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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA**

**FOURTH APPELLATE DISTRICT**

**DIVISION TWO**

In re N.W. et al., Persons Coming Under  
the Juvenile Court Law.

SAN BERNARDINO COUNTY  
CHILDREN AND FAMILY SERVICES,

Plaintiff and Respondent,

v.

N.R.,

Defendant and Appellant.

E057559

(Super.Ct.Nos. J235944 & J235945)

OPINION

APPEAL from the Superior Court of San Bernardino County. Christopher B.

Marshall, Judge. Affirmed.

Julie E. Braden, under appointment by the Court of Appeal, for Defendant and Appellant.

Jean-Rene Basle, County Counsel, and Kristina M. Robb, Deputy County Counsel, for Plaintiff and Respondent.

## I

### INTRODUCTION

This dependency case involves Ny.W., born in 2008, and her brother, No.W., born in 2010. Mother and father were longtime drug users and chronically homeless. After more than two years of dependency proceedings, the juvenile court denied mother's petition for modification, selected a permanent plan of adoption, and terminated parental rights to both children. (Welf. & Inst. Code, §§ 366.26 and 388.<sup>1</sup>) Mother appeals from the final judgment. Only Ny.W. is the subject of the appeal.

Mother argues that substantial evidence does not support adoption rather than legal guardianship as the permanent plan for Ny.W. After a thorough review of the record, we conclude the beneficial parental bond exception did not apply and Ny.W.'s best interests are served by adoption by the maternal relatives.

## II

### FACTUAL AND PROCEDURAL BACKGROUND

In July 2010, San Bernardino County Children and Family Services (CFS) had received a referral from Ontario code enforcement officers about the parents and Ny.W. living in the bathroom of a public park. Mother was pregnant. Parents were chronically homeless and appeared to be drug users. CFS lost contact with the parents.

In October 2010, shortly before No.W.'s birth, CFS received another referral and located the family in another public park in Ontario. Mother admitted father was using

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<sup>1</sup> All further statutory references are to the Welfare and Institutions Code.

methamphetamine. Mother could not provide immunization records for Ny.W. Mother was uncooperative about entering a shelter or seeking help from her family. It was also reported that father sold their food stamps to get money for drugs.

*A. Detention Proceedings*

In November 2010, CFS filed an original dependency petition alleging failure to protect (§ 300, subd. (b)) because of mother and father's history of substance abuse and homelessness. Ny.W. was unkempt and filthy. When No.W. was born, mother tested positive for marijuana use.

At the hospital, a nurse described the parents and Ny.W. as disheveled and unkempt. The parents offered multiple home addresses. Mother declined referrals for services or a homeless shelter. Mother said that Ny.W. was staying with the maternal grandfather. Mother insisted the parents had a plan to stay with a friend, "Ray", but she could not provide his contact information. Father appeared under the influence of drugs. The parents finally agreed to enter a shelter and to allow CFS to contact the maternal grandfather.

Mother was discharged on November 3, 2010. The hospital would not discharge No.W. because he was "slow feeding" and jaundiced. CFS learned that, on November 4, 2010, mother was with Ny.W., who was extremely dirty, and the parents were staying in an abandoned mobile home, not with Ray.

On November 5, 2010, CFS found mother and Ny.W. in an open field near Mercy House Homeless Shelter. Ny.W. was "dirty, unkempt, with a soiled diaper, and . . .

blisters on her face and fingers.”<sup>2</sup> Assisted by the Ontario police, CFS detained the children temporarily in foster care. On November 10, 2010, the court ordered the children’s detention.

*B. Jurisdiction and Disposition*

When CFS interviewed the parents, they both admitted using methamphetamine but they refused to acknowledge it was a problem. Both parents had positive drug tests. Mother stated she was willing to enroll in a substance abuse program because she was tired of living on the streets. While in foster care, No.W. was no longer jaundiced and was eating well.

Mother was born in 1974. Her parents had divorced because of her mother’s mental illness and her father’s methamphetamine use. Mother was raised in a culture of drug users and she began using methamphetamine at age 17. She was a functional drug addict until losing her home. Mother has three older children, born in 1993, 1999, and 2002, who are all in the custody of other relatives. Mother met father several years ago when they were both using methamphetamine. Father is estranged from his parents. He has two older children who live with their mothers.

