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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

In re J.S., A Person Coming Under the
Juvenile Court Law.

CONTRA COSTA COUNTY CHILDREN
& FAMILY SERVICE BUREAU,

Plaintiff and Respondent,

v.

A.S. et al.,

Defendants and Appellants.

A132873

(Contra Costa County
Super. Ct. No. J0802006)

Father P.S. (Father) and Mother A.S. (Mother) appeal from the order terminating their parental rights as to J.S.2¹ under Welfare and Institutions Code section 366.26. Mother has also filed a petition for writ of habeas corpus alleging ineffective assistance of counsel. We affirm the challenged order, and, in a separate order, summarily deny Mother’s habeas corpus petition.

BACKGROUND

We recited the background of this case in our previous opinion in Father’s original writ proceeding challenging the juvenile court’s order setting a hearing under

¹ Mother and Father have two minor daughters, J.S.1 and J.S.2, who are the subjects of the underlying dependency proceedings. This appeal concerns only the younger daughter, J.S.2.

section 366.26 to select permanent plans for his minor daughters, and thus quote from that opinion²:

Father “currently lives in Sweden under the auspices of a work visa he obtained while living in his native country, Nepal. . . . [¶] On December 18, 2008, Concord police officers arrested A.S. (Mother) at the house where she and the minors were staying with the maternal grandmother. The officers found Mother intoxicated and unconscious in a vehicle parked in front of the home, with a syringe of heroin in her purse. The minors appeared to be suffering from neglect. The Contra Costa County Bureau of Children and Family Services (Bureau) removed the two girls from the physical custody of Mother and filed dependency petitions under section 300 four days later, on December 22.

“Mother reported she had been born on the island of Saipan, in the Commonwealth of the Northern Mariana Islands, and she and the minors had only recently come from there to Contra Costa Country. She was married to Father, but separated due to domestic violence on his part. She thought he lived in Nepal, but had had no recent contact with him. However, the older daughter, J.S.1, said Father had moved to Sweden with an older daughter from another relationship.

“On January 6, 2009, the juvenile court sustained jurisdictional allegations under section 300, subdivision (b), that Mother (a) had a chronic substance abuse problem affecting her ability to care for the minors and (b) had placed the minors at risk of harm in that she had been a victim of domestic violence by Father, with some incidents in the children’s presence. The court also raised Father’s status from alleged to presumed father.

“In its report for the disposition hearing, the Bureau reported Father had made no contact and his whereabouts were still unknown, although it was attempting through county counsel to provide him with notice pursuant to the Hague Convention. The

² We previously granted Father’s request for judicial notice of certain pleadings in this case. On our own motion, and to the extent not addressed by our previous order, we take judicial notice of our prior opinions and records in this proceeding. (See Evid. Code, §§ 451, subd. (a), 452, subd. (d).)

Bureau did not recommend reunification services for Father, and ‘ha[d] not considered placement’ with him as a noncustodial parent because his whereabouts were unknown and he had not made contact to request either a noncustodial parent placement or reunification services.

“At the disposition hearing on March 6, the juvenile court dismissed jurisdictional allegations against Father on motion by county counsel. It then issued dispositional orders, including ordering reunification services for Mother. It ordered reunification services ‘were not to be provided’ to Father, but directed the Bureau to arrange visitation ‘when [Father was] in the local area.’ At the six-month review hearing on September 1, the juvenile court continued Mother’s reunification services.

“Later in September (more than nine months after the minors had been detained and the dependency proceedings, filed), Father for the first time left telephone messages with the Bureau that included his e-mail address. The Bureau informed Father about the minors’ foster placement and directed him to write a letter to the court requesting appointment of counsel. Father replied with a message describing his circumstances: When Mother told him she was going to the United States with the minors, he left Saipan without completing the ‘paperwork’ that would have allowed him to stay or return. He now lived in Sweden, and wanted ‘to have [his] kids.’ The next day he sent another message directed to the court, asking for ‘help to get me attorney . . . to fight for my 2 girls and bring them to me and give them good life with me.’ The Bureau responded with a reminder for him to request counsel, and Father then did so.

