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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

**In re JOHN E., a Person Coming Under
the Juvenile Court Law.**

**CONTRA COSTA COUNTY
CHILDREN & FAMILY SERVICES
BUREAU,**

Plaintiff and Respondent,

v.

S.E.,

Defendant and Appellant.

A135498

**(Contra Costa County
Super. Ct. No. J10-00666)**

S.E. (mother) appeals from an order terminating her parental rights to her son John under Welfare and Institutions Code section 366.26.¹ She argues that her parental rights should not have been terminated because the “beneficial relationship” exception of section 366.26, subdivision (c)(1)(B)(i) applies. We affirm.

BACKGROUND

John was born prematurely in January 2009, while mother (then 21 years old) was living in Mexico. The maternal grandmother provided much of John’s care. In November 2009, mother brought John to the United States for surgery to correct a heart

¹ Further statutory references are to the Welfare and Institutions Code.

condition, where he was diagnosed with failure to thrive, anemia and Kabuki Syndrome, which in his case caused a range of developmental delays and mild mental retardation. Following his heart surgery, John had to be fed through a gastronasal tube (g-tube) to avoid aspirating his food.

Medical staff at the hospital were concerned about mother's ability to parent a special needs child on her own given her apparent immaturity and her refusal to participate in teaching sessions. Notwithstanding, John was released to mother and the two of them moved in with mother's maternal aunt, who assisted in John's care. John was readmitted a month later for pneumonia, diarrhea and vomiting, amid concerns that mother had left him alone for extended periods of time; mother's explanation was that she had left John with her uncle, who had left John alone. In approximately February 2010, the maternal grandmother came from Mexico to help care for John, but medical personnel were concerned about her ability to feed him and maintain the g-tube. During medical appointments, it was noted that John seemed to prefer his grandmother and that she was acting as his primary caretaker, although she did plan to return to Mexico.

Because mother had missed several Regional Center appointments, John was not receiving the physical and occupational therapy to which he was entitled. During a visit from a home health nurse on March 18, 2010, mother was extremely agitated, pacing the floor with bloodshot eyes. The grandmother and other family members reported that she was unstable and suffered from mental health issues. Respondent Contra Costa County Children and Family Services Bureau (Bureau) received a referral after mother left John with the grandmother and moved in with her boyfriend due to ongoing family conflicts.

A doctor who had treated John sent the Bureau a letter saying that she had serious concerns about mother's ability to care for him, and noted that mother had been angry, irrational and so inappropriate that medical staff were concerned mother was incapable of giving informed consent for a surgical procedure John required. At a team meeting at the hospital on April 29, 2010, mother was argumentative and accusatory, and threatened to take John away from the grandmother and return to Mexico. Based on this threat, John

was detained with his grandmother, who, despite a history of difficulty with John's g-tube, had demonstrated that she was capable of feeding him. John was later moved to a licensed foster home for medically fragile children because although he was being adequately fed, his developmental activities in the grandmother's care were very limited.

On May 4, 2010, the Bureau filed a petition alleging that John was a dependent child under section 300, subdivision (b). At the jurisdictional hearing held August 11, 2010, mother (represented by a guardian ad litem) submitted an amended version of the petition. At the dispositional hearing held on September 24, 2010, John was formally removed from mother's custody and mother was given a reunification plan that included components of visitation, therapy, and a psychiatric assessment.

At a December 2010 interim hearing to update the court on mother's psychiatric assessment, the social worker reported that mother had been diagnosed with "Adjustment Disorder with Depressed Mood and V61.20 Parent-Child Relational Problem." She had been prescribed medication for depression, but continued to exhibit extreme mood swings. Mother's guardian ad litem was relieved by the court.

At the time of the six-month review hearing, John was doing well in the foster home and was a happy child despite his disabilities. Mother was pregnant and had married her boyfriend. Though mother was in therapy and had been attending parenting and anger management classes, the social worker was concerned about her ability to fully grasp the severity of John's medical condition. During a visit on his birthday, for example, mother gave John ice cream, even though nonsolid foods cause him to aspirate liquid into his lungs. Visitation was generally going well, although when the maternal grandmother participated, John slept for 14 hours after the visit and took several days to return to his usual disposition. The court ordered that reunification services continue and set a 12-month review hearing.

By the time of the 12-month review hearing held in July 2011, mother had given birth to a healthy daughter, Isabella. She was participating in John's therapy and had become comfortable with maintaining the g-tube. She was taking mood stabilizers and seemed to have benefited from counseling. There had been incidents of domestic

violence with her husband, who had moved out of the home. Mother explained, “He is a good father. We only fight when we are together but [we] are not together anymore.” Consistent with the Department’s recommendation, the court continued reunification services for another six months.

