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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

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

B288787

(Los Angeles County
Super. Ct. No. DK02034A)

LOS ANGELES COUNTY
DEPARTMENT OF
CHILDREN AND FAMILY
SERVICES,

Plaintiff and Respondent,

v.

JULIANA D.,

Defendant and Appellant.

APPEAL from an order of the Superior Court of
Los Angeles County, Kim L. Nguyen, Judge. Affirmed.

Nicole Williams, under appointment by the Court of
Appeal, for Defendant and Appellant.

Mary C. Wickham, County Counsel, R. Keith Davis,
Assistant County Counsel, Kimberly Roura, Deputy County
Counsel, for Plaintiff and Respondent.

Juliana D., the mother of five-year-old Alice A., appeals the juvenile court's February 14, 2018 order pursuant to Welfare and Institutions Code section 366.26¹ terminating her parental rights, identifying adoption as the permanent plan for Alice and designating Rita A., Alice's paternal grandmother, as the prospective adoptive parent. Juliana contends the court erred 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 Dependency Petition and Review Hearings

The juvenile court sustained an amended dependency petition on behalf of then-one-year-old Alice on November 20, 2013 pursuant to section 300, subdivision (b), finding that Juliana and Hovak A., Alice's father,² had engaged in a physical altercation while Juliana was holding the child, which endangered Alice's safety and placed her at risk of physical harm.³ The court removed Alice from Juliana and Hovak's

¹ Statutory references are to this code.

² Hovak, whose name is sometimes spelled, Hovek, was found to be Alice's presumed father at a hearing in October 2013.

³ The section 300 petition originally described the altercation as "violent" and alleged Juliana had brandished a knife and

custody and ordered the Los Angeles County Department of Children and Family Services to provide family reunification services for both parents, including for Juliana a full drug-alcohol program with aftercare and random testing, a domestic violence program, a parenting course and monitored visitation. The child was placed with her paternal grandmother on February 2, 2014.⁴

For the six-month review hearing (§ 366.21, subd. (e)) the Department reported Juliana had visited with Alice every Monday for six hours but was not consistent with returning her home on time. Juliana, who continued to test positive for marijuana, had only partially complied with her case plan. The court ordered family reunification services to continue for another six months.

By the 12-month review hearing (§ 366.21, subd. (f)) in February 2015, Juliana had completed anger management, substance abuse and domestic violence programs but had stopped drug testing. Reunification services were continued to the 18-month hearing (§ 366.22). During this period Juliana's visits with Alice decreased to once every three or four weeks, and she continued to return Alice late to her grandmother's home. On at least one occasion Alice told the social worker she did not want to

threatened to kill Hovak while she was holding Alice and Hovak had choked Juliana and thrown her against the wall. It also alleged there had been prior incidents of domestic violence. These details were deleted by interlineation before the court sustained the petition.

⁴ The Department's reports indicated, before Alice's removal just prior to her first birthday, Juliana, Hovak and Alice frequently resided with the paternal grandparents and Juliana and Hovak often left Alice in their care.

see Juliana. As of April 2015 the paternal grandmother expressed her desire to adopt Alice. On June 15, 2015 the court terminated Juliana's reunification services and scheduled a selection and implementation hearing (§ 366.26).

In July 2016 Juliana filed a section 388 petition requesting that Alice be returned to her custody or, in the alternative, that reunification services be reinstated with unmonitored visitation. In August 2016 the visitation monitor, Kelly M. (a friend of Juliana's), reported that during the past several months Juliana's all-day visits with Alice had been positive, mother and child had a close bond and Juliana fully engaged with Alice by playing with her and by talking to her when she misbehaved. In October 2016 the monitor stated the visits continued to go well.

The section 388 petition was granted and reunification services reinstated in November 2016. The court ordered Juliana to continue in her 12-step program and aftercare and authorized the Department to liberalize Juliana's visitation to unmonitored after she had 10 consecutive clean drug tests. On January 31, 2017 the Department liberalized the visits, and the following day the court gave the Department discretion to permit Juliana's visits to include overnights.

