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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

In re J.K., a Person Coming Under the
Juvenile Court Law.

RIVERSIDE COUNTY DEPARTMENT
OF PUBLIC SOCIAL SERVICES,

Plaintiff and Respondent,

v.

M.O.,

Defendant and Appellant.

E054262

(Super.Ct.No. SWJ008668)

OPINION

APPEAL from the Superior Court of Riverside County. Michael J. Rushton,
Judge. Affirmed.

Pamela J. Walls, County Counsel, Julie Koons Jarvi, Deputy County Counsel, for
Plaintiff and Respondent.

Lisa A. Raneri, under appointment by the Court of Appeal, for Defendant and
Appellant.

No appearance for Minor.

Appellant M.O. (Mother) appeals the termination of her parental rights under Welfare and Institutions Code section 366.26¹ as to her minor son, J.K. (born September 2005). Mother contends substantial evidence does not support the trial court's conclusion the parental benefit exception in section 366.26, subdivision (c)(1)(B)(i), did not apply. Mother believes she met her burden of showing the exception applies, because the record shows she maintained regular visitation with J.K. and they shared a strong bond. As a result, she argues, it would be detrimental to terminate her parental rights.

FACTUAL AND PROCEDURAL HISTORY

A. PRIOR APPEALS²

On September 9, 2008, DPSS filed a petition pursuant to section 300, subdivisions (b) and (g), as to two minor children, J.K. (born in 2005) and J.O. (born in 2008). The petition alleged removal was necessary because of substance abuse, domestic violence, and child abuse in the home. It was further alleged Mother and her domestic partner R.B., were incarcerated for domestic violence. As a result, the children were left with no provision for support. The children were placed in protective custody on September 7, 2008. At the detention hearing on September 10, 2008, the court found there was probable cause for detention.

On December 5, 2008, the children were placed with Mother as long as she continued with her case plan and did not reside with R.B. At the dispositional hearing

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

² Facts regarding prior appeals are taken from the record and unpublished opinion filed April 22, 2011. (*M.O. v. Superior Court* (Apr. 22, 2011, E052828) [nonpub. opn.])

held January 26, 2009, the court found the allegations in the petition to be true. The children were conditionally returned to Mother's custody under the supervision of the social worker, and with family maintenance services. Mother was ordered to participate in services as set forth in the case plan.

At the six-month review hearing held on July 28, 2009, pursuant to section 364,³ the children were continued in Mother's custody. However, Mother was ordered to participate in therapy and drug testing. At that time the younger child, J.O., was having overnight weekend visits with his biological father.

On February 24, 2010, the court held a 12-month review hearing pursuant to section 364. At that time, the court ordered Mother to immediately comply with the prior order requiring her to participate in therapy, drug testing, and to have a psychiatric medication evaluation. On March 5, 2010, Mother did not appear as directed for random drug testing. However, later tests were negative. As of March 25, 2010, Mother was not responding to telephone messages from the social worker, and was not present when home visits were attempted. In an addendum report filed March 25, 2010, the social worker also reported suspected child abuse by Mother.

At a continued 12-month review hearing on March 30, 2010, the court concluded there was a substantial risk to the children and ordered them detained from Mother. On April 1, 2010, DPSS filed a supplemental petition under section 387 alleging the prior

³ Under section 364, the court must hold a hearing every six months when a child is not removed from the physical custody of his or her parent, but continued supervision is ordered. Based on the evidence presented at the hearing, the court must determine whether continued supervision is necessary. (§ 364, subs. (a)-(c).)

disposition did not effectively protect the children, and Mother put the children at risk by failing to follow prior court orders. On April 2, 2010, the court concluded there was a prima facie case to detain the children from Mother.

On May 27 and 28, 2010, the court held a contested evidentiary hearing on the section 387 petition and considered testimony by several witnesses. At a continued hearing on June 3, 2010, the court found the allegations against Mother in the section 387 petition to be true. J.K. was placed in Mother's custody under a family maintenance plan, as long as she was in full compliance with the case plan. J.O. was placed with his father.

