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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

In re AUTUMN P. et al., Persons Coming
Under the Juvenile Court Law.

B241979

(Los Angeles County
Super. Ct. No. CK79542)

LOS ANGELES COUNTY
DEPARTMENT OF CHILDREN AND
FAMILY SERVICES,

Plaintiff and Respondent,

v.

K.P. et al.,

Defendants and Appellants.

APPEAL from an order of the Superior Court of Los Angeles County,
Steven R. Klaif, Referee. Affirmed.

Karen J. Dodd, under appointment by the Court of Appeal, for Appellant K.P.

Jack A. Love, under appointment by the Court of Appeal, for Appellant
Nicholas P.

John F. Krattli, County Counsel, James M. Owens, Assistant County Counsel, and
Jeanette Cauble, Deputy County Counsel, for Plaintiff and Respondent.

INTRODUCTION

Appellants Nicholas P. (father) and K. P. (mother) appeal an order terminating their parental rights to their three daughters, Autumn P., Summer P. and Hope P. Father and mother do not dispute that their children were likely to be adopted at the time the juvenile court issued the order. Under Welfare and Institutions Code section 366.26,¹ the juvenile court was required to terminate their parental rights unless one of the enumerated exceptions applied. The main issue on appeal is whether the juvenile court committed reversible error in ruling that the parent-child relationship exception (§ 366.26, subd. (c)(1)(B)(i)) did not apply. We shall conclude that the court did not commit such error and thus affirm the order.

FACTUAL AND PROCEDURAL BACKGROUND

1. *The P. Family*

Father and mother married in March 2007. Autumn was born in December 2007. Hope and Summer, who are twins, were born in September 2009. At the time these proceedings commenced, Autumn was 22 months old and the twins were one month old.

Mother has been diagnosed with mild mental retardation. She has been a client of a regional center since 1998. At the time this action commenced, mother had worked full-time as a broadcast librarian for an advertising agency for 11 years. Her wages were \$9 per hour.

It is undisputed that due to her disability, mother cannot serve as the primary caregiver for the children. Father thus served as the primary caregiver while the children were in his and mother's custody.

When mother first met father, he had two jobs. Father, however, stopped working at some point and was unemployed for long periods of time.

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

Before the commencement of this action, mother was “very close” to Rachel H., the children’s maternal grandmother. She also had a good relationship with L. H., the children’s maternal aunt. There was animosity, however, between father on the one hand and maternal grandmother and maternal aunt on the other.

2. *History of Domestic Violence*

Father has a long history of verbally abusing mother and committing domestic violence against her. He regularly called mother demeaning and derogatory names, referring to her as “slow,” “stupid” and “crazy.” He also physically abused and bullied mother, and mother sometimes responded with physical violence. According to mother’s case worker from the regional center, the police had been called to the family home after altercations between father and mother on “numerous” occasions. Mother estimated the police intervened about 20 times.

On most occasions, when the police arrived at the P. residence, they did not arrest either father or mother. In April 2009, however, when mother was five months pregnant with the twins, father was arrested for domestic violence and released. He was arrested because he had punched mother in the stomach, causing mother to go to the hospital.

Both father and mother agree that a major source of tension between them were visits by maternal grandmother and maternal aunt. In the summer of 2009, for example, maternal aunt and maternal grandmother brought Autumn home after she spent time with them. Father became very upset because they did not return some of Autumn’s clothes and because he did not want them visiting his home. An altercation between mother and father followed. During the altercation father spit in mother’s face. Mother responded by striking father on various parts of his body. She then left the home and spent the night with maternal grandmother.

On at least four occasions mother decided to end her relationship with father. Mother often lived with maternal grandmother and maternal aunt for days or weeks after altercations with father. Mother’s family made no secret of their desire for her to leave father.

3. *The Commencement of the Department's Involvement With the Family*

On October 18, 2009, maternal grandmother, maternal aunt and the children's maternal great aunt went to mother and father's home to return Autumn and to visit the twins. When they arrived, they heard mother and father arguing loudly. Father grabbed Autumn, told mother and her family to leave, and started pushing mother and her family out the door. He also shouted demeaning insults at mother, calling her among other things a "fat ass bitch." During the altercation, father scratched mother's arm. In response to mother's phone call, the police came to the scene and arrested father for spousal abuse.