Juliana failed to appear for a drug test on April 7, 2017. Although she tested negative on April 10, 2017, she tested positive for marijuana at a high level on April 21, 2017. The following week Juliana was caught by staff at the testing center trying to use a bag of urine strapped to her thigh for her drug test. She had a no-show on May 5, 2017 and tested positive for marijuana on May 12, 2017. The court again terminated reunification services at a review hearing on May 22, 2017 and

scheduled a new section 366.26 selection and implementation hearing.

2. *The Selection and Implementation Hearing and Termination of Parental Rights*

In its September 2017 report for the section 366.26 hearing the Department advised the court that Juliana had been consistent with her unmonitored visitation with Alice but repeatedly extended the visits from six hours, as permitted by the court's order, to nine or 10 hours, returning Alice at night as late as 11:00 p.m. Alice's paternal grandmother expressed her concern to both Juliana and the social worker about keeping Alice out so late. The Department reported the paternal grandmother, identified as the child's prospective adoptive parent, had demonstrated she was able and willing to provide a stable, permanent and supportive home environment for Alice, meeting all of her physical and emotional needs.

Two months later the Department stated in a status review report, "The child, Alice A[.], is thriving in her current placement." The paternal grandmother explained she is the only caregiver Alice has ever known and told the social worker Alice calls her "mom." Alice continued to have weekly visits with Juliana.

In a supplemental report in December 2017 the Department stated Alice and the paternal grandmother were closely bonded and the grandmother remained committed to providing a permanent home for Alice through adoption. Alice's grandmother, the Department reported, had provided her with "a safe and emotionally nurturing home since the time of her placement." The adoption home study was approved on December 14, 2017. Juliana continued to visit with Alice each

week for nine or 10 hours, returning the child to her home late at night.

After several continuances the court held the contested section 366.26 hearing on February 14, 2018. Arguing the parent-child relationship exception to the legislative preference for adoption and permanency applied, Juliana presented testimony from Alice, her friend and visitation monitor Kelly M. and herself.

Asked if she like visiting with her mother, Alice responded, “Pretty much.” When asked what she did with her mother, Alice answered, “I go play with my sisters and brothers.”⁵ Kelly M. testified she had monitored Juliana’s all-day Sunday visits for approximately 12 months during 2016 and 2017. During those visits Juliana and Alice attended church, and Juliana took Alice to the zoo or movies and played with her in the backyard at Kelly M.’s home. According to Kelly M., Alice enjoyed the visits “immensely” and was always happy to see her mother. At the end of visits Alice kicked, screamed and cried, saying she wanted to stay with Juliana. Kelly M. testified she never saw anything inappropriate during the visits.

In her testimony Juliana explained she always tries to find something active to do with Alice, taking her shopping, to the zoo or to a cousin’s house to play. Asked to describe her relationship with Alice, Juliana responded, “Great. We have a great bond. She doesn’t ever want to leave my side. Every time she knows it is time for her to go, she throws a fit. She wants to cry. She

⁵ When visiting with Alice, Juliana often brought her other two children, Alice’s half-siblings, 10-year-old Julian and 11-year-old Mary Jane, who live with their grandmother and are not involved in this dependency proceeding.

doesn't want to leave." During cross-examination Juliana acknowledged she did not know who took Alice to school in the morning or who was responsible for putting her to bed at night or making sure she saw a doctor.

Juliana's counsel argued the evidence established that Juliana had consistently visited with Alice and that the child knows her mother and enjoys the visits. Although Alice had not been in Juliana's care for a long time, her counsel contended terminating parental rights "would leave a void that perhaps would be adverse to Alice."

The Department's counsel argued the parent-child relationship exception did not apply because Juliana had not taken a parental role in Alice's life, noting that Alice had been detained from her parents when she was 11 months old. She also argued that bringing Alice home late at night from their visits, as Juliana had repeatedly done, was not in the best interest of a four-year-old child. Alice's counsel also supported termination of parental rights, stating it was clear Alice loved her mother and enjoyed spending time with her, but there was no evidence Juliana had acted in a parental role during the nearly four years Alice had been living with the paternal grandmother.

