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IN THE COURT OF APPEAL OF THE STATE OF
CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

In re K.A., a Person Coming Under
the Juvenile Court Law.

B278808
(Los Angeles County
Super. Ct. No. DK03298)

LOS ANGELES COUNTY
DEPARTMENT OF CHILDREN
AND FAMILY SERVICES,

Plaintiff and Respondent,

v.

B.A.,

Defendant and Appellant.

APPEAL from an order of the Superior Court of Los
Angeles County, Veronica S. McBeth, Judge. (Retired Judge

of the L.A. Sup. Ct. assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.) Affirmed.

Catherine C. Czar, under appointment by the Court of Appeal, for Defendant and Appellant.

Tarkian & Associates, Arezoo Pichvai, for Plaintiff and Respondent.

B.A. (mother) appeals from the dependency court's October 31, 2016 order terminating her parental rights over K.A., age seven. She contends the trial court erroneously found the beneficial parental relationship exception under Welfare and Institutions Code section 366.26¹ inapplicable. We affirm.

FACTS AND PROCEDURAL HISTORY

K.A., at the age of four years, was referred to the Los Angeles County Department of Children and Family Services (DCFS) on January 31, 2014, after mother and her domestic partner, J.G., were seen physically abusing him at a bus stop. Mother and J.G. became angry when K.A. asked a person standing nearby for money and food. J.G. grabbed K.A., pushed him into a fence, and hit him in the head three times. Mother punched K.A. in the face twice, punched him

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

on the back of his head twice, and kicked him in the back. K.A. reported that mother threatened to “throw me in the middle of the street so that a car can hit me and bust my head open.” Mother had hit, slapped, kicked, and verbally abused K.A. in the past. She and J.G. fought a lot and hit K.A. when they were angry. K.A. was afraid of mother. K.A. had scarring on his abdomen and reported previous bone fractures. Mother regularly used profanity with K.A., calling him the “B” word and the “N” word.

On February 5, 2014, DCFS petitioned the juvenile court to take jurisdiction over K.A. on the basis that he had suffered serious physical harm inflicted upon him nonaccidentally by mother and J.G., and there was a substantial risk that K.A. would suffer serious physical harm in the future. (§ 300, subds. (a) & (b).) A first amended petition filed on March 20, 2014, added J.G. as a presumed mother and alleged emotional abuse under section 300, subdivision (c). On April 3, 2014, the juvenile court sustained the petition, finding that mother had inappropriately disciplined K.A. (§ 300, subd. (a).) J.G. was dismissed from the petition and the remaining allegations were dismissed in the interests of justice. K.A. was ordered removed, and mother was provided with reunification services, including monitored visits once a week for three hours. Mother was ordered to participate in a parenting class, and individual counseling to address appropriate methods of discipline and anger management issues.

A DCFS status report filed just prior to the six-month review hearing on October 2, 2014, stated that K.A., who had been in shelter care from February 1 to March 13, had been placed with a foster family as of March 13, 2014. They reported that K.A. initially had problems with bed-wetting, urinating in the bedroom, and frustration in school, but had improved over time. K.A. received therapeutic treatment, and appeared to be happy and bonded with his caregivers. During the period following adjudication, mother enrolled in parenting and counseling services several times, but failed to complete any of the programs for various reasons, including cost and inability to work with program facilitators. Mother's visits with K.A. had become inconsistent in the month prior to the report, but were appropriate and welcomed by the child. At the hearing, the court ordered reunification services continued. The court increased monitored visitation to two to three visits per week.

A last minute information filed prior to an October 30, 2014 progress hearing stated that mother and J.G. had been terminated from a court-ordered program because they engaged in a physical altercation. Mother had not provided documentation of enrollment in any parenting or counseling programs at the time of the information. Her visits with K.A. were inconsistent, with frequent cancellations.

A DCFS status report filed prior to the 12-month permanency hearing informed that K.A. continued to receive therapeutic treatment and was doing well in his foster placement. His foster parents were not interested in

adoption. Mother had enrolled in a parenting course in January 2015, but her participation was sporadic. She had still failed to provide documentation of participation in individual counseling. Mother and J.G. had been terminated from two programs for engaging in domestic disputes, one of which occurred during their anger management class. Mother's visits with K.A. continued to be erratic. She often arrived very late when she did attend, but her interactions with K.A. continued to be appropriate, and K.A. enjoyed seeing mother. At the hearing, the court again continued reunification services and ordered mother to participate in individual counseling to address problems with domestic violence. Monitored visitation was ordered to occur twice a week for three hours.