On October 19, 2009, an anonymous person called respondent Los Angeles County Department of Children and Family Services (the Department) and asked that the Department investigate a possible risk of emotional and physical abuse of Autumn, Summer and Hope. While father was still in jail, the Department commenced its investigation. It quickly decided to temporarily place the children in the care of maternal aunt.

On or about October 20, 2009, mother obtained a restraining order against father, prohibiting him coming within 100 yards of her. The order expired in three years.

4. *Juvenile Dependency Petition*

On October 28, 2009, the Department filed a juvenile dependency petition. The petition prayed for the juvenile court to assert jurisdiction over Autumn, Summer and Hope pursuant to section 300, subdivision (b) [failure to protect] based on the October 18, 2009, incident, the history of domestic violence between father and mother, and mother's "developmental delays."²

² The petition also alleged the juvenile court could assert jurisdiction over the children pursuant to section 300, subdivisions (b) and (j), based on father's alleged drug use and father and mother's alleged failure to provide the children with timely medical treatment. Because these allegations were not ultimately sustained by the juvenile court, we shall not discuss them further.

5. *Juvenile Court Proceedings Before the Section 366.26 Hearing*

On the same day the petition was filed, the juvenile court found that there was a prima facie case for detaining the children. The court also approved the placement of the children with maternal aunt. Additionally, the court ordered that mother and father be permitted monitored visits with the children and that the parents not visit at the same time. The court further ordered the Department to provide family reunification services to mother and father.

On December 9, 2009, the court held a jurisdictional and dispositional hearing. After the hearing the court issued an order sustaining the petition as amended with interlineations. The order also declared Autumn, Summer and Hope dependants of the court, and approved the Department's case plan for mother and father. The plan required father to attend parenting and domestic abuse counseling, and to submit to random drug tests. It required mother to attend counseling and other treatments arranged by the regional center. Additionally, the order stated that mother could have unmonitored visits with the children so long as another adult was present, and that father could have visits monitored by the DCFS. The order prohibited father and mother from visiting the children at the same time.

Pursuant to the order, father visited the children weekly for two hours. Father attended almost all scheduled visits. During the visits father acted appropriately, often playing games with the children and feeding them snacks. Mother too visited the children regularly. She saw them about three or four nights a week at maternal aunt's home. Mother often fed and bathed the children, and put them to bed. Father and mother also initially regularly attended counseling sessions and made good progress satisfying the other requirements of the case plan.

On June 25, 2010, the juvenile court issued an order permitting father to have unmonitored weekly visits with the children for up to two hours. Father's visits with the children generally went well. Although father continued to display hostility toward maternal aunt, the children "thrive[d]" in maternal aunt's care.

In the first year after the petition was filed, mother and father partially complied with the Department's case plan. During this time period father had difficulty maintaining steady employment. In a report prepared for the 12-month status review hearing, the Department recommended that mother and father be provided an additional six months of family reunification services so that "they can obtain stable housing for their children and complete their court ordered programs."

On November 4, 2010, the juvenile court ordered that father's unmonitored visits be increased to weekly four-hour sessions with one of the twins, alternating between Summer and Hope, and six hours per week with Autumn. It also ordered a continuance of the status hearing to January 5, 2011.

In a "last minute information for the court" dated January 5, 2011, the Department reported that father was homeless and unemployed. It also stated that mother was having financial problems, and that she had not found a suitable residence for her children. On January 5, 2011, the court issued an order requiring the Department to continue providing mother and father with family reunification services.

Despite obtaining a restraining order against father, mother consistently expressed an interest in reviving her relationship with him. By April 2011, mother and father reported that they had "reconciled" and were living together.

In a status review report dated April 28, 2011, the Department recommended returning the children to mother's custody on the condition she live with maternal aunt. The report further stated, however, that if mother did not agree to live with maternal aunt, the Department recommended allowing maternal aunt to adopt the children. In response to the Department's recommendations, mother stated to the Department that she wanted to continue living with father and not with maternal aunt.

On April 30, 2011, maternal aunt brought Hope to a police station so that father could have his visit with the child. Father became enraged because he believed that maternal aunt should have brought Summer instead of Hope. In the parking lot of the police station, father shouted profanities at maternal aunt and slapped her in the face in front of Hope.

On May 11, 2011, the Department filed a section 388 petition seeking to modify the order permitting father to have unmonitored visits. The petition was based on father's "irrational and abusive behavior" toward maternal aunt on April 30, 2011.

