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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

In re A.E. et al., Persons Coming Under the
Juvenile Court Law.

RIVERSIDE COUNTY DEPARTMENT
OF PUBLIC SOCIAL SERVICES,

Plaintiff and Respondent,

v.

J.E.,

Defendant and Appellant.

E056193

(Super.Ct.No. INJ017307)

OPINION

APPEAL from the Superior Court of Riverside County. Lawrence P. Best,
Temporary Judge. (Pursuant to Cal. Const., art. VI, § 21.) Affirmed.

Rich Pfeiffer, under appointment by the Court of Appeal, for Defendant and
Appellant.

Pamela J. Walls, County Counsel, and Prabhath D. Shettigar, Deputy County
Counsel, for Plaintiff and Respondent.

I

INTRODUCTION

Mother appeals from an order terminating parental rights to her five-year-old son, A.E.M. (born in 2006) and two-year-old daughter, A.E.L. (born in 2010). Mother contends the juvenile court erred in rejecting the beneficial relationship exception to adoption under Welfare and Institutions Code section 366.26, subdivision (c)(1)(B)(i).¹ Mother also asserted in her appellate opening brief that the juvenile court abused its discretion in denying her section 388 petition. Mother has withdrawn this contention pursuant to a motion to strike, which this court granted. We reject mother's remaining contention the beneficial relationship exception to adoption applies, and affirm the judgment.

II

FACTS AND PROCEDURAL BACKGROUND

For purposes of this appeal, the Department of Public Social Services (DPSS) has stipulated to the following facts summarized in mother's appellate opening brief.

In January 2007, the DPSS received a general neglect referral. A.E.M.'s father (father-M) was reportedly living with A.E.M. at Martha's Village and was in possession of methamphetamine. Mother's whereabouts were unknown. In February 2007, the DPSS located mother, who was residing with A.E.M., father-M, and two other men at her brother-in-law's home. Father-M's brother was a known drug user and the two other

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

men also abused drugs. Mother admitted she had smoked marijuana. Mother and father-M also admitted using methamphetamine. On February 28, 2007, A.E.M. was detained in protective custody.

2007 Juvenile Dependency Petition and Detention Hearing

On March 2, 2007, the DPSS filed a juvenile dependency petition (2007 petition) on behalf of A.E.M., who was four months old. The DPSS alleged that mother and father-M abused drugs and were unable to parent their son, A.E.M. Mother had a history with the DPSS. Two of her other children were removed from her custody in August 2005, because of mother's abuse of methamphetamine. The DPSS received a referral in July 2006, alleging physical abuse. Mother was pregnant and admitted a history of drug use, including using drugs while pregnant. Mother's parental rights to two of her other children were terminated in January 2007. The juvenile court ordered A.E.M. detained in protective custody.

2007 Jurisdiction Hearing

On March 19, 2007, during A.E.M.'s half-sibling's 12-month review hearing, the juvenile court ordered the two half-siblings returned to mother's sole physical custody. Mother and father-M both admitted the petition allegations were true. According to an addendum report filed in April 2007, mother was attending a substance abuse treatment program and was visiting A.E.M. weekly.

At the jurisdiction/disposition hearing on April 24, 2007, the juvenile court found the 2007 petition allegations true, sustained the petition under section 300, subdivisions (b) (failure to protect) and (j) (abuse of a sibling), and ordered reunification services for

mother and father-M. The court ordered A.E.M. to remain in foster care and authorized supervised visitation for both parents.

Six-Month Status Review Hearing

In May 2007, the DPSS filed an updated case plan for mother, requiring her to test for drugs, participate in a substance abuse treatment program, participate in counseling, complete a parenting course, and attend a domestic violence course.

The September 2007 status review report stated that mother and father-M had moved to their own apartment. A.E.M. remained in foster home placement. Mother had completed an inpatient drug treatment program and a parenting course, and had enrolled in an aftercare program.