On May 8, 2015, DCFS filed a section 342 supplemental petition alleging marijuana use by mother and J.G. A jurisdiction/disposition report filed a few weeks later stated that mother had completed a parenting class and had visited with K.A. consistently twice a week in the months of April and May. K.A. played with mother and enjoyed the visits. He said, "I love my moms and I like to see them." The report also contained a statement from mother's counselor at SHIELDS for Families explaining that she had been terminated from the program in November because "she pulled a knife on her girlfriend and we have a zero tolerance policy for weapons. . . . She also tested positive for marijuana twice while she was enrolled in our program." Mother admitted to recent marijuana use. The court

dismissed the petition with prejudice on May 29, 2015, and amended the disposition plan to require conjoint counseling between the mothers for domestic violence and random weekly drug testing.

A DCFS status report filed prior to the 18-month review hearing, stated that K.A. continued to thrive in foster care and bond with his caregivers. Mother participated in biweekly monitored visitation in June and July 2015, at which she was appropriate and engaging. She had failed to complete individual and conjoint counseling, however, and did not participate in regular drug testing. On the only occasion she submitted to drug testing, she tested positive for Cannabinoids. DCFS recommended a review of permanent plans to determine suitable placement. The hearing was continued.

A last minute information filed prior to the 18-month review hearing stated that K.A. reported physical abuse by his foster father and had been placed in shelter care as of August 25. It also informed that mother had been arrested for a misdemeanor offense and held for several days. During this period, mother contacted the social worker to inform her that J.G. was harassing and threatening her, and that she planned to obtain a restraining order against J.G. Mother also admitted that she and J.G. were living with a prospective caregiver DCFS had been considering for K.A.'s placement, contrary to the caregiver's claims that they did not live in the home. Mother had not participated in drug testing as ordered. An attached letter from K.A.'s therapist

stated K.A. made significant progress, but had difficulty readjusting to his routine following visits with mother. The court terminated reunification services and set the matter for a section 366.26 hearing regarding termination of mother's parental rights.²

A DCFS report filed prior to the section 366.26 hearing set for January 13, 2016, stated that K.A. was placed with prospective adoptive parents on November 6, 2015. This was K.A.'s fourth placement, as he had been placed in shelter care for approximately a month and a half between his placements with the initial foster family and the current adoptive placement. K.A. loved his prospective family and stated that he would like to remain with them, referring to them as "mom" and "dad." Their biological son was the same age as K.A., and they all had fun together. Mother was scheduled to have monitored visits with K.A. twice a week, but often missed or was late for her second weekly visit. When visits did occur they went smoothly and were appropriate, but when mother missed visits K.A. became disappointed and confused. K.A. had difficulty establishing a routine, as he had to be taken out of after school programs to see mother, only to be disappointed when she failed to show up for their visits. Mother telephoned K.A. only three times over the two-month period and was inappropriate and overly emotional when they spoke. Two last minute

² The section 366.26 hearing was originally set for January 13, 2016, but was continued several times.

information stated that the adoptive home study had been approved, and K.A. was likely to be adopted. Due to mother's numerous last minute cancellations of visits, DCFS recommended that monitored visits be limited to once a week for two hours. The court followed the recommendation of DCFS, and admonished mother that if she arrived more than 20 minutes late to a visit it would be cancelled. The section 366.26 hearing was continued.

The section 366.26 hearing was continued several more times, and was ultimately held on October 12 and October 31, 2016, in conjunction with a hearing on mother's contested section 388 modification petition requesting that reunification services be reinstated, which mother filed on August 9, 2016. DCFS reports filed between March 7 and October 31 stated that mother visited with K.A. consistently in April, seeing him an average of twice a week. K.A. began having behavioral problems in school that coincided with mother's increased visits. He engaged in physical altercations with other students on several occasions and was once suspended for two days. On another occasion, K.A. urinated in a box of toys mother had given him following a visit with her. K.A. had trouble sleeping and said that he "worried" about seeing mother. Mother's visits returned to being sporadic and were of poor quality. Mother and K.A. engaged in minimal interaction, and she would often play on her cell phone while K.A. played with other children. When they did interact, it was usually to play games on mother's tablet. K.A. primarily went to mother to use the tablet or

get food. He did not display any particular emotional attachment to her, and had to be reminded to give her a hug goodbye. Mother often looked at her watch during visits and would ask to leave early. K.A. stated that he did not want to attend the visits or talk to mother on the phone. K.A. and mother had one very promising visit shortly before the hearings in which mother was exceptionally loving and attentive, but mother was less engaged in the visit that followed. The reports reflected that K.A. was increasingly bonded with his prospective adoptive family, gaining confidence, and thriving in his new home. The family showed a strong dedication to providing the resources K.A. needed to live a full and happy life. K.A. participated in weekly therapy sessions and educational programs to improve his academic performance. He also participated in and enjoyed sports. The prospective adoptive family expressed the desire to adopt him. K.A. loved living in their home and wanted to stay there. K.A. said, "I want to have the same last name as my mom and dad. I want to be K[F.]"