On May 17, 2011, the juvenile court granted a hearing on the Department's section 388 petition. It also issued an order requiring father's visits with the children to be monitored.

In the fall of 2011, the Department filed a series of reports critical of mother and father. The reports stated that (1) mother and father were again having altercations which necessitated police intervention; (2) mother and father had been evicted from their apartment; (3) after mother started living with father she began attending therapy sessions at the regional center less frequently; (4) despite repeated attempts, the Department was unable to schedule an inspection of mother and father's home; and (5) on December 3, 2011, during an exchange of the children, maternal aunt observed "two junkies from skid row" who were "drinking alcohol and smoking marijuana" in mother's vehicle.

On December 9, 2011, the Department filed a second section 388 petition. This petition sought to modify the order permitting mother to have unmonitored visits with the children.

On January 24, 2012, the juvenile court held a hearing on both section 388 petitions. After the hearing, the court issued an order granting both petitions and limiting mother and father to monitored visits. The order also terminated family reunification services for both parents.

6. *Section 366.26 Hearing and Order*

On May 22, 2012, the Department filed a section 366.26 report. The report stated that the children were "excellent candidates" for adoption planning due to their age, and the stability and placement history with maternal aunt since October 2009. With respect to maternal aunt, the report stated that she was working as a licensed vocational nurse and pursuing a registered nursing degree, she was financially stable, and that she had no mental health or substance abuse problems. It also stated that maternal aunt had assistance in taking care of the children from friends and relatives, and provided a safe

and secure home for the children. In the Department's view, the children were "thriving and in good health" in maternal aunt's care.

The report also indicated that while the children recognized mother and father, their primary emotional attachment was to maternal aunt. It also stated that although father partially complied with his case plan, "he failed to demonstrate a change in the behaviors which had led to the detention of the children."

The section 366.26 hearing was held on June 8 and 11, 2012. At the hearing, maternal aunt testified that Autumn did not ask for her parents between visits and that none of the children were "bonded" to mother or father. She further testified that while Autumn would sometimes run to father when she first saw him, the twins never would. Maternal aunt stated that she no longer had a relationship with mother.

Mother and father also testified. Father testified that he took the children to the park, read to them, played with them, and watched television with them. He further stated that his bond with his children was "immense." Mother testified that she changed the children's diapers, gave them snacks and watched television with them, and that the children were "happy" when she visited them.

After the hearing, on June 11, 2012, the juvenile court issued an order terminating the parental rights of mother and father. The court found that the children were likely to be adopted that there was no exception to the statutory requirement that parental rights be terminated. Mother and father filed timely notices of appeal.

DISCUSSION

1. The Parent-Child Relationship Exception

The purpose of a section 366.26 hearing is to determine a dependent child's permanent placement. At this point, a parent's interest in the care, custody and companionship of the child is no longer paramount. Instead, the focus is on the needs of the child for permanency and stability. (*In re Angel B.* (2002) 97 Cal.App.4th 454, 464.) The juvenile court has three alternatives at a section 366.26 hearing: adoption, guardianship or long-term foster care. (*In re S.B.* (2008) 164 Cal.App.4th 289, 296.)

“If the dependent child is adoptable, there is a strong preference for adoption over the alternative permanency plans.” (*Id.* at p. 297.)

Section 366.26, subdivision (c)(1) provides that if the juvenile court determines that it is likely the child will be adopted, the court “shall” terminate parental rights and order the child placed for adoption, unless one of the enumerated exceptions apply. The parent-child relationship exception applies when the court finds that termination of parental rights would be detrimental to the child because “[1] [t]he parents have maintained regular visitation and contact with the child and [2] the child would benefit from continuing the relationship.” (§ 366.26, subd. (c)(1)(B)(i).)

As we shall explain *post*, this opinion concerns the second prong of the exception. With respect to this prong, “the parent has the burden of showing either that (1) continuation of the parent-child relationship will promote the well-being the child to such a degree as to outweigh the well-being of the child would gain in a permanent home with new, adoptive parents [citation] or (2) termination of the parental relationship would be detrimental to the child.” (*In re Angel B.*, *supra*, 97 Cal.App.4th at p. 466.)

