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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

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

B271976

(Los Angeles County
Super. Ct. No. DK07991)

LOS ANGELES COUNTY
DEPARTMENT OF CHILDREN
AND FAMILY SERVICES,

Plaintiff and Respondent,

v.

GABRIELLE D.,

Defendant and Appellant.

APPEAL from an order of the Superior Court of
Los Angeles County, Frank Menetrez, Judge. Affirmed.

Emery El Habiby, under appointment by the Court of
Appeal, for Defendant and Appellant.

Mary C. Wickham, County Counsel, R. Keith Davis,
Assistant County Counsel, and Brian Mahler, Senior Associate
County Counsel, for Plaintiff and Respondent.

Gabrielle D., the mother of now six-year-old Anthony D., three-year-old Sariah C. and two-year-old Ayden C., appeals the juvenile court's April 25, 2016 order terminating her parental rights under Welfare and Institutions Code section 366.26.¹ Gabrielle contends the court violated her right to due process by denying her request for a contested hearing and in ruling she had failed to establish the parent-child-relationship exception to termination of parental rights (§ 366.26, subd. (c)(1)(B)(i)). We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

1. The Initiation of Dependency Proceedings and Removal of Anthony, Sariah and Ayden

The Los Angeles County Department of Children and Family Services (Department) first learned of this family in September 2014 when it received a telephone referral stating Ayden, who was born with respiratory distress in July 2014 at 10 weeks premature, had been hospitalized in the neonatal intensive care unit (NICU) for 41 days and Gabrielle had visited only nine times.

A Department social worker interviewed Gabrielle, who was then living in the home of her grandmother, Sandra D., with Anthony and Sariah, her grandparents, a sibling and a cousin.

¹ Statutory references are to this code unless otherwise stated.

Gabrielle reported Anthony's father was Jonathan A. and Sariah and Ayden's father was Steven C.² Gabrielle was still in a relationship with Steven, who she stated did not have a permanent address.

Gabrielle said Steven had committed several acts of domestic violence against her, most notably when he pushed her down while she was eight months pregnant with Sariah. She went to the hospital for treatment after the incident but did not call the police. Gabrielle also stated Steven had a history of drug and alcohol use and had been under the influence of those substances in front of the children. Gabrielle signed a safety plan stating she would enroll in domestic violence counseling and a parenting class. She also agreed she would not take the children to visit Steven by herself.

Gabrielle admitted she visited Ayden infrequently in the NICU. She explained it was because the bus took several hours and it was difficult to coordinate bus schedules with hospital visiting hours. Gabrielle and Steven did successfully complete a "nesting" training during which they stayed overnight in the hospital with Ayden. Shortly thereafter, Ayden was released from the hospital into Gabrielle's care.

Two weeks after signing the safety plan Gabrielle took Sariah and Ayden to stay with Steven for two or three days in a motel. Sandra took care of Anthony during this time. (Gabrielle had not told Sandra where she was going.) Gabrielle understood

² Jonathan never appeared in the case. Steven appeared and was represented by counsel throughout the juvenile court proceedings. He has not appealed the termination of his parental rights.

taking the younger children with her to visit Steven was a violation of her safety plan.

On October 8, 2014 the removal of Anthony, Sariah and Ayden from Gabrielle's custody was authorized, and the children were temporarily placed in Sandra's home. On October 22, 2014 the Department filed a petition to declare Anthony, Sariah and Ayden dependent children of the juvenile court under section 300, subdivisions (a) and (b), alleging serious physical harm and failure to protect based on the history of violent altercations between Gabrielle and Steven, Steven's history of domestic abuse against a former partner and Steven's history of substance abuse. At the detention hearing the court found a prima facie case for detaining the children and ordered them placed in the temporary custody of the Department with discretion to release them to an appropriate relative. The court ordered reunification services for Gabrielle. After the hearing the children continued to reside with Sandra.

