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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

In re Olivia S., a Person Coming  
Under the Juvenile Court Law.

LOS ANGELES COUNTY  
DEPARTMENT OF CHILDREN  
AND FAMILY SERVICES,

Plaintiff and Respondent,

v.

ROBERT S. et al.,

Defendants and Appellants.

B296367

(Los Angeles County  
Super. Ct. No. CK70591C)

APPEAL from an order of the Superior Court of Los Angeles County, Martha Matthews, Judge. Affirmed.

Jacques A. Love, under appointment by the Court of Appeal, for Defendant and Appellant, Robert S.

Michelle L. Jarvis, under appointment by the Court of Appeal, for Defendant and Appellant, Vanessa U.

Mary C. Wickham, County Counsel, Kristine P. Miles, Assistant County Counsel, and Peter Ferrera, Principal Deputy County Counsel, for Plaintiff and Respondent.

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## INTRODUCTION

Appellants Robert (Father) and Vanessa (Mother) each appeal the juvenile court’s order terminating their parental rights to their minor child Olivia with a permanent plan of adoption. (Welf. & Inst. Code<sup>1</sup>, § 366.26.) Father contends the court erred in finding that the beneficial parental relationship exception to adoption (*id.*, subd. (c)(1)(B)(i)) did not apply. Mother joins in Father’s argument on appeal<sup>2</sup>—she does not contend that the beneficial parental relationship exception applies with respect to her relationship with Olivia; instead, she contends if the order terminating Father’s parental rights is reversed on this ground, then reversal of the termination of her parental rights is “likewise required.”

We disagree with Father and affirm. As Father’s appeal did not result in a reversal, we also affirm the order terminating Mother’s parental rights.

## FACTUAL AND PROCEDURAL BACKGROUND

This is an unfortunate and not uncommon case of a parent who, despite his love and affection for his daughter, could not resolve his personal problems in time to regain custody of her. The juvenile court waited 29 months before it terminated Father’s parental rights and found that Olivia would be better off in an adoptive home rather than waiting in a foster home for her Father to be able to willingly and consistently parent her.

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

<sup>2</sup> “Instead of filing a brief, or as part of its brief, a party may join in or adopt by reference all or part of a brief in the same or a related appeal.” (Cal. Rules of Court, rule 8.200(a)(5).)

A. *Petition, Detention, Adjudication*

On November 4, 2016, the Los Angeles Department of Children and Family Services (DCFS) filed a petition pursuant to section 300, subdivisions (b)(1) and (j), on behalf of Olivia—a child who tested positive for opiates and amphetamine at birth. The petition alleged Olivia was experiencing “withdrawal symptoms related to prenatal drug exposure” as a result of Mother’s use of illicit drugs, which endangered Olivia’s physical health and placed her at substantial risk of serious harm. The petition also alleged Father knew or reasonably should have known of Mother’s illicit drug use and “failed to protect the child.”

Olivia was deemed “a critically ill patient” in the neonatal intensive care unit, and her release from the hospital was delayed. Mother’s toxicology results were positive for opiates and amphetamines at Olivia’s birth. Mother admitted to using heroin throughout most of her pregnancy. She had a 15-year history of illicit drug use including amphetamine, methamphetamine, and marijuana and had lost an older child to adoption.

The court initially detained Olivia from both parents. Mother and Father were each permitted monitored visits—three times per week, three hours each visit—and Paternal Grandmother was permitted unmonitored visits.

Father stated he was unaware of Mother’s drug abuse. Mother stated Father knew she was using ,and that he tried to show her the side effects of drug use on the baby. Neither had a home. DCFS assessed the home of Paternal Grandmother, found it appropriate, and the court released Olivia to Paternal Grandmother.

The 29 months between detention and termination of Father's parental rights did not bode well for Father. One month after Olivia's initial detention, on December 13, 2016, Father was arrested for forgery and violation of supervised release (he had an extensive criminal history). He was incarcerated for four months until April 2017, when he entered a plea and was conditionally released to a one-year inpatient substance abuse treatment program.

A little more than a month later, on January 27, 2017, Mother was arrested and charged with a felony. DCFS reported to the court that "both parents are currently incarcerated and prior to their incarceration were homeless and had no means to adequately care for such a young child." As to Father, DCFS stated: "Instead of utilizing the resources available to help him stabilize his life, he knowingly engaged in illegal activities which resulted in his current incarceration." As DCFS reported to the court, Father was not in any position to help Paternal Grandmother with Olivia's support.

