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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT
(Sacramento)

In re NATHANIEL S. et al., Persons Coming
Under the Juvenile Court Law.

SACRAMENTO COUNTY DEPARTMENT OF
HEALTH AND HUMAN SERVICES,

Plaintiff and Respondent,

v.

SANDY S.,

Defendant and Appellant.

C071703

(Super. Ct. Nos. JD225677,
JD225678, JD231875, JD231876)

Sandy S., the mother of seven-year-old K., six-year-old Nathaniel, five-year-old C., and two-year-old Bella, appeals from an order of the Sacramento County Juvenile Court finding the children were likely to be adopted, approving adoption as the permanent plan, and terminating her parental rights.¹

On appeal, mother contends the order terminating her parental rights must be reversed because (1) the juvenile court erred in failing to apply the beneficial relationship

¹ The fathers of the children are not parties to this appeal.

exception to adoption, and (2) the record does not reflect that the social worker made an inquiry regarding the relative caretaker exception to adoption. On the first contention, we conclude the record supports the juvenile court's finding the beneficial relationship exception did not apply. Further, mother has not identified any evidence in the record showing the juvenile court's finding lacks evidentiary support. Thus, mother has not met her burden of proving the beneficial parental relationship exception to adoption applies. As to the second contention, we conclude mother has forfeited this contention. Even if not forfeited, we reject mother's contention on the merits. Accordingly, we affirm the juvenile court's orders.

FACTUAL AND PROCEDURAL BACKGROUND

Prior Dependency Proceeding

In March 2007, Nathaniel and K. were placed into protective custody because, on multiple occasions, mother tested positive for methamphetamine or failed to test and she failed to comply with informal supervision services. The children were detained in the home of the maternal grandmother.

The Sacramento County Department of Health and Human Services (Department) filed petitions alleging Nathaniel and K. came within Welfare and Institutions Code section 300² because (1) mother had a substance abuse problem involving methamphetamine and (2) she signed a voluntary informal supervision agreement and failed to participate in services. The juvenile court ordered the children detained.

In April 2007, the maternal grandmother's home was found no longer suitable for Nathaniel and K. The Department placed the children in foster care.

² Undesignated statutory references are to the Welfare and Institutions Code.

At the jurisdiction and disposition hearing in June 2007, the juvenile court sustained the petitions, placed Nathaniel and K. in the home of Nathaniel's paternal grandparents, and ordered reunification services.

In December 2007, mother gave birth to C. He was not removed from her custody and was residing with her in transitional housing.

At the six-month review in December 2007, the juvenile court continued Nathaniel and K.'s out-of-home placement.

In a report for the 12-month review hearing, the social worker stated that, based on mother's completion of her case plan, the Department was recommending return of Nathaniel and K. to mother's care. At the review hearing in May 2008, the juvenile court returned Nathaniel and K. to mother.

In a report for an in-home review hearing, the social worker opined the children would be at low risk under mother's continued care. Thus, the social worker recommended the dependency be terminated. At the review hearing in January 2009, the juvenile court terminated the dependency.

Present Dependency Proceeding -- Originating Circumstances

In April 2010, Bella was born. Both mother and the child tested positive for methamphetamine. As a result, the Department gave mother informal supervision and she completed the program.

On September 27, 2011, Child Protective Services (CPS) received a referral that mother had been arrested for possession of methamphetamine. The next day, during an investigation of the CPS referral, mother did not respond to the social worker's knocking on the front door. The worker sought assistance from the Sacramento Police Department. The worker also received a telephone call from the paternal aunt, informing her that mother was hiding in her bedroom with the children.

Mother did not respond when the officer knocked on the front door. He determined forced entry was necessary. During an interview following the entry, mother

acknowledged to the social worker that, three or four weeks earlier, she had started selling methamphetamine and resumed using the drug. Mother admitted that, the previous day, she had been arrested for possession of methamphetamines and later released from custody.