“The Bureau advised the court of the e-mail correspondence with Father, and the court discussed appointment of counsel at a hearing on October 9. However, the court did not appoint counsel at that time since Father had ‘not contacted CCCDP’ (the Contra Costa County Dependency Program, which administers the assignments for appointed counsel in the county’s dependency proceedings).³

³ “In fact, whether Father received information about contacting CCCDP in time to make contact before the October 9 hearing is unclear. A Bureau report submitted in January 2010 noted only that the Bureau had notified Father by e-mail ‘with information

“In late January 2010, the Bureau submitted a report in anticipation of the 12-month permanency hearing that characterized (fairly) the e-mail messages Father sent to the Bureau in September 2009 as a request for placement with a noncustodial parent, but not a request for reunification services. With respect to the request for placement, the report stated the Bureau had ‘very little information on [Father,] . . . was concerned [about Mother’s] reports that [Father had been] domestically violent towards her[, and was] further concerned that [Father] ha[d] been estranged from his children for almost two years.’ The report also observed that, as Father was living in Sweden, he had not visited the minors. For these reasons, the Bureau did not believe it would be ‘safe or appropriate’ to place the minors in his care as a noncustodial parent. At the conclusion of the hearing, on January 29, 2010, the court ordered an additional three months of reunification services for Mother. It also found ‘return of the children to the custody of their mother/father would create a substantial risk of detriment to the safety, protection or physical or emotional well-being of each child.’

“In its report completed in late April 2010, for the 18-month permanency review hearing, the Bureau reported it had had no contact with Father during that review period. At the conclusion of the hearing, on June 1, the court terminated Mother’s services and set the matter for a hearing under section 366.26.⁴

“The same month, Father contacted the Bureau, which again e-mailed him the CCCDP paperwork for appointment of counsel, and this time he responded. An attorney was assigned on June 23, and the appointment of counsel was accepted on July 13.

“A month later, on August 17, Father’s appointed counsel filed a section 388 petition, seeking modification of both the March 6, 2009, dispositional order, in which

to contact [CCCDP] after the Court referred him to counsel.’ . . . In any event, a Bureau memorandum submitted in August 2010 reported the Bureau sent Father CCCDP paperwork by e-mail on December 29, 2009, Father confirmed receipt of that e-mail on January 8, 2010, but did not thereafter contact the CCCDP.” (Italics omitted.)

⁴ “Mother, but not Father, challenged this order by petition for extraordinary writ. This court denied Mother’s petition on August 25, 2010.” (*A.S. v. Contra Costa County Superior Court* (Aug. 25, 2010, A128769) [nonpub. opn.])

the court declined to order reunification services for Father, and the June 1, 2010, order setting a section 366.26 hearing. Father asserted no jurisdictional allegations against him had ever been sustained, and he requested that he ‘be allowed to participate in a case plan and have a period of time to provide evidence of his ability to care for his children.’ Father also sought approval for contact with the minors by ‘web cam and/or phone.’ He asserted the requested modifications would benefit the minors because of his existing bond with his daughters.

“In a memorandum dated August 30, the Bureau opposed Father’s section 388 petition. The Bureau reported Father had provided the following additional information: He and Mother were married in October 2000 (four months after the birth of the older minor, J.S.1). He lived with the minors from that time until September 17, 2008 (three months before the initiation of these proceedings). He took the minors to church, the beach, and the playground, and taught them to swim. He had provided for their care while living with them, and ‘was also sending them money’ and ‘talk[ed] to them regularly’ after Mother ‘took them away from [him]’ and went to California. He loved them and thought about them all the time, and he ‘live[d] a good life’ and ‘ha[d] work[ed].’ The minors would ‘have a good life and [go] to [a] good school’ if placed with him. He asked the ‘Court of California . . . to help [him] get [his] children back.’ The Bureau additionally reported Father was residing in Sweden with his older daughter by another relationship, pursuant to a work visa set to expire in 2011. He planned to renew his visa for another two years and establish permanent residence there. It also appeared, however, Father ‘would not be able to [enter] the United States in order to establish a relationship with his two daughters’ in the local area.