On November 8, 2010, the social worker decided to check the welfare of J.K. at Mother's home after it was learned Mother had submitted a diluted drug test. J.K. was found alone in the home with Mother's boyfriend, who was a known felon and drug user. Apparently, Mother had just gone out for a walk. Both Mother and the boyfriend were arrested for being under the influence of a controlled substance. At that time, J.K. was removed from Mother and placed in protective custody.

On November 10, 2010, DPSS filed a second supplemental petition under section 387. The petition alleged the previous disposition had not been effective in protecting the child, because Mother had failed to comply with drug testing, was arrested on November 8, 2010, for being under the influence of a controlled substance in the presence of her child, and had neglected the child by leaving him alone with a known felon and drug user. It was further alleged Mother neglected the child by not supervising him appropriately in a public gym, which placed him at risk for physical harm.

At a detention hearing on November 12, 2010, the court found there was a prima facie case for detention. On January 20 and 24, 2011, the court held a contested hearing on the supplemental petition filed November 10, 2010, and considered testimony by Mother and the social worker. The court found the allegations in the petition to be true, and concluded it would be detrimental for Mother to have custody. J.K. was removed from Mother's custody. Because the court concluded Mother had already received more than the maximum of 18 months of services and the child could not be returned to her custody, it denied Mother any further services and set a permanency hearing pursuant to section 366.26. Mother previously filed a petition for extraordinary writ pursuant to California Rules of Court, rule 8.452, challenging the denial of services. We affirmed the trial court's findings and orders in an unpublished opinion filed April 22, 2011.

In a report filed January 14, 2011, the social worker reported J.K. was refusing to visit with Mother, and the foster mother "had to bribe him to go." He also exhibited "avoidant behavior" during visits.

On March 25, 2011, Mother filed an ex parte application seeking an order authorizing her to videotape visits with J.K., and for the child to be made available for a bonding assessment. The court denied this request. Mother appealed from that order; but raised an ICWA notice issue and did not challenge the court's denial of her ex parte application. At the time Mother appealed, a permanency hearing pursuant to section 366.26 was pending. We affirmed the trial court's findings and orders in an unpublished opinion filed January 6, 2012. (*In re J.K.* (Jan. 6, 2012, E053663) [nonpub. opn.])

CURRENT APPEAL

On July 25, 2011, Mother filed a section 388 motion (Form JV-180, Request to Change Court Order) seeking reinstatement of reunification services or placement with Mother under a family maintenance plan. Mother argued there was a change in circumstances, because she was able to maintain her own household, had a part-time job, was enrolled in a vocational nursing program, was not involved in a romantic relationship, and was participating weekly in a single mothers support group at a Christian church.

On July 27, 2011, the court held a section 366.26 hearing and decided to consider Mother's section 388 motion at the same time. During the hearing, the court heard testimony by Mother and spoke with J.K. in chambers. DPSS submitted on the record. Based on the evidence, the court denied Mother's section 388 motion stating, "I do not find evidence of changed circumstances here. There's really no change based on any of the evidence presented by [Mother's counsel]. . . . [¶] . . . [¶] . . . I don't find that it's in the best interest of the child for me to grant this [motion] at this time." The court terminated Mother's parental rights and found the beneficial relationship exception to the termination of parental rights did not apply. In addition, the court found it likely J.K. would be adopted.

DISCUSSION

Mother cites a number of facts in the record to support her position that she met her burden of showing the parental benefit exception does apply in this case. First, Mother cites parts of the record indicating J.K. lived with Mother during most of his life.

Second, she cites portions of the record showing she was vigilant in visiting J.K. during the times he was removed from her care. Third, Mother refers to evidence indicating her visitation with J.K. was positive and beneficial. As Mother contends, the court praised Mother for being “proactive in seeking visitation with her child.” Fourth, Mother believes the record shows she and J.K. had a strong bond during most of the proceeding. Mother does concede J.K. began to resist contact with her about the time he was removed for the third time. However, she contends there was still a bond worthy of protection under the parental benefit exception, because the record indicates J.K. missed his Mother, sought comfort from her during visitation, and said he loved his Mother and wanted to live with and/or visit with her. Mother believes some of J.K.’s resistance to contact with her is a direct result of the court’s reduction in her visitation. According to Mother, some distance between them developed with the reduction in visitation, because she was “less of a part of his life and [this] led [J.K.] to believe she was no longer there for him.” In our view, Mother’s arguments ignore too much of the record.

