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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

In re MARCO M. et al., Persons Coming
Under the Juvenile Court Law.

SAN DIEGO COUNTY HEALTH AND
HUMAN SERVICES AGENCY,

Plaintiff and Respondent,

v.

JASMINE D.,

Defendant and Appellant.

D062476

(Super. Ct. No. J516742B-C)

APPEAL from a judgment of the Superior Court of San Diego County, Ronald F. Frazier, Judge. Affirmed.

Jasmine D. appeals the judgment terminating her parental rights to her sons, Marco M. and Jesus C. (together the boys). Jasmine contends the juvenile court abused its discretion by denying her modification petition (Welf. & Inst. Code, § 388)¹ and erred

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

by declining to apply the beneficial relationship and sibling relationship exceptions (§ 366.26, subd. (c)(1)(B)(i) & (v)) to termination of parental rights.² We affirm.

BACKGROUND

Jasmine began using drugs in 1996 or 1997, when she was 13 years old. She began using methamphetamine in 2000 or 2001, when she was 17 years old. Marco was born in August 2002 and Jesus was born in May 2006. When Jasmine gave birth to a daughter, T.C., in June 2007, they each tested positive for methamphetamine. T.C. became a dependent of the juvenile court, and Jasmine received more than two years of reunification services. Jasmine completed a substance abuse treatment program in August 2008 and reunified with T.C. in July 2009. During T.C.'s dependency, Marco and Jesus remained in Jasmine's care under a voluntary case plan. Jasmine's son J.D., born in June 2008, was also in Jasmine's care.

Jasmine used methamphetamine the day after she completed substance abuse treatment. In December 2009, there was a substantiated report she left the children home alone at night while she was at a neighbor's house.

In October 2010, the San Diego County Health and Human Services Agency (the Agency) received a report Jasmine was neglecting the children. A social worker went to Jasmine's apartment and found her asleep. When Jasmine woke up, she appeared to be under the influence of drugs. Jesus and J.D. ran outside the apartment building, down the

² Jasmine contends the sibling relationship exception applied to the boys' relationship with each other, and to the boys' relationship with their younger sister, T.C., and younger brother, J.D. We refer to T.C. and J.D. together as the siblings, and we refer to the boys, T.C. and J.D. collectively as the children.

sidewalk and past two other buildings. Jasmine yelled for them to return, but they ignored her. The social worker followed Jesus and J.D. and brought them home. She found cleaning supplies accessible to the children, empty bottles of medical marijuana and little food. Jasmine signed a safety plan. When the social worker returned to the home nine days later, she found drug paraphernalia and marijuana. Jasmine admitted she did not have a medical marijuana card.

On November 5, 2010, the Agency filed dependency petitions for the children. The petitions alleged Jasmine admitted using methamphetamine in the last two weeks and marijuana in the last four days. She said she used drugs when she felt stressed. She acknowledged she used drugs while caring for the children, but claimed she took walks so she was not around them when she did so. Marijuana and drug paraphernalia were in the home and accessible to the children.

The boys were detained in Polinsky Children's Center (PCC) for two weeks before being moved to a foster home. The siblings were detained in a separate foster home. The boys and siblings remained in separate foster homes throughout the proceedings.

On November 15, 2010, Jasmine admitted that since the children's detention, she had been drinking alcohol every night until she became dizzy. On November 22, during a visit with the children at a restaurant supervised by the foster parents, Jasmine ran outside with the children, put them in a car and drove away with them. Jasmine did not have car seats for the children and did not fasten their seat belts. She nearly ran over another child as she drove away from the restaurant. The police recovered the children and took them to PCC, where the foster parents picked them up. The boys were

distraught. Jasmine was arrested and charged with child abduction. She pleaded guilty and received three years' probation.

In January 2011, the court made true findings on the petitions, ordered the boys placed in foster care and ordered reunification services for Jasmine. Jasmine began a new substance abuse treatment program, but was discharged for fraud. She entered another program, but did not progress. At the six-month review hearing in September, the court terminated services and set a section 366.26 hearing. A few days later, Jasmine began another substance abuse treatment program. She completed the program in March 2012. In May, the court terminated Jasmine's parental rights to the siblings.

Problems arose with the boys' foster parents, and on May 17, 2012, after a report of physical abuse by the foster father, the boys were moved to a respite home. That month, Jasmine filed her section 388 petition. In June, the boys began a transition to the home of experienced foster parents with an approved adoptive home study. On July 5, the court granted Jasmine's section 388 petition in part by allowing unsupervised visits with the boys, monitored by the social worker from a distance of 300 yards. On July 11, the boys' transition into the approved adoptive home was completed. In August, the court denied the portion of Jasmine's section 388 petition seeking the boys return to her custody, and terminated parental rights.