In a December 10, 2014 jurisdiction/disposition report the Department noted Gabrielle had been difficult to reach because she did not have a permanent phone number and was staying with Steven at various relatives' homes. In the two months since the children were detained, Gabrielle had not visited them and had called to speak to Anthony only five or six times. Gabrielle had called once to request a visit, giving only an hour's notice. Sandra informed her the notice was too short, and Gabrielle never called to schedule another visit. The multidisciplinary assessment report attached to the jurisdiction/disposition report stated Anthony had a close relationship with Sandra and exhibited some anxiety when she was not with him. Sariah and Ayden were likewise noted to have a close relationship with

Sandra. Gabrielle had received notice of the multidisciplinary assessment meeting but did not attend. Gabrielle also set up an appointment with the Department social worker in early December but did not show up.

In January 2015 Gabrielle turned herself in on an outstanding warrant for a misdemeanor offense and served a three-week sentence after which she was released on a work-release program. In February 2015 Gabrielle sought a temporary restraining order against Steven due to harassing telephone calls and past episodes of violence. The TRO was issued on February 2, 2015, and a hearing set for three weeks later.

A combined jurisdiction/disposition hearing was held on February 23, 2015. Gabrielle and Steven pleaded no contest to the allegations in the petition. The court dismissed the allegations of serious physical harm and the allegations of failure to protect relating to Steven's history of substance abuse and history of domestic violence with a prior partner. The court amended and sustained the allegation of failure to protect based on Steven's history of violence against Gabrielle. The court declared the children dependents of the court and ordered they be placed in the care of the Department for suitable placement. The Department continued to place the children with Sandra.

The court ordered family reunification services and monitored visitation for Gabrielle with the Department having discretion to liberalize visitation. Gabrielle's court-ordered case plan required three random drug tests, enrollment in a domestic violence support group, enrollment in a 26-week parenting class and individual counseling. The court allowed the TRO against Steven to expire by statute.

2. The Six-month Review Hearing and Gabrielle's Compliance with Her Case Plan

Gabrielle completed three random drug tests in February and March 2015 and tested negative in each one. In March Gabrielle was again incarcerated for a little over two weeks due to failure to attend her work-release program. In April Gabrielle enrolled in a domestic violence support group but was terminated from the program a month later due to nonattendance. Gabrielle told the Department social worker she missed sessions due to the lengthy commute.

In April 2015 Gabrielle informed the Department social worker she was living with Steven in motels and hoped to reunify as a family. However, in June Gabrielle stated she had ended her relationship with Steven because he had continued to be violent toward her. In July Gabrielle was again living with Steven in a motel. On July 18, 2015 the couple had an argument, which led to Steven beating Gabrielle for a period of two hours during which he punched her, bit her, whipped her with a phone cord and threatened to kill her. Gabrielle later went to the hospital where she was treated for multiple facial fractures. The police were called to the hospital and issued an emergency protective order against Steven.

Because of this incident Gabrielle told the Department social worker she wished to enter a domestic violence shelter. Gabrielle called multiple shelters, but they were all full. The Department provided additional shelter referrals. As of July 28, 2015 Gabrielle had not enrolled in any of the court-ordered programs. In August Gabrielle did enroll in a 10-week parenting program, but her case plan required a 26-week program.

In mid-August Sandra reported to the Department that Gabrielle had been communicating with Steven by telephone. However, on August 20, 2015 Gabrielle requested and received another TRO against Steven.

In an August 21, 2015 status review report the Department stated Gabrielle's visits with the children had been sporadic over the prior six months. The Department had arranged for twice-weekly visits for Gabrielle with the monitor alternating between Sandra and Gabrielle's great-aunt, Cynthia. Gabrielle submitted a log of visits showing, between January 29 and July 30, she had visited the children only 11 times. Gabrielle stated one reason for her infrequent visits was her incarceration for three weeks in January and two weeks in March. She also stated she had missed five visits because Sandra had been unavailable or refused to respond to her requests. Sandra and Cynthia corroborated Gabrielle's visits occurred infrequently. Sandra told the Department the longest Gabrielle had gone without seeing the children was approximately six weeks.

Sandra told the Department Gabrielle was bonded with Anthony, but he got anxious when Gabrielle's visits were sporadic. Gabrielle had not, however, formed a bond with Ayden. Sandra also stated Gabrielle did not always interact with the children during visits, instead spending time with other family members who were present. Sandra said Gabrielle's visits were more regular during the periods she was not interacting with Steven. Anthony's therapist reported Anthony would scream and cry when separated from Sandra.