According to the paternal grandmother, mother was selling drugs and allowing drug users in and out of the home.

Petition

In October 2011, the Department filed section 300, subdivision (b), petitions on behalf of Nathaniel and K. and filed section 300, subdivisions (b) and (j), petitions on behalf of C. and Bella. Both petitions alleged mother had a substance abuse problem from which she failed or refused to rehabilitate; the problem impairs her ability to care for and supervise the children; mother used methamphetamine while C. and Bella were at home, otherwise unsupervised; and mother had been arrested by law enforcement officers.

Detention

At a detention hearing in October 2011, the juvenile court detained the children in the home of the paternal grandparents.³

Jurisdiction and Disposition

At the jurisdiction and disposition hearing in January 2012, the juvenile court sustained the section 300 petitions, declared the children dependents of the court, ordered that reunification services not be provided to the parents, and referred the matter for a selection and implementation hearing.

³ References to paternal grandparents are to the paternal grandparents of Nathaniel, C., and Bella.

Selection and Implementation

The selection and implementation report states K. and Bella are generally adoptable, and Nathaniel and C. are specifically adoptable. Nathaniel is diagnosed with apnea and uses oxygen at night to address the apnea condition. Both Nathaniel and C. are receiving mental health services to address lack of anger management. The paternal grandparents are “willing to provide permanency through adoption” for all four children, who have been placed in their home since October 2011. Mother has twice-monthly supervised visits with the children for two hours.

At the selection and implementation hearing in July 2012, the social worker recommended adoption as the best plan for the children. In response to the trial court’s question why the playful, caring relationship with mother was not enough to maintain the relationship with mother, the social worker explained, “I’m thinking long term to outweighing benefit of permanency, stability for children. Although the mother is able to handle an hour and a half, two hours with the children, there’s been a time when she has requested to shorten the visits. I think there’s -- given the struggle she is having with substance abuse, I think it’s different to visit with four children that have high activity levels. They’re in counseling because they need real strong structure and stability about their behaviors to keep them on their track. That is different to maintain that long term with a child as a parent. I would have to be saying outweighing permanency for these children for an hour, two hours’ worth of play time with their mother.”

The Department recommended the juvenile court order the termination of parental rights. The children’s counsel supported the plan of adoption, and argued a plan of guardianship could interfere with the children’s right to permanency, which they deserved. Counsel argued in part: “[T]he parents need to be parents. They can’t just be a friendly visitor or somebody that they play with at visits or somebody that they just have fun with. And these children have not looked to their mother or fathers as a parental figure for a significant amount of time. . . . [E]ven when [the children] were in the

parents' custody, . . . they were subjected to such instability that even at that time . . . the parents weren't being the parents that they're legally required to be. . . . [¶] . . . [¶] . . . And these children . . . after all they have been through deserve nothing less than a permanent, safe, stable home with a relative who loves them and who they love and care for.”

The juvenile court found mother did not meet her burden of proving the beneficial parental relationship exception to adoption applies to this case. The court ordered adoption as the permanent plan and terminated parental rights.

DISCUSSION

I

Beneficial Parental Relationship Exception

Mother contends the juvenile court erred when it terminated her parental rights notwithstanding the existence of the beneficial mother-child relationship. We disagree.

A.

Applicable 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; *In re Beatrice M.* (1994) 29 Cal.App.4th 1411, 1418.)

No matter how "frequent and loving [the] contact' [citation]," and notwithstanding "an emotional bond with the child, . . . the parents must show that they occupy 'a parental role' in the child's life. [Citation.]" (*In re Andrea R.* (1999) 75 Cal.App.4th 1093, 1108-1109; see *In re Jason J.* (2009) 175 Cal.App.4th 922, 938.)

"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.)

B.

Juvenile Court Ruling

The juvenile court found mother satisfied the first prong of the beneficial parental relationship exception by maintaining regular visitation and contact with the children. This finding is not disputed on appeal.

