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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

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

SAN DIEGO COUNTY HEALTH AND
HUMAN SERVICES AGENCY,

Plaintiff and Respondent,

v.

LARRY S.,

Defendant and Appellant.

D070034

(Super. Ct. No. J518986BD)

APPEAL from a judgment of the Superior Court of San Diego County, Denise de Bellefeuille, Judge. (Retired Judge of the Santa Barbara Sup. Ct. assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.) Affirmed.

The Law Office of Richard L. Knight and Richard L. Knight, under appointment by the Court of Appeal, for Defendant and Appellant.

Thomas E. Montgomery, County Counsel, John E. Philips, Chief Deputy County Counsel, and Lisa Maldonado, Deputy County Counsel, for Plaintiff and Respondent.

Larry S. (Father) appeals a judgment terminating his parental rights over Mariah S. and M.S. (together, the girls). Father contends the court erred by declining to apply the beneficial relationship exception to termination of parental rights and adoption under Welfare and Institutions Code section 366.26, subdivision (c)(1)(B)(i).¹ Father also contends the court erred by sustaining five hearsay objections during his direct examination testimony to establish the exception's applicability. Specifically, he wished to testify regarding statements Mariah made about her feelings toward him or things she was relying on him for. When the court ruled on the objections, Father's counsel did not assert any exceptions to the hearsay rule applied. We conclude the court did not err and affirm.

FACTUAL AND PROCEDURAL BACKGROUND

In May 2014 the San Diego Health and Human Services Agency (the Agency) initiated dependency cases for the girls based on allegations of physical abuse, emotional abuse, and neglect. At the time, Mariah was five years old and M.S. was eight months old. Father violently dragged their mother, Jessica G. (Mother) by her hair through their house while she was holding M.S., injured the girls' three-year-old half-brother by pulling and dragging him at the beach, punched Mother on other occasions, and routinely humiliated Mother and her eldest daughter. Immediately after being detained, baby M.S. also tested positive for methamphetamines. Father used illicit drugs and had an extensive criminal history back to 1998, including drug-related crimes, multiple robberies, weapons

¹ Unless otherwise specified, all statutory references are to the Welfare and Institutions Code.

possession, and parole violations, for which he had been frequently incarcerated for months and years at a time. The court sustained a section 300, subdivision (a) petition as to Mariah and a section 300, subdivisions (a) and (b) petition as to M.S. By July 2014 the court ordered reunification services and supervised visits for the parents, and placed both girls and their two half-siblings with the maternal grandparents.

Between May 2014 and June 2015, Father visited the girls in a supervised setting consistently on a weekly basis. Mariah had mixed feelings toward Father, and sometimes reacted negatively after the visits. Occasionally, she cried or begged not to see him. When asked to explain her feelings, Mariah would recall Father's treatment of Mother, herself, and her siblings. During the visits, Mariah was generally loving to him, and he behaved appropriately as a parent, with love and empathy. On certain visits, Father exhibited inappropriate behaviors, such as whispering fear-inducing comments to Mariah or acting "hyper" and agitated as if under the influence of drugs. In January 2015 a court appointed special advocate (CASA) who observed Father's visits and separately spent time with the girls reported "the visits between [Father] and Mariah are not in Mariah's best interest," and, at minimum, the CASA recommended visits be "closely supervised." Although M.S. was nonverbal and initially shy during her visits with Father, the visits proceeded without incident.

Father did not make substantial progress on his reunification services. He failed to attend parenting classes, would not submit to drug tests, continued using drugs, and failed to complete any drug treatment program. By June 2015 Father stole a car, evaded police,

and stopped visiting the girls. Police arrested him on July 1, imprisoned him in a local jail, and charged him with two counts related to the stolen vehicle.

In September 2015 M.S. visited Father at the local jail, which only permitted phone visits behind glass. She appeared to recognize him and laughed on the phone. Mariah was sick and could not attend the visit. One week later, Mariah and M.S. both visited Father at the local jail, which went well. Mariah talked to Father excitedly on the phone, including telling him she loved and missed him, and M.S. was sad to leave. That same month, the court terminated Father's reunification services and set a section 366.26 hearing.

The next month, Father was sentenced to four years in prison. He transferred to an out-of-county jail, which also did not permit physical contact with visitors. The Agency determined it was not beneficial for two-year-old M.S. to travel several hours and not be permitted physical contact with Father, and Mariah did not want to see him. From jail, Father wrote and sent the girls letters and drawings. Mariah acted indifferently to receiving his letters and ripped most of them up. She became upset over one of the drawings, which her grandmother described as a picture of Father "throwing gang signs." Mariah initially did not want to write a letter back to him, but eventually did in January and February 2016.