The jurisdictional and dispositional hearing occurred four months after Olivia's detention. The court sustained the petition as to Mother only and deleted the allegation that Father "knew of the mother's illicit drug use, or reasonably should have known, and failed to protect the child." Having found Olivia a dependent child of the juvenile court, the court continued placement with Paternal Grandmother.

DCFS was ordered to provide family reunification services to both Mother and Father. Father was permitted monitored visits twice a month, two hours per visit. Father was ordered to participate in a "Hands-on/dyadic" parenting program, and

individual counseling to address case issues. He was also ordered to participate in Alanon.

B. *Six-Month Review*

By October 25, 2017, now 11 months into the case, Father had failed to respond to DCFS's attempts to communicate for months. Paternal Grandmother informed DCFS that Father and Mother visited once a month. Olivia was bonded with them. Father was still in a rehabilitation program and individual and group counseling.

On December 11, 2017, the DCFS case worker reported to the court that she still has "not received a response from either parent and . . . has not observed a visit between them and Olivia." The juvenile court found "the extent of progress made toward alleviating or mitigating the causes necessitating placement" of Olivia has been "minimal" by Mother and by Father. The court then terminated reunification services for Mother but extended reunification services for Father; the court also cautioned that "if [Olivia] cannot be returned home by the 12[-]month permanency hearing, reunification services may be terminated and the matter referred for the selection of a permanent plan of adoption." The court increased monitored visitation for Father a minimum of three times a week, three hours per visit. On December 29, 2017, Father told the DCFS case worker his goal was to reunify with his daughter. He continued to visit Olivia and was still in the rehabilitation program. However, as of January 2, 2018, he was not yet participating in the court-ordered dyadic parenting classes.

DCFS later reported "an increase in communication" from Father. The case worker monitored a visit where Olivia was observed to be "comfortable" and "relaxed" in Father's arms.

Father was “attentive to her needs” and “playful.” Olivia called Father “Dada.” Father informed the case worker that he also enrolled in multiple parenting classes.

C. *Twelve-Month Review*

At the 12-month status review hearing on February 23, 2018, the juvenile court found Father has made “significant progress in resolving the problems that led to the child’s removal” and continued reunification services for him. The court authorized DCFS to liberalize Father’s visitation at its discretion.

The DCFS case worker conducted a child and family team meeting with Father. Father stated his goal was to have Olivia home with him and to help her “succeed and thrive.” Father’s strengths were identified as being “patient, playful, attentive and goal[-]oriented.” When Olivia was upset, the DCFS case worker observed Father “calm Olivia down by holding and rocking her.” Father expressed concerns about Olivia’s development and any difficulties she might experience due to her prenatal exposure. The case worker stressed to Father the importance of securing housing before the next hearing. However, DCFS recommended that the juvenile court terminate reunification services for Father as DCFS could not recommend returning Olivia to Father because of his “current housing and income situation.”

D. *Eighteen-Month Review*

At the 18-month status review hearing held May 1, 2018, the court permitted unmonitored visitation for Father, and gave DCFS discretion to release Olivia to Father after he secured appropriate housing.

Three months later, on August 14, 2018, however, Father still did not have housing and was residing with a friend. The court found that Father made “partial” progress toward alleviating the causes necessitating Olivia’s removal and placement and continued reunification services for Father.

E. *Olivia’s Removal from Paternal Grandmother’s Home*

In August 2018, DCFS removed Olivia from Paternal Grandmother after learning that she drank vodka and rum regularly and also gave vodka and rum to Olivia—possibly “to make the child go to sleep or for some other reason unknown.” Paternal Grandmother had previously referred to Olivia as “‘my alchi baby.’” The reporting party stated that Father and Mother moved in with Paternal Grandmother even though they “are not supposed to live in the same place as the child.”

The reporting party further stated that after Paternal Grandmother went to the beach and left Olivia at home in the care of Father, Father called Paternal Grandmother and “threaten[ed] to strangle or throw the child over the balcony of the family’s apartment [o]n the 3rd floor.” It was also reported that Paternal Grandmother “told [F]ather to take 3 Xanax pills to calm down, which allegedly he did.” In fact, DCFS found open wine bottles and beer, as well as “a dozen bottles of medications that were prescribed to father” inside Paternal Grandmother’s place of residence. The DCFS case worker observed “small faint light purple bruises/scratches” on Olivia’s lower legs/shins, on her back, and under her left eye; Paternal Grandmother said Olivia sustained most of the bruises while playing.

