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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

In re J.H., a Person Coming Under the  
Juvenile Court Law.

B244599  
(Los Angeles County  
Super. Ct. No. CK 78143)

LOS ANGELES COUNTY  
DEPARTMENT OF CHILDREN AND  
FAMILY SERVICES,

Plaintiff and Respondent,

v.

A.H.,

Defendant and Appellant.

Appeal from an order of the Superior Court of Los Angeles County. D. Zeke Zeidler, Judge. Affirmed.

Leslie A. Barry, under appointment by the Court of Appeal, for Defendant and Appellant.

John F. Krattli, County Counsel, James M. Owens, Assistant County Counsel, and Melinda A. Green, Senior Associate County Counsel, for Plaintiff and Respondent.

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A.H. (mother) appeals from the August 8, 2012 order (Welf. & Inst. Code, § 366.26)<sup>1</sup> terminating her parental rights and selecting adoption as the permanent plan for her son J.H. Mother contends the juvenile court failed to apply the parent-child beneficial relationship exception to the preference for adoption and, for this reason, the order terminating her parental rights and placing J.H. for adoption must be reversed. Mother also contends the court committed reversible error by asking questions of mother during the contested section 366.26 hearing and bringing an end to her counsel's argument when the court had heard enough. Mother contends the court thereby denied her a fair hearing and fair opportunity to prove that the beneficial parent-child relationship exception to adoption applied in this case.

We find the court did not commit reversible error in the way it conducted the hearing, nor did the court abuse its discretion in terminating the parental rights of mother and selecting adoption as the permanent plan for J.H. We also find substantial evidence supports the court's determination that the parent-child beneficial relationship exception does not apply. We affirm the order.

### **FACTS**

J.H. was detained from his mother on July 20, 2009, after both J.H. and mother had been hospitalized. On July 15, 2009, mother had argued with a family member, the police were called, and as mother approached to speak with the police, she tripped and dropped seven-month-old J.H. on the sidewalk. J.H. was hospitalized in a pediatric intensive care unit for a week as a result of his injuries. Mother was placed on a 72-hour psychiatric hospital hold. J.H. was detained in the home of mother's sister, S.K., pending adjudication of the dependency petition. On October 30, 2009, the court sustained these allegations under section 300, subdivisions (a)(1), (a)(2), and (b)(1) through (b)(4):

“a-1 [¶] On 7/15/09, the child [J.H.]’s mother, [A.H.] and the maternal aunt, [N.J.], engaged in a violent altercation in the child’s presence in

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<sup>1</sup> All further section references are to the Welfare and Institutions Code.

which the mother kicked the maternal aunt's leg while the aunt held the child. The mother seized the child from the maternal aunt's arms. The mother's violent altercation against the maternal aunt endangers the child's physical and emotional health and safety and places the child at risk of physical and emotional harm and damage."

"a-2 [¶] On prior occasions, the child [J.H.]'s mother, [A.H.] and father, [M.M.] engaged in violent altercations in which the father violently assaulted the mother. The father's violent assaults against the mother endanger the child's physical and emotional health and safety and place the child at risk of physical and emotional harm and damage."

"b-1 [¶] On 7/15/09, the child [J.H.]'s mother [A.H.] placed the child in an endangering and detrimental situation in that while the mother was in an incoherent agitated state while the child was in the mother's care resulting in the mother tripping while holding the child, causing the child to fall from the mother's arms striking the child's head against cement. The child sustained bi-lateral subdural hematomas to the child's head and a subarachnoid hemorrhage in the posterior convexity of the child's brain. The child was hospitalized in critical condition. Such an endangering and detrimental situation created for the child by the mother endangers the child's physical and emotional health and safety and places the child at risk of physical and emotional harm, damage and danger."

"b-2 [¶] The child [J.H.]'s mother [A.H.] suffers from mental and emotional problems including depression, suicidal ideation, delusions and hallucinations, which render the mother incapable of providing the child with regular care and supervision. On 7/15/09, the mother was involuntarily hospitalized for the evaluation and treatment of the mother's psychiatric condition. The mother's mental and emotional problems endanger the child's physical and emotional health and safety and place the child at risk of physical and emotional harm and damage."