The parents had a history of referrals in 2009 and 2010, involving neglect, homelessness, and methamphetamine abuse. Mother acknowledged selling her baby formula for money. Father had a grand theft conviction and had been arrested for violation of probation. Mother had a pending charge for possession of controlled

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<sup>2</sup> The allegation about blisters was eventually stricken.

substances.

Mother was having semi-weekly visitation with Ny.W. who cried and screamed when she left. Mother appeared to be under the influence during one visit. The parents were receiving services but the prognosis for reunification was poor because of the parents' chronic methamphetamine use and homelessness and their past failures at parenting.

At the jurisdictional and dispositional hearing, the juvenile court made true findings on the dependency petitions and ordered both children removed with the parents to receive reunification services.

In December 2010, the children were placed with the maternal great-uncle and his wife. In March 2011, the parents were granted expanded visitation because they were making progress toward reunification.

*C. Six-Month Status Review (§ 366.21, subd. (e).)*

In June 2011, CFS recommended parents continue to receive services. Initially, parents had made little progress in December 2010 and January 2011, when they had visited the children only half the time.

Mother entered an in-patient program in late January 2011. Mother was making good progress and randomly tested negative eight times. Mother was having successful unsupervised and overnight visits. Mother was taking a cooking and nutrition class to address Ny.W. being overweight. Mother was scheduled to complete her core program in June 2011 and to have the children for an extended visit. The prospects for reunification with mother were good.

Father entered an inpatient treatment program on February 16, 2011. He initially tested positive for methamphetamine but subsequently he had six random negative drug tests between March and May 2011. Father completed the 90-day program on May 16, 2011, making fair progress, but he continued to deny his addiction. He was not engaging in successful or appropriate visitation. At the six-month review hearing on June 1, 2011, father had left his program and missed his drug tests. The prognosis for father was guarded.

No.W. was a happy, healthy baby. Ny.W. displayed anxiety and engaged in overeating. Ny.W. was very upset when the parents failed to visit. The court increased visitation for mother and ordered continuing services for both parents. On July 12, 2011, the court ordered Ny.W. be placed in mother's custody with family maintenance services.

*D. Twelve-Month Status Review (§ 366.21, subd. (f))*

On November 21, 2011, CFS recommended that Ny.W. remain with mother receiving maintenance services and that father continue to receive reunification services. Mother was strongly bonded with Ny.W. but was willing to consider No.W. being adopted. The maternal great-uncle and his wife were willing to adopt No.W. Mother was working toward completing her program but father was not making any progress. Father was still homeless, unemployed, and using drugs.

Subsequently, on November 30, 2011, CFS filed a supplemental section 387 petition, asking that Ny.W. be detained from mother. Mother had left her treatment program on November 16, 2011, and she was not complying with her service plan or providing for Ny.W. Mother had arranged for the maternal great-uncle to pick up Ny.W.

while mother looked for housing. CFS agreed to give mother one week to find housing and to submit to drug testing. On November 28, 2011, mother and father were still homeless and had not had drug tests.

On December 1, 2011, mother had entered another treatment program but the court ordered Ny.W. to remain with the maternal great-uncle and the parents to receive reunification services. The court referred the case to mediation on the veracity of the allegation in the supplemental petition regarding mother's noncompliance with family maintenance services. Based on the mediation, the court found the allegation true. The court again ordered Ny.W. to remain with the maternal great-uncle and the parents to receive reunification services. Mother was allowed unsupervised and overnight visitation when occurring at the treatment facility.

*E. Eighteen-Month Status Review (§ 366.22)*

In May 2012, CFS recommended reunification services be terminated and a permanent plan of adoption be established for both children. The prognosis for reunification with either parent was poor. The parents had relapsed into addiction and homelessness. Mother had left the second treatment program on February 29, 2012, and not obtained work or housing. She missed or failed four drug tests. Father assaulted mother in March 2012. Mother had begun her third treatment program on April 2, 2012. Ny.W. was showing extreme separation anxiety—crying and soiling and wetting herself after mother's visits—stating “that her heart is broken because she misses her mommy.” The maternal great-uncle and his wife were very supportive of the parents' reunification efforts but they were also willing to adopt the children.

At the contested 18-month review hearing on June 4, 2012, the court terminated reunification services, set a section 366.26 hearing, and reduced visitation to once a month, giving CFS the discretion to expand.