Upon DCFS’s request, the court ordered Father to weekly drug and alcohol testing. Father’s response to the testing order: “‘[T]his is just getting more and more ridiculous.’” After Father

failed to submit to weekly drug tests, the court ordered monitored visitation “unless and until Father provides 5 consecutive clean drug tests.”

F. *Twenty-Four-Month Review*

On November 6, 2018, at the 24-month status review hearing, DCFS informed the court that Olivia had been residing with the Estrada foster family since August 2018 when she was removed from the care of Paternal Grandmother. The court specified its concerns: “Father has multiple no-shows for testing. No-shows must be regarded by this court as positive tests and so that is an indication that Father may have relapsed very recently.” Also, Father was late for several of his visits with Olivia, including on her birthday—“so late that the visits had to be canceled.” “Even when this court said Father’s visits can go back to unmonitored on the condition that he give five consecutive clean tests, Father no-shows for testing” which “raises a very strong inference that . . . the tests would have been dirty.”

The court found that returning Olivia to Father would “create a substantial risk of detriment” to her. The court stated “it would not be safe to release Olivia to her Father at this time” and terminated reunification services.

G. *Post-Termination of Reunification Services*

On December 17, 2018, DCFS reported to the court that Father missed all his drug tests since August 2018. However, Father visited regularly despite usually arriving 30 minutes late to each visit, often brought toys or food for Olivia, and was reported to be “appropriate and loving.” Father “spent all his time invested and concentrated on his daughter” during the visits; although he “followed Olivia excessively into the



playground structure, . . . he gave her independence and opportunity to learn how to do things herself with his guidance. He allowed her to cut and eat her own food and tended to her only at her request (while at the same time watching her closely). He gave her positive reinforcement in form of praise and emotional comfort.” The visitation monitor observed Father teaching Olivia “social skills like eating properly, saying please and thank you,” etc. Father was also observed to be vigilant of Olivia’s bathroom needs and changed her diaper “every visit with minimal need of help.”

DCFS was provided with an “undated letter” that stated Father was a participant in a rehabilitative program for veterans suffering from PTSD issues; Father had not “been forthcoming with DCFS on the matter.”

While living with her foster family, Olivia had “unpredictable and severe tantrums sometimes lasting 20 to 40 minutes,” but there has been a “gradual incremental improvement.” Similarly, although Olivia initially woke up during the night screaming “2 to 3 times a week,” the frequency reduced to once a month. Olivia’s psychotherapist found her to be “emotionally dysregulated”; her “emotions are all over the place” from “laughing joy to screaming rage with no apparent trigger for the transition.” Olivia was “noticeably more calm” during the weeks where Father and Paternal Grandmother did not visit.

Right after the 24-month review and termination of reunification services, on December 26, 2018, Father was arrested and incarcerated for forgery, possession of a stun gun by a felon, fraudulent possession/use of a scan device, possession of a switchblade in a vehicle, and possession of controlled substances.

On January 25, 2019, Olivia's psychotherapist wrote a letter to the DCFS case worker and confirmed Olivia was participating in weekly child-parent psychotherapy sessions to work on decreasing temper tantrums where she rejects comfort from caregivers and to decrease aggressive behaviors (biting, hitting, pulling hair).

H. *Section 366.26 Permanency Planning Hearing*

On March 12, 2019, the court held a section 366.26 hearing to select and implement a permanent plan for Olivia. Father remained incarcerated without bail awaiting trial for three felonies. DCFS reported that since his arrest, Father had spoken to Olivia at least three times by telephone. Meanwhile, Olivia has been in the Estrada home for six months, was "thriving," and had formed attachments with her caregivers. "The consistent daily care she receives [from the Estrada family] provides a sense of much-needed stability for Olivia."

The court found that Father did not maintain "regular visitation" with Olivia. It reasoned: "[S]ome of Father's own conduct has caused the events that have limited his amount of contact with the child. And so, unfortunately, Father is responsible for the incident that caused his visits to be monitored. And Father is responsible for whatever the conduct was that caused him to be arrested and have these charges pending against him. [¶] Because of those things, it will be quite some time before the father could be in a position to care for this child."

The court further stated that Father has a "strong bond" with Olivia and that she recognized him as her Father. "But, unfortunately, at this stage of the case, what the statutory standard tells us, and the case law interpreting that standard, is

that is not the only inquiry. The inquiry is whether the attachment that the child has to the parent is so significant that it would outweigh the benefits of stability and permanence through adoption. [¶] In this case, the child has never actually lived with the Father” who “was never in a position to actually be a custodial parent.”