"b-3 [¶] On 7/15/09, the child [J.H.]'s mother [A.H.] and the maternal aunt [N.J.] engaged in a violent altercation in the child's presence in which the mother kicked the maternal aunt's leg while the aunt held the child. The mother seized the child from the maternal aunt's arms. The mother's violent altercation against the maternal aunt endangers the child's physical and emotional health and safety and places the child at risk of physical and emotional harm and damage."

"b-4 [¶] On prior occasions, the child [J.H.]'s mother [A.H.] and father [M.M.] engaged in violent altercations in which the father violently assaulted the mother. The father's violent assaults against the mother

endanger the child's physical and emotional health and safety and place the child at risk of physical and emotional harm and damage.”

After sustaining these allegations on October 30, 2009, the court ordered J.H. removed from mother's custody and suitably placed with maternal aunt S.K. with whom he had been living since his detention three and a half months earlier. The court ordered reunification services for mother at the disposition hearing, and ordered further reunification services for her a year later, at the status review hearing held November 2, 2010. Mother had one hour of monitored visitation with J.H. on weekdays until mid-January 2011, when she began to have overnight visits. On March 9, 2011, on the recommendation of the Department, the court ordered J.H. to be placed in the home of his mother, with family maintenance services, conditioned on her continued compliance with the case plan.

A little over four months later, in mid-July 2011, the Department received a referral of possible physical abuse of J.H. The Department's investigation led to information that J.H. had either scratch marks or burn marks, as from a hot liquid spilled on his chest. Mother's explanations of what happened to J.H. were inconsistent. At varying times, she reported J.H. fell on a toy at his aunt S.K.'s home or that S.K.'s dog scratched him or that mother's boyfriend's dog had jumped on J.H. During the four months that J.H. was placed in the home of his mother, he lived with her three to four days a week, and he lived the rest of the time with his maternal aunt, S.K., with whom he had lived after he was detained from mother. Mother and S.K. agreed to this so that J.H. could transition back into mother's care.

Since the Department believed the marks were burns from a hot liquid dripping on J.H.'s chest due to neglect, the Department filed a section 342 petition to detain J.H. from mother. The child was detained in shelter care, but the court ordered he “may have a vacation” with his other maternal aunt, N.J., until N.J. left to go out of town. The court ordered mother was to have monitored visits at least twice a week. On August 22, 2011, the court ordered J.H. to be detained with his maternal aunt S.K. pending adjudication of the section 342 petition. At the August 29, 2011 hearing to

adjudicate the section 342 petition, mother pled no contest to allegations that J.H. suffered first degree hot liquid burns while in her care, which injuries would not ordinarily occur except as the result of deliberate or neglectful acts, and that mother failed to seek timely medical treatment for his injuries. The court then set a date for a contested disposition hearing.

At the October 18, 2011 disposition hearing, the parties submitted the matter to the court for decision based on the various reports submitted by the Department. Mother's counsel said he had explained to his client, and she understood, that she had received more than 18 months of reunification and family maintenance services; the court would probably terminate reunification services; J.H. would remain suitably placed; and the court would set a section 366.26 hearing. After hearing from all counsel, the court terminated services for mother, ordered that she was to have monitored visits with J.H. at least once a week, and set a section 366.26 hearing.

For the initial section 366.26 hearing, the Department submitted a report stating that mother had monitored visits with J.H. twice a week but had not attended J.H.'s third birthday party with other maternal relatives. The section 366.26 hearing was continued twice, with the court granting the Department discretion to liberalize mother's visits conditioned on her compliance with her case plan. For the second section 366.26 hearing, the Department submitted a report saying that mother had monitored visits with J.H. in a park twice a week for one and a half hours.

The court considered evidence and testimony at the third, contested section 366.26 hearing on August 8, 2012. The court admitted into evidence, without objection, the contents of the court file and identified particular documents it had considered, including the parties' joint issue statement and various reports from the Department with attachments. In their joint issue statement, the parties identified the issue to be litigated was whether any exception to adoption applied. Mother offered to prove that she played a primary role in caring for J.H., she had established a significant bond with him, terminating parental rights would be detrimental to J.H., and J.H. would benefit and thrive by continuing the relationship.