On October 31, 2011, while John was with his mother on an extended visit, mother was stopped for a traffic violation while she had both children with her in the car. Police discovered a gun in the diaper bag and ammunition in her purse, which were illegal for mother to possess due to her mental health issues. Mother claimed she needed the gun for protection because someone was after her and her new boyfriend.

An 18-month review hearing was held in January 2012. Although the Bureau had initially filed a report recommending that John be returned to mother’s care, it had changed its recommendation after mother’s arrest for firearm possession. Following the Bureau’s revised recommendation, the court terminated reunification services and set John’s case for a hearing under section 366.26. A petition had also been filed to declare Isabella a dependent of the court, and she was placed with John in a foster home.

The Bureau’s report for the section 366.26 hearing concluded that John was adoptable despite his special needs. He was currently placed in a home in which his foster parents (who had been married for 34 years and had five adult children and one adopted child) wanted to adopt him. The report recommended the termination of mother’s parental rights and the placement of John for adoption. It also described visits between mother, John and Isabella since the time of the gun incident:

“Between November 2011 and March 2012, the mother was offered twice monthly visits supervised by a social casework assistant. On November 16, 2011, the mother recorded the children on her cell phone. John played with toys on his own. On November 22, 2011, the mother texted on her phone and let John play alone on a chair for a short while. John came up to the casework assistant several times while the mother was interacting with Isabella. During the December 9, 2011 visit, the mother texted frequently on her phone. She gave John her keys to play with on his own. When he became bored, he came to the casework assistant. The casework assistant directed the

mother to keep her eye on John because he was climbing up on his stroller. On December 23, 2011, the mother and Ms. K. [apparently Isabella's maternal grandmother], visited John and Isabella. The mother took pictures and videos of the children after changing their diapers. At one point John approached the casework assistant because the mother and Ms. K. were paying more attention to Isabella than to him. John appeared tired and he sat on the floor. He did not respond when mother called to him. On January 13, 2012 and January 27, 2012, and February 10, 2012, and February 24, 2012 the mother and maternal grandmother participated in the visits. The mother took pictures and videos of the children with her phone. The maternal grandmother played with John while the mother held Isabella. The mother was observed to be able to interact with one child at a time, while the maternal grandmother would interact with the other child.”

The report indicated that mother had attended some of John's medical appointments during this period, but that while she was very affectionate and playful with John, she did not fully attend the conversations with the doctor and made irrelevant remarks. As to mother's relationship with John, the report concluded: “John has been observed to have an affectionate relationship with his mother, with whom he has had frequent visitation [] during the past two years that he has been in foster care. While the relationship between John and his mother is a positive one, it does not provide him with the predictability, structure, and careful attention to his medical needs that are required to adequately parent this medically fragile child. This relationship does not outweigh the benefits of legal permanence for John.”

The court held a contested hearing under section 366.26, at which the Bureau's adoptions social worker and mother both testified. Asked about mother's relationship to John, the social worker noted that while John would look to his foster mother for comfort while exploring his environment, he did not do the same with mother. He responded positively to mother while they were interacting, but in the same way that he did with other people who visited him regularly.

Mother testified that she had consistently visited John to the extent allowed and attended all of his medical appointments since the gun incident, but she did not know

anything about his feeding regimen. She explained that she did not get involved in discussions between the foster mother and the doctor because the foster mother was currently responsible for John's feeding issues. Mother indicated that she had been on the wrong dosage of medication during the dependency proceedings and that was the reason John was removed from her care. She was evasive about the gun incident and refused to answer questions about it, except to say that she had been "jumped" by her husband's friends and that her car had been burned and her house burglarized.

At the conclusion of the hearing, mother's counsel acknowledged that John might be receiving better care in his foster home than mother could provide, but asked the court to order a plan of guardianship rather than adoption to preserve the parent-child relationship. The court declined to do so, terminated mother's parental rights, and ordered a permanent plan of adoption: "First, very clearly, this is an adoptable child by – I would easily say by clear and convincing evidence. . . . [¶] And so let me turn to the possible exceptions. So here, the evidence is that John is not particularly bonded to [mother] as his mom. He does recognize her during visits. Sometimes he becomes bored and seeks out other[s'] attention. There's not sufficient proof of a close enough relationship that he's especially bonded to her as his mom as opposed to any other, I guess, type of play date or visit, and I find that John would not suffer detriment from the termination of parental rights at this stage."