After hearing argument the court, relying primarily on this court's decision in *In re K.P.* (2012) 203 Cal.App.4th 614, ruled the parent-child relationship exception did not apply in this case: "Here, the court has no doubt, Miss D[.], that you love Alice very much. However, in order to find the parental bond exception applies, the court must find that you occupied a parental role in Alice's life. And based on the evidence before the court, the court does not find that." The court explained the day-to-day parental role was critical and, based on her own testimony, Juliana did not

know what the child's bedtime routine was or who took her to school, "all critical aspects of being a parent."

The court found it would be detrimental to Alice to be returned to her parents, Alice was adoptable and no exception to termination of parental rights had been established. The court terminated Juliana's and Hovak's parental rights and ordered adoption to continue as Alice's permanent plan.

Juliana filed a timely notice of appeal.

DISCUSSION

1. 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*

Breanna S. (2017) 8 Cal.App.5th 636, 645-646; *In re Noah G.* (2016) 247 Cal.App.4th 1292, 1299-1300.)

Section 366.26 requires the juvenile court to conduct a two-part inquiry at the selection and implementation hearing. First, the court 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 the child is 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 both that he or she has maintained regular visitation and that 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 Breanna S.*, *supra*, 8 Cal.App.5th at p. 646; *In re Amber M.* (2002) 103 Cal.App.4th 681, 689; see *In re Autumn H.* (1994) 27 Cal.App.4th 567, 575 [“the court balances the strength and quality of the natural

parent/child relationship in a tenuous placement against the security and the sense of belonging a new family would confer”].)

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.*, *supra*, 203 Cal.App.4th at p. 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 any or all of the component determinations—whether the parent has maintained regular visitation, 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 maintained regular visitation or 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 [“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”]; see *In re Aurora P.* (2015) 241 Cal.App.4th 1142, 1157.) When the juvenile court concludes the benefit to 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.)

2. *Juliana Failed To Establish the Parent-child Relationship Exception to Termination of Parental Rights*

Juliana contends she established the existence of a beneficial parental relationship with Alice within the meaning of section 366.26, subdivision (c)(1)(B)(i), contrary to the juvenile court’s finding, because she visited regularly with Alice, to the extent permitted by court orders, and had a strong bond with her.⁶ We agree Juliana maintained regular visitation and contact

⁶ Juliana does not dispute the juvenile court’s finding Alice was likely to be adopted.

with Alice for most of the four year period following Alice's removal from her custody. However, the evidence did not compel a finding, as a matter of law, that Juliana occupied a parental role in Alice's life or that the bond they shared equated to the parent-child relationship required for this exception to termination of parental rights to apply. (See, e.g., *In re Anthony B.* (2015) 239 Cal.App.4th 389, 396 [fact children were happy to see parent 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 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].)

Alice had spent almost all her life being fully cared for by her paternal grandmother. Juliana, in contrast, visited with Alice one day per week, playing and engaging in various entertaining activities with her and her other two children. The serious business of being a parent was left to the paternal grandmother, who, as Juliana essentially acknowledged during cross-examination, had the responsibility for her daily routine including getting her to school in the morning and putting her to bed at night. Absent the requisite bond, the juvenile court properly found the parent-child relationship exception did not apply.