THE SECTION 388 PETITION

Section 388 allows the juvenile court to modify an order if a party establishes, by a preponderance of the evidence, that changed circumstances exist and the proposed modification would promote the child's best interests. (*In re Zachary G.* (1999) 77

Cal.App.4th 799, 806.) When a case is past the reunification phase, the focus is on the child's need for permanency and stability, and there is a rebuttable presumption that it is in the child's best interests to remain in the current placement. (*In re Stephanie M.* (1994) 7 Cal.4th 295, 317.) We review the denial of a section 388 petition for an abuse of discretion. (*In re Jasmon O.* (1994) 8 Cal.4th 398, 415.)

As changed circumstances, Jasmine's section 388 petition alleged she completed a 14-hour domestic violence awareness group in February 2012 and a six-month substance abuse treatment program in March. The petition alleged return to Jasmine's custody was in the boys' best interests because she had become a suitable caregiver and there was a parent-child bond. Psychologist Robert Kelin, who conducted a bonding study in April, found "there could be detriment to [the boys] if they were to lose contact with [Jasmine]."3

Jasmine had a history of child neglect. She had a substance abuse history of many years, with periods of treatment and relapse. She received a total of more than two and one-half years of reunification services in this case and T.C.'s case. When the court set the section 366.26 hearing in September 2011, it stated Jasmine "needs to have a long[-]term successful track record in drug treatment[;] [s]he hasn't finished a parenting class [and] she needs therapy." Nearly one year later, Jasmine had attended seven therapy appointments. She had just completed a parenting class, but the Agency had not

3 The bonding study lasted one or one and one-half hours.

seen a progress report. Visits with the boys remained monitored, and had been closely supervised until recently.

Jasmine did not enter an after-care program following her completion of drug treatment, but completed four steps of a 12-step program. In June 2012, she resumed attending Alcoholics Anonymous and Narcotics Anonymous meetings, and obtained a sponsor. At the time of the hearing, she was on step 1 with the sponsor. Jasmine had previously achieved a period of sobriety about equal in length to her latest period of sobriety. She planned to move to a sober living facility, but was currently living with relatives who had histories of drug abuse and child welfare referrals. The home was inappropriate for the boys. The court did not abuse its discretion by finding Jasmine had not met her burden of showing changed circumstances.

The court did not abuse its discretion by finding Jasmine had not met her burden of showing it would be in the boys' best interests to be returned to her custody. Because this case was past the reunification phase, the focus was on the boys' need for permanency and stability, and there was a rebuttable presumption it was in their best interests to remain with their foster parents, who wished to adopt them. (*In re Stephanie M.*, *supra*, 7 Cal.4th at p. 317.) As noted above, Jasmine's home was inappropriate for the boys. At the hearing on the petition, Jasmine's counsel proposed that as an alternative to the boys' return, the court continue the hearing to allow them to transition into Jasmine's care. Counsel did not say how long this might take. The boys were suffering from uncertainty about their future, and needed stability, structure and attention Jasmine was unable to provide.

THE BENEFICIAL RELATIONSHIP EXCEPTION

If a dependent child is adoptable,⁴ the court must terminate parental rights at the section 366.26 hearing unless the parent proves the existence of a statutory exception. (§ 366.26, subd. (c)(1); *In re Helen W.* (2007) 150 Cal.App.4th 71, 80-81.) One exception exists if "[t]he 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).) A beneficial 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." (*In re Autumn H.* (1994) 27 Cal.App.4th 567, 575.) If terminating parental rights "would deprive the child of a substantial, positive emotional attachment such that the child would be greatly harmed, the preference for adoption is overcome" (*Ibid.*) The existence of a beneficial relationship is determined by considering "[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 p. 576.) Examining the evidence most favorably to the judgment (*ibid.*), we conclude substantial evidence supports the court's finding "the benefits of adoption outweigh the parental-child bond. . . ." ⁵

⁴ Jasmine does not contest the adoptability finding.

⁵ The court did not expressly address the regularity of visitation and contact. For the most part, Jasmine visited the boys regularly. Early in the case, she missed three weeks of visitation, distressing the boys.

Marco suffered from anxiety and depression. Early in the case, he received a diagnosis of adjustment disorder with mixed disturbances of emotions and conduct. He began psychotherapy, and made marked improvement developmentally and behaviorally. The idea of adoption increased Marco's anxiety and confusion. He said he enjoyed visits and wished to return to Jasmine's care.