DISCUSSION

Mother argues that the judgment terminating her parental rights to John must be reversed because the quality of her relationship with him would make it detrimental to sever their relationship. We reject the claim.

At a hearing under section 366.26, the court may order one of three alternative plans: adoption (necessitating the termination of parental rights), guardianship, or long-term foster care. (§ 366.26, subd. (b)(1)-(6).) If the child is adoptable, there is a strong preference for adoption over the other alternatives. (*In re S.B.* (2008) 164 Cal.App.4th 289, 297 (*S.B.*)) Once the court determines the child is adoptable, a parent seeking a less restrictive plan has the burden of showing that the termination of parental rights would be

detrimental under one of the exceptions listed in section 366.26, subdivision (c)(1)(B). (*S.B.*, at p. 297; *In re Bailey J.* (2010) 189 Cal.App.4th 1308, 1314.)²

Section 366.26, subdivision (c)(1)(B)(i) provides for one such exception when “[t]he parents have maintained regular visitation and contact with the child and the child would benefit from continuing the relationship.” The “benefit” necessary to trigger this exception has been judicially construed to mean, “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 the sense of belonging a new family would confer. If severing the natural parent/child relationship would deprive the child of a substantial, positive emotional attachment such that the child would be greatly harmed, the preference for adoption is overcome and the natural parent’s rights are not terminated.” (*In re Autumn H.* (1994) 27 Cal.App.4th 567, 575 (*Autumn H.*); see also *In re Jasmine D.* (2000) 78 Cal.App.4th 1339, 1347 (*Jasmine D.*))

Case law is divided as to the correct standard for appellate review of an order determining the applicability of the beneficial relationship exception. Most published decisions have reviewed such orders for substantial evidence (see, e.g., *In re Christopher L.* (2006) 143 Cal.App.4th 1326, 1333; *Autumn H.*, *supra*, 27 Cal.App.4th at p. 576), while others have applied an abuse of discretion standard (see, e.g., *Jasmine D.*, *supra*, 78 Cal.App.4th at p. 1351; *In re Aaliyah R.* (2006) 136 Cal.App.4th 437, 449). The “practical differences between the two standards of review are not significant,” and as a reviewing court, we should interfere only if the facts, viewed in the light most favorable to the judgment, are such that no reasonable judge could have taken the challenged action. (*Jasmine D.*, at p. 1351.)

² Mother makes no claim on appeal that John is not adoptable.

Turning to the specifics of this case, we cannot say that no reasonable judge would have terminated parental rights based on the evidence presented. While mother's visits with John were generally positive, her relationship with him cannot reasonably be described as parental in nature. In the months leading up to the dependency proceedings, mother showed immaturity and an inability to focus on John's significant special needs, relinquishing her responsibility to the maternal grandmother. Mother essentially left John with the grandmother and an aunt while she pursued a relationship with the man who became her husband. During the reunification period, mother did make significant progress in dealing with her own mental health issues and in acquiring the skills that would be necessary to care for John. But despite these improvements and her frequent visits, nothing in the record suggests that they had formed a significant bond. The descriptions of visitation throughout the case suggest that John looked to other people (foster parents, the maternal grandmother) before looking to mother for comfort and security. During supervised visits following the gun incident, mother was distracted and disengaged, albeit affectionate toward her son.

The beneficial relationship exception requires more than a showing that the parent and child have a friendly and loving relationship. (See *In re Brian R.* (1991) 2 Cal.App.4th 904, 924; *In re Beatrice M.* (1994) 29 Cal.App.4th 1411, 1418 (*Beatrice M.*)) “ ‘Interaction between [a] natural parent and child will always confer some incidental benefit to the child[,]’ ” but the beneficial relationship exception contemplates that the parents have “occupied a parental role.” (*Beatrice M.*, at p. 1419.) “ ‘[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 an adoptive placement.’ [Citation.]” (*In re K.P.* (2012) 203 Cal.App.4th 614, 621.) “The exception must be examined on a case-by-case basis, taking into account the many variables that affect a parent/child bond. The 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 are some of the variables which logically affect a parent/child bond." (*Autumn H.*, *supra*, 27 Cal.App.4th at pp. 575-576.)

As a young child with significant special needs, John's interest in permanency and stability is particularly acute. The juvenile court did not err in concluding that his relationship to mother does not outweigh that interest.

DISPOSITION

The judgment (order terminating parental rights under section 366.26) is affirmed.

NEEDHAM, J.

We concur.

SIMONS, Acting P. J.

BRUINIERS, J.