“The Bureau further observed Father had not had a relationship with the minors for about two years. After the institution of the dependency proceedings, he did not communicate with the girls until June 2010, when he sent them e-mails and photographs, which the case worker read to the girls on July 20, 2010. J.S.1 was ‘excited to see the pictures and read the emails,’ but J.S.2 did not recognize Father in the photographs and ‘did not display a lot of interest when the emails were being read.’ On July 28, the case

worker informed Father he could, and should, continue sending e-mails and these would be forwarded to the minors. But Father had not communicated further. The reporting case worker noted J.S.1 had, earlier in the proceedings, said she did not want to talk to Father on the telephone or live with him in Saipan.

“In the meantime, on July 9, the case worker had a telephone conversation with Father, with the assistance of a Nepali interpreter. Father related details of his relationship with Mother, stating, among other things, that he had worked hard to support Mother and the minors while they lived in Saipan, had nursed her when she was ill with kidney problems, but had slapped her once because she had been ‘cheating on him’ and said she would not leave her boyfriend. Ongoing marital discord culminated in his ejection from Mother’s family home, and eventually his departure from Saipan following Mother’s departure for the United States in 2008. Father then returned to his native Nepal for a year, after which he obtained a visa to work in Sweden.

“The case worker concluded that, while Father loved his daughters and had provided for their care when they were younger, they had been estranged for two years, such that the younger minor, J.S.2, did not recognize him. Father ‘ha[d] not shown consistency in trying to maintain regular contact’ with them. Further, he had delayed contacting CCCDP to obtain counsel, and it appeared he could not legally enter the country, ‘making it difficult for [him] to engage and participate in services successfully.’ Accordingly, the Bureau recommended denial of his section 388 petition.

“In a supplemental memorandum dated September 2, the Bureau reported on the minors’ status, including that the older minor, J.S.1, was showing increasingly aggressive, defiant, and disturbing behaviors, particularly toward the prospective adoptive parent and her younger sister. These behaviors indicated underlying past trauma and anger issues, and seemed to be triggered by contacts with Mother. The prospective adoptive parent was no longer willing to have J.S.1 in her care, although she remained open to having J.S.1 return in the future. The Bureau had therefore decided to move J.S.1 to a separate foster placement, and had referred her for assessment for more intensive therapy.

“Originally set for September 7, 2010, the section 366.26 hearing was continued to October 5, the date set for hearing on Father’s section 388 petition. The court denied Father’s section 388 petition. . . . Proceeding to the section 366.26 hearing, the court continued the hearing to March 2011, as to the older daughter, J.S.1. As to the younger, J.S.2, the court terminated parental rights and directed her placement for adoption. Ten days later, however, the court set a special hearing on its own motion, and on October 19 set aside its October 5 order to the extent it had terminated parental rights to J.S.2.^[5] The court then granted Mother four additional months of reunification services as to both minors, and set a hearing in March 2011, to review this period of additional services.

“In February 2011, one month before the scheduled review hearing, Father filed a second section 388 petition. He again sought to modify both the March 6, 2009, dispositional order and the June 1, 2010, order setting the section 366.26 hearing. He also sought to modify the October 5, 2010, order denying his first section 388 petition. He claimed the following changed circumstances: J.S.1 was no longer placed in a concurrent home, and J.S.2 was having problems in her concurrent home placement. Father’s parental rights had been reinstated as to J.S.2. He had ‘maintained’ employment, was set to receive a new work visa in May 2011, and was ‘now in a position to welcome [the] child[ren] into his home.’ Father requested an order placing the children with him as a non-offending, noncustodial parent, or alternately permitting contact with the minors by ‘web or phone’ and participation in reunification services. He asserted these changes would benefit the children because of their bond with him. However, Father did not submit a declaration or any other documentation supporting his second petition. At the hearing on the petition, on March 11, the court concluded it could not entertain it since it had already adjudicated the issues presented, when it had denied

⁵ On October 19, 2010, Father filed a notice of appeal from the “Termination of Parental Rights.” After the juvenile court set aside its order, Father filed a motion in this court to construe or amend his notice of appeal to include the order denying his section 388 petition, which we granted on December 30, 2010. We affirmed that order in *In re J.S.* (March 15, 2012, A130103) [nonpub. opn.].

