011. Father was on parole, was a registered narcotic and gang offender, and tested positive for alcohol, marijuana, and methamphetamines between July and August 2011. S.S. and E.S. often arrived late, dirty, and hungry to school, while H.S. did not have the necessary immunizations to be enrolled in kindergarten. Between June 2011 and October 2011, the parents received informal supervision services but had made little progress.

At a joint jurisdiction and disposition hearing in November 2011, the court sustained the findings in the dependency petitions and adjudged the four children dependents of the court. Father and mother retained joint custody of the children under the Department's supervision and the court ordered that the children and their parents receive services from the Family Maintenance Program.

In May 2012, the court ordered father to leave the family residence for missing drug tests, having diluted drug tests, and testing positive for marijuana and methamphetamines. The court gave the social worker discretion to set up a visitation schedule between father and the children but it is unclear from the record whether that occurred. Father entered a drug treatment program in May but voluntarily left the program the following month without completing it. His departure from the program violated his parole officer's instruction that he complete inpatient drug treatment and move to a Transition Housing Unit upon completion.

The Department filed supplemental juvenile dependency petitions (Welf. & Inst. Code, § 387)² and applications for protective custody warrants for each of the four children in July 2012, alleging that mother failed to complete her outpatient substance abuse treatment, took the children to Madera to visit relatives, and failed to respond to repeated attempts by the supervising social worker and law enforcement to determine her and her children's whereabouts. The petition also related father's failure to complete his inpatient drug treatment program and stated he had not contacted the supervising social worker since June 2012. The court issued protective custody warrants. First amended supplemental petitions were filed in August 2012, stating that the children were placed in protective custody on August 9 and restating the allegations from the July 2012 supplemental petitions. The children were temporarily placed with their maternal uncle and his girlfriend.

The juvenile court sustained the first amended supplemental petitions in September 2012, following a hearing where mother appeared but father did not (father's appointed counsel was present). The court ordered the children to remain in the care, custody, and control of the Department for continued placement with their maternal uncle and his girlfriend. Regarding the parents, the court mandated weekly alcohol and controlled substance testing and ordered that they participate in substance abuse prevention classes and aftercare drug treatment programs if recommended following a mandatory substance abuse assessment. Among other reunification services, mother and father were permitted a minimum of two supervised visits with their children per week.

According to an interim review report filed in October 2012, father contacted the children's social worker that month asking to schedule a visitation with the children before surrendering on an outstanding arrest warrant, but he failed to appear when the

² Unspecified statutory references are to the Welfare and Institutions Code.

social worker arranged a meeting. Later that month mother and father visited the children before father went into custody.

At the six-month review hearing in April 2013, the court extended father's family reunification services but terminated mother's services. According to a six-month status review report, the four children were all in generally good health and developmentally on target. The three oldest children had weekly mental health therapy sessions and appeared well-adjusted to their caregivers. The report stated father entered an inpatient drug treatment program in November 2012 as a condition of his parole but was asked to leave the program in February 2013 after an altercation with another resident. While in the treatment program, father visited the children twice per week and the children reported that they enjoyed his visits.

At the 12-month review hearing in September 2013, the court terminated father's reunification services and set a section 366.26 hearing. That decision was based on the Department's 12-month status review report, which stated that the parents had no contact with the social worker between late February and early June 2013. Since February 2013, father had not re-entered drug treatment and did not comply with the drug testing requirements of his case plan. Father attended supervised visits with his children three times between February and March 2013 but then "began canceling or not showing up to the visits." The parents visited the children once per month in July and August 2013. While the children enjoyed the visits, the eldest son S.S. "has struggled with the infrequent visitation by the parents," making statements that "he 'wanted to die' and that he 'wasn't loved' " to his therapist. His therapist stated that unless the parents were able to start visiting consistently, further visitation would be "detrimental to [S.S.'s] well being." The other three children appeared more emotionally stable and comfortable with the care provided by their maternal uncle and his girlfriend. Pending the section 366.26 hearing, the court set visitation at a minimum of one visit per month.

The Department's section 366.26 report stated father and mother visited the children once per month in September, October, and November 2013. S.S. "has been very sad and withdrawn for several days following visits with his parents" and was struggling at school. S.S. was uncertain about being adopted but said that if he could not go back to his parents he would like to remain with his current caregivers. E.S. was performing well at school and "looks forward to the stability adoption will provide him." H.S. was repeating first grade, continued to attend therapy, and was also reportedly looking forward to the permanency of adoption. N.S. was not old enough to attend school and was "very bonded" to his caregivers.

