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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT

(Butte)

In re A.M., a Person Coming Under the Juvenile
Court Law.

BUTTE COUNTY DEPARTMENT OF
EMPLOYMENT AND SOCIAL SERVICES,

Plaintiff and Respondent,

v.

R.M.,

Defendant and Appellant.

C070727

(Super. Ct. No. J35338)

R.M. (mother) appeals from the juvenile court's order terminating her parental rights as to A.M. (minor). (Welf. & Inst. Code,¹ § 366.26.) She contends that the trial court erred by finding the beneficial parental relationship exception to terminating parental rights did not apply. We disagree and shall affirm.

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

FACTUAL AND PROCEDURAL BACKGROUND

Petition and Early Proceedings

On May 25, 2010, Butte County Department of Employment and Social Services (the Department) filed a section 300 petition as to four-year-old minor, alleging that mother's substance abuse problem put minor at risk. Mother had recently tested positive for methamphetamine. She had lost custody of minor's half sister, Marisol G., in 2003 due to methamphetamine abuse, and her parental rights had been terminated in 2006. When minor's half brother, Daniel A. (Daniel), was born in December 2009, mother and Daniel tested positive for methamphetamine; he had been in foster care since January 2010. The identity and whereabouts of minor's father were unknown.

The Department alleged further that when Daniel was detained from mother, minor was required under the Department's safety plan to be living with Daniel's paternal grandmother, who was also minor's godmother--this was the reason minor was not also detained from mother at the same time as was Daniel. At the time of minor's detention, minor was suspected to be living with mother again, and Daniel's father, Mario A., who had moved out but then moved back in with mother, was testing positive or failing to test for methamphetamine, as was mother.

In June 2010, the juvenile court found that minor came within its jurisdiction and detained him. Minor was placed in a foster home with Daniel. At a consolidated disposition hearing as to minor and six-month review hearing as to Daniel held on July 27, 2010, the juvenile court ordered reunification services for mother, but terminated them for Daniel's father.

Six-Month Review Hearing

The Department recommended terminating mother's services and setting a section 366.26 hearing as to both minor and Daniel in a status review report filed December 23, 2010. According to the report, minor and Daniel, still placed together, were closely

bonded, and their foster parents were willing to provide permanency for them if reunification failed.

Minor was developmentally on track, but having difficulty in kindergarten; an Individualized Education Plan (IEP) had been requested. He was adjusting well in placement, but felt anxious about mother's visits and her well-being in general. Mother had relapsed on methamphetamine several times, had developed an immune system disorder, and had suffered several bouts of illness; partly for these reasons, her participation in services and visitation had been minimal. She continued to see Daniel's father every day, which the Department considered one of mother's multiple "inappropriate relationships with active drug users." She was not taking prescribed medication for mental health problems and was not treating her immune-suppressive condition. She had tested positive for methamphetamine four times since mid-August 2010, although she now claimed to have gone three weeks since her last use. Her visitation had been inconsistent, with numerous missed visits, although the visits went well when she attended. Because of her inability to stay drug-free or to follow up with medical treatment, her lack of regular contact with minor and Daniel, and her failure to make significant progress in services, minor's risk if returned to her would be "very high."

On February 3, 2011, the juvenile court terminated mother's services as to Daniel only and set a 12-month permanency hearing as to minor.

Twelve-Month Review Hearing

The Department recommended terminating mother's services as to minor in a status review report filed June 10, 2011. The report alleged that mother had been evicted from her home and was now living with Mario A. and his parents. She had recently had suicidal ideation and hallucinations. She was not participating in her dual diagnosis treatment program, her 12-step program, substance abuse counseling, or mental health counseling, nor was she treating her medical problems. She was the subject of an active

criminal prosecution for animal abuse after an emaciated dog was removed from her care. After 18 months, she continued to test positive for methamphetamine or to fail to appear for testing. She still missed many visits with minor “due to a variety of reasons including illness, drug use, lack of transportation, and court appearances.”

Minor continued to adjust well to his placement and remained bonded to Daniel. He was still having difficulties at school and emotionally. He continued to feel anxiety about mother’s inconsistent visitation and her general well-being. He also had trouble with attachment and relationships--for example, he would approach strange adults and tell them he loved them. The foster parents had completed a home study and were in the process of adopting Daniel.

The juvenile court held a contested 12-month review hearing on August 10, 2011, at which case-carrying social worker Debora Jouliau and mother testified.

