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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

In re D.S., a Person Coming Under the
Juvenile Court Law.

LOS ANGELES COUNTY
DEPARTMENT OF CHILDREN AND
FAMILY SERVICES,

Plaintiff and Respondent,

v.

DERRICK S.,

Defendant and Appellant.

B240601

(Los Angeles County
Super. Ct. No. CK64912)

APPEAL from an order of the Superior Court of Los Angeles County. Deborah Losnick, Juvenile Court Referee. Affirmed.

Cristina Gabrielidis Lechman, under appointment by the Court of Appeal, for Defendant and Appellant.

John F. Krattli, County Counsel, James M. Owens, Assistant County Counsel and Frank J. DaVanzo, Deputy County Counsel, for Plaintiff and Respondent.

Derrick S. (father) appeals from the April 11, 2012 order terminating his parental rights to his son, D.S. Father contends insufficient evidence supported the juvenile court's finding that the Welfare and Institutions Code section 366.26, subdivision (c)(1)(B)(i) beneficial parental relationship exception to the preference for adoption did not apply.¹ We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

We set forth the history of these dependency proceedings in great detail in two prior opinions (*Tamara W. v. Superior Court* (Sept. 9, 2010, B224646) [nonpub. opn.]; *DCFS v. Derrick S.* (May 3, 2012, B234149) [nonpub. opn.]). We briefly summarize those facts here.

When D.S. was born prematurely in February 2009, both he and mother (Tamara W.) tested positive for cocaine. Father was a drug dealer and drug abuser with a long drug-related criminal history. The Los Angeles County Department of Children and Family Services (DCFS) detained D.S. in the hospital's intensive care unit and commenced dependency proceedings. In May 2009, the juvenile court sustained a section 300 petition alleging the parents had an extensive history of drug abuse, D.S. was born with cocaine in his system, and mother had failed to reunify with her three older children due to her drug abuse, thus placing D.S. at risk of physical and emotional harm. Mother and father were allowed monitored visits and ordered to attend parenting classes and drug rehabilitation programs with random testing.

Father completed parenting classes and a drug treatment program on October 22, 2009, but a week after the six-month review hearing he tested positive for cocaine and marijuana. Although he had achieved unmonitored visits, father's visits were restricted to monitored after his positive drug tests. By the time of the 12-month review hearing, D.S. was happy and doing well in the care of his foster mother, Mary, who was interested in adopting D.S. if his parents failed to reunify with him. Father, meanwhile, had entered

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

a relapse program. Although his drug tests were negative, he had two diluted tests in January, failed to appear for one test in March, and in the same month tested positive for alcohol. On May 21, 2010, the juvenile court terminated reunification services and scheduled a section 366.26 permanent placement plan hearing (.26 hearing) for September 16, 2010. Father's section 388 petition seeking to modify the order was denied. Both mother and father filed writ petitions challenging the order. We denied those petitions (*Tamara W. v. Superior Court, supra*, B224646).

Meanwhile, the .26 hearing was continued several times. Following a hearing on April 7, 2011, the juvenile court denied father's second section 388 petition, which sought additional reunification services. We affirmed that order (*DCFS v. Derrick S., supra*, B234149).

By April 2011, Mary's adoption application had been denied and D.S.'s placement with Mary was no longer stable. Another prospective adoptive family backed out after learning that mother had been diagnosed with schizophrenia. But on May 13, 2011, D.S. was placed with Mr. and Mrs. R., a foster family with an approved adoptive home study. At DCFS's request, both parents' monitored visits were reduced to one hour per week. On October 5, 2011, father's third section 388 petition was denied without a hearing.

By the time of the continued .26 hearing in November 2011, D.S. was doing well in his placement with Mr. and Mrs. R., who wanted to adopt him. As of the hearing, Father had consistently attended the weekly monitored visits, during which father actively engaged in play with D.S., participated in his toilet training, brought him snacks and was cordial to the monitoring staff and foster mother. Father wanted D.S. placed with a family member. DCFS, however, recommended that adoption by Mr. and Mrs. R. be the permanent placement plan, and that parental visits be terminated. The .26 hearing was continued to February 16, 2012.

According to the report for the February 2012 hearing, father had not visited D.S. since November 8, 2011. After father failed to appear at two visits without calling to cancel, DCFS learned that he was in jail. Father was still in custody as of the February 2012 hearing. D.S., meanwhile, continued to do well in his placement with Mr. and Mrs.

R., who wanted to adopt but were not interested in a Post Adoption Contract Agreement with mother or father. The .26 hearing was continued to April 2012.

For the continued .26 hearing on April 11, 2012, DCFS reported that D.S., now three years old, was thriving with Mr. and Mrs. R., with whom D.S. had developed a “deep bond.” At the hearing, D.S.’s counsel joined with DCFS in requesting that parental rights be terminated. Father was present at the hearing, but did not testify. His counsel argued that the beneficial exception to termination of parental rights applied because “the father has always been consistent in visiting his son. As this court is well aware, there have been several 388’s that have been filed. The father has done everything in his power to try to regain custody of his son. And a lot of it – he was maintain[ing] consistent visitation. So we would object to the court terminating parental rights at this time.” Regarding the beneficial exception, the court stated, “I do not feel that the evidence presented to me today by parent’s counsel reaches the level necessary to find a 366.26(c)(1)(B)(i) exception applies.” The court terminated parental rights, finding by clear and convincing evidence that D.S. was likely to be adopted. Father timely appealed.