At the hearing, K.A. testified that he liked visits with mother, but did not talk to her when he saw her because he was too busy playing. He and mother colored and drew together. He loved mother and would be sad if he never saw her again. K.A. was happy living with the prospective adoptive family, who he called "Mom and Dad." He had friends at school, liked his teacher, and got pretty good grades. If something very good or very bad happened, he

would tell the family about it. He never talked to mother about being sad.

Mother testified that she saw K.A. a lot, but admitted to missing many visits due to doctor's appointments. She did not remember she had appointments scheduled until the doctor's office called to confirm on the day of the appointment. She had a 40-minute bus ride to get to visits, and was sometimes delayed when the bus was late, but she planned to work harder to be on time. Mother tried to call K.A., but the prospective adoptive family did not answer the phone, and when they did answer they "bugg[ed]" K.A. until he said he did not want to talk to her.

After her reunification services were terminated, mother had to find classes, drug testing, and bus tokens by herself. Mother learned a lot from her parenting classes, including that the parent has to teach the child. A child will learn bad things, like smoking marijuana by example. She learned to be patient and not "run her mouth." She brought books for K.A. at visits. They did word searches, read, and colored together. She also fed K.A. and played with him on the tablet and on the playground. K.A. smiled when he saw her and was sad when the visits ended.

Esther Delcampo, an Exodus Foundation case manager, testified that mother re-entered the program in September of 2016, about two and a half weeks before the hearing. Mother participated in anger management classes for an hour once a week and had been making good progress.

Mother also participated in “Anything Anonymous” groups. All of her random drug tests were negative.

Ashley Landis, a DCFS human services aid, testified regarding three visits she monitored between K.A. and mother. Mother and K.A. appeared to have a nice time at visits. They played on the tablet and did workbook exercises together.

Following testimony and argument of counsel, the court denied mother’s section 388 petition, found K.A. was likely to be adopted, and terminated parental rights. Regarding mother’s section 388 petition, although it appeared that mother had made significant progress in her programs in the last five weeks, she had started eight different programs since K.A. had been removed and failed to complete any of them. Had mother completed her programming at the outset, K.A. would not have had to move from placement to placement and suffer years of upheaval. Mother’s weeks of progress could not undo the years of harm to the child. Visits were sporadic throughout the period, and there were several recent missed visits. There was not sufficient improvement to rise to the level of a change in circumstances.

With respect to adoptability under section 366.26, the court found that the prospective adoptive family was committed to K.A. and that he was bonded to them. When he had something serious to talk about, he went to the family and not mother. K.A. was also close with their biological son, who was his age. “And so it sounds like really

for the first time since he's four years old, he has a chance at permanency and to have a good life." It would be detrimental to return K.A. to mother or J.G. No exceptions to the preference for adoption applied.

DISCUSSION

Mother contends the dependency court erred when it found the parental relationship exception under section 366.26, subdivision (c)(1)(B)(i) inapplicable. She seeks reversal of the order terminating her parental rights. We find no error.

We assess whether the court's order on the parental relationship exception is supported by substantial evidence.³

³ "[S]ome courts have applied different standards of review. (*In re K.P.* [(2012)] 203 Cal.App.4th [614,] 621–622 [question of whether beneficial parental relationship exists is reviewed for substantial evidence, whereas question of whether relationship provides compelling reason for applying exception is reviewed for abuse of discretion]; *In re C.B.* (2010) 190 Cal.App.4th 102, 122–123 [abuse of discretion standard governs review, but 'pure' factual findings reviewed for substantial evidence]; *In re Jasmine D.* (2000) 78 Cal.App.4th 1339, 1351 [applying abuse of discretion standard].) On the record before us, we would affirm under either of these standards. (E.g., *Jasmine D.*, [*supra*,] at p. 1351 [practical differences between substantial evidence and abuse of discretion standards are minor].)" (*In re G.B.* (2014) 227 Cal.App.4th 1147, 1166, fn. 7.)