The Department recommended family reunification services be terminated for Gabrielle and further recommended monitored visitation occur at the Department's office. The six-

month review hearing originally scheduled for August 22, 2015 was set for contest and continued to October 26, 2015.

In September 2015 Gabrielle was again separated from Steven. On September 16 Steven approached Gabrielle as she was leaving her parenting class and told her to go with him to his motel room. Gabrielle said she agreed because she was afraid of him. Once in the hotel room Gabrielle and Steven had an argument, and Steven repeatedly kicked and hit Gabrielle and then choked her until she lost consciousness. Steven then told Gabrielle she needed to go with him to her aunt's house and get money. Gabrielle agreed. When they reached her aunt's house, Steven waited outside. Once inside Gabrielle told her family what happened, and they called the police. Steven was arrested for domestic violence assault.

On October 26, 2016 the Department filed a last minute information report prior to the continued six-month review hearing. Sandra had advised the Department Gabrielle's visits were more consistent now that Steven was incarcerated, but Gabrielle still did not pay as much attention to Ayden as to the other children. Sandra also reported Gabrielle had told her she still loved Steven and had spoken to him on the phone while he was incarcerated. The Department approved Gabrielle to resume one monitored visit per week outside the Department's office.

The contested six-month review hearing was held on October 26, 2016. At the hearing Gabrielle's counsel submitted a letter from a guidance center stating Gabrielle was enrolled in a 26-week parenting class. The letter was admitted into evidence along with the Department's reports. The court found by a preponderance of evidence Gabrielle was in partial compliance with her case plan but had not "consistently and regularly

contacted and visited” the children and had “not made significant progress in resolving the problems that led to the minor[s] removal from the home.” The court terminated reunification services and set a section 366.26 selection and implementation hearing for February 22, 2016.

3. Gabrielle’s Section 388 Petition for Modification

On February 8, 2016 Gabrielle filed a section 388 petition requesting the court return the children to her custody or grant her further reunification services with unmonitored visitation and overnight visits. Gabrielle asserted she had completed both a 12-session domestic violence victims program and a 26-week parenting program in late January.

While the section 388 petition was pending, the Department filed a report for the section 366.26 hearing. The report stated Sandra had been “extremely supportive” in working with Anthony in therapy. The report further noted Gabrielle’s visits had been inconsistent, averaging a couple of visits per month. In addition, the Department reported Gabrielle remained in contact with Steven. The Department recommended a permanent plan of adoption for the children but requested a 90-day continuance of the section 366.26 hearing so a homestudy for the prospective adoptive parents could be completed.³

The court granted the Department’s request for a continuance and set the section 366.26 hearing for April 25, 2016. The court also ordered the Department to respond to Gabrielle’s

³ Initially the adoptive parents were to be Sandra and her husband. However, in a last minute information filed on February 22, 2016 the Department recommended adoption by Sandra and her daughter Barbara.

section 388 petition and set the petition for hearing on March 24, 2016.

In its response to the section 388 petition the Department reported Gabrielle was currently living with Cynthia and taking care of Cynthia's young children while also looking for work. Gabrielle's visits had grown more consistent since Steven's incarceration. The Department noted Gabrielle's completion of a 12-week domestic violence program was not sufficient to address the extent of the domestic violence Gabrielle had suffered. The response concluded Gabrielle was in "a very early phase in her recovery as a battered woman, and is still dependent on others to protect herself from any further incidents of domestic violence [Gabrielle] was unable to state that she will call 911 as soon as able or just scream for help if assaulted in a public area, when asked what she would do if confronted with a domestic violence situation again. The mother cannot protect the children if she [is] not yet equipped to effectively protect herself. . . . [S]he has not gained the emotional strength and insight needed to self-protect and not allow herself to be in a domestic violence situation again." The Department recommended Gabrielle's section 388 petition be denied.