In March 2016 the court held the contested section 366.26 hearing. The court received in evidence several Agency and CASA reports and the curriculum vitae of Kelly Rollins, the Agency's assigned social worker. The evidence showed the girls were happily living with, and thriving under the care of, their maternal grandparents since July

2014, or for about 20 months. M.S. had lived with her grandparents for a large majority of her life. The grandparents were the girls' daily caretakers, and the girls repeatedly expressed their desire to be adopted by them. The girls turned to their grandparents for all of their basic living, health, educational, and emotional needs. Throughout the case, Father did not achieve unsupervised visits with the girls.

Rollins and Father testified regarding his relationship with the girls and whether the beneficial relationship exception to adoption applied. Rollins testified she witnessed Mariah express love for her father during a recent visit and that Mariah was excited to talk to him about school and other activities. Nevertheless, Rollins opined the exception to adoption did not apply. She gave her opinion that, overall, Father's visits triggered anxiety and fear in Mariah from her recalling his past abusive conduct, and M.S. was quite young and did not have sufficient contacts with him during her life to constitute a beneficial parent-child relationship.

Father testified to the timeline and quality of his visits with the girls, the strength of his relationship with them, and his desire to reunify with them. In response to hearsay objections, the court did not permit him to testify about certain statements Mariah made, but the court did permit Father to testify about his observations of the girls' behavior, conduct, and demeanor. For example, he testified Mariah was typically excited to see him and they would hug and hold each other during visits, and M.S. recognized him, was happy to see him, and wanted his attention and kisses. He stated he wrote the girls every week while in prison, received some responses back, and he would be enrolling in a parenting class. He admitted he did not know or remember the girls' teachers and

doctors, was not involved in their education and health issues, he had a "drug problem," and was trying to "detox" at the time he was arrested for the car theft in 2015. Father would remain incarcerated until June 2017, or another 15 months.

After considering all the evidence and hearing counsel's arguments, the court found by clear and convincing evidence the girls were likely to be adopted, adoption was in their best interest, and none of the exceptions to adoption set forth in section 366.26, subdivision (c)(1)(B) applied. The court stressed the girls needed a "safe and permanent home" so they could become "secure, happy, well-adjusted women." It terminated Father's parental rights, and he timely appealed.

DISCUSSION

I. The Juvenile Court Did Not Err in Declining to Apply the Beneficial Relationship Exception to Adoption

A. Applicable Law

At a section 366.26 permanency planning hearing, once the juvenile court finds by clear and convincing evidence a child is likely to be adopted within a reasonable time, the court is required to terminate parental rights and select adoption as the permanent plan unless the parent shows that termination of parental rights would be detrimental to the child under one of several statutory exceptions. (*In re Michael G.* (2012) 203 Cal.App.4th 580, 589.) One of these statutory exceptions is the beneficial relationship exception to adoption, which applies when "[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), italics added.) The burden is on the party

seeking to establish the beneficial relationship exception to produce evidence establishing the exception is applicable. (*In re Bailey J.* (2010) 189 Cal.App.4th 1308, 1314.)

We apply the substantial evidence standard of review to the juvenile court's factual findings on the existence of a beneficial parental relationship and the abuse of discretion standard to the determination of whether there is a compelling reason for finding that termination would be detrimental to the child. (*In re Anthony B.* (2015) 239 Cal.App.4th 389, 395, citing *In re J.C.* (2014) 226 Cal.App.4th 503 and other cases.)

B. *Analysis*

Father does not contest the juvenile court's finding the girls were likely to be adopted. He maintains instead he established the applicability of the beneficial relationship exception and terminating his parental rights would be detrimental to the girls. The court found the beneficial relationship exception to adoption did not apply without explicitly discussing Father's frequency of visitation or contact with the girls, but did indicate he was not meeting their needs for a parent and it was in the girls' best interest to terminate his parental rights.

Based on our review of the record, the court implicitly found Father maintained regular visitation and contact, at least between May 2014 and September 2015. When the court terminated his reunification services in September, it commented he had been "consistent" and "diligent" about visiting the girls. Also, Father maintained contact with the girls through letters when he could no longer see them on a weekly basis. However, to show applicability of the beneficial relationship exception to adoption, he was further

required to establish he had a relationship with the girls they would benefit from continuing.

The statutory phrase "benefit from continuing the relationship" (§ 366.26, subd. (c)(1)(B)(i)) refers to a parent-child relationship that "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 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.) "The balancing of competing considerations must be performed on a case-by-case basis and take into account many variables, including the 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." (*In re Zachary G.* (1999) 77 Cal.App.4th 799, 811.)

