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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

In re AVA B.,
a Person Coming Under the Juvenile Court Law.

B237272
(Los Angeles County
Super. Ct. No. CK65236)

LOS ANGELES COUNTY DEPARTMENT
OF CHILDREN AND FAMILY SERVICES,

Plaintiff and Respondent,

v.

DAWN B.,

Defendant and Appellant.

APPEAL from an order of the Superior Court for Los Angeles County,
Amy M. Pellman, Judge. Affirmed.

Judy Weissberg-Ortiz, under appointment by the Court of Appeal, for
Defendant and Appellant.

John F. Krattli, Acting County Counsel, James M. Owens, Assistant County
Counsel, and Jacklyn K. Louie, Deputy County Counsel, for Plaintiff and
Respondent.

Dawn B. (mother) appeals from a juvenile court order terminating her parental rights to her daughter, Ava B., under Welfare and Institutions Code¹ section 366.26.² She contends there was insufficient evidence to support the juvenile court's finding that the parent-child relationship exception set forth in section 366.26, subdivision (c)(1)(B)(i) (hereafter, subdivision (c)(1)(B)(i)) did not apply, and therefore the court erred in terminating her parental rights. We affirm the juvenile court's order.

BACKGROUND

Ava was born in a motel room in May 2007 and was transported with mother to a hospital, where both tested positive for cocaine. Ava was detained by the Los Angeles County Department of Children and Family Services (the Department) and placed with foster parents, Mr. and Mrs. L. A petition was filed under section 300, alleging two counts against mother relating to the risk of harm to Ava based upon mother's drug use, and two counts against Ava's presumed father, Andrew D. (father).³ (Because father is not a party to this appeal, our discussion of the facts will be limited to those facts relevant to mother's appeal.)

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

² Although her notice of appeal also indicates that mother appeals from the juvenile court's order denying her section 388 petition seeking to change a prior order terminating her family reunification services, mother does not raise any issue in her appellant's opening brief regarding the denial of her petition.

³ Mother and father had another child who was detained by the Department in October 2006 based upon allegations of caretaker absence/incapacity and general neglect arising from their arrest for driving a stolen vehicle. That child, who was two years old at the time of the arrest, was placed with his paternal grandmother in New Jersey. Parental rights were terminated as to the child, and he was adopted by his paternal grandmother. Mother also had a child with a different father; that child lives with his father under a family court order.

At the detention hearing held a few days after Ava's birth, the juvenile court found a prima facie case against mother (who was present at the hearing), and ordered family reunification services, including drug rehabilitation, random drug testing, individual counseling, and parenting classes, and monitored visits three times per week. A little more than two weeks later, mother and father checked out of the motel in which they were living, leaving no forwarding address, and the Department was unable to locate them.

The juvenile court sustained both counts as to mother at the jurisdiction hearing on July 10, 2007, and continued the disposition hearing. At the disposition hearing on August 28, 2007, the court declined to order family reunification services for mother because her whereabouts were currently unknown, but stated that she would be entitled to those services if she contacted the Department within the first six months.

From the time Ava was detained in May 2007 until December 2007, mother had very little contact with the Department. On three occasions, she had arranged to visit with Ava, but she failed to show up for those visits.⁴ Mother's first visit with Ava did not take place until December 2007, when Ava was nearly seven months old. She did not see her again for four months.

In March 2008, mother started an intensive six-month substance abuse recovery program, after she was arrested on a drug-related charge in February 2008 (she had also been arrested on a drug-related charge in Aug. 2007). Around that time, mother began to visit with Ava more regularly (one hour per week at first, then the visits were increased to three hours), with the visits monitored by the

⁴ Despite having made contact with the Department in order to arrange to visit Ava (although she ultimately failed to show up), mother did not receive reunification services until the juvenile court ordered them at the section 366.21, subdivision (e) six-month review hearing in March 2008.

foster mother. In September 2008, the juvenile court increased her visitation to twice per week, for five to six hours per week. Mother asked that her visits be unmonitored, but counsel for Ava asked that mother be ordered to submit to weekly drug tests before she was allowed unmonitored visitation. The court ordered weekly drug testing and set a hearing in a month to address the visitation issue. At that October 2008 hearing, the court granted unmonitored visits under certain conditions, including that the visits be in a public setting.