Father's first section 388 petition on October 5, 2010. The court accordingly deemed the second petition barred by res judicata and denied it on that basis

“On March 30, the hearing to review the four months of additional services to Mother commenced. Father appeared by telephone. His counsel cross-examined Mother, eliciting testimony she had had contact with Father after the minors were removed from her physical custody, and Father had emotionally, but not physically, abused her. Father's counsel later called Father to testify. Father confirmed he had sent his counsel various e-mail attachments: a photocopy of his work visa issued by the Kingdom of Sweden; a photocopy of a letter from his employer in Örebro, Sweden; and copies of photographs depicting his workplace, his home, and himself with his 19-year-old daughter. These were then admitted into evidence. Father testified he had never abused his children, and had never been arrested for domestic violence. He said further he had moved to Sweden in 2009 in order to obtain work for ‘really good money’ for ‘my . . . future, my kids,’ and he was currently employed and living in a rented house with enough room to accommodate the minors. When Father's counsel posed further questions, such as whether the minors would be able to get medical care in Sweden and whether Father wanted the minors to be placed with him, the court sustained objections on the ground of relevance. Father's counsel then called the current case worker, who stated he had not had any contact with Father and that services had not been offered to him. When counsel began to question the case worker concerning Father's previous requests to have the minors placed in his care, counsel for the Bureau objected, stating that it ‘sounds like an end-run on the court's . . . ruling[s denying] . . . father's 388 motions,’ to which the court responded ‘[t]hat's correct.’ The juvenile court commented that the hearing did not include a ‘de novo’ review of issues raised in Father's prior section 388 petitions. On a brief cross-examination by the Bureau's counsel, the case worker said Father had never contacted him directly and had never indicated he could legally enter the United States.

“During closing argument, Father's counsel argued Father was ‘clearly a 361.2 parent’—that is, a noncustodial parent—who had ‘continually’ asked for placement of the minors with him. Counsel urged further that Father's first section 388 petition had

indicated Father's willingness 'to work on a plan to slowly transition the children to Sweden,' at which the juvenile court interjected that "[w]e're not going to reargue the 388 motion.

"At the conclusion of the hearing, on April 5, the court found, among other things, that a return of the minors to either Mother or Father's custody would create a substantial risk of detriment to the safety, protection or physical or emotional well-being of the minors. The court again terminated services for Mother and reset the matter for a section 366.26 hearing. The court additionally directed that visitation was 'suspended' unless one of minor's therapists recommended a visit, in which case the court would reconsider the issue. Father's writ petition followed. (§ 366.26, subd. (l).)" (*P.S. v. Superior Court of Contra Costa County* (July 14, 2011, A131878) [nonpub. opn.], fns. omitted.) We denied that petition on July 14, 2011. (*Ibid.*)

At the hearing on July 19, 2011, the juvenile court again terminated Father and Mother's parental rights as to J.S.2 and found she was adoptable. The court found by clear and convincing evidence that terminating parental rights was in the best interests of J.S.2, and that it "would be detrimental to the child to return the child to either parent's custody." Father and Mother have filed timely appeals from that order.

DISCUSSION

A. Father's Appeal

In Father's opening brief, he raises the same issues he raised in his prior writ petition and appeal from the court's order denying his section 388 petition. (*In re J.S. & In re P.S.* (March 15, 2012, A130103, A132976) [nonpub. opn. & order].) After Father filed his opening brief, we issued our opinion in his appeal in case No. A130103. We held Father had not been denied his due process rights, and affirmed the juvenile court's order.⁶ (*Ibid.*)

"Where questions presented on a subsequent appeal were necessarily involved in a former appeal, and the conclusion arrived at on the former appeal could not have been

⁶ Father's petition for writ of habeas corpus was denied in a separate order. (*In re P.S.* (Mar. 15, 2012, A132976) [nonpub. opn.].)