Mother was the only witness called to testify. She testified to her twice-a-week monitored visits with J.H. in Alma Park in San Pedro, during which she and J.H. played, read books, and she fed him snacks. In answer to a question from the court, mother acknowledged her visits were not enough time to parent J.H., and that they just played. She testified that J.H. had lived with her full time for the first six months of his life and lived with her three or four days a week from March 9 to July 19, 2011. However, mother had not bathed or put J.H. to bed, or fed him a meal, in over a year. Mother testified that J.H. would feel abandoned if he were adopted, and that he cried when she missed a visit to attend a medical appointment.

When mother first took the witness stand, the juvenile court asked mother several questions. Mother argues on appeal that the court denied her a fair hearing because the court “employed judicial activism and took on the role of prosecutor.” (Boldface caps omitted.) Below we recite the court’s questions and mother’s answers.

“The Court: Do you visit on Tuesdays and Thursdays?

“The Witness: I do.

“The Court: Is that for an hour-and-half each?

“The Witness: Yes.

“The Court: Do you have any other visits?

“The Witness: No. I’ve requested other visits.

“The Court: Do the visits take place at a local park?

“The Witness: Yes.

“The Court: Are they monitored by the uncle?

“The Witness: Yes.

“The Court: The caretaker’s husband?

“The Witness: Yes.

“The Court: What do you do during the visits?

“The Witness: We play. I read him books. We talk, but mostly we just play.

“The Court: What types of things do you do with him that are a parental role in nature?

“The Witness: I don’t know. I don’t know if an hour-and-a-half is really enough time to parent him. We just play. I try to keep it at that level just so we have —

“The Court: Of his three-and-a-half years that he’s been alive, how much time has he lived with you?

“The Witness: The first six months, and then I think it was two months when I regained custody of him.”

The court was about to turn the examination over to mother’s counsel, but then asked:

“The Court: What’s your position on him being adopted?

“The Witness: I’ve been able to really not take him for granted[,] to see my—you know, having your child is not for me—it’s not something I take for granted. So I really want him in a safe and a good place, and I think it’s with me.”

The court then invited mother’s counsel to continue the examination of mother. Counsel’s initial questions focused on mother’s care of J.H. during the first six months of his life, to which the court sustained its own objection as irrelevant, explaining that the question was whether mother’s regular and consistent visitation demonstrated a parental role in J.H.’s life. Mother’s counsel continued to examine her regarding her care of J.H. during his first few months of life. Counsel for the Department offered to stipulate to what the record showed about the period of time the child was with the mother and later with the caretaker, and the court admonished counsel that the court had admitted the reports and had minute orders that showed the time frames of when the child was, and was not, in mother’s care.

Mother’s counsel then asked about the four-month period from March 9 to July 19, 2011, when J.H. was in mother’s care, establishing that J.H. spent three or four days

with mother and the rest of the time with her sister. Counsel established that while J.H. was in her care during this period, mother parented him by bathing and feeding him and putting him to bed. The court then asked mother when she last bathed, fed or put J.H. to bed, and she answered, “It was over a year ago.”

Counsel continued to inquire about the four-month period that J.H. stayed with mother for three or four days a week, and she testified that during that period, they went swimming, went for walks and watched TV; she helped potty train him, and they exchanged hugs, kisses and said “I love you.” Next, mother’s counsel inquired about the burns on J.H.’s chest, to which the Department’s counsel objected as irrelevant. The court sustained the objection. Instead of continuing his examination, mother’s counsel then argued that the court should consider relevant the attachment that mother and J.H. previously had between them. The court explained that it believed mother had a parental role and parent-child relationship during the periods that J.H. lived with her, so the court did not need to hear further testimony or argument about that. The court explained the question was to what extent mother’s visits with J.H. during the period when he was *not* placed in her home continued the parental relationship, and to what extent continuing the relationship would benefit J.H.

