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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

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

SAN BERNARDINO COUNTY
CHILDREN AND FAMILY SERVICES,

Plaintiff and Respondent,

v.

M.L.,

Defendant and Appellant.

E055419

(Super.Ct.No. J230682)

OPINION

APPEAL from the Superior Court of San Bernardino County. Wilfred J.

Schneider, Jr., Judge. Affirmed.

Liana Serobian, under appointment by the Court of Appeal, for Defendant and
Appellant.

Jean-Rene Basle, County Counsel, and Stacy A. Moore, Deputy County Counsel,
for Plaintiff and Respondent.

M.L. (mother) is the mother of A.A., born in November 2005. Mother argues the juvenile court erred when it terminated her parental rights and freed A.A. for adoption by her foster parents at a hearing held on January 5, 2012, pursuant to Welfare and Institutions Code section 366.26.¹ Specifically, mother argues the juvenile court should have declined to terminate her parental rights under the parental benefit exception to the preference for adoption, found at section 366.26, subdivision (c)(1)(B)(i). As discussed below, we conclude that, even if mother did not waive this argument by failing to raise it below, it has no merit. Thus, we affirm the juvenile court's orders terminating mother's parental rights and freeing A.A. for adoption.

FACTS AND PROCEDURE

A.A. was previously removed from her mother's care in San Diego County in June 2007, when A.A. was 19 months old. The cause was mother's chronic alcoholism and her third hospitalization for alcohol intoxication and detox in six months. After the case was transferred to San Bernardino County, A.A. was returned to mother on family maintenance in December 2008. The dependency case was dismissed in July 2009.

On December 30, 2009, police responded to a call to mother's home involving domestic violence. Mother was in the front yard with both arms or hands around 4-year-old A.A.'s neck. Mother was agitated and appeared to be intoxicated. When police asked mother to let go of A.A., she tightened her grip on A.A.'s neck and lifted her off the ground in an attempt to carry her into the house. A.A. appeared to the officers to be

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

choking. When the officers were able to disengage mother from A.A., they took mother to the squad car, where she immediately passed out drunk. Mother was arrested for cruelty to a child. (Pen. Code, § 273a.)

On January 4, 2010, the Department of Children and Family Services (CFS) filed a section 300 petition alleging that mother had failed to protect (sub. (b)) A.A. by engaging in domestic violence with her boyfriend, abusing alcohol, and having a history of neglecting and abusing A.A., and had made no provision for support for A.A. (subd. (g)) when mother was arrested for child cruelty.²

At the detention hearing held on January 5, 2010, mother was present, in custody. She submitted on the issue of detention. The juvenile court allowed mother to have weekly supervised visits with A.A. once she was released from custody.

The jurisdiction and disposition hearing was eventually held on May 17, 2010. Mother submitted a waiver of her rights. The juvenile court found true the allegations regarding mother and ordered CFS to provide her with reunification services. Mother was to have supervised visits with A.A. twice each week.

At the six-month review hearing held on November 17, 2010, the juvenile court found that mother had made substantial progress in her case plan and that there was a substantial probability that A.A. could be returned to mother by the next review hearing on May 17, 2011. The court ordered mother's visits increased to a minimum of twice a week for three hours each, unsupervised, to include all-day weekend visits and overnight

² A.A.'s father was initially granted reunification services, but failed to participate in the case plan after some initial visits with A.A., and is not a party to this appeal.

visits. The court authorized CFS to return A.A. to mother on family maintenance by information packet.

On April 21, 2011, the juvenile court held a special hearing because mother had suffered a relapse in her alcohol addiction in January and February. The court reduced mother's visits to once weekly for two hours, supervised, but authorized CFS to increase visits and return A.A. to mother on family maintenance by approval packet.

At the contested 12-month review hearing held on June 24, 2011, the juvenile court terminated mother's family reunification services and ordered mother's visits reduced to twice a month once A.A. could be placed in a concurrent planning home.³ The court set a section 366.26 hearing for October 24, 2011.

The contested Section 366.26 hearing was held on January 5, 2012; the court also heard mother's section 388 petition to modify the court orders of June 24, 2011. Mother testified, as did her sister-in-law and the social worker. At the conclusion of the hearing, the juvenile court denied the section 388 petition, found A.A. to be adoptable, terminated mother's parental rights, and ordered adoption as A.A.'s permanent plan. This appeal followed.

DISCUSSION

Mother argues the juvenile court erred when it failed to apply the parental relationship benefit exception to the termination of her parental rights. CFS contends mother waived this argument by failing to raise it at the section 366.26 hearing. We will

³ A.A. was placed in a concurrent planning home on August 31, 2011, and at that time mother's visits were reduced.

err on the side of finding that mother did raise this issue, if only in passing, when her counsel told the court that mother disagreed with the CFS recommendation to terminate parental rights: “Not only is [A.A.] strongly bonded to her mother, she is also very bonded with her sisters” The parties at the hearing apparently believed mother had raised the exception because both minor’s counsel and county counsel clearly argued that the exception had not been established.