At the six-month review hearing on September 25, 2007, the juvenile court adopted the DPSS's recommendations and continued reunification services.

12-Month Status Review Hearing

On December 17, 2007, the juvenile court granted the DPSS's section 388 petition, requesting A.E.M. be placed with mother, with family maintenance services, because mother had completed her case plan.

The DPSS reported in the March 2008 status review report that mother and father-M had separated in part because father-M had a relapse and was abusing drugs again. Mother and father-M were employed at Ralph's Grocery Store. Mother had completed her inpatient substance abuse program and domestic violence program. She also had been compliant with drug testing and had no positive test results. Mother completed an aftercare program in July 2007.

At the 12-month review hearing on March 19, 2008, the juvenile court ordered that A.E.M. remain in mother's custody and terminated juvenile dependency proceedings as to A.E.M. Mother was awarded sole physical custody. The court found father-M had not completed his case plan and had admitted to relapsing again. The court authorized supervised visits.

In July 2008, two of mother's other children were ordered adopted.

2010 Juvenile Dependency Petition

On July 14, 2010, the DPSS filed a new juvenile dependency petition (2010 petition) on behalf of mother's five-month-old daughter, A.E.L. (born in January 2010) and A.E.M., who was two and a half years old. A.E.M. and A.E.L. (the children) were detained in protective custody on July 12, 2010. The 2010 petition alleged that mother was unable to supervise and protect her children because she was abusing drugs and was arrested on July 12, 2010, on an old warrant for drug possession. She had also been arrested on June 2, 2010, for drug possession and in 2005, for harboring a felon. Father-M and A.E.L.'s father (father-L) had also failed to protect and provide for their children. Father-L's whereabouts were unknown.

2010 Detention Report

The detention report filed in July 2010, stated that the DPSS had received a referral of general neglect on July 12, 2010. Mother was living in an abandoned home and had an outstanding felony warrant for possession of methamphetamine. The owner of the home had requested law enforcement assistance in removing mother from the

home. Mother said she had been living there with her children for three months. She admitted to using methamphetamine two days before her arrest on July 12, 2010.

Father-M was living at Victory Outreach Men's Home in Banning. He had been in and out of jail during the past two years for being under the influence and for outstanding warrants. Mother reported she had had no contact with father-L and his whereabouts were unknown. The DPSS was unable to locate him.

At the detention hearing, the juvenile court ordered A.E.M. and A.E.L. detained in protective custody and authorized supervised visitation twice a week, conditional upon drug testing, with negative test results.

2010 Jurisdiction/Disposition Hearing

The August 2010 jurisdiction/disposition hearing report stated that mother had been released on probation on July 14, 2010. Father-L's whereabouts were still unknown. Father-M was participating in an inpatient substance abuse program. Mother stated during an interview on July 26, 2010, that she relapsed because she was associated with the wrong people and was under a lot of stress. She admitted to using methamphetamine on July 10, 2010.

At the August 2010 jurisdiction/disposition hearing, the juvenile court found the 2010 petition true and granted reunification services to mother and father-M, but not to father-L. The court ordered the children placed in foster care and authorized supervised visitation, as previously ordered.

2010 Six-Month Status Review Hearing

The DPSS reported in its six-month status review report filed in January 2011, that mother was living in her boyfriend's home. Mother had completed an inpatient drug treatment program and was participating in the MOM's program, which provided parent education and substance abuse treatment and testing. Mother and father-M visited the children once a week.

In its February 2011 addendum report, the DPSS recommended termination of mother's reunification services because she had failed to benefit from previous services. Mother failed to take a drug test on January 6, 2011, as required, and lied that she had tested.

At the six-month status review hearing on February 7, 2011, the DPSS social worker told the court that mother was going to be terminated from the MOM's Program because she had not made any contact with the program during the past 10 days. The matter was continued and scheduled for another review hearing.