The court concluded that it does not have the evidence it would need to find that the beneficial parental relationship exception applied in Father’s case; it found by clear and convincing evidence that Olivia was adoptable, proceeded with the termination of parental rights, and implemented a permanent plan of adoption. It designated the current caretakers—the Estrada foster family—as the prospective adoptive parents for Olivia, as she had lived with them for over six months, they had expressed a commitment to adopt her, and they had an approved adoption home study.

Father and Mother each timely appealed.

## **DISCUSSION**

Father contends the court erred in finding that the beneficial parental relationship exception to adoption set forth in section 366.26, subdivision (c)(1)(B)(i) did not apply. We disagree.

### **A. *Applicable Law***

“After reunification services have been terminated, the focus of a dependency proceeding shifts from family preservation to promoting the best interest of the child including the child’s interest in a ‘placement that is stable, permanent, and that allows the caretaker to make a full emotional commitment to the child.’” (*In re Fernando M.* (2006) 138 Cal.App.4th 529, 534.) At

a section 366.26 hearing, “to provide stable, permanent homes for [dependent] children” (§ 366.26, subd. (b)), the juvenile court “has three options: (1) to terminate parental rights and order adoption as a long-term plan; (2) to appoint a legal guardian for the dependent child; or (3) to order the child be placed in long-term foster care. [Citation.] Adoption is the preferred plan and, absent an enumerated exception, the juvenile court is required to select adoption as the permanent plan.” (*In re Fernando M.*, at p. 534.)

Nonetheless, there are statutory exceptions to the preferred plan of adoption, one of which was raised by Father and is now before us for review. “One exception to adoption is the beneficial parental relationship exception. This exception is set forth in section 366.26, subdivision (c)(1)(B)(i) which states: ‘[T]he court shall terminate parental rights unless . . . (B) The court finds a compelling reason for determining that termination would be detrimental to the child due to one or more of the following circumstances: [¶] (i) The parents have maintained regular visitation and contact with the child and the child would benefit from continuing the relationship.’” (*In re Noah G.* (2016) 247 Cal.App.4th 1292, 1300; see § 366.26, subd. (c)(1)(B)(i).) The parent bears the burden to establish that this exception applies. (*In re Noah G.*, at p. 1300.)

Here, Father must demonstrate that the parent-child relationship with Olivia “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.* (1994) 27 Cal.App.4th 567, 575 (*Autumn H.*)). In making this determination, courts consider “[t]he 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.” (*Id.*, at p. 576.) The court shall balance “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.” (*Id.*, at p. 575.)

“No matter how loving and frequent the contact, and notwithstanding the existence of an ‘emotional bond’ with the child, ‘the parents must show that they occupy “a parental role” in the child’s life.’ ” (*In re K.P.* (2012) 203 Cal.App.4th 614, 621 (*K.P.*).) “The relationship that gives rise to this exception to the statutory preference for adoption ‘characteristically aris[es] from day-to-day interaction, companionship and shared experiences. Day-to-day contact is not necessarily required, although it is typical in a parent-child relationship.’ ” (*Ibid.*) And finally, 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.” (*In re Jasmine D.* (2000) 78 Cal.App.4th 1339, 1350 (*Jasmine D.*).)

#### B. *Standard of Review*

In reviewing a challenge to the juvenile court’s decision regarding the applicability of an exception to adoption, we employ the substantial evidence or abuse of discretion standard of review, depending on the nature of the issue on appeal. (*In re*

*J.S.* (2017) 10 Cal.App.5th 1071, 1080; *K.P.*, *supra*, 203 Cal.App.4th at pp. 621–622.) We review the juvenile court’s factual determination—whether a beneficial parental relationship exists—under the substantial evidence standard. (*K.P.*, at p. 622.) However, given the existence of a beneficial parental relationship, we review the court’s discretionary decision—whether the termination of parental rights would be detrimental to the child as weighed against the benefits of adoption—under the abuse of discretion standard. (*Ibid.*; *In re J.S.*, at p. 1080.) “In the dependency context, both standards call for a high degree of appellate court deference” (*In re J.S.*, at p. 1080), especially considering the juvenile court’s “opportunity to observe the witnesses and generally get ‘the feel of the case’ warrants a high degree of appellate court deference.” (*Jasmine D.*, *supra*, 78 Cal.App.4th at p. 1351.)

