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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

In re DESTINY O., a Person Coming
Under the Juvenile Court Law.

SAN DIEGO COUNTY HEALTH AND
HUMAN SERVICES AGENCY,

Plaintiff and Respondent,

v.

LISA O.,

Defendant and Appellant.

D060881

(Super. Ct. No. J510900D)

APPEAL from a judgment of the Superior Court of San Diego County, Carol Isackson, Judge. Affirmed.

Lisa O., the mother of Destiny O., appeals the judgment terminating her parental rights under Welfare and Institutions Code,¹ section 366.26. Lisa contends that the juvenile court erred by not applying the beneficial parent-child relationship exception to adoption (§ 366.26, subd. (c)(1)(B)(i)).

¹ Statutory references are to the Welfare and Institutions Code.

FACTUAL AND PROCEDURAL BACKGROUND

In late June 2010, the San Diego County Health and Human Services Agency (Agency) took two-and-one-half-year-old Destiny into protective custody after receiving reports that the child had witnessed ongoing domestic violence in the family home. Lisa and Destiny were living in the maternal grandparents' home, where Lisa and the grandparents often argued. Some of the arguments resulted in violent confrontations, such as the one that prompted the dependency case. In that instance, Lisa kicked in the door to the bedroom that she shared with Destiny, and the maternal grandmother scratched Lisa's leg with a screwdriver. The incident occurred in the presence of Destiny, who cried.

Agency filed a dependency petition on behalf of Destiny, alleging that the child was at substantial risk of serious harm due to Lisa's mental health and child welfare histories, and Lisa's abuse of alcohol and drugs, and because she was exposed to domestic violence in the family home. (§ 300, subd. (b).)

On August 19 the juvenile court sustained the petition, declared Destiny a dependent child, removed her from Lisa's custody and ordered Agency to provide reunification services.

On September 10 Destiny was placed in the licensed foster home of her current caregivers.

At the contested six-month review hearing in May 2011, the social worker characterized Lisa's progress as "minimal" and reported that the protective issues continued. The social worker also testified that Lisa had not demonstrated the ability to

potentially benefit from the services. Specifically, Lisa had not obtained a psychological evaluation, had refused to drug test and was attending her individual therapy sessions only sporadically. Lisa was also homeless. The juvenile court terminated services and scheduled a section 366.26 hearing.

In November, just before the contested section 366.26 hearing, Lisa filed a section 388 petition seeking the return of Destiny to her custody and reinstatement of her reunification services. As changed circumstances, Lisa pointed to her completion of drug treatment, an intensive parenting program and a separate parenting class. Lisa was making progress in her therapy sessions and in a domestic violence group. Regarding the "best interests" prong of section 388, Lisa alleged that she had maintained a relationship with Destiny through regular visitation and telephone calls. The juvenile court found that Lisa had made a prima facie case and ordered an evidentiary hearing on the section 388 petition, to be held in conjunction with the section 366.26 contested hearing.

Marcia Robinson, the program manager for the KIVA residential drug treatment program, testified that Lisa had shown significant progress in her anger management and had tested negative on all random drug tests. During the five months Lisa was in KIVA, she participated in the following educational programs: relapse prevention; parenting; life skills; addiction; health education; and communications.

Therapist Stacey Johnston testified that she and Lisa focused on parenting and substance abuse issues. Johnston said that Lisa was making progress: "[H]er attitude and her focus had shifted, and it was actually very focused on her child[] and that became the

most important thing in her life." Lisa attended 17 therapy sessions with Johnston from November 15, 2010 to August 26, 2011. The sessions ended due to a funding issue.

Kelly King, who runs a domestic violence support group for the YWCA, testified that Lisa attended the support group 17 times, was an active participant and had shown progress in managing her anger.