An addendum to the section 366.26 report noted that the parents had not visited the children since November 2013 and that the parents were arrested on January 9, 2014 after their car was pulled over due to expired registration tags. Mother was arrested for driving with a suspended license but released within a week. Father was arrested on an outstanding arrest warrant (apparently related to a parole violation).

Father was still in custody at the time of the section 366.26 hearing in February 2014 but appeared and testified at the hearing. He asked that the court not terminate his parental rights because he believed "kids should be with their father." He provided defining personality characteristics of each child and told the court he loved the children with all his heart. On cross-examination, father stated that he did not visit his children in December 2013 because he and mother did not have a stable residence or a method of transportation. He explained that he was still in custody after the January 2014 traffic stop because of a parole violation stemming from his termination from the drug treatment program in February 2013.

Counsel for the Department defended its recommendation that parental rights be terminated, noting that neither mother nor father had adequately participated in family reunification services. Counsel noted that "one of the more critical aspects of the services was visitation ... and father was very inconsistent in that visitation." Father's

counsel argued that his parental rights should not be terminated because he loved the children and pointed out that the three older children “certainly are not going to forget” who their biological parents are even if his parental rights were terminated. Mother’s counsel claimed that because the children had spent the majority of their lives in the care of mother and father, legal guardianship was appropriate instead of termination of parental rights and adoption. Counsel further argued that the Department “should be compelled to talk to the caretakers about guardianship and provide ... some analysis of whether ... there has been a discussion with the caretakers about what a guardianship establishes for these children.” Counsel for the children concurred with the Department’s recommendation and noted “I believe the relatives have been made aware of the option of guardianship which relatives do have the option to choose; however, in this case they have chosen adoption.” Counsel also noted that terminating parental rights will provide the children “the surety and the permanency that has been needed for some time in this case.”

The court prepared a written order after the hearing, terminating mother’s and father’s parental rights and selecting adoption as the permanent plan. The court found the children adoptable, noting that neither parent presented evidence to the contrary. While S.S. expressed uncertainty about being adopted, the court did not view that statement as evidence of non-adoptability. The court rejected father’s argument that a legal guardianship should be established because the children would benefit from continuing their relationships with their parents, finding that “neither parent maintained regular visitation and contact with the children following the children’s removal from their custody” and that “at times the parents went months without visiting the children.” Though it was “clear to the Court that Father loves the children,” the children’s need for stability and permanence and the parents’ “limited and sporadic contact” with the children during the dependency process supported termination of parental rights. The court also rejected father’s argument for legal guardianship that was based on the

caregivers' status as relatives because "[n]o evidence was offered by Father to show that the relative caregivers are unable or unwilling to adopt the children."

II. DISCUSSION

"[T]he purpose of the section 366.26 hearing is ... to begin the task of finding the child[ren] a permanent alternative family placement." (*Cynthia D. v. Superior Court* (1993) 5 Cal.4th 242, 253.) "If the court determines, ... by a clear and convincing standard, that it is likely the child[ren] will be adopted, the court shall terminate parental rights and order the child[ren] placed for adoption." (§ 366.26, subd. (c)(1).) Two exceptions to the preferred disposition of adoption are relevant to this appeal. An alternative to adoption (such as legal guardianship) may be appropriate if "[t]he child is living with a relative who is unable or unwilling to adopt the child because of circumstances that do not include an unwillingness to accept legal or financial responsibility for the child, but who is willing and capable of providing the child with a stable and permanent environment through legal guardianship, and the removal of the child from the custody of his or her relative would be detrimental to the emotional well-being of the child." (§ 366.26, subd. (c)(1)(A).) Alternatively, maintenance of parental rights may be appropriate if "[t]he court finds a compelling reason for determining that termination would be detrimental to the child [because] ... : [¶] (i) The 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).) The burden is on the parent seeking to avoid termination of parental rights to produce evidence sufficient to support an exception. (*In re Bailey J.* (2010) 189 Cal.App.4th 1308, 1314 (*Bailey J.*).

A. PARENTAL RELATIONSHIP EXCEPTION

An appeal challenging the juvenile court's decision that the parental relationship exception to adoption does not apply implicates two standards of review. Whether an appellant meets the burden of producing evidence to support an exception to adoption is reviewed for substantial evidence. (*Bailey J., supra*, 189 Cal.App.4th at p. 1314.)