Jesus also exhibited behavioral problems and was in psychotherapy. During visits, he spent a great deal of time seeking Jasmine's attention, an indication their bond might be insecure. Jesus's therapist reported his behavior had improved, although the July 2012 change of placement had exacerbated his difficulties. Jesus told his therapist he did not want to be adopted.

By the time of the section 366.26 hearing, Marco was nearly 10 years old and Jesus was six years old. They had been out of Jasmine's care for one year nine months, and before the inception of this case, they were sometimes in the care of relatives. When the boys were in Jasmine's care, she did not always supervise them properly, and Marco assumed a parental role with Jesus and the siblings.

Jasmine's visits with the boys were supervised until the latter part of this case, and even then they were monitored. She was late to recent visits, and was more than one hour late to a visit in mid-July 2012, causing the boys great anxiety. That month, Jesus reported Jasmine talked to him about coming home, confusing him. At a visit in late July, Jasmine expressed anger about the boys' participation in an adoption event and Marco tried to comfort her.

The social worker believed Jasmine and Marco shared a strong bond, but it was one of sister and brother. During visits, Marco asked Jasmine to manage Jesus's behavior, and if she did not accede, he became upset. Kelin, who conducted the bonding study, concluded Marco and Jasmine shared "between a moderate and strong bond," but noted Marco assumed a parental role with Jasmine. Kelin assessed Jesus's bond with Jasmine as "at least . . . moderate." The social worker described Jasmine's relationship with Jesus as that of a mother and son. The social worker believed the boys would suffer some detriment if they no longer had contact with Jasmine, but it did not outweigh their need for stability. The boys were adjusting to their adoptive placement and were affectionate with their foster mother. The foster parents were committed to understanding and meeting the boys' needs. They helped reduce Marco's parentified behavior, and provided the structure, love and patience the boys needed.

Jasmine relies on *In re S.B.* (2008) 164 Cal.App.4th 289, in which this court concluded the juvenile court erred by declining to apply the beneficial relationship exception. (*Id.* at p. 301.) That case is distinguishable. There, the appellant father visited consistently (*id.* at pp. 293-294, 298, 300), "complied with 'every aspect' of his case plan" (*id.* at p. 298), empathized with his child, recognized her needs (*id.* at p. 294) and placed her needs above his own (*id.* at p. 298).

THE SIBLING RELATIONSHIP EXCEPTION

Section 366.26, subdivision (c)(1)(B)(v), provides an exception to termination of parental rights when termination would substantially interfere with the child's sibling relationship and the severance of the relationship would be so detrimental to the child to

outweigh the benefits of adoption. (*In re L.Y.L.* (2002) 101 Cal.App.4th 942, 951-953; § 366.26, subd. (c)(1)(B)(v).) The juvenile court must "balance the beneficial interest of the child in maintaining the sibling relationship, which might leave the child in a tenuous guardianship or foster home placement, against the sense of security and belonging adoption and a new home would confer." (*In re L.Y.L.*, at p. 951, citing *In re Autumn H.*, *supra*, 27 Cal.App.4th at p. 575.) Factors to be considered include whether the children were raised in the same home; whether they shared significant common experiences or have existing close and strong bonds; and whether ongoing contact is in the child's best interests, including his or her long-term emotional interests, as compared to the benefits of adoption. (§ 366.26, subd. (c)(1)(B)(v).) "[T]he application of this exception will be rare, particularly when the proceedings concern young children whose needs for a competent, caring and stable parent are paramount." (*In re Valerie A.* (2007) 152 Cal.App.4th 987, 1014.) Examining the evidence most favorably to the judgment, we conclude that substantial evidence supports the finding Jasmine did not meet her burden of proving the exception. (*In re L.Y.L.*, at pp. 947, 952.)

The boys and the siblings were very attached to one another. The boys had contact with T.C. during her dependency, and lived with her after Jasmine reunified with her. The boys lived with J.D. until the detention in this case. The boys always lived together, and were in the same approved adoptive home. No placement was available for all of the children together in San Diego County, but there were sibling visits during this case. The boys' foster parents and the siblings' caregivers were committed to ongoing

contact between the boys and the siblings.⁶ Furthermore, the social worker believed the boys needed the benefits of adoption more than they needed maintenance of the sibling bond. Substantial evidence supports the conclusion that even if termination of parental rights were to substantially interfere with the sibling relationships, this would not be so detrimental to the boys as to outweigh the benefits they would achieve through adoption.

DISPOSITION

The judgment is affirmed.

MCDONALD, Acting P. J.

WE CONCUR:

McINTYRE, J.

O'ROURKE, J.

⁶ The siblings' caregivers would have taken Marco and Jesus into their home had it been large enough for four children.