Social worker Tuyen Ly testified that in the five months that she has been assigned to the case, she supervised five or six visits. According to Ly, Lisa sometimes became frustrated with Destiny during visits. Ly testified that during a visit the previous month, Lisa had left Destiny in urine soaked clothing for 30 minutes because she did not want to argue with the child. The caregivers reported that Lisa's visits had become more consistent over time, but also said that Lisa sometimes did not phone Destiny for four or five days. Ly testified that Lisa's visits were still supervised, and Ly was concerned for Destiny if Lisa were granted unsupervised visits.

Ly expressed the view that Destiny's needs were being met by her caretakers, who had arranged speech therapy and individual therapy for the child. Destiny was thriving in their care. Ly also opined that removing Destiny from her placement would not be in the child's best interests, and noted that there was no evidence that Lisa could safely parent Destiny.

The parties stipulated that if Lisa were called as a witness, she would testify that she was living with a friend in Campo and was seeking sober housing resources through a scheduled intake with ParentCare. Lisa loved Destiny. Lisa played with Destiny and fed her during visits. Destiny told Lisa that she loved her, and called her "mom." Destiny

asked about her brothers. Lisa believed that Destiny enjoyed their visits and telephone calls.

The juvenile court denied Lisa's section 388 petition, finding that she had not demonstrated changed circumstances nor that maintaining the parent-child relationship would be in Destiny's best interests.

The juvenile court found that it was likely that Destiny would be adopted if parental rights were terminated, and that adoption was in the child's best interests. The court further found that Lisa had not shown that any statutory exception to adoption applied. The court terminated parental rights and identified adoption as Destiny's permanent plan.

DISCUSSION

Lisa contends that the juvenile court erred by not applying the beneficial parent-child relationship exception to adoption (§ 366.26, subd. (c)(1)(B)(i)). The contention is without merit.

Adoption is the permanent plan preferred by the Legislature. (*In re Derek W.* (1999) 73 Cal.App.4th 823, 826.) At the selection and implementation hearing, the juvenile court must terminate parental rights if the child is likely to be adopted within a reasonable time unless one of the statutory exceptions applies. (§ 366.26, subd. (c)(1).) The parent bears the burden to establish by a preponderance of the evidence that an exception to the statutory preference for adoption applies. (*In re Lorenzo C.* (1997) 54 Cal.App.4th 1330, 1343-1345.) Section 366.26, subdivision (c)(1)(B)(i), provides an exception to termination of parental rights when "[t]he parents have maintained regular

visitation and contact with the child and the child would benefit from continuing the relationship." The exception applies only if both prongs are met.

Our standard of review is the substantial evidence test. (*In re Autumn H.* (1994) 27 Cal.App.4th 567, 576.) We determine if there is substantial evidence, contradicted or uncontradicted, to support the conclusions of the juvenile court, resolving all conflicts in favor of the prevailing party, and drawing all legitimate inferences to uphold the lower court's ruling. (*In re Brison C.* (2000) 81 Cal.App.4th 1373, 1378-1379.)

The juvenile court found that Lisa had maintained regular contact with Destiny. Although Agency argues that there is not substantial evidence to support this finding, we conclude otherwise. Throughout the proceedings, Lisa visited Destiny regularly and maintained telephone contact with her. The visits occurred as frequently as three times a week. Typically, Lisa called Destiny 10 times a week. Lisa's behavior during the visits was sometimes inappropriate—particularly in the beginning. Further, there were times when Lisa missed visits or let four or five days pass without calling. However, the social worker acknowledged: "It appears that her visits have improved throughout the course of this case, as she is more attentive to Destiny's needs." In addition, the Incredible Families Program, which supervised visits through August 2011, reported that Lisa had "improved tremendously." There is substantial evidence in the record to support the court's finding that Lisa had maintained regular contact with Destiny.