Here, the juvenile court found Father did not maintain regular visitation with Olivia, and that it did not have the evidence it needed to find that the beneficial parental relationship exception applied. Thus, the issue is subject to a sufficiency of the evidence standard of review—i.e., does substantial evidence support the court’s factual finding that a beneficial parental relationship did not exist between Father and Olivia. “On review of the sufficiency of the evidence, we presume in favor of the order, considering the evidence in the light most favorable to the prevailing party, giving the prevailing party the benefit of every reasonable inference and resolving all conflicts in support of the order.” (*Autumn H.*, *supra*, 27 Cal.App.4th at p. 576.)

C. *Analysis*

The parties here differ as to whether Father maintained regular visitation and contact with Olivia. Respondent DCFS argues that while Father had “periods of regular visitation during the case, he did not maintain consistent visitation and contact with the child throughout the case.” Father contrarily argues that DCFS’s “reports and father’s testimony verified father attended weekly visits *when he was not incarcerated.*” We italicized the latter portion of Father’s argument in the preceding sentence, because therein lies a problem.

The appellate record shows as follows.

The dependency case began in November 2016 upon the filing of the petition. Although DCFS reported that Father began weekly monitored visits with Olivia, Father was arrested one month into the case, in December 2016. We find DCFS’s assessment of Father at the outset of the case accurate: “Instead of utilizing the resources available to help him stabilize his life, he knowingly engaged in illegal activities which resulted in his current incarceration.” After Father was released, he failed to respond to DCFS’s attempts to communicate for months.

Although Father admittedly realized that he “took a lot for granted” and that he was now “focused” on completing the requirements to regain custody of Olivia, he was later arrested again in December 2018 for being a felon in possession of a stun gun, possession of controlled substances, and possession of a switchblade in a vehicle, inter alia. He remained incarcerated for months leading up to and through the section 366.26 permanency planning hearing set for March 12, 2019. During these periods of incarceration, Father was unable to visit Olivia, but spoke with her via telephone a few times.

Although there were periods of time where Father was more consistent with visitation, we agree with DCFS's assessment that overall his visitation was not regular. Sporadic visitation is insufficient to satisfy the first prong of the beneficial parental relationship exception to adoption. (*In re Elizabeth M.* (1997) 52 Cal.App.4th 318, 324.) Further, even when Father was not incarcerated, he visited Olivia only once per month despite the juvenile court's authorization of monitored visitation twice a month. Father was also consistently late to his visits with Olivia, even on her birthday.

Additionally, while Olivia and Father had pleasant visits and we agree with the juvenile court's finding that there is some bond between Olivia and her "dada" (i.e., Father), there is no evidence showing Father occupied a parental role in her life such that the benefits of continuing the parental relationship outweighed the benefits of permanent placement via adoption. As *Autumn H.* points out, contact between a parent and child will always "confer some incidental benefit to the child," but an "incidental benefit" is not enough. (*Autumn H., supra*, 27 Cal.App.4th at p. 575.) It is true Father brought toys or food for Olivia and was "appropriate and loving" with her, but that is not enough. As examples of Father's inability to show the court his ability to parent Olivia: Father had little respect for and still repeatedly failed to submit to the court-ordered drug tests, despite being admonished that a missed test is the same as a dirty test; he disappeared from Olivia's life when he was incarcerated but for a few telephone calls; he disregarded the court's order that he not live with Olivia and Mother at Paternal Grandmother's house. He, at one point, threatened to throw Olivia out a window. He was, for better and worse, on a life path



of ups and downs that he did not or could not elude. Moreover, the evidence was clear that Olivia, at the Estrada home in the meantime, was beginning to overcome her aggressive behavior and temper tantrums, and to feel more calm and stable with her caregivers.

“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.” (*In re Brittany C.* (1999) 76 Cal.App.4th 847, 854.) There is no doubt Father loves Olivia and has made some efforts on her behalf. However, Olivia is entitled to stability and permanence through adoption, especially after the juvenile court gave Father 29 months to learn and implement the necessary changes in his life. At the time of the section 366.26 hearing, Olivia had resided with the Estradas for over six months and was described as “thriving” in their care. We conclude the court’s ruling is supported by substantial evidence.

Because the juvenile court reasonably found that Father had not maintained regular visitation and had not assumed a parental role, it did not err in determining that the beneficial parental relationship exception did not apply. (*In re I.R.* (2014) 226 Cal.App.4th 201, 212.)

Mother’s sole assertion on appeal is that a reversal of the order terminating Father’s parental rights requires a reversal of the order terminating *her* parental rights. Because Father does not prevail on appeal, neither does Mother.

## **DISPOSITION**

The order terminating parental rights as to Father and Mother is affirmed.

**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**

STRATTON, J.

We concur:

BIGELOW, P. J.

GRIMES, J.