reached without expressly or impliedly deciding the question subsequently presented, the decision on the former appeal is the law of the case and rules throughout all subsequent stages of the action.” (*Stock v. Meek* (1952) 114 Cal.App.2d 584, 586; see also *Kowis v. Howard* (1992) 3 Cal.4th 888, 892-893 [“The law of the case doctrine states that when, in deciding an appeal, an appellate court ‘states in its opinion a principle or rule of law necessary to the decision, that principle or rule becomes the law of the case and must be adhered to throughout its subsequent progress, both in the lower court and upon subsequent appeal’ ”].) Father agrees the issues he has raised in this appeal are the same as those raised in his prior appeal. Thus, our March 15, 2012, opinion constitutes law of the case, and the issues Father has raised in this appeal are no longer viable.

B. Mother’s Appeal

Mother maintains no substantial evidence supports the juvenile court’s finding that J.S.2 is adoptable, based solely on her claim the court should have found the beneficial parental relationship exception to adoptability applied.⁷ (§ 366.26, subd. (c)(1)(B)(i).) Mother did not raise the issue of exceptions to adoptability in the juvenile court. She now asserts, both in this appeal and in her petition for writ of habeas corpus, that if the issues were not preserved, her trial counsel was ineffective in failing to raise them.

“To establish ineffective assistance of counsel in dependency proceedings, a parent ‘must demonstrate both that: (1) his appointed counsel failed to act in a manner expected of reasonably competent attorneys acting as diligent advocates; and that (2) this failure made a determinative difference in the outcome, rendering the proceedings fundamentally unfair in that it is reasonably probable that but for such failure, a determination more favorable for [the parent’s] interests would have resulted.’ ” (*In re Dennis H.* (2001) 88 Cal.App.4th 94, 98, quoting *In re Diana G.* (1992) 10 Cal.App.4th 1468, 1479.)

⁷ In her opening brief, Mother also asserts the beneficial sibling relationship exception should have been applied. (§ 366.26, subd. (c)(1)(B)(v).) In her reply brief, she “concedes that the issue of the ‘sibling benefit exception’ is moot for purposes of the instant appeal, assuming no further action is taken in [J.S.1]’s appeal that would affect this issue.”

The “beneficial parental relationship” exception to adoptability is set forth in section 366.26. “[T]he court shall terminate parental rights unless . . . [¶] . . . [¶] (B) The court finds a compelling reason for determining that termination would be detrimental to the child due to one or more of the following circumstances: [¶] (i) The parents have maintained regular visitation and contact with the child and the child would benefit from continuing the relationship.” (§ 366.26, subd. (c)(1)(B)(i).) “After the parent has failed to reunify and the court has found the child likely to be adopted, it is the parent’s burden to show exceptional circumstances exist.” (*In re Autumn H.* (1994) 27 Cal.App.4th 567, 574 (*Autumn H.*)) “Because a section 366.26 hearing occurs only after the court has repeatedly found the parent unable to meet the child’s needs, it is only in an extraordinary case that preservation of the parent’s rights will prevail over the Legislature’s preference for adoptive placement.” (*In re Jasmine D.* (2000) 78 Cal.App.4th 1339, 1350 (*Jasmine D.*))

The “ ‘benefit from continuing the [parent/child] relationship exception . . . mean[s] the relationship 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 other words, the court balances the strength and quality of the natural parent/child relationship in a tenuous placement against the security and sense of belonging a new family would confer. . . . [¶] . . . The exception applies only where the court finds regular visits and contact have continued or developed a significant, positive, emotional attachment from child to parent.’ ” (*Autumn H., supra*, 27 Cal.App.4th at p. 575.) The parent must prove that the parental relationship “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.” (*Ibid.*) “ ‘When the benefits from a stable and permanent home provided by adoption outweigh the benefits from a continued parent/child relationship, the court should order adoption.’ ” (*Jasmine D., supra*, 78 Cal.App.4th at p. 1350.)

Mother asserts there were compelling reasons why termination of her parental rights would be detrimental to J.S.2. She avers J.S.2 stated she was her “real mom” and

told the social worker she wanted to live with her.⁸ Mother also claims J.S.2 had “deteriorating behavior with [the prospective adoptive parent] as contact with [M]other diminished.”