*F. Section 388 Petition*

On October 24, 2012, mother filed a request to change court order (JV-180), asking that reunification services be reinstated and that visitation be increased. Mother asserted she was participating in a treatment program, classes, and counseling. Mother believed it would be in Ny.W.'s best interest to be raised by mother because they had a strong bond.

CFS responded to mother's petition by reviewing the history of her failures. In November 2011, she left her first program after 11 months and tested positive for drugs in March and April 2012. During visitation, mother did not act appropriately. Mother was not entitled to additional time and services after two years of dependency. Mother's bond with Ny.W. did not outweigh the child's need for permanency and stability. CFS viewed mother as incapable of parenting successfully. With therapy and in the care of the prospective parents, Ny.W. was improving developmentally. An evaluation by a pediatric psychologist, Dr. Kiti Randall, concluded that "her current caregiving environment is providing her the opportunity for positive cognitive growth, amelioration of trauma symptomology and positive social emotional growth fostering with appropriate[] structure, consistency and nurturance."

*G. Section 366.26*

In October 2012, CFS recommended termination of parental rights and

implementation of a permanent plan of adoption by the prospective adoptive parents—the maternal great-uncle and his wife. The prospective parents, a married couple in their 40's, were attached to the children and enthusiastic about adoption.

Father was still homeless, using drugs, and not visiting the children. Mother was progressing in her recovery program. Mother was having consistent, positive, increased visitation with Ny.W. With therapy, Ny.W. was demonstrating less separation anxiety. Mother was more detached from than bonded with No.W.

The children were generally in good health but Ny.W. was emotionally troubled. She was described as quiet, anxious, hypervigilant, solitary, and having poor speech, including verbal tics. She would scratch and hit herself. She did not want to use the bathroom alone and she had accidents after visiting with her mother. She was receiving therapy, however, and her negative behavior was diminishing.

On November 15 and 16, 2012, the court conducted a combined hearing on section 366.26 and the section 388 petition.

Mother's case manager at the treatment program testified that mother had made significant changes and was 65 to 70 percent committed to sobriety. Mother was at step one of a 12-step program. Previously, she had achieved step two. Mother had separated from father. Her estimated treatment plan was for 13 or 14 months, followed by transitional housing with support for up to two years.

A CFS social worker testified that mother usually engaged in appropriate, positive visitation. Ny.W. was better able to accept the end of the visits but wanted to leave with mother. The social worker was surprised when mother abandoned her treatment program

in November 2011. She did not observe an improvement in mother's present level of commitment. The social worker agreed that placing Ny.W. with mother in a drug treatment program would not be a healthy environment and would not guarantee stability. The children were doing well in their prospective adoptive home. The prospective parents were willing to consider ongoing contact by mother with Ny.W.

A second social worker testified that the children were thriving and the prospective parents wanted to adopt them. Ny.W. needed therapy and stability to allay her anxiety. Mother acted more like a playmate and did not exert parental control over Ny.W.

Mother testified that she wanted to have Ny.W. back and she was able to care for her full time. She maintained it would be detrimental for Ny.W. not to see her. Mother planned to maintain a sibling bond between the children. Mother was committed to rehabilitation although she had relapsed before and used drugs with father. Mother had reached step two in a 12-step program and she had reached step four previously. She had ended her relationship with father. Mother planned to attend trade school. Mother's other children had been out of her care for 10 years.

The court found there was no change of circumstances and Ny.W.'s best interests would not be served by a modification. The court denied mother's section 388 petition. The court found Ny.W. needed the stability of adoption. The regular visitation and contact did not overcome the preference for adoption and mother did not demonstrate detriment in terminating parental rights. By clear and convincing evidence, the court

found the children were adoptable, selected adoption as the permanent plan, and terminated parental rights.

### III

#### BENEFICIAL PARENTAL BOND EXCEPTION

Mother contends the juvenile court's selection of adoption as the permanent plan for Ny.W. and subsequent termination of parental rights was unsupported by substantial evidence because Ny.W. shared a beneficial parent/child relationship with mother.

Mother argues legal guardianship would be a better plan for Ny.W. because it would preserve their relationship.

##### *A. Standard of Review*

The substantial evidence test is the appropriate standard for review of the juvenile court's findings and orders terminating parental rights for purposes of adoption pursuant to section 366.26. (*In re C.F.* (2011) 193 Cal.App.4th 549, 553; *In re Josue G.* (2003) 106 Cal.App.4th 725, 732.)