Jouliau testified that although mother had a “processing disorder” and a low IQ, she was a good mother when clean and sober and when she was “present” for minor, however, the Department had already provided her with two years of services (including those provided as to Daniel), and her recent 12-step attendance sheets looked forged. Mother made good efforts during visitation, but had trouble managing minor’s tantrums. He showed affection toward her and regularly asked to go home with her, but he also asked to go home with every adult woman he saw; he had a “reactive attachment disorder.”

Mother testified that she had been participating in dual diagnosis treatment and Narcotics Anonymous, although she had missed some meetings. She insisted that she had had no recent “dirty” drug tests and had been clean and sober for 60 days. Her sponsor filled out her attendance sheets. She had seen her counselor four times in the last six months, and she was not taking medications because they were not helping her or she did not need them. According to mother, she had tried to visit minor regularly, but the Department did not always schedule regular visits for her; she had never missed a

scheduled visit. Minor's recent tantrums were unusual. Whenever she visited him, he came running to her, hugged her, called her "Mom," and said he wanted to come home.

Finding that mother had received reasonable services but had participated minimally and that her prognosis was poor, the juvenile court terminated her services and set a section 366.26 hearing.

Section 366.26 Hearing

The Department's adoptions assessment filed November 17, 2011, opined that minor was likely to be adopted and recommended terminating mother's parental rights. Minor had adjusted well to his foster home and to his foster parents, who wanted to adopt him and had passed a home study. He had lived with them for 17 months, called them "Mom" and "Dad," and had substantial emotional ties to them, as well as to the other children in the home.

Minor still displayed great anxiety, fear, and worry, particularly as to mother, for whom he requested help. He had not yet been asked about his feelings concerning adoption because of his developmental delays and anxiety, especially regarding mother. Mother had not visited minor since October 27, 2011--the assessment observed that while minor "[had] an attachment to [mother], he worries about her and her health to his detriment." The assessment concluded that the benefit of adoption by a stable family outweighed any benefit to minor from continuing his relationship with mother, and termination of her parental rights would not be detrimental to him.

The Department filed a section 366.26 report on November 22, 2011, which also recommended termination of parental rights and adoption. Mother had been visiting minor monthly, according to the report, but refused to test for drugs while there, and at times acted inappropriately during visits. Minor was doing "relatively well" in the prospective adoptive home, where the foster parents were committed to him, had obtained services for him, and had the time, flexibility, and patience to meet his physical and emotional needs; the foster family was "soothing and calming" to him.

On March 6, 2012, the day of the section 366.26 hearing, mother filed a section 388 petition seeking minor's return under a family maintenance plan or a long-term plan of foster care or legal guardianship.² The juvenile court held its 366.26 hearing that same day, and also heard evidence regarding the section 388 petition. Mother, social workers John Dunlap and Debora Joulain, and adoptions specialist Joyce Felch testified.

Mother testified that she was living with Mario A. and his family, in the home where minor had lived for three years before his detention.³ According to mother, Mario A. had been sober for six months. Mother had been sober since mid-2011 and attended "meetings" twice a day, Bible studies, and counseling; she was on step 2 in her 12-step program.

Dunlap, the social worker who prepared the section 366.26 report, testified that mother had visited monthly. Minor had never spoken directly to Dunlap about whether he wanted to be adopted, and Dunlap had not talked to him about his relationship to mother because other people were discussing that with him. Dunlap felt that minor cared for and loved mother and his godmother, but he also loved his foster family. Dunlap had heard that minor was sometimes sad after visits. By all accounts, minor worried about mother. Dunlap thought that the anxiety minor displayed was mainly due to his uncertainty about the future. According to Dunlap, either the foster father or the foster

² Although mother originally included the juvenile court's denial of her section 388 petition in her notice of appeal, she failed to argue error as to the section 388 petition in her briefing. Consequently we deem it abandoned. (See 9 Witkin, Cal. Procedure (5th ed. 2008) Appeal, § 701, p. 769.)

³ Mother was not clear as to whether minor lived at that residence *with or without* mother for the three years before his detention, and the record is similarly unclear. Mother also testified that minor had lived with her "two years" and also "four years" before his detention. As explained *ante*, the information before the juvenile court at the time of minor's detention indicated that the Department had not requested minor's detention at the time of Daniel's detention because minor was *not* living with mother at that time.

mother was always at home. There were currently eight children there, including minor and Daniel. Mother's charge that a babysitter in the home had hit minor was determined to be unfounded. The foster parents were interested only in adoption, not in legal guardianship.