Immediately prior to the section 388 hearing the Department filed a last minute information reporting on interviews with Anthony, Sandra and Gabrielle's mother, Irene. Anthony said he liked visiting with Gabrielle and wanted to live with her. Sandra reported Gabrielle often returns the children early from visits and on a few occasions requested to leave Ayden behind because he was fussy. Irene reported she monitored some of Gabrielle's visits and there was still "some disconnect" between Gabrielle and the younger children, particularly Ayden.

The section 388 hearing was held on March 24, 2016. Gabrielle testified, and the court admitted letters from Gabrielle and her therapist into evidence. Gabrielle's therapist reported Gabrielle had attended 10 individual counseling sessions between November 2015 and March 2016 and had "demonstrated progress toward the issues and takes responsibility for her actions. Gabrielle appears capable of providing a safe environment for her children"

The court found the best interest of the children would not be served by modifying the prior order and denied the petition.

4. The Section 366.26 Hearing and Identification of Adoption as the Children's Permanent Plan

In a supplemental report prepared for the section 366.26 hearing the Department stated Steven was still incarcerated and Gabrielle was scheduled for monitored visitation with the children twice a week. Both visitation monitors reported Ayden was starting to build a connection with Gabrielle and called her "mom." Anthony told the Department he liked living with Sandra. The Department reported the children were suitably placed in Sandra's home and were likely to be adopted. A supplemental report stated the adoption home study for Sandra and Barbara had been approved.

The section 366.26 selection and implementation hearing was held on April 25, 2016. Gabrielle's attorney asked the matter be set for a contested hearing. In response to the court's request for an offer of proof, counsel stated she would submit pages of the Department's report indicating Gabrielle had a bond with the children and would have Gabrielle testify regarding her visits with the children to establish the parental bond exception to termination under section 366.26, subdivision (c)(1)(B)(i). The

court held the order of proof was insufficient to set the matter for contest because the potential evidence proffered would not “create any disputed issues of fact—of material fact.” The court proceeded with the hearing.

Despite denying the request to set the matter for contest, the court permitted Gabrielle’s counsel to submit evidence, including the section 388 petition and attachments and the Department’s status review report dated April 25, 2016. Counsel also called Gabrielle to testify, and she stated she had been visiting the children twice a week. Gabrielle testified during the visits she helped the children with homework, fed them and changed their diapers. She testified Ayden runs to her and calls her “mama,” although her relationship with him is a “work in progress.” She stated the older children call her “mom” and are excited when she visits. At the conclusion of Gabrielle’s testimony the court asked Gabrielle’s counsel if she had any additional evidence to present, and she stated she did not.

After hearing from counsel the court found Gabrielle’s visits had been inconsistent over the course of the case and a bond between Ayden and Gabrielle was just beginning to develop. Further, the court found the issues that brought the case to the Department’s attention had not been fully addressed. For those reasons the court found the section 366.26 parental bond exception did not apply and terminated Gabrielle’s parental rights. The care, custody and control of the children was transferred to the Department to complete adoption by Sandra and Barbara. Gabrielle filed a timely notice of appeal.

DISCUSSION

1. *The Juvenile Court Did Not Violate Gabrielle's Due Process Rights at the Section 366.26 Hearing*

a. *Governing law and standard of review*

Section 366.26 directs the juvenile court in selecting and implementing a permanent placement plan for a dependent child to hold a hearing at which it reviews reports prepared by the Department and “receive[s] other evidence that the parties may present.” (§ 366.26, subd. (b).) Because the hearing may result in termination of parental rights, a parent has due process rights at the hearing. (*In re Tamika T.* (2002) 97 Cal.App.4th 1114, 1120; *In re Jeannette V.* (1998) 68 Cal.App.4th 811, 816.) Due process “requires, in particular circumstances, a “meaningful opportunity to cross-examine and controvert the contents of the report.” [Citations.] But due process is not synonymous with full-fledged cross-examination rights. [Citation.] *Due process is a flexible concept which depends upon the circumstances and a balancing of various factors.* [Citation.] *The due process right to present evidence is limited to relevant evidence of significant probative value to the issue before the court.”* (*In re Tamika T.*, at p. 1120; accord *Maricela C. v. Superior Court* (1998) 66 Cal.App.4th 1138, 1146-1147 “[w]hile a parent in a juvenile dependency proceeding has a due process right to a meaningful hearing with the opportunity to present evidence [citation], parents in dependency proceedings ‘are not entitled to full confrontation and cross-examination”]; *In re Jeannette V.*, at pp. 816-817.) Thus, the court does not violate a parent’s due process rights when it excludes irrelevant evidence from the hearing. (*In re Tamika T.*, at pp. 1121-1122; *In re Jeannette V.*,