DISCUSSION

Father’s sole contention on appeal is that the juvenile court erred in finding the section 366.26, subdivision (c)(1)(B)(i) “beneficial relationship exception” to the preference for adoption did not apply. He argues there was substantial evidence that father consistently visited D.S., and that D.S. would suffer detriment if father’s parental rights were terminated. We find no error.

We begin with the standard of review. Most appellate courts apply a substantial evidence standard of review to the juvenile court’s determination of whether a section 366.26 statutory exception applies. (*In re Jasmine D.* (2000) 78 Cal.App.4th 1339, 1351.) Some courts have applied the abuse of discretion standard of review. (See, e.g., *In re Brittany K.* (2005) 127 Cal.App.4th 1497, 1512.) The practical differences

between the two standards are not significant (*In re Jasmine D.*, at p. 1351), and under either standard, we would affirm in this case.

If reunification does not occur within the statutorily prescribed period, the court must terminate reunification services and set the matter for a .26 hearing to select and implement a permanent placement plan. (§ 366.21, subd. (g); *In re Celine R.* (2003) 31 Cal.4th 45, 52.) At the .26 hearing, the court has four choices. In order of preference: “(1) terminate parental rights and order that the child be placed for adoption (the choice the court made here); (2) identify adoption as the permanent placement goal and require efforts to locate an appropriate adoptive family; (3) appoint a legal guardian; or (4) order long-term foster care. (§ 366.26, subd. (b).) Whenever the court finds ‘that it is likely the child will be adopted, the court shall terminate parental rights and order the child placed for adoption.’ (§ 366.26, subd. (c)(1).) . . . ‘Adoption is the Legislature’s first choice because it gives the child the best chance at [a full] emotional commitment from a responsible caretaker.’ [Citation.]” (*Celine R.*, at p. 53, citations omitted.)

While the Legislature has expressed a strong preference for adoption, adoption is not the appropriate plan in every case. (§ 366.26, subs. (b)(1), (c)(1).) An exception exists when the child has a strong bond with the parent and severing that bond would be detrimental to the child. (See § 366.26, subd. (c)(1)(B)(i); *In re S.B.* (2008) 164 Cal.App.4th 289, 299.) The beneficial parental relationship exception applies when “[t]he court finds a compelling reason for determining that termination would be detrimental to the child’ (§ 366.26, subd. (c)(1)(B)) because ‘[t]he 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).)” (*In re K.P.* (2012) 203 Cal.App.4th 614, 621.) “The ‘benefit’ prong of the exception requires the parent to prove 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.’ [Citations.] 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.’ [Citations.] The relationship

that gives rise to this exception to the statutory preference for adoption ‘characteristically aris[es] from day-to-day interaction, companionship and shared experiences. Day-to-day contact is not necessarily required, although it is typical in a parent-child relationship.’ [Citation.] 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.’ [Citation.]” (*Ibid.*) A showing that the child would derive some benefit from continuing a relationship with the parent through visitation is not enough to derail an adoption. (*In re Jasmine D., supra*, 78 Cal.App.4th at p. 1348.) The exception is not “a mechanism for the parent to escape the consequences of having failed to reunify.” (*Ibid.*) The parents bear the burden of showing that termination of parental rights would be detrimental to the child. (*In re Zachary G.* (1999) 77 Cal.App.4th 799, 809.)

Here, father argues that application of the beneficial relationship exception is established by evidence that D.S., “was quick to run to [father] and give him a kiss and was constantly saying ‘Da Da.’ [D.S.] was very happy and excited to see his father, and recognized him as his Dad. [D.S.] was sad at the end of visits. [¶] . . . [Father] would bring his son things he needed, such as clothing and diapers, baby food, walkers and strollers and toys for Christmas. In April 2010, the social worker believed that [father] loved [D.S.], and stated he was great with him at visitation. In November 2011, the social worker reported that during visitation, [father] actively played with [D.S.], brought him snacks and participated in potty training. [Father] would also bring fruit, cheese and [D.S.]’s favorite – vanilla soy milk – to visits. [Father] would play games with him and teach [D.S.] to write his name.” In addition, father’s older sons submitted letters to the court attesting to how much father meant to them.

This evidence while not insignificant is simply not enough to establish that this is an extraordinary case in which termination of parental rights would be detrimental to D.S. Although father’s weekly monitored visits with D.S. went well and were relatively consistent, father has not shown that he occupies a parental role in D.S.’s life, or that

maintaining D.S.'s relationship with father outweighs the well-being D.S. would gain in a permanent home with adoptive parents. Under these circumstances, the juvenile court did not err in terminating parental rights.

DISPOSITION

The order terminating father's parental rights is affirmed.

RUBIN, ACTING P. J.

WE CONCUR:

FLIER, J.

GRIMES, J.