Because “a challenge to a juvenile court’s finding that there is no beneficial relationship amounts to a contention that the ‘undisputed facts lead to only one conclusion,’ ” (*ibid.*, quoting *In re I.W.* (2009) 180 Cal.App.4th 1517, 1529 (*I.W.*)), an appellant can succeed in a substantial evidence challenge only upon a showing that “the evidence compels a finding in favor of the appellant as a matter of law.” (*I.W.*, at p. 1528.) Even if an appellant makes such a showing, the juvenile court nonetheless maintains discretion to terminate parental rights and order adoption if it finds that the evidence supporting the exception was not “a compelling reason for determining that termination would be detrimental to the child” (§ 366.26, subd. (c)(1)(B).) As determining whether the relationship is a compelling reason is “a ‘quintessentially’ discretionary decision,” we review that component of the juvenile court’s decision for an abuse of discretion. (*Bailey J.*, at p. 1314, quoting *In re Jasmine D.* (2000) 78 Cal.App.4th 1339, 1351.)

To meet his burden of showing that the parental relationship exception applied, father had to show not only regular visitation and contact with his children but also that the children would benefit from continuing the relationship. (§ 366.26, subd. (c)(1)(B)(i).) Failure to maintain regular visitation “fatally undermine[s] any attempt to find the beneficial parental relationship exception.” (*In re I.R.* (2014) 226 Cal.App.4th 201, 212 (*I.R.*); see also *In re C.F.* (2011) 193 Cal.App.4th 549, 554 [“Sporadic visitation is insufficient to satisfy the first prong of the parent-child relationship exception to adoption.”].)

Father argues he met the regular visitation prong by visiting “as regularly as possible.” However, “as regularly as possible” is not the applicable standard and the record does not support, much less compel, a finding of regular visitation. The children were removed from the parents’ custody in September 2012 and the court ordered a minimum of two visits per week. Father’s visitation was consistent between that order and March 2013, at which point “he began canceling or not showing up” to scheduled visitations. It does not appear father attended any visitation between April and June

2013, and he visited the children once per month in July and August 2013. When the court sustained the first amended supplemental petitions in September 2013 and set a section 366.26 hearing, it reduced the parents' visitation to once per month. Father maintained this more modest visitation schedule for three months but then did not visit the children in December 2013 and was in custody beginning in January 2014. The inconsistency of visitation was such that S.S.'s therapist opined that further visitation would be detrimental to him unless the parents could visit consistently. The significant gaps in father's visitation sufficiently support the juvenile court's finding that "neither parent maintained regular visitation and contact with the children," which fatally undermines father's parental relationship exception argument. (*I.R.*, *supra*, 226 Cal.App.4th at p. 212.)

Even assuming father's inconsistent visitation would meet the first prong, he also had to show that his children "would benefit from continuing the relationship" (§ 366.26, subd. (c)(1)(B)(i)), by demonstrating that the relationship "promotes the well-being of the child[ren] to such a degree as to outweigh the well-being the child[ren] would gain in a permanent home with new, adoptive parents." (*In re Autumn H.* (1994) 27 Cal.App.4th 567, 575.) This weighty burden requires evidence that "severing the natural parent/child relationship would deprive the child[ren] of a substantial, positive emotional attachment such that the child[ren] would be greatly harmed" (*Ibid.*) "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." (*Id.* at p. 576.)

The juvenile court found that father loved his children and noted that S.S. was uncertain about adoption, which the court found relevant to the parental relationship exception analysis. However, the court determined that the children's need for stability and permanence, especially in light of the parents' inconsistent visitation during the dependency proceedings, outweighed the benefit of the continuing relationship.

We are unpersuaded by father’s reliance on *In re Jerome D.* (2000) 84 Cal.App.4th 1200 (*Jerome D.*). The court of appeal in that case found that a mother had met her burden of showing a beneficial relationship with her eight-year-old son sufficient to overcome the preference for adoption. (*Jerome D.*, at pp. 1207-1209.) Significantly, the mother in *Jerome D.* “had maintained regular visitation and contact” with her son, including “unsupervised overnight visits in her home.” (*Id.* at pp. 1206-1207.) There was “no woman in [Jerome D.’s] life other than Mother with whom he had a beneficial relationship,” whereas father’s children here had bonded with their maternal uncle and his girlfriend. (*Id.* at p. 1207.) We therefore find no abuse of discretion even if we reach this second prong of the exception.