The DPSS reported in its March 2011 addendum report that mother failed to test for drugs twice in February. The April 2011 addendum report stated that mother admitted to a relapse on February 23, 2011, and was terminated from the MOM's Program on March 28, 2011.

At the six-month status review hearing on April 13, 2011, the juvenile court ordered services continued for mother and father-M, with the understanding this would be mother's last chance.

2011 12-Month Status Review Hearing

The DPSS reported in its August 2011 status review hearing report and addendum that mother moved to Martha's Village in June 2011. The children were living in a foster home. Mother was visiting the children consistently and the visits went well. The children appeared to be bonded with mother and father-M. Both parents were in compliance with their case plans. Father-M requested to be recognized as the presumed father of A.E.L. The DPSS recommended returning the children to mother and father-M on a family maintenance plan.

On August 9, 2011, the juvenile court adopted a mediated agreement by mother and father-M regarding custody and visitation. It was agreed the children would be placed in the care of mother and father-M, and the family would receive family maintenance services. The children were to live with mother, with father-M having visitation.

2011 Juvenile Dependency Petition and Section 387 Supplemental Petition

On September 21, 2011, the DPSS filed a section 387 supplemental petition (supplemental petition), alleging that, after the children were returned to mother, mother and father-M relapsed. Mother admitted to the social worker she had relapsed and tested positive for methamphetamine and amphetamine. The children were detained in protective custody on September 19, 2011. On September 21, 2011, the DPSS also filed a new juvenile dependency petition on behalf of mother's new child, K.B.A. (2011 petition). It is unclear from the record as to when she was born. K.B.A. is not a party to this appeal.

At the detention hearing on the supplemental petition on September 22, 2011, the juvenile court ordered the children removed from mother and father-M and placed in foster care. The court additionally ordered reunification services and visitation. The court also conducted a detention hearing on the 2011 petition and ordered K.B.A. removed from the care of mother and K.B.A.'s father (father-A). The court ordered reunification services and weekly visitation of K.B.A. for mother and father-A.

2011 Jurisdiction/Disposition Hearing

The DPSS reported in the October 2011 jurisdiction/disposition hearing report that father-M admitted relapsing again. Father-M was discharged from Family Preservation Court because of noncompliance. Mother was terminated from counseling because of nonattendance. On October 5, 2011, the children were placed with the same foster family they had lived with before being returned to mother in August 2011. Mother visited the children once a week, beginning on September 29, 2011.

On November 23, 2011, at the contested jurisdiction hearing on the 2011 petition and supplemental petition, the juvenile court sustained the 2011 petition as to K.B.A. As to the supplemental petition, the court ordered that the children remain in their current foster home and authorized supervised visitation once a month. The juvenile court denied reunification services and set a section 366.26 hearing.

Section 366.26 Hearing on the Supplemental Petition

During a review hearing on January 25, 2012, the juvenile court authorized increasing mother's visitation of the children to two visits per month. Mother had been participating in the Family Preservation program for almost a year.

The DPSS reported in the section 366.26 hearing report filed in February 2012, that the children were placed together and were bonded to their foster parents. The children were originally placed in the home for 13 months before being returned to mother temporarily in August 2011. On October 5, 2011, the children were placed back in the same foster home and have resided there continuously ever since. A.E.M. stated that he enjoyed his foster family and did not want to leave his foster home. A.E.L. referred to her foster parents as mom and dad. The children appeared happy and well adjusted in their foster home.

Mother's monthly visits with the children went well, although during the December 2011 visit, she spent most of the visit with K.B.A., while A.E.M. sat by himself. Mother's visit in February 2012 was terminated early because she inappropriately questioned A.E.M. about telling the social worker and his foster parent that he saw mother while visiting his maternal grandmother. The children's foster mother said she was willing to allow mother to visit the children after adoption finalized, conditioned upon mother maintaining sobriety.