Moreover, the juvenile court's implied finding that, whatever the nature of Juliana's relationship with Alice, the benefits of adoption far outweighed those from continuing that relationship was well within its discretion. The evidence in the record falls far short of demonstrating a substantial emotional attachment that would cause Alice to suffer great harm if

severed. (See *In re Anthony B.*, *supra*, 239 Cal.App.4th at p. 396 [parent-child relationship exception requires parent to demonstrate “relationship remained so significant and compelling in [the child’s] life that the benefit of preserving it outweighed the stability and benefits of adoption”]; *In re Bailey J.*, *supra*, 189 Cal.App.4th at p. 1315 [juvenile court determines “the importance of the relationship in terms of the detrimental impact that its severance can be expected to have on the child and to weigh that against the benefit to the child of adoption”]; *In re Autumn H.*, *supra*, 27 Cal.App.4th at p. 575 [exception applies only if the severance of the parent-child relationship would “deprive the child of a substantial, positive emotional attachment such that the child would be greatly harmed”].)

The cases cited by Juliana do not require a different result. Discussing its earlier decision in *In re Autumn H.*, *supra*, 27 Cal.App.4th 567, the court in *In re Casey D.* (1999) 70 Cal.App.4th 38, while affirming the juvenile court’s finding there did not exist a beneficial parent-child relationship between the child and her mother at the time of the selection and implementation hearing, clarified that day-to-day contact is not necessarily required for the requisite beneficial bond to be established between a parent and a child: “A strong and beneficial parent-child relationship might exist such that termination of parental rights would be detrimental to the child, particularly in the case of an older child, despite a lack of day-to-day contact and interaction.” (*Id.* at p. 51.) But the court went on to explain, even though the mother was loving toward her child and appropriate during visits, absent near daily contact the showing required for the exception to apply “will be difficult to make in the situation, such as the one here, where the parents

have essentially never had custody of the child nor advanced beyond supervised visitation.” (*Ibid.*) In the case at bar, Alice was only five years old at the time of the section 366.26 hearing, not “an older child”; and Juliana had custody of her only during the first 11 months of her life. Even then, however, the paternal grandmother played a significant caregiver role in infant Alice’s life. While Juliana ultimately enjoyed unmonitored visitation, and thus did not present a situation identical to the mother’s in *In re Casey D.*, like the record in that case, the evidence here did not compel the juvenile court to find the emotional attachment between Juliana and Alice was “parental” in nature. (See *id.* at p. 52 “[i]t is the trial court’s role to assess the credibility of the various witnesses, to weigh the evidence to resolve the conflicts in the evidence”].)

In *In re Brandon C.* (1999) 71 Cal.App.4th 1530, described at length in Juliana’s opening brief, the appellate court affirmed the juvenile court’s order selecting guardianship with the paternal grandmother as the permanent plan for twin boys, rather than adoption, after finding the parent-child relationship exception to termination of parental rights applied. Stating the governing legal standard, our colleagues in Division Four of this court wrote, “Courts have required more than just ‘frequent and loving contact’ to establish the requisite benefit for this exception.” (*Id.* at p. 1534.) Evaluating conflicting evidence under the substantial evidence standard of review, the court concluded it was sufficient to support the juvenile court’s decision to order guardianship. (*Id.* at p. 1538.) That analysis, of course, which properly deferred to the juvenile court’s assessment of the nature of the interaction between parent and child, fails to demonstrate the court in this case was compelled to find

Juliana's relationship with Alice, while loving and, perhaps, frequent, was parental in nature.

Similarly, neither *In re Amber M.*, *supra*, 103 Cal.App.4th 681 nor *In re S.B.* (2008) 164 Cal.App.4th 289, the other two cases upon which Juliana primarily relies, provides support for Juliana's argument the evidence here required the juvenile court to apply the parent-child relationship exception. In *In re Amber M.* the appellate court reversed the juvenile court's order terminating parental rights, concluding the mother had carried her burden of showing the requisite beneficial relationship with her three children (seven-, nearly five- and nearly three-years old), who had been out of her custody for slightly more than two years. Significantly, the mother presented evidence from a psychologist who had conducted a bonding study and concluded mother and children shared a "primary attachment" and a "primary maternal relationship" and opined that it could be detrimental to sever that relationship. (*In re Amber M.*, at p. 689.) In addition, the court-appointed special advocate testified adoption was not in the children's best interest because of the bond and love between them and their mother, and the children's therapists supported that view. (*Id.* at pp. 689-690.) As the court explained, the social worker was "the only dissenting voice among the experts," and she had "provided no more than a perfunctory evaluation of Mother's relationship to the children, instead focusing on her current inability to provide a home for them and on the suitability of the current placements." (*Id.* at p. 690.) The court was also concerned that the proposed plan of adoption would have separated the three children, substantially interfering with the siblings' relationship with each other, as well

as the mother-child relationship. (*Id.* at pp. 690-691; see § 366.26, subd. (c)(1)(B)(v).)