The court found mother did not satisfy the second prong of the exception, as follows: "It is likely that [K.], and, perhaps, even Nathaniel and C., may suffer some loss

or detriment if parental rights are terminated because they have had frequent and loving contact with their mother. [¶] But the evidence is insufficient to show that continuing the relationship would deprive the children of a substantial positive, emotional attachment such that the child[ren] would be greatly harmed; and therefore the preference for adoption is not overcome.”

C.

Burden and Standard of Review

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

As the party 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.)

“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.” (*In re Jasmine D., supra*, 78 Cal.App.4th at p. 1351.)

D.

Analysis

Mother claims the juvenile court “erred by applying an exaggerated standard of proof” as to the second prong of the beneficial parental relationship exception.

Specifically, she argues section 366.26, subdivision (c)(1)(B)(i), does not require “overwhelming proof of a ‘substantial, positive, emotional attachment,’” or that a child be “greatly harmed” by termination of the relationship. Mother asserts *Autumn H.*, *supra*, 27 Cal.App.4th 567, which established the foregoing requirements, is not controlling because it was decided under a prior version of the statute. But none of mother’s authorities suggests the statute was amended to supersede or supplant *Autumn H.* (See *C.F.*, *supra*, 193 Cal.App.4th at p. 555, applying *Autumn H.*) No error is shown.

Mother’s reliance on *In re Brandon C.* (1999) 71 Cal.App.4th 1530 is misplaced. In that case, the juvenile court, applying *Autumn H.*, *supra*, 27 Cal.App.4th 567 found a “significant, positive, emotional attachment,” the severance of which would cause “the child [to] be greatly harmed.” (*Brandon C.*, *supra*, at p. 1534.) The appellate court held *this* finding was supported by substantial evidence. (*Ibid.*) Here, in contrast, the juvenile court found there was *no* such attachment. The fact that the reports were positive regarding visitation and contact with mother is not enough to establish a mother-child relationship. On appeal, mother has not identified any uncontradicted evidence showing the juvenile court’s finding lacks evidentiary support.

Mother argues this case is similar to *In re Scott B.* (2010) 188 Cal.App.4th 452 in which the appellate court reversed a juvenile court order terminating parental rights. (*Id.* at p. 473.) But the facts in the two records are entirely different. In *Scott B.*, the appellate court recognized that, although it may never be in Scott’s best interest to be returned to his mother’s care, the record clearly showed it would be detrimental to Scott if his relationship with his mother were disrupted. (*Id.* at pp. 471-472.) Given Scott’s precarious emotional state and his history of running away and regressing when under stress, there was a very good chance Scott would experience a severe setback if visitation with his mother did not continue. (*Id.* at p. 472.) In this case, there was no evidence any of the children would be adversely affected by any interruption in their visitation with mother.

Mother disagrees, claiming detriment was “implicit” given the demonstrated bond between her and the children. But even if some degree of detriment is implicit, there was no evidence the detriment was such that any of the children “would be greatly harmed.” (*Autumn H.*, *supra*, 27 Cal.App.4th at p. 575.) Thus, the legislative preference for adoption was not overcome. (*Ibid*; see *In re Angel B.* (2002) 97 Cal.App.4th 454, 466 [“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”].)

Mother complains the children’s “therapists had not been consulted as to what the impact would be on the [children] if they had no further contact with the mother.” She also contends the evidence “offered to support the decision of the juvenile court . . . was underwhelming,” and “[t]he unfounded conclusion of the adoptions social worker does not substantiate the order terminating parental rights below.” These complaints do not satisfy mother’s burden.

The party claiming the exception in the juvenile court has the burden of establishing the existence of any circumstances that constitute an exception to termination of parental rights. (*C.F.*, *supra*, 193 Cal.App.4th at p. 553.) Mother’s complaints about the strength of the Department’s evidence do not meet that burden.