(*In re G.B.*, *supra*, 227 Cal.App.4th at p. 1166.) If supported by substantial evidence, the finding here must be upheld, even though substantial evidence may also exist that would support a contrary result and the dependency court might have reached a different conclusion had it determined the facts and weighed credibility differently. (*In re Dakota H.* (2005) 132 Cal.App.4th 212, 228.) “We do not reweigh the evidence or exercise independent judgment, but merely determine if there are sufficient facts to support the findings of the trial court.” (*In re Matthew S.* (1988) 201 Cal.App.3d 315, 321.)

Under section 366.26, subdivision (c)(1)(B)(i), if the dependency court terminates reunification services and finds the child is adoptable, it must terminate parental rights unless it “finds a compelling reason for determining that termination would be detrimental to the child due to [the circumstance that the parent has] [¶] . . . maintained regular visitation and contact with the child and the child would benefit from continuing the relationship.”

The record does not compel the conclusion that mother met either prong of the beneficial parental relationship exception. Mother did not maintain consistent visitation with K.A. over a substantial period at any time. She frequently cancelled visits at the last minute, showed up very late, or failed to show up at all, causing K.A. to miss valuable time in after school activities that would have benefitted him, and disappointing the child. The court reduced mother’s visiting time with K.A. as a consequence.

Mother never progressed beyond monitored visits and never had an overnight visit with K.A. Her behavior never changed significantly enough to warrant restoring visits to their prior duration. 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 and 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”].)

With respect to the second prong of the exception, the parental relationship exception “does not permit a parent who has failed to reunify with an adoptable child to derail an adoption merely by showing the child would derive some benefit from continuing a relationship maintained during periods of visitation with the parent.” (*In re Jasmine D.*, *supra*, 78 Cal.App.4th at p. 1348.) “A parent must show more than frequent and loving contact or pleasant visits. [Citation.] ‘Interaction between natural parent and child will always confer some incidental benefit to the child. . . .’ [Citation.] The parent must show he or she occupies a

parental role in the child's life, resulting in a significant, positive, emotional attachment between child and parent. [Citations.] Further, to establish the section 366.26, subdivision (c)(1)(B)(i) exception the parent must show the child would suffer detriment if his or her relationship with the parent were terminated. [Citation.]" (*In re C.F.*, *supra*, 193 Cal.App.4th at p. 555, fn. omitted.) "The significant attachment from child to parent results from the adult's attention to the child's needs for physical care, nourishment, comfort, affection and stimulation." (*In re Autumn H.* (1994) 27 Cal.App.4th 567, 575.)

The record demonstrates that mother's visits took an emotional toll on K.A., as evidenced by his aggressive behavior at school near the times of visits, and increased behavioral problems when visits occurred regularly. Although K.A. testified that he loved mother and would be sad if he could not see her again, mother's relationship with K.A. fell far short of being parental. She was often disengaged at visits, looking at her watch and asking to leave early on occasion. They played together and did some educational exercises, but when K.A. had something serious or sad that he needed to talk about, he went to the prospective adoptive family for support and guidance. He did not want to keep mother's last name—he wanted to be an "F."

Even if mother could establish a parental bond, however, she has not demonstrated the benefit to K.A. from continuing the relationship with her would outweigh the

well-being he would gain from permanent placement with the family. (*In re Brandon C.* (1999) 71 Cal.App.4th 1530, 1534; accord, *In re Jasmine D.*, *supra*, 78 Cal.App.4th at pp. 1347–1350.) Mother has consistently failed to address the domestic violence and anger management issues that first required DCFS’s intervention to protect K.A. She has enrolled in multiple programs over a span of years, yet never completed any. She and J.G. were terminated from two programs for engaging in physical violence. In one of those instances, mother threatened J.G. with a weapon. Despite stating that she understands that when a parent engages in bad behaviors like smoking marijuana the child will learn those behaviors, mother only consistently complied with the court’s drug-testing order for the two and a half weeks prior to the section 366.26 hearing. The other three times that she was known to have been tested, she tested positive for Cannabinoids. In contrast, K.A.’s placement with the prospective adoptive family has been a stable and positive influence. K.A. is bonded with his prospective adoptive parents and their son. The family takes an active role in his development. He participates in therapy to address his emotional issues, after-school programs to assist him academically, and extracurricular activities. After years of instability, K.A. has a home and a family who loves and cares for him. In sum, substantial evidence supports the juvenile court’s finding that mother’s progress did not provide a sufficient benefit to K.A. 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, [and] mother was only at the beginning stages of working on the effects of domestic violence in her life”].)

DISPOSITION

The order terminating mother’s parental rights is affirmed.

KRIEGLER, Acting P.J.

We concur:

BAKER J.

DUNNING, J.*

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