However, in order to establish that the beneficial parent-child relationship exception to adoption applies, Lisa also had to show that Destiny would benefit from continuing her relationship with her mother. Such a showing requires more than frequent

and loving contact, an emotional bond with the child, pleasant visits, or incidental benefit to the child. (*In re Derek W.*, *supra*, 73 Cal.App.4th at p. 827.) To overcome the statutory preference for adoption, a parent must prove that he or she occupies a parental role in the child's life, resulting in a significant, positive emotional attachment of the child to the parent. (*Ibid*; *In re Elizabeth M.* (1997) 52 Cal.App.4th 318, 324.)

In *In re Autumn H.*, *supra*, 27 Cal.App.4th at page 575, this court explained that to come within the beneficial parent-child relationship exception to adoption, a parent must show that the "relationship promotes the well-being of the child to such a degree as to *outweigh* the well-being the child would gain in a permanent home with new, adoptive parents." (Italics added.) The court must balance "the strength and quality of the . . . 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." (*Ibid.*) The court's balancing test must be performed on a case-by-case basis, taking into account variables such as "[t]he age of the child, the portion of the child's life spent in the parent's custody, the 'positive' or 'negative' effect of interaction between parent and child, and the child's particular needs" (*Id.* at pp. 575-576.)

The parent must also show that the benefit arises from a parental relationship rather than that of a caretaker or friendly visitor. (See *In re Beatrice M.* (1994) 29 Cal.App.4th 1411, 1420.) We have affirmed this balancing test, explaining the

standard "reflects the legislative intent that adoption should be ordered unless *exceptional circumstances* exist." (*In re Casey D.* (1999) 70 Cal.App.4th 38, 51, italics added.)

There is substantial evidence supporting the juvenile court's finding that Lisa failed to demonstrate that Destiny would benefit from continuing the relationship with her mother to such a degree as to *outweigh* the well-being that Destiny would gain in a permanent home with new, adoptive parents. Although Lisa had parented Destiny for the first two and one-half years of the child's life and maintained contact with her during the pendency of this proceeding, their relationship at the time of the section 366.26 hearing was not a beneficial parent-child relationship within the meaning of the statute.

(§ 366.26, subd. (c)(1)(B)(i).) During the 15 months that Destiny had been out of her mother's care, Lisa had not progressed beyond supervised visitation. Although Lisa recently had shown admirable improvement in dealing with many of the issues that prompted Agency intervention, the social worker continued to believe that it would be unsafe for visits between Lisa and Destiny to be unsupervised. Meanwhile, Destiny has been thriving in a prospective adoptive home where she feels safe and loved in a stable, nurturing environment. Destiny's caregivers have arranged speech therapy for her twice a week and enrolled her in a preschool.

At most, Lisa demonstrated that a bond may have existed between her and Destiny and that they have had mostly pleasant visits and loving contact. But Lisa has not demonstrated that maintaining her relationship with Destiny outweighs the benefits of adoption. Nor has Lisa established that Destiny would suffer great harm if Lisa's parental rights are terminated. Lisa's reliance on *In re S.B.* (2008) 164 Cal.App.4th 289 is

misplaced because that case is readily distinguishable. In *S.B.*, this court reversed the juvenile court's finding that the beneficial parent-child relationship exception did not apply after concluding that the father had established that the child would be greatly harmed by the loss of the significant positive relationship she shared with him. The father had complied with every aspect of his case plan, frequently visited his daughter and was devoted to her. She loved him and wanted to live with him. (*Id.* at pp. 294-295.) In addition, the results of a bonding study showed that the father and daughter shared a "fairly strong" bond. The psychologist who conducted the bonding study testified that there was a potential for harm to the daughter if she were to lose the parent-child relationship. (*Id.* at pp. 295-296.) Lisa did not make a similar showing, and there was no bonding study. Moreover, we have repeatedly limited the holding in *S.B.* to its facts. (*In re Jason J.* (2009) 175 Cal.App.4th 922, 937; *In re C.F.* (2011) 193 Cal.App.4th 549, 558-559.)

DISPOSITION

The judgment is affirmed.

AARON, J.

WE CONCUR:

NARES, Acting P. J.

McINTYRE, J.