Mother’s counsel continued to argue with the court, saying the question whether mother admitted her responsibility for J.H.’s burns, or was in denial, was relevant to whether J.H. would benefit from continuing the relationship. When the court told counsel to move on, counsel asked mother if she was currently in counseling and then asked questions about her twice-a-week visits over the past 13 months, many of which she had previously answered. During this questioning, when counsel asked mother, “When you see [J.H.] at the beginning of the visit, how does he greet you if he greets you at all?” mother answered, “He says, ‘Hi, [mother’s first name]. What did you bring me?’ ” Mother’s counsel concluded his examination by asking mother what benefit J.H. would achieve by maintaining his relationship with her. Mother testified, “I think he would feel abandoned. He would maybe feel all alone. But certainly he’d feel abandoned I think.”

After mother's counsel rested, other counsel waived cross-examination, and the court invited mother's counsel to argue the section 366.26 issues. Counsel argued that under *section 366.22* (18-month permanency review hearing) the Department is required to consider alternatives to adoption such as legal guardianship or long term foster care, particularly when a child is placed with a relative. The court asked mother's counsel to clarify on what basis mother contended that J.H. was not adoptable. Mother's counsel answered that J.H. was not adoptable based on the Department's obligation under section 366.22. Counsel then asked to argue the applicability of *In re Autumn H.* (1994) 27 Cal.App.4th 567 and *In re Beatrice M.* (1994) 29 Cal.App.4th 1411, at which point the court cut off mother's counsel's argument. The court explained it did not need to hear further from counsel because the court had considered the reports and mother's testimony, and understood the record demonstrated mother loved and was affectionate toward J.H., maintained regular contact with him, and did as much as she could in an hour and a half visit. After hearing further argument from all counsel (including mother's counsel), the court terminated mother's parental rights, finding that continuance of the parent-child relationship did not outweigh the benefits of permanence in adoption.

## **DISCUSSION**

Mother contends the substantial evidence rule applies to the question whether the beneficial parent-child relationship exception to adoption exists in this case, and the abuse of discretion standard applies to the question whether termination of parental rights would be detrimental to the child. (*In re L. Y. L.* (2002) 101 Cal.App.4th 942, 947; *In re Autumn H.*, *supra*, 27 Cal.App.4th at p. 576; compare *In re Aaliyah R.* (2006) 136 Cal.App.4th 437, 449 [abuse of discretion standard of review].) "The practical differences between the two standards of review are not significant. '[E]valuating the factual basis for an exercise of discretion is similar to analyzing the sufficiency of the evidence for the ruling. . . . Broad deference must be shown to the trial judge. The reviewing court should interfere only " 'if [it] find[s] that under all the evidence, viewed most favorably in support of the trial court's action, no judge could reasonably have

made the order that he did.’ . . .”’ [Citations.]” (*In re Jasmine D.* (2000) 78 Cal.App.4th 1339, 1351.)

Mother contends the juvenile court erred in concluding there was no showing that she had a beneficial parent-child relationship sufficient to prevent termination of parental rights, and that by asking her questions and bringing an end to her counsel’s argument, she was denied a fair hearing. We first address the court’s finding that mother did not demonstrate the parent-child beneficial relationship was sufficient to bring J.H.’s case within the exception to the preference for adoption.

Once reunification services to the natural parents have been terminated and the dependency proceedings reach the section 366.26 hearing, adoption is the preferred permanent plan decreed by the Legislature. (§ 366.26, subd. (b); see also *In re Beatrice M.*, *supra*, 29 Cal.App.4th at p. 1419.) The statute mandates that parental rights be terminated, unless the parent can establish one of the enumerated exceptions. (§ 366.26, subd. (c)(1).) “An exception to the adoption preference applies if termination of parental rights would be detrimental to the child because 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).)” (*In re C.F.* (2011) 193 Cal.App.4th 549, 553.) “[T]he party claiming an exception to adoption has the burden of proof of establishing by a preponderance of evidence that the exception applies.” (*In re Aaliyah R.*, *supra*, 136 Cal.App.4th at p. 449.)