By the time of the section 366.22 18-month review hearing in February 2009, mother had had a total of six unmonitored visits with Ava since she was born, and had had no overnight visits. The juvenile court noted that normally at the 18-month hearing, the court is supposed to either return the child to the parent or terminate reunification services if the child cannot be safely returned to the parent. The court observed that although mother was doing well, she was not ready to have Ava returned to her care because she had not yet had any unmonitored overnight visits. The court concluded, however, that it could not in good conscience terminate services because mother was so close to being able to have overnight visits. The court explained that mother had received no services during the first six months on the ground that her whereabouts were unknown, even though she had had some contact with the Department during that time. As a result, mother had been given only 12 months of services. It noted that if it had found at the six-month review hearing that mother had not been given reasonable services up to that point (which the court observed it could have found), she would be automatically entitled to an additional six months of services at this time. Therefore, the court invoked its power to continue the section 366.22 hearing for 90 days due to exceptional circumstances to allow mother time to begin having overnight visits.

Mother had her first overnight visit with Ava in mid-March 2009, and had weekly overnight visits thereafter, in addition to her regular twice-weekly visits. At the continued section 366.22 hearing in June 2009, the court ordered Ava placed with mother, with the conditions that mother continue attending a 12-step program, have a sponsor, continue Mommy & Me classes, and continue drug testing. Ava was two years old, and living with mother for the first time.

In July 2009, the children's social worker (CSW) assigned to the case received a letter from the attorney for Mr. and Mrs. L., Ava's former foster parents (who had been granted de facto parents status in September 2008), attaching printouts from mother's Facebook page that included postings with references to mother's drinking. The CSW spoke with mother, who admitted that she occasionally had a drink of wine or beer, and that she believed she was allowed to do so because her counselor told her that she did not have a problem with alcohol. Although concerns were raised at a review hearing in September 2009 regarding mother's drinking and the fact that she lost her job because she missed 14 days of work, no changes were made to Ava's placement.

Over the next two months, the Department investigated reports by mother's roommate, Jesse A., and by Ava's attorney, that mother was not properly supervising Ava, was drinking several times a week, had forged signatures on her Narcotics Anonymous sign-in sheets, and was allowing father to live with her and Ava. The Department found the allegations to be unfounded. Nevertheless, the Department held a team decision meeting with mother, at which mother was told that she could not allow father to be around Ava, and that Ava could be cared for only by an approved child care provider.

A week after the team decision meeting, Mr. and Mrs. L. filed a section 388 petition asking that Ava be re-detained and placed with them. The petition was supported by a declaration from mother's roommate, Jesse A. Mr. A. stated that he

was concerned about mother's treatment of Ava, particularly her methods of discipline. He also expressed concern that mother did not exercise appropriate oversight. He noted that Ava was once found by a neighbor wandering down the street, that he once came home after midnight to find Ava alone inside the apartment (he said a friend of mother's was standing outside the apartment and told him that mother had asked her to watch over Ava while mother was at a party in another apartment in the building), and that mother once asked a homeless person to babysit Ava. Mr. A. also stated that mother allows father to come to the apartment and that he frequently stays overnight.

The juvenile court granted a hearing on the petition. In its written response to the petition, the Department expressed its disagreement with Mr. and Mrs. L.'s position that Ava should be re-detained, noting that the allegations had been investigated by several CSWs, and were determined to be unfounded. At the December 1, 2009 hearing on the petition, which was held at the same time as the six-month review hearing under section 364, the court denied the petition and continued the section 364 hearing for contest, to be heard on December 18.⁵

In preparation for the contested section 364 hearing, the Department interviewed mother's neighbors, who reported they heard a lot of screaming and use of profanity coming from mother's apartment, and that a man matching father's description was at the apartment on a regular basis. The Department also interviewed two-and-a-half-year-old Ava, whose answers contradicted the allegations that mother had mistreated her, but who answered "yes" when asked if her daddy was at home with Ava and mommy and if he slept there. Based upon

⁵ At that same hearing, the court denied a section 388 petition mother had filed seeking termination of Mr. and Mrs. L.'s de facto parent status.

these interviews, the Department detained Ava and placed her with Mr. and Mrs. L., her previous caregivers.

The Department filed a section 387 supplemental petition on December 22, 2009, alleging that mother violated court orders by allowing father into her home with unlimited access to Ava, and by failing to participate regularly in Narcotics Anonymous meetings. The juvenile court found a prima facie case had been established, ordered Ava detained, and ordered six hours of monitored visits per week. Over the next four months, mother had 18 two-hour monitored visits with Ava. Ava, who was bonded to Mr. and Mrs. L., often would cry when she was dropped off for her visits and was withdrawn during the first half-hour of the visits; she was happy to see her foster parents when the visits were over.