Felch testified that minor was somewhat developmentally delayed. He was very worried about mother; he asked Felch, "Can you fix my mom?" Felch had not interviewed him because of his delays and his anxiety. Felch had not observed mother's visits with him, primarily because they were inconsistent. Felch had no concerns about minor's attachment to the foster parents or their ability to meet his needs. They had always wanted to adopt him.

Joulian testified that the relationship between minor and mother was positive; he enjoyed their visits and benefited from the relationship. (Sometimes, however, he pushed her away.) According to Joulian, severing all contact with her would be detrimental to him because of his anxiety about her; he was "a little bit parentified." Although mother was loving and nurturing toward minor, she failed to act parentally or set boundaries when he displayed tantrums and defiance like a normal six-year-old. When she and his godmother visited together, she let the godmother parent him. His relationship with the godmother was at least as much a parent-child relationship as that which he had with mother.

Joulian felt that minor worried a great deal about mother, including her physical well-being, but she believed his current anxiety was more about the uncertainty of his future than about mother. Joulian had no concerns about conditions in the foster parents' home, which was well-organized despite the large number of children there. Minor was physically affectionate with the foster parents and the other children in the home. The foster mother took him everywhere and was always "there for him." Permanence through adoption would help minor to alleviate his anxiety.

The juvenile court denied mother's section 388 petition and then found that mother had not established the applicability of the beneficial parental relationship exception to adoption: The court found that "although [mother] has maintained regular visitation and contact, she has not established that the benefit to the child in maintaining the parent-child relationship outweighs the benefit of adoption." The court specifically noted that minor's concern over mother's health and well-being did not establish the parental relationship exception to adoption.

The court thereafter terminated mother's parental rights and ordered adoption as the permanent plan for minor.

DISCUSSION

Beneficial Relationship Exception

Mother contends the juvenile court erred by failing to apply the beneficial parental relationship exception to adoption and thus avoid terminating her parental rights.

A. *The Law*

"At the selection and implementation hearing held pursuant to section 366.26, a juvenile court must make one of four possible alternative permanent plans for a minor child. . . . *The permanent plan preferred by the Legislature is adoption.* [Citation.]" [Citations.] If the court finds the child is adoptable, it *must* terminate parental rights absent circumstances under which it would be detrimental to the child." (*In re Ronell A.* (1996) 44 Cal.App.4th 1352, 1368.)

There are only limited circumstances permitting the court to find a "compelling reason for determining that termination [of parental rights] would be detrimental to the child." (§ 366.26, subd. (c)(1)(B).) One of these is where the parent has maintained regular visitation and contact with the child *and the child would benefit* from continuing the relationship, often referred to as the beneficial parental relationship exception. (§ 366.26, subd. (c)(1)(B)(i).) The "benefit" to the child must promote "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.*); *In re C.F.* (2011) 193 Cal.App.4th 549, 555 (*C.F.*)) Even frequent and loving contact is not sufficient to establish this benefit absent a *significant, positive, emotional attachment* between parent and child. (*C.F.*, *supra*, 193 Cal.App.4th at p. 555; *Autumn H.*, *supra*, 27 Cal.App.4th at p. 575.)

"Because 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." (*In re Jasmine D.* (2000) 78 Cal.App.4th 1339, 1350 (*Jasmine D.*))

B. Burden and Standard of Review

The party claiming the exception has the burden of establishing the existence of any circumstances which constitute an exception to termination of parental rights. (*C.F.*, *supra*, 193 Cal.App.4th at p. 553.)

As the parent must establish the existence of the factual predicate of the exception--that is, evidence of the claimed beneficial parental relationship--and the juvenile court must then *weigh* the evidence and determine whether it constitutes a compelling reason for determining detriment, substantial evidence must support the factual predicate of the exception, but the juvenile court exercises its discretion in weighing that evidence and determining detriment. (*In re Bailey J.* (2010) 189 Cal.App.4th 1308, 1314-1315; *In re K.P.* (2012) 203 Cal.App.4th 614, 622.) "On review of the sufficiency of the evidence, we presume in favor of the order, considering the evidence in the light most favorable to

the prevailing party, giving the prevailing party the benefit of every reasonable inference and resolving all conflicts in support of the order.” (*Autumn H.*, *supra*, 27 Cal.App.4th at p. 576.) “[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.” (*Jasmine D.*, *supra*, 78 Cal.App.4th at p. 1351.)⁴

C. Analysis

Because the trial court found regular visitation, we shall assume that prong was satisfied, but note that our review of the record reveals irregular visitation. But even assuming mother met the first requirement to establish the exception, she could not meet the second. Mother established neither that she occupied a *parental* role in minor’s life, nor that the benefits of her relationship with him outweighed those of adoption.