at p. 817; see also *Maricela C.*, at pp. 1146-1147 [“The state’s strong interest in prompt and efficient trials permits the nonarbitrary exclusion of evidence [citation], such as when the presentation of the evidence will ‘necessitate undue consumption of time.’ (Evid. Code, § 352.)”].)

The question whether a parent’s due process rights were violated presents an issue of law, which we review de novo. (*In re A.B.* (2014) 230 Cal.App.4th 1420, 1434.)

b. *Gabrielle’s right to due process was not violated at the section 366.26 hearing*

Gabrielle contends the juvenile court violated her right to due process by denying her request for a contested selection and implementation hearing. Gabrielle further contends the juvenile court’s request for an offer of proof before granting a contested hearing was improper and argues, even if an offer of proof was permitted, she presented sufficient evidence to warrant a contested hearing.

Gabrielle’s arguments lack merit. Although the court nominally denied Gabrielle’s request for a contested hearing,⁴ it

⁴ In *In re Tamika T.*, *supra*, 97 Cal.App.4th 1114, our colleagues in Division Four of this court held in the context of a post-reunification selection and implementation hearing, as here, “due process does not require a court to hold a contested hearing if it is not convinced the parent will present relevant evidence on the issue he or she seeks to contest.” (*Id.* at p. 1122.) Accordingly, the juvenile court does not deny due process “if it requires a parent to make an offer of proof before it conducts a contested hearing on the issue of whether a parent can discharge his or her burden of establishing a statutory exception to termination of parental rights.” (*Id.* at p. 1116; accord, *In re Earl L.* (2004) 121 Cal.App.4th 1050, 1053.)

allowed Gabrielle to present at the scheduled hearing all the evidence her attorney had identified in the offer of proof. Specifically, the portion of the report on which Gabrielle relied to show a parent-child bond was admitted into evidence, and Gabrielle was permitted to testify. At the conclusion of her testimony the court then gave Gabrielle the opportunity to present additional evidence, asking her counsel if she had any additional evidence; Gabrielle's attorney replied she did not.⁵

Notwithstanding her opportunity to present evidence at the section 366.26 hearing, Gabrielle contends her right to due process was violated because she was not able to cross-examine the Department social workers or question Sandra. As discussed, however, Gabrielle's counsel was twice asked what evidence she wished to present in addition to documents regarding Gabrielle's visits with her children and Gabrielle's own testimony—during her offer of proof and at the conclusion of Gabrielle's testimony. On neither occasion did she state she wanted to question Sandra or the social worker. (See *In re Tamika T.*, *supra*, 97 Cal.App.4th at p. 1124 [an offer of proof “must be specific, setting forth the

⁵ In her reply brief Gabrielle appears to concede she was given a contested evidentiary hearing but argues her due process rights were nonetheless violated because the juvenile court denied her request for a continuance, which, she argues, would have provided her with additional time to prepare her case. Because she failed to address the denial of a continuance in her opening brief, Gabrielle has forfeited the issue. (*Kelly v. CB&I Constructors, Inc.* (2009) 179 Cal.App.4th 442, 452 [“point not raised in opening brief will not be considered”]; *Shade Foods, Inc. v. Innovative Products Sales & Marketing, Inc.* (2000) 78 Cal.App.4th 847, 894-895, fn. 10 [arguments raised by appellant for first time in reply brief generally not considered, absent good reason for failing to present them earlier].)

actual evidence to be produced, not merely the facts or issues to be addressed and argued”]; *In re A.B.*, *supra*, 230 Cal.App.4th at p. 1441 [same].) Accordingly, the issue has been forfeited. (See *In re S.B.* (2004) 32 Cal.4th 1287, 1293 [forfeiture doctrine applies in dependency cases]; *Sea & Sage Audubon Society, Inc. v. Planning Com.* (1983) 34 Cal.3d 412, 417 [issues not raised in trial court cannot be raised for first time on appeal]; *Zimmerman, Rosenfeld, Gersh & Leeds LLP v. Larson* (2005) 131 Cal.App.4th 1466, 1488.)