At the contested adjudication of the supplemental petition, held in April 2010, mother testified that she did not allow father to visit her home when Ava was there, although she admitted that she saw him a few times when Ava was not there.⁶ She also admitted that she occasionally had a glass of wine with meals, but denied ever being drunk when Ava was living with her. Her former roommate, Mr. A., testified that he vacated the apartment on December 3, 2009 because father, who was at the apartment every day and slept there, threatened him. He also testified that father was frequently around Ava.

The juvenile court sustained the supplemental petition. Stating that it found mother's testimony was not credible and that Mr. A.'s testimony was credible, the court found that mother allowed father to have unlimited access to Ava in violation of the court's order and failed to provide evidence that she participated in Narcotics Anonymous meetings. At the disposition hearing held a few days later,

⁶ Father, who was in and out of prison or jail throughout the proceedings in this case, was not incarcerated from mid-October 2009 through the end of January 2010.

mother's attorney conceded that mother could not receive further reunification services because she had run out of time. Instead, counsel asked that Ava be returned to mother's home. The court ordered Ava removed from mother, declined further family reunification services, and set a section 366.26 hearing.

For various reasons, the 366.26 hearing was continued several times, and did not take place for 18 months. During that time, mother had a total of 30 four-hour monitored visits: three in May 2010, two in June 2010, two in July 2010, one in August 2010, two in September 2010, one in October 2010, two in November 2010, one in December 2010, one in January 2011, one in February 2011, three in March 2011, three in April 2011, two in May 2011, none in June 2011, two in July 2011, two in August 2011, and two in September 2011.⁷ Although those visits generally went well, the social worker who monitored the visits over the last six months reported that Ava's reaction to the visits varied, in that she sometimes ran to mother and other times cried for Mr. and Mrs. L. The social worker also reported that mother was frequently on her cell phone during the visits, observing Ava from a distance as she played with other children; the social worker timed mother's interaction with Ava during one visit, and found she spent just over two hours interacting with her. On two visits, mother asked the social worker to contact Mr. and Mrs. L. to pick Ava up early because Ava was misbehaving and throwing tantrums and mother could not get her to calm down. The social worker opined that the visits were "not conducive to positive interaction between the child and the birth mother." The foster family agency also reported that Ava's aggressive behavior and tantrums, which had been first observed when Ava was re-

⁷ Although the court had ordered weekly four-hour monitored visits, which would have given mother 72 visits during that 18-month period, mother cancelled or failed to show up at many of them; a few were cancelled by the Department or the foster agency for scheduling or other reasons.

placed with Mr. and Mrs. L., would intensify immediately before and after her visits with mother.

At the final section 366.26 hearing, held on October 24, 2011, mother testified that she had moved to Oakland about eight months before because she had difficulty finding a job or a place to live in Los Angeles, and she had a support system in Oakland. She explained that she would fly down on Thursday nights for her Friday visits, but when she could not do so she would text Mr. L. to arrange a convenient time for her to call to talk to Ava; she did not talk to Ava at any other time. She said that Ava always seemed to be happy when she first saw mother at their visits, and usually ran over to her. During their visits, mother would ask Ava what she learned in school, and would quiz her on letters, colors, and numbers. Mother also testified that she spoke to Mr. and Mrs. L. about how Ava was doing, and asked them about how they handled disciplining her so she could be consistent.

After the testimony and admission of the various Department reports into evidence, counsel for Ava asked the juvenile court to terminate mother's parental rights, arguing that mother occupies no parental role in Ava's life and that their relationship is more like a babysitter-child relationship. Mother's counsel asked the juvenile court to find that the subdivision (c)(1)(B)(i) exception applied because there was an emotional bond between Ava and mother, and to order guardianship as the permanent plan. The court found that mother had not maintained a consistent pattern of visitation and that the visitation had not created so strong a bond that Ava would suffer detriment from its termination; in fact, the court noted that Ava would suffer emotional and psychological distress if she were removed from the care of Mr. and Mrs. L. The court found Ava to be adoptable,

and terminated mother's parental rights. Mother timely filed a notice of appeal from the court's order.⁸