##### *B. Discussion*

Adoption is the permanent plan preferred by the Legislature when a child cannot be returned to the care of the parents. (*In re Beatrice M.* (1994) 29 Cal.App.4th 1411, 1416.) Once Ny.W. was determined to be adoptable, mother had the burden to establish termination of parental rights would be detrimental to the child under one of the exceptions to section 366.26, subdivision (c)(1)(B). (*In re C.F. supra*, 193 Cal.App.4th at p. 553.) Section 366.26, subdivision (c)(1)(B)(i) states that there can be no termination of parental rights where the parents "have maintained regular visitation and contact with

the child and the child would benefit from continuing the relationship.” Application of the exception requires the parent to prove that 1) the parent maintained regular visitation and contact, and 2) the child would benefit from continuing the relationship. (§ 366.26, subd. (c)(1)(B)(i); *In re Zeth S.* (2003) 31 Cal.4th 396, 412, fn. 9.) Adoption is still preferred. (*In re C.B.* (2010) 190 Cal.App.4th 102, 122.)

Here the court found mother had maintained regular and consistent visitation with Ny.W. Mother did not show, however, that a benefit existed, such that termination would be detrimental to Ny.W. when contrasted with the permanency and stability of adoption. (*In re Autumn H.* (1994) 27 Cal.App.4th 567, 575.) Section 366.26 requires a comparison of “the strength and quality of the natural parent/child relationship in a tenuous placement against the security and sense of belonging a new family would confer.” (*In re Autumn H.*, at p. 575.) The parent must establish the parent/child relationship is of such strength that severance would deprive the child of a substantial, positive emotional attachment such that the child would be greatly harmed if the relationship was terminated. The parent/child relationship warranting preservation cannot confer “some incidental benefit,” but must result “from the adult’s attention to the child’s needs for physical care, nourishment, comfort, affection and stimulation.” (*Ibid.*)

In order for the beneficial relationship exception to apply, mother must show she “occupies a parental role” in the life of her child. (*In re Mary G.* (2007) 151 Cal.App.4th 184, 207; *In re C.F.*, *supra*, 193 Cal.App.4th at p. 555.) A parent-child relationship may exist without daily contact. (*In re Mary G.*, at p. 207.) “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.]” (*In re Angel B.* (2002) 97 Cal.App.4th 454, 467; *In re Jasmine D.* (2000) 78 Cal.App.4th 1339, 1349-1350.)

Ny.W. was four years old in November 2012. She had been removed from mother when she was 23 months old. After the initial foster placement of a few weeks, she was placed with the maternal great-uncle and his wife in December 2010. Ny.W. had not been in mother's care except for four months between July and November 2011. The 19 months living with the maternal relatives offered the stability Ny.W. had never received from her mother. Although the record certainly established positive interaction between mother and Ny.W., there were also indications that mother functioned more like a playmate than a parent and that mother's relationship with Ny.W. increased her separation anxiety and threatened her emotional stability. As confirmed by Dr. Randall, the improvements observed in Ny.W. were attributable more to therapy and to a stable home with the maternal relatives than to mother's comparatively brief visits. Additionally, the record supported that Ny.W. was bonded with her brother and affectionate with the prospective parents.<sup>3</sup> Finally, it is essentially undisputed that mother would not ever be able to provide Ny.W. with a stable home and physical care.

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<sup>3</sup> Mother's references to the physical or mental conditions of the caretakers are improper. Such references are irrelevant to the application of the parental bond exception. Issues such as these only become relevant where an issue is raised as to legal impediments that would prevent adoption by the designated adoptive parent. (*In re R.C.* (2008) 169 Cal.App.4th 486, 494; *In re Jose C.* (2010) 188 Cal.App.4th 147, 158.)

When considering the totality of the factors, the court had substantial evidence to find that the parental bond exception did not apply and that NyW. would not suffer detriment if her relationship with mother was terminated. Mother did not occupy a parental role in Ny.W.'s life but rather contributed to the upheaval that caused severe anxiety and other emotional issues for Ny.W. Ny.W.'s needs were being met by the maternal relatives who were willing to provide her with the stability and permanency she needed through adoption. Under these circumstances, mother's proposed alternative for guardianship is not the better plan.

IV

DISPOSITION

We affirm the juvenile court's findings and orders and reject mother's appeal.

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CODRINGTON  
J.

We concur:

HOLLENHORST  
Acting P. J.

RICHLI  
J.