On March 20, 2012, at the section 366.26 hearing on the supplemental petition, mother's attorney requested a continuance to file a section 388 petition. The trial court denied the continuance. Mother alternatively requested the court to order legal guardianship of A.E.M. and A.E.L., instead of adoption, since K.B.A.'s case was in family reunification, with a hearing the following month. At the time of the section 366.26 hearing, mother was living with father-A and K.B.A.'s paternal grandmother. Mother was participating in phase three of the Family Preservation program. She also

was participating in K.B.A.'s case plan. The juvenile court terminated mother's parental rights to A.E.M. and A.E.L., finding that the children's placement was appropriate, the children's sibling relationship had been maintained, and adoption was appropriate.

Mother's Section 388 Petition

On April 9, 2012, mother (in pro. per.) filed a section 388 petition, requesting the juvenile court vacate the order terminating parental rights to the children and reinstate reunification services. Mother argued the order should be set aside because there was paperwork that was not filed before the section 366.26 hearing. Most likely, mother was referring to her section 388 petition. Mother asserted it was in the children's best interests to grant her section 388 petition because she loved her children and she had been drug free since her children were detained on September 19, 2011. The juvenile court set the section 388 for hearing and then later summarily took the matter off calendar.

III

THE BENEFICIAL RELATIONSHIP EXCEPTION

Mother contends the juvenile court erred in rejecting the beneficial relationship exception to adoption (§ 366.26, subdivision (c)(1)(B)(i)). This exception is often raised but rarely applies. (*In re Eileen A.* (2000) 84 Cal.App.4th 1248, 1255, fn. 5, disapproved on other grounds in *In re Zeth S.* (2003) 31 Cal.4th 396, 413.) While it can have merit in an appropriate case (e.g., *In re S.B.* (2008) 164 Cal.App.4th 289, 296-301), this is not such a case.

A. *Applicable Law*

Generally, at a section 366.26 hearing, if the juvenile court finds that the child is adoptable, it must terminate parental rights. (§ 366.26, subds. (b)(1) & (c)(1).) This rule, however, is subject to a number of statutory exceptions (§ 366.26, subds. (c)(1)(A) & (c)(1)(B)(i)-(vi)), including the beneficial relationship exception, which applies when “termination would be detrimental to the child” because “[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).)

“When applying the beneficial parent-child relationship exception, the court balances the strength and quality of the parent-child relationship in a tenuous placement against the security and sense of belonging that a stable family would confer on the child. If severing the existing parental 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.’ [Citation.]” (*In re B.D.* (2008) 159 Cal.App.4th 1218, 1234-1235.) “The factors to be considered when looking for whether a relationship is important and beneficial 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. [Citation.] While the exact nature of the kind of parent/child relationship which must exist to trigger the application of the statutory exception to terminating parental rights is not defined in the statute, the relationship must be such that

the child would suffer detriment from its termination. [Citation.]” (*In re Angel B.* (2002) 97 Cal.App.4th 454, 467.)

“[F]or the exception to apply, the emotional attachment between the child and parent must be that of parent and child rather than one of being a friendly visitor or friendly nonparent relative, such as an aunt.’ [Citation.]” (*In re Jason J.* (2009) 175 Cal.App.4th 922, 938.) “‘A biological parent who has failed to reunify with an adoptable child may not derail adoption merely by showing the child would derive *some* benefit from continuing a relationship maintained during periods of visitation with the parent. [Citation.] 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.’ [Citation.]” (*Id.* at p. 937.)

“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 . . . review[] the evidence most favorably to the prevailing party and indulg[e] in all legitimate and reasonable inferences to uphold the court’s ruling. [Citation.]” (*In re B.D., supra*, 159 Cal. App.4th at p. 1235.) Because parents had the burden of proof, we must affirm unless there was “indisputable evidence [in parents’ favor] no reasonable trier of fact could have rejected” (*In re Sheila B.* (1993) 19 Cal.App.4th 187, 200.)