The fact J.S.2 regards Mother as “her mother” and told a social worker she wants to live with her is simply not sufficient to demonstrate a beneficial parental relationship. “Interaction between natural parent and child will always confer some incidental benefit to the child. 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. [Citation.] The relationship arises from day-to-day interaction, companionship and shared experiences. [Citation.] The exception applies only where the court finds regular visits and contact have continued or developed a significant, positive, emotional attachment from child to parent.” (*Autumn H.*, *supra*, 27 Cal.App.4th at p. 575. “The positive and negative effect of interaction may be shown by such things as . . . and unhappiness and acting out by the child related to parental visits.” (*In re Angel B.* (2002) 97 Cal.App.4th 454, 467, fn. 4.)

The record is replete with evidence of the negative effects on J.S.2 of her visits with Mother and of J.S.2’s continuing uncertain situation. J.S.2 was six years old at the time of the hearing, and had spent almost one-half of her life out of her Mother’s custody. Mother’s last visit with J.S.2 was on February 7, 2011, over five months before the hearing on adoptability on July 19, 2011. The court ordered visits suspended in March based on concerns raised by the social worker’s report. After J.S.2 visited Mother and her sister, she “would regress and curl up on the floor and not dress herself.” J.S.2’s therapist diagnosed her with posttraumatic stress disorder. She indicated J.S.2 “is very confused about with whom she will live and with whom she should align,” and blamed herself, “believ[ing] she is the cause of her current situation.” J.S.2 called both her biological mother and her prospective adoptive parent “mom.” The therapist opined “that

⁸ Regardless of whether Mother’s counsel “argued” the issue, the information that J.S.2 expressed a desire to live with her Mother was before the court in the social worker’s report.

this prolonged waiting period regarding with whom she will live is detrimental to the child's well being." Both the social worker and J.S.2's therapist indicated continuing interaction with Mother and the prolonged dependency proceeding had resulted in J.S.2's insecurity and acting out. J.S.2's therapist did "not feel that it is in [J.S.2's] best interests to maintain contact with her mother or sister."

On March 11, 2011, the court suspended visits between both children and their mother. The social worker reported J.S.2 and her foster mother moved to a new residence a month earlier due to safety concerns after there was an attempted break-in at the foster mother's home, her car was stolen, and an "unknown and unfamiliar person" was "checking out the foster mother's parking space and the car that was parked there." The foster mother also reported feeling threatened by Mother's boyfriend after they left court.

" 'A biological parent who has failed to reunify with an adoptable child may not derail adoption merely by showing the child would derive *some* benefit from continuing a relationship maintained during periods of visitation with the parent. [Citation.] A child who has been adjudged a dependent of the juvenile court should not be deprived of an adoptive parent when the natural parent has maintained a relationship that may be *beneficial to some degree*, but that does not meet the child's need for a parent.' " (*In re Jason J.* (2009) 175 Cal.App.4th 922, 937, quoting *In re Angel B.*, *supra*, 97 Cal.App.4th at p. 466.)

Substantial evidence supports the juvenile court's finding of adoptability.⁹ Even if Mother's attorney was ineffective in failing to specifically "argue" the issue of the beneficial parental relationship exception to adoptability, there is no reasonable probability an outcome more favorable to her would have resulted if she had.

⁹ Mother notes the split of authority concerning the standard of review in this context. (See *In re Bailey J.* (2010) 189 Cal.App.4th 1308, 1314-1315 [hybrid combination of substantial evidence and abuse of discretion standards]; *Jasmine D.*, *supra*, 78 Cal.App.4th at p. 1351 [abuse of discretion test]; *Autumn H.*, *supra*, 27 Cal.App.4th at p. 576 [substantial evidence test].) Our conclusion in this case would be the same under any of these standards.

DISPOSITION

The order is affirmed.¹⁰

Banke, J.

We concur:

Marchiano, P. J.

Margulies, J.

¹⁰ By separate order filed concurrently with this opinion, we summarily deny Mother's petition for a writ of habeas corpus. (Case No. A134899.)