At the section 366.26 hearing, mother had the burden to establish both prongs of the parental relationship exception. First, she had to show she had maintained regular contact with J.H., and also that J.H. would benefit from a continued parental relationship with mother. (§ 366.26, subd. (c)(1)(B)(i).) There must be solid, credible evidence in support of both prongs of the exception. “The Legislature emphasized the exceptional nature of all the circumstances identified in section 366.26, subdivision (c)(1) by revising the statute in 1998 to require the court to find not only that one of the listed circumstances exists, but also that it provide ‘a compelling reason for determining that termination would be detrimental to the child.’ [Citation.] This amendment . . .

makes it plain that *a parent may not claim entitlement to the exception . . . simply by demonstrating some benefit to the child from a continued relationship with the parent, or some detriment from termination of parental rights.*” (*In re Jasmine D.*, *supra*, 78 Cal.App.4th at p. 1349, italics added.)

“To overcome the preference for adoption and avoid termination of the natural parent’s rights, the parent must show that severing the natural parent-child relationship would deprive the child of a *substantial*, positive emotional attachment such that the child would be *greatly* harmed. [Citations.] A biological parent who has failed to reunify with an adoptable child may not derail an adoption merely by showing the child would derive *some* benefit from continuing a relationship maintained during periods of visitation with the parent.” (*In re Angel B.* (2002) 97 Cal.App.4th 454, 466.)

In his three and a half years of life, J.H. lived with mother the first six months and later, for a four-month period, he stayed with her three or four days a week. Otherwise, mother had only monitored visitation with J.H. In the 13 months before the section 366.26 hearing, mother had pleasant, happy visits with J.H. As the court found, mother maintained regular visitation and did as much as she could in her twice-weekly, one and a half hour visits with J.H. in the park. However, “[a] parent must show more than frequent and loving contact or pleasant visits.” (*In re Mary G.* (2007) 151 Cal.App.4th 184, 207; accord, *In re Derek W.* (1999) 73 Cal.App.4th 823, 827.) We find substantial evidence supports the court’s finding of inadequate evidence to establish the parent-child beneficial relationship exception to adoption, and the court did not abuse its discretion in terminating mother’s parental rights.

In terms of the conduct of the section 366.26 hearing, mother acknowledges in her opening brief that the court has the power to “ ‘control all proceedings during the hearings,’ ” citing section 350, subdivision (a)(1). Mother argues that the court acted in excess of this power by limiting the presentation of relevant evidence and argument. We disagree that the court denied mother an opportunity to present evidence and argument. However, we acknowledge that, customarily, the lawyer who has called a witness to testify will begin the examination of that witness, not the court, not even in a

bench trial. The court was entitled to question mother at any point during the proceedings, but the court's decision to begin the examination of mother before her counsel had asked her even a few introductory questions departed from customary procedures. The court's questions here properly sought evidence relevant to the issues before the court, as framed by the parties' statement of issues. The court's questions did not show partiality or bias. Nonetheless, the court must have known that mother was under considerable stress, since she hoped her testimony would prevent termination of her parental rights, and the court should have refrained from asking questions of mother until she had an opportunity to answer at least a few questions from her own counsel. In the end, however, we are not persuaded the court denied mother a fair hearing.

During counsel's questioning of mother, the court told counsel it found the evidence established mother had maintained regular contact with J.H. and did not need to hear more testimony on that question. The court guided counsel to seek testimony from mother showing that J.H. would benefit from continuing the relationship and suffer detriment from terminating parental rights. Other than mother's own testimony that she believed J.H. would feel abandoned and alone if her parental rights were terminated, the record does not suggest that mother had any other evidence to offer to show that J.H. would suffer significant harm by severing his relationship with mother (whom, according to mother, he greeted in the park by calling her by her first name and asking what she had brought for him). On appeal, mother does not state in her briefs what additional evidence or argument she wished to offer the trial court. We find the trial court gave mother an adequate opportunity to prove that J.H. was not adoptable, and that mother was not denied a fair hearing.

**DISPOSITION**

The order of August 8, 2012, terminating parental rights is affirmed.

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GRIMES, J.

WE CONCUR:

BIGELOW, P. J.

RUBIN, J.