Interaction between a biological parent and a child will almost always confer some incidental benefit to the child. (*In re Autumn H.* (1994) 27 Cal.App.4th 567, 575.) But only in the “extraordinary case” (*In re Jasmine D.* (2000) 78 Cal.App.4th 1339, 1350) when the child would be “greatly harmed” by the termination of parental rights (*In re Autumn H.*, at p. 575; *In re Angel B.*, *supra* 97 Cal.App.4th at p. 466) does the parent-child relationship exception apply.

The relationship that gives rise to this exception typically occurs from day-to-day contact, shared experiences, and the parent’s attention to the child’s needs for physical care, nourishment, comfort, affection and stimulation. (*In re Autumn H.*, *supra*, 27 Cal.App.4th at p. 575; *In re K.P.* (2012) 203 Cal.App.4th 614, 621.) Although the parent is not required to prove he or she maintained daily contact with the child or that the child has a “primary attachment” to the parent (*In re C.B.* (2010) 190 Cal.App.4th 102, 124), the parent must show that he or she occupies a parental role in the child’s life

(*In re K.P.*, at p. 621), which is something qualitatively greater than the role of an adult friend. (*In re Autumn H.*, at p. 576.)

2. *Standard of Review*

Reviewing courts have applied both the substantial evidence (*In re Autumn H.*, *supra*, 27 Cal.App.4th at p. 576) and abuse of discretion (*In re Jasmine D.*, *supra*, 78 Cal.App.4th at p. 1351) standards of review to a juvenile court’s decision regarding the parent-child relationship exception. Recently, some courts have applied the substantial evidence test to factual determinations, such as whether a parental relationship exists, and an abuse of discretion test to the issue of whether the existence of the relationship constituted a sufficient reason to not place the child for adoption. (*In re K.P.*, *supra*, 203 Cal.App.4th at p. 622; *In re C.B.*, *supra*, 190 Cal.App.4th at p. 123; *In re Bailey J.* (2010) 189 Cal.App.4th 1308, 1314-1315.)

In our view, the practical differences between the two standards are not significant. (*In re Scott B.* (2010) 188 Cal.App.4th 452, 469.) We would come to the same conclusion under either test, or a hybrid of the two.

3. *The Juvenile Court Did Not Erroneously Conclude the Parent-Child Relationship Exception Was Inapplicable*

Both mother and father contend the juvenile court erroneously concluded that the parent-child relationship exception was inapplicable in this case. Applying either the substantial evidence or abuse of discretion standard of review, both of which are deferential, we reject this argument.

Preliminarily, we note that mother and father do not dispute the juvenile court’s determination that Autumn, Summer and Hope were adoptable. The juvenile court thus was obligated to consider the strong legislative preference for adoption.

We also note the Department does not dispute that mother and father maintained “regular” visitation and contact with the children within the meaning of section 366.26, subdivision (c)(1)(B)(i). On appeal therefore only the second prong of the exception—whether the children “would benefit from continuing the relationship”—is at issue.

There was substantial evidence from which the juvenile court could have concluded that the relationship between appellants and their children was not “parental” in nature. Although the children, especially Autumn, seemed to enjoy visits by father and mother, they did not have daily contact with their biological parents. Also, at the time of the section 366.26 hearing, mother and father had not taken care of the children’s needs for physical care, nourishment, comfort, affection and stimulation to a significant degree for more than two and one-half years, which was a period of more than half of Autumn’s life and virtually the entire lifetime of the twins. Indeed, Hope and Summer, whose primary caretaker was maternal aunt since they were one month old, had no memory of living with mother and father. Autumn, too, who was 22 months old when this action commenced, was unlikely to have any significant memory of living with mother and father. Accordingly, there was no evidence that the children had substantial, meaningful shared experiences with their biological parents.

While the children undoubtedly enjoyed some incidental benefits from visits by mother and father, the juvenile court could have reasonably concluded that the benefits of such visits were not substantially greater than the benefits of visits from friends, albeit adult ones. A reasonable juvenile court could have concluded, as the court did in this case, that the benefits the children enjoyed from continuing their relationship with mother and father did not outweigh the well-being the children would gain in a permanent home with maternal aunt. We thus find no reversible error in this case.

DISPOSITION

The order dated June 11, 2012, terminating the parental rights of mother and father is affirmed.

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KITCHING, J.

We concur:

KLEIN, P. J.

CROSKEY, J.