Even “frequent and loving contact” is insufficient to establish the “benefit from continuing the relationship” (§ 366.26, former subd. (c)(1)(A), now subd. (c)(1)(B)(i)) contemplated by the statute (*In re Beatrice M.* (1994) 29 Cal.App.4th 1411, 1418). After it became apparent that mother would not reunify with minor, the juvenile court had to find an “exceptional situation existed to forego adoption.” (*Autumn H.*, *supra*, 27 Cal.App.4th at p. 576.) The juvenile court determined minor would not benefit from continuing his relationship with mother to such a degree that termination of parental rights would be detrimental to him. Mother bore the burden to demonstrate the statutory exception applied and failed to make the requisite showing. (See *C.F.*, *supra*, 193 Cal.App.4th at p. 553.) Therefore, the court did not err in terminating parental rights.

⁴ We acknowledge the parties’ discussion in their respective briefing regarding the split of authority as to whether the substantial evidence standard, the abuse of discretion standard, or a hybrid standard applies in reviewing the juvenile court’s rejection of exceptions to adoption. We shall apply the hybrid standard, but note that “[t]he practical differences between the two standards are not significant” in this context. (*Jasmine D.*, *supra*, 78 at p. 1351.)

By the time of the section 366.26 hearing, minor, now six years old, had been living with the prospective adoptive parents for almost two years. As we noted *ante*, the record is not clear as to how many of his first four years of life he actually lived with mother--even before formal removal, minor was not consistently living with mother due to her failure to make her residence safe for him to occupy. But even assuming the full four years, he had lived one third of his life away from her. He had developed strong emotional bonds to the foster parents and the children in the home, including Daniel, his half brother. He called the foster parents “Mom” and “Dad.” They worked diligently to meet his special needs. (*In re Dakota H.* (2005) 132 Cal.App.4th 212, 231; *In re Angel B.* (2002) 97 Cal.App.4th 454, 467 [child’s age, portion of life spent in biological parent’s custody, and particular needs must be considered in assessing whether a relationship is important and beneficial to child].)

Furthermore, mother’s relationship with minor was not unequivocally parental. When mother and the godmother visited together, she deferred to the godmother and let the godmother act as the parent. Minor seemed at least as closely bonded to the godmother as to mother. Moreover, he displayed a “parentified” anxiety about mother’s well-being, which is not an appropriate feeling for a child and certainly not an appropriate basis for a healthy, parent-child relationship. The record is devoid of evidence that would permit, much less compel, a finding that minor’s relationship with mother was “sufficiently strong that the child would suffer detriment from its termination” (*Beatrice M., supra*, 29 Cal.App.4th at p. 1418) or that it established a “*compelling reason* for determining that termination would be detrimental to the child” (§ 366.26, subd. (c)(1)(B), italics added).

Considering all the evidence, the juvenile court could properly conclude that any benefit of minor’s continuing his relationship with mother did not rise to the type of substantial, positive, and emotional attachment that would cause minor great harm if severed, and did not outweigh the benefits of a stable and permanent home.

Mother relies mainly on *In re Scott B.* (2010) 188 Cal.App.4th 452 (*Scott B.*). There, however, the mother's parental relationship with the 11-year-old minor was far stronger than here, he had spent most of his life with her before being placed with his foster family, he repeatedly said he would prefer to live with her, he accepted the idea of adoption only because he thought it would mean he could live with her as well as his foster parents, and there was a strong possibility that if he were adopted his foster parents would cut her completely out of his life. (*Scott B., supra*, 188 Cal.App.4th at pp. 471-472.) Under these highly unusual circumstances, the appellate court found that legal guardianship was the only option which would provide the minor with stability. (*Scott B., supra*, at pp. 472-473.) Because none of the unusual facts found in *Scott B.* exist here, that case does not assist mother.

DISPOSITION

The juvenile court's order terminating parental rights is affirmed.

DUARTE, J.

We concur:

RAYE, P. J.

NICHOLSON, J.