Even if the issue has not been forfeited because not raised below, moreover, the failure to allow cross-examination of these witnesses did not impermissibly limit Gabrielle’s right to present evidence at the hearing. (See *In re Tamika T.*, *supra*, 97 Cal.App.4th at p. 1120 [“[t]he due process right to present evidence [at a 366.26 hearing] is limited to relevant evidence of significant probative value to the issue before the court”].) The testimony Gabrielle suggests she would have obtained from Sandra had no significant probative value for the issue of the parent-child exception. Specifically, Gabrielle argues her counsel would have questioned Sandra about her role in causing Gabrielle to miss visits with the children. However, evidence already in the record from Gabrielle indicated she had missed five visits with the children between April and July 30, 2015 due to Sandra’s unavailability or nonresponsiveness. Gabrielle’s visits were consistent, albeit limited, thereafter. Even if Sandra had admitted interfering with Gabrielle’s visitation rights on those five occasions, the fact remains Gabrielle visited the children only 11 times between January and July 30, 2015. This visitation record falls far short of what would be required to show “regular visitation and contact” under section 366.26, even if the

five missed visits were not counted against Gabrielle. In addition, Gabrielle had the opportunity to testify about the missed visits and Sandra's behavior. Having failed to do so in the juvenile court, she cannot now claim the evidence was improperly excluded.

Gabrielle's challenge to the denial of her right to cross-examine the social workers also fails. Gabrielle has provided no indication of what information she might elicit from that testimony, nor has she articulated any way in which such testimony would be probative. A parent at a section 366.26 hearing "does not have a per se right to cross-examine the authors of reports adverse to the parent's position even though those reports are introduced into evidence." (*In re Tamika T.*, *supra*, 97 Cal.App.4th at p. 1123.) In the absence of a showing of relevance, it is not a denial of due process to exclude the testimony. (*Id.* at p. 1122.)

In sum, the juvenile court did not deny Gabrielle her right to a contested hearing. Rather, the court exercised its broad authority to control contested dependency proceedings by limiting cross-examination of witnesses, while still allowing Gabrielle to present evidence to challenge the Department's adverse recommended findings.

2. *The Juvenile Court Did Not Err in Ruling Gabrielle Had Failed To Establish the Parent-child-relationship Exception to Termination of Parental Rights*

a. *Governing law and standard of review*

The express purpose of a section 366.26 hearing is "to provide stable, permanent homes" for dependent children. (§ 366.26, subd. (b).) Once the court has decided to end parent-child reunification services, the legislative preference is for

adoption. (§ 366.26, subd. (b)(1); *In re S.B.* (2009) 46 Cal.4th 529, 532 “[i]f adoption is likely, the court is required to terminate parental rights, unless specified circumstances compel a finding that termination would be detrimental to the child”]; *In re Celine R.* (2003) 31 Cal.4th 45, 53 “[I]f the child is adoptable . . . adoption is the norm. Indeed, the court must order adoption and its necessary consequence, termination of parental rights, unless one of the specified circumstances provides a compelling reason for finding that termination of parental rights would be detrimental to the child.”]; see *In re Marilyn H.* (1993) 5 Cal.4th 295, 307 [once reunification efforts have been found unsuccessful, the state has a “compelling” interest in “providing stable, permanent homes for children who have been removed from parental custody,” and the court then must “concentrate its efforts . . . on the child’s placement and well-being, rather than on a parent’s challenge to a custody order”]; see also *In re Noah G.* (2016) 247 Cal.App.4th 1292, 1299-1300; *In re G.B.* (2014) 227 Cal.App.4th 1147, 1163.)