To meet the burden of proof to establish a beneficial relationship, "the parent must show more than frequent and loving contact, an emotional bond with the child, or pleasant visits—the parent must show that he or she occupies a parental role in the life of the child." (*In re I.W.* (2009) 180 Cal.App.4th 1517, 1527 (*I.W.*); see *In re Jason J.* (2009) 175 Cal.App.4th 922, 936-938; *In re Derek W.* (1999) 73 Cal.App.4th 823, 827.) The evidence must establish more than merely "a loving and happy relationship" (*In re*

Beatrice M. (1994) 29 Cal.App.4th 1411, 1419), and the parent must be more than a "friendly nonparent relative" (*Jason J.*, at p. 938). "A child who has been adjudged a dependent of the juvenile court should not be deprived of an adoptive parent when the natural parent has maintained a relationship that may be beneficial to some degree, but that does not meet the child's need for a parent." (*In re Angel B.* (2002) 97 Cal.App.4th 454, 466.) "[I]t 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.)

Here, substantial evidence supports the juvenile court's finding that Father's relationships with the girls were not beneficial parent-child relationships within the meaning of the statutory exception to adoption. Father generally had loving, happy visits with the girls and he displayed appropriate parenting skills in a closely supervised setting. However, the social worker opined that Father's relationship with Mariah was not beneficial. Mariah suffered recurring fear and anxiety after seeing him, and Father had not shown he could behave in a loving manner in an unsupervised setting. Father admitted he was completely uninvolved in the girls' health and educational needs, his "drug problem" was untreated, and he had yet to complete a parenting class. The original protective issues surrounding domestic violence and neglect were unresolved.

In addition, M.S. was an infant when she was taken into protective custody and had spent most of her life in her grandparents' home. In the social worker's estimation, M.S. had not had sufficient contacts with her father to develop an attachment. The girls' primary attachment was to their grandparents, who cared for them and directed all of

their daily activities, including school, meals, playtime, and bedtime. The girls considered their grandparents' home to be their own. The girls eagerly wished to be adopted and permanently live with their grandparents. Although the girls expressed love for their father, he was not meeting their needs for a parent.

Based on this evidence, the juvenile court reasonably could conclude that terminating Father's parental rights would not be detrimental and he did not "occup[y] a parental role in the [lives] of the [girls]." (*I.W.*, *supra*, 180 Cal.App.4th at p. 1527.) Furthermore, the girls were happy and thriving in a stable home such that any relationship between them and Father was not outweighed by the security of a permanent placement. He would be incarcerated for at least another year, and the court determined the girls immediately needed permanency. We see no basis to disturb the court's findings.

Finally, we are not persuaded by Father's argument that the Agency prevented him from developing a beneficial relationship with his daughters when he transferred to an out-of-county jail. The record shows Father did not have a beneficial relationship with the girls during the period he was consistently visiting them. He failed to show how jail visits behind glass would allow him to occupy a parental role or outweigh the benefits of a permanent placement, considering in particular, the girls' youth, Mariah's steadfast refusal to visit him in a new setting, and M.S.'s limited verbal abilities and need for physical interaction. We accordingly conclude Father has not demonstrated the beneficial relationship exception to adoption was applicable, and the court properly selected adoption as the girls' permanent plan. (§ 366.26, subd. (c)(1).)

II. *The Juvenile Court Did Not Err in Sustaining Hearsay Objections*

Father also argues the court erred in sustaining five hearsay objections to his testimony, and the errors affected his ability to meet the burden of proof described *ante*. He contends two of the hearsay objections were untimely because Father had already responded in full or part to the question, none of Father's testimony was hearsay, and exceptions to hearsay applied. We review for substantial evidence a trial court's underlying factual findings and for abuse of discretion the ultimate decision whether to admit hearsay evidence. (*People v. Phillips* (2000) 22 Cal.4th 226, 236.) We conclude the two objections challenged on timeliness grounds were timely, Father's testimony contained hearsay, and he forfeited any arguments relating to hearsay exceptions.

Objection No. 1

Father was called to testify regarding the strength of his relationship with the girls and whether the beneficial relationship exception applied. His counsel argued in opening: "The evidence today will show . . . [h]e was consistent and regular with his visitation, and his relationship with both Mariah and [M.S.] rises to the level for the exception of the parent-child bond to exist." Accordingly, after Father testified about the timeline and nature of his visits with the girls, his counsel asked him:

"Q: Can you give me some examples of some of the things that you were able to talk to Mariah about during those visits?"

"A: I was—well, first, I let them—let her—I don't know how to answer the question really. But I just know I let her—when we exchanged words like, "I miss you," you know, we let each other know that—I let her know—

"[Agency's counsel]: Objection [No. 1]. Hearsay."

The court found the testimony contained hearsay. Father's counsel did not assert any exceptions to hearsay and merely asked whether she could explain to her client "what hearsay is so he's not confused."

Contrary to Father's argument, the Agency timely objected. The question did not clearly call for Father to respond with hearsay since he could have responded with topics of conversation. When it became apparent Father intended to relay Mariah's statements, the Agency objected. Under the circumstances, its objection was timely. Moreover, Father's testimony contained hearsay, which is "a statement that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter stated." (Evid. Code, § 1200, subd. (a).) Here, Father wished to prove Mariah missed him, which would be relevant to the strength of their relationship. At trial, he did not assert the statements were being offered for any purpose other than their truth.