The mother in *In re Amber M.*, *supra*, 103 Cal.App.4th 681 had been the caregiver for her two older children for significantly longer than Juliana had Alice in her custody. In addition, Juliana's evidentiary presentation was entirely devoid of the affirmative expert testimony the appellate court found compelling in *In re Amber M.* (See *id.* at pp. 689-690.)

Finally, in *In re S.B.*, *supra*, 164 Cal.App.4th 289 the juvenile court had found the father, who had been his daughter's primary caregiver for three years, continued to have frequent and loving visits with his daughter during the two years since she had been removed from his custody and shared "an emotionally significant relationship" with her. Nonetheless, the juvenile court declined to apply the parent-child relationship exception in part because the child had a strong bond with her grandmother and because the grandparents, the prospective adoptive parents, were willing to allow the father to continue visiting the child. The court of appeal held neither of those factors was properly considered in deciding whether to apply the parent-child relationship exception (*id.* at pp. 299-300) and also rejected the child welfare agency's position that the exception does not apply "unless the child has a 'primary attachment' to the parent." (*Id.* at p. 299.) To the contrary, the court concluded, "The record here fully supports the conclusion [the father] continued the significant parent-child relationship [he had previously formed with his daughter] *despite* the lack of day-to-day contact with S.B. after she was removed from his care." (*Ibid.*)

In finding the father had established the parent-child relationship exception, the *In re S.B.* court emphasized that,

when his daughter was removed, the father immediately acknowledged his drug use was untenable, started services, maintained his sobriety, sought medical and psychoanalytic services and complied with every aspect of his case plan. (*In re S.B.*, *supra*, 164 Cal.App.4th at p. 298.) He was unable to reunify with the child only because he continued to suffer from posttraumatic stress disorder as a result of his service on a helicopter gunship in Vietnam. (*Id.* at p. 294.) Juliana’s efforts to deal with the problems creating the need for dependency jurisdiction are far different.

In addition, as in *In re Amber M.*, and unlike Juliana’s case, in *In re S.B.* the appellate court emphasized a psychologist’s bonding study had found a “fairly strong” bond between father and daughter and opined there was a potential for harm should S.B. lose the parent-child relationship. (*In re S.B.*, *supra*, 164 Cal.App.4th p. 296.) Moreover, in *In re C.F.* (2011) 193 Cal.App.4th 549 the same court that had decided *In re S.B.*—and also *In re Autumn H.*, *supra*, 27 Cal.App.4th 567, *In re Casey D.*, *supra*, 70 Cal.App.4th 38 and *In re Amber M.*, *supra*, 103 Cal.App.4th 681—cautioned that “S.B. is confined to its extraordinary facts. It does not support the proposition a parent may establish the parent-child beneficial relationship exception by merely showing the child derives some measure of benefit from maintaining parental contact. As *Autumn H.* points out, contact between parent and child will always ‘confer some incidental benefit to the child,’ but that is insufficient to meet the standard.” (*In re C.F.*, at pp. 558-559.)

The facts here are not extraordinary. Alice no doubt benefited to some extent from her relationship with Juliana. But the evidence simply does not compel the conclusion that Juliana

occupied a parental role in Alice's life or that it was an abuse of discretion to conclude their relationship was not so significant that its preservation outweighed the stability and benefits of adoption.

DISPOSITION

The juvenile court's February 14, 2018 order is affirmed.

PERLUSS, P. J.

We concur:

ZELON, J.

SEGAL, J.