B. RELATIVE CAREGIVER EXCEPTION

The juvenile court determined that the relative caregiver exception to adoption did not apply, which allows for legal guardianship instead of adoption when the children are “living with a relative who is unable or unwilling to adopt the child[ren] because of circumstances that do not include an unwillingness to accept legal or financial responsibility for the child[ren], but who is willing and capable of providing the child[ren] with a stable and permanent environment through legal guardianship, and the removal of the child[ren] from the custody of [their] relative would be detrimental to the emotional well-being of the child[ren].” (§ 366.26, subd. (c)(1)(A).) Father claims the juvenile court erred by not requiring the Department to show that it informed the uncle and his girlfriend of “ ‘the permanency options of guardianship and adoption, including the long-term benefits and consequences of each option, prior to establishing legal guardianship or pursuing adoption.’ ” (Quoting § 361.5, subd. (g)(2)(B).) As father had the burden of showing the relative caregiver exception applied (*Bailey J., supra*, 189 Cal.App.4th at p. 1314), we review for substantial evidence and, on appeal, he must show

that “the evidence compels a finding in favor of the appellant as a matter of law.” (*I.W.*, *supra*, 180 Cal.App.4th at p. 1528.)³

Three sections of the Welfare and Institutions Code mandate that “[r]egardless of his or her immigration status, a relative caregiver shall be given information regarding the permanency options of guardianship and adoption, including the long-term benefits and consequences of each option, prior to establishing legal guardianship or pursuing adoption.” (§§ 361.5, subd. (g)(2)(B); 366.21, subd. (i)(2)(B); 366.22, subd. (c)(2)(B).) “It is presumed that official duty has been regularly performed” in the absence of evidence to the contrary. (Evid. Code, § 664; *In re Julian R.* (2009) 47 Cal.4th 487, 499.) Father argues that the juvenile court should have required the Department to provide evidence that the disclosures had been made, but that would improperly shift the burden of proof from father to the Department. The only evidence before the juvenile court relating to disclosure was the statement by counsel for the children that “I believe the relatives have been aware of the option of guardianship” and that “in this case they have chosen adoption.” Neither parent’s counsel responded to that statement, despite being given the opportunity to make further argument. The caregivers expressed their desire to adopt the children to give them “a loving and stable home.” The lack of evidence showing any interest by the relative caregivers to choose legal guardianship instead of adoption, provides substantial evidence to support the juvenile court’s decision and distinguishes this case from the case relied on by father. (See *In re K.H.* (2011) 201 Cal.App.4th 406, 416-419 (*K.H.*) [affirming application of the relative caregiver

³ We disagree with the Department’s argument that this issue was not raised in the juvenile court. (Citing *In re Dakota S.* (2000) 85 Cal.App.4th 494, 502.) Though father’s counsel did not focus on disclosure specifically, his counsel urged the court not to terminate father’s parental rights, and counsel for mother argued that “social services should be compelled to talk to the caretakers about guardianship and provide for the Court some analysis of whether or not there has been a discussion with the caretakers about what a guardianship establishes for these children.”

exception where evidence indicated relative's preference for guardianship instead of adoption].)

The juvenile court's erroneous reference to section 366.26, subdivision (c)(1)(B)(iv) instead of subdivision (c)(1)(A) does not affect our decision. The court stated "a relative placement exception exists under section 366.26, subdivision (c)(1)(B)(iv)," but in 2008 the relative caregiver exception was moved to section 366.26, subdivision (c)(1)(A).⁴ (Stats. 2007, ch. 565, § 4, pp. 4574-4575.) Before that amendment, the exception applied when a court found "a compelling reason for determining that termination would be detrimental" to a child based on a showing that a relative was "unable or unwilling to adopt the child because of exceptional circumstances" (Former § 366.26, subd. (c)(1)(D), amended by Stats. 2007, ch. 565, § 4, pp. 4574-4575.) The amendment removed the word "exceptional," and also relocated the exception so that "a compelling reason" is no longer required. (See *K.H.*, *supra*, 201 Cal.App.4th at pp. 416-419 [finding mere preference for guardianship an adequate "circumstance" to justify application of the relative caregiver exception].) Even if the juvenile court erroneously applied the more stringent standard, it is not reasonably probable that the court would have reached a different decision on this issue in light of father's failure to make any evidentiary showing in support of his contention. (*People v. Watson* (1956) 46 Cal.2d 818, 836-837.)

III. DISPOSITION

The order terminating parental rights is affirmed.

⁴ Section 366.26, subdivision (c)(1)(B)(iv) is similar to the relative caregiver exception but applies to "*a foster parent or Indian custodian who is unable or unwilling to adopt the child because of exceptional circumstances, that do not include an unwillingness to accept legal or financial responsibility for the child, but who is willing and capable of providing the child with a stable and permanent environment and the removal of the child from the physical custody of his or her foster parent or Indian custodian would be detrimental to the emotional well-being of the child.*" (Italics added.)

Grover, J.

WE CONCUR:

Bamattre-Manoukian, Acting P.J.

Mihara, J.