Section 366.26, subdivision (c)(1)(B)(i), provides for an exception to a court’s decision to terminate parental rights. The exception 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).) The parent bears the burden of proving that the exception applies. (*In re Cristella C.* (1992) 6 Cal.App.4th 1363, 1372-1373; *In re Lorenzo C.* (1997) 54 Cal.App.4th 1330, 1345.) “The exception applies only where the court finds regular visits and contact have continued or developed a significant, positive, emotional attachment from child to parent.” (*In re Autumn H.* (1994) 27 Cal.App.4th 567, 575.) This means 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.” (*Ibid.*) The factors to be considered are: ““(1) the age of the child, (2) the portion of the child’s life spent in the parent’s custody, (3) the positive or negative effect of interaction between the parent and the child, and (4) the child’s particular needs.”” (*In re Jason J.* (2009) 175 Cal.App.4th 922, 937-938, quoting *In re Angel B.* (2002) 97 Cal.App.4th 454, 467.)

There must be a “compelling reason” for applying the parental benefit exception. (*In re Jasmine D.* (2000) 78 Cal.App.4th 1339, 1349.) This is a “quintessentially discretionary determination”; thus, we review the juvenile court’s determination for an abuse of discretion. (*Id.* at p. 1351.) Nevertheless, “ ‘[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. The reviewing court should interfere only “ ‘if [it] find[s] that under all the evidence, viewed most favorably in support of the trial court’s action, no judge could reasonably have made the order that he did.’ . . .” ’ [Citations.]” (*Ibid.*)

It is arguable that mother, for the most part, meets the first requirement of the exception, which is regular visitation and contact. In the two years between this latest removal and the section 366.26 hearing in January 2012, mother kept in regular contact with A.A. and attended all the visits she was allowed, with two exceptions: (1) mother missed three weeks of visits in February 2010, while hospitalized for alcohol intoxication and detox, prior to beginning inpatient drug and alcohol treatment and regular visits with A.A.; and (2) mother missed all visits in February 2011, when she relapsed into alcohol abuse, beginning in mid-January 2011, and was hospitalized for about three weeks in February and March with liver and kidney failure, just as she was about to have A.A. returned to her on family maintenance.⁴ Although mother had progressed to having

⁴ Mother left her sober living home and remained out of contact for a week in September 2010 when she went to San Diego to visit an older daughter in the hospital, but the record does not indicate whether she missed any visits during that time. The

[footnote continued on next page]

unmonitored weekend and overnight visits with A.A., at that time her visits were reduced to monitored visits one to two times a week.

It is, however, not arguable that mother meets the second requirement of the exception that A.A. have a “significant, positive, emotional attachment” to mother, such that the benefits to A.A. from continuing the parent-child bond would outweigh the benefits to A.A. from being adopted. This was A.A.’s second dependency case, and she had been in her mother’s custody for only her first 19 months of life, plus approximately six months when she was three and four years old. The other three-and-a-half of her six years⁵ had been spent in foster care; mother was someone with whom A.A. had scheduled visits, not someone she lived with or depended on for care. As the social worker pointed out in her testimony at the section 366.26 hearing, A.A. was used to having “two mothers” from having been in foster care for so long. Although A.A. definitely enjoyed her visits with mother and derived some benefit from their relationship, she never asked for more contact with mother as those visits decreased and, as time passed, did not complain or appear to mind when the visits were over. During a visit with mother in December 2011 that the social worker observed, A.A. demonstrated a previous behavior of gorging on food while in mother’s presence. In addition, as CFS

[footnote continued from previous page]

social worker, in an addendum to the 12-month status review report, characterizes this incident as a “setback” or “relapse” in Mother’s recovery, but in the six-month status review report, does not.

⁵ Contrary to CFS’ calculations, A.A. was six years old at the time of the section 366.26 hearing held on January 5, 2012, as she was born in November of 2005.

points out, the record shows that A.A.'s primary bond was with her prospective adoptive parents, rather than with mother. The social worker testified that, although A.A. had fun during her visits with mother, A.A. had formed a strong bond and primary attachment with her prospective adoptive mother, and had been fully integrated into the prospective adoptive family. A.A. had gone on vacation with the family, had actually been in a family wedding, and loved to follow around her 13-year-old foster brother. When asked if she wanted to stay with her prospective adoptive parents until she was grown up, A.A. said, "yes," and when asked why, she answered, "because I like it here."

Based on this substantial evidence, we cannot say that the juvenile court abused its discretion when it failed to apply the parental benefit exception to the presumption for adoption.

DISPOSITION

The court's orders are affirmed.

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RAMIREZ
P. J.

We concur:

MILLER
J.

CODRINGTON
J.