Section 366.26 requires the juvenile court to conduct a two-part inquiry at the selection and implementation hearing. First, it determines whether there is clear and convincing evidence the child is likely to be adopted within a reasonable time. (*Cynthia D. v. Superior Court* (1993) 5 Cal.4th 242, 249-250; *In re D.M.* (2012) 205 Cal.App.4th 283, 290.) Then, if the court finds by clear and convincing evidence the child is likely to be adopted, the statute mandates judicial termination of parental rights unless the parent opposing termination can demonstrate one of the enumerated statutory exceptions applies. (§ 366.26, subd. (c)(1)(A) & (B); see *Cynthia D.*, at pp. 250, 259 [when child adoptable and declining to apply one of the statutory exceptions

would not cause detriment to the child, the decision to terminate parental rights is relatively automatic[.]

One of the statutory exceptions to termination is contained in section 366.26, subdivision (c)(1)(B)(i), which permits the court to order some other permanent plan if “[t]he parents have maintained regular visitation and contact with the child and the child would benefit from continuing the relationship.” The exception requires the parent to prove he or she has maintained regular visitation and his or her 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 Marcelo B.* (2012) 209 Cal.App.4th 635, 643; accord, *In re Amber M.* (2002) 103 Cal.App.4th 681, 689; see *In re Autumn H.* (1994) 27 Cal.App.4th 567, 575 “[t]he 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”].)

A showing the child derives some benefit from the relationship is not a sufficient ground to depart from the statutory preference for adoption. (See *In re Angel B.* (2002) 97 Cal.App.4th 454, 466 “[a] biological parent who has failed to reunify with an adoptable child may not derail an adoption merely by showing the child would derive *some* benefit from continuing a relationship maintained during periods of visitation with the parent”].) 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; *In re I.W.* (2009) 180 Cal.App.4th 1517,

1527.) Factors to consider include “[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.”” (*In re Marcelo B.*, *supra*, 209 Cal.App.4th at p. 643.) Moreover “[b]ecause 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.)

The parent has the burden of proving the statutory exception applies. (*In re I.W.*, *supra*, 180 Cal.App.4th at p. 1527; *In re Derek W.* (1999) 73 Cal.App.4th 823, 826.) The court’s decision a parent has not satisfied this burden may be based on either or both of two component determinations—whether a beneficial parental relationship exists and whether the existence of that relationship constitutes “a compelling reason for determining that termination would be detrimental to the child.” (§ 366.26, subd. (c)(1)(B); see *In re K.P.*, *supra*, 203 Cal.App.4th at p. 622; *In re Bailey J.* (2010) 189 Cal.App.4th 1308, 1314.) When the juvenile court finds the parent has not established the existence of the requisite beneficial relationship, our review is limited to determining whether the evidence compels a finding in favor of the parent on this issue as a matter of law. (*In re I.W.*, at pp. 1527-1528.)⁶ When the juvenile court concludes the benefit to

⁶ Because the juvenile court’s factual determinations are generally reviewed for substantial evidence, it has often been posited a challenge to a finding that no beneficial relationship exists is similarly reviewed for substantial evidence. (See, e.g., *In re Bailey J.*, *supra*, 189 Cal.App.4th at p. 1314; *In re*

the child derived from preserving parental rights is not sufficiently compelling to outweigh the benefit achieved by the permanency of adoption, we review that determination for abuse of discretion. (*In re K.P.*, at pp. 621-622; *In re Bailey J.*, at pp. 1314-1315.)

b. *Gabrielle failed to establish the (c)(1)(B)(i) exception to termination of parental rights*

Gabrielle contends she established the existence of a beneficial parental relationship with the children within the meaning of section 366.26, subdivision (c)(1)(B)(i), because she maintained regular visitation and the children were happy to see her during visits.⁷ However, the record does not compel a finding that regular visitation occurred or that Gabrielle sustained a parent-child relationship with the children. Gabrielle was permitted to visit the children twice a week but did not visit at all for the first two months following the children's removal from her custody and visited only 11 times during the six months between

Jasmine D., *supra*, 78 Cal.App.4th at p. 1351.) The parent's failure to carry his or her burden of proof on this point, however, is properly reviewed, as in all failure-of-proof cases, for whether the evidence compels a finding in favor of the appellant as a matter of law. (*In re Aurora P.* (2015) 241 Cal.App.4th 1142, 1157; see *In re I.W.*, *supra*, 180 Cal.App.4th at pp. 1527-1528 ["where the issue on appeal turns on a failure of proof at trial, the question for a reviewing court becomes whether the evidence compels a finding in favor of the appellant as a matter of law"]; *Almanor Lakeside Villas Owners Assn. v. Carson* (2016) 246 Cal.App.4th 761, 769 [same].)