DISCUSSION

At a section 366.26 hearing, the juvenile court must select a permanent plan for the dependent child. (*In re Casey D.* (1999) 70 Cal.App.4th 38, 50.) Adoption is the permanent plan preferred by the Legislature. (*In re Celine R.* (2003) 31 Cal.4th 45, 53.) If the court finds that a child may not be returned to his or her parents and is likely to be adopted, it must select adoption as the permanent plan unless it finds a compelling reason for determining that termination of parental rights would be detrimental to the child under one of the exceptions set forth in section 366.26, subdivision (c)(1). One such exception is the subdivision (c)(1)(B)(i) exception, which applies when a parent has "maintained regular visitation and contact with the child and the child would benefit from continuing the relationship." (§ 366.26, subd. (c)(1)(B)(i).) A parent wishing to avoid termination of parental rights bears the burden to show that the subdivision (c)(1)(B)(i) exception applies. (*In re Lorenzo C.* (1997) 54 Cal.App.4th 1330, 1345.)

There are two prongs that must be satisfied for the exception to apply: (1) the parent must have maintained regular visitation and contact with the child such that there is a relationship between them that provides some benefit to the child; and (2) "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,

⁸ The court also denied mother's section 388 petition, filed the day of the section 366.26 hearing, requesting that Ava be returned to her care, or that the court order additional reunification services. As noted in footnote 2, mother's notice of appeal states that she is appealing from that order as well, but she raises no issue regarding the denial of her petition.

adoptive parents.” (*In re Autumn H.* (1994) 27 Cal.App.4th 567, 575.) The juvenile court in this case found that mother had not established either prong because the evidence showed she had not maintained a consistent pattern of visitation, and whatever bond established through the visitations was not sufficiently strong that Ava would suffer detriment from its termination.

Mother challenges the juvenile court’s findings as to both prongs on sufficiency of the evidence grounds; the Department also applies a substantial evidence standard of review to both findings. While there is no question that the existence of a beneficial relationship is a factual issue subject to a substantial evidence standard of review, some appellate courts have concluded that the second prong includes a quintessentially discretionary decision -- i.e., determining the importance of the parent-child relationship and the likely impact its termination would have on the child, and weighing that against the benefit to the child of adoption -- that is reviewed for abuse of discretion. (See, e.g., *In re Bailey J.* (2010) 189 Cal.App.4th 1308, 1314-1315; *In re K.P.* (2012) 203 Cal.App.4th 614, 621-622.) We agree with those courts that both standards of review should be applied.

As to the first prong, the juvenile court found that mother failed show that she maintained a consistent pattern of visitation. Substantial evidence supports the court’s factual finding. Even putting aside the first eleven months of Ava’s life, when mother visited her only two times, the evidence before the court showed that mother’s record of visitation was uneven. Although mother regularly visited Ava for the year leading up to Ava’s placement with her when Ava was two years old, the reports submitted by the Department show that after Ava was re-detained, mother missed more than half of the weekly visits to which she was entitled over the next 18 months. Based upon the court’s factual finding, supported by substantial evidence, the court correctly concluded that mother could not establish

the existence of a beneficial relationship, since under the statutory language, the exception requires a showing of “regular visitation and contact” between the parent and the child. (§ 366.26, subd. (c)(1)(B)(i).)

But even if mother’s visitation, although inconsistent, was sufficient to establish the existence of a beneficial relationship, the court did not abuse its discretion in finding that mother did not satisfy the second prong, i.e., that the relationship between mother and Ava was so strong that terminating it would be detrimental to Ava. The court had before it reports of the social worker who monitored mother’s visits that Ava’s reaction to the visits varied (sometimes she was excited to see mother and other times she cried for Mr. and Mrs. L.) and that mother spent a good deal of time on her cell phone during visits. The court also considered the foster family agency’s reports that Ava acted out before and after her visits with mother. Finally, there were numerous reports from the Department stating that Ava was bonded with Mr. and Mrs. L., who cared for her for all but six months of her life and wanted to adopt her. Based upon this information, the court reasonably could conclude that Ava’s need to continue the relationship with mother did not outweigh her need for a stable and permanent home, which would come with her adoption by Mr. and Mrs. L., and that termination of mother’s parental rights would not be detrimental to Ava. Having thus found that the subdivision (c)(1)(B)(i) exception did not apply, the juvenile court properly terminated mother’s parental rights.

DISPOSITION

The order terminating mother parental rights is affirmed.

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WILLHITE, J.

We concur:

EPSTEIN, P. J.

MANELLA, J.