On appeal, Father argues Mariah's statements would be admissible under one or more hearsay exceptions, such as evidence of her state of mind (Evid. Code, § 1250, subd. (a)(1)) or spontaneously made under the stress of excitement (Evid. Code, § 1240, subd. (b)). We conclude he forfeited these arguments and decline to address them. (*In re Ana C.* (2012) 204 Cal.App.4th 1317, 1325 (["When an objection is not made, a record for meaningful review is not available."].) The Agency argues the statements were not made under startling circumstances or to narrate Father's visit nor were they offered to show Mariah's state of mind. Because Father did not assert any applicable exception to hearsay at trial, the court did not make relevant factual findings, such as whether the

statements qualified under the "stress of excitement" exception or whether they were offered to show state of mind. The court did not err. (See *People v. Demetrulias* (2006) 39 Cal.4th 1, 27.)

Objection Nos. 2 and 3

Father went on to testify about the topics he and Mariah talked about during their visits, such as her favorite color or school activities, and their mutual love. Then, the following two hearsay objections occurred:

"Q: . . . Going back to before you were in custody—so from May 2014 to about July of 2015—can you—can you explain how Mariah would respond when she saw you at the beginning of a visit?

"[Agency's counsel]: Objection [No. 2]. Calls for hearsay.

"The Court: Sustained.

"[Father's counsel]:

"Q: Can you explain your daughter's behavior when she saw you at the beginning of a visit for the time period . . . ?

"A: I think I understand. . . . And she was just telling—she told me that she didn't like where she was at and that she wants to come back home. [¶] . . .

"[Minors' counsel]: Objection [No. 3]. Hearsay.

"The Court: Sustained.

"[Agency's counsel]: Move to strike.

"The Court: Stricken.

"[Father's counsel]:

"Q: . . . what I'm asking is: During this time period, how did—how was Mariah's behavior when she saw you? Did she hide? Did she

run towards you? Did she smile at you? [¶] Can you describe what you observed her behavior to be at the beginning of the visits?"

The court properly sustained Objection No. 2. Like Objection No. 1, the question potentially called for Father to relay Mariah's statements to him during their visits. By Objection No. 3, it was clear Father would respond with hearsay. Counsel timely objected as soon as Father testified about Mariah's statements. Further, the statements would tend to support her attachment to him, and Father did not argue they were being offered for any other purpose. His trial counsel also did not claim any exceptions to hearsay applied, and thus, we will not address the issue for the first time on appeal. Father subsequently described Mariah's behavior during their visits. The court properly sustained the hearsay objections.

Objection Nos. 4 and 5

Father challenges the last two hearsay objections on grounds the statements were not being offered to prove the truth of the matter asserted and exceptions to hearsay applied. The dialogue was:

"Q: . . . when you saw her—you heard Ms. Rollins discuss this last visit you had this last Wednesday—did [Mariah] ask you to do specific things for her when you were out of custody?"

"[Agency's counsel]: Objection [No. 4]. Hearsay.

"The Court: Sustained.

"[Father's counsel]:

"Q: Did you hear when Ms. Rollins testified that your daughter had asked you to enroll her in a soccer game while she was on the stand? Did you hear that testimony?"

"A: Yes.

"Q: Is that an accurate depiction of what your daughter had asked you at your last visit?

"[Minors' counsel]: Objection [No. 5]. Hearsay.

"The Court: Sustained."

Father's trial counsel never suggested Mariah's statements were being offered for a purpose other than their truth or exceptions to hearsay applied, and the trial court therefore had no opportunity to evaluate these contentions. The arguments are forfeited. The record supports Father wanted to establish the truth of the statement, namely, Mariah asked him to enroll her in soccer, suggesting she viewed him as a parent. The court did not err.

Finally, Father contends the court deprived him of due process by sustaining the hearsay objections, which prevented him from meeting his burden of proof to establish the beneficial relationship exception. This argument lacks merit. As we have discussed, the court properly excluded Mariah's statements. Father could have called her as a witness, but he chose not to do so. Further, he provided detailed testimony of the girls' behavior, demeanor, and conduct during their visits with him. He called the Agency's social worker as a direct witness, as well as cross-examined her, and could have presented a rebuttal expert. Father has not shown any violations of due process. (*In re Valerie A.* (2007) 152 Cal.App.4th 987, 1013 [no violation of due process where parent had opportunity to present witnesses and cross-examine the social worker regarding a claimed exception to adoption].)

DISPOSITION

The judgment is affirmed.

NARES, Acting P. J.

WE CONCUR:

O'ROURKE, J.

IRION, J.