II

Relative Caretaker Exception

Mother contends the order terminating parental rights must be reversed because the record does not reflect the social worker made an inquiry regarding the relative caretaker exception to adoption. Specifically, mother claims the worker failed to offer the paternal grandparents any permanent placement options other than adoption. The record does not support this claim.

A.

Applicable Law

An exception to adoption can be established if a relative who has been caring for the child “is unable or unwilling to adopt the child because of circumstances that do not include an unwillingness to accept legal or financial responsibility for the child.”

(§ 366.26, subd. (c)(1)(A).) “The statute clearly states that the relative must be unable or unwilling to adopt the child because of circumstances, and those circumstances must not include an unwillingness to accept legal or financial responsibility for the child.” (*In re K.H.* (2011) 201 Cal.App.4th 406, 416.)

Section 366.22, subdivisions (c)(1)(D) and (c)(2)(B), direct the social worker to provide a relative caregiver information regarding the permanency options of adoption *and guardianship* and to discuss the legal and financial rights and responsibilities of adoption *and guardianship* with a prospective adoptive parent or legal guardian.

In this case, the social worker reported, “[t]he paternal grandparents have expressed a commitment to providing permanency for adoption at each face to face meeting.” The social worker further reported, “[a]ll four children are placed in a home willing to provide permanency through adoption.”

B.

Forfeiture

The juvenile court has no sua sponte duty to determine whether an exception to adoption applies. (E.g., *In re Melvin A.* (2000) 82 Cal.App.4th 1243, 1252.) Rather, the parent has the burden of proving an exception applies. (*Ibid*; *C.F., supra*, 193 Cal.App.4th at p. 553.) Here, it was mother’s burden to prove the application of the relative caregiver exception. Her failure to do so in the juvenile court forfeits her contention on appeal. (*In re Christopher B.* (1996) 43 Cal.App.4th 551, 558; *In re Dakota S.* (2000) 85 Cal.App.4th 494, 501-501; *In re S.B.* (2004) 32 Cal.4th 1287, 1293, fn. 2.)

Acknowledging her trial counsel's omission, mother argues forfeiture should be excused because her contention raises "pure questions of law." This argument fails. Whether the social worker failed to advise the grandparents of the possibility of guardianship is a question of fact. Thus, mother's contention is forfeited.

C.

Merits

Even if there was no forfeiture, we would reject mother's contention on the merits.

Mother claims there is not sufficient evidence the social worker advised the paternal grandparents of the relative caregiver exception to adoption. Because the advisement is mandated by statute (§ 366.22, subs. (c)(1)(D), (c)(2)(B)), the evidentiary presumption that official duty was regularly performed (Evid. Code, § 664) provides prima facie evidence the social worker gave the required advisements. Because the issue was not litigated in the juvenile court, there is no evidence in the record to contradict the presumption. For this reason alone, mother's substantial evidence contention would fail.

In any event, the record contains additional evidence supporting the presumption. As noted, the relative caregiver exception requires "that the relative must be unable or unwilling to adopt the child *because of circumstances*, and *those circumstances* must not include an unwillingness to accept legal or financial responsibility for the child." (*In re K.H.*, *supra*, 201 Cal.App.4th at p. 416; italics added.)

The social worker reported, "[t]he paternal grandparents have expressed a commitment to providing permanency for adoption at each face to face meeting." The social worker further reported, "[a]ll four children are placed in a home willing to provide permanency through adoption." Viewing this record, as we must, "in the light most favorable to the prevailing party" and "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), there is no evidence the paternal grandparents were not willing to adopt. In fact, the record shows the grandparents have consistently expressed

their commitment to adopt the four children. We must infer from the grandparents' repeated expressions of "commitment to providing permanency for adoption at each face to face meeting" that there were no "circumstances," such as family dynamics, that made them "unable or unwilling to adopt." We conclude mother's relative caregiver contention has no merit.

DISPOSITION

The orders terminating parental rights are affirmed.

_____ HOCH _____, J.

We concur:

_____ HULL _____, Acting P. J.

_____ ROBIE _____, J.