B. Discussion

Mother argues the juvenile court should have applied the beneficial relationship exception because she shared a significant relationship with the children and the children would benefit from continuing her relationship with them. Mother notes she had regular and appropriate visits with the children. But even though mother regularly visited the children and her visits in most instances were appropriate, she has not established that her relationship with the children was sufficiently strong and the children had such a substantial positive emotional attachment to her, that they would be greatly harmed by terminating their relationship with her.

The children were removed from mother because of her substance abuse, which interfered with her ability to care for and protect her children. Mother has a lengthy history with the DPSS, in which her parental rights were terminated to four of her children, before termination of parental rights in the instant case. In this case, A.E.M. was removed from mother in February 2007, when he was five months old, and returned to her about 10 months later, after mother completed drug treatment. About two and a half years later, after mother gave birth to A.E.L., mother relapsed on drugs and the children were removed from mother in July 2010. A.E.M. was two and a half years old and A.E.L. was five months old. A year later, after mother again completed drug treatment, the children were returned to mother in August 2011. A month later, mother relapsed and once again the children were removed from mother. A.E.M. was almost five years old and A.E.L. was one and a half years old.

Mother's history with the DPSS shows she had repeatedly struggled with drug addiction, rehabilitation, and relapsing. At the time of the section 366.26 hearing in March 2012, she claimed she had been sober since the children were removed from her in September 2011. This was only six months, not long enough to establish that she had permanently rehabilitated and would not relapse once again, as she had done so many times before. No doubt, the reoccurring process of mother relapsing on drugs, removing the children from mother, placing them in foster care, returning them to mother, and again removing them from mother has taken a toll on mother's relationship with her young children.

Furthermore, there does not appear to be any evidence that mother's relationship with the children was emotionally significant or close at the time of termination of her parental rights. As of November 2011, mother was visiting the children only once a month, and visitation was supervised. During the December visit, mother reportedly spent most of the visit with K.B.A., while A.E.M. sat by himself playing an electronic game. At the end of January 2012, visitation was ordered increased to twice a month, at mother's request, but her February 2012 visit was terminated early because of mother inappropriately questioning A.E.M about telling the social worker and his foster parent that he had had contact with mother while visiting his maternal grandmother.

A.E.M. and A.E.L. were placed together and bonded to their foster parents. The children were living with the same foster family they had lived with for 13 months before being returned to their parents temporarily in August 2011. In October 5, 2011, the children were placed back in the same foster home at A.E.M.'s request, and had resided

there ever since. A.E.M. told the social worker he did not want to leave his foster home. He said he enjoyed his foster family and wanted to remain with the family until he was grown up. A.E.L. referred to her foster parents as mom and dad. The children appeared happy and well adjusted in their foster home.

The evidence demonstrates that the juvenile court did not err in rejecting the beneficial interest exception. No exceptional circumstances exist that justify applying the exception. The children were young, they had spent a great deal of their lives in foster care, and their interaction with mother by the time mother's parental rights were terminated was limited to brief, supervised monthly or bi-monthly visits. There was no indication the children were extremely close to mother, or that the children would be greatly harmed by terminating their relationship with her. Even though adoption might result in terminating the children's relationship with K.B.A., there was no evidence they had a close relationship with her. The children had not lived with K.B.A. for very long and she was an infant during that time. Furthermore, mother is not arguing the sibling exception to adoption (§ 366.26, subd. (c)(1)(B)(v)) applies.

Even assuming mother had maintained a close relationship with the children, mother has not established that the benefits from continuation of her relationship with the children outweigh the benefit to the children of being placed in a safe, stable, permanent adoptive home. (*In re Angel B.*, *supra*, 97 Cal.App.4th at p. 467.) We therefore affirm the juvenile court's order rejecting the beneficial relationship exception. (*In re Zachary G.*, *supra*, 77 Cal.App.4th at p. 809.)

IV
DISPOSITION

The judgment is affirmed.

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CODRINGTON
J.

We concur:

McKINSTER
Acting P. J.

RICHLI
J.