⁷ Gabrielle does not dispute the juvenile court's finding the children were likely to be adopted.

January and July 2015. Even considering her five-week incarceration in early 2015 and five missed visits due to Sandra's unavailability, Gabrielle's visits fell far short of the number permitted by the Department. Although Gabrielle's visitation became more consistent in the months leading up to the 366.26 hearing, she never progressed beyond monitored visits and never had an overnight visit with the children. Taken together, these factors "fatally undermine any attempt to find the beneficial parental relationship exception." (*In re I.R.* (2014) 226 Cal.App.4th 201, 212 [finding no parental relationship exception when there were "significant lapses in visits" and parents did not "visit consistently to the extent permitted by court orders"]; see *In re C.F.* (2011) 193 Cal.App.4th 549, 554 [finding no parent-child relationship when parent "was more consistent with visitation as the section 366.26 hearing neared, but . . . overall her visitation was sporadic"]; *In re Casey D.* (1999) 70 Cal.App.4th 38, 51 [no parental relationship "where the parents have essentially never had custody of the child nor advanced beyond supervised visitation"].)

Similarly, the fact the children were happy to see Gabrielle during visits does not compel a finding a parental relationship existed absent some other evidence of a "significant, positive, emotional attachment from child to parent." (*In re Anthony B.* (2015) 239 Cal.App.4th 389, 396; see also *In re K.P.*, *supra*, 203 Cal.App.4th at p. 621 ["loving and frequent contact" and an "emotional bond" not per se sufficient to establish parental relationship].) Nothing in the record provides such evidence.

Even if Gabrielle could establish a parental bond, however, she has not demonstrated the benefit to the children from continuing the relationship with her would outweigh the well-

being the children would gain from permanent placement with Sandra and Barbara. (See *In re Marcelo B.*, *supra*, 209 Cal.App.4th at p. 643; *In re Autumn H.*, *supra*, 27 Cal.App.4th at p. 575.) Although Gabrielle again emphasizes her bond with the children, this argument ignores her inconsistent role in their lives, including not only her failure to maintain regular visitation but also her lack of attention to some or all of the children during some visits.

In addition, the domestic violence issues that first required the Department's intervention to protect the children have now only begun to be resolved. Two major incidents of abuse occurred during the pendency of this case, both resulting in police involvement and temporary restraining orders. Gabrielle failed to enforce the temporary restraining orders when they were violated and never took steps to obtain permanent restraining orders. Indeed, Gabrielle's progress appears in large part to have been possible because of Steven's incarceration. There are no indications Gabrielle would not regress once he is released. This history demonstrates, as the Department social worker stated, that Gabrielle is, at best, in the very early stages of dealing with her abuse and has not yet gained the emotional strength to protect herself.

In contrast, the children's placement with Sandra has been a stable and positive influence. The children are bonded with Sandra, and she takes an active role in their development. Sandra's home has been the only home Ayden has ever known. Even Anthony and Sariah lived with Sandra before they were detained.

In sum, the juvenile court did not abuse its discretion in concluding Gabrielle's progress did not provide a sufficient

benefit to the children to outweigh the stability provided by a permanent home. (See *In re G.B.*, *supra*, 227 Cal.App.4th at p. 1166 [benefit prong of parental relationship exception not met when mother’s “visits with her children were always supervised, mother was only at the beginning stages of working on the effects of domestic violence in her life, and there was still instability and dysfunction surrounding her relationship with father”]; *In re K.P.*, *supra*, 203 Cal.App.4th at p. 622 [benefit prong not met when child removed at young age and mother never progressed beyond monitored visitation].)

DISPOSITION

The juvenile court’s April 25, 2016 order is affirmed.

PERLUSS, P. J.

We concur:

ZELON, J.

SEGAL, J.