In pertinent part, the beneficial relationship exception set forth in section 366.26, subdivision (c)(1)(B)(i), provides as follows: “[T]he court shall terminate parental rights unless either of the following applies: [¶] . . . [¶] (B) The court finds a compelling reason for determining that termination would be detrimental to the child due to one or more of the following circumstances: [¶] (i) The parents have maintained regular visitation and contact with the child and the child would benefit from continuing the relationship.”

“Once reunification services are ordered terminated, the focus shifts to the needs of the child for permanency and stability.’ [Citation.]” (*In re Celine R.* (2003) 31 Cal.4th 45, 52.) If the child is adoptable, “the court must order adoption and its necessary consequence, termination of parental rights, unless one of the specified [exceptions] provides a compelling reason for finding that termination of parental rights would be detrimental to the child.” (*Id.* at p. 53.) Adoption is the preferred permanent plan for an adoptable child, because the child has a compelling right “to have a placement that is stable, permanent, and that allows the caretaker to make a full emotional commitment to the child. [Citation.]” (*In re Marilyn H.* (1993) 5 Cal.4th 295, 306.) “The statutory exceptions merely permit the court, in *exceptional circumstances* [citation], to choose an option other than the norm, which remains adoption.” (*Celine R.*, at p. 53.) “We must affirm a trial court’s rejection of these exceptions if the ruling is supported by substantial evidence. [Citation.]” (*In re Zachary G.* (1999) 77 Cal.App.4th 799, 809.) “We determine whether there is substantial evidence . . . by reviewing the evidence most favorably to the prevailing party and indulging in all legitimate and reasonable inferences to uphold the court’s ruling. [Citation.]” (*In re B.D.* (2008) 159 Cal.App.4th 1218, 1235.)

For the exception to apply, the parent must show “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. 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 exception must be examined on a case-by-case basis, taking into account the many variables which affect a parent/child bond. 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 are some of the variables which logically affect a parent/child bond." (*Id.* at pp. 575-576.)

Here, the court concluded the parental benefit exception did not apply, and it would not be detrimental to J.K. to terminate Mother's rights. In reaching its decision, the court noted evidence indicating visitation "as of late" had not been beneficial to the child. In addition, the court indicated it relied in large part on the evidence presented in the social worker's two most recent reports.

As noted above, the parent must show a "significant, positive, emotional relationship" with the child in order for the exception to apply. (*In re S.B.* (2008) 164 Cal.app.4th 289, 300.) The focus is on the child's attachment to the parent, not the parent's attachment to the child. (*In re Autumn H., supra*, 27 Cal.App.4th at p. 575.) "Some incidental benefit to the child" from the interaction with a parent during visitation is not enough. (*Ibid.*) Rather, there must be "a compelling reason" for the court to determine it would be detrimental to the child to terminate the relationship. (§ 366.26, subd. (c)(1)(B).)

Based on the record before us, it is our view the evidence supports a conclusion Mother's relationship or bond with the child was not so strong or so positive as to overcome the benefits of adoption in a stable, permanent, and loving home. As Mother contends, the child was in her care for the first two years of his life, as well as a significant portion of time between December 5, 2008, when he was first returned to Mother under a family maintenance plan, and November 8, 2010, when Mother was arrested and the child was removed from her care for the third and last time. As the court remarked, Mother was "very proactive" in seeking visitation when the child was not in her custody and in participating actively during visitation.

On the other hand, the record shows J.K.'s tender years were fraught with troubles caused by Mother's poor choices, lack of parenting skills, poor decisions, and resistance to meaningful participation in services. As outlined more fully *ante*, the record indicates the child endured three separate removals from Mother; neglect; and problems with domestic violence. The record is replete with evidence supporting a conclusion by the juvenile court that Mother's overall effect on J.K.'s life was more negative than positive.

A psychological examination of Mother on December 1, 2010, was consistent with information in the social worker's prior reports, indicating Mother was "physically aggressive towards others," was resistant to treatment, and had little understanding of how to manage a wide range of situations with children. She was described by the social worker as "extremely argumentative, uncooperative and extremely sporadic in her mood and speech."

In our view, the juvenile court could reasonably conclude problems with J.K.'s behavior were an indication Mother was not a positive influence in J.K.'s life, and Mother's problems were having a negative effect on the child's conduct. Behavior problems with the child were observed as early as June 25, 2009, which was prior to the six-month review hearing. Although Mother had completed parenting classes, the social worker said J.K. appeared "defiant and extremely difficult to re-direct" during home visits. J.K. acted aggressively toward the social worker. The social worker reported being hit and shoved by J.K. with both hands. J.K.'s preschool claimed he was aggressive with other children, and often appeared sad and depressed. He talked about Mother being upset with him. On one occasion, he told the social worker Mother "smacked" him resulting in a small bruise over his right eye.

On July 28, 2009, the juvenile court ordered Mother to participate in Parent Child Interactive Therapy (PCIT). Mother gave the social worker a number of excuses for not enrolling or participating. On February 24, 2010, the court once again ordered Mother to participate in PCIT. Although Mother attended PCIT, she was resistant and uncooperative even though J.K.'s behavior and interactions with Mother and others indicated the program was appropriate for him. As of September 1, 2010, the social worker reported Mother did begin active participation in PCIT but missed some appointments. Because J.K. continued to display out-of-control behaviors during home visits and Mother appeared overwhelmed, the social worker also referred Mother to an in-home parenting class. However, as noted above, J.K. was removed shortly thereafter for the third time on November 8, 2010, as a result of Mother's arrest and neglect.

It is also significant that J.K.'s behavior problems improved in two different foster homes, but would deteriorate again after visits with Mother. The foster mother described J.K. as "very sweet, loving, and affectionate" while in her care. However, she said he was "defiant and aggressive" during visits with Mother, and would have serious behavior issues the day after visits with Mother. J.K. was then placed with prospective adoptive parents who also noticed serious and aggressive behavioral problems after visits with Mother. They also said J.K. "began to exhibit insecurity and nervousness" after visiting Mother, and he was concerned about "what was going to happen next." Otherwise, the prospective adoptive parents indicated J.K.'s behavior was positive, and the social worker reported J.K. had a "strong bond" with the prospective adoptive parents.

Although Mother believes J.K. began resisting contact with her because the court reduced her visitation so J.K. no longer believed she was "there for him," the court reasonably reached a different conclusion based on the totality of evidence in the record, as well as J.K.'s in-chambers testimony during the evidentiary hearing. The juvenile court stated in part as follows: "[J.K.] was portrayed in the report[s], effectively, as being some little earthquake who could not be controlled. I remember one of the reports the social worker was basically attacked by [J.K.] during her efforts to find out what was going on. [¶] I have to say I was very reluctant to have [J.K.] come into my chambers today based on everything that I had read about him. When he came in, I found him to be exceptionally bright, exceptionally articulate. I was very touched by one of his answers. [¶] [Mother's counsel] said, well, if I asked you if you wanted to visit with your mother today, would you want to visit with her. No. What if I told you she were here today,

what would you say, and paraphrasing he, effectively, said I would say yes because I don't want to hurt her feelings, but I don't want to visit with her. [¶] It showed a great deal of insight, I believe, into the mind of this little boy that he has some love for his mother, but whatever has gone on in their relationship has not been healthy for him.”

In sum, substantial evidence supports the juvenile court's conclusion the parental benefit exception does not apply under the facts of this case. There is simply no compelling reason to find that termination of parental rights would be detrimental to this child. In other words, this is simply not an extraordinary case where the preferred permanent plan of adoption should be derailed by the parental benefit exception in subdivision (c)(1)(A) of section 366.26. The advantages of a stable, permanent adoptive home for this child clearly outweigh the benefits of a continued legal relationship with Mother.

DISPOSITION

The judgment is affirmed.

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MILLER

J.

We concur:

McKINSTER

Acting P. J.

RICHLI

J.